



# MIGRATION AND CULTURE: IMPLEMENTATION OF CULTURAL RIGHT OF MIGRANTS

*Edited by* Giovanni Carlo Bruno  
Fulvio Maria Palombino  
Adriana Di Stefano  
Gianpaolo Maria Ruotolo





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## PREFACE

The New York Declaration for Refugees and Migrants, of 19 December 2016 reaffirms the commitment for human rights of all refugees and migrants, as well as the pledge for their protection. Its paragraph 6 states that “[t]hough their treatment is governed by separate legal framework, refugees have the same universal human rights and fundamental freedoms”.

The Declaration reiterates the obligation to apply the general setting of principled commitments covering the whole range of human rights – civil, political, economic, social and cultural – to all people involved in migration processes, and in Countries (of origin, transit and destination) linked to migration .

‘*Culture*’, ‘*education*’, ‘*active participation of migrants in the receiving societies*’ are essential elements for achieving objective No. 16 of the non-binding Global Compact for Safe, Orderly and Regular Migration, outcome of a lengthy inter-governmental proceedings concluded in 2018, endorsed by the UN General Assembly on 18 December of the same year. To “[e]mpower migrants and societies to realize full inclusion and social cohesion”, States agreed, *inter alia*, to:

“Promote mutual respect for the cultures, traditions and customs of communities of destination and of migrants by exchanging and implementing best practices on integration policies, programmes and activities, including on ways to promote acceptance of diversity and facilitate social cohesion and inclusion”.

The increasing demand for better protection of cultural rights, taken into account as a value necessary to achieve human dignity, and encompassing the preservation

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of cultural identity of all communities, groups and individuals, goes along with the issue of the substantial reduction of disparities and inequalities, for cases involving protection of migrants, in particular in receiving Countries.

The obligation to respect, protect, fulfil and implement human rights applies entirely to cultural rights. Nevertheless, which cultural rights can be considered internationally protected? What is their legal content? How to put pressure on States for the full implementation of cultural rights? And, focusing more on the general questions of the present volume, how to cope with cultural rights and ‘new’ groups and communities present on the territories of States?

Without entering in the discussion on whether cultural rights may have been considered a ‘neglected’ category of human rights, it may be useful just recall how their legal status evolved: from Article 27 of the 1948 Universal Declaration of Human Rights, which states that

“1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”,

to Article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.”

Other international provisions (such as UNESCO/Council of Europe conventions), as well as their interpretation by independent and monitoring bodies, courts

and tribunals, are useful for crafting the content of cultural rights with a holistic approach.

In addition, the definition of ‘culture’ should be considered more in detail. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 21 on Article 15 (1) ICESCR of 2009, states that (paras. 12-13):

“The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society.

[C]ulture [...] encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.”

The multifaceted and evolutionary content of ‘culture’ covers several aspects of migrants’ life. The preservation of their cultural traditions, the empowering role of culture – and the possibility of accessing to education as a pre-requisite for a better integration, the recognition of cultural diversity as a source of mutual enrichment for the cultural life of humankind, are all matters connected for overcoming inequalities.

The volume *Migration and Culture: Implementation of Cultural Rights of Migrants* aims at contributing to the reflection on global issues in the promotion of cultural rights of migrants, including the value of heritage, the right to participate in cultural rights, the right to education and the right to enjoy the arts and culture, considering the COVID-19 pandemic outbreak too.

Papers, from experts, scholars and practitioners, offer a critical review of domestic and international practice on both ‘culture’ and ‘mainstreaming cultural rights’, including legal and judicial practice, and institutional and civil society activities on the promotion and protection of migrants’ cultural rights. The organization of the volume reflects the width of issues that may be gathered under the category of studies on cultural rights and migration. However, the eleven chapters do not cover all the

topics of the subject.

The first chapter, by *Eleonora Psenner*, *Maggie Laidlaw* and *Tasawar Ashraf*, investigates how poetry as an artistic practice enables young migrants and their peers in host communities to reflect upon the limitations of the cultural rights' policies of host states, and how these limitations may lead to discrimination and inequality. Empirical evidence, from an Asylum, Migration and Integration Fund (AMIF) project aimed at enhancing integration in receiving countries, demonstrates the need of 'enabling environments' to produce creative content.

The contribution of cultural rights for building inclusive societies is at the center of the essay by *Pietro Mattioli*. The reflection on their legal foundation, together with the analysis of the peculiarities of migrants as 'cultural rights' holders', brings the Author to examine and discuss the role of international organizations and the effectiveness of their systems of protection.

*Aliki Gkana* explores the relationship between migration and the safeguarding of living heritage under the prism of international law, within and beyond the UNESCO system. The need for protection of the 'transit' of people in different communities/States may be applied to their living heritage, with special reference to the right of all persons to enjoy their own culture in community with others, and to take part in cultural life.

The development of digital technologies, enabling people to overcome physical barriers and distances for accessing information in real time, may have consequences on the full enjoyment of cultural rights. In his paper, *Davide Vaira* examines the advantages linked to the use of Internet by migrants, and the effects of policies of censorship and geo-blocks, together with the need of balancing the same policies for the protection of cultural identities and, widely, of freedom of expression of migrant communities.

How 'culture' may need to be adapted in the interest of specific subjects, such as migrant women, in order to enable their equal access to human rights, is discussed by *Shilpi Pandey* in her chapter. She analyses the legacy of colonialism, and in general of western views on cultural relativism, on the perception of migrant women, with examples in international practice.

The paper by *Noelle Higgins*, *Laura Serra* and *Delia Ferri* focuses on COVID-19 related restrictions on asylum seekers and their impact on cultural policies and rights in Ireland. The Authors illustrate how a formal dualistic approach in the appli-

cation of human rights internationally protected may not achieve their effective realization within vulnerable groups, in particular under exceptional circumstances.

Three chapters of the volume deal with the right to education, from different viewpoints. *Francesco Luigi Gatta* addresses the right to education of aliens and minorities in Europe, by examining the relevant legal-institutional frameworks of the EU and the Council of Europe. The analysis shows the attention of European institutions for the issue and demonstrates the limits of international cooperation, an indispensable means for implementing the same right for all minorities and aliens.

*Giulia Ciliberto* and *Fulvia Staiano* use the 2016 European Commission's Action Plan on the Integration of Third-Country Nationals to reflect on the capability of the multi-level legal framework to secure a full and effective access to education for migrant children and children with a migratory background. A section of the chapter is devoted to the case study on the city of Naples (Italy).

A more general reflection on the case of Italy for implementing the right to education and training of children of foreign origin is carried out by *Luana Scialpi*. The compliance of domestic provisions on immigration and education with both the Italian Constitution and the international and EU legal standards is sought, to ensure the full realization of children's rights.

'Bangla-stories' by *Valentina Grillo* recalls the 'stories' – as past experiences – told by Bangladeshis when they arrive in their receiving Country/city (Italy/Palermo, in this chapter). The Author shows, from the point of view of an anthropologist, the link between legal regularization and the starting of social inclusion of 'new' local inhabitants, underlying the importance of bringing a human experience to the study of migration.

The last chapter of the volume, by *Stefano Dominelli*, deals with private international law and cultural heritage protection under the coexistence of different domestic rules applicable to cultural objects and restitution actions. The pathway to set up a European judicial space does not contain yet specific provisions concerning cultural objects; the Author proposes a reading of interpretative issues arisen under the Brussels regime.

The volume *Migration and Culture: Implementation of Cultural Rights of Migrants* stems from the cooperation on migration studies among the Institute for Research on Innovation and Services for Development of the National Research Coun-

cil of Italy (CNR-IRISS), the Department of Law of the University of Naples Federico II, the Department of Law of the University of Catania and the Department of Law of the University of Foggia.

We would like to thank the Authors who enthusiastically replied to the call for papers and made the publication of this volume actually possible.

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Napoli, 30<sup>th</sup> December 2021

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# 1. POETRY AS UNIVERSAL TOOL TO PROMOTE CULTURAL RIGHTS, EMPOWER AND BUILD TRUST

*Eleonora Psenner\*, Maggie Laidlaw\*, Tasawar Ashraf*

SUMMARY: 1. Introduction. – 2. Poetry as Research Tool and Space for Cultural Democracy. – 2.1. Artistic Expression as a Key for Cultural Rights Promotion. – 3. Creative Work as Collective Process and Research Method. – 3.1. Empirical Evidence from the VOLPOWER Creative Hub in South Tyrol, Italy. – 3.1.1. General Background of the Case Study Context of South Tyrol. – 3.1.2. Setting up and Implementing Poetry Group Work with VOLPOWER Volunteers in South Tyrol. – 4. Insights and Recommendations for Collective Poetry Work with Young Volunteers. – 4.1. What Can Research Learn from Arts? – 5. Disclaimer and Interpretative Reflexivity. – 6. Conclusion.

## *1. – Introduction.*

While exploring the rights and lives of migrants, how do we capture lived experiences, and what methods are available to researchers to allow them to work with groups of people in ways that are collaborative and inclusive? There is an ever-growing interest in the use of creative, or arts-based methods within community research that is opening a space outside of the boundaries of traditional methods of data gathering; a space that improves the ‘critical attentiveness, collaboration and experimentation’<sup>1</sup> of both data gathering and dissemination of analysis.

\* Main authors, contributed in equal amounts. On funding, the authors gratefully acknowledge the European Union AMIF programme - grant number 821619; Eleonora Psenner also gratefully acknowledges European Union Horizon 2020 European Training Networks programme - grant number 955907.

<sup>1</sup> *Live Methods*, BACK and PUWAR (eds.), Oxford, 2012.

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This paper explores how art as a medium connects and enables being heard. Hence, studying data and activities involving migrant and local youth participants in Italy, we explore how arts and culture takes the role of universal language and of ‘free space’ where practices of self-expression, dialogue, and conflict management (at individual and collective level) unfold.

A special focus is put on the power of poetry, and its ability to capture everyday knowledge. Poetry, as a form of art is a valuable tool for self-expression and deep reflection, allowing oneself to connect to one’s very intimate personal sphere, elaborate and rekindle long-lasting or past conflicts and give life to new perspectives on past or present issues - while allowing to also conjure images of the future. In a cultural rights perspective, poetry serves as a vehicle to facilitate and promote the free expression of thought and to leverage the dialogue between peoples of all cultures and times. Poetic expression is not subject to state censorship.<sup>2</sup> The European Court of Human Rights (ECtHR) has advanced protection of the freedom of expression to poetic expression; thereby, state authorities are restricted from encroaching on the freedom of poetic expressions. Poetry can reveal aspects of ourselves, the other, our history and the environment that surround us – at times taking even the author him/herself by surprise. In unexpected ways, a poetic composition can make us aware of the source of inner and outer conflict, and the conscious elaboration and interaction with poetic reflection can even help to solve or overcome certain barriers and contrasts in our lives.

Empirical evidence shows that within the format of creative hubs in the AMIF VOLPOWER project, there are different experiences that country coordinators make during the implementation process of workshop exercises. The paper offers some insights regarding useful techniques to facilitate the work, motivate the group and set up ‘rules of the game’ that can be essential for establishing an enabling environment for producing creative content. Some empirical data from the South Tyrolean case study describe the volunteers’ artistic training and give special attention to the use of poetry. The ‘creative hubs’ as moments of encounter and exchange among the researcher and the volunteers, resulted to be fruitful for the project’s progress and to grow together as a group.

## *2. – Poetry as Research Tool and Space for Cultural Democracy.*

Academically positioned understandings of knowing and doing are only one part of the research landscape, which suggests that new conceptual tools are needed

<sup>2</sup> ECtHR, *Karatas v Turkey*, application no. 23168/94, Judgment of 8 July 1999.

to explore the lives of individuals and groups in communities. Collaborative methodologies, such as poetry, are empowering and congruent with a mode of being and understanding that values voice and peoples own creative potential.<sup>3</sup> They challenge traditional ways of knowing, instead, concerning themselves with producing knowledge which is ‘situated’ and paying attention to discursive practices that shape human experience.<sup>4</sup>

Poetry can humanise research – and give it emotion and authenticity.<sup>5</sup> It helps both researcher and participant to reflect, and to weave together, or at least ‘narrow the gap between, academically and community driven narratives’.<sup>6</sup> The artistic underpinning of poetry, like any creative activity, is connecting.<sup>7</sup> It can also provide a democratic space to say what one wants without the fear of reprisal. One can be free to ‘act out loud’; to reach out to make connections with others and to cross boundaries. Poetry, as a process and as a site for considering the politics of listening, voice and resonance, traces a journey within the temporal structure of the poem.

American poet laureate Billy Graham describes poetry as an ‘interruption of silence’. In our own study, our aim was to position the authors’ voices in a space where they may have been previously unheard (silenced): a space to reflect, create, imagine new possibilities and to connect. Elsdon-Clifton<sup>8</sup> refers to this space as a ‘third space’: a space where there is potential to “resist cultural authority and challenge dominant conceptions of subjectivities as unified and fixed”.<sup>9</sup> Within societies, the quality of public culture is defined by how safe and secure minorities feel – and the arts can provide a space where we can all participate – indeed art has a vital role to play in democratizing culture for all”.

Spaces where people can come together to create already offer a sense of cultural democracy. We see this in the hair and fashion styles we choose, the food that we eat, or the music we listen to. These things help us make sense of who we are:

<sup>3</sup> LAIDLAW et al., “How can Youth Empowerment and a Sense of Belonging Benefit from Creative Arts?”, *Discover Society*, 2 September 2020, available at: <<https://discoversociety.org/2020/09/02/how-can-youth-empowerment-and-a-sense-of-belonging-benefit-from-creative-arts/>>.

<sup>4</sup> LEAVY, *Method Meets Art: Arts-Based Research Practice*, New York, 2009, p. 65.

<sup>5</sup> NDLOVU, “How Poetry Can Represent Research”, The British Academy, *How Poetry Can Represent Research* (blog), 21 August 2018, <<https://www.thebritishacademy.ac.uk/blog/how-poetry-can-represent-research/>>.

<sup>6</sup> LASSITER, *The Chicago Guide to Collaborative Ethnography*, Chicago, London, 2005, p. 4.

<sup>7</sup> GAUNTLETT, *Making Is Connecting: The Social Meaning of Creativity, from DIY and Knitting to YouTube and Web 2.0*, Cambridge, UK, 2011.

<sup>8</sup> ELSDEN-CLIFTON, “Constructing ‘Thirdspaces’: Migrant Students and the Visual Arts”, *Studies in Learning, Evaluation, Innovation and Development*, 2006, 3, no. 1, pp. 1-11.

<sup>9</sup> See also, SOYA, *Thirdspace: Journeys to Los Angeles and Other Real and Imagined Places*, Malden, MA, 1996; BHABHA, *The Location of Culture*, London, 1994.

they ‘express our values and cultural identities’.<sup>10</sup> They allow us to share our experiences, ‘to compare, negotiate and reflect the self and others – and discover how others’ worlds of meaning might differ, and correspond to one’s own’.<sup>11</sup> In this sense introducing poetry and experimenting with it in a group setting or as a collective exercise, particularly with participants with migration background, can contribute to the promotion of values strictly linked to cultural rights.

## 2.1. – Artistic Expression as a Key for Cultural Rights Promotion.

Cultural rights are an indispensable component of policies of tolerance, diversity and pluralism.<sup>12</sup> Respect for cultural rights, vis-a-vis migrants and ethnic minorities, is particularly important for peace and harmony in society. The Universal Declaration of Human Rights (UDHR) (1948) – the first-ever international instrument recognising cultural rights as human rights – encourages the signatory states to respect cultural rights of their citizens.<sup>13</sup> The UDHR lacked the authority of legally binding the signatory states; yet it became a source of emulation for the forthcoming international treaty law. Accordingly, article 5(e)(vi) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965),<sup>14</sup> article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966),<sup>15</sup> article 27 of the International Covenant on Civil and Political Rights (ICCPR) (1966),<sup>16</sup> article 3 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), article 29(c) of the Convention on the Rights of the Child (CRC) (1989), and article 31 of the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CPRMW) (1990),<sup>17</sup> speak for the promotion of cultural rights.

<sup>10</sup> MATARASSO, “More In Common: Meeting One Another through Art and culture v.2”, Talk, Millennium Galleries, Sheffield, 2016, p. 4, available at <<http://www.imaginecommunity.org.uk/wp-content/uploads/2016/09/Matarasso-2016-More-in-Common.pdf>>.

<sup>11</sup> LASSITER, *The Power of Kiowa Song*, Tuscon, 1998, p. 8.

<sup>12</sup> STAMATOPOULOU, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond*, Boston, 2007, p. 7.

<sup>13</sup> UN General Assembly, Universal Declaration of Human Rights (UDHR), 10 December 1948, 217 A (III), Art 27.

<sup>14</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 21 December 1965, United Nations, Treaty Series, Vol. 660, p. 195, Art 5(e).

<sup>15</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3, Art 15.

<sup>16</sup> UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171, Art 27.

<sup>17</sup> UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPRMW), 18 December 1990, A/RES/45/158, Art 31.

However, despite universal recognition, cultural rights belong to a relatively weaker arena of human rights. The dilemma started with the adoption of the International Bill of Human Rights (IBHR) under Resolution No 217(III) of the UN General Assembly. The IBHR divided the human rights into two separate treaties, i.e. the ICCPR and the ICESCR. The ICCPR enshrines civil and political rights, which require the signatory states to refrain from interfering and adopt the necessary legislation to ensure the enjoyment of the rights enshrined therein.<sup>18</sup> Whereas, the ICESCR enshrines economic, social and cultural rights, which require the signatory states to recognise these rights and agree to commit all available resources to achieve the progressive realisation of these rights.<sup>19</sup> The ICESCR does not attach a positive duty – a duty to take necessary measures to safeguard a right or, more precisely, to adopt reasonable and suitable measures to protect a right of the individuals<sup>20</sup> – to signatory states with respect to economic, social and cultural rights<sup>21</sup>. Accordingly, a major body of scholarly literature alienates economic, social and cultural rights from the classic human rights.<sup>22</sup> As the realisation of economic, social and cultural rights is related to the availability of economic resources and commitment of the signatory states,<sup>23</sup> the scope of cultural rights varies in different states, and across different social settings.

In the European Union (EU) Treaty Law, cultural rights are recognised under Chapter III of the Fundamental Rights of the European Union (CFR) (2000). The Chapter enshrines cultural rights along with clauses giving effect to prohibition of discrimination and promotion of equality and rights of vulnerable groups. This is a recognition of the fact that the denial of cultural rights leads to discrimination inequality in society. However, the Chapter lacks a specific reference to migrants and ethnic minorities as a vulnerable group. Furthermore, article 22 of the CFR reads that

<sup>18</sup> UN General Assembly, ICCPR, Art 2.

<sup>19</sup> UN General Assembly, ICESCR, Art 2.

<sup>20</sup> AKANDJI-KOMBE, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights*, Human Rights Handbook, No. 7, Council of Europe, 2007, 7, <https://doi.org/10.5040/9781474201520>.

<sup>21</sup> SCOTT LECKIE, “Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights”, *Human Rights Quarterly* 20, 1998, p. 82 ff..

<sup>22</sup> EIDE, “Economic, Social and Cultural Rights as Human Rights”, in *Economic, Social, and Cultural Rights: A Textbook*, Krause, Rosas, Eide (eds.), 1<sup>st</sup>, Boston, 1995, pp. 21-40; ORWIN, PANGLE, “The Philosophical Foundation of Human Rights”, in *Human Rights in Our Time: Essays in Memory of Victor Baras*, Planttner (ed.), London, 1984, p.15.

<sup>23</sup> DONDEERS, “The Protection of Cultural Rights in Europe: None of the EU’s Business?”, *Maastricht Journal of European and Comparative Law*, 10, 2, 2003, 119, <https://doi.org/10.1177/1023263X0301000202>.

“the Union shall respect cultural diversity”.<sup>24</sup> But there is no clarity what cultural diversity is; what cultural rights are included in the ‘cultural diversity’ concept, and what the Member States’ responsibilities towards promoting cultural diversity are.

Council of Europe made significant progress by introducing the Framework Convention for the Protection of National Minorities (FCPNM) (1998) – an International Convention specifically dealing with the cultural rights of national minorities. Article 5 of the Convention states that the parties to the Convention undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.<sup>25</sup> However, the Convention falls short of giving legal effect to cultural rights. It only encourages the party states to apply the provisions enshrined therein in good faith.<sup>26</sup> And submit periodic reports to the Council of Europe containing full information on the measures taken to give effect to the Convention.<sup>27</sup> The Convention is just a start towards the realisation of cultural rights. Despite the progress made by the Convention, cultural rights remain the least addressed category of rights enshrined under the ICESCR.<sup>28</sup> The realisation of cultural rights has remained at stake due to problems surrounding perception and resolve.<sup>29</sup>

Based on Article 2(2) of the ICESCR, Stamatopoulou encompasses cultural rights by enshrining, *inter alia*, non-discrimination, equality, freedom from interference, freedom of choice, and freedom of dissemination in the definition of the cultural rights.<sup>30</sup> Similarly, Farida Shaheed – United Nations Special Rapporteur in the field of Cultural Rights and author of ten thematic reports (2009-2015) elaborating cultural rights in light of the Article 15 of the ICESCR and Article 27 of the UDHR, describes cultural rights as free dissemination of one’s culture without any fear of discrimination and interference of whatsoever. Farida particularises on the freedom of artistic expression and creativity as a key to enjoyment of cultural rights.<sup>31</sup> In her view, artistic expression transforms the process of social inclusion by engaging the

<sup>24</sup> Council of the European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Art. 22.

<sup>25</sup> Council of Europe, Framework Convention for the Protection of National Minorities, ETS 157 § (1995), Art 5.

<sup>26</sup> Council of Europe, Framework Convention for the Protection of National Minorities, Art 2.

<sup>27</sup> Council of Europe, Framework Convention for the Protection of National Minorities, Art 25.

<sup>28</sup> DONDEERS, *op. cit.*, 120.

<sup>29</sup> LECKIE, *op. cit.*, 82.

<sup>30</sup> STAMATOPOULOU, *op cit.*, 115–43.

<sup>31</sup> SHAHEED, “The Right to Freedom of Artistic Expression and Creativity”, Report of the Special Rapporteur in the field of cultural rights, UN Human Rights Council, 2013, p. 18, <https://un-docs.org/en/A/HRC/23/34>.

mundane.<sup>32</sup> Art is not only a cultural right, per se, it is also a medium to promote other forms of cultural rights. It allows the excluded, particularly migrants, to express themselves. It helps them interactively inform others, in similar circumstances, and policymakers of the limitations hindering promotion of cultural rights in the host societies. Hence, the existing literature gives a significant importance to culture's dissemination to promote cultural rights.<sup>33</sup>

Although overall implementation of the entire set of cultural rights remains weak, the ECtHR has made a significant effort to overcome problems relating to free enjoyment of poetic and artistic expressions - as a cultural right - by linking such expressions to freedom of expression.<sup>34</sup> Therefore, poetry can serve as a best tool to promote Migrants' cultural rights. Henceforth, we analyse the use of poetry by migrants as a cultural right and as a medium to freely disseminate their culture. We further analyse poetry's role in promoting the cultural rights and highlighting the limitations hindering full realisation of the cultural rights in host societies.

### 3. – *Creative Work as Collective Process and Research Method.*

As a complementary method to interviews and ethnographic study, poetry seeks to reveal the diversity of people, emphasising the complexities of lived experiences, allowing voices to be heard, and "captur[ing] the essence of the how, the why, the what".<sup>35</sup> It is an 'engaged method of writing that evokes emotion and promotes human connection and understanding, and can capture a unique aspect of the human condition, thereby expanding our understanding of social reality'.<sup>36</sup> Its use of metaphorical language can reach into the heart of its readers and break down barriers in its ability to produce shared understanding. In addition to allowing the researcher the opportunity to gather more in-depth data, the creative 'space' can allow participants to direct the conversation, and allow them to position their experiences within

<sup>32</sup> SHAHEED, 18.

<sup>33</sup> CAUST, "Cultural Rights as Human Rights and the Impact on the Expression of Arts Practices", *Journal of Citizenship and Globalisation Studies*, 3, 1, 2020, pp. 17-30, <https://doi.org/10.2478/jcgs-2019-0004>; GOLVAN, "Aboriginal Art and the Protection of Indigenous Cultural Rights", *European Intellectual Property Review*, 7, 1992, pp. 227-32; LENA, "Immigrant Arts Participation: A Political Study of Nashville Artist", in *Engaging Art: The Next Great Transformation of America's Cultural Life*, Cornfield, Tepper, Ivey (eds.), Routledge, 2008, pp. 147-70.

<sup>34</sup> ECtHR, *Karatas v Turkey*, para. 49.

<sup>35</sup> P. Carroll, K. Dew, and P. Howden-Chapman, "The Heart of the Matter: Using Poetry as a Method of Ethnographic Inquiry to Represent and Present Experiences of the Informally Housed in Aotearoa/New Zealand", *Qualitative Inquiry* 17, no. 7 (2011): 264, <https://doi.org/10.1177/1077800411414003>.

<sup>36</sup> Leavy, *Method Meets Art: Arts-Based Research Practice*, 64.

wider aspects of their own position in society (*ibid.*) – and to share, in their own terms, their social and cultural discourses.

The sociologist Howard Becker often tells audiences of students that sociological research frequently has two main questions: ‘What brought you here?’, and ‘what happened next?’. Research poetry allows these very questions to be asked and expanded on in a similarly open fashion. The researcher is not leading with pre-designed questions but leaving a space where research participants can share their own meaning and experiences to topics of inquiry. The participatory nature of poetry workshop events allows understandings to be shared, and memories stirred. The writer is taking control, especially of their own experiences, memories, inspirations and ideas of self and culture.

Poetry allows the reader to see something of themselves in the writer and something of the writer in themselves. This shared understanding, and the relationships between the micro and macro ethics of empathy, show the obligation we can feel toward each other, as strangers and as friends, by being able to say ‘I feel the same way’.<sup>37</sup> Using elements of poetry within the research process allows for a potential to make our findings more accessible and to convey the “complexity of the observed world”.<sup>38</sup> It allows both researcher and participants to act on emerging data, rather than ‘simply reflecting reality’.<sup>39</sup> Although findings may be condensed in poetic form, this potentially augments its ability to help audiences connect with aspects of the author’s social reality.<sup>40</sup> In poetry, it’s often about what is left out, as much as what is included in the poem. The reader will fill in with emotion and understanding – which allows a personal connection to take place.

Poetry offers a powerful tool to connect people, no matter where they come from, what language they speak and what social class or religion they belong to. It uses imagery to convey emotions and memories that are often close to our own, and to introduce pathways to new understanding of our own emotional lives. Creativity and artistic expression can play a role in leveraging cultural rights - as witnessed in the creative hubs organized during the AMIF-VOLPOWER project – a project spanning seven European countries. This speaks for activation and empowerment of who engages with becoming a poet and assisting the creative process.

<sup>37</sup> MARGALIT, *The Ethics of Memory*, Harvard, 2013.

<sup>38</sup> CAHNMANN, “The Craft, Practice, and Possibility of Poetry in Educational Research”, *Educational Researcher*, 3, 32, 2003, 34.

<sup>39</sup> *Live Methods*, cit.

<sup>40</sup> LEAVY, *Method Meets Art: Arts-Based Research Practice*, 68.

### 3.1. – Empirical Evidence from the VOLPOWER Creative Hub in South Tyrol, Italy.

#### 3.1.1. General Background of the Case Study Context of South Tyrol.

South Tyrol is an Italian province bordering Austria and Switzerland characterised by the presence of a German native-speaking population and a Ladin native-speaking minority. It is a small, mainly mountainous territory of 7,398 km<sup>2</sup>, counting 531,178 inhabitants at the end of 2018<sup>41</sup>. The province has few urban areas, including the capital, Bolzano/Bozen. After having experienced ethnic tensions in the 1960s and 1970s, South Tyrol today is an exemplary model in relation to national minorities thanks to a complex power-sharing system which protects its specific cultural characteristics. Such a system, composed of an extensive political autonomy, several consociational measures, and linguistic rights, has fostered a peaceful relationship among South Tyrolean linguistic groups, although some separation persists in some aspects of their social and political life<sup>42</sup>.

Within a context like South Tyrol (Italy) in which the German - and Ladin-speaking minority co-exists next to the Italian-speaking community, the importance of safeguarding and promoting cultural rights play a crucial role. The 2011 provincial law on the integration of foreign citizens in South Tyrol recognizes the importance of associations that deal with the migrant population for the process of linguistic and cultural integration. However, data concerning the participation of foreign migrants in volunteering activities are scarce. The refugee crisis and its local impact on South Tyrol has contributed to the visibility of migration in the province. Volunteering groups and other local associations have drawn attention to weaknesses of the South Tyrolean reception system. In the light of this territorial context, the volunteering activities carried out through the Creative Hubs with the Volpower group gain yet another additional value and importance in finding new paths towards an inclusive society.<sup>43</sup>

#### 3.1.2 Setting up and Implementing Poetry Group Work with VOLPOWER Volunteers in South Tyrol.

During the AMIF-VOLPOWER project we were able to experiment with the technique of collective poetry writing in order to analyse its impact on seven volunteers

<sup>41</sup> ISTAT *Dati Demografici 2018*, Roma, 2019.

<sup>42</sup> CARLÁ et al., 'Volunteering in South Tyrol. General Framework and Results of an Online Survey among the Youth: VOLPOWER (821619)', 2021, <https://webassets.eurac.edu/31538/1612455697-country-report-south-tyrol.pdf>.

<sup>43</sup> CARLÁ et al., cit.

(age 18-27). Four of our volunteers were native South Tyrolean females (two from the German speaking community and two from the Italian speaking community), two were Third Country Nationals from Nigeria, and one, a second-generation migrant with Bangladesh roots. As one of the country teams of the VOLPOWER consortium, we organised a series of encounters with the volunteers to first introduce them to a set of creative tools including ‘1-sec-a-day videos’,<sup>44</sup> a thematic photography collection, and a toolkit for “how to become a poet”. We wanted to use these creative techniques to understand how the young participants were feeling, as individuals and as members of a group - and in response to their daily routine, to their environment and sense of belonging, while keeping in mind the impact of the project’s volunteering and training experiences. We called these specific meetings ‘Creative Hub’ and set them up as informal moments of encounter and exchange among the researcher and the volunteers.

Part of the assignment for each national group revolved around a poetry collection, which started at the beginning of 2020. A clear and simple instruction sheet for all country groups was set up by the project leader explaining the exercise together with some “poetry tools” and a template. These documents provided an important overall guide and support and helped to create a specific and uniform ground for every country team’s empirical work. The coordinators of each country’s Creative Hub were then left free to organise the session and identify the most suitable procedure to motivate, activate and empower the volunteers throughout the activity:

The first step was to invite the volunteers to gather for an update of the activities. On this occasion the poetry template was illustrated on a monitor and handed out as hard copy to every participant. This template outlined the structure of what would become the final poem. It was structured in a clear way including simple instructions. Each line began with a universal introductory phrase of few words, and participants were invited to complete each sentence until the exercise was complete - and the ‘skeleton’ or ‘frame’ for a poem was created. Although everyone was given the same template and working title of poem, the works resulting at the end differed completely between participants. This showed the great freedom poetry offers to give voice to the individuality of everyone and how much diversity and creativity lurks in each one of us even when given the same initial or basic frame of action. Furthermore, participants are writing in the first person, from their own experiences, and so their poems are unique.

The introduction to the first line given to everyone was simple but challenging: “I AM...”

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<sup>44</sup> 1 Second Everyday, ‘1 Second Everyday’, 1 Second Everyday, 2020, <https://1se.co/>.

Unfolding in a marvellous world of personal claims, doubts, fears, hopes, memories, self-reflection, and praises, as well as critiques of life, the first poetic art works started to come to life. (see F1)

*F1: Overview of poems produced by VOLPOWER volunteers in South Tyrol, 2020*

*I am like a flower  
you hold me tight you lose me  
and you hold me gently I become fabulous  
I wonder what is going on in the heart of a  
lion  
when hunting for another animal child to  
feed his own  
I heard an animal crying in the jungle  
I went to take a look, the animal was stuck  
in hunter trap  
I wanted to help but no way will I go close  
I will not be bitten by the animal  
so, I wish I could speak his language  
to let him know I am trying to help”  
(V1)*

*I am bird that flies with the wind, all  
alone.  
I wonder why I fly so high, all alone.  
I heard a strange sound and ask myself  
what could that be?  
I saw a shadow of something, but I  
couldn't figure out what it is.  
I want to end being alone,  
I want to be in a circle of birds  
And fly together with them.  
(V2)*

*I am love and light  
I wonder how others see this world we live  
in  
I hear children laugh  
I see hearts full of anger and souls filled  
with joy  
I want all the intense feelings in this pool of  
emotions  
(V5)*

*I am changeable like the wind.  
I wonder about stillness,  
about the rooms that never get rear-  
ranged,  
about the luggage that has never travelled  
anywhere,  
about the eyes that don't feel the urge  
to see something different from what  
they've seen before.  
How do they do that?  
(V3)*

*I am awake in the middle of the night  
Wondering why I hear a loud noise of si-  
lence  
I see you  
I want to hug away those shadows  
To take a bath with you in all those colors  
The blue of the deepest ocean and the yel-  
low of the sunflower,  
The lilac of lavender fields  
And the unspoiled white of jagged rocks  
up in the mountains  
(V4)*

*I am a red Kashmiri shawl,  
Soft and delicate.  
Winter breeze waving me up,  
Left and right.  
Now and again  
Questioning of my ancestors  
(V6)*

#### *4. – Insights and Recommendations for Collective Poetry Work with Young Volunteers.*

Although the assignments, materials and target group were formally the same across the seven European groups, when discussing workshops contents with other group coordinators it was possible to learn about the different experiences that each one was having with the activity. For the researchers, it became vital to discuss varying manners of approaching the volunteers, and to find out what could be useful techniques to facilitate the work, motivate the group and/or to set up “rules of the game”, that – although simple - could be essential for establishing an enabling environment for producing creative content.

On reflection, accompanying the seven young volunteers with mixed cultural backgrounds through the poetry assignment and working as a group has been fundamental. We met up twice, within our institution's main building, once in January and once in February 2020. Meetings were scheduled from 4 to 8pm on Friday evenings. There was peace and quiet within the whole building and being allowed to use the facilities beyond the regular working hours, added to the overall feeling of trust, and on some level, we felt a little privileged.

The group gathered in the ‘Lounge’ of the research centre; a modern, yet relaxed room with some colourful armchairs and a nice big wooden table surrounded with benches. Some bowls of chips and some soft drinks were prepared beforehand to welcome the group and create a warm and friendly atmosphere. Furthermore, a quantity of white paper, some pencils, felt pens and pastel colours were placed on the table for everyone’s use. After a brief informal greeting and some relaxed chit-chat, the participants were invited to choose their seat around the table and the coordinator of the Creative Hub started to explain the exercise. The group remained together working their way through the poem, at times scribbling busily on paper or glancing around the room while they searched for ideas, words and inspiration with their imaginations. Good humour, fun and genuine laughter were interspersed with moments of amazement and revelation.

Despite having established a specific place to meet and having set the workshop up in a way to create a safe, intimate and familiar space of encounter, where creativity could freely unfold, it became apparent that some ‘rules of the game’ were required. Rather than being left to complete all poetry individually, the group agreed that they should progress as a team, supporting and helping each other throughout the process. After some discussion, it was agreed that each participant would take turns to read out the beginning of each line, leaving time for everyone to compose his/her sentence. Once completed, each person placed down their pencil and waited

for the last to finish. At that point, the individual, who had introduced the sentence, would read aloud what she/he had written. The others followed, one by one.

These moments were fascinating: The group members each found ways to start – some by scribbling, some by using pastel colours to paint an image until finding the words to describe their idea. At one point, the group clapped their hands together in a ‘1-2-3’ rhythm to ‘force’ the words out of their bodies and overcome any mental blockades.

The researcher here takes the role of ‘observant participant’.<sup>45</sup> Fully immersed in the activities of the group and participating with their activities, the researcher is permitted a unique view of individual experiences,<sup>46</sup> while also facilitating trusts to be formed and power differences to be reduced. Providing this setting, where the group members felt comfortable leading and making changes to the workshop, in turn promoted a level of respect for each other’s struggles and pace. All group members actively participated in reading their own creations aloud (not always an easy thing to do), while at the same time remaining attentive and giving ear and appreciation to what their colleagues were sharing.

The experience furthermore proposes that to work in groups helps to motivate and empower participants. It inspires and enables one to open one’s own horizon by being given the unique opportunity to explore the inner world of oneself and others in the group. Everyone, including the researchers, were part of the creative exchange and contributed to trust-building. What counted most of all during the exercise was the collaborative quality of the process.

Being a process means that there is a temporal framework around this method, and it can be very time-consuming. Participating and engaging with a group requires learning about the group and its activities in much greater detail than when simply observing or taking notes. Performing shared activities with group members offers greater empathy, as well as a much richer understanding of others in the group, and the rules and norms of their activities together.<sup>47</sup> Acting as a group member, the researcher is able to notice things, such as norms of behaviour within the groups. As a group member, the researcher spends more time with the participants and gets to observe them in more varied situations. In some situations, participating eliminates the formality of interview schedules, however, within this study, interviews, and informal conversation were part of the ethnographic research process.

<sup>45</sup> CAMPBELL, LASSITER, *Doing Ethnography Today: Theories, Methods, Exercises*, West Sussex, UK, 2015.

<sup>46</sup> GRASSWICK, “Feminist Social Epistemology, The Stanford Encyclopedia of Philosophy (Winter 2012 Edition)”, Stanford.edu, 2012, <http://plato.stanford.edu/archives/win2012/entries/feminist-social-epistemology/>.

<sup>47</sup> GRASSWICK, cit.

The experience of the VOLPOWER Creative Hub setting in South Tyrol shows that by tackling poetry writing as a group task allowed participants to also engage in direct conversation with one another. By having everyone reading out aloud the single poetic verses to the rest of the group, the other members felt free, and even encouraged, to react with a spontaneous comment, or a similar thought or anecdote of their own life experience. Sometimes the astonishment of discovering certain unexpected and profound reflections of a participant, pushed the others to ask for more details or further explanation. At times it turned out to be a source of inspiration for others to also open up on similar episodes or emotions in their life. So, while concentrated on the same poetic task, the exercise also induced participants to regularly branch off from their poetic context to wider aspects of their position in society. Dialectic interactions of this type fulfil several functions; they provide active means of challenging and strengthening one's self-knowledge while also taking part in shared meanings across varied contexts.<sup>48</sup>

It could be suggested that poetry, here, acts as a vehicle of communication, encouraging participants to open up and share personal thoughts and experiences with others. The very act of sharing and exchanging such personal insights, also encouraged the group members to engage in a wider spectrum of conversations and topics to those strictly arising from the poetic verses. Additionally, another valuable aspect arising from the workshop was the learning and resilience skills gained from all members being faced with a new task together. No-one in the groups had any experience of this particular exercise, and so all were confronted with the specific task of poetry writing for the first time. This aspect made it possible for each one to deal with a new learning terrain - exploring different ways to handle the new situation, while learning from one another. For some of them the biggest challenge was just simply getting started. For others, the verses being produced never quite felt 'good enough'. Some members of the group liked to show a humble attitude at first, and then surprise everyone with their marvellous metaphors. Others felt happy focusing on a process of self-discovery – captivated by the unfolding of their own personal composition, and simply enjoying the beauty of being allowed some time to indulge in self-reflection, and direct connection with their "inner self".

The participants were given the opportunity to lead and offer changes to the planned event; allowing them control over what they felt happy sharing while also allowing them to find meaning to their own experiences.<sup>49</sup> Oakley suggests that the personal involvement in this type of research is more than a 'dangerous bias', it is

<sup>48</sup> GRASSWICK, cit.

<sup>49</sup> BRAYTON, "What Makes Feminist Research Feminist? The Structure of Feminist Research within the Social Sciences", 2005, <http://www.unb.ca/par-1/win/feminmethod.htm#femlim>.

the way people come to know, trust and confide in each other.<sup>50</sup> Creating this type of suitable environment is crucial to motivate everyone to learn from each other and to work together as a group. They offered friendliness and patience during the contemplative and harmonious moments of those that suddenly became silent and needed their personal time to get immersed in their ‘creative world’. Besides learning a new approach and skill at individual level, the poetic group exercise helped participants to also understand how others share and overcome similar struggles. In this sense, the group workshop setting turned out to be beneficial in terms of networking, resilience building, giving support and uncovering new knowledge<sup>51</sup> and skills.

Sometimes idea sharing is linked to relatively inefficient processes. Under certain conditions, however, the same idea sharing process can become productive. According to the study of Paulus, P.B. and Yang H.C.<sup>52</sup> one important element is the ‘attention’ that group members pay to the process of exchanging ideas in the group, while the second most important element is the “incubation”, that is, “the opportunity for group members to reflect on the ideas after the exchange process”<sup>53</sup>

In the following section we want to offer our reflections on some of the poetic outputs that the volunteers of the South Tyrolean Volpower team realized during the Creative Hubs with us.

#### 4.1 – What Can Research Learn from Arts?

“Uncertainty stares us in the face from the moment we are in the womb and once we are born there is only one certainty to come and therefore every stage of life should be lived to the full.”<sup>54</sup>

In his personal collection, Haig Barclay<sup>55</sup> discusses the art of poetry writing from a very practical perspective. As a passionate writer and thinker, he explains his approaches to poetry and how it accompanied him during ups and down of his life. What is striking about his collection of poems is the fact that the whole compilation of 100 items were written with great dedication and authenticity by an amateur poet and businessman. Despite his amateur status, he includes personal reflections with

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<sup>50</sup> OAKLEY, “Interviewing Women: A Contradiction in Terms”, in *Doing Feminist Research*, Roberts (ed.), London, 1981, 58.

<sup>51</sup> BARCLAY, *RAW2525 - A Consolidated Collection of Poetry*, 2019, <http://www.raw2525.com/>.

<sup>52</sup> PAULUS, YANG, “Idea Generation in Groups: A Basis for Creativity in Organizations”, *Elsevier*, 82, 1, 2000, pp. 76-87, <https://doi.org/10.1006/obhd.2000.2888>.

<sup>53</sup> PAULUS, YANG, cit..

<sup>54</sup> BARCLAY, cit.

<sup>55</sup> BARCLAY, cit.

every single poem and introduces his own techniques and processes of writing. By doing so he argues that (his) poetry builds on “...structures that can be appreciated by and have an impact on anyone, anywhere.” He follows the intent to make poetry more available to all. Researchers new to poetry may feel at ease, or intrigued to learn about this approach to indulge in poetry as an amateur poet, while also being aware and critical of potential impacts this art form has on those who read or compose verses. His approach, showing both sides of poetic writing (the artistic output on the one hand, and the reflective ponderings of the experience behind the scene while producing it), could act to incentivise others to likewise explore this medium.<sup>56</sup>

“But why hit on poetry as a means of expression? Poetry has the potential to reach a wide range of readers (...) Few collections foster and encourage more people from diverse social backgrounds to read poetry and (why not?) even write the stuff. Yet we all experience love, tension, despair, glee. These emotions need not be necessarily expressed in some obscure language but can be conveyed in simple yet evocative terms. Poetry has advantages over other forms of writing: it can be short and to the point; it can be easily divided into shortish verses; it can play easily on the rhyme, rhythm and music of words; it can provide the ideal release for the build-up of a writer’s need to write, and the reader’s need to face up to conflict and resolve dilemmas.”<sup>57</sup>

The experience with the seven volunteers during the Creative Hub’s poetry assignment of the VOLPOWER project shaped the way of doing and valorising our research. It had an impact not only on an individual level but made us realize once more that we are members of a community. The experience taught us the importance of ‘taking time to stop and stare’ and let the spoken or written messages of who surrounds us, not only touch the intellectual eye and ear but also reach further depth. In line with Barclay’s assumption, we argue that poetry can help “...to make a personal sense of our lives, to reveal an awareness that will sustain us, and, in some way, help contribute to others.”<sup>58</sup>

The poetic verses composed by our VOLPOWER volunteers impacted, not only the others in the group, but also fellow VOLPOWER researchers, and later, visitors to our exhibition.<sup>59</sup> It is not too far-fetched then, to imagine that these same verses could have a similar emotional impact on policy makers if they too had the opportunity to read these poems. Our volunteers externalise with profound reflexivity,

<sup>56</sup> BARCLAY, cit.

<sup>57</sup> BARCLAY, cit.

<sup>58</sup> BARCLAY, cit.

<sup>59</sup> VOLPOWER, ‘Joint Narratives & Digitalised Aesthetics of Youth Volunteering’, Volpower.eu, 21 January 2021, <http://www.volpower.eu/digital-exhibition/>.

their experiences of migration and the difficulties they have experienced while settling into a new living environment. The metaphoric language exposes images of their state of emotion; their sorrow or mourning of having had to leave their family and cultural roots behind, their hopes for a better and harmonious life in future, attempts to fit into a new society, and difficulties attached to being understood and accepted.

As depicted by the verse (V1.1) below, from subject V1, the poet is aware of ‘duties’ of civic engagement expected in his/her host country and feels a sense of responsibility to engage. However, this is hindered by language barriers (if the term “language” is interpreted in a strict sense). The poet may also be responding to governance procedures that inhibit newcomers’ access to, and be included in, societal processes.

I heard an animal crying in the jungle  
I went out to take a look, the animal was stuck in hunter trap  
I wanted to help  
but no way I will go close  
I will not be bitten by the animal  
so, I wish I could speak his language  
to let him know I am trying to help  
(V1.1)

The verse presented above illustrates a situation in which a sense of frustration and disempowerment overcomes the author of the poem. The poet highlights the radical anti-migrant elements in society and expresses his/her desire to help the distressed radical element (the beast) present around him/her in society. The verse shows the poet’s human compassion for a distressed radical element despite facing immediate threat and abuse. In this sense, this verse reflects a situation of cultural conflict and general discrimination existing in society.

The poet further expresses discomfort for not being able to take action even though aware and wishing to contribute to the integrity of his/her community or living environment. Additionally, there lurks a sense of fear about possibly being unfairly punished as a consequence of taking action (“No way I will go close, I will not be bitten by the animal”). The poet describes a feeling of being captured in a sense of stasis, impregnated by incertitude and ineptness.

In the next set of verses, the same author (V1) again points out his/her sentiment of impediment to act freely according to his/her own natural impulse and discretionary power. The poem hints at a way of living (or an existential condition) that shows some signs of resignation. Even if not expressed explicitly, the surrounding

environment seems to force him/her to accept a superimposed societal position or behaviour that he/she not entirely identifies with.

In verse V1.2, shown next, the subject V1 calls for more freedom and understanding in the way he/she is or lives and ought to be treated.

I am like a flower,  
you hold me tight you lose me,  
you hold me gently and I become fabulous.  
I pretend to be fine  
even when the situation hurt so badly  
all because I don't like the word sorry.  
(V1.2)

The verse suggests that by showing respect and tenderness towards the subject V1 (*"you hold me gently"*) great unfolding can take place at a personal level. The subject V1 also alludes to being encouraged to exercise levels of self-restraint, and to not demand more than his/her present life can give. This type of self-restraint by minority groups is important in the maintenance of host country claims of superiority and the reinforcement of "specific emotional bonds" that allow privileged groups "to stand together"<sup>60</sup> by insisting that newcomers integrate according to their host cultures and ways of being. It appears that there is a sense of dissatisfaction and unhappiness here. At a later moment, the subject V1 offers his/her reflection on where this unhappiness has its source. There are mixed feelings between the need for forgiveness, and a state of helplessness (*"all because I don't like the word sorry"*) whereby it remains open for interpretation whether the subject is struggling with forgiving oneself, others, fate, or whether the issues lay rather in continuously being told *'sorry'* without any concrete resolutions. It may be that the poet finds less appeal in self-restraint according to other people's norms, particularly if he/she judges that their prospects of becoming accepted remain open to doubt however hard they try to conform to established norms, simply because of their background (ibid).

These verses might be cautiously interpreted as an alert on the subject's feeling of surrender and disconnection from his/her deeper concerns and desires in life. At the group level, these verses may be interpreted as dissatisfaction of states' integration policies. The verses inform the policymakers about the existence of inequality and ineffectiveness of the state's policies giving effect to cultural rights. The verses

<sup>60</sup> ELIAS, SCOTSON, *The Established and the Outsiders: A Sociological Enquiry into Community Problems*, 2<sup>nd</sup> ed., London, California, New Delhi, 1994), 155.

reflect that non-realisation of cultural rights prevent migrants from becoming an effective part of society.

Again, another verse (V1.3) illustrates the subject V1's longing for some more stable and harmonious life:

I see the evening sun shining and beautiful  
I wish I could hug it.  
I want to listen to the sound of the rain, the sound of the water and the sound of the sea  
so that I can relax my soul  
(V1.3)

The verse reflects a sense of isolation existing in the author's mind. The author sees society flourishing but remains isolated, and somewhat 'apart' from society due to cultural difference. In this sense, this verse also speaks of an existence of a serious cultural conflict and reminds policymakers to take initiative to overcome the difference.

Love, in this final verse (V1.4), is depicted as a universal power that heals wounds and promotes a positive perspective of the future. For subject V1, the thought of a better future is directly connected to a world in which there is equality among all people. He/she expresses the firm intention to always be the best version of him/herself, and to be the person helping in times of need. A certain nostalgic tone appears in the last verse, when the subject V1 realizes that there might not be many occasions to reunite, hoping it will occur at least in the moment of a loved one's (maybe parent or close relative) final moments.

I say keep smiling is the key of love.  
I dream one day everyone will live in the world and feel equal with no superiority.  
I try to always be the best then I realize I may not be the best but am better  
than the rest.  
I hope to be there when you are going to need me most,  
I hope to be there to hold your hands for the last time,  
I hope to be there when you say goodbye forever.  
(V1.4)

These verses shine a spotlight once again on the author's dissatisfaction of the existence of inequality in society. The third line '*I try to always be the best ....*' shows that a sense of discrimination inequality experienced by the author has started to develop superiority complex in her/his mind. S/he is somehow trying to tell herself/himself that s/he is better than those out there.

In the following poem from author V2, the theme of loneliness strikes the reader most. In the verse presented below, the lament of being the only one of his/her kind and feeling alone in life is made explicit:

I am bird that flies with the wind, all alone.  
I wonder why I fly so high, all alone.  
I heard a strange sound and ask myself what could that be?  
I saw a shadow of something, but I couldn't figure out what it is.  
I want to end being alone,  
I want to be in a circle of birds  
And fly together with them.  
(V2)

The author V2 expresses a strong desire of becoming part of a community and to actively contribute to its well-being. Wishing to find a sense of belongingness - and meeting difficulty here, highlights the two-way nature of belongingness – and how the nature of belongingness is predominantly held by a more powerful group. The future tense of the poem also allows us to understand the temporality of belongingness – that it is a process of emergence, negotiated over time – although not necessarily by equal partners.

After a first feedback loop, the author of V2 stresses the importance of the line “I want to end being alone.” He/she wants to highlight this core message, hinting at a mixture of fear of being left alone and his/her determination to act against loneliness and exclusion. The line here suggests that the author is both aware of his/her present circumstances and future opportunities and struggles to balance self-restraint and self-fulfilment. The line transmits self-awareness and self-determination and suggests to the reader that subject V2 feels empowered to reach his/her personal goals and that he/she will take considerate decisions and actions in life to make sure not to be put aside but instead to be included in the community and feel actively part of society.

Almost in resonance with this poem comes the contribution from author V3, who expresses his/her astonishment and almost perplexity about people not being open to change and diversity, nor willing to question what is beyond the borders and norms of their own daily lives (V3.1).

I wonder about stillness,  
about the rooms that never get rearranged,  
about the luggage that has never travelled anywhere,  
about the eyes that don't feel the urge  
to see something different from what they've seen before.  
How do they do that?  
(V3.1)

Verse V3.2 illustrates the author's thoughtful contemplation of *diversity* and *migration*. While the world, at times, overwhelms with multiple options and opportunities, the verse also speaks of the myriad possibilities that come with rich diverse societies. The author challenges notions of ownership and superiority by asking 'Which one is mine?... *Do I really have to pick?*'

I hear the sound of all the different possibilities,  
clashing like waves meeting the reef,  
overlapping and mixing up as they bounce back in the ocean.  
I see a million shapes, a million colors,  
a million situations, a million lives.  
Which one is mine? What is right for me to pick?  
Do I really have to pick?  
(V3.2)

Verse V3.3 returns to tackle the theme of *migration*, as the author reflects on human nature and whether personal fulfilment is found in remaining fixed in one's place of origin. Subject V3 argues that it might be a form of illusion to regard remaining still and stable as being a source of wellbeing because future possibilities are not always predetermined. In this verse the concept of *time* plays a role, emphasising the importance of temporality for the understanding of our social worlds, and arguing that these should not be understood as static, but as interconnected dimensions of past, present and future which are constantly changing.

While pretending to be satisfied whit being still  
I feel shivers and tickles.  
Time appears untouchable and I worry  
my hands will never be able to hold it.  
The memory of most past days has already faded.  
(V3.3)

The next example from author V4 shows the wide spectrum of imagination that poetry offers to both the person writing the verses and the reader who appreciates them afterwards. The verses transmit words of wonder, and it could be suggested that the subject V4 is pondering life's multitude of shapes and colours. The author is longing for a harmonious reunification - perhaps with parts of him/herself or with a beloved person. The author dreams about and calls upon his/her personal space of safety and intimacy, described with intense colours, a strong bond to nature's rough and tender beauty and uncontaminated environment. The verse tackles the appreciation of the diversity we find in nature and in life. The author wants to get rid of shadows, unclarity

or inequalities in his/her surroundings and proposes to do so through tenderness and affection. She/he is aware of 'the other' and wants to enjoy diversity by fully indulging (bathing) in it. The poem calls our attention towards the moment in life in which we instantaneously realise, or become more aware of, our existence and surroundings. A moment, like a gateway, when past and futures collide in the present, and suddenly, a wide landscape of intense emotion and colours presents itself in front of us. There is something in this poem that speaks to the necessity of the interdependencies within nature and society - and that we are all part of these networks.

I am awake in the middle of the night  
Wondering why  
I hear a loud noise of silence  
I see you  
I want to hug away those shadows  
To take a bath with you in all those colors  
The blue of the deepest ocean and the yellow of the sunflower,  
The lilac of lavender fields,  
And the unspoiled white of jagged rocks up in the mountains  
(V4)

There is a sense of self-awareness present in the next poem V5. The author expresses a sense of gratitude for living in a privileged position in society. He/she dreams of a peaceful and equal society, and promises to use this position, and power to do good for the community, by sharing knowledge and showing kindness, empathy and tolerance. The author sees him/herself as part of a network in which we are all born into; a citizen of the world. He/she embraces diversity and suggests that humanity is bound together by universal themes like fear, love, death and peace. Perhaps, in a cultural rights perspective, the verse calls for awareness raising and protection of the universal benefits of diversity in culture and freedom of expression on a basis of peaceful co-living among cultures and religions.

I am love and light  
I understand that I have the power to do good in this world  
I say that love is the universal source we all carry within us  
I dream about an intense life  
I try to experience just that  
I hope to hear my own children laugh one day  
I am love and light  
(V5)

The author of the poem V6 describes the unrest of being called between two cultures, two homes, two realities that come as a consequence of ancestors' decisions. He/she expresses resignation, destruction, death taking place inside her, maybe an internalization of hopes and dreams she/he and the family and peers have lost or were forced to abandon. At the same time the inner conflict finds resolution by accepting and making friends with the turbulent forces that, at the end, can be turned into a virtue.

I am a red Kashmiri scarf,  
soft and delicate  
Winter breeze waving me up,  
left and right.  
Now and again  
questioning my ancestors  
Pretening,  
lighting fires around the world  
and chasing rainbows.  
Deep down I am dying  
to make peace with my inner mistress.  
I am a red Kashmiri scarf  
soft and delicate  
(V6)

After a first feedback-loop with the author of V6 the following additional interpretations were provided:

The author of V6 proudly presents him/herself as a citizen from the East, even though the subject is no longer living there ("I am a red Kashmiri scarf, soft and delicate.") The author stresses his/her strong connection with the own cultural roots. He/she admits being a sensitive and a humble person, as a reflection of a "typical oriental citizen".

The fact to live between two cultures, two homes, and two realities causes lots of trouble in the subject's mind, as highlighted in the lines V6.1. He/she continually questions about his/her own identity and persona, about the own origin, about the place where he/she is growing up. The author's understanding of his/her own origin belongs to "somewhere between knowing and unknowing." The subject explains he/she is being told to do or not to do certain things without receiving a proper explanation of why. This causes confusion and pushes him/her to look for a possible answer in the ancestral culture: the author feels called to reading books in his/her own language and talking with his/her own cultural group peers.

Winter breeze waving me up,  
Left and right.  
Now and again  
Questioning my ancestors  
(V6.1)

As the subject explains there is no manual on how to solve such identity/cultural/nationality crises and finding a possible solution results sometimes to become exhausting. The author explains, he/she could easily avoid this struggle by ignoring the identity conflict and choosing an easy way out, but he/she is determined to find a balance. The author affirms to be willing to remain connected with his/her own original ethnic group. "The game is not over here, because I grew up in a different culture which taught me new values, which is sometimes conflictual and against the previous one." The subject expresses his/her attempt and determination to find a possible fusion between the two.

With the lines V6.2 the author expresses his/her wish to help all other individuals facing the same dilemma to integrate into a new cultural landscape. He/she is ambitious to bring changes in the migration system, because he/she feels that within governmental institutions there is still a lack of interest in the conditions and struggles of migrants.

Pretending  
Lighting fires around the world  
(V6.2)

Overall, the subject expresses a great desire for love, and seems to be in constant search for answers and inner peace and balance ("and chasing rainbows.") This is particularly striking in lines V6.3 in which the subject explicitly describes inner conflict and a desire for resolution. The lines V6.3 express a negotiation with self between death (existential confusion) and peace (within finding a sense of contentedness) refers to the difficulties associated with finding a balance between two cultures. The poem suggests the reconciliation with one's own identity, history and an acceptance of his/her own fragility and inner conflicts. However, these two aspects of self are embraced and transformed into personal strength. With his/her poem the subject celebrates in subtle tones the realization of his/her own empowerment.

Deep down I am dying  
To make peace with my inner mistress  
(V6.3)

These examples provide evidence of what poetry, as a unit of observation, can offer to facilitate individual voice and social sensitivities. As a research method here, poetry has offered our participants' opportunity to externalise their own experiences, in their own words. This is especially important to groups who may have difficulty raising concerns directly relating to issues within their own lives - and for making it possible for these views to be expressed.

### *5. – Disclaimer and Interpretative Reflexivity.*

Much in the same way that one would familiarise oneself by the reading and re-reading of data, the act of crafting and revising (and group discussions) that took place during and after our poems were written, and/or the subsequent return to the work and reflection upon them helped clarify meaning to us.<sup>61</sup>

Besides being aware of personal bias in interpreting the empirical data, that is the poetic verses realized by the volunteers of the VOLPOWER case study in South Tyrol, there is an additional trade-off to be taken into account when engaging with poetry exercises in research: there is negotiation that has to take place between giving credit to the authors'/poets own works and their collaboration in the research, and the need to protect the identity of vulnerable groups. This is something that has to be fully negotiated with participants in research of this type.

In our study, participants' artistic endeavours were fully credited within our final online exhibition. However, for the purposes of this article, it has been agreed that we will protect the identity of the authors.

In the article we combine cultural rights issues with theories of art-based- and transdisciplinary art research and the empirical experience of working with a group of young volunteers of mixed cultural background. The empirical data were collected within the specific project context and framework of VOLPOWER. For the present paper a special focus was put to the use of poetry art to promote resonance, free expression, creativity and at the same time facilitating the interaction among participants, understanding what moves them (conflicts, desires, bonds). At the time of meeting up for the Creative Hub in January-February 2020, the group of participants had known each other already for about nine months. The existing bonds, also with the researchers on site that accompanied the process of poetry writing, were an important precondition for the poetry assignment to work out smoothly and to reach creative outputs of a certain profoundness that could be further resonated among the group and, in a later stage, discussed with the researchers by means of feedback loops.

<sup>61</sup> CAHNMANN, "The Craft, Practice, and Possibility of Poetry in Educational Research".

The main scope of the poetry assignment was to offer participants a safe space to have fun together and to provide them with a tool for personal reflection, growth and empowerment. Another precondition was, thus, to create the appropriate physical and atmospheric space for it.

The approach of Transdisciplinary Art Therapy<sup>62</sup> was of support in terms of facilitation techniques and group supervision. The school of thought promotes the act of ‘listening’ and ‘accompanying’ the artistic process by putting the focus of reflection on the artistic output and the impact and effects of its creation rather than on the poet’s or reader’s role, personal background or motives. The researchers involved in the process of poetry writing with the group of participants can, therefore, help promote acceptance, diversity and tolerance when interacting with the art piece itself. This approach turns out to be useful also when it comes to interpret selected verses of poems, in order to maintain a certain distance from personal and subjective interpretations.<sup>63</sup>

There is something to be gained from grappling with positions as group members and as researchers, and there are times when this closeness can inhibit a role as researcher. However, transcending that boundary between researcher and group member allows one to not only observe the compromises, negotiations and discussions taking place, but to experience them – while also experiencing the relationship building happening between the group: the learning of each other’s lives – and the ways in which their poems developed from the relational interactions and conversations.

As researchers we feel enriched by assisting the unfolding of creative expression and by being accepted as part of the group in the very process of artistic creation, while at the same time operating in the role of facilitator and observer. However, when confronted with the task of data analysis, meaning to use the poetic outputs for interpretation purposes in order to help showcase possible inner or hidden emotions, imaginaries and visions of the sample units, we are aware that the poems are subject to subjectivity. It is important to stay in a feedback loop with the authors of the verses and to understand what their reaction and opinion about our interpretation was like. The return to these poems in this way takes the research one step further, by seeking participants’ responses to the text as a way to begin dialogues anew.

The interpretations offered in this paper are merely a part of the process, a snapshot of the ongoing conversation with the poems’ authors and one of many facets of resonance that such art work can induce and provoke in the reader.

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<sup>62</sup> *El Arte y La Persona. Arteterapia: Esa Hierbita Verde*, Gysin Capdevilla, Sorín Zocolsky (eds.), ISPA Ediciones, 2011.

<sup>63</sup> GADAMER, “Poetizar e Interpretar”, in *Estética y Hermenéutica*, Madrid, 2018, pp. 73-80.

## 6. – *Conclusion.*

Through their everyday and cultural conversations, and through the creative activities that acted as a vehicle for communication to negotiate the differences and tensions of negotiating cultural differences, our groups' poetry explored many facets of diversity, migration and belonging - and allowed us an insight into their journeys, that is, their hopes, dreams, and temporal frames of cultural diversity. Poems may on the surface appear to be about the individual - but as is evidenced in the poetry within this project, this was not always the case. The group often wrote their poems as part of a 'we'. Something within their poetry points to the interdependencies across individuals and cultures, to the ways in which we are all part of networks. Their ideas, thoughts and compositions were also generated through collaboration with one another - collectively produced by an exchange of ideas and experiences.

Poetry has an ability to touch upon the 'difficult to get at' aspect of understanding the world around us: those internal struggles that are so part and parcel of everyday life, they go almost unnoticed. The hidden, and sometimes overlooked thoughts we have as we negotiate our way each day. These areas can be difficult to grasp and to articulate, and poetry has enabled the participants in this study to express their ideas about their relationships with others.

Poetry can be thought-provoking, and encouraging of a more reflective mode of consideration, and within research, it is a valuable tool. One of the benefits of combining academic research with creative practice lies in its ability to reach wider audiences, and to evoke emotion and inspire further interaction. Research should not simply be about finding absolute answers to problems. It has a role to play in prompting more questions about a particular phenomenon, and so perhaps poetry works because it does not provide a concrete answer or comprehensive empirical evidence. On one level poetry may be thought of as more accessible and simpler than academic writing/reading, but at another level what it is doing is something quite different. It can be more profound and thought-provoking to a reader than perhaps the findings of a survey that tell people 'a certain percentage of the population do this or that'. With some poetry, what is attractive is that the meaning isn't immediately obvious. It may be ambiguous in a way that draws people to return to it and think about it further. So in this sense it is not that poetry is simple, it may be accessible in that one can imagine oneself there, but it can also take the reader to another level that is more engaging because it is not giving an answer, but raising (more) questions – and taking the reader into a more reflective mode.

Some extracts of the poetic compositions realized by the VOLPOWER volunteers in South Tyrol have been illustrated in this paper to give insight on how the youngsters perceive their existence and role in the (new) environment they live in. These

examples of poetic language make certain abstract images and deep feelings more graspable to any kind of audience that has an open ear and a genuine interest to understand better the human condition. With respect to the promotion and freedom of expression of cultural rights, some of the poetic verses composed by the group of young volunteers with mixed cultural background give reason to suggest criticism of barriers or restrictions in the integration of migrants.

In addition to allowing the researcher the opportunity to gather more in-depth data, the poetry making workshop allowed the participants to reposition their experiences by offering support to each other in a wider sense of socio-political perspectives. In addition to this, the success of the workshop may be viewed in its ability to have the findings reach a wider audience. The concern here is about the power and politics of representation; who has the right to represent whom, and whether or not research remains in the hands of a few or accessible to the many. Our paper argues that poetry can offer a wider function to social workers, third sector organisations and policy makers to detect where cultural rights are not yet being entirely respected or where gaps in the governance system cause a barrier for cultural rights to manifest at all levels.

Although international treaty law including the Framework Convention for the Protection of National Minorities (1995) falls short of giving legal effect to cultural rights, practices like the creative hubs with the poetry workshops offered to migrants and young volunteers, proved an alternative way to support the Convention's guidelines: they contribute to promote the necessary conditions for persons' belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity - namely their religion, language, traditions and cultural heritage, while at the same time being empowered to freely manifest and express themselves creatively and sharing their own "culture" with others.

Creative hubs like the one held with the young volunteers in South Tyrol (Italy), therefore present a valid approach at community- and policy-level to work towards the realisation of cultural rights. This is even more relevant when working for the integration of migrants in a territory in which, historically, multiple minorities (German, Italian and Ladin speaking) coexist.

## **Abstract**

Poetry is a powerful tool for expression. The European Court of Human Rights affords special protection to poetic expressions under the freedom of expression by restricting states from encroaching on the freedom of poetic expression. Therefore, the paper looks into how poetry as an artistic practice enables young migrants and their peers in host communities to reflect upon the limitations of the cultural rights' policies of host states, and how these limitations lead to discrimination and inequality. Empirical evidence from our creative hubs in South Tyrol (Italy) created under the AMIF-VOLPOWER-Project to train and enable young migrants to express their life experience through the use of poetry shows the existence of discrimination, inequality, and isolation feelings in the participant minds. Therefore, the paper advocates for the use of poetry and other artistic expressions, within and outwith of research, to promote cultural rights of the people belonging to national minorities and inform the policy makers of the real-life situation from the migrants' perspective. Furthermore, the paper provides some insights regarding useful techniques to facilitate the work, motivate the group and set up "rules of the game" that can be essential for establishing an enabling environment for producing creative content.



## 2. **BUILDING INCLUSIVE SOCIETIES THROUGH THE PROMOTION OF MIGRANTS' CULTURAL RIGHTS: LEGAL CHALLENGES AND POTENTIAL SOLUTIONS**

*Pietro Mattioli*

*SUMMARY:* 1. Introduction. – 2. Cultural Rights of Migrants: Substantive and Procedural Evaluations. – 2.1. Cultural Rights' Legal Foundation. – 2.1.1. The Collective and Individual Nature of Cultural Rights. – 2.1.2. The 'Universalism' vs 'Relativism' Debate from the Lens of Cultural Rights. – 2.2. Migrants as Cultural Rights Holders. – 2.3. International Enforcement Procedures of Migrants' Cultural Rights. – 2.3.1. The European Union and Council of Europe's Judicial Systems of Protection of Migrants' Cultural Rights. – 2.3.2. The Increasing Interest of The Council of Europe for the Protection of Cultural Interests. – 3. Inclusive Societies' Legal Foundation. – 3.1 Building Inclusive Societies on the Basis of Migrants' Cultural Rights. – 4. Conclusions.

### *1. – Introduction.*

Historically, cultural rights have been associated with economic and social rights, together representing the 'second generation' of human rights. They are human rights designed to directly promote and protect cultural interests of individuals and communities. However, cultural rights have been practically and theoretically underdeveloped compared to economic and social rights.

One of the greatest challenges for those investigating cultural rights has been the relativism of the term "culture", which represents an obstacle to a clear and comprehensive understanding of cultural rights' nature and scope of application. Despite

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this conceptual constraint, different attempts to define cultural rights stem from the legal literature. For instance, Elisabeth Roy Trudela includes in the definitions of cultural rights “*la liberté d’expression dans la langue de son choix, les libertés de pensée, de conscience, d’opinion et de création, la liberté religieuse, les droits d’auteur, le droit à la propriété intellectuelle, ainsi que les principes de non-discrimination et d’égalité*”.<sup>1</sup> This list, without the intent to be exclusive, enumerates rights and principles which are linked and indispensable for the exercise of cultural rights.

Moreover, the UNESCO Universal Declaration on Cultural Diversity (UDCD) provides one of the most complete, but also not exhaustive, definitions of cultural rights.<sup>2</sup> Art. 5 UDCD recalls Art. 27 of the Universal Declaration of Human Rights (UDHR or “the Universal Declaration”)<sup>3</sup> and Arts. 13 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>4</sup> At the same time, this provision omits any reference to the right of freedom of religion or other human rights, which are generally considered to be part of the broad category of cultural rights and to identify State’s obligations.<sup>5</sup>

Furthermore, at international level, there have been other attempts to define cultural rights. At this regard, it can be mentioned the Fribourg Declaration on Cultural Rights, which defines culture as an essential element for the self-development of individuals.<sup>6</sup>

The breadth of cultural rights’ scope of application raises further practical questions. For instance, it comes naturally to wonder whether the freedom of religion falls within the category of culture rights or not. The recent controversies concerning Islamic headscarves in Europe have raised doubts as to whether the right to wear headscarves is part of the freedom of religion or of their cultural rights, or perhaps both. In fact, not all cultures or people clearly distinguish between law, religion, and other aspects of social and cultural life as most people do in Western countries.<sup>7</sup>

<sup>1</sup> TRUDELA, “La culture des groupes minoritaires face au droit international”, *Canadian Journal of Law and Society / Revue Canadienne Droit Et Société*, 2013, p. 347 ff, p. 351.

<sup>2</sup> General Conference of UNESCO (31st Session), Universal Declaration on Cultural Diversity, CLT.2002/WS/9 (2002), Art. 5.

<sup>3</sup> Universal Declaration of Human Rights, UN Doc. 217 A (III), (1948), Art. 27.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, UN Doc. 14531 (1976), Arts. 13-15.

<sup>5</sup> DONDEERS, “Cultural rights in the Convention on the Diversity of Cultural Expressions: included or ignored”, in Kono, Van Uytsel (eds.), *The UNESCO Convention on the Diversity of Cultural Expressions: a tale of fragmentation of international law?*, Antwerp, 2012, p. 165 ff., p. 173.

<sup>6</sup> Fribourg Group, Fribourg Declaration on Cultural Rights, Art. 2.

<sup>7</sup> MCGOLDRICK, “Culture, Cultures, and Cultural Rights”, in Baderin and McCorquodale, *Economic, Social, and Cultural Rights in Action*, Oxford, 2007, p. 447 ff., p. 450.

Finally, another obstacle to the understating of cultural rights is the fact that this category of rights has hardly been subjected to judicial control. The reason is that international and national judicial organs have been reluctant to inquire about the positive obligations that economic, social, and cultural rights might impose. Hence, international and national courts have not had many chances to contribute to the substantive development of this category of human rights.

Following these introductive considerations, this paper aims to take part in the academic debate on cultural rights. In the first place, it explores the substantive nature of cultural rights. More precisely, the debate on the individual or collective nature as well as the relative or universal character of these rights will be discussed. Afterwards, this legal debate will be examined from the perspective of migrants, intended as a special category of rights holders. Finally, this paper will analyse the impact of migrants' cultural rights on the process to build inclusive societies.

## *2. – Cultural Rights of Migrants: Substantive and Procedural Evaluations.*

This section focuses on the substantive and procedural aspects of cultural rights. Initially, it traces back the development of cultural rights within the international legal framework by exploring the progressive emergence of their collective nature. Likewise, the debate on the relative or universal nature of human rights and cultural rights will be discussed. Afterwards, the previous discourse on cultural rights will also take into account migrants, as cultural rights holders. Finally, following this substantive assessment of cultural rights, the mechanisms of protection of migrants' cultural rights will be analysed.

### *2.1. – Cultural Rights' Legal Foundation.*

The legal existence of cultural rights was officially marked by the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948.<sup>8</sup> Art. 27 of the UDHR recognises that: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits". In line with the traditional reluctance of international law to accept human rights' collective dimension, the UDHR conceives cultural right as individual rights. Art. 27 UDHR, hence, highlights the individual nature of cultural rights, entitling "everyone" to enjoy cultural rights.<sup>9</sup> This

<sup>8</sup> See *supra* note 2.

<sup>9</sup> *Ibid.*

choice was dictated by the consciousness of the risk of associating cultural rights to groups' identities, which, if accorded rights, would have threatened national identities' integrity and existing borders. This can be also explained in the light of the liberal view, which was predominant at that time claiming that there was no need for collective rights. Therefore, individual rights were considered sufficient to protect the wellbeing of cultural minorities. Likewise, Art. 22 of the UDHR confirms the individual rather than collective nature of cultural rights by affirming that: "Everyone, as a member of society [...] is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality".<sup>10</sup>

Despite the predominant individualistic approach, the drafters of the UDHR also discussed the possibility of including minority and groups rights within the scope of Art. 27 of the Declaration. In this regard, the debate within the First Session of the Commission on Human Rights focused on whether, apart from individual rights, the Universal Declaration should have explicitly mentioned minority rights. This debate was connected to the simultaneous redaction of the Convention on the Prevention and Punishment of the Crime of Genocide, where it was proposed to include cultural groups alongside "national, ethnical, racial or religious" groups.<sup>11</sup> However, Western States, which constituted the majority of the States within the relevant committees, opposed the different attempts to connect cultural rights and collective identities and hence, both efforts eventually failed.

Nevertheless, the collective nature of human rights arguably emerged, despite further international instruments and their relevant minority rights provisions tried to expose the cultural rights' collective character. For instance, Art. 27 of the International Covenant on Civil and Political Rights ("ICCPR")<sup>12</sup> states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".<sup>13</sup> It should be mentioned that one part of the legal literature contests the capacity of Art. 27 ICCPR of granting minorities an unequivocal collective right, since this article still refers to "persons belonging to such minorities". Therefore, according to this part of the doctrine, the text of Art. 27 seems to

<sup>10</sup> See Universal Declaration of Human Rights, Art. 22.

<sup>11</sup> STAMATOPOULOU, *Cultural rights in international law: article 27 of the Universal Declaration of Human Rights and beyond*, Leiden, 2008, p. 15.

<sup>12</sup> International Covenant on Civil and Political Rights, UN Doc. 14668 (1966), Art. 27.

<sup>13</sup> *Ibid.*

suggest that minority rights are individual rights to exercise in community with others and not collective rights of a minority.<sup>14</sup>

Before moving to the next paragraphs, a conceptual clarification is necessary. Cultural rights and minority rights are two distinct concepts despite their several connections. For instance, the scope of application might be different. Cultural rights mainly relate to access to culture, whereas minority rights also embody political rights, such as the right of self-determination. Furthermore, cultural rights can be extended to all persons regardless of their status, whereas minority rights are limited to minorities. At the same time, cultural rights constitute an integral part of minority rights. At this regard, “the right to enjoy their own culture” results crucial for the full protection of minorities within a State, as Art. 27 ICCPR demonstrates.

### 2.1.1. The Collective and Individual Nature of Cultural Rights.

The precedent subparagraph briefly introduced the debate on the potential collective nature of human rights, whose existence remains contested. In this regard, two opposite arguments arise.

On the one hand, one part of the doctrine still denies the necessity of collective rights, arguing that collective rights are a superfluous category of human rights because an extensive interpretation of pre-existing individual rights can equally protect the interests at stake. For instance, in light of this argument, most migrants' collective cultural claims may fall and be satisfied by referring to the category of social rights.<sup>15</sup>

On the other hand, another part of the doctrine advocates for the existence of collective rights,<sup>16</sup> arguing that these rights guarantee for an effective exercise and enforcement of certain interests and rights, which can only be exercised collectively.<sup>17</sup> In line with this perspective, Capotorti refers to collective rights as rights whose actual holder is a group of people to whom protection is granted but that, at the same time, give advantages to each member of the group. For this reason, Art. 27 ICCPR intends to highlight the need for a collective exercise of such rights.<sup>18</sup>

Moreover, the so-called “third generation” of human rights has reinforced the idea of the collective nature of human rights. This third category of human rights include several collective rights, which complement civil and political rights, on the

<sup>14</sup> MACKLEM, “Minority Rights in International Law”, *International Law Journal of Constitutional Law*, 2008, p. 531 ff, p. 535.

<sup>15</sup> FACCHI, “Diritti collettivi, diritti culturali”, *Contemporanea*, 2003, p. 701 ff., p. 702.

<sup>16</sup> MIODRAG JOVANOVIĆ, *Collective rights: A legal theory*, Cambridge, 2012

<sup>17</sup> DINSTEIN, “The Collective Human Rights of Peoples and Minorities”, *International and Comparative Law Quarterly*, 1976, p. 102 ff.

<sup>18</sup> CAPOTORTI, Are Minorities Entitled to Collective International Rights, *Israel Yearbook on Human Rights*, 1990, p. 351 ff. p.356.

one hand, and economic, social and cultural, on the other hand. The third generation of human rights includes collective rights, such as the right to development, the right to peace, and the right to a clean environment.<sup>19</sup>

Cultural rights take part in the debate on the collective and individual nature of human rights. The legal issues of whether cultural rights are individual, collective or both is open to different interpretations.

Those who claim the individual character of cultural rights argue that individual members of certain groups remain those entitled to protect the value of culture and so, the concept of culture remains based on individuals' autonomy and dignity.<sup>20</sup> Likewise, in the domain of collective rights of different groups, the diversity of such groups and the cultural distance between various migrant groups may pose a problem in terms of entitlement and legitimation to act, as it will be described below. At the same time, those who advocate against the collective element of cultural rights do not completely oppose to the use of the concept of "groups" or "collective", but they constrain collective rights to the theoretical domain.

On the side of those who claim the collective nature of cultural rights, this category of rights is described as dependent on the notion of culture and hence, the individual component is bound to its collective element. In other terms, the individual right to take part in the cultural life of a given community is intrinsically related to the right of that community. Thus, the exercise of the individual right makes sense only in the light of its collective significance.<sup>21</sup> Moreover, cultural rights have a special position in the discussion on collective rights because they refer directly to individuals as members of communities. Cultural rights protect the individual within the cultural community but also the cultural communities as such.<sup>22</sup> At national level, for instance, Art. 75, para. 1, of the 2006 Constitution of Serbia, which refers to the rights of national minorities, states: "Persons belonging to national minorities shall be guaranteed special individual or collective rights in addition to the rights guaranteed to all citizens by the Constitution. Individual rights shall be exercised individually and collective rights in community with others, in accordance with the Constitution, law and international treaties".<sup>23</sup>

<sup>19</sup> FREEDMAN, "Third Generation Rights: Is There Room for Hybrid Constructs within International Human Rights Law", *Cambridge Journal of International and Comparative Law*, 2013, p. 935 ff, pp. 936-937.

<sup>20</sup> REIDEL, "What are Cultural Rights? Protecting Groups With Individual Rights", *Journal of Human Rights*, 2010, p. 65 ff., p. 66.

<sup>21</sup> LENZERINI, "Indigenous peoples' cultural rights and the controversy over commercial use of their traditional knowledge", in Francioni, Scheinin (eds.), *Cultural Human Rights*, Leiden, 2008, p. 119 ff., p. 125.

<sup>22</sup> DONDEERS, "Foundations of Collective Cultural Rights in International Human Rights Law", Amsterdam Centre for International Law, 2015, p. 85 ff., p. 95.

<sup>23</sup> Constitution of The Republic of Serbia, Official Gazette of the Republic of Serbia", No. 1/90, Art. 75.

At the same time, there are elements that suggest a dual nature of cultural rights, both individual and collective. For instance, artistic freedom, which includes the individual freedom of performing, has a distinctly individualist character. By contrast, the right to enjoy one's own culture has a more evident communitarian connotation. It is primarily a right that intends to preserve communities' traditions inherited from the past. Balancing these two dimensions does not always result easy.<sup>24</sup> For instance, the right of freedom of religion has individual and collective attributes. On the one hand, individuals must have the freedom to believe and on the other hand, there is also the collective aspect of ensuring the full realisation of this right, like sharing beliefs in collective activities.

These and other reasons seem to lead to the conclusion that cultural rights might have a double nature. In particular, the evaluation of the individual or collective nature of the different rights composing the wider category of cultural rights require a case-by-case analysis. International law intends to protect culture as a right that collectively includes a set of human rights, which might have different connotations and characteristics.

Furthermore, cultural rights were originally individual in nature. Gradually, their collective nature emerged. However, international instruments regulating cultural rights are sometimes unclear and politically oriented and hence, individual States still enjoy a wide discretion in defining cultural rights' policies. These elements lead to the conclusion that claiming the exclusive individual or collective nature of cultural rights would be inconsistent with the practice and the peculiarities of this category of rights.

#### 2.1.2. The 'Universalism' vs 'Relativism' Debate from the Lens of Cultural Rights.

The debate on universalism or relativism of cultural rights should start by understanding what these two concepts imply.

The theory claiming the universal character of human rights, including cultural rights, alleges that human beings are endowed with equal human rights by virtue of being humans, regardless of where the right holders are, their status, and particular cultural characteristic. The universality of human rights is one of the most important principles codified in international law and served as central idea for the UDHR. For instance, for the drafting process of Art. 27 UDHR the representatives of different religions and cultures were brought together. The intention was to insist on the uni-

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<sup>24</sup> RINGELHEIM, "The rise of cultural rights in international Human Rights law", CRIDHO Working Paper, 2017, p.1 ff, p. 16.

versality of the rights protected by this provision and hence, to demonstrate that various cultural and religious traditions share the principles enshrined in the Universal Declaration, despite not being always expressed in terms of rights.<sup>25</sup>

Moreover, the almost universal consensus to the Universal Declaration of Human Rights and the International Human Rights Covenants advocates in favour of the universalism of the rights included in these documents.<sup>26</sup> Additionally, further evidence in support of universalism comes from the Preamble of the Fribourg Declaration on Cultural Rights, which, in light of Art. 5 of the UDCD, asserts that “human rights are universal, indivisible and interdependent and that cultural rights, as much as other human rights, are an expression of and a prerequisite for human dignity”.<sup>27</sup> Likewise, within the legal literature on the theme, Federico Lenzerini argues that cultural or geographical origins of human rights are not a decisive criterion for deciding in favour of universalism or relativism. In fact, cultural changes may result from the internal development of the community, which is an everyday process that interests all cultures and is not necessarily the result of the imposition of cultural models. Furthermore, inter-cultural interactions can determine cultural changes and allow cultures to evolve and flourish. Thus, in these terms, the cultural origin of a given human right standard is irrelevant, considering that such a standard becomes spontaneously accepted everywhere. Taking the example of slavery, the author asserts that: “[...] today it is refuted all over the world, as a result of a cultural evolution of global character. In the end, it is not important who was the first to say that slavery is incompatible with human dignity, or which was the first state outlawing enslavement and slave trade”.<sup>28</sup>

On the other hand, the doctrine has equally justified the relative nature of human rights.<sup>29</sup> For instance, the different degree of culturalization of human rights has been the main criterion for distinguishing “strong” and “weak” cultural relativism. Whereas the former theory holds that culture is the principal source of the validity of rights or rules, “weak” cultural relativism recognises a comprehensive set of *prima facie* universal human rights and accepts strictly limited local variations and exceptions. This latter position is not far from a moderate universalism.<sup>30</sup> Moreover, the collective nature of human rights, especially migrants’ cultural rights, might further suggest the

<sup>25</sup> See STAMATOPOULOU, *cit. supra* note 11, p. 76.

<sup>26</sup> POLLIS and SCHWAB, “Human Rights: A Western Construct with Limited Applicability,” in Pollis, Schwab (eds.), *Human rights: cultural and ideological perspectives*, New York, 1979, p. 1 ff, p. 5.

<sup>27</sup> See *supra* note 5.

<sup>28</sup> LENZERINI, *The Culturalization of Human Rights Law*, Oxford, 2014, p. 238.

<sup>29</sup> DONNELLY, *Cultural Relativism and Universal Human Rights*, *Human rights quarterly*, 1984, p.40 ff, pp. 401- 403.

<sup>30</sup> *ibid*

relativisation of rights and values. In fact, social, cultural, anthropological differences can practically prevent the universality of human rights. Cultural rights as collective rights are strictly bound to the group or community, which have different features and characteristics, making the possibility of speaking of universalism problematic. Likewise, the potential conflict between a collective right of the community and the individual right of the single individual within the community makes even more obvious that claiming cultural rights' universality is rather complex.

This paper does not intend to solve this doctrinal debate but rather represents a divided theoretical framework, which equally allows for both a universal and relative conception of human rights.

Moreover, it can be already anticipated that a nexus between migrants and cultural rights exists. Migrants individually and communally share different cultural traditions that might endanger the universal idea of human rights. At the same time, it is also evident that there are some rights, which are best viewed as universal because, for instance, they protect human dignity and other rights that are ideally relative in nature, such as the freedom of conscience, speech, and association, since they might vary according to different communities.<sup>31</sup> Therefore, a discourse on migrants' cultural rights enforces the idea that relativism and absolutism are two abstract conceptually reflected into practice. As the second section will show, international and regional instruments promoting the creation of inclusive societies are based on a more collective but still relative idea of human rights.

## 2.2. – Migrants as Cultural Rights Holders.

Once that cultural rights' nature has been assessed, this paper aims to provide an overview of the relationship between migrants as right holders and cultural rights. This analysis will explore the relevant legal instruments that directly and indirectly cope with the cultural sphere of migrants' rights.

At this stage, an introductory remark is necessary. There is no universally accepted definition of migrant. The International Organization for Migration (IOM) defines migrant as "person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of the person's legal status, whether the movement is voluntary or involuntary, what the causes for the movement are or what the length of the stay is".<sup>32</sup> The breadth of this definition makes rather complex to identify migrants as a unified category or group.

<sup>31</sup> See DONNELLY, *cit. supra* note 29, p. 412.

<sup>32</sup> International Organization for Migration, *Glossary on Migration*, 2019, p. 40.

This wide understanding of the concept of “migrant” implies that different migrants’ groups might have different cultural characteristics and interests.

Moreover, from a legal perspective, migrants can rely on several international minority rights instruments, which have flourished in the 1990s and have been the most successful contribution in delimiting States’ obligations in order to accommodate and protect the cultural identity of national minorities. Art. 27 ICCPR makes clear that minorities have the right to maintain their own language, religion and culture and that States have a positive obligation to assist minorities in that regard.<sup>33</sup> Other international instruments also accord rights on a collective basis to ethnic, religious and linguistic minorities.

It also needs to be clarified to what extent migrants can enjoy the same legal and political guarantees of autochthonous or traditional minorities, considering that, at this regards, wide discretion is left to States.<sup>34</sup>

The concept of minority has been subject to different interpretations. In public international law, the definition of minority provided by Capotorti, one of the foremost scholars on the rights of minorities, is one of the most common accepted definitions:

“a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members, being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, religion or language”.<sup>35</sup>

Thus, migrants, according to the general meaning attributed to the term, could fall within the category of minority. Migrants, who move across international borders, tend to maintain and affirm their individual and collective culture and identity through connections with those who remain in the homeland and with compatriots living in the same or other States.<sup>36</sup> Their cultural elements often do not reflect those of the majority of the population of the hosting State and, for this reason, they can

<sup>33</sup> WIPPMAN, “The evolution and implementation of minority rights”, *Fordham Law Review*, 1997, p. 597 ff., p. 605.

<sup>34</sup> RUBIO-MARIN, “Integration in Immigrant Europe: Human Rights at a Crossroads”, in Rubio-Marín, *Human Rights and Immigration*, Oxford, 2014, p. 73 ff., p. 77.

<sup>35</sup> UN Subcommission on Prevention of Discrimination and Protection of Minorities, ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities / by Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities’ UN Doc E/CN.4/Sub.2/384/Add.1–7, para 23.

<sup>36</sup> CHECHI, “Migrants’ Cultural Rights at the Confluence of International Human Rights Law and International Cultural Heritage Law”, *International Human Rights Law Review*, 2016, p. 26 ff., p. 33.

be considered an ethnic minority or a religion or language minority when it comes to the right of freedom to religion or speak with one's own language.

Moreover, the discourse about migrants and cultural rights should also start by identifying the relevant legal framework. At this regard, there is not a comprehensive treaty regulating all aspects of migration, but rather a plurality of multilateral treaties and instruments that directly and indirectly protect several migrants' interests.

The very few migrant-focused instruments share a common principle, namely the need to respect migrants' cultural identity. For instance, Art. 31 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)<sup>37</sup> states that: "States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin".<sup>38</sup> Furthermore, the UN Committee on Economic, Social and Cultural Rights (CESCR) in the General Comment No. 21 to Art. 15 ICESCR declares that: "State parties should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. State parties should not prevent migrants from maintaining their cultural links with their countries of origin".<sup>39</sup>

As well, the General Comment No. 23 of the Human Rights Committee's (HRC) on Art. 27 ICCPR, which clarifies the scope of application of the article in question, affirms that: "Article 27 confers rights on persons belonging to minorities which "exist" in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes". The Comment further explains that "Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents".<sup>40</sup> The HRC moves even further by stating that "migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights."<sup>41</sup> Therefore, General Comment

<sup>37</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN Doc. A/RES/45/158 (1990), Art. 31.

<sup>38</sup> *Ibid.*

<sup>39</sup> UN Committee on Economic, Social and Cultural Rights, General comment no. 21, UN Doc. E/C.12/GC/21 (2009), para. 34.

<sup>40</sup> UN Human Rights Committee, General Comment No. 23, UN Doc. CCPR/C/21/Rev.1/Add.5 (1994), para. 5.2.

<sup>41</sup> *Ibid.*

No. 23 extends the guarantees of Art. 27 to migrants' cultural interests and recognises their rights in relation to a group. From this perspective, migrants are compared to any other minority within a State in the enjoyment of cultural rights.

It is hard to draw a general conclusion on migrants' cultural rights following unfocused international instruments in relation to the topic. Additional considerations on the relationship between migrants and cultural rights seem to advocate in favour of the collective nature of these rights. For instance, migrants tend to recreate and share their background culture in receiving societies and, in these terms, the collective aspect emerges more than the individual one. Moreover, the individual identity of migrants' cultural rights may constitute an obstacle to their enforcement and implementation, resulting in the renouncement of their cultural claims. The implementation of cultural rights, such as the right to speak one's own language or to practice their own religion or to protect traditional knowledge, leads to more effective results when it is linked to a group of people or a community rather than a single individual. Therefore, the initial fear of the drafter of the Universal Declaration that cultural rights can permeate States' barriers and break their sovereignty remains a vivid but unjustified reason against the recognition of the collective nature of cultural rights, in particular, when it comes to migrants.

### 2.3. – International Enforcement Procedures of Migrants' Cultural Rights.

The assessment of migrants' cultural rights continues with a description of the mechanisms of enforcement of cultural rights that migrants have at their disposal. It should be highlighted that the aforementioned documents and instruments are far from being comprehensive sources of rights for migrants, especially in relation to the cultural sphere. The same consideration applies also in relation to the correspondent states' obligations. The accuracy of the international enforcement mechanisms of migrants' cultural interests remains relative. For instance, it might be argued that migrants may use the complaint procedure before the Human Rights Council. However, this procedure is eventually an ill-suited mechanism to enforce migrants' cultural claims. Despite migrants can collectively claim the violation of their cultural interests, this procedure is meant to address consistent patterns of gross and reliably attested human rights violations and hence, migrants' cultural rights' claim might be affected by this limited scope of application.<sup>42</sup>

Moreover, under Article 77 of the ICRMW, individuals are entitled to submit a complaint to the Committee on Migrant Workers (CMW). However, Art. 77 refers

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<sup>42</sup> UN Human Rights Council, Institution-building of the United Nations Human Rights Council, UN Doc. A/HRC/RES/5/1 (2007), para 87.

to “individual rights as established by the present Convention”. This article highlights the individual nature of the claim. Thus, collective claims of migrants’ groups or community might result excluded.<sup>43</sup> To date, only Guatemala, Mexico and Uruguay have accepted the individual complaint procedure, in respect to the 10 necessary declarations. The mechanism has not entered into force yet.

Within the legal framework of UNESCO, the 104 EX/Decision 3.3 of the Executive Board has provided a confidential procedure for the examination of complaints issued by individuals, groups of individuals, and non-governmental organizations (NGOs).<sup>44</sup> The complaint can be made before the Committee on Conventions and Recommendations against any Member State precisely because it is a member of UNESCO and for the violation of those rights falling within UNESCO’s competence, among which the rights protected by Arts. 18 and 27 of the UDHR are included. Despite this procedure allows both individuals and groups to claim the violation of their cultural rights against any member of UNESCO, its concrete effectiveness is weak. Firstly, this procedure is not well-known and so it has been used in a rather limited number of cases. Furthermore, in those cases where it has been used, the Committee on Conventions and Recommendations has solved the case in the spirit of international cooperation, dialogue, conciliation, and mutual understanding, since it is not an international tribunal.

Moreover, not even the “minimum core obligations”, a concept developed by the Committee on Economic, Social and Cultural Rights, could sufficiently compensate the lack of States’ obligations in this field. This concept was created in order to fulfil the basic needs of the population without waiting for discretionary and positive States’ actions required by the “second generation” rights. However, these obligations of immediacy meet the obstacles of insufficient resources and competing priorities. Furthermore, their compliance is hard to prove within the human rights monitoring body systems.<sup>45</sup>

In conclusion, it is evident that these international human rights enforcement mechanisms result inadequate for the protection of migrants’ cultural rights. Thus, it rests to analyse whether regional systems are more prepared to cope with these kinds of claims.

<sup>43</sup> See *supra* note 23, Art. 77.

<sup>44</sup> UNESCO Executive Board, UN Doc. 104 EX/3.3 (1978), para. 21.

<sup>45</sup> See STAMATOPOULOU, *cit. supra* note 11, pp. 154-158.

### 2.3.1. The European Union and Council of Europe's Judicial Systems of Protection of Migrants' Cultural Rights.

Beside these judicial and quasi-judicial mechanisms of protection of migrants' cultural rights at international level, other international organizations' (IOs) legal systems can also be source of rights and obligations, respectively for migrants and States. This and the next subparagraph intend to discuss to what extent the two widest IOs in the European continent in terms of States' membership, namely the European Union (EU) and the Council of Europe, protect and enforce migrants' cultural rights.

In the first place, the European Union legal system has originally promoted economic integration. The founding members excluded the protection of human rights from the scope of application of the treaty establishing the European Community. Hence, human rights became domain of the Council of Europe. However, further EU treaties have expanded the scope of application of the Union's legal system, progressively incorporating human rights. On December 28, 2000 the Charter of Fundamental Rights of the European Union<sup>46</sup> ("the EU Charter") was adopted. This instrument represents an independent EU system of recognition and protection of fundamental rights, which offers an equivalent but also alternative form of protections to individuals and groups compare to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or "the European Convention on Human Rights").<sup>47</sup>

Regarding migrants' cultural rights, two contrasting elements emerge. The EU Charter directly addresses cultural rights.<sup>48</sup> Furthermore, an overall interest for cultural rights results from the cultural policies undertaken and promoted by the EU. However, third country nationals' cultural rights have not yet been fully protected in the context of the EU legal framework.

Moreover, despite the lack of a European definition of culture, which may be explained by the fact that the area of culture falls within Art. 6 of the Treaty on the Functioning of the European Union ("TFEU"),<sup>49</sup> as supportive competence, the European Union has tried to develop its own cultural policy, beside the one of the Member States. However, the European legislator has not promptly addressed the relevant issue of cultural rights' scope of application, *i.e.*, whether European Union law should exclusively protect European culture and the national culture of the Member

<sup>46</sup> Charter of Fundamental Rights of the European Union, EU Doc. C 364/1 (2000).

<sup>47</sup> European Court of Human Rights, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Judgment of 30 June 2015, para. 165.

<sup>48</sup> See Charter of Fundamental Rights of the European Union, *cit supra* 46, Art. 22.

<sup>49</sup> Consolidated version of the Treaty on the Functioning of the European Union, EU Doc. C 326/49 (2012), Art. 6.

States or also other cultures, whose manifestations arrive in the Member States together with the influx of migrants. The constant presence and arrival of third-country nationals in the territory of the Union urgently requires the adoption of integration policies, which aim to secure cultural rights of migrants and to facilitate their realisation in a new cultural environment.<sup>50</sup> Art. 22 of the Charter of Fundamental Rights of the EU states that: "The Union shall respect cultural, religious and linguistic diversity".<sup>51</sup> In these terms, the cultural diversity of and within the European Union, as a whole, results protected. However, the responsibility to respect cultural diversity resulting from migration seems to be excluded from its scope of application.<sup>52</sup>

A viable attempt to establish a legal connection between migration and culture within the EU legal framework is the "humanitarian clause" contained in Art. 15 of the Regulation No 343/2003 ("the Dublin Regulation").<sup>53</sup> This clause applies upon request of a Member State in order to bring together any family relations on humanitarian grounds, based on family or cultural considerations. The Court of Justice of the European Union ("CJEU" or "European Court of Justice") in the case *K v. Bundesasylamt* case noted that Article 15, para. 1, is an optional provision which affords the Member States extensive discretion with regard the decision of bringing together family members and other dependent relatives on the base of family or cultural considerations.<sup>54</sup>

Despite the significant role in the protection of cultural rights of third-country nationals played by the European Court of Justice, which encounters real and concrete problems of migrants in their everyday functioning, it is premature speaking of a specific and comprehensive protection of migrants' cultural rights within the EU legal framework. The European equality, citizenship, and immigration policies enhance cultural diversity and stimulate cultural encounters but are not directly concerned with cultural rights and no measure is designed to encourage migrants' engagement with cultural activity or to facilitate enjoyment of their own culture.<sup>55</sup>

### 2.3.2. The Increasing Interest of The Council of Europe for the Protection of Cultural Interests.

Within the European continent, a more mature legal system in terms of protection of human rights is the one of the Council of Europe, whose central human rights

<sup>50</sup> KOSIŃSKA, *Cultural Rights of Third-Country Nationals in EU Law*, Cham, 2019, p. 75.

<sup>51</sup> See *supra* note 41.

<sup>52</sup> See *supra* note 38.

<sup>53</sup> Council of the European Union, Regulation No 343/2003 (2003), Art. 15.

<sup>54</sup> European Court of Justice, Judgment of the Court 6 November 2012, *K v Bundesasylamt*, C-245/11, EU:C:2012:685, paras. 26-27.

<sup>55</sup> VRDOLJAK, *The Cultural Dimension of Human Rights*, Oxford, 2013, p. 174.

document is the European Convention on Human Rights. The ECHR is meant to protect human rights of “first generation”. Economic, social and cultural rights are *prima facie* excluded from its scope of application. However, through an extensive interpretation of the interests protected by ECHR articles, the European Court of Human Rights (ECtHR) has indirectly addressed cultural as well as economic and social interests. The ECtHR has embraced this option by referring to Art. 8, the right to the protection of private and family life, Art. 9, the freedom of thought, conscience and religion, Art. 10, the freedom of expression, Art. 11, the freedom of assembly and association, Art. 14, the prohibition of discrimination and Article 2 of Protocol no. 1 to the ECHR, the right to education. An example of this approach by the ECtHR can be found in the *Khurshid Mustafa and Tarzibachi v. Sweden* case.<sup>56</sup> The applicants, a married couple of Iraqi origin with three minor children, were evicted by a court order after the landlord terminated their tenancy for having installed a satellite dish for the reception of television channels in Arabic and Farsi, in breach of the tenancy agreement. The couple claimed the violation of their freedom of receiving information under Art. 10 of the Convention. The ECtHR observed that:

“the freedom to receive information does not extend only to reports of events of public concern but covers in principle also cultural expressions as well as pure entertainment. The importance of the latter types of information should not be underestimated, especially for an immigrant family with three children, who may wish to maintain contact with the culture and language of their country of origin. The right at issue was therefore of particular importance to the applicants”.<sup>57</sup>

Thus, the European Court of Human Rights found a violation of Art. 10 of the ECHR. However, for the purpose of this paper, it is relevant the fact that the ECtHR included the protection of the cultural interest of the applicants under the scope of application of Art. 10. The Court also underlined the special importance of cultural expression as it relates to migrants.

Likewise, the protection of cultural and artistic expression under the right of freedom of expression has also been confirmed by the UN Human Rights Committee in General Comment No. 34 concerning Article 19 of the ICCPR.<sup>58</sup>

<sup>56</sup> ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, Application No. 23883/06, Judgment of 16 December 2008.

<sup>57</sup> *Ibid.*, para. 44.

<sup>58</sup> UN Human Rights Committee, General comment no. 34, UN. Doc. CCPR/C/GC/34 (2011), para. 11.

Moreover, the Council of Europe's desire to protect cultural aspects of groups' identity is corroborated by the adoption of the European Charter for Regional or Minority Languages<sup>59</sup> and the Framework Convention for the Protection of National Minorities.<sup>60</sup>

An additional consideration is necessary at this stage, namely whether the potential collective nature of cultural rights, as discussed above, could constitute an impediment to the enforcement of cultural claims. From a procedural point of view, Art. 34 of the ECHR states that the ECtHR can receive applications from "any person, non-governmental organization or group of individuals".<sup>61</sup> There are several examples of groups collectively demanding the enforcement of the ECHR. For instance, in the *Canea Catholic Church v. Greece* case,<sup>62</sup> the applicant, the Right Reverend Frangiskos Papamanolis, acting on behalf of Canea Catholic Church, an entity or group whose members cannot be strictly identified, claimed that the refusal by the Greek Court of Cassation to recognize the legal personality of the Cathedral of the Roman Catholic diocese of Crete, thereby denying its *locus standi* to protect its property, constituted a violation of Arts. 6, para. 1, 9, 14 of the Convention and Art. 1 of Protocol No. 1 to the Convention. In contrast with the government of Greece's claim that the application was inadmissible since the legal entity that the applicant claimed to represent did not, in fact, exist, the European Commission of Human Rights and likewise the European Court of Human Rights stated that: "the application should be treated as having been submitted by the church itself, which it classed as a "non-governmental organisation" within the meaning of Article 25 of the Convention".<sup>63</sup>

Moreover, on 18 October 1961, the Council of Europe adopted a first version of the European Social Charter (ESC), which, compared to its counterpart, the ECHR, focuses on social and economic rights. In the early 1990s, seeking to revitalise the Charter, the Council of Europe created an additional compliance mechanism in the form of a system of collective complaints before the European Committee on Social Rights (ECSR). Furthermore, a Revised European Social Charter (ESC Revised) was also adopted in 1996. Although the ESC Revised explicitly added references to the term "culture", in harmony with the relatively recent tendency to include provisions incorporating an explicit culturally based approach,<sup>64</sup> the overall protection of cultural rights offered by the ESC can be hardly considered effective. The

<sup>59</sup> European Charter for Regional or Minority Languages, ETS No.148 (1992).

<sup>60</sup> Framework Convention for the Protection of National Minorities, ETS No.157 (1995).

<sup>61</sup> See *supra* note 32, Art. 34.

<sup>62</sup> ECtHR, *Canea catholic church v. Greece*, Application No. 25528/94, Judgment of 16 December 1997, paras. 28-29.

<sup>63</sup> *Ibid.*, para. 29.

<sup>64</sup> European Social Charter, Council of Europe Doc. ETS No. 163 (1996), Arts. 15-23.

collective complaint mechanism entitles “international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee”, among the other subjects mentioned in Art. 1 of the Protocol, to bring a claim before the European Committee of Social Rights.<sup>65</sup>

In these terms, the ESC system may potentially represent an additional form of protection of the collective cultural rights of migrants. The ECSR in the decision regarding the case *Fédération européenne des Associations nationales travaillant avec les Sans-abri (FEANTSA) c. Pays Bas* affirms that: “la restriction du champ d’application personnel de la Charte figurant dans l’Annexe ne saurait se prêter à une interprétation qui aurait pour effet de priver les étrangers en situation irrégulière de la protection des droits les plus élémentaires consacrés par la Charte”.<sup>66</sup> Thus, the ECSR extended the guarantees of the Charter to irregular migrants when their exclusion from the protection afforded by the provisions of the Charter would have serious prejudicial consequences for their fundamental rights. There are other examples of the ECSR extending the guarantees of the European Social Charter for the protection of cultural interests of migrants. The 2019 Conclusions of the ECSR, which followed a report by Albania,<sup>67</sup> regarding teaching migrants in their mother tongue when there are a significant number of children of migrants who would follow such teachings, invites States to “promote and facilitate, as far as practicable, the teaching in schools or other structures, such as voluntary associations, of those languages that are most represented among migrants within their territory”.<sup>68</sup> Thus, the ECSR has demonstrated to not be indifferent to the new types of needs and interests raised by new categories of vulnerable groups.

In conclusion, there are two different tendencies. On the one hand, the above-mentioned international mechanisms of protection of migrants’ cultural rights are inadequate to address migrants’ cultural claims. When it comes to the protection of specific collective entities such as migrants, there is not a uniform system of protection. The few and diverse instruments do not directly and comprehensively address migrants’ cultural rights. For this reason, these groups need to refer to other systems of protection, which can only in part satisfy their collective claim or are meant to protect interests other than cultural ones. On the other hand, the two regional legal

<sup>65</sup> Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, ETS No.158 (1995), Art. 1.

<sup>66</sup> European Committee of Social Rights, *Fédération européenne des Associations nationales travaillant avec les Sans-abri (FEANTSA) c. Pays Bas*, Decision on the merit of 2 July 2014, par.58.

<sup>67</sup> 10th National Report on the implementation of the European Social Charter, Doc. RAP/RChA/ALB/10 (2019).

<sup>68</sup> European Committee of Social Rights, Conclusion No. 2019/def/ALB/19/12/EN (2019), p. 40.

systems seem to be more directly concerned with the protection of migrants' cultural interests. However, the overall procedural protection of migrants' cultural rights remains inadequate and ineffective.

### 3. – *Inclusive Societies' Legal Foundation.*

This section aims to discuss how migrants' cultural rights, according to the meaning and features discussed above, can contribute to build and develop inclusive societies. This analysis will be conducted by describing the role that cultural rights have in the international and regional documents that intend to promote the creation of inclusive societies.

#### 3.1. – Building Inclusive Societies on the Basis of Migrants' Cultural Rights.

The discourse about universalism and relativism as well as individual and collective human rights serves different purposes. This paper argues that the potential relativism of migrants' cultural rights and their collective nature might constitute the legal foundations for building inclusive societies.

The 1995 World Summit for Social Development describes inclusive society as “a society for all, in which every individual, each with rights and responsibilities, has an active role to play”, and which should be based on the respect “for all human rights and fundamental freedoms, cultural and religious diversity, social justice and the special needs of vulnerable and disadvantaged groups, democratic participation and the rule of law”.<sup>69</sup> In other words, building inclusive societies is a process meant to fight the exclusion of vulnerable groups and intended to promote different level of integration of these groups. Therefore, the culture of different communities, which include those of distinct migrants' groups present in hosting States, are defended and promoted, since they play a vital role in this process.

In a document issued by the UN Department of Economic and Social Affairs (DESA) in 2009, an explicit reference is made to migrant groups as one of the marginalised groups that participate to the integration process. The document considers migrants as groups that are bound to their cultural and linguistic rights. In particular, as part of the integration process for building inclusive societies that the document intends to promote, the lack of recognition of immigrant groups' cultural and linguistic rights is defined as one of the main obstacles to their inclusion.<sup>70</sup>

<sup>69</sup> World Summit for Social Development, UN. Doc. A/CONF. 166/9, para. 66.

<sup>70</sup> UNDESA, *Creating an Inclusive Society: Practical Strategies to Promote Social Integration*, 2009, p. 27.

Furthermore, it is also worthwhile to mention a recent UN policy brief on Covid-19 and human rights, which takes into account the vulnerability of certain groups, such as migrants. The document underlines the necessity to promote and enhance human rights in order to protect these groups, which have been particularly hit by the pandemic. However, it should be noticed that the focus is placed on inequality, non-discrimination as well as economic and social rights, whereas cultural rights seem to be placed in the background.<sup>71</sup> The failure to take cultural rights into account anticipates the challenge for migrants to see their cultural identity and interests protected within host societies during and after the covid-19 outbreak. Even though the UN High Commissioner for Human Rights has called on States to allocate resources to protect “the economic, social and cultural rights of marginalized people”,<sup>72</sup> migrants’ cultural rights do not seem to emerge as a priority in international and national policy agenda.

Shifting the attention from the international level to the European continent, the Council of Europe’s Action Plan on Building Inclusive Societies defines inclusive societies as “societies where individuals maintain their own identities while respecting each other differences, united by a set of shared, democratic values”.<sup>73</sup> In these terms, cultural relativism as well as the existence of universal values are both accepted. Cultural relativism becomes a key element for the creation of inclusive societies. The Council of Europe’s perspective seems to be inspired by the Permanent Court of International Justice’s (PCIJ) on the *Minority Schools in Albania* Advisory Opinion. The PCIJ states that “the idea underlying the treaties for the protection of minorities is to secure peaceably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority and satisfying the ensuing special needs”.<sup>74</sup>

Nevertheless, it should be recalled that the democratic values that the Council of Europe intends to preserve are not necessarily universal. The concept of democracy is far from universal but rather reflects Western and Northern-Western values. In these terms, the idea of an inclusive society promoted by the Council of Europe is

<sup>71</sup> UN Secretary-General, “COVID-19 and Human Rights, We are all in this together”, 23 April 2020, available at: [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief\\_on\\_human\\_rights\\_and\\_covid\\_23\\_april\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf)

<sup>72</sup> UN High Commissioner for Human Rights, “Addressing the disproportionate impact of COVID-19 on minority ethnic communities”, 24 November 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26541&LangID=E>

<sup>73</sup> Action Plan on Building Inclusive Societies, CM (2016) 25, Introduction.

<sup>74</sup> Permanent Court International of Justice, *Minority Schools in Albania*, Advisory Opinion No. 26 of 6 April 1935, para. 48.

based on integration and amalgamation of cultural differences between the parties while the European values are preserved and potentially imposed.

In the European Union's legal framework, the European Commission's action plan on Integration and Inclusion 2021-2027 conceives diverse and inclusive societies as a process that involves both migrants and the receiving society.<sup>75</sup> The plan intends to increase the opportunities for encounters and exchanges between migrants, EU citizens with a migrant background and local communities to include art, culture, sport and social life in general.

This interaction may lead to two opposite conclusions. As Janusz Symonides has previously suggested, cultural differences should not lead to the rejection of any part of universal human rights. Globalization has enhanced the interaction of and influences between different cultures. However, this contact culminates in the emergence, consolidation or reformulation of specific cultural and ethical values common to the various cultural areas.<sup>76</sup> Under the auspices of an inevitable universality of human rights, the author refers to paragraph 1 of the Vienna Declaration adopted by the World Conference in 1993, which states that "the universal nature of these rights and freedoms is beyond question".<sup>77</sup>

The universality of human rights standards is a possible but not inevitable outcome of the interaction between different cultures. When it comes to migrants' cultural rights, the expectation to preserve and protect the minoritarian and collective perception of human rights standards collide with the expectation of universality. Furthermore, in terms of protection, even assuming the universal character of some human rights standards, the disparity of judicial and quasi-judicial remedies between cultural rights of migrants and those of the individuals belonging to the majority of the society is evident.

Moreover, modern Western societies have traditionally conceived human rights as a mechanism for protecting a relatively universal core of human nature and the dignity of autonomous individuals, making human rights' universalism an ally of individualism. On the other hand, the concept of inclusive society implicitly relies on the collective nature of the interests that migrants take with them and intend to promote. Therefore, the EU's action plan does not mention cultural rights but cultural "diversity". Building inclusive societies is the final stage of a process of integration where the different situations of migrants are taken into consideration and in which human rights play a fundamental role.

<sup>75</sup> European Commission, Action plan on Integration and Inclusion 2021-2027, Brussels, COM (2020) 758 final

<sup>76</sup> SYMONIDES, "Cultural rights: a neglected category of human rights", *International social science journal*, 1998, p. 559 ff., p. 564.

<sup>77</sup> World Conference on Human Rights, UN Doc. E/CN.4/RES/1994/95 (1994), para. 1.

The relationship between migration, culture, and integration is also underlined by the 2001 Declaration adopted by the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The Declaration demands States to adopt measures in order to encourage cultural diversity, promote the fair treatment of migrants, and develop programmes that facilitate their integration into social, cultural, political, and economic life.<sup>78</sup>

International and regional organizations have strongly encouraged and promoted policies based on the idea of cultural integration. Likewise, States are also undertaking different initiatives at this regard. For instance, the New Scots' refugee integration strategy 2018 to 2022 engages with the idea that the promotion of refugees and asylum seekers' own cultural is part of the process of integration that Scotland seeks to realize with this strategy.<sup>79</sup>

There is broad consensus on what inclusive societies are and wide understanding of the role that migrants and their cultural heritage, especially as a group, bring within hosting countries. However, the way in which inclusive societies should be built eventually relies on States' discretion. For this reason, the process for building inclusive societies experience a number of structural obstacles. One barrier to the development of inclusive societies is the existence of national legislation and policies that disadvantage certain groups. Furthermore, the absence of a well-suited legal system able to directly address migrants' cultural claims is a further barrier to inclusivity. This results in line with the general tendency of denying basic rights to migrants, especially undocumented migrants. At the same time, integration requires equal responsibilities for migrants and host communities. For this reason, receiving communities and local authorities should also educate and empower all members of society, not just migrants, about the importance integration process.<sup>80</sup>

#### *4. – Conclusions*

The demand for legal recognition and protection of migrants' cultural interests have been partly hampered by the reluctance of supranational and national legislators to specifically address the phenomenon of migration in relation to culture and integration. This has also negatively affected the process for the creation of inclusive societies, which are structurally tied to inclusive policies. This final consideration

<sup>78</sup> Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance A/CONF. 189/12 (2001), para. 30.

<sup>79</sup> Scotland, Local Government and Communities Directorate, New Scots: refugee integration strategy 2018 to 2022, 2018

<sup>80</sup> International Organization for Migration, Integration and Social Cohesion: Key Elements for Reaping the Benefits of Migration, 2017

results from a legal analysis of the substantive and procedural aspects of migrants' cultural rights as well as their role for building inclusive societies.

The first section of this paper has provided an overview of the contested nature of cultural rights as well as of the mechanisms of protection and enforcement of these rights. Cultural rights results to be substantively divided between a collective and individual nature as well as universalism and relativism. Furthermore, migrants' cultural rights are not directly protected by a specific legal action, especially before international courts. Thus, migrants rely on extra-judicial or political-oriented procedures and bodies in order to see their cultural rights enforced.<sup>81</sup>

Regarding the role of migrants' cultural rights in the process of building inclusive societies, international organizations have progressively focused on the importance of preserving and promoting the cultural tradition of migrants' groups.

The substantive and procedural aspects of migrants' cultural rights have been previously assessed. The outcome is an unfocused legal framework, which leaves the doctrine divided on the nature of these rights, on the one hand, and the practical enforcement potentially ineffective, on the other hand. Furthermore, the relevant documents and instruments raise different considerations in relation to migrants' cultural rights. For instance, despite the several attempts to claim human rights' universality, migrants' cultural rights have enhanced relativism.

A final consideration also emerges from the previous analysis. Although the initial *impetus* comes from the international community, cultural rights, as "second generation" rights, rely on States' positive obligations. National policies eventually define the individual or collective nature of cultural rights. They might enhance or weaken their universal character and finally, build inclusive societies through the promotion of migrants' cultural rights.

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<sup>81</sup> DE STEFANI, "Diritti umani di terza generazione", *Aggiornamenti sociali*, 2009, p. 11 ff., p. 22

**Abstract**

The paper aims to investigate migrants' cultural rights in order to understand their impact on the process of creation of inclusive societies. Initially, the research discusses the substantive nature of cultural rights, alleging the coexistence of their individual and/or emerging collective nature. Afterwards, the focus shifts to the debate on "universalism" versus "relativism", which represents a useful conceptual framework for a better understanding of migrants' cultural rights. As regards the relationship between migrants as right holders and cultural rights, several questions arise. Do migrant-focused instruments identify and protect migrants' collective cultural identity and rights? Do migrants have effective mechanisms for the enforcement of their cultural rights? To address these questions, this contribution intends to focus on the European Union and Council of Europe's systems of protection and enforcement of migrants' cultural rights. Finally, Section 3 discusses the role that migrants' cultural rights have in relation to the promotion and creation of inclusive societies.

# 3. LIVING HERITAGE IN TRANSIT: MIGRATION AND THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE UNDER INTERNATIONAL LAW

*Aliki Gkana*

*SUMMARY:* Introduction. – 2. The Parameter of Migration in the UNESCO 2003 Convention Framework. – 2.1. Intangible Cultural Heritage (ICH) ‘in Transit’ vs ICH ‘Present in a Territory’? – 2.2. Migrants’ ICH in the Implementation of the Conventional Mechanism. – 3. The International Protection of Migrants’ Human Rights and Living Heritage. – 3.1. The Complementarity of the UNESCO 2003 Convention and International Human Rights Protection Frameworks. – 3.2. The Dimension of Cultural Heritage Protection in the Existing International Human Rights Instruments. – 4. Conclusion.

## *1. – Introduction.*

Culture has always been controversial as a regulatory object, while its broad concept traverses all aspects of human existence. Anthropological analyses would probably contribute to grasping its meaning,<sup>1</sup> while it has been used in different ways

<sup>1</sup> See a categorization of culture as “capital”, “creativity” and “the sum total of all material and spiritual activities and products of a given social group that distinguishes it from other social groups” in STAVENHAGEN, “Cultural Rights: A Social Science Perspective”, in *Cultural Rights and Wrongs*, Niec (ed.), Paris, 1998, pp. 1-20; Besides, a commonly used definition is the first scientific and classic anthropological one by E.B. Tylor (1871): Culture is “that complex whole which includes knowledge, beliefs, arts, morals, laws, customs, and any other capabilities and habits acquired by [a human] as a member of society”.

BRUNO, PALOMBINO, DI STEFANO, RUOTOLO (eds.), *Migration and Culture: Implementation of Cultural Rights of Migrants*, Rome, CNR Edizioni, 2021, ISBN 978 88 8080 301 0, pp. 55-75.

according to its inclusion in different instruments<sup>2</sup> with no common definition accepted as binding in international law. As a step further, cultural heritage, whose legal definition is demanding as well,<sup>3</sup> encompasses the idea of the inheritance of cultural manifestations handed down from ancestors in order to be cared for before passing them on to successors augmented by the creations of the present.<sup>4</sup> On the same track, the notion of cultural life contains “an explicit reference to culture *as a living process*, historical, dynamic and evolving, with a past, a present and a future”.<sup>5</sup> Parallely, in the diverse universe of the international cultural heritage law, its youngest fruit is what we would describe as *living heritage*, specified mostly as intangible cultural heritage (‘ICH’)<sup>6</sup> in legal and policy documents and established as such - certainly- after the adoption of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Safeguarding of the Intangible Cultural Heritage (‘2003 Convention’).<sup>7</sup>

Beyond any controversy on ICH itself as a working definition,<sup>8</sup> a focus on the essence of the international protection of what is aptly described as “the living culture of peoples”<sup>9</sup> is needed. And this is no other than the promotion and preservation

<sup>2</sup> See indicatively, UNESCO, *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It*, adopted in Nairobi, on 26 November 1976, preamble, para. 5; UNESCO, *Universal Declaration on Cultural Diversity*, adopted in Paris, on 2 November 2001, preamble, para. 5; *Fribourg Declaration on Cultural Rights*, 2007, Art. 2 (a).

<sup>3</sup> See indicatively a rarely existent definition in COUNCIL OF EUROPE, *Framework Convention on the Value of Cultural Heritage for Society* (Faro Convention), 2005, Art. 2 (a).

<sup>4</sup> PROT and O’KEEFE, “Cultural Heritage or Cultural Property?”, *International Journal of Cultural Property*, 1992, p. 307 ff., pp. 307, 311.

<sup>5</sup> COMMITTEE ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (CESCR), General comment No. 21: *Right of everyone to take part in cultural life* (Art. 15, para. 1 (a), of the ICESCR), UN Doc. E/C.12/GC/21 (2009), para. 11.

<sup>6</sup> “Oral culture”, “traditional culture” or “folklore” are some of the terms used at UNESCO level, “traditional cultural expressions” in the work done by the World Intellectual Property Organization (WIPO); The first international instrument setting the base for a holistic approach to the safeguarding of this part of cultural heritage was the *UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore*, 15.11.1989 (Paris).

<sup>7</sup> UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, of 17 October 2003, with 180 States Parties (as of 27.07.2020); <https://ich.unesco.org/en/convention> (last accessed 6.1.2021).

<sup>8</sup> The term “oral and intangible heritage” was firstly institutionally employed in the 1998 UNESCO Masterpieces Programme: <https://ich.unesco.org/en/proclamation-of-masterpieces-00103> (last accessed 5.2.2021); However, even the 2003 Convention’s Entity within UNESCO’s Culture Sector has been renamed from “ICH Entity” to “Living Heritage Entity” officially since early 2019, still revealing a possible uncertainty of the term’s use.

<sup>9</sup> LENZERINI, “Intangible Cultural Heritage: The Living Culture of Peoples”, *The European Journal of International Law*, 2011, p. 101 ff., pp. 101-120.

of cultural diversity as a fundamental *ratio* of protection.<sup>10</sup> Delving into the notion of diversity, we cannot accept the existence of one and only *culture* but that of several “*cultures* of groups and societies”<sup>11</sup> within a single State or region. Besides, culture as a concept – seen “as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity”<sup>12</sup> – necessarily takes account of the *otherness*. Cultivating and promoting the respect for *the other* and the meeting of cultures is of crucial importance today when the unconditioned engagement of all people with aspects of their cultural heritage in its diversity is strongly questioned by acts implying “a supremacist view of history”.<sup>13</sup>

It is exactly at this point that the dimension of human migration enters into the dialogue. Human beings, their cultures and cultural expressions are in the state of a constant mobility by their nature. It is inevitable that this eternal movement and evolution characterizes their living heritage as anything else living. In a contemporary world, characterized by the movement of persons, either voluntary or forced, including the cases of armed conflicts, we cannot disregard the emerging need to protect more and more the human rights of the more vulnerable within this state of movement: the migrants<sup>14</sup>, asylum seekers or refugees, without entering into an examination of their *status* from a legal perspective for the needs of the following analysis, which will be limited to the rights of migrants. Among those rights: their -under recognition- right to access and enjoy their cultural heritage. The latter proves to be of critical importance,<sup>15</sup> taking into consideration the role of living heritage for the enhancement of migrants’ integration in host habitats<sup>16</sup> and in a process of new place-

<sup>10</sup> UNESCO 2003 Convention, preamble, para. 2: “Considering the importance of the intangible cultural heritage as a *mainspring* of cultural diversity”.

<sup>11</sup> UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, of 20 October 2005, Art. 4, para. 1.

<sup>12</sup> CESCR, General comment No. 21, cit., para. 12.

<sup>13</sup> See the joint statement of the UN Special Rapporteur for cultural rights and Special Rapporteur on freedom of religion or belief on the occasion of the designation of the historic Hagia Sophia by Turkey as a mosque in July 2020 in <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26146&LangID=E> (last accessed 5.2.2021).

<sup>14</sup> The UN Migration Agency (IOM) defines a migrant as “any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal *status*; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is” – <https://www.iom.int/who-is-a-migrant>.

<sup>15</sup> See some aspects of a social analysis on the issue: GOOD GINGRICH, “Preserving Cultural Heritage in the Context of Migratory Livelihoods”, *International Migration*, 2014, p. 1 ff., pp. 1-20.

<sup>16</sup> See some references and examples from the case of the Americas (Latin America and the Caribbean) in NETTLEFORD, “Migration, Transmission and Maintenance of the Intangible Heritage”, *Museum International*, ICOM, Vol. 56, No. 1–2, 2004, p. 78 ff., pp. 78-83.

making,<sup>17</sup> as well as for resilience diachronically but also especially in times of crises and conflicts,<sup>18</sup> as the ongoing Covid-19 pandemic has already revealed.

The paper explores the relationship between migration and the safeguarding of living heritage under the prism of international law. Its purpose is to chart the various ways these two axes interact as well as the possible outcomes of their creative connection in a common analysis, within and beyond the UNESCO system. In the first part, it will run through the mechanism established by the UNESCO 2003 Convention in an attempt to point out the parameters related to migration from a theoretical and practical perspective. Highlighting the contradiction between ICH as “present in a territory” conventionally and “in transit” by its nature, it will search for the place accorded to migrants’ ICH within the mechanism. In this context, it will question whether ICH safeguarding at the international level -mainly through the listing system – contributes or not to the effective protection of migrants’ cultural expressions, rights and identities. In the second part, it will conversely examine the possible ways to legally protect migrants’ human rights under international law with a view to safeguard eventually their living heritage. It will discuss, thus, the complementarity between the UNESCO 2003 Convention and the international human rights framework for a holistic protection of the relationship of migrant communities – as ICH bearers – with their heritage. In this regard, a focus will be made to specific rights serving as the legal basis for such an attempt, while recent developments incorporating the dimension of cultural heritage protection in them or pointing out linkages with migrants’ cultures in particular will be mentioned.

## *2. – The Parameter of Migration in the UNESCO 2003 Convention Framework.*

### *2.1. – Intangible Cultural Heritage (ICH) ‘in Transit’ vs ICH ‘Present in a Territory’?*

Intangible cultural heritage is defined as “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cul-

<sup>17</sup> See a relevant analysis on migrants in Paris in SALZBRUNN, “The Place-Making of Communities in Urban Spaces: The Invention of the Village Saint-Louis Sainte-Marthe” in *Between Imagined Communities and Communities of Practice*, Adell, Bendix et al. (eds.), Göttingen, 2015, p. 185 ff., pp. 185-199.

<sup>18</sup> See a survey conducted in the context of UNESCO’s Living Heritage Entity work on “Living heritage in emergencies”, CHATELARD, UNESCO, Survey report: “Intangible Cultural Heritage of Displaced Syrians”, November 2017, available at: <https://ich.unesco.org/en/projects/survey-on-intangible-cultural-heritage-of-displaced-syrians-00379>.

tural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”.<sup>19</sup> Some of its key characteristics are its intergenerational transmission, its constant recreation “by communities and groups in response to their environment, their interaction with nature and their history”, the fact that it provides them “with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity”.<sup>20</sup> For what is more, the respect for “existing international human rights instruments” as well as the “mutual respect among communities, groups and individuals, and of sustainable development”<sup>21</sup> constitute core principles. A lot has been written before and after the adoption and entry into force of the Convention about its “view” on ICH.<sup>22</sup> However, for the purposes of the present analysis, emphasis should be given to the following decisive factors emerging from it in an explicit or implicit way.

On the one hand, the strong relationship between ICH and *its people* who “create, maintain and transmit” it.<sup>23</sup> In fact, the Convention accords a central role to the cultural communities associated with ICH,<sup>24</sup> marking the progressive transition from the notion of “cultural heritage of humanity” as considered in the past and reflected also in the UNESCO 1972 Convention<sup>25</sup> -otherwise inspiration and model for the 2003 Convention-, towards the “cultural heritage of communities, groups and individuals”, later acknowledged, at the regional level, by the Council of Europe’s Faro Convention too, which interestingly initiates the definition of “heritage community”.<sup>26</sup> On the other hand, the interrelationship between ICH and *its people’s environment*, in the same manner that human beings always develop a dialectic and holistic relationship, instead of a dichotomous one, with nature and place.<sup>27</sup> An analysis

<sup>19</sup> UNESCO 2003 Convention, Art. 2, para. 1; The terms “communities, groups and individuals” are not legally defined neither in the Convention nor in any other relevant text.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

<sup>22</sup> BLAKE, UNESCO, Preliminary Study into the Advisability of Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage (‘Traditional Culture and Folklore’), International Round Table of experts, “*Intangible Cultural heritage*” - *Working Definitions* (2001), pp. 7-12; LIXINSKI, *Intangible Cultural Heritage in International Law*, Oxford, 2013, pp. 7-10.

<sup>23</sup> UNESCO 2003 Convention, Art. 15

<sup>24</sup> *Ibid.*, preamble, para. 6; BLAKE, “UNESCO’s 2003 Convention on Intangible Cultural Heritage: the implications of community involvement in ‘safeguarding’” in *Intangible Heritage*, Smith and Akagawa (eds.), Abingdon (UK), 2009, p. 45 ff., p. 45.

<sup>25</sup> UNESCO, *Convention concerning the Protection of the World Cultural and Natural Heritage*, of 16 November 1972.

<sup>26</sup> Faro Convention, Art. 2 (b).

<sup>27</sup> Environment, place and land are in the center of certain cultures and perceived as decisive for the

on place-based ICH elements as well as associated cultural spaces and landscapes would maybe enrich this remark.<sup>28</sup> However, we should focus on the cultural practice that is the one defining and giving value to the space, which constitutes the *context* where the practice flourishes and is being constantly recreated, while deeply connected “with the identity and cultural distinctiveness of its creators and bearers”.<sup>29</sup>

These factors seem to constitute the two sides of the same coin and highly relevant to the dimension of human migration, which entails the movement, displacement and placement, of people who “carry” their living heritage with them and continue “feeding” it wherever they might settle themselves away from their place of origin. Under this prism, one would expect that we can only consider ICH as “present” wherever its bearers are<sup>30</sup> and as the creative result of their interaction with their old and new environments, history, memory, origin, sense of belonging, exchanges, communication and identity, which also evolves and changes. In any case, we would expect that ICH, as territorially flexible<sup>31</sup>, cannot be considered anchored in a delimited territory or a contemporary State, something that would not only be contrary to its nature but also not strictly corresponding to its conventional definition which does not contain any geographical condition.

Nevertheless, the prerequisite enshrined in the central obligation of each State Party to “take the necessary measures to ensure the safeguarding of the ICH *present in its territory*”<sup>32</sup> eventually establishes a fixed link between ICH and State territories. The discussion around the issue was apparent during the drafting period as well, but

shape of heritage and worldview, apparently by rural, mountainous or indigenous peoples; HERMAN, “Indigenous geography and place-based intangible cultural heritage”, in *The Routledge Companion to Intangible Cultural Heritage*, Stefano and Davis (eds.), Abingdon (UK), 2017, p. 314 ff., p. 315.

<sup>28</sup> ROE, “Landscape and intangible cultural heritage”, in *The Routledge Companion to Intangible Cultural Heritage*, cit., p. 342 ff., pp. 342-356.

<sup>29</sup> LENZERINI, *op. cit.*, p. 109.

<sup>30</sup> LOGAN, “Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice”, *International Journal of Heritage Studies*, 2012, p. 231 ff., p. 241.

<sup>31</sup> ARANTES, “Part II Commentary, Art.2(3) Safeguarding Intangible Cultural Heritage” in *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, Blake and Lixinski (eds.), Oxford (UK), 2020, p. 81 ff., p. 87.

<sup>32</sup> UNESCO Convention 2003, Art. 11 (a); See the reference at ICH “presence” also at Arts. 12, 13, 23.

the negotiating Parties concluded on a clear position in the final text of the Convention in favor of the aforementioned prerequisite,<sup>33</sup> in consistency with the strong sovereignty-based arrangements in the field of international cultural heritage law.<sup>34</sup> As a result, the whole construction of the safeguarding mechanism is built on this important territorial clause, which directs the States' action and defines their legal obligations.

At the national level, each State Party shall, among others, "identify and define the various elements of the ICH present in its territory, with the participation of communities, groups and relevant non-governmental organizations",<sup>35</sup> "draw up (...) inventories of the ICH present in its territory",<sup>36</sup> "endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management".<sup>37</sup> At the international level, the nomination procedure for the inscription of elements as well as practices on the listing mechanisms under the 2003 Convention<sup>38</sup> re-affirms the conformity with the aforementioned territoriality principle, the legality of which is, nevertheless, questioned.<sup>39</sup> Every nomination is once again based on the territorial "delimitation" of ICH expressions and safeguarding practices in order to "fit them in" the necessary patterns of the nomination forms<sup>40</sup> submitted exclusively as State proposals. The provision for multinational nominations does not

<sup>33</sup> See more in UNESCO, Select Drafting Group on the first draft of an international convention for intangible cultural heritage - Final Report (2002), Discussion of Unit 8 - Article 4, p. 7: "It was suggested that the idea of 'present' is important as providing the necessary temporal element that characterises IH as evolving and *migratory*. A further suggestion was a formulation such as 'with links with the population situated on the territory'. [An alternative proposal not supported was 'practised by its citizens']. (...) Although the issue of transboundary IH was raised, it was felt that any reference to extra-territoriality of State jurisdiction should be avoided."

<sup>34</sup> GKANA, "Peoples' Heritage or States' Heritage? Sovereignty in the UNESCO Mechanism for the Safeguarding of Intangible Cultural Heritage", *2019 ESIL Annual Conference-Working Paper Series*, 2020, Available at SSRN, <https://ssrn.com/abstract=3582184>

<sup>35</sup> UNESCO Convention 2003, Art. 11 (b)

<sup>36</sup> *ibid.*, Art. 12, para. 1

<sup>37</sup> *ibid.*, Art. 15

<sup>38</sup> *ibid.*, Art. 16-18; <https://ich.unesco.org/en/lists> (last accessed 30.1.2021); AIKAWA-FAURE, "From the Proclamation of Masterpieces to the Convention for the Safeguarding of ICH", in *Intangible Heritage*, SMITH and AKAGAWA, p. 13 ff., pp. 13-14. See some important arguments of criticism in LENZERINI, "Part II Commentary, Art.16-17 Listing Intangible Cultural Heritage" in *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, cit., p. 306 ff., pp. 326-328.

<sup>39</sup> UBERTAZZI, "The Territorial Condition for the Inscription of Elements on the UNESCO Lists of ICH", *Between Imagined Communities and Communities of Practice*, cit., p. 111 ff., pp. 111-119.

<sup>40</sup> In practical terms, sections titled "geographical location and range of the element" or "geographical scope" and "geographical location" are enshrined in the nomination forms: *UNESCO-ICH*, <https://ich.unesco.org/en/forms> (last accessed 30.1.2021).

overcome this “mapping of cultures into bounded and distinct places”,<sup>41</sup> since it reproduces the same approach to ICH while simply describing elements “found on the territory of more than one State Party”.<sup>42</sup>

## 2.2. – Migrants’ ICH in the Implementation of the Conventional Mechanism.

A question, thus, emerges regarding the way this system handles or should handle migrants’ ICH expressions. Are they recognized and safeguarded or misrepresented and marginalized? In theoretical terms, the Convention does not contain any reference to migration but the State obligation to safeguard “the ICH present in its territory” does not exclude the living heritage of the migrants *also* present in its territory, despite the fact that “such presence requires some degree of stability in practice” and is obviously in favor of the communities living regularly on a territory.<sup>43</sup> On the contrary, the conventional mechanism tends to adopt a broad, inclusive approach for the protection of all kinds of ICH independently of its bearers’ identity, nationality and citizenship. This is reinforced by the relevant references included in the Operational Directives for the implementation of the Convention, as in particular: “States Parties shall endeavour to ensure that their safeguarding plans and programmes are *fully inclusive of all sectors and strata of society*, including indigenous peoples, *migrants*, immigrants and refugees, people of different ages and genders, persons with disabilities and members of vulnerable groups, in conformity with Article 11 of the Convention.”<sup>44</sup> Besides, this inclusion potentially contributes to social cohesion<sup>45</sup> and the construction of lasting peace.<sup>46</sup> Furthermore, we find a similar,

<sup>41</sup> BORTOLOTTI, “Placing ICH, owning a tradition, affirming sovereignty: the role of spatiality in the practice of the 2003 Convention”, in *The Routledge Companion to Intangible Cultural Heritage*, cit., p. 46 ff., p. 48.

<sup>42</sup> UNESCO, Operational Directives for the Implementation of the Convention for the Safeguarding of the ICH, adopted by the General Assembly of the States Parties to the Convention at its second session (2008), as amended into their last version by 8.GA (2020), paras.13, 14; The extension of an existent inscription is also encouraged in paras. 16-19.

<sup>43</sup> CARDUCCI, “Part II Commentary, Art. 11 Role of States Parties” in *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, cit., p. 173 ff., p. 176.

<sup>44</sup> UNESCO, Operational Directives 2020, para. 174.

<sup>45</sup> *ibid.*, para. 194: “States Parties are encouraged to give particular attention to those practices, expressions and knowledge that help communities, groups and individuals to transcend and address differences of gender, colour, ethnicity, origin, class and locality and to those that are broadly inclusive of all sectors and strata of society, including indigenous peoples, *migrants*, immigrants and refugees, people of different ages and genders, persons with disabilities and members of marginalized groups.”

<sup>46</sup> *ibid.*, para. 197 (a): “States Parties are encouraged to: (a) ensure respect for the ICH of indigenous peoples, *migrants*, immigrants and refugees, people of different ages and genders, persons with disabilities, and members of vulnerable groups in their safeguarding efforts.”

more recent, incitement to States Parties for the participation of communities, including “*migrants* present in their territories”, in their safeguarding actions, in the Operational principles and modalities for safeguarding ICH in emergencies.<sup>47</sup>

However, no specific guarantee exists in the conventional text itself and the language chosen for the aforementioned Operational Directives and Principles is once again loose (“are encouraged”, “shall endeavour”). As a result, any decision to include migrants’ ICH in the safeguarding plans and programmes, as well as exclude migrant communities or groups from participating and being actively involved in those plans and programmes, namely the manner a national policy on ICH safeguarding is to deal with the ICH of “different groups within or also beyond the society of the State”,<sup>48</sup> rests solely with the State. This is apparently relevant to the decision not only to identify and include ICH manifestations in the National Inventories but also to nominate such elements for the Representative List of the ICH of Humanity (‘RL’) or the List of ICH in Need of Urgent Safeguarding (‘USL’) as well as proposals for the Register of Good Safeguarding Practices. As a consequence, on the basis of absence of legal guarantees, the conventional system accords to the States a very wide margin in order to take such decisions, inevitably under the pressure of political, commercial, touristic or other interests.

Only a systematic mapping of those manifestations and a comparative analysis of State practice would reveal the real condition of migrants’ ICH safeguarding policies around the globe but would also go beyond the scope of the present paper. Our analysis is, thus, limited to one -albeit crucial- aspect of the whole system: the elements inscribed on UNESCO’s Lists, which could reveal some tendencies and dominant trends or at least highlight the possibilities and risks of the nominating procedure with respect to the issue. It is worth mentioning that only one inscribed element contains the notion of migration in its core description and title.<sup>49</sup> Otherwise, migration often appears in nominations as a factor that threatens the viability of ICH elements, mostly those in need of urgent safeguarding.<sup>50</sup> But what happens with migrants’ ICH *per se*?

<sup>47</sup> UNESCO, Operational principles and modalities for safeguarding ICH in emergencies, adopted by the General Assembly of the States Parties to the Convention at its eighth session, (Resolution 8.GA 9, 2020), Principle 4.

<sup>48</sup> VAIVADE, “Part II Commentary, Art.13 Other Measures for Safeguarding: Developing Intangible Cultural Heritage Policies and Legislation at the National Level”, in *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, cit., p. 199 ff., p. 203.

<sup>49</sup> See, “Transhumance, the seasonal droving of livestock along migratory routes in the Mediterranean and in the Alps”, RL, Austria, Greece and Italy (2019).

<sup>50</sup> E.g., “Seperu folkdance and associated practices”, USL, Botswana (2019). See also, Intergovernmental Committee for the Safeguarding of ICH (IGC), Decision 14.COM 10.a.1, para. 2 (U.2); “Buklog,

In some cases, there might be a tendency to (re)baptize cultural expressions as belonging to the whole “nation” or “people” of a State,<sup>51</sup> “by presenting the nation as an ethnic community that gathers around its heritage”,<sup>52</sup> which does not necessarily correspond to reality in anthropological terms. This, being either clearly stated in the nomination file or implied by the elements’ descriptions and even by their titles,<sup>53</sup> could reveal a strategic option of the nominating State using constitutively ICH in order to “build” a national identity<sup>54</sup> in the informal but inevitable inter-State “competition” during the inventorying process. This trend becomes relevant to the issue of migration insofar as States could intentionally overlook that a nominated element could be mostly characterized as migrants’ ICH expression and/or expression shaped over the years mainly thanks to the osmosis of autochthonous and migrant communities and/or ICH practice that independently of “its origin” is mostly performed by migrants present in their territories. In response, a tendency has been detected over the years, according to which States use a language that presents ICH as “manifestation *in*” rather than “manifestation *of*” (a place, region, State).<sup>55</sup> However, even this “preferred” tendency is considered problematic and States are lately discouraged to do so, as clearly expressed also in the latest published Report of the Evaluation Body.<sup>56</sup>

thanksgiving ritual system of the Subanen”, USL, Philippines (2019), IGC, Decision 14.COM 10.a.4, para. 2 (U.2); “Spring rite of Juraŭski Karahod”, USL, Belarus (2019), IGC, Decision 14.COM 10.a.5, para. 2 (U.2); “Shadow play”, USL, Syrian Arab Republic (2018), IGC, Decision 13.COM 10.a.7, para. 2 (U.2).

<sup>51</sup> See an analysis on the perception of “national heritage” and the case of Australia in SIMPSON, “Cultural Heritage on the Move: Significance and Meaning”, *Law in Context: A Socio-Legal Journal*, 1996, p. 45 ff., pp. 45-68.

<sup>52</sup> BORTOLOTO, *op. cit.*, p. 46 ff., p. 50.

<sup>53</sup> E.g., elements inscribed on the RL: “Albanian folk iso-polyphony” (2008), “Palestinian Hikaye” (2008), “Georgian polyphonic singing” (2008), “Indonesian Batik” (2009), “Fado, urban popular song of Portugal” (2011), “Equitation in the French tradition” (2011), “Turkish coffee culture and tradition” (2013), “Ancient Georgian traditional Qvevri wine-making method” (2013), “Ethiopian epiphany” (2019), “Traditional Turkish archery” (2019).

<sup>54</sup> This was, however, reflected in previous international cultural heritage treaties: e.g. the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, of 14 November 1970, preamble, para. 3: “Considering that cultural property constitutes one of the basic elements of civilization and *national culture*”, Art. 5(b): “*national cultural heritage*” (*emphasis added*).

<sup>55</sup> E.g., Armenia’s nomination’s title of “Lavash, the preparation, meaning and appearance of traditional Armenian bread as an expression of culture” was changed to “Lavash, the preparation, meaning and appearance of traditional bread as an expression of culture *in Armenia*” after reactions by Azerbaijan and Iran and finally inscribed (RL, 2014) (*emphasis added*). See also, “Flatbread making and sharing culture Lavash, Katyrma, Jupka, Yufka” inscribed by Azerbaijan, Iran, Kazakhstan, Kyrgyzstan, Turkey (RL, 2016).

<sup>56</sup> Report of the Evaluation Body on its work in 2020 to the IGC, UN Doc. LHE/20/15.COM/8 (2020), para. 35: “although the inclusion of a location may help determine the geographical situation of the element, the Evaluation Body recommends avoiding references to geographic origin or original location in the title

In other cases, migrants' ICH might be totally absent from National Inventories and International Lists, as if it is not actually "present" in the nominating State. In this regard, if the attempt either to integrate a certain group's cultural expressions in an "official" general culture of the State<sup>57</sup> or to highlight the "authentic" locality of an expression at the expense of its wide international dispersion and its deep connection to migrants in the State and abroad<sup>58</sup> has failed, then those expressions simply do not exist in the eyes of the nominating State. Elsewhere, a reference to migrant communities might exist only in relevance to the dominant cultural community(ies) of the State barely as a source of cultural exchange.<sup>59</sup> However, there might be a few instances where an ICH expression is inscribed on the RL by a State different than that of the expression's "origin" or the origin of its community of bearers,<sup>60</sup> practiced (also) by a migrants' community living in the State,<sup>61</sup> and/or practiced with respect to the value of inclusion of migrants to local communities via their participation in

of nomination files, as this may imply exclusiveness or ownership of the element (when using wording that points to an element being of/belonging to a particular country)".

<sup>57</sup> E.g., according to some scholarly opinions, this was the case with the inscription of the "Tibetan Opera" as a cultural expression of "minority ethnic groups" by China (RL, 2009); This was also the case with "Nawrouz" celebration, when Turkey presented it as a "Turkish spring holiday" in order to dissociate it from the Kurdish communities identity in the context of its multinational inscription along with Afghanistan, Azerbaijan, India, Iran, Iraq, Kazakhstan, Kyrgyzstan, Uzbekistan, Pakistan, Tajikistan, Turkmenistan (RL, 2016). It is notable that community consent regarding Turkey in the nomination was exclusively provided in a merely standardized way by Turkish Associations.

<sup>58</sup> E.g., this was the fact with the nomination for the "Tango" inscribed by Argentina and Uruguay (RL, 2009) where the tension between the tango "known almost all over the world" and the tango "as it really is in its most authentic way and character", namely as practised in the Rio de la Plata basin, is evident, at the same time that the element itself is presented as a result of "a multiplicity of cultures" originated in migrants' cultures as well.

<sup>59</sup> E.g., in the Decision for the inscription of the "Morna, musical practice of Cabo Verde" by Cabo Verde (RL, 2019), the Committee notes that "the inscription would also create new opportunities for the exchange of knowledge between generations and between bearers from different regions of the archipelago *and immigrant communities*", IGC, Decision 14.COM 10.b.8, para. 2 (R.2).

<sup>60</sup> E.g., China inscribed on the RL in 2009 the "Mongolian art of singing, Khoomei", which was also inscribed by Mongolia as "Mongolian traditional art of Khöömei" in 2010. It is notable that in China's nomination file, the element is presented always as belonging to Mongolian communities: "Khoomei has been created, possessed and transmitted among Mongolian people. It is a form of art existed in the Mongolian communities. In China, the key locations include Xilin Gol League in Inner Mongolia Autonomous Region and the Altai area in Xinjiang Uygur Autonomous Region." (nomination file, p. 1, C). However, it is also notable that the community consent is insufficient and problematic at both files.

<sup>61</sup> E.g., "Ommegang of Brussels, an annual historical procession and popular festival", Belgium (RL, 2019), IGC, Decision 14.COM 10.b.4, para. 2 (R.2): "the element is practised not only by French-speaking people but also by Dutch-speaking residents of Brussels and surrounding areas *and immigrant communities*"; "Celestinian forgiveness celebration", Italy (RL, 2019), IGC, Decision 14.COM 10.b.19, para. 2 (R.2): "It would also promote cultural diversity *by involving migrant resident communities.*" (*emphasis added*).

the practice.<sup>62</sup> This reality could more easily be reflected in nominations for the Register of Good Safeguarding Practices, where States focus on the description of the safeguarding practice -which could favorably involve also migrant communities- rather than that of the element itself.<sup>63</sup>

### *3. – The International Protection of Migrants’ Human Rights and Living Heritage.*

#### *3.1. – The Complementarity of the UNESCO 2003 Convention and International Human Rights Protection Frameworks.*

Following the aforementioned remarks on relevant practice until today, one could notice that safeguarding migrants’ ICH is not among State’s top priorities in the UNESCO 2003 Convention’s apparatus. In a system that favors a State approach which seeks to promote ICH manifestations as national products in the international market,<sup>64</sup> claim exclusiveness, authenticity or ownership over them and reaffirm State sovereignty, safeguarding the living heritage of migrant communities is inevitably not prioritized. As a consequence, a series of political or other interests may lead to the absolute absence of protection for this part of ICH that does not conform to a certain State’s official heritage policy, since no specific guarantee exists, as well as no practical enforcement and monitoring mechanism for its implementation -except for the periodic reporting system- is prescribed by the Convention. What are,

<sup>62</sup> E.g., it has been said that this is the case with the inscription of “Human towers”, Spain (RL, 2010): LIXINSKI, “Part III Additional Issues Related to the 2003 Convention, The Convention for the Safeguarding of the Intangible Cultural Heritage and Human Rights: Relativism and Collectivism 2.0?”, in *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, cit., p. 470 ff., p. 476.

<sup>63</sup> E.g., such practices where migrants are actively involved in safeguarding or their presence, participation and contribution is clearly stated in the practices’ nomination are: the “Táncáz method: a Hungarian model for the transmission of intangible cultural heritage” Hungary (2011), the “Polyphonic Caravan, researching, safeguarding and promoting the Epirus polyphonic song” Greece (2020).

<sup>64</sup> The risk of turning the inscription process into a race or contest as well as the risk of over-commercialization and de-contextualization of ICH have been repeatedly pointed out not only by scholars but also by the Convention’s bodies. The most recent step towards a more completed analysis of the issue was the request by the Committee towards the Secretariat “to publish the recommendations of the Evaluation Body on the safeguarding measures and good practices that address the risk of decontextualization and over-commercialization of elements in a guidance note for communities and States Parties” in IGC, Decision 14.COM 10, para. 14.

then, the obligations of the receiving State with regards to heritage safeguarding of incoming migrant groups?<sup>65</sup>

The emerging legal constraints would make us turn to human rights protection mechanisms, in an attempt to use existing legal tools for the support of those communities that are intentionally left outside of any plan of ICH safeguarding or management, in the name of the UNESCO 2003 Convention, by the States in which they are living.<sup>66</sup> The linkages between ICH safeguarding and existing international human rights instruments are declared by the Convention<sup>67</sup> but are also apparent given the undeniably strong relation between living heritage and its people, as analyzed above. Besides, it has been supported that the field of ICH converges with multiple branches of international law and “in particular the areas of minorities and cultural rights”<sup>68</sup> as well as that the protection of ICH practitioners is far more important than that of ICH itself since they are the ones that create, maintain and transmit it.<sup>69</sup> Therefore, by developing an effective protective framework for their rights, insofar as this framework allows the unhampered practice of their living heritage, the latter is eventually also indirectly protected. And this might be even more crucial for migrant groups, displaced communities and, by extension, asylum seekers and refugees, something already recognized at the level of UNESCO.<sup>70</sup>

Towards this direction, the development of the Convention’s life has led to the adoption of the Ethical Principles for ICH Safeguarding<sup>71</sup> among which Principle 2 declares: “the *right* of communities, groups and individuals to continue the practices, representations, expressions, knowledge and skills necessary to ensure the viability of

<sup>65</sup> See a relevant analysis, for the State of origin too, in LIXINSKI, “Moving Cultures: Engaging Refugee and Migrant Cultural Rights in International Heritage Law”, *Indonesian Journal of International Law*, 2018, pp. 1-27.

<sup>66</sup> Criticism has been expressed on the inability of UNESCO to defend cultural rights through its treaties and treaty bodies; CHECHI, “Migrants’ Cultural Rights at the Confluence of International Human Rights Law and International Cultural Heritage Law”, *International Human Rights Law Review*, vol. 5, No. 1, 2016, p. 26 ff., p. 37.

<sup>67</sup> UNESCO Convention 2003, preamble, para. 1 and Art. 2, para. 1.

<sup>68</sup> VRDOLJAK, “Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage” in *ESIL Research Forum on International Law Contemporary Issues*, Mainetti (ed.), Geneva, 2005, p. 1 ff., p. 24.

<sup>69</sup> BAKAR et al., “Analysis on Community Involvement Level in Intangible Cultural Heritage: Malacca cultural community”, *Procedia - Social and Behavioral Sciences*, 2014, p. 286 ff., p. 287.

<sup>70</sup> UNESCO, Strategy for the reinforcement of UNESCO’s action for the protection of culture and the promotion of cultural pluralism in the event of armed conflict, UN Doc. 38 C/49 (2015), para. 7: “A related and major concern for UNESCO is the deprivation of cultural rights experienced by populations affected by conflict, particularly the growing number of refugees and internally displaced people worldwide. This includes the inability to access cultural heritage, to fully practice intangible cultural heritage and to transmit it to younger generations, to enjoy freedom of expression and creativity, and to participate in cultural life.”

<sup>71</sup> IGC, Decision 10.COM 15.a, Annex.

the ICH". However, *all* Ethical Principles are useful in order to support claims for respect of migrants' rights and their inclusion in State policies, since although they function merely as a code of conduct, their adoption in 2015 reveals an inter-State discussion towards the recognition of certain rights. Therefore, the argument in favor of the complementarity between the two frameworks, which a number of expert and scholarly voices have already pointed out,<sup>72</sup> is adequately persuasive when answering the question: what could the members of a -migrant- community legally argue against the State within the territory or under the jurisdiction of which they are living, if their rights related to cultural heritage are at stake? Of course, a series of theoretical and practical issues and limitations immediately arise,<sup>73</sup> among which: the possible legal bases that could support such an argument, on which the following analysis will focus.

The latest developments at the level of the UN Human Rights Council (HRC) reinforce this human rights-based approach, having its origins in the report of the independent expert in the field of cultural rights,<sup>74</sup> which concludes that the right of access to and enjoyment of -also intangible- cultural heritage "forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life, the right of members of minorities to enjoy their own culture and the right of indigenous peoples to self-determination and to maintain, control, protect and develop their cultural heritage",<sup>75</sup> with migrants mentioned explicitly among the rights-holders.<sup>76</sup> It is notable that one of the expert's recommendation in it, regarding the content of States' periodic reports to treaty bodies "on action taken to ensure the full participation of concerned individuals and communities in cultural heritage preservation/safeguard programmes",<sup>77</sup> could function complementarily to the UNESCO 2003 Convention deficient periodic reporting mechanism. In the same line, the subsequent reports of the Special Rapporteur in the field of cultural rights,

<sup>72</sup> Report of the independent expert in the field of cultural rights to the HRC, Farida Shaheed, UN Doc. A/HRC/17/38 (2011), para. 2: "Considering access to and enjoyment of cultural heritage as a human right is a necessary and complementary approach to the preservation/safeguard of cultural heritage"; See also: LENZERINI, *op. cit.*, pp. 114-118; LIXINSKI, *Intangible Cultural Heritage*, cit., pp. 145-173; BLAKE, *International Cultural Heritage Law*, Oxford, 2015, pp. 271-312.

<sup>73</sup> Such as: the identification and definition of the rights-holders, the *status* of the beneficiaries, the collective nature of the rights prevailing the individual one, the scope of the rights, the nature of the obligations imposed, the potential violations of these rights.

<sup>74</sup> HRC, Independent expert in the field of cultural rights, Tenth Session, UN Doc. A/HRC/RES/10/23 (2009).

<sup>75</sup> Report of the independent expert in the field of cultural rights to the HRC, Farida Shaheed, UN Doc. A/HRC/17/38 (2011), para. 78. In specifying the right, the report mentions (para. 79): "It also includes the right to participate in the identification, interpretation and development of *cultural heritage*, as well as to the design and implementation of preservation/safeguard policies and programmes". (*emphasis added*).

<sup>76</sup> *ibid.*, para. 61.

<sup>77</sup> *ibid.*, para. 80 (n).

focusing on the intentional destruction of cultural heritage in conflict and non-conflict situations, contain in their scope references directly to ICH<sup>78</sup> and to the particular need to incorporate the perspective of *migrants' rights* in making any relevant analysis.<sup>79</sup> This approach was reasserted by the Human Rights Council calling “upon all States to respect, promote and protect the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage”<sup>80</sup> as well as, at the regional level, by the Council of Europe’s Faro Convention.<sup>81</sup>

At this point, another important dimension -regarding however displaced populations- should be emphasized, once again merging the parallel developments at the two frameworks: the role of ICH in emergencies as pointed out at the level of UNESCO,<sup>82</sup> and of cultural heritage preservation “in the integration and rehabilitation of refugees and displaced persons after trauma (...) in post-conflict stabilization and reconciliation” as pointed out by the HRC.<sup>83</sup> The Special Rapporteur, in particular, recommends that States *inter alia* “ensure the cultural rights of refugees and displaced persons, including women, and especially those from locations where cultural heritage has been destroyed, including their right to take part in cultural life and to enjoy their ICH”.<sup>84</sup> Importantly, the HRC calls States “for the recognition of the protection of cultural heritage as an important component of humanitarian assistance, including in armed conflict and with regard to displaced populations”<sup>85</sup> and “for enhanced cooperation between the Office of the UN High Commissioner for Human Rights, the mandate of the Special Rapporteur in the field of cultural rights, the UNESCO and other relevant agencies and stakeholders”.<sup>86</sup>

<sup>78</sup> Report of the Special Rapporteur in the field of cultural rights, to the UN General Assembly UN Doc. A/71/317 (2016), paras. 6, 7, 10, 11, 16, 53, 61, 78 (a), (c), (i).

<sup>79</sup> Report of the Special Rapporteur in the field of cultural rights to the HRC, UN Doc. A/HRC/31/59 (2016), paras. 10, 11, 19, 29, 38, 90 (c).

<sup>80</sup> HRC, Cultural rights and the protection of cultural heritage, UN Doc. A/HRC/RES/33/20 (2016), p. 2, para. 1.

<sup>81</sup> Faro Convention, Art. 1 (a): “The Parties to this Convention agree to: a. recognize that rights relating to cultural heritage are inherent in the right to participate in cultural life, as defined in the Universal Declaration of Human Rights”.

<sup>82</sup> UNESCO initiatives and analyses in this regard presents some interest, insofar as the issue of migration and ICH comes once again at the forefront; See, e.g., <https://ich.unesco.org/en/emergency-situations-01117> (last accessed 5.2.2021).

<sup>83</sup> HRC, Cultural rights and the protection of cultural heritage, UN Doc. A/HRC/RES/33/20 (2016), para. 78 (i).

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*, p. 3, point 8.

<sup>86</sup> HRC, Cultural rights and the protection of cultural heritage, UN Doc. A/HRC/RES/37/17 (2018), p. 3, point. 8

### 3.2. – The Dimension of Cultural Heritage Protection in the Existing International Human Rights Instruments.

Returning to the search for possible legal bases, a primary selection among recognized human rights in the existing relevant international instruments is necessary for the needs of the present limited analysis. Such rights, as recognized at the international or regional level, associated with the protection of cultural heritage could be *inter alia*: the right to freedom of expression, thought, conscience and religion, the right to property ownership, the right to protection of private and family life, the right to information and education, the right of ethnic, religious or linguistic minorities to enjoy their own culture. However, a focus will be made to the rights included in the Universal Declaration on Human Rights (UDHR) of 1948 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, also mentioned in the preamble of the UNESCO 2003 Convention<sup>87</sup>, which explicitly refer to the right to participate in cultural life, although not directly including the dimension of cultural heritage. Under this prism, as a means to address the need to protect those aspects of migrant communities' life related in one way or another to the enjoyment of their cultural heritage, the following -already mentioned in the statements at the level of the HRC- stands out.

The right of everyone to take part in cultural life, as recognized under Article 15 of the ICESCR<sup>88</sup> and Article 27 of the UDHR,<sup>89</sup> offers a “fertile” legal ground for the inclusion of the parameter of ICH protection in it. With its General Comment No. 21,<sup>90</sup> the Committee on Economic Social and Cultural Rights (CESCR) encompasses the axis of the respect and protection of cultural heritage in the aforementioned right, contributing for the first time to the debate with such a statutory expansive interpretation. The latter, by specifying the legal obligations of the States Parties, clearly adds the access to one's own cultural heritage in the obligation to respect as well as the respect and protection of “cultural heritage of all groups and communities” and “in all its forms” in the obligation to protect.<sup>91</sup> Additionally, the CESCR underlines the “particular attention to the protection of the cultural identities of *migrants* as well as their (...) *folklore*” that should be paid by States Parties,<sup>92</sup> while at

<sup>87</sup> UNESCO Convention 2003, preamble, para. 1

<sup>88</sup> ICESCR, Art. 15, para. 1(a): “The States Parties to the present Convention recognize the right of everyone: (a) to take part in cultural life; (...)”.

<sup>89</sup> UDHR, Art. 27, para. 1: “Everyone has the right freely to participate in the cultural life *of the community*, to enjoy the arts (...)” (*emphasis added*).

<sup>90</sup> CESCR, General comment No. 21: *Right of everyone to take part in cultural life* (Art. 15, para. 1 (a), of the ICESCR), Un Doc. E/C.12/GC/21 (2009).

<sup>91</sup> *ibid.*, para. 49 (d), para. 50 (a), (b).

<sup>92</sup> *ibid.*, para. 34; References to migration exist also in paras. 35, 41 and 52.

the same time the obligation to fulfil, subdivided into an obligation to facilitate, contains also “taking appropriate measures or programmes to support minorities or other communities, including *migrant communities*, in their efforts to preserve their culture”.<sup>93</sup> Nonetheless, the Committee has never proceeded with adopting Views on the merits in a case examining Article 15 (1)(a) and as a result no practical example can be found in CESCR’s jurisprudence so far<sup>94</sup>, while States’ positions and practice with regard to this matter -though not yet clearly manifested- would be maybe revealing in the future, as well as while there is a dynamic towards developments in this field.<sup>95</sup> In any case, the enjoyment of migrants’ cultural rights, in particular, depends on the respect of non-discrimination principles<sup>96</sup> – irrespectively of their *status* and including those in an irregular situation,<sup>97</sup> as also clearly stated by CESCR in its analysis on the prohibition of discrimination on grounds of nationality or legal *status* regarding States Parties obligations under the Covenant towards refugees and migrants.<sup>98</sup>

Last but not least, the right of access to and participation in cultural life is directly recognized also by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>99</sup> which is of particular importance for our analysis, despite the very low percentage of ratifications by States, as well as the fact that the competent treaty body, the Committee on Migrant Workers, has not yet functioned under its capacity to consider individual complaints or communications and has not proceeded in a respective interpretation of that right in particular. However, what would prove important in the future is following the work

<sup>93</sup> *ibid.*, para. 52 (f).

<sup>94</sup> In fact, the only case invoking Art. 15 para 1 (a) was judged as inadmissible: CESCR, *AMB v. Ecuador*, Communication No. 3/2014, Adoption of views of 8 August 2016. Its examination on the merits would have been of particular interest since the communication submitted concerned the rights of a minor under refugee *status*, alleging “indirect discrimination on the basis of his migration *status* and nationality”.

<sup>95</sup> High Commissioner’s for Human Rights report on the intersessional seminar on cultural rights and the protection of cultural heritage which took place in 2017, contains the seminar’s recommendation addressed to civil society, stated as follows: “Civil society organizations should: (a) Submit more shadow reports and individual complaints related to article 15 of the ICESCR and under the Optional Protocol thereto, to help expand the Committee’s jurisprudence regarding the right to take part in cultural life and the right to access and enjoy cultural heritage”; Report of the United Nations High Commissioner for Human Rights to the HRC, UN Doc. A/HRC/37/29 (2017), para. 110 (a).

<sup>96</sup> CESCR, General comment No. 21, cit., para. 55 (a), (d). See also, CESCR, General Comment No. 20: *Non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the ICESCR)*, UN Doc. E/C.12/GC/20 (2009), para. 30.

<sup>97</sup> OHCHR, *The Economic, Social, and Cultural Rights of migrants in an irregular situation*, UN Doc. HR/PUB/14/1 (2014), p. 36.

<sup>98</sup> CESCR, Statement, UN Doc. E/C.12/2017/1 (2017), paras. 5-8.

<sup>99</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, of 18 December 1990, Art. 43, para. 1 (g); Art. 45, para 1 (d)

of the Special Rapporteur on the human rights of migrants, who has not already dedicated a specific analysis to migrants' cultural rights<sup>100</sup> but whose mandate covers all countries, irrespective of whether they have ratified this Convention. In the same line, the activities carried out at the level of the Office of the UN High Commissioner for Human Rights ("OHCHR") on the topic "migration and human rights"<sup>101</sup> might also in the future incorporate a focused examination of migrants' cultural rights -and by extension: the right to cultural heritage- which has not taken place until today, despite the scattered general references to them in relevant reports and publications.<sup>102</sup>

#### 4. – Conclusion

Connecting the fields of living heritage and migrants' rights protection under international law in a common analysis is apocalyptic in various ways. Firstly, a core similarity between them, which should define their protection regime to a certain extent, is apparent: their *status* of mobility. In the same manner that people diachronically tend to move away from their "homes", their living heritage also migrates. ICH should, thus, be perceived as heritage in the state of transit, evolving and never static, something not necessarily reflected in the implementation of the safeguarding mechanism under the UNESCO 2003 Convention so far.

Secondly, a paradoxical relationship between them is developed. Migration may at the same time "undermine the processes of transmission and continuity" and

<sup>100</sup> We find some references to "cultural rights", "cultural interests" and "cultural life" in the thematic reports already published: E.g.: UN General Assembly, *Human rights of migrants*, UN Doc. A/69/302 (2014), para. 109 (a); UN General Assembly, *Good practices and initiatives on gender-responsive migration legislation and policies*, UN Doc. A/74/191 (2019), para. 115 (g); HRC, *Right to freedom of association of migrants and their defenders*, UN Doc. A/HRC/44/42 (2020), para. 86.

<sup>101</sup> <https://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx> (last accessed 11.2.2021).

<sup>102</sup> See, e.g.: OHCHR, *Study – The slow onset effects of climate change and human rights protection for cross-border migrants* (2018), para. 44: "Loss of land further threatens the right to take part in cultural life and to enjoy one's culture, which protects the practices and languages of minority and indigenous groups", para. 132: "The case studies also highlight that climate change poses a progressive threat to human rights, and at its most extreme a threat to the rights to life, food, water, health, housing, and culture among others".

be “a key element in maintaining and sustaining ICH manifestations and practices”,<sup>103</sup> something particularly interesting also for future analyses on the impact of the ongoing Covid-19 pandemic on the practice of living heritage.<sup>104</sup>

Thirdly, the system reveals its inconsistencies. While ICH is conceptualized as bounded to State territories, certain expressions of it could end up being considered “absent” rather than “present” in them. And this is due to the lack of specific legal guarantees for the meaningful participation of *all* communities and inclusion of *all* manifestations of ICH in States’ safeguarding policies, which can easily render migrant communities’ ICH misrepresented and undefended. By extension, if this dominant trend takes place in reference to migrants, who are settled in one way or another in a specific territory, then what would potentially be the destiny of nomads’, asylum seekers’ and refugees’ ICH, which would seem to be excluded by definition from such State policies? In any case and in legal terms, a selective policy to the detriment of the living heritage of migrant groups, “present” in a territory of a State Party to the Convention, raises the issue of the latter’s improper implementation and may constitute violation -by act or omission- of the State’s conventional obligations.

In this context, international law faces the challenge to construct a solid framework for the effective safeguarding of an object which is inherently *on the move* as well as to endorse any necessary adaptations following current evolutions. Otherwise, it risks to remain a plain outline without vivid content, namely a set of rules not corresponding to reality. In view of this challenge, a human rights-based approach *especially* for migrants’ ICH safeguarding should be promoted. On the one hand, such an approach is coherent with UNESCO’s strategy, the latter stating that: “there is today growing recognition that the protection of cultural diversity and the promotion of cultural pluralism, through the safeguarding of the tangible and intangible heritage of communities and the protection of human rights and fundamental freedoms, is more than a cultural emergency”.<sup>105</sup> On the other hand, it supports the cross-fertilization of two frameworks, the UNESCO 2003 Convention and the international protection mechanism for cultural rights.

<sup>103</sup> AMESCUA, “Anthropology of Intangible Cultural Heritage and Migration: An Uncharted Field” in *Anthropological Perspectives on Intangible Cultural Heritage*, Arizpe and Amescua (eds.), Cham-Heidelberg-New York-Dordrecht-London, 2013, p. 103 ff., p. 107.

<sup>104</sup> The UNESCO 2003 Convention’s Secretariat has recently launched an online survey on the experiences of communities around the world related to the practice of their living heritage during the Covid-19 pandemic, receiving some interesting responses; See the results in <https://ich.unesco.org/en/living-heritage-experiences-and-the-covid-19-pandemic-01123> (last accessed 5.2.2021).

<sup>105</sup> UNESCO, Strategy for the reinforcement of UNESCO’s action for the protection of culture and the promotion of cultural pluralism in the event of armed conflict, UN Doc. 38 C/49 (2015), para. 10.

Supporting this complementarity, voices in favor of which gain more and more ground, implies supporting a creative dialectic relationship between the two frameworks, where the response to the current deficiencies may be exactly found. In this way, the UNESCO framework needs to be enriched by tools, inspired by human rights law, that guarantee the protection of migrants' ICH, while the scope of migrants' cultural rights needs to incorporate the dimension of their ICH protection, reinforced -if not inspired- by the UNESCO framework. Besides, recent developments at the level of the HRC, the work and analysis done by the Special Rapporteur in the field of cultural rights and the CESCR, show the way clearly towards this direction, as analyzed above, without prejudice to the position that States would eventually adopt. Beyond these -albeit indispensable- theoretical constructions, what would be needed is to "build" on them, by implementing the experts' and HRC's recommendations proposed and by "building" a jurisprudence for the realization of cultural rights, for example *via* the complaints procedure before the HRC and the UN human rights treaty bodies. However, it is still crucial to legally deal with the collective nature of those rights and conduct relevant analysis on the right to cultural heritage as a *collective* right, a field yet unexplored.

Regardless of the bearers' *status*, the right of *all* persons to enjoy their own culture in community with others and to take part in cultural life, the right to have access to and enjoy their ICH – finding its legal basis *inter alia* in the right to take part in cultural life / to participate in the cultural life of the community, need to be effectively promoted, respected and protected. In a world of an unprecedented level of human mobility and increase of migrants' presence in all countries,<sup>106</sup> the need for the respect for migrant cultures becomes prominent today maybe more than ever.<sup>107</sup> At the end of the day, calling for an effective protection of migrants' cultural rights and safeguarding of migrants' living heritage, means defending the actual diversity of cultural expressions -as a common heritage of humanity<sup>108</sup> – and its quintessence, which is no other than the meeting with the *other*, the diverse, the different. It is through this diversity that we understand the commonalities of human cultures.

<sup>106</sup> UN General Assembly, New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1 (2016), para. 3.

<sup>107</sup> This, being also acknowledged in the recent Global Compact for Migration: UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195 (2018), para. 32 (a), (h).

<sup>108</sup> UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, of 20 October 2005, preamble, para. 2

**Abstract**

The paper explores the relationship between migration and the safeguarding of living heritage under the prism of international law, charting the various ways these two axes interact as well as the possible outcomes of their creative connection in a common analysis, within and beyond the UNESCO system. In the first part, it runs through the mechanism established by the UNESCO 2003 Convention in an attempt to point out the parameters related to migration from a theoretical and practical perspective. Highlighting the contradiction between ICH as “present in a territory” conventionally and “in transit” by its nature, it searches for the place accorded to migrants’ ICH within the mechanism. In the second part, it examines the possible ways to legally protect migrants’ human rights under international law with a view to safeguard eventually their living heritage. It discusses, thus, the complementarity between the UNESCO 2003 Convention and the international human rights framework for a holistic protection of the relationship of migrant communities – as ICH bearers – with their heritage, referring to the right of all persons to enjoy their own culture in community with others and to take part in cultural life, the right to have access to and enjoy their ICH – finding its legal basis *inter alia* in the right to take part in cultural life. Migration and ICH are indissolubly connected as far as both are fundamentally defined by their constant movement and evolution. In this context, the paper explores the evolution of the international legal framework itself towards an effective protection of migrants’ rights, as rights of people in transit, in relation to their living heritage, as heritage also in transit.



# 4. ONLINE INDIVIDUAL SHARING AS AN EXPRESSION OF A COMMON CULTURAL MODE: THE CASE OF MIGRANTS AND GEOBLOCKS

*Davide Vaira*

SUMMARY: 1. Introduction. – 2. The Regulation of Cultural Rights. – 2.1. International Regulations. – 2.2. European Regulation. – 2.3. Equal Enjoyment Online and Offline. – 3. Internet as a Vehicle for the Implementation of Cultural Rights by Migrants. – 4. Security Limits to the Enjoyment of Cultural Rights by Migrants. – 4.1 Block Definition and Types. The Role of General Principles. – 4.2. Limitations on the Enjoyment of Cultural Rights: Characteristics. – 4.3. Blocks by Private Entities. – 4.4. Infrastructure Protection. – 4.5. Issues Related to Blocks. – 5. Conclusions.

## *1. – Introduction.*

The new millennium is characterised by the development of digital technologies that enable people to overcome physical barriers and distances and access potentially unlimited information in real time.

Anyone can access information from other sources or provide information and express opinions in person on the Internet anywhere in the world at any time. This instant availability of data via the Internet gives migrant people access to information about their cultural heritage and their homeland.

The Internet has allowed people to easily buy goods and services online and enabled the free flow of information to anyone who has access to it.

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And the recent crisis caused by the COVID-19 pandemic has resulted in an exponential increase in the flow of digital information which in turn fosters tempering or at least stemming of the resulting reduction in freedom of movement<sup>1</sup>. The increase in the use of the Internet has also aided the expression of cultural identity, allowing both greater and more immediate access to information and a more widespread exercise of freedom of expression.

However, the flow of digital information in commercial and some other fields can be censored by host nations to protect national security and to counter cyberterrorism.

This paper aims to analyse the balance between the cultural rights of migrants and the policy of censorship at both European and international levels. Specifically, the first part of the paper analyses people's universal cultural rights to freely access and enjoy information both online and off. The second part analyses the ways in which people can exercise their cultural rights and their relationship with geo-blocks. It considers whether these limits are there to protect national security and how they can be used in keeping with European and international legislation.

## *2. – The Regulation of Cultural Rights.*

To better understand the issue of cultural rights, we have to consider the impact of immigration on both economic and cultural policy, particularly when the migrants have a different culture and language.

The protection of people's cultural rights generally and specifically of migrants' cultural rights developed greatly both in Europe and internationally in the mid-twentieth century: cultural rights are referred to as second-generation rights and like first-generation rights are considered fundamental and inviolable; certain rights straddle both generations such as the right to freedom of expression or religion. These are fundamental individual human rights defined as first-generation rights. However, where they include people's cultural rights, they are defined as second-generation.

But even though the regulation of cultural rights at both international and European level is nothing new, it is still lacking even today: despite much attention being paid to these rights, their regulation is, as mentioned, patchy even today. On the one hand this is due to the different nature of the regulatory sources that recognise and govern them – international, supranational, national – and their being both binding and non-binding. On the other hand, it is due to the wide discretion States still

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<sup>1</sup> By way of example it is possible to consider the use of online e-commerce platforms as Amazon, streaming platforms for audio-visual contents, online platforms for meetings or lessons.

have in managing issues relating to migration, albeit tempered by international standards and principles that direct legal systems towards guaranteeing regulations<sup>2</sup>.

Indeed, it can certainly no longer be said that countries have *full* authority over people who are *within* their borders<sup>3</sup>.

## 2.1. – International Regulations.

The protection of migrants' cultural rights internationally has aroused interest both in international treaty law and at a soft law level.

Even if international law is mainly based on state-centrism, sovereignty and territoriality, it nonetheless recognizes the centrality of cultural heritage for the communities, safeguarding it both in wartime and peacetime and underlining its importance to create national cohesiveness, intercultural understanding, world peace and economic development<sup>4</sup>.

The 1948 Universal Declaration of Human Rights<sup>5</sup> first explicitly recognized, even in a non-binding act, cultural rights in Article 22 as fundamental and instrumental for safeguarding human dignity and personality.

International sources basically aim to set up some basic principles to guide individual States in regulating cultural rights and safeguarding migrants' cultural diversity; an example can be found in Article 15 of the International Covenant on Economic, Social and Cultural Rights which sets out that it is States' responsibility to allow everyone the right to participate in cultural life<sup>6</sup>.

The "relativism" of cultural rights was even internationally recognized within the 1966 Declaration of the Principles of International Cultural Cooperation adopted by the General Conference of the United Nations Educational, Scientific and Cultural

<sup>2</sup> PACIOTTI: "L'Europa dei diritti e delle migrazioni. Le norme e la realtà", *Questione Giustizia online – Osservatorio Internazionale*, 20.5.2019, available at: [https://www.questionegiustizia.it/articolo/l-europa-dei-diritti-e-le-migrazioni-le-norme-e-la-realta\\_20-05-2019.php](https://www.questionegiustizia.it/articolo/l-europa-dei-diritti-e-le-migrazioni-le-norme-e-la-realta_20-05-2019.php).

<sup>3</sup> CATALANO: "Migranti e Diritti – Quali diritti?", Fondazione della Memoria della Deportazione, Milano, 5.3.2010, p. 28 available at: <http://www.italia-liberazione.it/publicazioni/36/Catalano.pdf>.

<sup>4</sup> LIXINSKI, *International Heritage Law for Communities*, Oxford, 2019, pp.17, 81-82.

<sup>5</sup> Universal Declaration of Human Rights, 1948, available at: [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf). On the issue of cultural rights in an online perspective, see RUOTOLO, *Right to science and open access to legal knowledge in international and European law*, in Faro, Peruginelli (eds.), *Knowledge of the Law in the Big Data Age*, Amsterdam/Berlin/NewYork, 2019, p. 101 ff.

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights, Available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

Organization (UNESCO) <sup>7</sup>, whose Article 1.1. clearly attributes dignity and value to every culture to be safeguarded and respected.

Recently, additional sources both binding and soft have also ensured that migrants have the right to take part in cultural life and have generally ensured them a non-discriminatory treatment compared to the host State's citizens.

Some examples are the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>8</sup>, which considers cultural diversity as a common heritage to be valued and safeguarded, the 2005 Faro Convention which identifies conservation among each country's cultural identity objectives, understood as a set of cultural resources and values inherited from the past and the General Comment No. 21 of the 2009 Committee for Economic, Social and Cultural Rights of the United Nations<sup>9</sup>.

All these sources have set their subjective scope of application very broadly: the list of rights contained in the Universal Declaration and subsequent international agreements applies to everybody.

In addition, the nature of customary rights has been attributed to many rights listed in the agreements and as such they are also binding for the treaties' non-signatory States<sup>10</sup>, without, however, making them compulsory. Indeed, the same Covenant on civil and political rights establishes in article 12 that each right may be subject to restrictions to protect other rights or interests of equal value including national security.

## 2.2. – European Regulation.

In Europe the protection of cultural rights was recognised in 1950 also by the European Convention of Human Rights and its Protocols when it highlighted the difference between the universality of human rights and the relativism of cultural

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<sup>7</sup> Declaration of Principles of International Cultural Co.Operation, 1966, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13147&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13147&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>8</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, available at: <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf>

<sup>9</sup> Economic and Social Council – Committee on Economic, Social and Cultural Rights, “General Comment no.21 – Right of Everyone to take part in Cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)” 21 December 2009, E/C.12/GC/21, available at: <https://www.refworld.org/docid/4ed35bae2.html>

<sup>10</sup> AIDOS, “Migrazioni, diversità culturale, uguaglianza fra i sessi – Rapporto del gruppo di specialiste del Consiglio d'Europa, 1994”, *Donne, migrazioni, diversità: l'Italia di oggi e di domani: atti del seminario 1 marzo 2001*, Rome, 2002, available at: [http://dirittiumani.donne.aidos.it/bibl\\_1\\_temi/f\\_indice\\_per\\_soggetti/g1\\_migranti/home\\_migranti.html](http://dirittiumani.donne.aidos.it/bibl_1_temi/f_indice_per_soggetti/g1_migranti/home_migranti.html).

rights that must be recognised and protected separately also in the light of people's needs<sup>11</sup>.

In fact, cultural rights include the right to so-called appropriate cultural resources which guarantees everyone the right to express their abilities in the best possible way. Consequently, there is the right to dignity and defence of individual culture and the right to different treatment based on specific cultural needs.

The 1961 European Social Charter<sup>12</sup> stimulated the conditions to promote social and economic progress by identifying general principles aimed at guiding the work of various countries. The declarations adopted by the Committee of Ministers of the Council of Europe, especially the 1982<sup>13</sup> ones on freedom of expression and information, are also important for enjoying cultural rights.

In 2005 the Council of Europe intervened with the framework convention on the value of cultural heritage for society (Faro Convention)<sup>14</sup> which integrates the 1954 European Cultural Convention<sup>15</sup>, recognizing that everyone has the right to contribute to enrich cultural heritage as well as the right to benefit from one's own cultural heritage.

Switching to European Union, let us recall that immigration, starting from the Treaty of Amsterdam<sup>16</sup>, is part of the EU competences, especially for the conditions governing the entry and the residence in a Member State, despite Countries keep the right to determine the volumes of admissions for people coming from third Countries<sup>17</sup>. The idea that in EU States' authority cannot be resolved by absolute discretion, is found for example in art. 79 TFEU which provides that "The Union shall

<sup>11</sup> QUADRANTI ET AL.: I diritti culturali nella carta dei diritti fondamentali dell'Unione Europea, *Archivi storici dell'Unione Europea*, Florence, 26 November 2018, available at: [http://www.politicheuropee.gov.it/media/4440/univerona\\_i-diritti-culturali-nella-carta-dei-diritti-ue.pdf](http://www.politicheuropee.gov.it/media/4440/univerona_i-diritti-culturali-nella-carta-dei-diritti-ue.pdf).

<sup>12</sup> The European Social Charter is available at: <https://rm.coe.int/the-european-social-charter-treaty-text/1680799c4b>.

<sup>13</sup> Council of Europe – Committee of Ministers: "Declaration on the Freedom of Expression and Information" available at: [https://www.right2info.org/resources/publications/instruments-and-standards/coe\\_decl-on-foe-and-foi\\_1982](https://www.right2info.org/resources/publications/instruments-and-standards/coe_decl-on-foe-and-foi_1982).

<sup>14</sup> Council of Europe, Framework Convention on the Value of Cultural Heritage for Society, 2005, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680083746>

<sup>15</sup> European Cultural Convention, 1954, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006457e>

<sup>16</sup> For a complete analysis of the evolution of migration and culture in the European framework see KOSINSKA, *Cultural Rights of Third-Country Nationals in EU law*, Cham, 2019.

<sup>17</sup> Migration regulation has been constantly developed in the last decade on an almost yearly base. These provisions have kept to the 2020 Pact on Migration and Asylum that provides a regulation for the management of external borders, humanitarian admission and pathways linked to education and work. For

develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings”.

The regulation of migrants’ rights requires Member States to ensure human rights treatment as a regulatory principle.

However, in some cases States are free to choose the methods to deal with migration effectively and correctly<sup>18</sup>. The European Union, indeed, provides incentives and supports for measures taken by Member States to promote the integration of legally resident third-country nationals, but EU law makes no provision for the harmonization of national laws and regulations<sup>19</sup>.

In any case today migration regulation cannot be limited to the area of the issuing country.

Freedom of movement and even more so the birth of new technologies have highlighted how the protection of cultural rights of migrants is a global and cross-border phenomenon that requires coordinated solutions between countries.

Despite being aware of not agreeing on a single regulation of the matter due to the nuances with which it is articulated in various countries, common principles have been identified (the 1997 Maastricht guidelines on violations of economic, social and cultural rights, the 2011 Maastricht Principles) which go beyond borders and at least allow common objectives to be pursued clarifying the extent of State aims outside the single national territory<sup>20</sup>.

Another reason the regulation of migrants’ cultural rights is lacking in Europe is linked to the European Union’s historical evolution.

The European Communities and subsequent organisations arose basically for economic reasons, so that over time economic rights and freedoms have developed more, while social and cultural rights have been relegated to a minority position unlike other situations in which a balance was found between the various types of rights<sup>21</sup>. Only later, in conjunction with the European Union’s growth to areas of

an analysis of all the provisions of the last decade, see: SHMID-DRÜNER, “Immigration Policy”, *Fact Sheets on the European Union*, 2021, available at: <https://www.europarl.europa.eu/factsheets/en/sheet/152/politica-d-immigrazione>

<sup>18</sup> PACIOTTI: *cit. supra* note 2

<sup>19</sup> SHMID-DRÜNER: *cit supra* note 17.

<sup>20</sup> VITERBO: “L’applicazione extraterritoriale del Patto internazionale sui diritti economici, sociali e culturali: i principi di Maastricht del 2011”, *Diritti Umani e diritto internazionale*, 2012, available at: <http://www.sidi-isil.org/wp-content/uploads/2010/02/Anna-Viterbo-Lapplicazione-extraterritoriale-del-Patto-internazionale-sui-diritti-economici-sociali-e-culturali-i-Principi-di-Maastricht-del-2011.pdf>.

<sup>21</sup> MOSCHELLA: “La legislazione sull’immigrazione e le prospettive della tutela dei diritti fondamentali:

interest other than the economic one, did social and cultural rights (recognised by art. 3 TEU) fall under second-generation rights, functional to economic development, competitiveness, as well as protecting the internal market.

Despite the legislation's being patchy, the protection of cultural rights is generally recognised by numerous European sources which link it to the protection of other rights in some cases.

The EU Charter of Fundamental Rights<sup>22</sup> recognises, in article 11, the right to freedom of expression, which also includes freedom of opinion and the freedom to receive or communicate information and in art. 22 the right to cultural, religious and linguistic diversity.

Cultural rights can consist in both individual rights and common rights, as they can be enjoyed by a single person, as part of his cultural heritage, or by a community of individuals, as part of a commonality of values.

These are rights which Member States are required to comply with not only passively, as a prohibition of interference in the enjoyment of the same (except to balance them with the protection of rights of equal value), but also *actively* by placing limits on persistence of unjustified discrimination<sup>23</sup>.

Nowadays, groups which have the right to express their identity are considered to be protected not just to avoid their culture's being absorbed by the dominant one.<sup>24</sup>

Having said this, people's cultural rights generally and migrants' rights more specifically have a dual nature. In fact, since the term "cultural rights" often refers to cultural inheritance, i.e. the set of values that every individual can draw from, the need has been felt to recognise an individual and a collective nature enabling the people to enjoy their own culture and to express it individually and with others<sup>25</sup>.

The European countries base the concept of multi-ethnic pluralism in relation to both individual and collective cultural rights, as it is frequently the migrants themselves who claim the enjoyment of collective cultural rights<sup>26</sup>.

l'ordinamento europeo e l'esperienza italiana", *Ordine Internazionale e Diritti Umani*, 2019 p. 473 ff., pp. 478-479, available at: [http://www.rivistaidu.net/sites/default/files/1\\_Moschella\\_OIDU\\_3\\_2019.pdf](http://www.rivistaidu.net/sites/default/files/1_Moschella_OIDU_3_2019.pdf).

<sup>22</sup> The Charter of Fundamental Rights of European Union is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=IT>

<sup>23</sup> International Commission of Jurists: *Migration and International Human Rights Law – A Practitioners' Guide n.6* Updated Edition, Geneva, 2014 p.227, available at: <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>

<sup>24</sup> QUADRANTI ET AL., *cit. supra* note 11.

<sup>25</sup> Recently the sense of belonging to a specific culture has overcome the sense of belonging to a State, causing struggles and fights to claim the respect of one's own culture and sometimes to force this culture above the others. For an analysis of this problem, see HUTINGTON, *The clash of civilization and the re-marking of world order*, New York, 1996.

<sup>26</sup> CATALANO: *cit supra* note 3 *ibid*.

The choice of a framework convention enables us to understand once again how the regulation dictated at a supranational level is a general one. It is based on principles guiding individual countries in the detailed regulation of migrants' cultural rights.

Finally, it should be noted how the European Union, open to recognition and protection of cultural diversity (such as in articles 13, 19, 165 TFEU<sup>27</sup> and 3.3 paragraph 4 of the TEU<sup>28</sup>), however, pays attention to Member States' cultural identity (article 167 TFEU).

It grants them powers to safeguard cultural heritage to the point of providing for the need for a unanimous decision in the hypothesis of negotiation or conclusion of agreements in the area of cultural and audio-visual services, "where there is a risk of prejudice to the competence of the Member States regarding their performance" (Art. 207 (4) (a)).

### 2.3. – Equal Enjoyment Online and Offline.

A fundamental principle for the protection of cultural rights by the Web, and specifically for the protection of migrants' cultural rights, is the equitable enjoyment of online and offline rights.

Internet is considered as a global public good<sup>29</sup>. Some authors consider it as a "final" global public good (being an independent fundamental right), some others consider it as an "intermediate" global public good, being it instrumental to protect further goods or interests (such as expression, information, culture). Its use can only be limited with a clear-cut provision of law and in line with freedom of expression and information<sup>30</sup>.

Currently the right to freedom of expression, connected to the cultural rights, is affected by a global crisis related to regulatory gaps in the indication of individual States' obligations and to different States' regulations which do not always guarantee human rights adequately in order to ensure better control over information shared online.

<sup>27</sup> Consolidated Version of the Treaty on the Functioning of European Union, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>.

<sup>28</sup> Consolidated version of the Treaty of European Union, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF)

<sup>29</sup> For an analysis about the idea of global public good see RUOTOLO, "Fragments of fragments. The domain name system regulation: global law or information of the international legal order", *Computer Law and Security Review*, 33, 2017, p. 159 ff., p. 167.

<sup>30</sup> Article.19 at the UNHRC: "The same rights that people have offline must also be protected online", 14<sup>th</sup> of June 2017, available at <https://www.article19.org/resources/article-19-at-the-unhrc-the-same-rights-that-people-have-offline-must-also-be-protected-online/>

Some of the domestic measures adopted to regulate some online behaviours are causing a reduction of the possible choices that an average user (and especially a migrant) can make about informations to examine online. This condition is carrying to a frustration of the exercise of cultural rights<sup>31</sup>.

Among the tools that States are using to limit freedom of expression and information via the Internet are localized Internet and telecommunications shutdowns, the analysis of users' personal access data and encryption level reduction<sup>32</sup>, all of which affect net neutrality<sup>33</sup>.

Therefore, deeming to identify a connection between the right to privacy on the Internet and the right to freedom of expression recognized to each individual, the Human Rights Council has repeatedly adopted the concept of equality between the rights that can be enjoyed online and offline<sup>34</sup>, and has indicated standards to deplore the behaviour of States that prevent access to or the free flow of information online.

These resolutions have also foreseen online and offline rights beyond State borders, due to the open nature of the Internet which is a tool for society's progress and development.

As far as this is concerned it was stated that the United Nations Guiding Principles on Business and Human Rights (UNGPs)<sup>35</sup> can be a starting point for providing respect for human rights on companies as well, given that free Internet access is now a collective right and that restrictions on access affect freedom of expression

<sup>31</sup> These considerations are made by Cowen about differences in social classes, but can be transferred to cultural rights. For an analysis of the problem regarding the differences in social classes see COWEN, *Average is Over: powering America Beyond the Age of the Great Stagnation*, Penguin Group, 2013.

<sup>32</sup> Human Rights Council, "Report of the special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye", A/HRC/29/32 of 22 May 2015, pp. 5-6, available at: [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32\\_AEV.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.doc)

<sup>33</sup> For an analysis about net neutrality see RUOTOLO, "The Multilateral Regime on Digital Trade", *Diritto Pubblico Comparato ed Europeo*, VI, 2014, p. 1887 ff, paras. 7-9, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2761759](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761759).

<sup>34</sup> This principle has been expressed for the first time in the Resolution No. 20/08 adopted by the Human Rights Council about "promotion, protection and enjoyment of human rights on the internet", A/HRC/20/8 of 16 July 2012, (available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/25/PDF/G1215325.pdf?OpenElement>), and then again in the Resolution No. 26/13 adopted by the Human Rights Council about "promotion, protection and enjoyment of human rights on the internet", A/HRC/26/13 of 14 July 2014 (available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/83/PDF/G1408283.pdf?OpenElement>), both adopted by consensus; and then again in the Resolution No. 32/L.20 adopted by the Human Rights Council about "promotion, protection and enjoyment of human rights on the internet", A/HRC/32/L.20 of 27 July 2016 (available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement>).

<sup>35</sup> UN Human Rights – Office of the High Commissioner: "Guiding Principles on Business and Human Rights – Implementing the UN 'Protect, Respect and Remedy' Framework", 2011, HR/PUB/11/04, available at [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

and users' rights. The UNGP's are structured in three pillars, about respectively States' duties on human rights, companies' responsibility to respect them and remedies. The UNGPs provides that in all contexts private companies should comply with all applicable laws and respect internationally recognized human rights, but also find instruments to honor the principles of internationally recognized human rights when faced with conflicting requirements<sup>36</sup>. The UNGPs clarify the impact that companies have on the enjoyment of human rights and on the objectives pursued by States and, at the same time, gives advices about the behaviours that companies can adopt to ensure the protection of human rights, such as avoid causing or contributing to adverse human rights impacts through their own activity or seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations<sup>37</sup>.

Net neutrality is relevant to the issue and is advantageous for guaranteeing freedom of expression and access to information via the Internet and thus is useful for the enjoyment of cultural rights.

In fact, net neutrality allows the widest possible access to information and its transmission without borders, discrimination or interference by non-State subjects, requiring States to guarantee the maximum enjoyment of freedom of expression and information via the Internet without discrimination between individuals<sup>38</sup>.

<sup>36</sup> RUOTOLO, "A little hate, Worldwide! Di libertà d'opinione e discorsi politici d'odio online nel diritto internazionale ed europeo", *Diritti Umani e Diritto Internazionale*, 2020, p. 549 ff., p. 568.

In general on UNGDPs in the digital contest see: BONFANTI, "ICT Companies' Responsibility to Respect Human Rights: Remarks in the Light of the EU General Data Protection Regulation", in *Business and Human Rights in Europe: International Law Challenges*, Bonfanti (ed.), Abingdon/New York, 2019, p. 168 ff.; FASCIGLIONE, "I principi guida ONU su impresa e diritti umani e il consolidamento del regime internazionale in materia a settant'anni dalla dichiarazione universale" in *I diritti umani a settant'anni dalla Dichiarazione universale delle Nazioni Unite*, Cataldi (ed.), Napoli, 2019, p. 93 ff.; FASCIGLIONE, "An International Mechanism of Accountability for Adjudicating Corporate Violations of Human Rights? Problems and Perspectives", in *Judicial Power in a Globalized World. Liber Amicorum Vincent De Gaetano*, Pinto de Albuquerque, Wojtyczek (eds.), Cham, 2019, p. 179 ff.; FASCIGLIONE, "Enforcing the State Duty under the UN Guiding Principles on Business and Human Rights. Strasbourg View", in *Business and Human Rights in Europe: International Law Challenges*, Bonfanti (ed.), Abingdon/New York, 2019, p. 38 ff.; P. MUCHLINSKI "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights", in *Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers*, C. Ryngaert, M. Noortmann (eds), London/New York, 2010

<sup>37</sup> "Guiding Principles on Business and Human Rights, cit. p. 14.

<sup>38</sup> Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of the right to freedom of opinion and expression – Note by the Secretariat", A/HRC/35/22 of 30 March 2017, p. 8, available at: <https://freedex.org/wp-content/blogs.dir/2015/files/2017/05/AHRC3522.pdf>

### 3. – *Internet as a Vehicle for the Implementation of Cultural Rights by Migrants.*

Even though the regulation of cultural rights and their enjoyment, especially online, concerns all individuals, a separate issue must be considered for migrants, as they are persons who exercise their cultural rights differently from the citizens of the host country, due to the diversity of their mother country, their language, their culture. And during the Covid-19 pandemic, migrants have had even more troubles accessing information about their homeland and fully enjoying their cultural rights because of their location.

In addition, people's movements have been drastically curbed for health reasons.

This is the increase (greater than it was previously) in digital technologies that are invaluable for the digital goods and services market sector, and which have become a means of exercising cultural rights. Migrants, especially the new generation, also use digital communication technologies to acquire information and keep contacts between them and with their country of origin, and to facilitate the freedom of expression and the enjoyment of cultural rights, not only through the traditional Internet or with online articles or blogs but on social networks, a real device for free expression and information.

Posts, photographs and messages with cultural content uploaded by users onto their social network personal profiles cannot be considered a simple expression of the individual's ideas, rather they become historical documents that constitute an actual archive of individual and collective experience and opinions<sup>39</sup>.

This is because cultural heritage is an instrument, relevant for the survival and perpetuation of a social group and for the maintenance over time of a certain cultural identity, recognizing cultural heritage as a right belonging first to the communities and only as a second step to individuals<sup>40</sup>.

The notion of cultural heritage has developed over time, but has always been perceived as an important component of the community's social and cultural identity. Thus it has been clear the necessity for a safeguard of cultural heritage under both a

<sup>39</sup> For a complete analysis of the "pocket archives" phenomenon LEURS: "Communication rights from the margins: politicising young refugees' smartphone pocket archives", *The International Communication Gazette*, 2017, Vol. 79(6-7) pp. 674 ff., available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5732588/>.

<sup>40</sup> LIXINSKI, *Intangible Cultural Heritage in International Law*, Oxford, 2013, pp. 7-8.

“tangible” (e.g. linked to the protection of art or monuments) and “intangible” aspect (e.g. linked to the expression of ideas and traditions)<sup>41</sup>.

The archives of ideas voluntarily or involuntarily created by users on their social media profiles become a collection of material which sometimes can show the sharing of a phrase or an idea by a common cultural mode through social media platforms.

Through these systems migrants can safeguard their cultural identity and raise awareness in their host country or throughout their country on issues concerning their own culture or country of origin and participate actively in the cultural life of the host community instantly and directly, as is also envisaged by the Universal Declaration of Human Rights (Art. 27.1), according to which “everyone has the right freely to participate in the cultural life of the community”, and by the UNESCO Universal Declaration on cultural diversity (art. 5), according to which “all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices”.

Communication alone, however, is not enough to allow the enjoyment and exercise of cultural rights as it needs to be integrated and safeguarded by recognising other rights: the close connection between fundamental rights is highlighted by the fact that the right to free communication presupposes that migrants can enjoy the right to access to the Internet, of freedom of expression, of information, as well as of privacy, all of which allow the free use of digital channels to spread ideas, as well as by the fact that these channels are also used to call for the protection of other rights.

Therefore, for migrants, freedom of communication is a means to exercise their cultural rights but also to defend them from possible restrictions or external interference.

Let’s recall how article 19 of the Universal Declaration of Human Rights states that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”, recognizing the right to the free circulation of information and ideas in the media, but also protection from external interference independently of the existing borders between the country where the person is and the country reached by the message on the Internet.

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<sup>41</sup> For a deep analysis of the concept of “tangible and intangible” cultural heritage and for an historical reconstruction of its protection see UNESCO, “International Round Table on ‘Intangible cultural heritage – working definitions’”, Torino, 2001, available at: <https://ich.unesco.org/doc/src/00077-EN.pdf>

This creates a network of rights to information, privacy and freedom of expression that completes the category of cultural rights, making room for the era of so-called social rights<sup>42</sup>.

However, the provisions of the Universal Declaration of Human Rights do not always provide actual protection for migrants' cultural rights, since article 19 mainly refers to freedom of expression in areas of public domain while cultural rights essentially fall within the *private* sphere.

It is now a consolidated orientation, also referred to in the UNHR Guidelines on Freedom of Expression Online and Offline<sup>43</sup>, that all rights used offline must be protected online as well.

Nevertheless, many actions are aimed more at facilitating citizens' access to the digital market than protecting cultural rights and free expression or information<sup>44</sup>.

Lately, due to the Covid-19 pandemic there has been progress in this direction.

In fact, the need to implement the attention and interest in culture through digital channels has led European institutions to launch projects the objective of which is to protect people's identity and cultural background and develop freedom of expression and the free and rapid flow of information<sup>45</sup>.

However, the use of migrants' cultural rights on the Internet has many limits in the necessary balance with *national security needs*<sup>46</sup> that each host country implements by censoring ideas, information and opinions expressed online and on social networks.

In some cases these measures have repercussions in the private sphere and could even lead to their expulsion from the host country: this means migrants limit

<sup>42</sup> UNESCO: "Many Voices, One World – towards a new more just and more efficient world information and communication order", Paris, 1980, p. 265, para. 54, available at: UNESCO/ICSCP(063.2)/C6/ENG, Available at: <https://digitallibrary.un.org/record/80>.

<sup>43</sup> EU Human Rights Guidelines on Freedom of Expression online and offline, available at: <https://www.consilium.europa.eu/media/28348/142549.pdf>.

<sup>44</sup> This aim is for example pursued by the Digital Agenda for Europe or by the Digital Single market strategy, based on three pillars: providing better access for consumers and businesses to digital goods and services across Europe, creating the right conditions for digital networks and services to flourish, maximizing the growth potential of the digital economy, <https://www.europarl.europa.eu/factsheets/en/sheet/64/digital-agenda-for-europe>

<sup>45</sup> Examples about european projects aimed to the conservation of cultural heritage and implementation of digital innovation in schools are available at: <https://ec.europa.eu/digital-single-market/en/news/european-competence-centre-digital-preservation-and-conservation-cultural-heritage-and-projects>.

<sup>46</sup> One of the main limits to the freedom of expression is linked to the prevention of terrorism and hate speech, and to the prevention of fake news. For an analysis of this phenomenon see RUOTOLO, *cit. supra* note 36; RUOTOLO, "Il diritto internazionale", in Fattori (eds.) *Libertà religiosa e sicurezza*, Pacini Giuridica, 2021, p. 3 ff., p. 12; MAZZANTI "Glorification of Islamic Terrorism in criminal justice and immigration law", *Diritto Penale Contemporaneo*, 1/2017, pp. 26 ff.

their freedom of expression by self-censorship. These apparently spontaneous choices are the instead the result of indirect censorship which is not always justified by real national security needs and becomes a real violation of cultural, expression, information and any other human rights generally understood and connected to them.

The necessary balance between the rights to freedom of expression and information and cultural rights on the one hand and national security on the other represents one of the thorniest issues related to the control of online content and social networks and has raised issues that have been addressed by individual countries and by supranational and international institutions.

#### *4. – Security Limits to the Enjoyment of Cultural Rights by Migrants.*

Although today the equation between the enjoyment of online and offline rights is uncontested, the prospect of limiting migrants' free expression and free information to protect rights and interests of equal value is also undeniable.

In the Internet context whether it is social networks, online newspapers or other sites, an effective tool for limiting communication contents is the *geoblock*, with which it is even possible to prevent online access in certain geographical areas<sup>47</sup> using users' IP addresses or other technical tools<sup>48</sup>.

Geoblocking was created in the goods and services digital market sector to limit or prevent the use of content or the purchase of goods in specific areas<sup>49</sup>. Over time it has developed to limit content uploaded online and access by users (especially about audiovisual content) and to protect national security and other fundamental rights.

<sup>47</sup> For an analysis of geo-blocks in the EU regulation and their application see MESSINA, "Geo-blocking and EU Competition Law in the Digital Era", in Rodriguez, Green, Kubica(eds.), *Legal Challenges in the New Digital Age*, Leiden/Boston, 2021, pp. 13 ff.

<sup>48</sup> Department for European Policies – Presidency of the Council of Ministers: "Geo-blocking", available at: <http://www.politicheeuropee.gov.it/it/comunicazione/europarole/geoblocking/>.

Examples of technical tools could be the use of roaming data or the client presence verification (CVP) that analyse the delay in the internet transmission with geographical distance. For an analysis see RUOTOLO, "La lotta alla frammentazione geografica del mercato unico digitale: tutela della concorrenza, uniformità, diritto internazionale privato", *Diritto del Commercio internazionale*, 2018, p. 501 ff.

<sup>49</sup> European Commission – Shaping Europe's Digital Future: "Geo-blocking", available at: <https://ec.europa.eu/digital-single-market/en/geo-blocking>

#### 4.1. – Block Definition and Types. The Role of General Principles.

Applying geoblocks (and more generally blocks) to content uploaded via the Internet by users goes back to 2011 and has been the subject of careful analysis by the United Nations<sup>50</sup>.

In some countries blocks applied to content uploaded on the Internet are based on specific regulations<sup>51</sup>. However, in other countries since there are no specific regulations<sup>52</sup>, this can lead to arbitrary limitations of users' cultural rights.

This second scenario provides for a further distinction, since where there is no specific legislation on online content some countries apply general rules relating to other sectors. Others, especially Common Law countries<sup>53</sup>, rely on the law, leaving it to the Courts to identify the correct balance between the right to freedom of expression and the right to security case by case<sup>54</sup>.

In some cases, the decision to use general rules or principles derives from the choice of the lawmakers to consider a specific regulation of the matter superfluous in the face of general legislation already suitable for the purpose. In other cases, it arises from the idea that regulatory compliance capacity does not keep pace with the speed with which online content is evolving, so it is better to apply general and flexible legislation<sup>55</sup>.

<sup>50</sup> UN General Assembly – Human Rights Council: “Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue”, A/HRC/17/27 of 16 May 2011, pp. 9-10, available at: [https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf).

<sup>51</sup> About geo-blocking regulation see GIMIGLIANO, “Il regolamento c.d. Geoblocking nel Quadro della disciplina sul commercio elettronico”, *Ianus diritto e finanza*, 18, 2018, pp. 169 ff., available at: [https://www.rivistaianus.it/numero\\_18\\_2018/09\\_Gimigliano\\_169-198.pdf](https://www.rivistaianus.it/numero_18_2018/09_Gimigliano_169-198.pdf); PESCE, “Unjustified Geo-Blocking”, *I post di Aisdue*, I, 2019, available at: <https://www.aisdue.eu/blocchi-geografici-ingiustificati-unjustified-geo-blocking/>.

<sup>52</sup> MUIŻNIEKS, “Arbitrary Internet Blocking jeopardises freedom of expression”, 26 September 2017, Strasbourg, available at: <https://www.coe.int/en/web/commissioner/-/arbitrary-internet-blocking-jeopardises-freedom-of-expression>.

<sup>53</sup> Swiss Institute of Comparative Law: *Comparative study on blocking, filtering and take-down of illegal internet content*, Lausanne, 2015, p. 775, available at: <https://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet>.

<sup>54</sup> Swiss Institute of Comparative Law, *cit. supra*.

<sup>55</sup> In the case of the Internet, the legal regulation of technologies is often made particularly complex and difficult to pursue through traditional instruments because they ‘move too quickly for regulatory comfort’: BROWNSWORD, YEUNG, “Regulating Technologies: Tools, Targets and Thematics”, in Brownsword, Yeung (eds.), *Regulating Technologies. Legal Futures, Regulatory Frames and Technological Fixes*, Hart, 2008, p. 5.

It should be considered that if a country decides to use a specific legal framework to regulate online content blocks, it is necessary not only to provide for a balanced system between the opposing interests (right to free expression, right to information and more generally cultural rights on the one hand and protection of national security on the other), but also to decide whether this provision should be left to the legislator or to the evaluation of the courts, in a case by case approach.

To speed up, the procedures to activate control systems, rights or interests for the protection of which the blocking or filtering of content uploaded via the internet can be applied have been catalogued: these are, mostly, national security, public order and public morality.

Even identifying these categories not only varies from country to country but is often deliberately vague and left to the work of the courts<sup>56</sup>.

It should be once more highlighted that the lack of borders and barriers on the Internet makes content instantly available all over the world making it hard to identify the regulations to which it is subjected.

Users who exercise their right to freedom of expression or their right to access information online should normally consider the regulation of the Country in which they are operating.

The rule yields when content violates norms of a supranational or international nature<sup>57</sup>.

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<sup>56</sup> Swiss Institute of Comparative Law, *cit. supra* note 53, pp. 776-778 *ibid*. There is the problem of control by international bodies on the measures adopted by different States to provide national security, due to the vagueness of regulations and the possibility of exceptions. Countries have an absolute power in deciding the content of their own national security interests and the level of need of the concrete measures. See RUOTOLO, "il diritto internazionale", *cit.*, p. 3 ff., p. 12 The same mechanism has been analysed in the multilateral trading system (but the results can be adapted to other aspects of the international law) by PICONE, LIGUSTRO, *Diritto dell'Organizzazione Mondiale del Commercio*, Padova, 2002, p. 337.

<sup>57</sup> Council of Europe, "The Rule of Law on the internet and in the wider digital world", 2014, p. 23, available at: [https://rm.coe.int/ref/CommDH/IssuePaper\(2014\)1](https://rm.coe.int/ref/CommDH/IssuePaper(2014)1).

This principle recall a problem argued in the case *LICRA v. Yahoo!*, 22 November 2000, RG. 00/0538 where a jewish student association in France claimed against auctions held by Yahoo! in the United States and regarding nazist memorabilia. The Yahoo! platform chose to apply a ban on nazi memorabilia after the claiming to satisfy an ethical and moral imperative shared by all democratic societies. For an analysis of the case see AKDENIZ, "Case analysis of League against Racism and Antisemitism (LICRA), French Union of Jewish Students, v. Yahoo! Inc. (USA), France, Tribunal de Grand Instance de Paris (The County Court of Paris), Interim Court Order, 20 November, 2000", 2001, available at [https://www.researchgate.net/publication/288876894\\_Case\\_Analysis\\_of\\_League\\_Against\\_Racism\\_and\\_Antisemitism\\_LICRA\\_French\\_Union\\_of\\_Jewish\\_Students\\_v\\_Yahoo\\_Inc\\_USA\\_Yahoo\\_France\\_Tribunal\\_de\\_Grande\\_Instance\\_de\\_Paris\\_The\\_County\\_Court\\_of\\_Paris\\_Interim\\_Court\\_](https://www.researchgate.net/publication/288876894_Case_Analysis_of_League_Against_Racism_and_Antisemitism_LICRA_French_Union_of_Jewish_Students_v_Yahoo_Inc_USA_Yahoo_France_Tribunal_de_Grande_Instance_de_Paris_The_County_Court_of_Paris_Interim_Court_).

Methods by which content uploaded to the Internet can be blocked are different. First, the difference between blocking and removal of content should be highlighted. The block, which is implemented by a national Internet Service Provider, inhibits the access to contents or information from a country outside the one where it is consulted. On the other hand, the removal concerns contents or information from the same country that obscures it by forwarding the request to a host in the country itself. In some cases, the contents are anonymous, and it is also hard to find out its provenance and geographical origin. Therefore, a hierarchy has been identified between the two figures, so that the block is considered secondary and applies only when a content cannot be removed, or it is too expensive<sup>58</sup>.

In order to use these tools correctly specific models are provided, such as the co-perpetrator model, according to which online content blocking or removal is carried out by adapting the civil, criminal or administrative rules in force to the real case to counter any type of illegal content<sup>59</sup>, considering, as seen before<sup>60</sup>, that the traditional instruments not always are efficient in the regulation, due to the fastness of the technology evolution.

There is also a self-regulation model allowing autonomous and voluntary regulation by service providers<sup>61</sup>. However, this entails the risk of over-removal of contents to prevent any type of sanction<sup>62</sup>.

Blocking or openly removing content from the Internet is not the only system used to protect interests such as national security or public order, which are potentially conflicting with the exercise of cultural rights.

There are actually less obvious but equally effective ways such as the forced slowdown of some sites' loading or the Internet's general functioning (throttling), which make it difficult or downright impossible to load and use online content while not removing or apparently blocking the contents themselves.<sup>63</sup>.

<sup>58</sup> Swiss Institute of Comparative Law, *cit supra* note 53, p. 794 *ibid*.

<sup>59</sup> Swiss Institute of Comparative Law, *cit supra* note 53, p.795 *ibid*.

<sup>60</sup> *Cit. supra* note 55.

<sup>61</sup> Service providers have a determinant role in granting effectiveness to the freedom of opinion and expression online and in balancing different positions before the intervention of authorities. RUOTOLO, "A little hate, Worldwide!", *cit.*, p. 549 ff., p. 567. Some authors consider the function of service providers as "quasi-governmental", WETTSTEIN, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution*, Stanford, 2009. For an analysis about how ISPs works see COHEN-ALMAGOR, "The end of self-regulation: On the role of Internet intermediaries in countering terror", in Goldstone et al (eds.), *The post-ISIS era: regional and global implications*, The Netherlands, IOS Press, 2021.

<sup>62</sup> Swiss Institute of Comparative Law, *cit supra* note 53 p. 799 *ibid*.

<sup>63</sup> MUIŻNIEKS, *cit supra* note 52 *ibid*.

These are less certain measures compared with blocking or removal, due to their inherent characteristics and because they are often managed directly by private companies (e.g., the same ones that manage social networks) which only receive general indications from the authorities, leaving ample room to manoeuvre in applying these methods.

Some examples may be useful for a better comprehension of the problems and to clarify the possible solutions.

Restrictions on users' exercise of freedom of expression or information occurred in Azerbaijan in 2017. At the request of the Ministry of Transport, Communications and High Technologies Baku District Court blocked radio stations, newspapers and online television channels, the contents of which were deemed to be injurious to public order<sup>64</sup>.

Also, in 2017 Ukraine imposed certain sanctions against the Russian Federation, including blocking websites and social media belonging to Russian companies to protect national security as they were considered tools of disinformation, propaganda and cyber-attacks<sup>65</sup>.

In that case, non-governmental organizations considered the block to be disproportionate since it indiscriminately impacted not only essentially illegal content but also legal content, thus effectively limiting freedom of information and expression and the enjoyment of cultural rights of Russians in Ukraine. In Turkey numerous sites and online newspapers have been blocked for pro-Kurdish content or for supporting the LGBT community or because they are considered anti-Muslim, atheist or opposing religious values<sup>66</sup>, thus limiting the free religious practice of migrants from countries with different cultures.

In Italy it is believed that national security can be safeguarded, especially where there is high risk of terrorism, by using preventive measures aimed at blocking the online spread of information and ideas contrary to public order. However, this requires a difficult and complex preventive classification of simple ideological opin-

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<sup>64</sup> European Human Rights Advocacy Centre, "Popular critical news sites challenge block by Azerbaijani Government", 2017, available at: [https://ehrac.org.uk/news/critical-websites-challenge-block-azerbaijan/#\\_ftnref1](https://ehrac.org.uk/news/critical-websites-challenge-block-azerbaijan/#_ftnref1)

<sup>65</sup> MUIŽNIEKS, *cit. supra* note 53, *ibid*.

<sup>66</sup> Council Of Europe – Commissioner For Human Rights: "Memorandum on freedom of expression and media freedom in Turkey", Strasbourg, 2017, p. 20, available at: [https://rm.coe.int/ref/CommDH\(2017\)5](https://rm.coe.int/ref/CommDH(2017)5)

ions (expression of cultural rights and therefore also admitted by the framework decision 2008/919/JHA<sup>67</sup> according to which it goes beyond the notion of public provocation to commit terrorist offences “the expression of radical, polemic or controversial views in the public debate on sensitive political questions, including terrorism”) and opinions integrating criminally relevant facts that include crimes of opinion and crimes of association with the intention of terrorism.<sup>68</sup>

Another method to limit the enjoyment of cultural rights online concerns privacy. The Internet lets users remain anonymous, which is particularly useful when exercising freedom of expression.

However, States have many tools to monitor and collect data that can undermine the right to anonymity by letting you trace the author of certain online content.

In some countries these instruments along with fear of retaliation are used indirectly to control freedom of expression.

If it can be said that free expression can be limited, it is also true that this can happen in exceptional situations always complying with a fair proportion between State intervention and the protection of privacy, expressly recognized by article 12 of the Universal Declaration on Human Rights and by article 17 of the International Covenant on Civil and Political Rights, the application of which, although envisaged in relation to the right to freedom of correspondence, has also been extended to communication on the Internet.<sup>69</sup>

Innovations in the technological field, tools for limiting Internet content and their regulation and procedures must always consider the right to privacy and users' cultural rights. Thus, the ways to protect and limit content on the Internet must be updated at the same time as the protection of human rights generally and specifically cultural rights. Any limitations must meet certain requirements and be authorized by impartial, politically independent and legally competent authorities. They must be

<sup>67</sup> This Council framework decision has introduced new crimes about terrorism (and specifically provoking, recruiting and training for terrorism purposes) and aims at blocking the diffusion of material and ideas that could incite or help terrorism. The framework decision aims at filling the gaps in the legislation of different countries and strengthen the cooperation between them. For an analysis of the aims of this framework decision: European Commission, “Report from the Commission to the European Parliament and the Council on the implementation of Council framework decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, Brussel, 2014, COM(2014)554final, pp. 3-4.

<sup>68</sup> MAZZANTI, “Glorification of Islamic Terrorism in criminal justice and immigration law”, *Diritto Penale Contemporaneo*, 1/2017, pp. 26 ff, p. 29.

<sup>69</sup> UN General Assembly – Human Rights Council: “Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue”, A/HRC/17/27 of 16 May 2011 pp. 15-16, available at: [https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf).

justified so that the legal basis on which they stand, and the conformity of the proportionality principle is made clear considering both the objectives and the blocked online content.<sup>70</sup>

#### 4.2. – Limitations on the Enjoyment of Cultural Rights: Characteristics.

As we have seen, blocking content on the Internet interferes with freedom of expression and the right to information and therefore requires regulation.

Blocking content on the Internet must have a legal basis<sup>71</sup> to ensure its transparent and correct use and the possibility of taking legal action<sup>72</sup>.

These measures must also meet a lawful aim.

In this regard, article 19 paragraph 3 of the International Covenant on Civil and Political Rights makes it possible to identify the types of restrictions that countries may provide to ensure that limiting freedom of expression is at a minimum and proportionate.

In fact, it is foreseen that lawful purposes to impose such blocks may be represented by the protection of the rights of others of equal value (such as image or reputation rights), national security, public order, public health or public morality<sup>73</sup>.

Restrictive measures must respect the requirements of proportionality and necessity compared to the objectives pursued and limited rights. For this reason, their application must always be justified considering that freedom of expression is the rule whereas limitations are the exception, even if they are justified, so that they must limit enjoying human rights as little as possible<sup>74</sup>.

To avoid political exploitation by blocking content on the Internet these measures must be applied or at least authorized by politically independent bodies and that in any case the affected subjects must be able to take legal action to protect their rights also by accessing the list of reasons for which the restrictions have been applied.<sup>75</sup>

<sup>70</sup> UN General Assembly – Human Rights Council: “Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression – Note by the Secretariat”, A/HRC/35/22 od 30 March 2017, pp. 17-21, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/077/46/PDF/G1707746.pdf?OpenElement>.

<sup>71</sup> UN General Assembly – Human Rights Council: “Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue”, cit., p. 8.

<sup>72</sup> MUIŽNIEKS: *cit supra* note 52 *ibid*.

<sup>73</sup> UN General Assembly – Human Rights Council: “Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue”, cit., p. 8.

<sup>74</sup> UN General Assembly – Human Rights Council: “Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue”, cit., p. 19.

<sup>75</sup> UN General Assembly – Human Rights Council: “Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue”, cit., p. 20.

The European Court of Human Rights intervened on the question of proportionality between applicable measures, objectives pursued and restrictions on online content<sup>76</sup>, stating that it is not necessary for restrictive measure to completely remove illegitimate content uploaded online. However, the block must be reasonable and discourage possible further violations.

The blocks therefore are there to remove illegal contents already uploaded and to discourage subsequent violations.

Over-blocking can occur when too much freedom of choice is left about the measures to be applied to remove illegal content<sup>77</sup>.

#### 4.3. – Blocks by Private Entities.

Internet information and contents are almost never directly accessible from author to user. This is because in some cases, such as on social platforms, they are spread by the Internet Service Providers (IPS).

In some cases, countries do not remove contents directly, but rather the task is given to the IPS through a system called "notice and take-down". A maximum time is allocated within which the contents considered inappropriate must be removed. In addition, a fine must be paid by the Internet provider itself if the deadline is not met.

To be legitimate, orders given to Internet providers must have appropriate intents, such as protecting national security and public order. However, in some cases blocks are applied by Service Providers without prior authorization from the competent authority when time is of the essence.

In countries where judicial authorization is considered necessary, the problem is circumvented by replacing public authority orders with a collaboration between the providers and the public administration. The administration forwards informal requests to providers to remove contents, only then acting personally if the request is not met<sup>78</sup>.

The negative consequences of this system are related to the fact that intermediaries must act quickly and hence often identify the contents to be removed.

Online platforms such as social networks often adopt both community standards and internal guidelines to self impose a direction in managing the content uploaded by users in the lack of an adequate and complete regulation. These guidelines

<sup>76</sup> EJudgement of 27 March 2014, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, C-314/12, EU:C:2014:192, para. 63.

<sup>77</sup> Council of Europe, "The Rule of Law on the internet and in the wider digital world", 2014 pp. 83-84, available at: [https://rm.coe.int/ref/CommDH/IssuePaper\(2014\)1](https://rm.coe.int/ref/CommDH/IssuePaper(2014)1)

<sup>78</sup> Swiss Institute of Comparative Law: *cit supra* note 53 (p. III) *ibid.*

and principles are used to prevent discretion in selecting the lawful and unlawful content and to maintain a coherence with decisions taken in previous cases<sup>79</sup>.

On the other hand, the very existence of intermediaries makes it difficult and burdensome for the censured parties to take legal action to protect their rights<sup>80</sup>.

To facilitate the managing of disputes, some service providers have created internal independent boards. It is the case, for example, of the Facebook Oversight Board, announced in 2020, that not only reaffirm the duty of the platform itself to control the content uploaded by users, considering the international principles and the States' authority, but provides a board, composed by independent and highly qualified experts of privacy, freedom of expression, technology and security regulations, that will be charged of the complaints made by users for an unlawful content uploaded by others or for an unlawful removal of content uploaded by themselves<sup>81</sup>.

Sometimes to speed up and facilitate the removal of unsuitable content, some sites and especially social platforms use a system based on algorithms capable of analysing the words used by users.<sup>82</sup>

In some cases, they also use the number of reports from other users relating to a post, applying a temporary block which is then manually verified in terms of proportionality.

The notice and take-down procedure is in any case no less burdensome than the direct removal of contents by the authorities. In fact, this measure must legally meet the basic requirements (which can also come from a legal authority order), of working towards goals necessary in a democratic society and of proportionality.

Only these requirements and the chance that the injured party can take legal action makes the action adequate.

The proportionality principle may be violated using the service and take-down procedure because Internet Providers block all access to the site to avoid sanctions and make the most effective measure. This is because of limited time to remove contents and there not always being specific orders about the contents to be removed<sup>83</sup>.

<sup>79</sup> RUOTOLO, "A little hate, Worldwide!", cit., p. 549 ff., p. 576

<sup>80</sup> UN General Assembly – Human Rights Council: "Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue", cit., pp. 11-12.

<sup>81</sup> RUOTOLO, "A little hate, Worldwide!", cit., p. 549 ff., pp. 577-578.

<sup>82</sup> HOPKINS: "Revealed: Facebook's internal rulebook on sex, terrorism and violence", *The Guardian international edition*, 21 May 2017, available at: <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence>.

<sup>83</sup> An emblematic examples is made by COHEN-ALMAGOR, cit. *supra* note 56, where is told an episode of 30<sup>th</sup> of May 2019, when Mark Zuckerberg (Facebook CEO) asked for a "government more active role", because there were everyday decisions to make about which content uploaded by users on the platform was harmful and which one was not, so it was necessary an update of internet regulation to prevent a too wide discretion of the platform.

This measure often borders on censorship when one considers that platforms, such as social networks, also allow individuals to take part in public life.

To avoid the danger of a disproportionate use of measures, the e-Commerce directive <sup>84</sup> has given service providers greater guarantees. Even though removal is required through the notice and take-down process, service providers are not deemed, for that alone, responsible if this measure does not find solutions<sup>85</sup>.

Sometimes service providers carry out over-blocking not only because they are afraid of being fined but also because the State will be held responsible for any damage caused to the user by acting like this.

In 2017 the European Union intervened in the matter precisely to avoid over-blocking, clarifying that blocks cannot be applied without an adequate and precise legal basis.<sup>86</sup>

People enjoy the same freedom of expression and information online and offline. Therefore, the individuals who limit their enjoyment, even if they are private citizens, must be subject to laws that ensure the protection of human rights and the consistency between them and provides for the limits imposed<sup>87</sup>.

Numerous cases of over-blocking and notice and take down have been analysed in Europe.

In Germany, the Network Enforcement Act came into force in 2017 to limit the spread of hate speech and fake news using the notice and take down system. It imposes fines on social networks if they fail to remove harmful content quickly.

However, this regulation was criticised because despite regular reports allowing the German legislator to control what social networks did, they had too much discretion to act. This was due to a limited time margin for assessing the actual damage to the contents and the immediate effect of censorship, where the legislator's control would intervene only following the control of periodic reports<sup>88</sup>.

Similarly, the European Court of Human Rights <sup>89</sup> has highlighted how in a dispute concerning a private company that was fined for not respecting the deadlines

<sup>84</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000

<sup>85</sup> Swiss Institute of Comparative Law: *cit supra* note 53, p. 789 *ibid*. See also *infra* note 90.

<sup>86</sup> Swiss Institute of Comparative Law: *cit supra* note 53, p.792 *ibid*.

<sup>87</sup> Council of Europe, "The Rule of Law on the internet and in the wider digital world", *cit.*, p. 119.

<sup>88</sup> GESLEY: "Germany: Social media platforms to be held accountable for hosted content under 'Facebook Act'", 11 July 2017, available at: <https://www.loc.gov/law/foreign-news/article/germany-social-media-platforms-to-be-held-accountable-for-hosted-content-under-facebook-act/>.

<sup>89</sup> *Delfi AS v. Estonia*, Application n. 64569/09, Judgment of 10 october 2013, paras. 87-89. The same case has clarified that there is no responsibility of a service provider for the contents uploaded by users, unless the service provider had a priority check on it or unless after having discovered the unlawful content did not remove it immediately, as analysed in RUOTOLO, "A little hate, Worldwide!", *cit.* , p. 549 ff., pp. 570-571.

in the notice and take down system, the restricted time limits are the main cause of arbitrariness when applying the restrictive measures<sup>90</sup>.

Over-blocking can mean shutting down entire websites or social platforms.

Although these shutdowns are most often localized and do not last long, they often violate the requirement of proportionality because in short, they prevent the exercise of freedom of expression indistinctly.

One way to hinder this phenomenon is the use of Content Delivery Networks (CDN), networks that help distribute content all over the world by transferring it to different servers, to avoid or otherwise limit blocks' being applied<sup>91</sup>.

#### 4.4. – Infrastructure Protection.

The right to access online information and the possibility of enjoying cultural rights with this information do not only depend on uploading or consulting online data, but also on actual IT and telematic infrastructures that allow people to use them without limits, meaning that they are prerequisites for online access.

The Internet essentially acts as a catalyst that facilitates freedom of expression and protection of human rights.<sup>92</sup>

Several countries recognize not only equal rights online and offline, but also an autonomous and generic right to access the Internet and hence the right to access and use related infrastructures.

In some cases, to prevent the right to access the Internet from being significantly bypassed through throttling systems, a minimum standard of operation for the Internet and a minimum connection speed are guaranteed, below which the right is considered violated<sup>93</sup>.

Everybody must be guaranteed the right to access infrastructures regardless of their economic or social condition in accordance with the equality principle.

<sup>90</sup> Council of Europe: "The Rule of Law on the internet and in the wider digital world", cit., p. 82.

<sup>91</sup> UN General Assembly – Human Rights Council: "Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression – Note by the Secretariat", A/HRC/35/22 of 30 March 2017, pp. 6-11, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/077/46/PDF/G1707746.pdf?OpenElement>

<sup>92</sup> UN General Assembly – Human Rights Council: "Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue", cit., p. 4.

<sup>93</sup> UN General Assembly – Human Rights Council: "Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue", ", cit., p. 18.

#### 4.5. – Issues Related to Blocks.

Internet content blocks are used to prevent certain users from accessing web-sites and platforms and thus exercising their rights, including cultural rights, or to censor and control content to protect national security, public order, health or morals.<sup>94</sup>

Blocking mechanisms raise several problems.

The criteria for choosing the content to be blocked are often unclear and are not always known to users thus violating the transparency principle.

In some cases, to improve their efficiency from a quantitative point of view, we resort to algorithms, but they can however create false positives or false negatives.

Furthermore, although legal action can be taken for violating the right of access following the use of limitations, appeals are often onerous and therefore difficult to put into practice<sup>95</sup>.

Furthermore, although specific requirements are foreseen so that the restrictive measures are considered legitimate, they are often disregarded.

The restrictions' legal basis is often vague or disproportionate. The reasons sites and content are blocked are often different from those provided for by article 19 of the International Covenant on Civil and Political Rights and the lists of blocked sites are kept secret, so that it is difficult for the injured party to take legal action.<sup>96</sup>

All this, along with an approximate indication of the unlawful content that must be the subject of restrictive measures by Internet providers, leads to uncertainty and imbalance between protecting national security and people's being able to enjoy their cultural rights.

#### 5. – *Conclusions.*

The Internet is undoubtedly the main channel for broadcasting data and information in real time everywhere.

However, although the rules governing the system are equally valid for everyone, their effectiveness varies from citizens to migrants.

<sup>94</sup> CASTELLANETA: "Libertà di espressione e internet: si diffondono interventi statali che impediscono l'accesso al web", 5 October 2017, available at: <http://www.marinacastellaneta.it/blog/liberta-di-espressione-e-internet-si-diffondono-interventi-statali-che-impediscono-laccesso-al-web.html>.

<sup>95</sup> MUIŽNIEKS, *cit. supra* note 52, *ibid*.

<sup>96</sup> UN General Assembly – Human Rights Council: "Report of the Special Rapporteur on the promotion and the protection on the right to freedom of opinion and expression, Frank la Rue", *cit.*, p.10.

For the citizens of a State, indeed, the Internet is one of many means of information and exercise of freedom of expression. All of them are equivalent to one other.

For migrants, the Internet is often *the only channel* to connect with their homeland and therefore, the only real way to exercise their cultural rights.

In this sense, an example found in recent years is shown by distributing migrant literature<sup>97</sup>, which allows migrants to express their culture with an immediacy that traditional systems do not allow.

Information and ideas can be stored on the Internet and can be divided by cultural themes making up real global cultural inheritance.

The phenomenon is increasing exponentially and is inversely proportional to the increase in restrictions on freedom of movement.

These have increased following the Covid-19 pandemic which has made it difficult, if not impossible, for migrants to keep in touch with their country and culture of origin very often.

In the same way, the Internet is a channel that can easily spread hatred and abuse of one culture about another, fake news or harmful information, allowing anyone with access to express their ideas anonymously and without filters provided by traditional means.

Therefore, preventive measures to restrict freedom of expression and information are necessary to prevent risks and dangers that may derive from an uncontrolled flow of information<sup>98</sup>, connected to the use of the Internet as a means of spreading extremist ideas by organizations, terrorists or private individuals.

Due to the continuous and rapid evolution of the Internet, content control regulation is still vague. It fluctuates between effectiveness that is not always satisfactory and sometimes too much censorship because it is based on automatic algorithm calculations rather than on well thought-out assessment.

The Internet can be thought of as a global public good<sup>99</sup>, albeit virtual, without borders. Considering the opposing interests involved the system must be consistent with the proportionality principle.

The proportionality principle can be considered as one of the most important tools to balance the possibility to exercise cultural rights on one hand and the control

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<sup>97</sup> For a complete analysis of migrant literature and its distribution PANZARELLA, "Quando le parole migrano in rete", in DI GIOVANNI, *Migranti, identità culturale e immaginario mediatico*, Rome, 2012, pp. 93 ff.

<sup>98</sup> MAZZANTI: *cit supra* note 68, p. 30 note 25

<sup>99</sup> For the concept of global public good see: *cit supra* note 30.

the flow of information in order to avoid a distorted use of them and maintain social stability<sup>100</sup>.

Internet content restrictions are an apparent paradox: information is censored to ensure the correct use of the right to information<sup>101</sup>.

This paradox is affected, sometimes excessively, by the cultural rights of migrants which, exercised through information and the expression of thought, are limited by virtue of the balance that is not always proportionate with the opposing interests of national security and public order.

In addition, it has to be considered that the cultural rights have both a link with individuals and with different communities, even if not always this dualism brings to a double protection, for example for the cultural heritage, which protection cannot be asked by individuals<sup>102</sup>.

The protection of cultural rights has to face the difficult balance in the internet regulation, that has to face both the balance of different needs and the necessity of a constant updating, often substitute by the intervention of service providers. Anyway, it is nowadays undeniable the importance of social media and internet in general to provide a place where people can express freely their ideas and access to information, with the creation (voluntary or not) of a common heritage that has to be protected.

There is a need for a complete and elastic regulation, adaptable to the constant change of needs, but in the lack of this possibility, it is at the moment particularly important the activity made by privates that control the online platforms, websites and social media, always respecting general principles and regulation.

<sup>100</sup> The Proportionality principle is aimed at avoiding the paradox of the so called “Dictatory of the Small Minority” that allows the needs of few people to condition the majority. For an analysis of the dictatory of the small minority see TALEB, “The most intolerant Wins: The Dictatorship of the Small Minority” chapter from *Skin in the Game*, Allen Lane, 2018. Chapter available at: <https://medium.com/incerto/the-most-intolerant-wins-the-dictatorship-of-the-small-minority-3f1f83ce4e15#.7ewbna5m8>

<sup>101</sup> The danger behind the non-application of restrictions is the “information overload”, in which quantity affects quality causing the impossibility for users to distinguish between authoritative sources and unverified sources. For a complete analysis of the information overload consequences see ROETZEL, *Information overload in the information age: a review of the literature from business administration, business psychology, and related disciplines with a bibliometric approach and framework development*, Bus Res 12, 2019, pp. 479 ff., available at <https://doi.org/10.1007/s40685-018-0069-z>.

<sup>102</sup> The European Court of Human Rights has not recognized the possibility for an individual to ask for the protection of cultural heritage in the case *Ahunbay et al. vs Turkey* (application n. 6080/06), judgement of 21<sup>st</sup> of February 2019. See also CASTELLANETA, “ECHR: inadmissible the application concerning the protection of cultural heritage”, 2019, available at: <http://www.marinacastellaneta.it/blog/inammissibile-il-ricorso-alla-cedu-per-la-tutela-del-patrimonio-culturale-echr-inadmissible-the-application-concerning-the-protection-of-cultural-heritage.html>.

## **Abstract**

One of the few “baggage” that a migrant brings with him is his own culture. The one to culture is indeed one of the fundamental rights recognized by international law and, at the same time, one of the main elements of diversification between human beings.

The management of cultural rights, complex in itself, has been furtherly complicated by the development of digital technologies as tools for its enrichment and vehicle for disclosure.

This paper aims to analyze the regulation and protection of the cultural rights of migrants provided by international and European law, with regard to their exercise by the Internet, in an era that can benefit of an immediate and direct access to both information and expression of ideas.

In particular, in the first part it is resumed the international and European regime pertaining cultural rights, in particular in the perspective of their universality, and of the related needs to recognize their equal exercise both offline and online.

The second part of the paper is then focused on the ways to exercise the cultural rights of migrants through the Internet, both as freedom to access to information in the host country, useful for the growth of one's cultural background, and, above all, as a right of access to information coming from the Country of origin, as a means to guarantee the preservation of the cultural heritage, which could however be jeopardized by the so-called geo-blocks.

Taking the discipline provided in by the EU law against geo-blockings as a model, the paper focuses on its possible application to the information sectors, to guarantee the access to information or online services of cultural relevance and so avoiding to restrict the freedom of expression of individuals.

It is evaluated whether the use of geoblocks can represent a real censorship to the free enjoyment of the cultural rights of migrants or an admissible measure for the fight against cyberterrorism and for the protection of national security.

## 5. DECOLONISING THE UNDERSTANDING OF 'ACCEPTABLE CULTURE'

Shilpi Pandey

*SUMMARY:* 1. Introduction. – 2. Cultural Rights in International Law. – 3. The Colonial Selectivity and Description of 'Unacceptable Culture' and the Selectivity in Defining Harmful Traditional Practices (HTPs). – 4. Migrant Women within the European Policy Framework and Jurisprudence. – 5. Liberal Feminism and the Assumed Victimhood of Migrant Women. – 6 Why Decolonise the Understanding of 'Acceptable Culture'. The Change in Discourse within the Human Rights Committee. – 7. Conclusion.

"Women and their bodies are the symbolic-cultural site upon which human societies inscript their moral order"  
Seyla Benhabib<sup>1</sup>

### 1. – Introduction.

Human rights as a group of rights hold a very high moral authority.<sup>2</sup> This moral authority becomes even more evident when these rights relate to entitlement<sup>3</sup> or from the standpoint of human rights as a representation of human capabilities.<sup>4</sup> Protection of cultural identity (including but not limited to religion) as a ground for recognizing human capability is a well-established and recognized principle of human rights.

<sup>1</sup> BENHABIB, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton, 2002, p. 84.

<sup>2</sup> NUSSBAUM, "Capabilities and human rights", *Fordham Law Review*, 66, 1997, p. 273 ff., p.273.

<sup>3</sup> The entitlement theory propagates the conception of human rights as rights attributable to humans because they are born as humans. See PAINE, *Rights of Man, Common Sense, and other political writings*, Oxford, 2008, pp. 80-85.

<sup>4</sup> NUSSBAUM, in Nussbaum et.al. (eds.), *Women, culture and development: A study of human capabilities*, Oxford, 1995 p.61 ff., p.84.

BRUNO, PALOMBINO, DI STEFANO, RUOTOLO (eds.), *Migration and Culture: Implementation of Cultural Rights of Migrants*, Rome, CNR Edizioni, 2021, ISBN 978 88 8080 301 0, pp. 105-128.

These rights reflect an extensive and important impact on the life and values of individuals in addition to the individual political identity.<sup>5</sup> Thus, the moral high ground of these rights is extremely eminent when these human rights correspond to individual belief and selfhood.<sup>6</sup>

Based on this understanding of cultural rights as an intrinsic aspect of the International human rights law regime, this paper argues that while the International human rights regime recognizes cultural and religious rights as one of the fundamental rights; this recognition has not resulted in the acceptance of all versions of cultural rights. The reason for this non-acceptance is because the existing dialogue on cultural rights is still dominated by the historic evolution of International law and its colonial origin. The dominance of a certain narrative given by the global north still resonates within all aspects of discourses relating to cultural rights. These narratives in turn have established a pattern of perception which overshadows all attempts of “mainstreaming” cultural practices of migrant women.

However, in taking this argument this paper does not want to take a position of a cultural relativist and defend all cultural practices without objective judgments. This paper specifically deals with the cultural rights of migrant women within Europe, more specifically Western Europe interchangeably referred to as European and modern liberal societies). The aim of this paper is limited to acknowledge that certain colonial legacy and bias is the reason why certain cultural practices cannot be mainstreamed within modern liberal societies. To do so the paper will question the underlying assumption regarding cultural practice and their historical origins which deny any justification of those practices and reduce the status of migrant women to a mere victim of their own culture.

Although great value has been attached to the global debate on the issue of migration and protection of migrant rights, the issue of cultural rights of migrant women has become an increasingly difficult one to answer. Between the theories of universally accepted human rights and the argument of cultural relativism, it is becoming very difficult to create a balance between cultural diversity and the protection of the universality of human rights at a global level. This is because while the universality of human rights is not very controversial, what is problematic is how such universalism is also attached to the universal character of the norms themselves.<sup>7</sup>

<sup>5</sup> BLOSS, “European Law of Religion-organizational and institutional analysis of national systems and their implications for the future European Integration Process”, *Jean Monnet Working Papers*, 13/03,(2003), p. 7.

<sup>6</sup> See NUSSBAUM, cit. *supra* note 2, p. 277.

<sup>7</sup> DONDEERS, “Do cultural diversity and human rights make a good match?”, *International Social Science journal*, 61.199, 2010, p.16, ff., pp.15-35.

One of the main critiques of the notion of universality of human rights is the fact that in light of the undeniability of the existence of multiple cultures and traditions; how do we define a universal standard of acceptable modes of governance and individual rights without denying the existence of cultural diversity?

While this paper acknowledges the multitudes of nature of cultural rights it narrows down its focus to the issue of religious identity of migrant women within the purview of cultural rights as prescribed and recognized under the International Human Rights Law regime. In doing so this paper specifically emphasizes on the ongoing controversies of cultural rights of migrant women within a number of European countries (hereinafter referred as European Countries). One of the main issues in cultural rights debate of migrant women has been the issue of policies banning the wearing of various forms of the headscarf (for the purpose of this paper this reference is also relating to *jibab*, *hijab*, *niqab*, *burqa* and *full-face veil*) in a number of European Countries. (based on the argument that all these objects share the common nexus of representing a religious identity falling within the purview of cultural rights).

Based on the argument that within Western Europe, the *headscarf* has become the site for negotiating postcolonial differences relating to immigrant women,<sup>8</sup> this paper particularly focuses on this specific issue.

In doing so this paper wants to explore that there is a colonial nexus between existing International law, regional European policies, and liberal feminist theory on the issue of the definition of what constitutes as 'acceptable culture'. A definition that is based on the hegemonic project of the colonial agencies. Thus, in light of this historical background, it is important to change the narratives of 'acceptable culture' to decolonise its understanding for mainstreaming cultural rights of migrant women to ensure their rights in modern liberal democracies.

To begin a process of such a change in the narrative we need to understand how a certain version of culture became the civilised one while the others remained at the periphery waiting to undergo the process of civilisation.? Before going into this discussion, it is indispensable to understand the evolutionary history of cultural rights within International Law.

## 2. – *Cultural Rights in International Law.*

The importance of cultural rights can be easily derived from the fact that they form one of the five categories of rights recognised in the work of the United Nations

<sup>8</sup> KORTEWEG, YURDAKUL, "Liberal feminism and postcolonial difference: Debating headscarves in France, the Netherlands, and Germany", *Social Compass*, 2020, p. 3 ff., pp. 1-20.

Treaty Bodies.<sup>9</sup> However, in lack of a concrete definition of what constitutes culture it has to be seen from its objective (such as language, religion, or customs) and subjective (shared attitudes of thinking, acting, etc.) manifestation.<sup>10</sup> Based on such extensive interpretation of culture it is to be considered to include (amongst others) the right to self-determination, freedom of thought, religion, and association.<sup>11</sup>

Protection of culture has been a part of the International Human Rights Law since 1949 when the Universal Declaration of Human Rights was adopted and it included Article 27 regarding the protection of 'cultural rights'. These rights have been extensively recognised in the work of the United Nations Treaty Bodies.<sup>12</sup> The historical context of the development of these treaties is relevant to understand the evolution of cultural rights in International Law. In the context of a conflict between liberal democracies and communist bloc; and their respective interest in protecting civil and political rights on one hand and economic and social rights on the other the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Convention on Civil and Political Rights (ICCPR) came into being.<sup>13</sup> Through this historical evolution, ICESCR became one of the core instrument with an explicit mandate for cultural rights in its title.<sup>14</sup>

The provision on cultural rights is considered to be generally inspired by Article 27 of the UDHR which provides 'the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits' as well as 'the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' In addition, another important aspect of International Law regarding the protection of cultural rights is found under Article 27 of the ICCPR. It is considered to be one of the most widely accepted and legally binding provisions on the rights of minorities and includes the protection of minorities' rights to enjoy their own culture and practice their religion.<sup>15</sup> There has been an increasing acceptance of the importance of cultural rights as a representative of individual identity.<sup>16</sup>

<sup>9</sup> DINSTEIN, "Cultural Rights", *Israel Yearbook on Human Rights*, 1979, p. 58 ff., pp.58-81.

<sup>10</sup> See DONDEERS, cit. *supra* note 7.

<sup>11</sup> MARKS, in *Defining Cultural Rights*, in Bergsmo (ed.), *Human Rights and Criminal Justice for the Down-trodden, Essays in Honour of Asbjorn Eide*, 2003, p. 293 ff., pp.299-300.

<sup>12</sup> See DINSTEIN cit. *supra* note 9.

<sup>13</sup> CHOW, *Cultural Rights in International Law and Discourse: Contemporary Challenges and Interdisciplinary Perspectives*, Brill, 2018, p. 97.

<sup>14</sup> *ibid*, p. 98.

<sup>15</sup> United Nations Human Rights Office of the High Commissioner, *International Standards on Minority Rights*, available at: <https://www.ohchr.org/en/issues/minorities/srminorities/pages/standards.aspx>.

<sup>16</sup> VRDOLJAK, "Liberty, Equality, Diversity: States, Cultures and International Law", in Vrdoljak (ed.), *The cultural dimension of human rights*, Oxford, 2013, p. 26.

The Committee on Economic Social and Cultural Rights (CESCR) for the implementation of the ISESCR was established in 1986.<sup>17</sup> However, there was little attention given to the rights envisaged under Article 15 until the 1990s when the '1990 Revised Guidelines' were issued where certain obligations were put on states including the '[p]romotion of cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions.'<sup>18</sup> Resulting in putting a duty on the states to respect and protect the rights of minorities to manifest their identities.<sup>19</sup> As a result right to cultural identity has taken a central place in both Article 15 of ICESCR and Article 27 of the ICCPR.<sup>20</sup>

The importance of protection of cultural identity can also in General Comment No. 23 on Article 27 of the ICCPR which establishes that language, religion, and cultural distinctiveness are core features constituting the identity of individuals, and groups.<sup>21</sup> An approach which was further confirmed in the case of *Ballantyne v Canada*<sup>22</sup> where the Human Rights Committee (HRC) acknowledged that for the preservation of cultural identity, the freedom and capacity of a group to manifest its cultural features such as ethnic character, religion and language need to be preserved.<sup>23</sup>

The significance of the right to cultural identity is also seen in the independent expert report of the Human Rights Council on the issue. Within the multitudes of cultural rights which are protected by the treaty bodies under the umbrella of International law, the independent expert in her first report of the Human Rights Council submitted in June 2010, undertook to investigate which human rights may be considered cultural and further defined the scope of cultural rights, in absence of an official definition of cultural rights. Within this document, the expert found that cultural rights also relate to identity and belonging to multiple, diverse, and changing communities of shared cultural values among many other related rights described as cultural rights.<sup>24</sup>

Beyond the above-mentioned instruments of International law to protect cultural rights, another important addition to this line of instrument is done in the form

<sup>17</sup> See DONDERS, cit. *supra* note 7, p. 15.

<sup>18</sup> UN Committee on Economic Social and Cultural Rights, *Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by State Parties under Articles 16 and 17 of the International Convention on Economic, Social and Cultural Rights*, UN Doc E/C.12/1990/8 (1990), Annex iv, p. 108. As cited in *ibid*.

<sup>19</sup> *ibid*. p.139.

<sup>20</sup> *ibid*.

<sup>21</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), CCPR/C/21/Rev.1/Add.5, (1994), para. 9.

<sup>22</sup> Human Rights Committee, *Ballantyne, Davidson, McIntyre v Canada*, Views of 5th May 1993, UN Doc CCPR/C/47/D/359/1989.

<sup>23</sup> *ibid*.

<sup>24</sup> SHAHID, Report of the independent expert in the field of cultural rights, A/HRC/14/36 (2010) p. 8.

of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on Elimination of all Forms of Racial Discrimination (CERD).<sup>25</sup> CEDAW plays an extremely important role in establishing the rights of women within International law instruments. Article 1 of the CEDAW categorically recognizes discriminations as "any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field".<sup>26</sup>

Evidently, there exist a number of International law instruments which ensure that cultural rights are protected and supported within the International human rights law regime. However, problems begin when this human rights regime is analysed in terms of how the description of culture has been shaped within the International human rights law regime based on how certain norms regarding culture are considered universally acceptable and others are seen as sites that need to be reformed.

The importance of cultural rights is clear and evident in how policies regarding their protection have evolved within International Law. However, these rights are not absolute and are subject to certain limitations. Article 29 (2) of the UDHR provides the general framework for such limitations and states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."<sup>27</sup> Article 29 (3) further qualifies the limitations in the following clause: "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."<sup>28</sup> The limitation criteria of the general welfare of the democratic society is also included within Article 4 of the ICESCR.<sup>29</sup>

Looking at the criteria set out in these limitations renders a wide manoeuvring space for a state to limit cultural rights as the term "for the general welfare" is vague. Thus, the question arises on what kind of cultural practices and activities can be limited by a state. Hence it has been suggested that:

<sup>25</sup> UN Convention on the Elimination of all Forms of Discrimination (CEDAW), UN Doc. CEDAW/C/GC/30 (1979); UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (CERD) United Nations, 1969.

<sup>26</sup> *ibid.* CEDAW Art. 1.

<sup>27</sup> Universal Declaration of Human Rights (UDHR), UNGA Res 217 A(III), 1948, Art. 29.

<sup>28</sup> *ibid.*

<sup>29</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, 1966, Art. 4, p. 3.

“An appropriate criterion could therefore be that cultural practices should not be in conflict with the value of human dignity and the internationally accepted norms of human rights.”<sup>30</sup>

Based on this suggestion, it is important to understand the history and evolution of ‘acceptable norms’ in International law and how the process of colonialism has contributed to define and describe these norms.

### 3. – *The Colonial Selectivity and Description of ‘Unacceptable Culture’ and the Selectivity in Defining Harmful Traditional Practices (HTPs).*

From the discussion in the previous section of this paper, a significant observation can be made regarding the limitation clause which is essentially related to the “accepted norms” of morality in modern democratic societies. However, these norms themselves have evolved over a period of time under the shadows of the process of evolution International law and are assumed to be universal based on the historic origin of International law. Within the International Human Rights regime, the notion of looking at traditional cultural practices as being harmful to women and children began as early as 1956 and eventually has become widely recognised as ‘harmful traditional practices’ (HTPs).<sup>31</sup>

The colonial origin of International law has been widely discussed in the discourse of the legitimacy of International law and resulted in a new school of thought within the domain of International law namely Third World Approaches to International law (TWAIL) which has grown as a critical scholarly network since the 1990s.<sup>32</sup> In this regard within the TWAIL scholarship the following statement gives an insight into how TWAIL recognizes the colonial origins of International law:

“Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but also has drawn its vital essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin”.<sup>33</sup>

<sup>30</sup> See DONDEERS, cit. *supra* note 7, p.18.

<sup>31</sup> UN Office of the High Commissioner for Human Rights (OHCHR), “Harmful Traditional Practices Affecting the Health of Women and Children”, Fact Sheet No. 23 (1979).

<sup>32</sup> GATHII, “TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography”, *Trade Law & Development*, 3, 2011, p. 26. ff., pp. 26-64.

<sup>33</sup> VERZIJL, *International Law in Historical Perspective: State Succession*, Martinus Nijhoff Publishers, 1974, p.435, ff., pp. 435-436.

The statement is the main premise on which this research is based, and it situates itself within TWAIL to show how the concept of cultural differences has defined the existing policies on cultural rights. Moving beyond the traditional idea of International Law as an instrument establishing ‘order among sovereign states’, renowned TWAIL scholar Antony Anghie writes that the role of non-European societies in the evolution of International law can be better understood in terms of the problems of cultural differences.<sup>34</sup> Thus, International law has to be seen as an instrument which tries to establish order among entities belonging to different cultural systems giving rise to the ‘dynamic of difference’.<sup>35</sup>

This ‘dynamic of difference’ is a direct corollary of the orientalist hegemonic project which established a knowledge based on their own experience of cultural, and economic dominance across the Orient. In doing so they created dichotomies of ‘the other’ which needed to be saved, educated, and emancipated. This description is still ongoing in how the orientalist project perceives ‘the other’. Muslim being at the centre of this description as these descriptions are directly based on religious accounts denying any other social, economic, or political features of the orient.<sup>36</sup> I want to argue that in its interaction with acceptance of cultural rights, the International law project has based its assumptions on this ‘dynamic of difference’ and othering of the non-Western cultures. According to the view expressed by Koskenniemi, all existing concepts which form the basis of International Law and provide the distinctions ‘point to European experiences and conceptualisation’ and ensure that ‘even if postcolonialism has now become international law’s official ethos, it remains the case that “Europe rules as the silent referent of historical knowledge’.<sup>37</sup>

Analysing the description of the concept of ‘Harmful Traditional Practices’ (HTP) in light of these observations on the colonial origins of International Law, we can, possibly, find certain narratives which were the guiding force in how traditions and cultures were perceived and categorized within the purview of International Law. The concept of HTP is an important instrument in how traditional practices in numerous cultures were portrayed in International law and the work of UN treaty bodies. The focal point in defining HTP was the practice of Female Genital Mutilation (FGM) which underwent a series of debates since the advent of the period of decolonisation till the 1990’s when it was formally recognised as an HTP in Fact Sheet No. 23.<sup>38</sup>

<sup>34</sup> ANGHIE, “The evolution of international law: Colonial and postcolonial realities”, *Third World Quarterly*, 2006, p. 739, ff., pp.739-753.

<sup>35</sup> *ibid.* p. 742.

<sup>36</sup> SAID, *Orientalism*, New York, 1978, pp.1- 4.

<sup>37</sup> KOSKENNIEMI, *Histories of international law: dealing with eurocentrism*, 2011, pp. 152-176.

<sup>38</sup> See Fact Sheet No. 23, cit. *supra* note 31.

The Fact Sheets states and includes an obligation that:

“States Parties shall take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

This obligation of modifying the cultural pattern of conduct to achieve the elimination of prejudices and customary and all other practices has an extremely wide purview and can extend to a wider variety of cultural practices which may be assumed to be harmful for women but have no real basis for such assumptions. In addition, it is relevant to understand why the understanding and definition of HTP have been criticized.

The UN definition of HTP can be summarized as practices which are either causing health damage to women and girls, or practices in favour of men or creating stereotypical roles for sexes justified by either tradition or culture.<sup>39</sup> The category of HTP's is generally considered to include practices such as FGM, dowry, early pregnancy, son preference et al. However, it is important to note that most practices included within the category of HTP in mostly limited to practiced prevalent in non-Western countries. However, in doing so the UN Factsheet on HTP disregards and completely denies any existence of HTP in the West apart from domestic violence.<sup>40</sup> This argument has found support in numerous scholars such as the works of Sheila Jeffreys where she gives critical observations on how the practices in the West based on defined beauty standards and misogyny can also constitute 'harmful cultural practices.'<sup>41</sup>

The distinct approach of the UN is defining the scope of what constitutes HTP suggests a hierarchical distinction between 'Western' and 'non-Western'. As in clear from the following statement made by Wynter in her observation regarding HTPs

“What concerns us about this UN focus on non-western societies is that it gives the impression that the metropolitan centres of the West contain no 'traditions' or 'culture' harmful to women, and that the violence which does exist there is idiosyncratic and individualized rather than culturally condoned.”<sup>42</sup>

<sup>39</sup> WINTER, THOMPSON, JEFFREYS, “The UN approach to harmful traditional practices.”, *International Feminist Journal of Politics*, 4.1, 2002, p. 72 ff., pp. 72-94.

<sup>40</sup> *ibid.*

<sup>41</sup> JEFFREYS, *Beauty and misogyny: Harmful cultural practices in the West*. Routledge, 2014, p.2.

<sup>42</sup> See WINTER (et al.), cit. *supra* note 39, p. 72.

Taking this obligation as an instrument for establishing gender equality, it is even more relevant that in the overt exclusion of any Western practices within the ambit of HTPs is a direct legacy of colonialism. The origin of HTP's is clearly indicative of this fact as HTPs formed a part of the UN agenda in light of the practice of FGM as considered by colonial agencies. Consequently, the description of the other as 'uncivilised' and West's conception of its own culture being the embodiment of 'civilisation' became a part of the International standards of defining what constitutes acceptable culture and what needs to be modified in the civilised world to be accepted.<sup>43</sup>

This distinction of Western and non-Western is evident in how there is a differentiation between the 'modern' and 'traditional' (or 'cultural') made in the 1994 Preliminary Report of the UN Special Rapporteur on violence against women, which describes 'modernity' as the only possible solution to bring about improvements in the condition of women otherwise belonging to 'traditional' societies.<sup>44</sup> Thus, in the evolution of International Law, a specific vocabulary similar to the one used during the European expansion through colonialism can be seen. For example, terms such as 'progress' 'modernity' 'humanity', and 'civilisation' have been the benchmark for assessing the subjects of colonialism.<sup>45</sup>

Based on this narrative, The UN approach to the issue of ban *face-coverings* in France becomes an example amongst numerous other dichotomies of 'tradition' vs 'modernity' and the quest for the emancipation of women in modern societies. The UN approach on the issues also suggests that in light of these 'traditional' practices migrant women who identify with religion and culture cannot be emancipated unless they evolve through the process of modernity.

This was seen in the decisions of the UN bodies regarding the policies banning religious clothing of Muslim women where the CEDAW and CERD regarded that such a ban does not violate human rights principles.<sup>46</sup> The observation was made in light of the French Law enacted to amend the Educational Code which prohibited the ostentatious wearing of religious clothing or symbols in public schools.<sup>47</sup> The justification of the Law was presented to be secularism and gender equality.<sup>48</sup>

<sup>43</sup> See WINTER (et al.), cit. *supra* note 39, p. 79.

<sup>44</sup> *ibid.* p. 76.

<sup>45</sup> ESLAVA, PAHUJA, "Beyond the (post) colonial: TWAIL and the everyday life of international law", *Politics in Africa, Asia and Latin America*, 2012, p.196 ff., pp. 195-221.

<sup>46</sup> See *supra* note 25.

<sup>47</sup> LOI n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.

<sup>48</sup> *ibid.*

The justification of gender equality has been a consistent argument in all policy matters regarding migrant women. This goal is also clearly included within Article 5 of the CEDAW which provides that:

“States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women...”

A reading of this provision reflects a general obligation on the state to promote gender equality amongst all citizens. However, it is clear that most of these policies are directed towards migrant women. As illustrated above, the selective nature of enactment of these policies, and the target audience who need emancipation clearly show the dichotomy of colonial descriptions of ‘modern’ and ‘traditional’.

Discussing the legal strategies for ensuring equality of women under the CEDAW; Penelope Andrews writes:

“legal strategies adopted to achieve equality under the CEDAW model are premised on liberal assumptions that do not exist in large parts of the globe.... CEDAW advances a secular vision of individual rights enforcement and as a result could be limited in contexts of deeply entrenched cultural and religious mores.”<sup>49</sup>

The next part of the paper elaborates this argument in the context of Europe and its interaction with migrant women.

#### *4. – Migrant Women within the European Policy Framework and Jurisprudence.*

Within western liberal democracies (including Europe) individual autonomy of belief (religious or otherwise) and selfhood form one of the cores of the human rights regime.<sup>50</sup> Therefore, the discourse on religious rights prescribes the rights of individuals by creating a duty of tolerance towards religious identities and cultural

<sup>49</sup> ANDREWS, “Women's human rights and the conversation across cultures”, *Albany Law Review*, 2003, p. 610 ff., pp. 609-616.

<sup>50</sup> See NUSSBAUM, cit. *supra* note 2.

differences.<sup>51</sup> This is specifically seen within the conception of modern liberal democracies wherein the state's political aspirations include the issue of individual autonomy at its centre.<sup>52</sup>

It is important to note that in the European regional instrument, the right to cultural identity has been not directly addressed. However, the protection to cultural identity is provided under Article 8 (right to freely choose a cultural identity) and Article 9 (right to religious identity) of the ECHR.<sup>53</sup> Yet, there is a certain degree of conflict in the accommodation of these rights when relating to migrant women (particularly belonging to the Muslim faith).

These conflicts are caused due to two sets of policies pursued within the European framework namely assimilation and state neutrality in terms of religion which are interrelated. Assimilation reflects that the conception of goods is based on an aggregation of majority preferences<sup>54</sup> which transforms in the need of *assimilation* of minorities to resemble the majority conception of 'good'.<sup>55</sup> Two points become evident from this analysis, firstly the rights of minority populations are being conceived in how they interact with the majority's perception of modern society. Secondly, the neutrality of a state in terms of religion has been extended to demand religious neutrality of individuals. This becomes problematic explicitly when we talk about the religious identity of migrant women within Europe. The process of secularisation of individuals is evident in a number of European countries through attempts of civic integration and harmonisation of individual identities to fit within modern European identity.<sup>56</sup>

This *assimilation* finds its justification within the limitation clause stipulated within Article 9 of the European Convention on Human Rights (ECHR) which guarantees freedom of thought, conscience and religion subject to public safety, order, health, morals or for the protection of the rights and freedom of others. A clause which is similar to the limitation clause provided with the UDHR.<sup>57</sup> Migrant women

<sup>51</sup> ADAMS IV, "A Human Rights Imperative: Extending Religious Liberty Beyond the Border", *Cornell International Law Journal*, 2000, p. 2 ff., pp. 1- 66.

<sup>52</sup> MCCONNELL, "God is Dead and We Have Killed Him: Freedom of Religion in the Post-Modern Age", *The Brigham Young University Law Review*, 1993, p.166 ff., pp. 163-188.

<sup>53</sup> *Cultural rights in the case-law of the European Court of Human Rights*, (2017), available at: [https://www.echr.coe.int/Documents/Research\\_report\\_cultural\\_rights\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf).

<sup>54</sup> WHEATLEY, "Deliberative democracy and minorities", *European Journal of International Law*, 2003, p. 509 ff., pp. 507-527.

<sup>55</sup> *ibid.*

<sup>56</sup> MANCINI, "The power of symbols and symbols as power: Secularism and religion as guarantors of cultural convergence", *Cardozo Law Review*, 2008, p. 2629 ff., pp. 2629-2668.

<sup>57</sup> ZALNIERIUTE, WEISS, "Reconceptualizing Intersectionality in Judicial Interpretation: Moving Beyond

have been subject of numerous policy frameworks in terms of the presence of their religious identity in the public sphere. Hence, the question of rights of migrant women has been at the forefront in a number of Western European countries, where the individual religious and cultural identity of migrant women have consistently been assumed to be in conflict with the representation of a modern liberal society. One of the main issues in these debates has been the issue of the *head scarf ban* which began as a policy decision in France in the early 2000s and has since gained support across a number of European Countries.<sup>58</sup> Resulting in a number of human rights violation case in the European Court of Human Rights (ECtHR). However, its essential to understand how these cases have been dealt with by the ECtHR in order to create an understanding of the existing conflict of migrant women and their rights relating to cultural identity in modern European societies.

These Articles have been the main point of contention in several cases brought before the ECtHR. The ECtHR formally recognizes the Freedom of thought, conscience, and religion guaranteed under Article 9 of the convention to be an important instrument to protect and preserve minority identities in both public and private sphere, in working, teaching, practice, and observance.<sup>59</sup> Despite this recognition, the issue of the headscarf has been a contentious one in the jurisprudence of the ECtHR.

As mentioned, the issue of the headscarf has become of paramount importance in describing the conflict of migrant women and their cultural rights within Europe. In this discourse, in most recent times, one of the most discussed cases in this regard has been in the cases of *SAS v France* (hereinafter referred as SAS),<sup>60</sup> followed by *Belkacemi* and *Oussar v Belgium* (hereinafter referred as the *Belkacemi*)<sup>61</sup> and *Dakir v Belgium* (hereinafter referred as the *Dakir*).<sup>62</sup> These three cases give an insight into how a ban on *burqa* been considered in the jurisprudence of the ECtHR. In finding that the bans were justified in light of the justification of 'living together' in modern democracies. In their finding, the ECtHR found that the practice of wearing the face veil is incompatible with "the modalities of social communication, and more generally the establishment of human relations indispensable for life in society."<sup>63</sup>

This notion of 'living together' as a justification to restrict freedom of expressing cultural identity, reflects a certain approach towards migrant women which are

Formalistic Accounts of Discrimination on Islamic Covering Prohibitions", *Berkeley Journal of Gender, Law and Justice*, 2020, p. 78 ff., pp. 71 - 90.

<sup>58</sup> THOMAS, MODOOD, *Country Report: France*, European University Institute, 2019.

<sup>59</sup> *ibid.*

<sup>60</sup> ECtHR, *SAS v France*, Application no. 43835/11, judgment of 1<sup>st</sup> July 2014.

<sup>61</sup> ECtHR, *Belkacemi and Oussar v Belgium* Application no. 37798/13, judgment of 11 July 2017.

<sup>62</sup> ECtHR, *Dakir v Belgium* Application no. 4619/12, judgment of 11 July 2017.

<sup>63</sup> *ibid.*

based on how cultural differences are perceived by the majority and their descriptions of migrant women. The judgment of the ECtHR has resulted in defining the practice of expression of a specific cultural identity to be in conflict with the values of Western civilisation.<sup>64</sup>

To understand the extent of the acceptance of the notion of ‘living together’ it can be useful to look at the Parliamentary Assembly of the Council of Europe adopted Resolution 2076 in October 2015. The assembly poses a fundamental duty on religious authorities to “*to promote the shared values and principles which underpin ‘living together’ in our democratic societies.*”<sup>65</sup> While non-binding in nature the resolution still provides legitimacy to the ban cultural practices of the migrant population so that they can adopt an identity which is conducive to the idea of ‘living together’ in European societies. The justification for this resolution is presented in the form of the purpose of the resolution which is to ensure mutual recognition and solidarity, respect for human dignity, human rights, the rule of law and, non-discrimination.<sup>66</sup> However, the resolution goes further to also include goals such as the fundamental rights of others” but also with “the right of everyone to live in space of socialisation which facilitates living together”.<sup>67</sup>

Apart from the judicial interpretation of the policies, it is also relevant to understand the basis of such policies on *assimilation* and civic integration of migrant women. In this context, the integration policies of the Netherlands and France have been at the centre of these discussions.<sup>68</sup> An analysis of these policies reveals a common recognizable pattern on the issue of legal pluralism and the rights of minority migrant women which presumes gender oppression and violence to be a direct result of the religious and cultural identity of the migrant women.<sup>69</sup>

The extent of this pattern of describing migrant women and the impact of such a description has been substantial; to the point where migrant women are portrayed as victims without the power of free will or agency to decide or enact their own identity hence resulting in ‘death by culture’; a concept described by Leti Volpp. In her explanation of this phenomenon, she connects this concept with how immigrant and minority women populations are considered to be mere victims of a peculiar

<sup>64</sup> BREMS, VRIELINK, CHAIB, “Uncovering French and Belgian face covering bans”, *Journal of Law’ Religion and State*, 2013, p. 77-88 ff., pp. 69-99.

<sup>65</sup> Parliamentary Assembly of the Council of Europe, Resolution 2076 [2015] [1], available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22199&lang=en>

<sup>66</sup> *ibid.*

<sup>67</sup> *ibid.*

<sup>68</sup> FARRIS, “Dispossessing the private sphere? Civic integration policies and colonial legacies”, *Darkmatter*, 14.2, 2016, p. 2 ff., pp. 1-19.

<sup>69</sup> *ibid.*

nature of violence which is perceived to have a direct nexus with religious and cultural identity.<sup>70</sup> The colonial truth of this narrative becomes clear when we see that while describing a scene of domestic violence from the majority community it is considered to be an act done by an individual and without any cultural connotation but a similar case in the minority community is considered to be a cultural phenomenon designed to structural subjugation of women.<sup>71</sup> This description of one culture as a site of violence is reflective of the 'dynamic of difference' which is consistently used to describe non-Western cultures.<sup>72</sup>

However, this narrative of migrant women being a victim of their own culture creates a conflicting position of two distinct conceptions; on the one side culture and religion and the other human rights and gender equality.<sup>73</sup> This being said, it appears that these two conceptions cannot coexist in modern liberal societies based on the existing narrative taken to describe migrant culture. An incongruity which does not find acceptance within the existing discourse on cultural rights in International Law and the prohibition on such cultural practices are considered to be justified to pursue the goals of women emancipation and gender equality.<sup>74</sup>

However, the selective approach of the policies enacted in pursuit of the emancipation of women and gender equality especially because no such policies regarding non-migrant women are deemed to be necessary. Clearly indicating that the policies enactment is directly related to the colonial discourse of 'the other' and the need of the civilisation process of these 'others'.

Furthermore, the notion of 'living together' for the purpose of "rights of others" and "non-discrimination" as well as the policies of *assimilation* and integration appear to be problematic in terms of the position of migrant women in the society. For example, if the purpose is to "mainstream" certain cultural practices, the role of law and its impact on social movements is highly relevant.<sup>75</sup> In denying the migrant women their right to wear a *headscarf* or *burqa* can result in further isolation of

<sup>70</sup> VOLPP, "Feminism versus multiculturalism", *Columbia Law Review*, 2001, p. 1181 ff., pp. 1181-1198. (While the article refers to the Western culture in the form of American Culture, it is clear that such perceptions also exist in the wider West which includes societies based on liberal values of democracy, human rights and individual autonomy). This argument was published earlier in PANDEY, "The Spirit of 'Living Together': Gender, Secularization, Perceptions and the Survival of Multiculturalism", *Juidische Meesterwerken VUB 2017-18*, 2020, pp. 72-80 ff., pp. 63-102.

<sup>71</sup> *ibid.*

<sup>72</sup> See ANGHIE, cit. *supra* note 34, p. 739.

<sup>73</sup> BUCHLER, "Islamic Family Law in Europe-From Dichotomies to Discourse-Or: Beyond Cultural and Religious Identity in Family Law", *International Journal of Law in Context*, 2012, p. 208 ff., pp. 196-210.

<sup>74</sup> See *supra* note 25.

<sup>75</sup> SCHEINGOLD, *The politics of rights: Lawyers, public policy, and political change*, Michigan, 2010.

migrant women, which defeats the whole purpose of ‘living together’, as a number of Muslim women had decided or were forced to limit their social life significantly.<sup>76</sup>

For example Open Society Foundations study on the impact of the French ban on *full-face veil* ‘Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France’ describes that the ban considerably negatively affected the physical and mental well-being of these women resulting in further isolation in light of cases of physical assault and public harassment.<sup>77</sup> In more recent news a 20 year old woman wearing a *hijab*, who posted her cooking videos for college students was termed as terrorist on Twitter and forced to remove the video in light of such allegations. Allegations which were not only put out by young students but known politicians.<sup>78</sup>

Arguably, the narratives of migrant women based on a historical understanding of the other in the dynamic of difference between the ‘traditional’ and ‘modern’ have had an impact on how policies on and decision on migrant women have been evolving. However, these policies are not only influenced by legal or political discourse but the sociological discourse on migrant women specifically one presented in liberal feminist theory has also influenced the description of migrant women and their cultural rights.

### 5. – *Liberal Feminism and the Assumed Victimhood of Migrant Women.*<sup>79</sup>

The role of the liberal feminist movement in defining migrant women as mere victims of their own culture is an important point of reference. Liberal feminism has been consistently in conflict with the notion of multiculturalism as it has been consistently working on the agenda of liberating migrant women to ensure they can take part in the “progressive” social customs of the West.<sup>80</sup> In this regard, the issue of the headscarf has been a central premise of such a liberation agenda. which establishes

<sup>76</sup> ECtHR, *Fouzia Dakir v. Belgium*, Application No. 4619/12. Written submission by the Human Rights Centre of Ghent University, available at: <https://hrc.ugent.be/clinic/third-party-interventions-before-ecthr/>.

<sup>77</sup> Open Society Foundation, *Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France*, 2011, available at: <https://www.opensocietyfoundations.org/publications/unveiling-truth-why-32-muslim-women-wear-full-face-veil-france>.

<sup>78</sup> Politico, *Advice on cheap meals cooks up a racism storm on French Twitter*, 17 September, 2020, available at: <https://www.politico.eu/article/how-advice-on-cheap-meals-cooked-up-a-racism-storm-on-french-twitter-muslim-headscarf-france-racism/>.

<sup>79</sup> See PANDEY, cit. *supra* note 70.

<sup>80</sup> See VOLPP, cit. *supra* note 70, p. 1181.

Western women as the epitome of individual sovereignty and Muslim women as mere victims of their culture and religion.<sup>81</sup>

Clearly, there is a direct nexus between the agenda of liberal feminism in the emancipation of migrant women and the colonial historical background of how Western and non-Western cultures are categorized in the system of International Law which also works on the assumption that modernity is the only solution for the emancipation of women.<sup>82</sup> Thus, the headscarf has become an important symbol which is reflective of an extension of violence of coloniser in colonial history.<sup>83</sup> In assuming the position of Western women of that of a liberated individual and migrant women as the victim; there is a denial of any other possible way of being civilised or liberated for migrant women.<sup>84</sup> Such a denial is in direct conflict with acknowledgment of the reality of cultural diversity and is also evidence of a certain degree of discomfort of culture.

This discomfort of culture is so assertive for some liberal feminists that it has been suggested that the only way of the emancipation of migrant women is either the extinction of the culture itself or the internal alternation of cultures to modify itself to include and propagate women equality.<sup>85</sup> The extent of presumption of 'victimhood' of migrant women in the above suggestions shows the stance of liberal feminism and how it defines 'the other' non-Western women as mere subjects of a culture in contrast to the liberated Western women.<sup>86</sup>

The purpose of presenting this argument is to establish the nature of patronisation that policies and discourse on migrant women and their cultural practices take and the colonial foundation of such an approach towards 'the other' within modern liberal democracies. For example, denying the possibility that even a migrant woman with a distinct cultural identity can still be liberated in her own rights and definition of individual identity is indicative of this approach. Specifically, when all these policies target one specific cultural identity. An approach which has been instrumental in defining the scope of cultural rights of migrant women in Europe.

The idea of migrant women as victims who lack agency to make informed choices has been so prevalent that they have even been excluded from the process of decision-making regarding their own cultural identity. For example, while the proceedings on making a policy decision on *veils* were ongoing in French Parliament,

<sup>81</sup> MOHANTY, "Under Western eyes: Feminist scholarship and colonial discourses", *Feminist review*, 30.1, 1988, pp. 61-88.

<sup>82</sup> See WINTER, cit. *supra* note 39, p. 76.

<sup>83</sup> ASAD, *Genealogies of religion: Discipline and reasons of power in Christianity and Islam*, JHU Press, 2009.

<sup>84</sup> OKIN, *Is multiculturalism bad for women?*, Princeton, 1999.

<sup>85</sup> *ibid.*

<sup>86</sup> See VOLPP, cit. *supra* note 70 p. 1183.

the commission appointed to advise the decision consisted of 200 “experts” out of which only was a wearer of a *niqab*.<sup>87</sup> The rejection of the power of agency and exclusion from policy-making process of migrant women does indicate the superiority with which migrant women are seen as a site for reform or liberation.

All these arguments and decision-making processes essentially deny all forms of agency that a Muslim migrant woman can have regarding her own identity. However, these policy decisions and emancipation drives for migrant women tend to overlook the power and agency that a number of headscarves wearing migrant women intend to establish. For example, several Muslim women now wear the headscarf as a representation of the politics of refusal.<sup>88</sup> It offers them an opportunity to embrace self-determination of their own bodies, recognise the path of postcolonialism, and demand rights of inclusion as full citizens within Europe.<sup>89</sup>

Migrant women as ‘traditional’ and the Western women as ‘modern’ show the inherent flaws in understanding of a culture. For example; no such emancipation is deemed necessary for young adults who decide to follow Catholic religion and live a monastic life. In contrast are migrant women belonging to Muslim traditions an infantilized based on claims of emancipation lack of agency.<sup>90</sup>

Thus, migrant women are progressively resembling a symbolic-cultural site of moral order in modern European societies.<sup>91</sup> This approach of liberal feminism is reflective of a deeply complex interaction of colonialism and how it has impacted all aspects of our existence including the understanding of being liberated as a woman or being culturally civilised. Deriving arguments presented in the section on HTPs, it is clear that a central approach in perceiving migrant woman is based on the idea that women belonging to non-Western cultures are victims and do not possess the power of choice that their Western counterparts simply because they belong to the ‘civilised’ Western societies.

In light of the above discussion, it is clear that the approach of liberal feminism towards migrant women is based on a colonial consciousness which represents women in all other cultures except Western culture as mere victims of a patriarchal

<sup>87</sup> BOUTELDJA, “France vs. England”, in Brems (ed.), *The Experience of Face Veil Wearers in Europe and the Law*, Cambridge, 2014, p.115.

<sup>88</sup> EMEJULU, “Notes from a catastrophe”, in Proceedings of the keynote address, European conference of politics and gender, Amsterdam, 4–6 July 2019, available at: [https://standinggroups.ecpr.eu/gender/?page\\_id=343](https://standinggroups.ecpr.eu/gender/?page_id=343).

<sup>89</sup> KORTEWEG, YURDAKUL, *The Headscarf Debates Conflicts of National Belonging*, Stanford, 2014.

<sup>90</sup> LI, VAN DE VELDE, in Brems (ed.), cit. *supra* note 87.

<sup>91</sup> See BENHABIB, cit. *supra* note 1.

system.<sup>92</sup> This approach of liberal feminist theory can even be equated to how colonialism worked on the process of 'civilisation' of the other, including how could they improve the position of women in society.<sup>93</sup> The assumption of one culture being superior to the other cannot be reflected better than in the following statement made by Elisabeth Badinter who defended the young French women's right of wearing skirts, where she noted:

".....we're headed for 'the burqa is better than the headscarf' – and it's going to be ever more difficult for these young women to say 'no' to the headscarf and prefer the skirt. And if there is one freedom of dress we have to defend, that is the one."<sup>94</sup>

This statement shows a deep-rooted bias which is evidence of the colonial nature of the discourse that has come to define migrant women and their identity. An evidence of this can be seen within the practice of lifting the veil. The earliest examples of which can be found in the British colonial history of its interaction with women in Egypt. The case highlights how the British colonial agencies justified colonialism as an instrument to remove the veil.<sup>95</sup> The liberal feminist discourse on rights and identity of migrant women shows a clear nexus between the modern emancipation drive of migrant women and colonialism as an instrument to liberate women from their own culture.

In their attempts of emancipation of women, the policies on migrant women's cultural identity are 'othering' a culture and deeming it as site for reformation. This is essentially reproducing the colonialist version of culture and their description thereby denying all possibilities of "mainstreaming" of cultural rights of migrant women.

## 6. – *Why Decolonise the Understanding of 'Acceptable Culture'. The Change in Discourse within the Human Rights Committee.*

As the conversation on decolonisation is becoming more and more relevant, cultural relativism seems to be in a clash with the principle of universality of human rights bringing widely accepted global norms under scrutiny. The demand for recognition of identity by migrant Muslim women is becoming more and more pronounced

<sup>92</sup> MANCINI, "Patriarchy as the exclusive domain of the other: The veil controversy, false projection and cultural racism", *International journal of constitutional law*, 2012, p. 419 ff., pp. 411-428.

<sup>93</sup> See VOLPP, cit. *supra* note 70, p. 1181.

<sup>94</sup> HANCOCK, "The Republic is lived with an uncovered face'(and a skirt):(un) dressing French citizens", *Gender, Place & Culture*, 2015, p.1032 ff., pp. 1023-1040.

<sup>95</sup> AHMED, *Women and gender in Islam: Historical roots of a modern debate*, Yale, 1992, pp. 152-153.

in how they want to become a part of the mainstream society without giving up on their cultural identity. A demand which needs to be seen as legitimate in modern liberal societies based on their commitment to the protection of human rights including cultural rights.

Within the HRC, we can also recognize a movement towards an acknowledgment of the unchallenged reality of cultural diversity and the necessity to create a balance between such diversity and the universality of human rights principles. A very important development in this field of discussion was when Karima Bennouna, the UN special rapporteur in the field of cultural rights gave her statement on the issue of Universality, cultural diversity, and cultural rights.<sup>96</sup>

Quoting the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Universal Declaration on Cultural Diversity, the special rapporteur said that cultural diversity has been under attack by the denial of this human reality and attempts to impose monolithic identities. Cultural diversity must not be seen as against universal human rights, and there is a need to reorganize the history of forced *assimilation* which has been forced on indigenous people, minorities, and people living under colonialism. Universality is about human dignity and not about homogeneity.<sup>97</sup> While the rapporteur also discussed the need for eliminating the justification of cultural relativism to repudiate universal human rights, it is important to notice that it was clearly acknowledged that cultural diversity is essential for the protection of universal human rights.<sup>98</sup>

Another important development is acknowledging the problematic assumptions regarding the ban on *full-face veil* has come in the HRC decisions, which shows a shift towards the recognition of discrimination against migrant women through policies of legal prohibitions on women for wearing *full-face veil* in France.

In doing so the HRC has taken a step-in contrast to the approach taken by the UN treaty bodies and the ECtHR in previous cases. In its discussion on the cases of *Yaker v France* and *Hebbadj v. France*, the HRC in 2018, recognized that the French prohibition was of a discriminatory nature. While this decision related to claims of violation to rights guaranteed under Article 18 of the ICCPR, it shows a clear departure from the earlier held positions on the issue of prohibitions of such clothing by the HRC.<sup>99</sup> The opinion of the HRC in these claims is reflective of the changing nature of the discourse on culture in light of the reinvigorated decolonisation movement.

<sup>96</sup> BENNOUNE, Report of the Special Rapporteur in the field of cultural rights, 25 July 2018, UN Doc. A/73/227.

<sup>97</sup> *Ibid.* para. 6-8.

<sup>98</sup> *Ibid.* para. 48.

<sup>99</sup> See cit. *supra* note 25.

The HRC in this case noted:

“the blanket ban on the full-face veil introduced by the Act appears to assume that the full veil is inherently discriminatory and that women who wear it are forced to do so. While acknowledging that some women may be subject to family or social pressures to cover their faces, the Committee observes that the wearing of the full veil may also be a choice — or even a means of staking a claim — based on religious belief, as in [Sonia Yaker’s] case.”<sup>100</sup>

The acknowledgement by the HRC that considering the *full-face* veil as inherently discriminatory is problematic, shows a deliberated attempt of the HRC to recognize the bias which has been instrumental in the formation of such policies. The opinion of the HRC is clearly indicative of the acknowledgment within the International law regime that considering a cultural practice such as a *full-face* veil is prone to preconceived notions of such practices and lack an objective judgment.

It is also reflective of how the HRC is moving away from its earlier decisions and recommendations on the issue which considered the practice to inherently oppressive and a result of a culture of subjugation of migrant women.<sup>101</sup>

While cultural practices may seem to be differentiated they have to be evaluated be based on the principle of equality to the extent they can be invoked by communities and individuals alike.<sup>102</sup> However, when a discourse on a cultural practice such as the headscarf, is from the onset, based on a colonial understanding of ‘the other’ and aimed to reform it, the effort of “mainstreaming” can only be successful when these narratives are freed from the biases which have categorized them as unacceptable.

## 7. – Conclusion.

From the above discussion, it can be clearly derived that Colonialism has not ended as it still exists in the descriptions and narratives of how the world came to be categorized. As discussed earlier, in its colonial experience, the West conceived the future of the world order and also how it works at all levels including economic, political, and cultural. The role of International law in this regard has been instrumental as a globally recognized instrument that came to define the modern world post the Second World War. However, the place of origin of International law and

<sup>100</sup> Human Rights Committee, *Hebbadj v. France*, Communication No. 2807/2016, 17 July 2018, UN Doc. CCPR/C/123/D/2807/2016; and Human Rights Committee, *Yaker v. France*, Communication No. 2747/2016. at para. 8.15 (citing S.A.S., at para. 119).

<sup>101</sup> See ZALNIERIUTE, WEISS, cit. *supra* note 57.

<sup>102</sup> See DONDEERS, cit. *supra* note 7, p. 15.

its evolution cannot be segregated from the history of colonialism. Thus, despite its intentions of promoting principles of equality amongst sovereign nations, it reproduced the knowledge from its colonial experience. As clearly seen in the following statement:

“The tendency of International law to consider global north as the universal, the abstract, and the general, and the global south as specific, local and concrete is colonial.”<sup>103</sup>

This very approach has rendered the discourse on what can be acceptable as cultural practice in modern liberal societies to be one full of colonial biases.

From its inception, International law has influenced how policies and discourses on cultures have evolved around the globe. The social and individual impact of this discourse is clearly visible in the ongoing debate on the cultural rights of migrant women. Beginning from the description of HTPs, to the quest of gender equality, the denial of agency in women belonging to a non-Western culture, the emancipation and universality of Western norms of cultural practices have defined the policies on migrant women in Europe.

Most aspects of International Law have been based on an assumed position of superiority of the European peoples over non-European and the civilisation drive.<sup>104</sup> The legacy of colonialism is a remnant in the form of International Law which is perhaps the most important weapon in the spread of Eurocentrism which is presented as the epitome of civilisation.<sup>105</sup> The assumed cultural superiority of one specific version over all others cannot stand the test of universality under International law. Hence for the protection of the cultural rights of migrant women, TWAIL should be looked at to find truly universal protection of human rights that goes beyond the colonial understanding to what is ‘acceptable culture’. As TWAIL, in contrast to the existing discourse on International Law which ‘assumes the *moral equivalency of cultures* and peoples and rejects “othering,” the creation of dumb copies of the original’.<sup>106</sup> In doing so TWAIL rejects the claim of the universality of a specific culture under the semblance of human rights.<sup>107</sup>

The reality of diversity within Europe is unquestionable, with an increasing number of cultural identities claiming their place in a diverse Europe. The hegemonic

<sup>103</sup> SPIJKERBOER, *Confronting the colonial structure of international migration law*, available at: <https://www.law.ugent.be/opnames/Francqui/Inaugural-Lecture-Prof-Thomas-Spijkerboer.mp4>.

<sup>104</sup> DAVIDSON, *African Civilization Revisited: From Aniquity to Modern Times*, Africa World Press, 1991.

<sup>105</sup> MUTUA, ANGHIE, “What is TWAIL?”, in *Proceedings of the Annual Meeting (American Society of International Law)*, 2000, p. 32 ff., pp. 31- 40.

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

claim on international standards of cultural practices, deny all other cultures a voice. Hence, it is necessary to move beyond the existing colonial descriptions of 'acceptable culture' and find value and acceptance in cultures and norms in light of the reality of cultural diversity. The mainstreaming of cultural practices can only be achieved by redefining 'acceptable culture' from a narrative of acceptance rather than rejection and this demands the process of decolonising the understanding of 'acceptable culture'.

In this context, the methodology of adopting such as approach is also relevant for any fruitful outcome. On the methodology for such a process of decolonisation, I would like to quote prof. Thomas Spijkerboer; from his lecture 'Confronting the colonial structure of international migration law':

"If International Law claims to be international it cannot in the words of Achille Mbembe, make generalisations from idioms of provincialisms...."<sup>108</sup>

Based on this statement we can see the generalisation made within International law has resulted in presumptions regarding cultures which are considered non-Western. This has in turn affected the efforts of "mainstreaming" cultural rights of migrant women. In adopting this methodology by moving away from the existing generalisation of the 'others' based on the colonial history that is defined by a 'dynamic of difference', we can possibly find a method to mainstream culture by changing its colonial narrative. However, this decolonisation needs to be done at all level and forms of discourses relating to migrant women including laws, policies, and social sciences.

<sup>108</sup> SPIJKERBOER, "Confronting the colonial structure of international migration law", 20 January 2020, available at: <https://www.law.ugent.be/opnames/Francqui/>.

**Abstract**

Benhabib's statement signifies a 'moral authority' through which the cultural rights and identities of women are dictated in a society. While such an authority is used across the globe it has become increasingly visible in modern liberal societies in terms of its relation with migrant women. This authority is used in justification of attempts of liberalizing migrant women from their own cultural practices as an act of emancipation of women and gender equality. This discourse works on the assumption that migrant women need to be freed from their own culture into the "progressive" social customs of the West. This narrative is directly related to the West's negative perception of other cultures that do not have the same definition of women liberation, equality, and emancipation. A perception that is a direct corollary to the nexus between colonialism and the new World order in terms of International Law and organisations has evolved in the past.

These descriptions of migrant women work on the assumption that migrant cultures treat their women as subordinates as compared to western culture. This understanding has reached a point where migrant women are seen as victims of their own culture, subjected to a 'death by culture'. This research argues that this negative notion of culture is directly related to the colonial consciousness which sees the practice of minority cultural rights as merely a symbol of domesticity and subjugation. This assumption of oppression of women in migrant cultures is one of the most important legacies of the colonial movement in terms of perceptions of women, which works on the idea that migrant communities are more patriarchal than the liberal west. In his conception of Orientalism, Edward Said explained how western modernity was considered to be the only cure for such traditional consciousness. It is not difficult to find how the civilisation process perceived a need for improvement in the position of women in society. This thought process resonates with a highly western-centric idea of gender equality that denies any other experiences of culture and identity, a right of survival on its terms supported in the discourse of International Law. This consciousness is consistently reintroduced and regenerated to form a specific perception of non-western cultures. This paper aims to establish that any attempts of "mainstreaming" cultural practices for acceptance of the cultural rights of migrant women have to first undergo a process of decolonising the knowledge of the acceptable culture in Western societies.

# 6. THE RIGHT TO CULTURE FOR ASYLUM SEEKERS IN IRELAND: LESSONS TO BE LEARNED FOR THE INTERNATIONAL LEGAL SYSTEM

*Noelle Higgins, Laura Serra, Delia Ferri \**

*SUMMARY:* Introduction. – 2. The Direct Provision System in Ireland and its Impact on Cultural Rights. – 2.1. The Direct Provision System and Cultural Rights. – 2.2. The Impact of COVID-19 Related Restrictions on Asylum Seekers in Direct Provision. – 3. The Irish Legal Framework and Cultural Rights: A Brief Overview. – 3.1. Cultural Rights under Domestic Law in Ireland. – 3.2. Irish Policies on Cultural Rights and Migrants. – 4. The Protection of International Cultural Rights in Ireland. – 4.1. Setting the Scene: Cultural Rights under International Law. – 4.2. Implementing and Protecting International Cultural Rights in Ireland – 4.2.1. The Irish Constitution and International Law. – 4.2.2. Ireland and International Cultural Rights. – 4.2.3. Dualism as Hurdle for the Protection of Cultural Rights. – 5. Concluding Remarks.

## *1. – Introduction.*

This Chapter provides a reflection upon the application of internationally recognized cultural rights standards in practice. It does this via the analysis of a case study, namely that of asylum seekers in Ireland.<sup>1</sup> This case study is significant in that

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the Direct Provision system<sup>2</sup> currently in place in Ireland greatly impacts on the enjoyment of cultural rights in their individual and collective dimensions<sup>3</sup> - alongside all human rights - of asylum seekers. While the Irish government, through its Migrant Integration Strategy,<sup>4</sup> highlights the importance of cultural diversity and recommends cultural programmes in order to facilitate the integration of migrants into Irish society, asylum seekers are *de facto* excluded from the mainstreaming protection of cultural rights. They are discriminated against in the exercise of those rights, even though these rights should be applied equally to all persons within the jurisdiction. The violation of cultural rights of asylum seekers has been further exacerbated by the recent government-imposed restrictions on gatherings and activities, including those of a cultural nature, in response to the Covid-19 pandemic.

This Chapter comes at an opportune time, given that, after approximately twenty years following its introduction, the Irish government has indicated that the Direct Provision system will be dismantled in the near future,<sup>5</sup> in light of the enduring and numerous criticisms of this system both from international human rights bodies,<sup>6</sup>

870626. The Chapter has been completed as of 28 October 2021, and takes into account the legal developments occurred up to that date.

<sup>1</sup> In line with Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 2013, p. 60–95, asylum seekers are those “third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken individuals awaiting”. In other terms, we refer to individuals whose claim for refugee or subsidiary protection is under consideration but yet to be determined by means of administrative processes under Irish law (see Section 2 of the International Protection Act, 2015. No. 66 of 2015 (as amended), Irish Statute Book at <http://www.irishstatutebook.ie/eli/2015/act/66/enacted/en/pdf>).

<sup>2</sup> See *infra* Section 2. See *infra* note 11.

<sup>3</sup> In this contribution we refer to cultural rights as encompassing the right of individuals to access cultural activities and to actively participate in culture as creators, as well as the right of cultural communities to be recognised and protected as well as to enjoy and make use of their cultural heritage and cultural expressions.

<sup>4</sup> The Migrant Integration Strategy is available at: [http://www.integration.ie/en/isec/pages/migrant\\_integration\\_strategy#:~:text=The%20Migrant%20Integration%20Strategy%20which,involving%20actions%20by%20all%20Departments](http://www.integration.ie/en/isec/pages/migrant_integration_strategy#:~:text=The%20Migrant%20Integration%20Strategy%20which,involving%20actions%20by%20all%20Departments).

<sup>5</sup> Department of Children, Equality, Disability, Integration and Youth, “White Paper on Ending Direct Provision”, 26 February 2021, available at: <https://www.gov.ie/en/publication/7aad0-minister-ogorman-publishes-the-white-paper-on-ending-direct-provision/>.

<sup>6</sup> For example, the UN Committee on Elimination of Racial Discrimination in its Concluding Observations of 10 March 2011 stated: “The Committee is concerned at the negative impact that the policy of ‘direct provision’ has had on the welfare of asylum-seekers who, due to the inordinate delay in the processing of their applications, and the final outcomes of their appeals and reviews, as well as poor living conditions, can suffer health and psychological problems that in certain cases lead to serious mental illness”. In addition, the UN

as well as non-governmental organisations.<sup>7</sup> In particular, in recent years, the Irish government has established review mechanisms to make recommendations on the system, for example the McMahon Review<sup>8</sup> and the Day Review.<sup>9</sup> The terms of reference of the McMahon Review were limited to considering reform of the existing Direct Provision system, and detailed the multifarious difficulties faced by people living within this system. The recently published Day Report recommended that the Direct Provision system be phased out and replaced by 2023. While the Day Report was being written, the Irish government decided to end Direct Provision as part of the Programme for Government and to publish a White Paper, informed by the findings of the Day Report, by the end of 2020.<sup>10</sup> Despite the commitment in the Programme for Government, the White Paper was not completed until February 2021.<sup>11</sup> This White Paper, entitled ‘White Paper on Ending Direct Provision’,<sup>12</sup>

Independent Expert on Human Rights and Extreme Poverty, stated on a Mission to Ireland, 17 May 2011 that “[t]he independent expert reminds Ireland that asylum-seekers and refugees must be guaranteed the enjoyment of all human rights, including the right to privacy and family life, an adequate standard of living, and adequate standards of physical and mental health, rights that complement the provisions of the 1951 Refugee Convention.” Furthermore, Thomas Hammarberg, Council of Europe Commissioner for Human Rights, on a Visit to Ireland, 30 April 2008 stated in respect of the Direct Provision accommodation that “[t]here were, however, no apartments available for families with children; each family shared one room, which resulted in very limited private space. Civil Society representatives have informed the Commissioner that this is a general problem in Irish reception centres. Reports from independent inspectors engaged by the Reception and Integration Agency (RIA) Ireland also indicate that deficiencies exist in certain centres, such as lack of recreational facilities, overcrowding and problems of safety”.

<sup>7</sup> NGO Alliance Against Racism, “Shadow Report: In response to the Third and Fourth Periodic Reports of Ireland under the UN International Convention on the Elimination of All Forms of Racial Discrimination”, January 2011, available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT\\_CERD\\_NGO\\_IRL\\_78\\_9047\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_NGO_IRL_78_9047_E.pdf).

<sup>8</sup> Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, “Final Report”, June 2015, available at: <http://www.masi.ie/wp-content/uploads/2016/07/Working-Group-Report-to-Government-on-Improvements-to-the-Protection-Process-including-Direct-Provision-and-Supports-to-Asylum-Seekers.pdf>.

<sup>9</sup> Government of Ireland, “Report of the Advisory Group on the Provision of Support including Accommodation to Persons in the International Protection Process”, September 2020, available at: [http://www.justice.ie/en/JELR/Pages/Report\\_of\\_the\\_Advisory\\_Group\\_on\\_the\\_Provision\\_of\\_Support\\_including\\_Accommodation\\_to\\_Persons\\_in\\_the\\_International\\_Protection\\_Process](http://www.justice.ie/en/JELR/Pages/Report_of_the_Advisory_Group_on_the_Provision_of_Support_including_Accommodation_to_Persons_in_the_International_Protection_Process).

<sup>10</sup> Department of the Taoiseach, “Programme for Government: Our Shared Future”, 24 November 2020, p. 76, available at: <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/>.

<sup>11</sup> THOMAS, “Government's plan for ending Direct Provision delayed until February 2021”, *TheJournal.ie*, 16 December 2020, available at: <https://www.thejournal.ie/governments-plan-for-ending-direct-provision-delayed-until-february-2021-5300684-Dec2020/>.

<sup>12</sup> Department of Children, Equality, Disability, Integration and Youth, “White Paper on Ending Direct

foresees a phased dismantling of the Direct provision system by 2024. A Programme Board to oversee the implementation of A White Paper to End Direct Provision and to Establish a new International Protection Support Service was fully set up in July 2021.<sup>13</sup> In that regard, this Chapter is particularly timely, as it facilitates a reflection on how the cultural rights of asylum seekers in Ireland have been dealt with in the past and how these rights should be better protected in the future.

However, the analysis, has a broader relevance, well beyond the Irish context, as it illustrates the inherent difficulty in enforcing international cultural rights domestically in dualist States. While Ireland has ratified the International Covenant on Social, Economic and Cultural Rights, it has not incorporated it into domestic law. Because Ireland is a dualist State, individuals cannot rely on its provisions as a cause of action in an Irish Court, and the instrument is of persuasive value only. In this context, the Chapter shows how States' relationships with international law (in particular, the dualist exposition of international law) significantly impact on how cultural rights can be accessed and enjoyed by citizens and migrants alike, and how this is particularly detrimental for vulnerable groups of migrants, such as asylum seekers.

Further to these introductory remarks, Section 2 provides a brief overview of the Direct Provision system in Ireland. It highlights the core features of this system and discusses how it negatively infringes upon cultural rights of asylum seekers by presenting some factual data emerging from social science literature and reports of the Irish national human rights institution (*i.e.* the Irish Human Rights and Equality Commission) and civil society organisations. Section 3 sets out the legal context and reflects on the (limited) role of domestic law and policies in protecting and promoting cultural rights, and the (even more limited) extent to which those relate to asylum seekers. Section 4 focuses on international cultural rights in the Irish legal system and comments on the extent to which a dualist approach taken by Ireland to international law affects the enjoyment of cultural rights. It discusses how the absence of a robust domestic system of protection of cultural rights combined with the lack of enforceability of relevant international standards produce a magnified detrimental effect on particularly vulnerable groups, such as asylum seekers in Direct Provision. Section 5 presents some concluding remarks.

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Provision", 26 February 2021, available at: <https://www.gov.ie/en/publication/7aad0-minister-ogorman-publishes-the-white-paper-on-ending-direct-provision/>.

<sup>13</sup> See the Press release at <https://www.gov.ie/en/press-release/edef3-minister-ogorman-announces-membership-of-the-programme-board-overseeing-the-end-of-direct-provision-as-set-out-in-the-white-paper/>.

## 2. – *The Direct Provision System in Ireland and its Impact on Cultural Rights.*

### 2.1. – The Direct Provision System and Cultural Rights.

In 2000, in response to a vast increase in asylum applications, Ireland adopted a system, entitled “Direct Provision”, to oversee the asylum application process, whereby the Irish State “directly provides” essential services to asylum applicants, including accommodation, food and medical care, and a small weekly allowance.<sup>14</sup> Asylum seekers are hosted in communal centres managed by private contractors across Ireland. Some of those centres are located in extremely rural areas and, as consistently highlighted, asylum seekers have no input into where they are placed. Currently, there are approximately 7,000 people living in almost 40 Direct Provisions centres across the State. The average length of stay is 24 months, however, some residents have spent up to 12 years living in Direct Provision, as their asylum applications have been processed extremely slowly by the International Protection Office,<sup>15</sup> or because of the unduly lengthy appeals process that often has to be navigated by default. While there is no obligation on individuals to stay within the Direct Provision system, no other State support is provided to those seeking asylum in Ireland. As noted by Thornton, there “has been a tendency to exclude asylum seekers from supports that are seen as essential to allowing citizens and legal residents to live with a basic degree of dignity”.<sup>16</sup> The justification provided at a governmental level for the system of Direct Provision is that asylum seekers do not

<sup>14</sup> The initial legal basis of Direct Provision was the Department of Social Protection Ministerial Circular 04/00 of 10 April 2000 and Circular 05/00 of 15 May 2000 (now repealed). For information and resources on the Direct Provision system in Ireland see, generally, THORNTON, “Exploring Direct Provision: Politics. Law. Rights”, available at: <https://exploringdirectprovision.ie/>. See also THORNTON, “Spotlight on Direct Provision” in Children’s Rights Alliance (ed.), *Making Rights Real for Children: A Children’s Rights Audit of Irish Law*, Dublin, 2015, pp. 124-130; O’REILLY, “‘Living Liminality’: everyday experiences of asylum seekers in the ‘Direct Provision’ system in Ireland”, *Gender, Place & Culture*, 2018, p. 821-842; THORNTON, “The Rights of Others: Asylum Seekers and Direct Provision in Ireland”, *Irish Community Development Law Journal*, 2014, p. 22-42.

<sup>15</sup> Thornton recalls that it was stated that people would be within the system for no more than six months, however most people will spend many years within the system. See THORNTON, “For Just Six Months’: Establishing Direct Provision Accommodation Centres”, 13 November 2019, available at: <https://exploringdirectprovision.ie/2019/11/05/for-just-six-months-establishing-direct-provision-accommodation-centres/>. In September 2021, the IHREC commissioner Colm O’Dwyer stated that more than 5,000 people were awaiting a “first instance” decision on their applications and the median time to get a decision was 26.9 months (HOLLAND, “Commitments to end direct provision ‘already behind schedule’”, *Irish Times*, 16 September 2021).

<sup>16</sup> THORNTON, “The Rights of Others: Asylum Seekers and Direct Provision in Ireland” *supra* note 11.

have to pay for accommodation, food, electricity and other essentials goods.<sup>17</sup> However, as noted by the Dublin's Free Legal Advice Centre, privately owned centres "operat[e] as an industry rather than a means by which the government is fulfilling its human rights commitments".<sup>18</sup>

Adults in the Direct Provision system receive a weekly allowance of €38.80, while children receive €29.80. Until recently, people within the Direct Provision system were not permitted to work,<sup>19</sup> meaning that the allowance was their only means of purchasing personal items such as books, to participate in, or attend, cultural events, such as theatre productions, or to contribute to the organisation of cultural activities, such as concerts. Ní Raghallaigh and Thornton, in an article addressing the rights of children or young people under the age of 18 who are living in Direct Provision being separated from their legal or customary caregiver, highlight that those young people will receive this meagre weekly sum only and "*access to social activities and cultural outlets will not be available*".<sup>20</sup>

As mentioned above, accommodation is provided in a variety of locations across the State, including in hostels, hotels, former convents, mobile home sites etc, which are very different from "homes" and "detached" from cultural communities. Some residents of Direct Provision centres may even have to share rooms with non-family members and stay in communal accommodation centres,<sup>21</sup> which are often not in line

<sup>17</sup> THORNTON, "Augmenting Social Welfare for Asylum Seekers in Ireland", *Journal of Social Welfare and Family Law*, 2020, pp. 441-460. See also High Court of Ireland, *C.A and T.A. (a minor) v Minister for Justice and Equality, Minister for Social Protection, the Attorney General and Ireland* [2014] IEHC 523, Judgment of 14 November 2014.

<sup>18</sup> Free Legal Advice Centre, "One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal System in Ireland, 10 Years On", November 2009, p. 11, available at: [https://www.flac.ie/as-sets/files/pdf/one\\_size\\_doesnt\\_fit\\_all\\_full\\_report\\_final.pdf](https://www.flac.ie/as-sets/files/pdf/one_size_doesnt_fit_all_full_report_final.pdf).

<sup>19</sup> The law on prohibiting asylum seekers from working was changed following the case of High Court (IEHC), *N.H.V. and F.T. v. The Minister for Justice and Equality (Respondent) and the Irish Human Rights Commission (Notice Party)* [2015] IEHC 246, Judgment of 17 April 2015. For a comment of the case see MCCORMACK-GEORGE, "Asylum Seekers and The Right to Work in Irish Law: NHV v Minister for Justice and Equality", *The Irish Jurist*, 2019, pp. 174-186. Also see the decision by the Irish government in opting-into the EU Reception Conditions Directive, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180, 2013, p. 96-116 For a discussion of the timeline concerning the right to work of asylum seekers in Ireland, see DORAS, "Right to Work", available at: [https://doras.org/right-to-work/#:~:text=The%20Supreme%20Court%20has%20declared,\(recast\)%20Reception%20Condi-tions%20Directive](https://doras.org/right-to-work/#:~:text=The%20Supreme%20Court%20has%20declared,(recast)%20Reception%20Condi-tions%20Directive).

<sup>20</sup> NÍ RAGHALLAIGH and THORNTON, "Vulnerable childhood, vulnerable adulthood: Direct provision as aftercare for aged-out separated children seeking asylum in Ireland", *Critical Social Policy*, 2017, pp. 386-404, p. 390 (emphasis added).

<sup>21</sup> MORAN et al. "Hoping for a better tomorrow: a qualitative study of stressors, informal social support

with their cultural norms and practices. Nedeljkovic states that “[r]esidents live in dirty, cramped conditions, with families often forced to share small rooms. Managers control every aspect of their lives: meals, mobility, access to bed linen and cleaning supplies”.<sup>22</sup> The Irish Human Rights and Equality Commission (IHREC) argue that “the use of ‘emergency’ accommodation in hotels and similar facilities is particularly unsuitable for international protection applicants, who can become very isolated staying in remote hotels, without cooking facilities or other people from a *similar cultural background* (or who speak the same language)”.<sup>23</sup> In a similar vein, Moran *et al.* contend that asylum seekers experience “feelings of isolation, *cultural* and economic marginalization”.<sup>24</sup> Furthermore, while each accommodation setting varies greatly, some centres do not have sufficient communal space to facilitate a family or community gathering or offer space to organise a cultural activity, such as a dance performance or ceremony, and complaints have been made concerning the lack of space for children to play or enjoy their leisure time in Direct Provision centres.<sup>25</sup>

Food is provided in the Direct Provision accommodation and residents are not allowed to cook for themselves. Eating “foreign” food, deprived of choice, as well as the opportunity to cook for family, greatly impacts on the cultural identity of asylum seekers. In fact, as noted in several instances by the United Nations Educational, Scientific and Cultural Organization (UNESCO), food collection, preparation and service are part of our cultural heritage, both tangible and intangible, and are a source of cultural identity, where each cuisine mirrors history, lifestyle, values and beliefs.<sup>26</sup> The UN Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment No. 12, issued in 1999, noted that the right to adequate food includes access to food which is both culturally appropriate and provides adequate nutritional value. While the General Comment does not further engage with the link between culture and food, it does emphasise the importance of the cultural acceptability of food and “perceived non-nutrient-based values attached

and parental coping in a Direct Provision centre in the West of Ireland”, *Journal of Family Studies*, 2019, p. 427 ff.

<sup>22</sup> NEDELJKOVIC “Reiterating *Asylum Archive*: documenting Direct Provision in Ireland”, *Research in Drama Education: The Journal of Applied Theatre and Performance*, 2018, pp. 289-293.

<sup>23</sup> Irish Human Rights and Equality Commission, “IHREC White Paper Submission Direct Provision”, 17 December 2020, p. 8 (emphasis added), available at: <https://www.ihrec.ie/app/uploads/2020/12/IHREC-White-Paper-Submission-Direct-Provision.pdf> (emphasis added).

<sup>24</sup> MORAN *et al.*, *cit. supra* note 15 (emphasis added).

<sup>25</sup> Art 24 of the Universal Declaration of Human Rights, 1948, provides that everyone has the “right to rest and leisure...”.

<sup>26</sup> See SANTUCCI OLIVEIRA *et al.*, “The culinary intangible cultural heritage of UNESCO: a review of journal articles in EBSCO platform”, *Journal of Culinary Science & Technology*, 2020, p. 138 ff.

to food and food consumption”.<sup>27</sup> In a similar vein, the Irish Immigrant Support Centre, NASC, highlights that:

“food expresses and is tied to social relations, *cultural ideas*, expression of self and can be a measure of social exchange as well as health. Food habits and beliefs have important meanings to people, from birth to death and changes take place throughout the lifespan of a person. *Many types of foods are linked to cultural norms and therefore food selection is often influenced by cultural rather than other factors* such as nutritional value. *Food is also tied to cultural identity*; and a change in where someone lives geographically does not subsequently mean there is a change in food choice or preference”.<sup>28</sup>

On the whole, the Direct Provision system, as well as clearly violating social rights as consistently highlighted by scholarship,<sup>29</sup> *de facto* prevents asylum seekers from engaging in cultural activities (including cooking their own food, as expression of their identity) and speaking their own language, another important cultural practice. It also endangers their collective cultural rights as it is extremely difficult for them to gather in groups inside the centres, and they have very limited possibilities to engage outside with their local communities. Several cases have also been taken before the Irish superior courts, challenging the legal basis of the system and the manner in which it operates. While these cases generally focus on issues related *inter alia* to the right to work, the right to private life, family life, and protection of the home,<sup>30</sup> they signal that the conditions people endure within the Direct Provision system also fundamentally undermine their cultural rights.

## 2.2 – The Impact of COVID-19 Related Restrictions on Asylum Seekers in Direct Provision.

The United Nations Committee on Economic, Social and Cultural Rights has highlighted that the pandemic “has profoundly negative impacts on the enjoyment of economic, social and cultural rights, especially the right to health of the most

<sup>27</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 12, 26 April -14 May 1999, E/C/12/1999/5, para. 11.

<sup>28</sup> BARRY, “What’s Food got to do with it: Food Experiences of Asylum Seekers in Direct Provision”, 2014, p. 23, available at: <https://nascireland.org/sites/default/files/WhatsFoodFINAL.pdf> (emphasis added).

<sup>29</sup> See *supra* note 11.

<sup>30</sup> See, among others, Ireland High Court (IEHC), *N.H.V. and F.T. v. The Minister for Justice and Equality (Respondent) and the Irish Human Rights Commission (Notice Party)* [2015] IEHC 246, Judgment of 17 April 2015; Ireland High Court (IEHC), *C.A and T.A. (a minor) v Minister for Justice and Equality, Minister for Social Protection, the Attorney General and Ireland* [2014] IEHC 523, Judgment of 14 November 2014.

vulnerable groups in society”.<sup>31</sup> It has also urged States “to take measures to prevent, or at least to mitigate, these impacts”, and stated that “if States do not act within a human rights framework, there exists a clear risk that the measures taken might violate economic, social and cultural rights and increase the suffering of the most marginalized groups”.<sup>32</sup>

In Ireland, the COVID-related restrictions have made it even more difficult for asylum seekers to enjoy basic human rights. As underlined by Gusciute, the onset of the “current pandemic has further highlighted the unsuitability of Direct Provision”, and the impossibility of keeping social distance and the impinging risks of outbreaks has also been highlighted.<sup>33</sup> O’Sullivan underlines that the degree to which asylum seekers have remained excluded from many of the protections extended to citizens and migrants alike as part of the State’s COVID-19 response illustrates the extent to which they remained ‘othered’ in Ireland.<sup>34</sup> In August 2020, IHREC “voice[d] its ongoing concerns for the safety and well-being of people in the Direct Provision system around COVID-19” and asked the Irish government to adopt adequate measures to protect the health and wellbeing of asylum seekers in this system. IHREC highlighted that “people in direct provision are at an increased risk due to COVID-19 because they have been placed by the State in a situation which does not empower them as individuals and families to protect themselves in the same way as the general population”.<sup>35</sup> A recent survey conducted by the Irish Refugee Council found that 55% of respondents felt unsafe during the pandemic and that 50% of the

<sup>31</sup> Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights by the Committee on Economic, Social and Cultural Rights, 17 April 2020, E/C.12/2020/1, para. 2.

<sup>32</sup> *Ibid.*

<sup>33</sup> Movement of Asylum Seekers in Ireland, “Statement on the government’s appalling response to COVID-19 in Direct Provision”, 11 April 2020, available at: <https://www.masi.ie/2020/04/11/statement-on-the-governments-appalling-response-to-covid-19-in-direct-provision/>. The IOM report highlights that emergency measures have been adopted to facilitate social distancing (*IOM Ireland Rapid Policy Survey Report: The Irish Government’s Policy Response to COVID-19 from a Migration Governance Lens*, at <https://publications.iom.int/system/files/pdf/iom-ireland-rapid-policy-survey-report.pdf>). In particular new temporary hotel beds have been procured. However, these emergency measures aggravate the cultural isolation of asylum seekers in Direct Provision.

<sup>34</sup> O’SULLIVAN, “Against Ideology? Examining Social Rights in Ireland During Times of Crisis”, *BioLaw Journal - Rivista di BioDiritto*, 2020, pp. 715-721.

<sup>35</sup> Irish Human Rights and Equality Commission, “Statement from the Irish Human Rights and Equality Commission in Respect of Direct Provision”, 19 August 2020, available at: <https://www.ihrec.ie/statement-from-the-irish-human-rights-and-equality-commission-in-respect-of-direct-provision-2/>.

respondents were unable to socially distance themselves from other residents during the pandemic.<sup>36</sup>

As yet, little or no attention has been paid to cultural rights in Direct Provision in the context of the pandemic, given the extent and seriousness of basic health concerns. However, there is anecdotal evidence that the enjoyment of cultural rights by asylum seekers has become impossible under current conditions. The scant research available has shown that living in confined spaces with poor internet access has contributed to isolation, and in the case of children, this has caused increased levels of anxiety and mental health issues.<sup>37</sup>

At the time of writing this Chapter, while the most acute phase of the pandemic seems over, the long lockdown has delayed the enactment of new legislation envisaged in the White Paper to protect the rights of asylum seekers. The establishment of a new system of accommodation and supports is also lagging behind. It remains to be seen whether the negative impact of the pandemic will be fully addressed, and the extent to which cultural rights will feature in the new system.

### *3. – The Irish Legal Framework and Cultural Rights: A Brief Overview.*

The UN Special Rapporteur in the field of cultural rights has highlighted the importance of the same, commenting that cultural rights “are transformative and empowering, providing important opportunities for the realization of other human rights”.<sup>38</sup> However, these rights have also been described as the “neglected category of human rights”<sup>39</sup> and the “Cinderella” of human rights.<sup>40</sup> While these rights are protected in a variety of international legal instruments, they have not, to date,

<sup>36</sup> Irish Refugee Council, “‘Powerless’ Experiences of Direct Provision During the Covid-19 Pandemic”, August 2020, available at: <https://www.irishrefugeecouncil.ie/Handlers/Download.ashx?IDMF=419a9b2f-c405-4cc8-93c7-c27a618beb07>.

<sup>37</sup> BAKER, “Direct provision system ‘magnified’ issues faced by children during Covid-19 lockdown”, *Irish Examiner*, 10 December 2020, available at: <https://www.irishexaminer.com/news/arid-40188087.html>. See also MURPHY, “Direct Provision, Rights and Everyday Life for Asylum Seekers in Ireland during COVID-19”, *Social Sciences*, 10(4) 2021, 140.

<sup>38</sup> Report of the Special Rapporteur in the field of cultural rights to the Human Rights Council, 3 February 2016, A/HRC/31/59, para. 5.

<sup>39</sup> SYMONIDES, “Cultural Rights: A Neglected Category of Human Rights”, *International Social Science Journal*, 1998, p. 595.

<sup>40</sup> XANTHAKI, “Cultural Rights”, *Oxford Bibliographies*, 29 May 2015, available at: <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0123.xml>.

garnered significant attention in international courts<sup>41</sup> or quasi-judicial bodies.<sup>42</sup> Thus far, Ireland has not enacted domestic legislation protecting cultural rights, nor are these explicitly protected within the Irish Constitution. Furthermore, as will be discussed in Section 4, due to the fact that Ireland is a dualist State, persons residing within the jurisdiction cannot make a claim before an Irish Court relying on cultural rights provided for within international treaties.

### 3.1. – Cultural Rights under Domestic Law in Ireland.

In the Irish legal framework, cultural rights have been, to a great extent, sidelined, or indeed, neglected.

As Ireland is a member of the European Union, EU law is supreme in the State, and takes precedence over other sources of law. Next in the hierarchy of applicable law in Ireland comes the Constitution of Ireland 1937 (*Bunreacht na hÉireann*), followed by legislation, common law doctrines and case law. Under Art 29.4 of the Constitution, the European Union Treaties form part of Irish law and prevail over conflicting Irish law, including Irish constitutional law. Since the coming into force of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties themselves,<sup>43</sup> Article 22 of which provides that “[t]he Union shall respect cultural, religious and linguistic diversity”.<sup>44</sup> In accordance with Article 51 of the Charter, its provisions are addressed to the EU institutions and “to the Member States only when they are implementing Union law”<sup>45</sup>, which limits its scope of application.

*Bunreacht na hÉireann* makes very few references to cultural rights. The only provision which explicitly seeks to protect an aspect of culture is Art. 8 which deals with the official languages of the States, i.e. Irish and English.<sup>46</sup> However, in addition,

<sup>41</sup> See, however, POLYMEÑOPOULOU, “Cultural Rights in the Case Law of the International Court of Justice”, *Leiden Journal of International Law*, 2014, p. 447 ff; and Council of Europe / European Court of Human Rights Research Division, “Cultural Rights in the Case-law of the European Court of Human Rights”, 2011, updated 2017, available at: [https://www.echr.coe.int/Documents/Research\\_report\\_cultural\\_rights\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf).

<sup>42</sup> See STRYKOWSKA, “Cultural Rights and Cultural Identity in the Case-Law of the Human Rights Committee”, *Adam Mickiewicz University Law Review*, 2017, p. 119 ff.

<sup>43</sup> Art. 6 TEU.

<sup>44</sup> Art. 22 of the Charter of Fundamental Rights. See MORIJIN, “The EU Charter of Fundamental Rights and Cultural Diversity in the EU”, in Psychogiopoulou (ed.), *Cultural Governance and the European Union*, London, 2015, p. 151 ff.

<sup>45</sup> Art. 51 Charter of Fundamental Rights.

<sup>46</sup> Art. 8 reads as follows: “1 The Irish language as the national language is the first official language. 2 The English language is recognised as a second official language. 3 Provision may, however, be made

Art. 1 of the Constitution provides that “[t]he Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions”. In a similar vein, Irish identity and culture of the diaspora is referred to in Article 2, which provides that “the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage”. While the Constitution is encouraging of Irish culture of its citizens and diaspora, no mention is made of the cultural rights of non-Irish people. Given that the Constitution was drafted in 1937 when Ireland was a country of emigration rather than immigration, this focus on Irish, rather than immigrant, culture may be understandable.

Ireland’s Constitution is very much balanced in favour of first generation, rather than second or third generation rights, but there have been a number of recent attempts to include economic, social and cultural rights within the ambit of the Constitution, albeit with an emphasis on economic and social, rather than cultural rights. A Constitutional Convention, composed of 100 people, including politicians and randomly selected individuals, guided by an expert advisory group, was established in 2012 to discuss proposed amendments to the Constitution on a number of issues.<sup>47</sup> The Convention took this opportunity to recommend that the Constitution be amended to better protect economic, social and cultural rights.<sup>48</sup> Among the rights discussed at the Convention were linguistic and cultural rights and rights covered in the International Covenant on Economic, Social and Cultural Rights (ICESCR). While some aspects of the work of the Convention have been developed by the Irish Parliament, no progress has been made in respect of cultural (or economic and social) rights.

Ireland has adopted some legislation in the field of cultural rights, but this is quite sparse,<sup>49</sup> and, in general, focuses on cultural institutions, e.g. *National Archives Act* 1986 and *National Monuments Act* 1930. The *Official Languages Act* 2003

by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.”

<sup>47</sup> On the Constitutional Convention see generally CAROLAN, “Ireland’s Constitutional Convention: Behind the Hype about Citizen-Led Constitutional Change”, *International Journal of Constitutional Law*, 2015, pp. 733-748.

<sup>48</sup> Eighth Report of the Convention on the Constitution Economic, Social and Cultural (ESC) Rights, March 2014, available at: <http://www.atdireland.ie/wp/wp-content/uploads/2015/07/ESCRights-Const-Conv-Report.pdf>. See also, generally, Amnesty International (Ireland), “Bringing ESC Rights Home. The Case for Legal Protection of Economic, Social and Cultural Rights in Ireland”, 2014, available at: [https://www.amnesty.ie/wp-content/uploads/2016/02/Bringing\\_ESC\\_Rights\\_Home\\_Case-for-legal-protection-of-ESCR.pdf](https://www.amnesty.ie/wp-content/uploads/2016/02/Bringing_ESC_Rights_Home_Case-for-legal-protection-of-ESCR.pdf).

<sup>49</sup> See European University Institute, “Ireland: Irish Cultural Heritage legislation as at July 2010”, available at: <https://www.eui.eu/Projects/InternationalArtHeritageLaw/Ireland>.

focuses on the rights of Irish speakers, rather than on protecting linguistic diversity within the State. In respect of minority groups in the State, Ireland has recently recognised Travellers as an ethnic group,<sup>50</sup> and has adopted a robust legislation on non-discrimination and equality, including the *Equal Status Acts* 2000-2018. There are not, however, specific legal provisions explicitly protecting the cultural rights of migrants, nor is specific attention paid to the cultural rights of asylum seekers enshrined in legislation.

### 3.2. – Irish Policies on Cultural Rights and Migrants.

Whilst the formal legal protection of cultural rights in Ireland is sparse, the government has adopted a number of policies on culture, some of which are in the area of cultural rights, and some of which are applicable to (albeit not explicitly targeted at) migrants.

The key Irish policy in the realm of culture is “Culture 2025. *Éire Ildánach*. A National Cultural Framework Policy to 2025” (hereafter “Policy Framework”),<sup>51</sup> which is the first national holistic cultural policy adopted by the Irish government. The Foreword, by the then-Minister for Culture states that “[o]ur culture is now much more intricate and varied than ever, reflecting our increasingly diverse society”,<sup>52</sup> and one of the key values recognised in the Policy Framework is “[t]he value of cultural diversity, informed by the many traditions and social backgrounds now in Ireland”.<sup>53</sup> The importance of cultural diversity and languages “which have become part of Irish life in more recent years”, as well as the role of culture in the context of integration are recognised in the Policy Framework.<sup>54</sup> However, those issues are not engaged

<sup>50</sup> Department of the Taoiseach, 2017, “Statement by An Taoiseach Enda Kenny TD on the recognition of Travellers as an ethnic group, Dáil Éireann”, at <https://www.gov.ie/rai/29014-statement-by-an-taoiseach-enda-kenny-td-on-the-recognition-of-travel/>. See also the Department of Justice and Equality, “National Traveller and Roma Inclusion Strategy 2017 – 2021”, available at: <http://www.justice.ie/en/JELR/National%20Traveller%20and%20Roma%20Inclusion%20Strategy,%202017-2021.pdf/Files/National%20Traveller%20and%20Roma%20Inclusion%20Strategy,%202017-2021.pdf>. On this issue see among others HAYNES, JOYCE, and SCHWEPPE, “The Significance of the Declaration of Ethnic Minority Status for Irish Travellers”, *Nationalities Papers*, 2021, pp. 270-288.

<sup>51</sup> Government of Ireland, “Culture 2025. *Éire Ildánach*. A National Cultural Framework Policy to 2025”, 2016. For a discussion of the Policy Framework, see HADLEY, COLLINS and O’BRIEN, “Culture 2025. A National Cultural Policy Framework for Ireland”, *Cultural Trends*, 2020, p. 1 ff.

<sup>52</sup> Government of Ireland, *cit. supra* note 49, p. 1.

<sup>53</sup> Government of Ireland, *cit. supra* note 49, p. 3.

<sup>54</sup> For example, the Framework Policy states: “Culture also has an important role in social integration. It must reflect Ireland’s shift to a multicultural society and recognise the value of diverse cultural influences. Interaction, equality of opportunity, understanding, respect and integration all contribute to the enrichment of our culture”. Government of Ireland, *cit. supra* note 49, p. 6.

with in any great depth within the document. Indeed, one worrying aspect of the Policy Framework is the seeming restriction of culture to citizens which emerges from the language adopted throughout the document. For example, the Policy Framework states that “[e]very citizen should have the opportunity to live a rich and creative life, participate in the cultural life of the community and enjoy our cultural heritage”.<sup>55</sup>

Outside the remit of cultural policy *strictu sensu*, Irish migration policy has dealt with cultural rights of migrants to a limited extent. The first Migrant Integration Strategy covered the government’s policy on migrants from 2017-2020 and set out “the Government’s commitment to the promotion of migrant integration as a key part of Ireland’s renewal and as an underpinning principle of Irish society”.<sup>56</sup> Furthermore, the Strategy provides “a framework for a range of actions to support migrants to participate fully in Irish life. The actions proposed are designed to support the integration process. They are also intended to identify and address any remaining barriers to integration”.<sup>57</sup> The Strategy was scheduled to end in 2020 but, as a consequence of the impact of COVID-19 on its implementation, the Minister decided to extend its lifetime to end-2021.<sup>58</sup> Notably, for the purposes of the Strategy, integration is defined as the “ability to participate to the extent that a person needs and wishes in all of the major components of society without having to relinquish his or her own *cultural identity*”.<sup>59</sup> The Migrant Integration Strategy “encompasses migrants and those of migrant background and envisages integration to encompass participation in the economic, social, cultural and political life of the State”.<sup>60</sup> In respect of culture, the Strategy comments that “[i]ntegration recognises the right of migrants to give *expression to their own culture* in a manner that does not conflict with the basic values of Irish society as reflected in Ireland’s Constitution and in law.”<sup>61</sup> The Strategy further recognises integration as “a two-way process”, involving “change for Irish society and institutions so that the benefits of greater diversity can be fully realised.”<sup>62</sup> Thus, in theory, culture forms an important tenet of the Irish government’s approach to migrants’ integration policies. However, those policies fail to translate cultural rights in practice. More notably, the Migrant Integration

<sup>55</sup> Government of Ireland, *cit. supra* note 49, p. 6.

<sup>56</sup> FITZGERALD, “Foreword by Frances Fitzgerald”, in Department of Justice and Equality (ed.), *The Migrant Integration Strategy. A Blueprint for the Future*, Dublin, 2017, p. 2.

<sup>57</sup> FITZGERALD, “Foreword by Frances Fitzgerald”, *supra* note 54.

<sup>58</sup> See: [https://merriestreet.ie/en/news-room/releases/minister\\_ogorman\\_marks\\_international\\_migrants\\_day\\_with\\_2\\_2m\\_funding\\_for\\_integration\\_projects.html](https://merriestreet.ie/en/news-room/releases/minister_ogorman_marks_international_migrants_day_with_2_2m_funding_for_integration_projects.html).

<sup>59</sup> Department of Justice and Equality, *cit. supra* note 54, p. 11.

<sup>60</sup> Department of Justice and Equality, *cit. supra* note 54, p. 11.

<sup>61</sup> Department of Justice and Equality, *cit. supra* note 54, p. 11.

<sup>62</sup> Department of Justice and Equality, *cit. supra* note 54, p. 11.

Strategy does not engage with the difficulties posed by the Direct Provision system in accessing and practising culture, and this can be considered, for the purpose of this analysis, a significant limitation of the Strategy.

#### *4. – The Protection of International Cultural Rights in Ireland.*

Further, having provided a general overview of the (limited) extent to which the Irish domestic legal order engages with cultural rights, and in particular cultural rights of asylum seekers, we turn to examine the role of international cultural rights in Ireland.

##### *4.1. – Setting the Scene: Cultural Rights under International Law.*

It is worth recalling, albeit cursorily, the most relevant sources of international protection of cultural rights.

The original source is Article 27 of the Universal Declaration of Human Rights (UDHR), which states: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.<sup>63</sup> A reference to cultural rights is also found in Article 27 of the International Covenant and Civil and Political Rights (ICCPR).<sup>64</sup> However, in this instrument, cultural rights are identified in respect of people belonging to minorities only, rather than being applicable to all people.<sup>65</sup> This provision states: “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”.<sup>66</sup> The Human Rights Committee (HRC) has stated that this right applies to all individuals within a territory, including those who do not have

<sup>63</sup> The Declaration was proclaimed by the United Nations General Assembly, 10 December 1948, General Assembly Resolution 217 A.

<sup>64</sup> The ICCPR was adopted by the United Nations General Assembly, 16 December 1966, General Assembly Resolution 2200 A (XXI).

<sup>65</sup> VRDOLJAK comments: “Although Article 27 is riddled with provisos, since its inclusion in the Covenant, it has played a crucial role in defining the cultural rights held by minorities and indigenous peoples in international law.” VRDOLJAK, “Self-Determination and Cultural Rights”, in Francioni and Scheinin (eds.), *Cultural Human Rights*, Leiden, 2008, p. 41 ff., p. 60.

<sup>66</sup> Art 27 ICCPR, adopted by the General Assembly, 16 December 1996, General Assembly Resolution 2200 A (XXI).

permanent residency status and those who are temporarily in the State.<sup>67</sup> In particular, in its General Comment No. 23 on Article 27, it has highlighted that:

“Article 27 confers rights on persons belonging to minorities which “exist” in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term “exist” connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, *migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights*. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression”.<sup>68</sup>

Cultural rights are further protected in ICESCR, in particular in Article 15 (1) (a), which provides that “the States Parties to the present Covenant recognize the right of everyone to take part in cultural life”.<sup>69</sup> The meaning of “culture” and “cultural life” for the purposes of the ICESCR has been analysed in General Comment No. 21 of the Committee on Economic, Social and Cultural Rights, adopted in 2009 which states that culture, for the purpose of implementing Article 15 (1) (a) of ICESCR,

“encompasses, *inter alia*, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives”.<sup>70</sup>

<sup>67</sup> CCPR General Comment No. 23: Article 27 (Rights of Minorities) Adopted at the Fiftieth Session of the Human Rights Committee, on 8 April 1994 CCPR/C/21/Rev.1/Add.5, General Comment No. 23., para. 5.2. The approach adopted by the HRC and the inclusion of migrants and new minorities within the scope of Article 27 has been criticised by some scholarship (see PENTASSUGLIA, *Minorities in International Law*, Council of Europe, 2002, p. 9).

<sup>68</sup> See *supra* note 65 (emphasis added).

<sup>69</sup> The ICESCR was adopted by General Assembly, 16 December 1966, General Assembly resolution 2200 A (XXI).

<sup>70</sup> General Comment No. 21 to Art. 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, 2009.

Thus, culture has an expansive meaning in terms of international human rights law.

Cultural rights are also protected in various provisions of other core UN human rights treaties including Articles 30 and 31 of the Convention on the Rights of the Child<sup>71</sup> and Article 30 of the Convention on the Rights of People with Disabilities.<sup>72</sup> Article 5(e) (vi) of the Convention on the Elimination of All Forms of Racial Discrimination also requires that States parties ‘undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law’, including with regard to ‘the right to equal participation in cultural activities.’<sup>73</sup> In addition, the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families also contains provisions relating to cultural rights, including article 43, paragraph 1 (g), and article 45, paragraph 1 (d), on access to, and participation in, cultural life. Article 31 relates to the respect for the cultural identity of migrant workers.<sup>74</sup> Furthermore, UNESCO has adopted numerous instruments on in the field of cultural rights, including the Recommendation on the Safeguarding of Traditional Culture and Folklore (1989),<sup>75</sup>

<sup>71</sup> Article 30 of the Convention on the Rights of the Child states: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.” Article 31: “(1) States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. (2) States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”

<sup>72</sup> The Convention on the Rights of Persons with Disabilities, recognises: “[...] the right of persons with disabilities to take part on an equal basis with others in cultural life, and [States parties] shall take all appropriate measures to ensure that persons with disabilities: (a) Enjoy access to cultural materials in accessible formats; (b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats; (c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance [...]”.

<sup>73</sup> Article 5 (vi).

<sup>74</sup> This Article reads as follows: “(1) States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin. (2) States Parties may take appropriate measures to assist and encourage efforts in this respect”.

<sup>75</sup> This instrument defines folklore as “[...] the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by

the Universal Declaration on Cultural Diversity (2001).<sup>76</sup> In 2005, it also adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO Convention on Cultural Diversity).<sup>77</sup> The Declaration aims to promote the diverse “forms of culture across time and space which is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind”.<sup>78</sup> In a similar vein, and through binding obligations, the UNESCO Convention on Cultural Diversity places a strong emphasis on the diversity of cultural expressions, including traditional cultural expressions as “an important factor that allows individuals and peoples to express and to share with others their ideas and values”.<sup>79</sup>

## 4.2 – Implementing and Protecting International Cultural Rights in Ireland.

While Ireland has ratified a number of the above-mentioned instruments, at the domestic level, cultural rights continue to attract scant attention. Before turning to these, we first highlight the core tenets of the dualist approach adopted by Ireland.

### 4.2.1. The Irish Constitution and International Law.

Ireland’s approach to international law is set out in Article 29.6 of the Irish Constitution, which states that “[n]o international agreement shall be part of the domestic law of the State save as may be determined by the *Oireachtas* (the Irish Parliament)”, illustrating that Ireland is a dualist State.<sup>80</sup> This means that international rules must be incorporated into domestic law, normally by means of legislation, and it is this domestic legislation which is then applied by national

imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts”. Section A, Recommendation on the Safeguarding of Traditional Culture and Folklore, 1989.

<sup>76</sup> UNESCO Universal Declaration on Cultural Diversity adopted 2 November 2001.

<sup>77</sup> Adopted by the UNESCO General Conference on 20 October 2005, during the 33rd session of the UNESCO General Conference held in Paris.

<sup>78</sup> Article 1 “Cultural diversity: the common heritage of humanity” of the UNESCO Universal Declaration on Cultural Diversity.

<sup>79</sup> Preamble of the 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions.

<sup>80</sup> In monist systems, international law and domestic law form one holistic legal system, whereas dualist States view international law and domestic law as forming two separate legal orders. The monist and dualist theories have implications for the application and implementation of international law by national courts. Courts in monist States can apply international law directly, whereas in dualist States international law rules are not automatically directly applicable domestically. Rather, international rules must be incorporated into domestic law, normally by means of legislation, and it is this domestic legislation which is then applied by national courts.

courts.<sup>81</sup> The effect of this provision is that, in the absence of legislation, an international agreement, which Ireland has ratified, is not part of Irish law, notwithstanding its binding effect on the State as a matter of international law. In other words, in order for an international treaty to be justiciable in Ireland it must be ratified at an international level and then directly incorporated into the domestic legal system, either as an amendment to the Constitution or by an Act of Parliament.<sup>82</sup> Only then can people within the jurisdiction of the State benefit from the rights set out in the international treaty. International treaties which have been ratified but not incorporated into domestic law can, however, act as an aid to the interpretation of Irish law.<sup>83</sup>

If domestic law is in conflict with an international agreement, this may give rise to the State's responsibility at the international level for breach of the relevant international agreement. As Article 27 of the Vienna Convention on the Law of Treaties<sup>84</sup> makes clear, a party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". The State is bound to respect international law and is responsible for any acts or omissions in breach thereof.<sup>85</sup>

Leaving aside the supremacy of EU law over Irish law, there is an exception to the dualist rule which is encapsulated in Art 29.3 of the Constitution, which provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States. This provision has been referred to in a number of decisions of Irish courts, however "this provision operates primarily in terms of the international relations between Ireland, represented by the Government, and other states".<sup>86</sup> However, in the main, dualism remains the prevalent approach in respect of international law in Ireland.<sup>87</sup>

<sup>81</sup> See generally, FULLER, *Biehler on International Law. An Irish Perspective*, 2nd ed., Dublin, 2013.

<sup>82</sup> Generally, the *Oireachtas* passes a bill reiterating the content of the international agreement, or it can pass a bill requiring that domestic laws be interpreted in a manner consistent with certain international obligations, as with the case of the European Convention on Human Rights Act 2003.

<sup>83</sup> The principle that domestic law should be interpreted in a manner compatible with international law, where it is possible to do so, is widely recognised across legal systems. See NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford, 2011, Chapter 7.

<sup>84</sup> Vienna Convention on the Law of Treaties, signed at Vienna, 23 May 1969.

<sup>85</sup> Chapter I, International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. See generally, Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge, 2002.

<sup>86</sup> Law Reform Commission, 'Domestic Implementation of International Obligations', LRC 124-2020, para. 2.8.

<sup>87</sup> In the decision *J. McD. v P. L. and B.M* [2009] IESC 81, Murray C.J. states that the Irish Constitution is "imbued with the notion of dualism". On the relationship between the Irish legal system and international law see also CASEY, *Constitutional Law in Ireland*, 3rd ed, Dublin, 2000, Chapter 8; HOGAN AND WHYTE, *JM Kelly: The Irish Constitution*, 4th ed, Dublin, 2004, Chapter 5.

Ireland's treaty practice to date has been that ratification of an international treaty occurs only when the State has put in place many, though not necessarily all, of the domestic legal requirements needed to align with the obligations in that treaty.<sup>88</sup> In the case of complex human rights treaties that require a wide range of legislative reforms, this may mean a significant time lag between signing a treaty and its ratification. The government has been under constant pressure from non-governmental organisations and human rights bodies to incorporate international human rights instruments into domestic law. There is also some internal pressure within the Parliament with regard to the ratification, and incorporation, of international treaties, as "Parliamentary Questions have regularly been used by members of *Dáil Éireann* (the Parliament's Lower House) to pose important questions as to the ratification of, and if ratified the effect of, international agreements".<sup>89</sup> Indeed, even in the absence of incorporation, "given the character of international human rights obligations and the principles of good faith elaborated in the Vienna Convention on the Law of Treaties, it should comply with treaty obligations in all spheres of activity, at the national and international levels, whether or not the specific wording of the treaty has been incorporated in domestic laws".<sup>90</sup> However, this approach to international law, as we shall see below, has meant that cultural rights are not adequately protected in Ireland. This gap is felt acutely in respect of migrants, and particularly asylum seekers.

#### 4.2.2. Ireland and International Cultural Rights.

As mentioned above, the ICESCR is the most important international treaty in respect of cultural rights. The treaty was adopted by the United Nations in 1966 and came into force in 1976.<sup>91</sup> Pursuant to Article 2 of the treaty, States who have ratified it "undertake to guarantee that the rights enunciated in [it]... will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".<sup>92</sup> Ratifying States also undertake "to take steps, individually and through international

<sup>88</sup> Law Reform Commission, 'Domestic Implementation of International Obligations', LRC 124-2020, para. 2.95.

<sup>89</sup> Section 4.36, Law Reform Commission, 'Domestic Implementation of International Obligations', LRC 124-2020.

<sup>90</sup> SEPÚLVEDA CARMONA, Report of the Independent Expert on the Question of Human Rights and Extreme Poverty: On the Human Rights Based Approach to Recovery from the Global Economic and Financial Crises, with a Focus on those Living in Poverty, UN Doc. A/HRC/17/34, 17 March 2011, para. 7.

<sup>91</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>92</sup> Art 2(2) ICESCR.

assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.<sup>93</sup> While Ireland is bound by the above obligations it has not incorporated the treaty into domestic law. Hence, the treaty cannot be used as the basis of a claim before Irish courts and is referred to in terms of persuasive precedent only.

The ESCR Committee has expressed its concern at the failure to give effect to the Covenant in Ireland, and has recommended the incorporation of the treaty into Irish domestic law.<sup>94</sup> The Irish Government maintains that it meets its obligations to implement the Covenant “through policies aimed at improving the enjoyment of economic, social and cultural rights” as in its view “this differentiated approach affords the best means of implementing Ireland’s obligations under the Covenant”.<sup>95</sup> However, significant gaps remain. This is especially true in respect of the Irish government’s failure to adopt policies in respect of certain groups, including asylum seekers. Indeed, as noted above, “Culture 2025. *Éire Ildánach*. A National Cultural Framework Policy to 2025” does not engage with migrants’ culture, but only alludes to cultural diversity, and does not, at all, address the challenges faced by asylum seekers. The Migrant Integration Strategy, while highlighting in a general fashion the importance of cultural rights, disregards asylum seekers. Overall, neither of these policies seem particularly concerned with the effective implementation of the ICESCR.

Furthermore, while Ireland has signed the Optional Protocol to the ICESCR, allowing for individual complaints to be made to the ESCR Committee, it has yet to ratify this instrument. Thus, no-one within the jurisdiction can make a complaint against Ireland to the ESCR Committee under this mechanism.<sup>96</sup>

<sup>93</sup> Art. 2(2) ICESCR. The Convention recognises that implementing the rights enshrined therein will be a financial burden on States, and so makes some concessions in respect of developing States, stating in Article 2.3: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”.

<sup>94</sup> UN Committee on Economic, Social and Cultural Rights (1999) Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, Geneva: Office of the High Commissioner for Human Rights, para.9; UN Committee on Economic, Social and Cultural Rights (2002) Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, Geneva: Office of the High Commissioner for Human Rights, para.12.

<sup>95</sup> *O'Donnell (a minor) & Others v. South Dublin County Council* [2007] 1 IEHC 2014.

<sup>96</sup> See, generally, Amnesty International (Ireland), “Bringing ESC Rights Home. Ireland and the Optional Protocol to the International Covenant on Economics, Social and Cultural Rights”, 2014, available at: [https://www.amnesty.ie/wp-content/uploads/2016/02/Bringing\\_ESC\\_Rights\\_Home\\_Ireland\\_and\\_the\\_OP\\_ICESCR.pdf](https://www.amnesty.ie/wp-content/uploads/2016/02/Bringing_ESC_Rights_Home_Ireland_and_the_OP_ICESCR.pdf).

A slightly higher level of protection is ensured to cultural rights protected under the ICCPR, which Ireland signed in 1973 and ratified it in 1989. The ICCPR is not, as yet, directly applicable in the State. While Ireland has adopted some pieces of legislation with a view to enabling it to ratify the Covenant,<sup>97</sup> it has not adopted legislation to incorporate the Covenant fully into the Irish legal system, in spite of the HRC repeatedly underlining the need for domestic implementation of human rights treaties.<sup>98</sup> Although Irish courts have, on occasion, referred to the ICCPR,<sup>99</sup> in a similar manner to the ICESCR, the Covenant does not have direct effect in Irish law and is of persuasive value only.<sup>100</sup> However, Ireland did acceded to the First Optional Protocol to the ICCPR in 1989, thus recognising the competence of the HRC to receive and consider communications from individuals within the jurisdiction of the State concerning alleged breaches of their rights by the State. This could potentially be important for migrants and asylum seekers trying to have their cultural rights protected, because under Article 27, migrants who belong to an ethnic, religious, or linguistic minority group have the right to enjoy, practice, and use their culture, religion, and language together with other members of their community.<sup>101</sup>

#### 4.2.3. Dualism as Hurdle for the Protection of Cultural Rights

As noted above, cultural rights are very sparse in the Irish domestic legal system, and those living in the Direct Provision system fall outside the (already limited) remit of those rights and of the policies aimed to give substance to them. Furthermore, in general, Irish superior courts have been reluctant to intervene in the protection of social, economic and cultural rights on the basis of those scant provisions or of unenumerated constitutional rights. By contrast, they have generally adopted a restrained approach in the absence of explicit legislative provisions, through the invocation of the principle of separation of powers, especially where those rights which could result in a cost to the State.<sup>102</sup> Exemplary of such a reluctance is the statement of Keane J., in *TD v Minister for Education*<sup>103</sup>:

<sup>97</sup> The then government cited the Prohibition of Incitement to Hatred Act 1989 as being necessary in order to enable the State to ratify the Convention.

<sup>98</sup> FENNELLY, *International Law in the Irish Legal System*, Dublin, 2014, pp. 26-27.

<sup>99</sup> See *DPP v Hannon* [2009] 4 IR 147.

<sup>100</sup> *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97. See FENNELLY, *cit. supra* note 96, p. 339.

<sup>101</sup> Art. 27, ICCPR. See also, Human Rights Committee, *General Comment No. 23: Article 27 (Rights of Minorities)*, UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, para. 5.1.

<sup>102</sup> Irish Human Rights and Equality Commission, "Ireland and the International Covenant on Economic, Social and Cultural Rights", 2015, p. 12. See, for example, *Sinnott v. Minister for Education* [2001] 2 I.R. 545, p. 710.

<sup>103</sup> [2001] 4 I.R. 259 at 282.

“I would have the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as ‘socio-economic rights’ to be unenumerated rights guaranteed by Article 40. In my view, however, the resolution of that question must await a case in which it is fully argued”.

Up to now, cases adjudicated upon in relation to the Direct Provision system have been mostly linked to social rights, and Irish judges have been somewhat unwilling to engage in any kind of redistributive measures, or to hold the government responsible for realizing these measures. However, *mutatis mutandis*, such a reluctance would apply also to cultural rights, especially where their recognition would engage redistributive justice measures.

In such a “deprived” context, asylum seekers should be able to resort to cultural rights provided for within international human rights treaties. However, Ireland has not incorporated any of the relevant treaties which it has ratified, and Irish courts have refrained from enforcing international human rights law, as they do not have direct effect. De Londras suggests that Irish courts have tended to rely on international law only in non-contentious areas (thus outside the remit of social, economic and cultural rights), and have been unwilling to express “internationalism”.<sup>104</sup> In that regard, it transpires that dualism facilitates a framework whereby people (and notably those who are most vulnerable) fall outside the protective remit of international law. Feldman, referring to the UK, has stated that dualism is based on two considerations: “[t]he first, derived from political theory, is concerned with self-determination, democracy, and accountability”, and the second linked to the idea of protecting the rule of law and “political processes against legislation by treaty”.<sup>105</sup> These considerations are also at the core of the Irish approach to international law, as is illustrated by the words of Murray C. J. in *J. McD. v P. L. and B.M.*, where he states that “[a]ccording to the concept of dualism, at national level national law *always takes precedence* over international law”.<sup>106</sup> However, the impossibility to enforce international treaty rights gives rise to a significant gap in human rights protection. While, echoing Feldman’s words, “[i]nternational human rights form a base below which states are not to fall”, the Irish case shows that the dualist approach tends to remove that “base”,<sup>107</sup> i.e. that floor of protection. This is

<sup>104</sup> DE LONDRAS, “Dualism, Domestic Courts, and the Rule of International Law”, in MORTIMER, SELLERS & TOMASZEWSKI (eds.), *Ius Gentium: The Rule of Law in Comparative Perspective*, Wien, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1393293](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393293)>

<sup>105</sup> FELDMAN, “Monism, Dualism and Constitutional Legitimacy”, *Australian Year Book of International Law*, 1999, pp. 105-126, p. 106-107.

<sup>106</sup> *J. McD. v P. L. and B.M.*, *supra* note 85.

<sup>107</sup> FELDMAN, *supra* note 103, p. 126.

particularly serious with regard to marginalised groups, such as asylum seekers, who, *de facto*, do not have rights.<sup>108</sup>

## 6. – *Concluding Remarks.*

The right of access to, participation in, and enjoyment of culture for all those who are living within the Direct Provision system in Ireland has long been neglected. In fact, the system, which has been referred to as a “long period of enforced passivity”,<sup>109</sup> removes from asylum seekers not only the possibility to be included in the cultural community of the host country, but also the possibility to engage in the practice of their own culture. Whilst the Irish government has encouraged the development of cultural rights of migrants in its policies, those living in Direct Provision accommodation centres fall outside of this domestic framework. Given the dualist approach to international law adopted by Ireland and the lack of implementation of the ICESCR, asylum seekers cannot resort to, and seek enforcement of, international cultural rights.

It is somewhat doubtful that Ireland will incorporate the ICCPR or ICESCR in the near future, given the comments of the State in its Second Periodic Report to the UN Human Rights Committee concerning the ICCPR, submitted in 1998, where it commented that the rights protected in the ICCPR are of the kind that would be expected to be included in a Constitution or Bill of Rights, and that therefore, a referendum would be required to amend Ireland’s Constitution in order to incorporate all of the ICCPR rights at an appropriate level, if they were not already included, explicitly or implicitly, under the constitutional framework.<sup>110</sup> However, in 2020, the Irish Law Reform Commission published a report examining the application of international obligations in domestic law, with specific focus on Article 29.6 of the Irish Constitution.<sup>111</sup> The Report does not make recommendations

<sup>108</sup> This also begs broader questions as regard to the different protections afforded to citizens and migrants, and what President Michael D. Higgins termed as “the national appropriation of ‘human rights’”, alluding to the “entanglement” between human rights and citizenship which leave persons at the fringe of society without rights. See Higgins, M.D. “International Human Rights and Democratic Public Ethics”, Royal Irish Academy: Summer Discourse, University of Limerick, 2014.

<sup>109</sup> Ní RAGHALLAIGH et al., *Transition from Direct Provision to life in the community: The experiences of those who have been granted refugee status, subsidiary protection or leave to remain in Ireland*, Dublin, 2016, available at: <http://www.tara.tcd.ie/handle/2262/79220>.

<sup>110</sup> Second Periodic Report by Ireland to the UN Human Rights Committee under Art. 40 of the ICCPR, September 1998, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2f98%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2f98%2f2&Lang=en).

<sup>111</sup> Law Reform Commission, “Domestic Implementation of International Obligations”, LRC 124-2020.

as such as to Ireland's approach to international law, but is rather a "Discussion Paper", and sets out the extant legal framework and practice on this subject. Interestingly, it notes an important role to be played by members of the Lower House of Irish Parliament, the *Dáil*, in addressing the issues of incorporation of international treaties into domestic law, stating that "since Irish treaty practice is to have all international agreements to which the State is party laid before *Dáil Éireann* [...] this provides a clear opportunity for members of *Dáil Éireann* to debate, for example, the merits of implementing, in whole or in part, any such agreement in Irish law".<sup>112</sup> This mechanism provides a facility for members of Parliament to put pressure on the government in relation to upholding international human rights standards in Ireland, which could prove to be useful, especially where there are significant gaps in the domestic protective system such as in the sphere of cultural rights. This mechanism can also shine a light on the human rights of vulnerable groups, including asylum seekers, whose rights, as briefly discussed in Section 2.2, have been further impacted by the Covid-19 Pandemic.

Furthermore, this Irish case study illustrates that a dualist approach to international law, in States where a robust protection of cultural rights is lacking at the domestic level, increases the vulnerability of already marginalised groups. While it is acknowledged that international law is not a panacea for all problems, it is also recognised that international human rights are an essential tool to protect those marginalised groups. It is suggested that a more open approach to international law, rather than formal dualism as that practiced in Ireland, is to be preferred, in order to support the realization of cultural rights for all.

Our culture is our way of life, and denial of cultural rights is a denial of what is at the very core of our individual and collective identity. The multifarious restrictions imposed by the Covid-19 Pandemic in States around the world has unfortunately vividly illustrated the loss of richness of life when cultural practices cannot be accommodated or cultural diversity celebrated. It is necessary that cultural rights be given due weight in domestic legal systems, and that the tenets of the ICESCR are protected by governments in respect of citizens and non-citizens alike, in a post-Pandemic world.

<sup>112</sup> Section 4.35, Law Reform Commission, "Domestic Implementation of International Obligations", LRC 124-2020.

### **Abstract**

This Chapter reflects on the practical application of internationally recognized cultural rights standards via the analysis of a case study, namely that of asylum seekers in Ireland. This case study is significant in that the Direct Provision system currently in place in Ireland greatly impacts on the enjoyment of cultural rights of asylum seekers. In fact, asylum seekers are de facto excluded from the mainstreaming protection of cultural rights. This Chapter comes at a particularly opportune time, given that the Irish government has indicated that the Direct Provision system will be dismantled in the near future, in light of the enduring criticisms of this system both from international human rights bodies and non-governmental organisations. On the whole, this Chapter contends that a dualist approach to international law, in States where a robust protection of cultural rights is lacking at the domestic level, increases the vulnerability of already marginalised groups. The case study illustrates that a more open approach to international law, rather than formal dualism as is practiced in Ireland, would allow to better support the realization of cultural rights for those who are most vulnerable.

7.

**UNITED IN WHAT DIVERSITY?  
RIGHT TO EDUCATION OF ALIENS AND  
MINORITIES IN EUROPE:  
LEGAL AND JUDICIAL CHALLENGES IN THE  
PROTECTION SYSTEMS OF THE EU  
AND THE COUNCIL OF EUROPE**

*Francesco Luigi Gatta*

*SUMMARY:* 1. Introduction. – 2. The Legal Framework of the Council of Europe for the Protection of Cultural Rights. – 2.1. The European Charter for Regional or Minority Languages and the Central Role of Education. – 2.2. The Framework Convention for the Protection of National Minorities. – 2.3. The ECHR and the Role of the Court in the Protection of Educational Rights. – 2.3.1. Right to Education and Expulsion of Foreign Students. – 2.3.2. Access to Education, Nationality and Immigration Status. – 2.3.3. Access to Education for Vulnerable Minorities and Discrimination Based on Ethnic Origin. – 2.3.4. Education and Linguistic Rights. – 3. Minority Protection and Aliens' Right to Education in the EU. – 3.1. Education and Cultural Rights of Minorities in the EU Enlargement Policy. – 4. Concluding Remarks.

*1. – Introduction.*

It is estimated that, on the European continent, there are more than 400 different autochthonous minority groups, for more than 100 million people all together,

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while in the European Union (EU) their number would exceed 50 million.<sup>1</sup> When it comes to language, apart from the 24 official languages of the EU, there are at least around 80 regional and minority languages used by 201 national minorities or linguistic groups<sup>2</sup>. All of that should be coupled with the great variety of cultural and linguistic features of aliens and migrants, coming to Europe for a multiplicity of reasons.

This scenario entails a tremendous source of cultural diversity, which enriches the history and culture of European societies and peoples. However, such cultural patrimony is confronted with a number of challenges, which often impair the full enjoyment of cultural rights of their owners. In this framework, one of the main problematic issues is education, which represents a pillar of culture, and a vehicle of tolerance, pluralism and democracy. It represents, furthermore, the indispensable tool that enables the preservation of cultural and linguistic diversity, and its transmission to future generations.

This chapter addresses the right to education, understood as an essential component of the right to participate in the cultural life of a Country and as a significant tool for integration. The focus is put on the problematic enjoyment of educational rights by categories of individuals, such as minorities, ethnic groups, aliens and migrants, by examining the two legal-institutional frameworks of the EU and the Council of Europe (CoE). The latter is the first to be addressed (§2), with a focus on two *ad hoc* legal tools for the protection of minorities and their right to education (§§2.1 and 2.2). The analysis is then complemented with an illustration of the relevant case-law of the European Court of Human Rights (ECtHR) relating to the right to education, as safeguarded under Article 2, Protocol 1 of the European Convention on Human Rights (ECHR) (§2.3), and as interpreted by the Strasbourg judges in a variety of cases concerning aliens, minorities and marginalised ethnic groups (§§ 2.3.1 – 2.3.4). Attention is then devoted to the EU legal framework (§3), highlighting the protection gaps in terms of safeguard of minority and aliens' rights, including, in particular, within the EU enlargement policy (§3.1.). Finally, some concluding remarks are provided with regard to the two European legal frameworks of protection of educational rights (§4).

<sup>1</sup> According to the data of the Federal Union of the European Nationalities (FUEN) and available online: <https://www.fuen.org/en/article/Autochthonous-minorities-in-Europe>.

<sup>2</sup> See the table, updated in April 2020, relating to the States Parties to the European Charter for Regional or Minority Languages and their regional or minority languages, available on the website of the Council of Europe: <https://rm.coe.int/languages-covered-en-rev2804/16809e4301>.

## 2. – *The Legal Framework of the Council of Europe for the Protection of Cultural Rights.*

Since its very foundation, the CoE has been committed to the protection of the rights of non-citizens, vulnerable ethnic groups and individuals belonging to national minorities. It aimed, in particular, at the promotion and preservation of cultural, educational and linguistic rights, as an expression of diversity and specificity. The existence of such a richness and variety of many different languages and cultures, called on CoE institutions, faithful to the objective of creating a Europe based on democracy and cultural diversity, to launch a process of elaboration and conceptualisation of a normative framework for the safeguard and promotion of this precious, and yet fragile, European heritage<sup>3</sup>.

While the ECHR was in place, with the Court being operationalised in 1959, the awareness of the difficulty faced by minorities, as groups or collective entities, in the enjoyment of their own language and cultural life, emerged already in 1961 with a Recommendation where the Parliamentary Assembly of the Council of Europe (PACE) highlighted the individualistic focus of the ECHR and the lack of a tool able to guarantee a collective dimension of the cultural, educational and linguistic rights of minority groups<sup>4</sup>. It thus called for an attempt to overcome the existing legal vacuum and enable national minorities “to enjoy their own culture, to use their own language, to establish their own schools and receive teaching in the language of their choice”<sup>5</sup>. Twenty years later, in its Recommendation on Educational and cultural problems of minority languages and dialects in Europe<sup>6</sup>, the PACE insisted on the need to promote and safeguard the cultural rights of minorities and non-citizens, focusing, in particular, on language as tool for access to education.

It took, however, almost another decade for the adoption of relevant legal instruments specifically devoted to the protection of minority rights. The 1990s represented a crucial period, marked by violent conflicts, related to delicate ethnic and minority issues. The dissolution of the Eastern communist bloc, the complex process of formation of new and still fragile democracies and their subsequent integration into the “Western Europe” put the issue of minorities in the spotlight. This led to the

<sup>3</sup> For an historical overview of the protection of minorities language within the CoE, see CoE, *Mission Possible. Looking back at the making of the European Charter for Regional or Minority Languages*, Strasbourg, 2012; CoE, *Minority Language Protection in Europe: Into a New Decade*, Regional or Minority Languages No.8, CoE, Strasbourg, 2010; WOEHLING, *La Charte Européenne des Langues Régionales ou Minoritaires. Un Commentaire Analytique*, Strasbourg, 2005.

<sup>4</sup> PACE, Recommendation 285(1961), 28 April 1961.

<sup>5</sup> *ibid.*

<sup>6</sup> PACE, Recommendation 928(1981), *Educational and cultural problems of minority languages and dialects in Europe*, 7 October 1981.

adoption of two *ad hoc* international treaties: the European Charter for Regional or Minority Languages (ECRML) in 1992, and the Framework Convention for the Protection of National Minorities (FCPNM) in 1994. Additionally, the PACE made an attempt to expand the scope of protection of the ECHR, with the adoption of a specific additional protocol on the rights of national minorities<sup>7</sup>.

As a result, the CoE's system of protection of minority rights has been designed around the two mentioned protective tools. While the FCPNM focuses on the recognition of the existence of national, ethnic and cultural minorities in Europe, granting them a formal status associated with a number of supportive measures aimed at collectively protecting their specificities; the ECRML affords "cultural protection", promoting the respect of the linguistic (and, thus, cultural) diversity, understood as a common, European value.

An additional form of protection is linked to the ECHR, which, although providing individual protection of subjective human rights in relation to specific cases, has been interpreted by the ECtHR so as to extrapolate principles and standards of protection for persons belonging to minority or vulnerable ethnic groups.

## 2.1. – The European Charter for Regional or Minority Languages and the Central Role of Education.

The ECRML represents the first, specific tool of CoE minority law to be adopted, in 1992, then entering into force in 1998. It had a long and complex gestation, which is somehow reflected into its partial and fragmented ratification process<sup>8</sup>. The Charter is designed as a binding regional tool aimed at the protection of regional and minority languages. By promoting their use both in private and public life, it safeguards the European linguistic diversity, understood as overall cultural good and common heritage. It aims, thus, at promoting cultural pluralism through linguistic pluralism<sup>9</sup>.

As such, strictly speaking, the Charter does not establish single, specific rights or subjective positions, whether with an individual or collective character. Rather, going beyond minority protection from discrimination, it obliges the States Parties

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<sup>7</sup> PACE, Recommendation 1201(1993), Additional Protocol on the Rights of Minorities to the European Convention on Human Rights, 1 February 1993.

<sup>8</sup> The Charter was adopted as a convention on 25 June 1992 by the Committee of Ministers of the CoE and was opened for signature in Strasbourg on 5 November 1992. It entered into force on 1 March 1998. At the time of writing, 25 Member States have ratified it. Others have signed it, but not yet ratified it, as in the case of Italy or France. Most recently, on 7 September 2021, Portugal signed the Charter.

<sup>9</sup> The Culture-linguistic nexus is underlined in various passages of the text, including the Preamble and various provisions, such as Articles 7, 8 and 12.

to take active promotional measures for the use and the benefit of minority languages in various fields. Put it differently, it protects the languages, rather than the people that speak them<sup>10</sup>.

The undertakings for the States are designed in a manner that ensures flexibility and adaptability, depending on the different and peculiar linguistic, geographical and socio-political situation. This character is reflected in the Charter's structure, whose legal core encompasses a list of undertakings contained in two parts of the convention, Parts II and III: while the former entails general obligations, conceived as guiding principles which cover all the domains of language use in public life and has to be accepted in its entirety (Article 7); the latter is designed as a "menu" of concrete measures from which States make a choice of commitments (Articles 8-14)<sup>11</sup>.

Education and schooling have a pivotal role in both sections of the Charter. They represent, indeed, the domain of public use where language is crucial for the promotion of the cultural heritage and its transmission through time and generations. Article 7 establishes, as a general principle, the need to base States' policies, legislation and practice on "appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages"<sup>12</sup>.

This principle is then elaborated within more specific obligations in order to encourage the use of regional or minority languages in seven areas of public life<sup>13</sup>. Significantly, the first to be regulated, under Article 8, is education. This choice, which highlights the relevance of this field, is not unintentional, as teaching and schools are understood as the primary, fundamental vehicle for the transmission of a language. The Charter covers all stages of the educational path, ranging from pre-school education, to education in primary and secondary schools, whether public or private. University and other forms of higher educations are also covered, as well as technical, vocational and adult and continuing education. Undertakings by the States include not only ensuring the right to receive and impart teaching in the relevant language, but also the promotion of the language itself, by providing adequate facilities for the study of the history, traditions and the culture which are reflected

<sup>10</sup> WOEHLING, *cit. supra*, note 3, p. 15

<sup>11</sup> State Parties may regularly review their level of commitment under the Charter and accept additional undertakings. In this regard, the United Kingdom and Germany have recently decided to extend the protection they accord to minority languages. See CoE, *United Kingdom, Germany Extend Protection of Minority Languages*, Newsroom, Strasbourg, 13 January 2021.

<sup>12</sup> Art. 7(1)(f).

<sup>13</sup> Education (Art. 8), courts (Art. 9), administration (Art. 10), media (Art. 11), culture (Art. 12), economic and social life (Art. 13), and cross-border co-operation (Art. 14).

therein<sup>14</sup>. Finally, the ECRML provides also for the possibility to learn the relevant languages outside the traditional area where they are spoken.

In terms of monitoring, the Charter is based, as is the case of other CoE conventions, on a two-tier approach. First, the Country itself is required to regularly report on the implementation, then, a second monitoring is carried out by an independent Committee of Experts. The monitoring process, which has been recently reformed<sup>15</sup>, involves multiple actors with the idea of ensuring a continuous and constructive dialogue, through the involvement and participation of a multiplicity of parties (CoE bodies, competent national authorities, as well as representatives of the speakers of the languages concerned and NGOs).

## 2.2. – The Framework Convention for the Protection of National Minorities.

The FCPNM is the first legally binding multilateral instrument devoted to the protection of national minorities in general, and the most comprehensive tool in Europe in this area<sup>16</sup>. Although it was adopted few years after the ECRML, in 1994, it entered into force in the same year, 1998, experiencing, thus, a faster process of enactment<sup>17</sup>. It has also received more ratifications than its older “brother”<sup>18</sup>.

By understanding “cultural diversity” as “a source and a factor, not of division, but of enrichment for each society”, as affirmed in its Preamble, the Framework Convention sets out rights enjoyed by individuals belonging to national minorities and complementary obligations for the States. However, it does not contain a defini-

<sup>14</sup> Article 8 is the only provision referring also to the history of a language.

<sup>15</sup> Changes to the Charter’s monitoring mechanism were adopted in November 2018 and entered into force in July 2019. With a view to strengthening the system, States must now present a periodical report on the application of the Charter every five years, followed by information on recommendations for immediate action. Country visits are then carried out by the Committee of Experts to evaluate whether and how measures have been put in place. For an overview of the monitoring of the Charter, see CoE, Directorate General Human Rights and Rule of Law, *Practical Impact of the Council of Europe Monitoring Mechanisms*, Strasbourg, 2014, notably p. 43 ff.

<sup>16</sup> For an in-depth analysis of the Convention, its background, contents, and an analytical commentary on its provisions, see CoE, Framework Convention for the Protection of National Minorities and Explanatory Report, Strasbourg, 1995.

<sup>17</sup> The FCNM was adopted on 10 November 1994, open for signature in 1995 and entered into force on 1 February 1998.

<sup>18</sup> At the time of writing, the FCNM is in force in 39 States. While four CoE Member States have signed but not yet ratified the Convention (Belgium, Greece, Iceland, Luxembourg), additional four have not signed it (Andorra, France, Monaco, Turkey).

tion of “national minority”, given the lack of a universal (or even European) consensus on a common, agreed notion. CoE Member States, thus, are left with a certain margin of flexibility to decide who falls under the protection of the FCPNM<sup>19</sup>.

Minority rights, according to Article 3(2), are exercised “individually as well as in community with others”, an element that highlights their social and collective dimension and marks the difference with the ECRML in terms of protective approach<sup>20</sup>.

In this framework, education has a crucial importance, being understood as a right in itself, as a precondition for the full enjoyment of other rights, such as those to participation, expression, association, as well as a tool for transmitting knowledge and values. No other issue is given the same space in the FCPNM: in addition to specific provisions (Articles 12-14), education is referred to in the part on general provisions, being considered as an area of specific importance for tolerance and intercultural dialogue (Article 6)<sup>21</sup>.

In terms of scope of application, by establishing the obligation to promote “access to education at all levels for persons belonging to national minorities”, the Framework Convention addresses a variety of persons: men or women, children or adults, students and teachers. Education is conceived as entailing both the right *to education* and the rights *in education*. Primarily, Article 12 ensures equal access to education at all levels, encompassing not only education in general, but also a specific type of education aimed at promoting awareness and knowledge amongst the majority population of the language, culture and traditions of minorities. Article 13 establishes the principle of equal opportunities within the educational system, while Article 14 focuses on the education-language nexus, pointing out the right to learn one’s minority language and to be taught in the same language. Further rights cover free and compulsory primary education; the liberty of parents to choose the children’s education according to their own religious, moral or philosophical convic-

<sup>19</sup> States Parties have various approaches with regard to the definition of a national minority. For many of them, national minority status implies having the national citizenship and/or long-standing ties with the Country. Others choose to afford protection only to groups specifically identified and listed. For an in-depth analysis of the scope of application of the Convention, see Advisory Committee on the Framework Convention for the Protection of National Minorities, *The Framework Convention: A Key Tool to Managing Diversity through Minority Rights*, Thematic Commentary No. 4, Strasbourg, 27 May 2016, ACFC/56DOC(2016)001.

<sup>20</sup> WOEHLING, *cit. supra*, note 3, p. 21 ff.

<sup>21</sup> For a specific analysis of education rights in the Convention, see Advisory Committee on the Framework Convention for the Protection of National Minorities, *Commentary on Education under the Framework Convention for the Protection of National Minorities*, Thematic commentary No. 1, Strasbourg, 2 March 2006, ACFC/25DOC(2006)002.

tions; the right of individuals and legal entities to establish and direct their own educational institution; the right to language education for migrant workers and their families<sup>22</sup>.

The monitoring of the FCPNM's implementation is based on a system involving Country reports and evaluations carried out by an Advisory Committee of independent experts, responsible, *inter alia*, for adopting Country-specific opinions. These are meant to advise the Committee of Ministers in the preparation of its resolutions to improve minority protection in terms of domestic legislation and practice. The FCPNM, thus, lacks a legal enforcement mechanism. Nevertheless it has served as an indirect tool of protection, being used, for example, as interpretative material by the ECtHR<sup>23</sup>, or as an authoritative source for the assessment of the overall suitability of a candidate Country for membership and accession to the EU<sup>24</sup>.

### 2.3. – The ECHR and the Role of the Court in the Protection of Educational Rights.

Differently from the above-described legal tools, the ECHR does not specifically cover minorities and their related cultural and educational rights, as confirmed by the Court itself<sup>25</sup>. Therefore, there is no clear precedent or principle according to which minority interests and values inform the ECHR, nor that they are substantive and justiciable rights before the Strasbourg judges<sup>26</sup>. Nevertheless, cultural and educational rights of minorities and aliens have found their way through the Convention, despite its individualistic focus. Indirect protection has been achieved through the jurisprudence. The ECtHR, indeed, has been called to address a variety of issues,

<sup>22</sup> Educational rights are also provided for in the CoE 1977 European Convention on the Legal Status of Migrant Workers, which, under Article 14(1), endorses migrant children's right to access, "on the same basis and under the same conditions as nationals", to general education and vocational training in the host State.

<sup>23</sup> For example, significantly, ECtHR, Grand Chamber, *Chapman v the United Kingdom*, Application no. 27238/95, Judgment of 18 January 2001.

<sup>24</sup> On this topic, see *infra*, at para. 3.1.

<sup>25</sup> *Grisankova v Latvia*, Application no. 36117/02, decision on the admissibility of 13 February 2003. The Convention does not include specific provisions on minorities, except for its Article 14, and Article 1 of Protocol 12, concerning prohibition of discrimination, which both mention, among the various grounds of discrimination, the "association with a national minority".

<sup>26</sup> As pointed out by the PACE, which, in 2012, made a new attempt to introduce an *ad hoc* additional protocol to the ECHR covering the rights of national minorities. According to the PACE, such a tool would grant national minorities a direct and effective access to the ECtHR and reinforce their standing before it, in light of the protection of group rights. See, PACE, Resolution 1866(2012), An additional protocol to the European Convention on Human Rights on national minorities, 9 March 2012, para. 5.

which, albeit related to a case-by-case litigation started by single applicants and associated with individual rights, have led to the emergence of certain standards of protection of cultural rights of persons belonging to vulnerable categories such as migrants, minorities, or marginalised ethnic groups<sup>27</sup>.

In general, the right to education, guaranteed under Article 2, Protocol 1, ECHR, has a crucial importance for the Court: as it has acknowledged on a number of occasions, “in a democratic society, the right to education [...] is indispensable to the furtherance of human rights [and] plays [...] a fundamental role”<sup>28</sup>. As such, education represents a vehicle to preserve and transmit specific values and beliefs, especially to young generations<sup>29</sup>.

In terms of contents, Article 2, Protocol 1 ensures a general, individual right to access to education<sup>30</sup>. The Court clarified that, while there is no positive obligation for the national authorities to *create* a specific education system, they cannot deny access to the *existing* educational institutions and services<sup>31</sup>. The right covers everyone (“no person shall be denied the right to education”), including, thus, children, but also adults and elderly people, as well as teaching provided at various level of education and in public as well as in private institutions.

Limitations can be imposed on this right, which is not absolute. The State, indeed, enjoys a certain margin of appreciation in managing educational matters, however restrictions shall comply with certain requirements outlined by the Court. Limitations, in particular, shall not curtail the right to education to such an extent as to impair its very essence and deprive it of its effectiveness. They shall, moreover, be

<sup>27</sup> On the role of the ECtHR in protecting marginalised individuals and minorities, see, ANAGNOSTOU and PSYCHOGIOPOULOU, *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context*, Leiden, 2010.

<sup>28</sup> *Leyla Şahin v. Turkey* [GC], Application no. 44774/98, Judgment of 10 November 2005, para. 137; *Timishev v. Russia*, Applications nos. 55762/00 and 55974/00, Judgment of 13 December 2005, para. 64; more recently, see *Velyo Velez v. Bulgaria*, Application no. 16032/07, Judgment of 27 May 2014, para. 33; *Çam v. Turkey*, Application no. 51500/08, Judgment of 23 February 2016, para. 52.

<sup>29</sup> The ECtHR identified the concept of education and teaching in the case *Campbell and Cosans*, affirming that “the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development”. See *Campbell and Cosans v. the United Kingdom*, Applications nos. 7511/76 and 7743/76, Judgment of 25 February 1982, para. 33.

<sup>30</sup> Besides a general right to education, enshrined in the first sentence of Art. 2, Protocol 1, the provision also guarantees, in its second sentence, the right of parents to impart education to their children in conformity with their religious and philosophical convictions.

<sup>31</sup> The general content of the right to education has been clarified in the famous case known as *Belgian linguistic case*, where the ECtHR determined the obligation imposed on States, framing it as that of guaranteeing to individuals “the right, in principle, to avail themselves of the means of instructions existing at a given time”. See, ECtHR, *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, Application nos. 1474/62, 1677/62, 1691/62, 1994/63, 2126/64, 23 July 1968, para. 3.

proportionate and foreseeable for the persons concerned, and must pursue a legitimate aim<sup>32</sup>.

It is especially in light of the restrictions, or conditions, imposed by States, in order to gain access to education, that the ECtHR has dealt with cases especially targeting aliens, minorities and marginalised groups of individuals.

### 2.3.1. Right to Education and Expulsion of Foreign Students.

The right enshrined under Article 2, Protocol 1 may be breached in case of refusal to guarantee access to school, however it does not conversely confer a right for an alien to enter or stay in a given country for the purpose of studying and receiving education. The clash between an alien's right to education and the State prerogative to control immigration has been assessed in a number of occasions, first, by the European Commission on Human Rights (ECmHR), then, by the ECtHR. In the balance between the two competing positions, both the institutions have reached the conclusion in the sense of the prevalence of the State. Such considerations emerged rather early in time, in the framework of a case-law developed from litigation against the United Kingdom (UK) and involving the expulsions of foreign students.

In the first case, *Foreign Students* of 1977, concerning the expulsion of students of various nationalities from the UK, the ECmHR did not accept the applicants' argumentation, according to which the right to *continue* their education and *complete their studies* in the UK would have implied a corollary right to remain in the country<sup>33</sup>. The ECmHR concluded that the expulsion of an alien represents a legitimate measure of immigration control by the State, falling outside the scope of Article 2, Protocol 1, and that cannot be construed as a deprivation of the right to education within the meaning of such provision.

This conclusion is in line with the principle of international law according to which States have the sovereign right to control aliens' entry and stay in their national territory. A principle that will be later reiterated by ECtHR, becoming a "mantra" of the whole of its immigration case-law<sup>34</sup>. Such State prerogatives in terms of immigration control, prevailing over the right to education, have been reaffirmed by the ECmHR in additional cases against the UK<sup>35</sup>, as well as, later on, by the ECtHR,

<sup>32</sup> *Leyla Şahin v. Turkey* [GC], para. 154 and ff.

<sup>33</sup> *15 Foreign Students v. the United Kingdom*, Application no. 7671/76, 19 May 1977.

<sup>34</sup> CARLIER and SAROLEA, *Droits des étrangers*, Bruxelles, 2016, p. 73. On this essential principle governing the case-law of the Court in migration-related matters, see also DEMBOUR, *When Human Rights Become Migrants*, Oxford, 2015.

<sup>35</sup> ECmHR, *Sorabjee v. the United Kingdom*, Application no. 23938/94, decision of 23 October 1995; *Jaramillo v. the United Kingdom*, Application no. 24865/94, decision of 23 October 1995; *Dabhi v. the United Kingdom*, Application no. 28627/95, decision of 17 January 1997.

for example in *Vikulov and Others v. Latvia*<sup>36</sup>. In this latter case the Court took the occasion to stress even more clearly that the right to enter and remain in a given Country is not guaranteed under the ECHR, nor, in particular, it is linked to or derived from Article 2, Protocol 1, which merely provides for a right to education<sup>37</sup>.

More recently, in the case *Muhammad and Muhammad*, the Grand Chamber of the ECtHR dealt with the expulsion of two Pakistani students lawfully residing in Romania, where they were conducting their university studies until they were declared undesirable and deported on the basis of national security reasons<sup>38</sup>. Although not directly invoking Article 2, Protocol 1, the applicants claimed a violation of Article 8 ECHR due to the impossibility to continue their studies in Romania, or even elsewhere, given the impact on their reputation provoked by the accusations of participation in terrorist activities in support of a fundamentalist Islamist group. This claim, however, was dismissed at an earlier stage of the proceeding and was not addressed by the Grand Chamber.

### 2.3.2. Access to Education, Nationality and Immigration Status.

The right to education has also been addressed in cases where access to school was made conditional upon the nationality or the immigration status. In a number of cases, in particular, children were denied access to education due to the lack of a specific administrative status of their parents.

In *Timishev v. Russia*, for example, the applicant, a Russian national of Chechen origin, complained about the refusal to admit his children to school, which they had been attending for the previous two years<sup>39</sup>. The refusal was based on the applicant's surrender of his migrant's card, a document confirming the residence in Russia and his status of forced migrant from Chechnya. The ECtHR, recognising that "the right to education guarantees access to elementary education which is of primordial importance for a child's development"<sup>40</sup>, found that Russian law did not allow the exercise of that right by children to be made conditional on the registration of their parents' residence and, accordingly, found a violation of Article 2, Protocol 1.

<sup>36</sup> *Vikulov and Others v. Latvia*, Application no. 16870/03, decision of 25 March 2004.

<sup>37</sup> *ibid.*, para. 11.

<sup>38</sup> *Muhammad and Muhammad v. Romania* [GC], Application no. 80982/12, Judgment of 15 October 2020. For an analysis of the judgment, see AARRASS, "The case of Muhammad and Muhammad v. Romania: the first Grand Chamber judgment on article 1 of Protocol Nr. 7 ECHR (procedural safeguards with regard to expulsion of aliens)", *Strasbourgobservers*, 29 October 2020; GATTA, "Equo processo e espulsione dello straniero (regolare). La Grande Camera di Strasburgo delinea i diritti di trasparenza procedurale", *ADiM Blog*, 31 October 2020.

<sup>39</sup> *Timishev v. Russia*, Applications nos. 55762/00 and 55974/00, Judgment of 13 December 2005.

<sup>40</sup> *ibid.*, para. 64.

In *Ponomaryovi v. Bulgaria* the ECtHR dealt with a case of discrimination and differential treatment in the right to education, not strictly in the sense of access to it, but with regard to its enjoyment, which had been interfered and restricted on the ground of nationality and immigration status<sup>41</sup>. The applicants were two Russian children, who, at the material time, had no permanent residence permits and had been living with their mother in Bulgaria. Under domestic law, only Bulgarian nationals and certain categories of aliens were entitled to primary and secondary education free of charge. Being in the position of aliens without a permanent residence permit, the applicants had been required to pay a fee in order to pursue their secondary education. They invoked a breach of their right to education associated with Article 14, prohibition of discrimination.

The Court, first, clarified that States may regulate education and decide whether and to what extent charge fees for it, according to their different circumstances, needs and resources. It also affirmed that “a State may have legitimate reasons for curtailing the use of resource-hungry public services [...] by short-term and illegal immigrants, who, as a rule, do not contribute to their funding”<sup>42</sup>. Following this rather ambiguous statement, the judges highlighted the crucial importance of education, by making two points: first, education is “one of the most important public services in a modern State”, second, the right of access to it enjoys direct protection under the ECHR<sup>43</sup>. The importance of education, in particular, is two-fold, having both individual and societal positive implications: it plays a fundamental role in the personal and professional development of a person, and it enhances human rights, pluralism and democracy.

That said, the ECtHR explained how the margin of appreciation of States is influenced by the relevance of such public service and how it shall be “measured” accordingly: it increases with the level of education “in inverse proportion to the importance of that education for those concerned and for society at large”. Accordingly, for the Court, while for university, which remains optional, “higher fees for aliens [...] can be considered fully justified”<sup>44</sup>, the opposite applies to primary school, as it provides basic and indispensable knowledge, but also – as in the applicants’ case – to secondary school, which plays an ever-increasing role in the successful personal development and socio-professional integration of the individuals.

<sup>41</sup> *Ponomaryovi v. Bulgaria*, Application no. 5335/05, Judgment of 21 June 2011. For an analysis of the judgment, see CHAIB, “Immigration, Education and Integration. A Cloudy Combination. (Anatoliy Ponomaryov and Vitaliy Ponomaryov v. Bulgaria)”, *Strasbourgobservers*, 7 July 2011.

<sup>42</sup> *Ponomaryovi v. Bulgaria*, para. 54

<sup>43</sup> *Ponomaryovi v. Bulgaria*, para. 55

<sup>44</sup> *Ponomaryovi v. Bulgaria*, para. 56

In the assessment of the proportionality of the domestic measures, which led to Bulgaria's violation of the Convention, the Court noted, *inter alia*, the absence of considerations relating to the control and contrast of illegal immigration, as well as of deportation measures vis-à-vis the applicants, who, moreover, were fully integrated in the host society. Since there was no possibility of an exemption from the payment of school fees, the ECtHR concluded that the requirement for the applicants to pay for their secondary education on account of their nationality and immigration status was not justified. Accordingly, it unanimously found a violation of Article 14 taken in conjunction with Article 2, Protocol 1.

The repercussions on access to education of nationality or immigration status have also been addressed by the European Committee of Social Rights, which affirmed that, under Article 17(2) of the revised European Social Charter, States should ensure that children unlawfully present in their territory have also access to education<sup>45</sup>.

### 2.3.3. Access to Education for Vulnerable Minorities and Discrimination Based on Ethnic Origin.

The ECtHR has also dealt with restrictions to access to education and schooling related to the ethnic origin of students and their families. Here, rather than aliens lacking nationality or a certain administrative immigration status, the case-law involves nationals of the respondent State, who are discriminated against due to their ethnic origin, with repercussions on the enjoyment of their educational rights. In this framework, the case-law of the ECtHR has been growing especially with regard to the differential treatment of Roma children.

In the landmark case *D.H. and Others v. the Czech Republic*, the Grand Chamber framed the wide context of often systematic discrimination of Roma, acknowledging that “as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority [...] they therefore require special protection [which] also extends to the sphere of education”

<sup>46</sup>. As also highlighted by other CoE Institutions and bodies, it is precisely in light of

<sup>45</sup> European Committee of Social Rights, *Médecins du Monde – International v. France*, Complaint no. 67/2011, 11 September 2012. Initially the European Social Charter, in its 1961 version, did not contain a provision on the right to education. According to Article 17(2) of the revised Charter, States undertake “to take all appropriate and necessary measures designed [...] to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools”.

<sup>46</sup> *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, Judgment of 13 November 2007, para. 182.

the specific vulnerability of Roma children that the right to education is of paramount importance and requires special protection from the States<sup>47</sup>.

Building on this premise, the case-law developed by the ECtHR around Roma and access to school has been characterised by the design of positive obligations for the States, the domestic authorities being required to translate the particular attention to be paid to Roma children into proactive conducts. Accordingly, in *Sampanis* the Court, emphasising the importance of integrating Roma children in the process of national education, recognised the duty to facilitate their registration in primary school, even in the case of absence of the required administrative documents<sup>48</sup>. But the ECtHR further clarified that the mere enrolment in itself does not necessarily exclude a violation of the right to education, as education of Roma children must also take place in satisfactory conditions. In other words, for the Court, it is not only a matter of access to education, but also of quality of the education provided, which shall adequately promote the children's personal-societal development.

Against this background, the ECtHR has been dealing with a number of cases relating to segregated education and placement of Roma children in special schools, framing such issues in light of Article 2, Protocol 1 alone, or in conjunction with Article 14 ECHR<sup>49</sup>. The terms of discrimination of Roma in education have been crucially outlined in two Grand Chamber judgments. In the already mentioned *D.H. and Others* of 2007, the Court identified a general discriminatory policy of segregation conducted by the Czech authorities, leading to the automatic and unjustified placement of Roma pupils in separate schools, with a simplified curriculum for children with special needs and learning difficulties. It underlined how such systematic segregation intensified the fragility of Roma children, compromising their difficult personal and societal development, instead of helping their already complex integration into the majority population.

Later, in 2010, in the controversial case *Oršuš and Others v. Croatia* the ECtHR dealt with fifteen applicants of Roma origin who complained about the quality of the education and the teaching organised in Roma-only classes within ordinary primary schools<sup>50</sup>. According to them, the segregated education represented a racially

<sup>47</sup> See, among others, PACE, Recommendation 1203(1993) on Gypsies in Europe, 2 February 1993; PACE, Recommendation 1557(2002) on the legal situation of Roma in Europe, 25 April 2002.

<sup>48</sup> *Sampanis and Others v. Greece*, Application no. 32526/05, Judgment of 5 June 2008, paras. 85-86.

<sup>49</sup> The European Committee of Social Rights has also dealt with segregated education of Roma. In particular, it held that even though educational policies of Roma children may be accompanied by flexible structures to meet the diversity of the group, there should be no separate schools for Roma children. See, in particular, European Committee of Social Rights, European Social Charter (revised) – conclusions 2003 (Bulgaria), Art. 17(2), p. 53.

<sup>50</sup> *Oršuš and Others v. Croatia* [GC], Application no. 15766/03, Judgment of 16 March 2010.

discriminating treatment, impacting on their education, but also on their overall psycho-physical well-being, in terms of lack of integration and obstacle to creating a social network with non-Roma children.

The Chamber found no violation of Article 2, Protocol 1, taken alone or in conjunction with Article 14 ECHR, holding that the applicants had been assigned to Roma-only classes because they lacked sufficient command of the Croatian language and that this measure had been justified<sup>51</sup>. The Grand Chamber, on the contrary, found – although with a slight majority of 9 votes to 8 – a violation of the prohibition of discrimination taken in conjunction with the right to education. While schooling arrangements for Roma children or other disadvantaged groups are part of the State's margin of discretion in regulating and organising educational services, and even if temporary placement in separate class with separate teaching is not, *per se*, contrary to Article 14 ECHR, the Grand Chamber considered that such measures must be assisted by adequate safeguards linked to the special needs of the persons concerned. In the specific case, the prolonged, separated education had resulted in a *de facto* segregation of Roma children, worsening their vulnerability, and compromising their subsequent personal development and the already difficult possibilities of social integration.

Similar conclusions were reached – unanimously, this time – in *Horváth and Kiss v. Hungary*, where the Court acknowledged that “misplacement of Roma children in special schools has a long history across Europe” and that some States have a “history of racial segregation in special schools”<sup>52</sup>. It then concluded that it is precisely in light of such widespread phenomena that States are under a positive obligation to take proactive effective measures against segregation.

The Court has also clarified the aspect of discrimination with regard to segregated education of Roma children, pointing out that a discriminatory intent is not necessary *per se* for a violation of the ECHR. In *Lavida and Others v. Greece*, for example, it found that Greek authorities violated Article 14 in conjunction with Article 2, Protocol 1 as, even in the absence of any discriminatory intent, they failed to adopt effective anti-segregationist measures (e.g. organisation of mixed classes in other schools), thereby *de facto* perpetuating a discriminatory educational treatment of Roma children in Roma-only schools for a prolonged duration of time<sup>53</sup>. Additionally, in *Horváth and Vadászi*, the Court affirmed that, regardless of a clear discriminatory intent, “the placement of Roma children in special remedial classes, physically segregated, creates a rebuttable presumption of discrimination”<sup>54</sup>.

<sup>51</sup> *Oršuš and Others v. Croatia*, Application no. 15766/03, Judgment of 17 July 2008.

<sup>52</sup> *Horváth and Kiss v. Hungary*, Application no. 11146/11, Judgment of 29 January 2013, paras 115 and 128.

<sup>53</sup> *Lavida and Others v. Greece*, Application no. 7973/10, Judgment of 30 May 2013.

<sup>54</sup> *Horváth and Vadászi v. Hungary*, Application no. 2351/06, decision of 9 November 2010.

#### 2.3.4. Education and Linguistic Rights.

The right to education can be impaired by the language used for teaching. In this respect, the ECtHR has been dealing with various linguistic issues, impacting, on the one hand, on the right to education, and determining, on the other, a violation of the prohibition of discrimination. While the ECHR *per se* does not guarantee a linguistic freedom or the right to use a certain language for communication in the public sphere, the choice of the language plays a particularly important role in the field of access to education, especially for vulnerable categories of individuals, as those belonging to linguistic or ethnic minorities or foreign citizens. In this framework, the Court has sometimes associated the right to education with the prohibition of discrimination on the ground of language, in terms of access to educational services and proportionality of differential treatment.

In the *Belgian linguistic case*, the first landmark judgment for linguistic rights and education, the Court clarified that Article 2, Protocol 1 does not specify the language in which education must be conducted in a given State. Domestic authorities are in the position to arrange and organise the educational services according to the specific needs and circumstances, including the language-related aspects. However, the Court acknowledged that “the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be”<sup>55</sup>. In that specific case, it found a violation of the right to education, taken together with the prohibition of discrimination, in so far as children with French as mother tongue living in Dutch-speaking areas of Belgium were unable to follow classes in French, while the other way round was possible, with Dutch-speaking children having classes taught in their mother tongue in French-language areas<sup>56</sup>.

In other cases, linguistic and educational rights have been anchored to other aspects, such as the freedom of expression guaranteed under Article 10 ECHR. In this framework, access to education and linguistic issues have been addressed by the Court especially in the case-law relating to the use of Kurdish language in Turkish universities<sup>57</sup>. In *İrfan Temel and Others v. Turkey*, decided in 2009, 18 Turkish university students petitioned the University Rector to request that Kurdish language

<sup>55</sup> *Belgian linguistic case, cit. supra*, para. 3 of “the Law” part.

<sup>56</sup> The Court clarified, however, that the Convention does not cover linguistic preferences and Art. 2, Protocol 1 does not entail the right to obtain education in the language of one’s choice. It rather ensures, when read in conjunction with Art. 14, the right of everyone to receive education (“no person shall be denied the right to education”) without discrimination, including, in particular, on the ground of language. See *Belgian linguistic case*, para. 11.

<sup>57</sup> Turkey was also involved in issues relating to education and linguistic rights of aliens in respect of

classes be introduced as an optional module<sup>58</sup>. As a result, they faced disciplinary sanctions in terms of expulsion or temporary suspension of their studies. The ECtHR deemed to frame the applicants' complaints within the right to education, "read in the light" of the freedom of expression, unanimously finding a violation of the Convention. For the Court, although the right to education does not in principle exclude recourse to disciplinary measures, these must not injure the substance of the right and impair its very essence, as occurred in the specific case<sup>59</sup>.

Such events were not episodic, as similar petitions were also submitted by students from other various Universities in Turkey. In the more recent judgment *Çölgeçen and Others v. Turkey*, delivered in December 2017, the Court dealt again with the Turkish authorities' refusal to provide the applicants with the opportunity to learn their mother tongue, finding a violation of the right to education. Here, again, the Court decided to frame the breach of the Convention from the angle of Article 2, Protocol 1 "read in light" of Article 10<sup>60</sup>. Such configuration of the right to education associated with the freedom of expression, however, has turned out to be controversial, generating – as previously occurred in *İrfan Temel* – separate opinions by some judges, who considered the disciplinary measures imposed on Kurdish students as interferences with their right to freedom of expression, rather than a proper *vulnus* to their educational rights<sup>61</sup>.

Finally, the Court has also dealt with the repercussions on the right to education of a widespread policy of "Russification" of the language and the culture conducted in some former Russian, Soviet territories. In *Catan and Others*, the measures put in

secondary school. In the inter-State case *Cyprus v. Turkey*, the ECtHR found a violation of the right to education with regard to children of Greek Cypriots living in Northern Cyprus in so far as no Greek-language secondary-education facilities were available, although they had previously attended and completed primary schooling in Greek language. See *Cyprus v. Turkey*, Application no. 25781/94, Judgment of 21 May 2001, notably paras. 273-280.

<sup>58</sup> *İrfan Temel and Others v. Turkey*, Application no. 36458/02, Judgment of 3 March 2009.

<sup>59</sup> In his separate opinion, however, Judge Cabral Barreto expressed the need of an examination of the case under Article 10 alone, defining the approach of the Court to focus on Art. 2, Protocol 1 as "dangerous" and "not at all sound". According to the Portuguese Judge, the case concerned a mere restriction of the right to education, the very essence of which was not impaired.

<sup>60</sup> *Çölgeçen and Others v. Turkey*, Applications nos. 50124/07, 53082/07, 53865/07, 399/08, 776/08, 1931/08, 2213/08 and 2953/08, Judgment of 12 December 2017.

<sup>61</sup> In other cases concerning Turkey and Kurdish minorities, and involving cultural activities, linguistic rights have been more easily associated with the right to freedom of expression under Article 10 ECHR. For example, with regard to the Kurdish language being used in a theatrical play in a municipal building (*Ulusoy and Others v. Turkey*, Application no. 34797/03, Judgment of 3 May 2007), or concerning the ban on Kurdish language for newspapers in Turkish prisons (*Yurtsever and Others v. Turkey*, Applications nos. 14946/08, 21030/08, 24309/08, 24505/08, 26964/08, 26966/08, 27088/08, 27090/08, 27092/08, 38752/08, 38778/08 and 38807/08, Judgment of 20 January 2015).

place in connection with the language policy targeting the Moldovan community (e.g. forced closure of Moldovan/Romanian-language schools, prohibition to use the Latin alphabet, eviction of teachers) were found by the Grand Chamber to be in violation of Article 2, Protocol 1<sup>62</sup>. The interferences with the right to education, in particular, had been two-fold. On the one hand, in terms of children's right to access to educational institutions and to be educated in the national language, and, on the other, in terms of parents' right to impart education and teaching.

Despite the wide policy targeting children and parents of the Moldovan community, the ECtHR this time framed the issue under the terms of the right to education alone, considering other complaints, in particular under Articles 8 and 14 ECHR, as "absorbed". Such choice has been criticised as too restrictive by six judges, who, in their joint separate opinion, expressed the position in the sense that the Court should have dealt also with other provisions of the Convention, in particular by linking the right to education with the prohibition of discrimination based on language<sup>63</sup>.

More recently, in 2019, in *Iovcev and Others*, the Court dealt again with similar issues, reiterating the unlawful interferences in the educational rights of the Moldovan community, and unanimously confirming the violation by Russia, *inter alia*, of the right to education<sup>64</sup>. On the contrary, in *Georgia v. Russia (II)*, decided in January 2021 by the Grand Chamber, the Court excluded a violation of Article 2, Protocol 1<sup>65</sup>. The applicant Government complained about an administrative practice of violating the right to education by Russian troops and forces, aimed in particular at the destruction of public schools and libraries in the occupied territories, as well as at the intimidation of ethnic Georgian teachers and pupils, thereby preventing them from continuing with their education. However, despite the evidentiary materials submitted to the Court, including from the Coe Commissioner for Human Rights, the Grand Chamber did not find a violation of the right to education, based on the consideration that it did "not

<sup>62</sup> *Catan and Others v. Moldova and Russia* [GC], Applications nos. 43370/04, 8252/05 and 18454/06, Judgment of 19 October 2012.

<sup>63</sup> *ibid.* The dissenting judges highlighted the link of the right to education with Articles 8 and 14, observing, on the one hand, that "the applicants [...] had been subjected to discrimination based on their language. More specifically [...] to study in a language which they considered artificial caused them disadvantages in their private and family lives, and particularly in their education" (para. 13); and, on the other, that "language is the essential vehicle for education, the latter being the key to socialisation [...] Conversely, language barriers are liable to place pupils in a position of inferiority and hence, in some cases, of exclusion" (para. 14).

<sup>64</sup> *Iovcev and Others v. Moldova and Russia*, Application no. 40942/14, Judgment of 17 September 2019.

<sup>65</sup> *Georgia v. Russia (II)* [GC], Application no. 38263/08, Judgment of 21 January 2021.

have sufficient evidence in its possession to conclude beyond reasonable doubt that there were incidents contrary to Article 2 of Protocol No. 1”<sup>66</sup>.

### 3. – *Minority Protection and Aliens’ Right to Education in the EU.*

EU primary law dedicates some provisions to educational rights. While the word “education” is absent in the Treaty on the European Union (TEU), it appears various time in the Treaty on the Functioning of the EU (TFEU): first of all, in its preamble, where the Parties declare their intention “to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating”. Education is then reiterated in consideration of the allocation of competences, being an area, together with culture, which falls within the Union’s competence to support, coordinate or supplement the actions of the Member States<sup>67</sup>.

It has been observed that the lack of competence of the EU in these fields determines a scarce capacity to intervene in the protection of minorities and diversity management. The Union has no legislative competence over questions such as the use of regional or minority languages, in public education or elsewhere. Those issues fall under the responsibility of the Member States. Cultural and educational policies, thus, are important elements in national unity and have eluded harmonisation<sup>68</sup>.

While it is true that education and culture are areas where national sensitivities are particularly apparent, they may also serve as “vectors” to foster a European identity, which the EU can promote through policies such as educational mobility, language learning, support of cultural cooperation projects with a European dimension, or the designation of European Capitals of Culture. Yet, it has been highlighted that, if such kind of policies would facilitate and reinforce a sort of “Europeanisation” of cultural and educational processes, promoting European integration and a European identity, at the same time, would entail the risk of emphasising an “impoverished view of cultural policy”, with a focus on the European common ground at the expense of minorities and groups which do not have a long history of European identity<sup>69</sup>.

The Eurocentric focus of EU law would be confirmed in the TEU, by the references made, under Article 3(3), to the Union’s commitment to “respect *its* rich

<sup>66</sup> *ibid.*, para. 314.

<sup>67</sup> Art. 6(1)(c) and (e) TFEU.

<sup>68</sup> VON BOGDANDY, “The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship”, *European Journal of International Law*, 2008, pp. 241-275.

<sup>69</sup> WALLACE and SHAW, “Education, multiculturalism and the EU Charter of Rights”, *conWEB – webpapers on Constitutionalism and Governance beyond the State*, p. 13.

cultural and linguistic diversity, and [...] ensure that *Europe's cultural heritage* is safeguarded and enhanced"<sup>70</sup>; and, under Article 4(2), to the Union's task to respect Member States' national identities. According to the treaties, while there is a clear intent to promote and safeguard the European dimension of culture and education, there is no specific obligation on the Member States to support, protect and foster multicultural and multi-educational policies with regard to minorities and/or other groups such as migrants and non-EU nationals<sup>71</sup>.

Although the TEU generally proclaims that the EU is founded, among others, on the values of respect for human rights, "including the rights of persons belonging to minorities" (Article 2), such commitment remains to be implemented and elaborated with positive actions. Besides non-discrimination purposes, accomplished with EU secondary law<sup>72</sup>, protection of minority rights requires positive and promotional measures, in areas such as education, support and safeguard of cultural and linguistic diversity. These, however, relate to policy fields that do not occupy a strong place in EU law and that are reflected into measures that, given the allocation of competences, lack legally binding force or an incisive capacity to protect minorities in a substantial sense. In light of such considerations, it has been pointed out how, overall, minority protection in the EU remains fragmented and without policy direction<sup>73</sup>.

As for the Charter of Fundamental Rights of the EU (CFREU), its Preamble affirms the Union's contribution to the preservation and development of European common values "while respecting the diversity of the cultures and traditions of the peoples of Europe". The Charter then guarantees the right to education and to have access to vocational and continuing training in favour of "everyone" (Article 14)<sup>74</sup>; and

<sup>70</sup> Emphasis added.

<sup>71</sup> The focus on the "European" diversity, rather than, in general, on that of minorities and other groups, would also emerge from the terminology used. In this regard, for instance, while Article 165(2) TFEU provides for the role of the EU in the development of "the *European dimension* in education" and for the "teaching and dissemination of the *languages of the Member States*"; Article 167(2) TFEU establishes that action by the Union shall be aimed at "the improvement of the knowledge and dissemination of the culture and history of the *European peoples*" and at "safeguarding of cultural heritage *of European significance*" (emphasis added).

<sup>72</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. According to its Art. 3(1)(g), the Directive applies to all persons, as regards both the public and private sectors, in relation to education.

<sup>73</sup> AHMED, "The EU's Relationship with Minority Rights", in Psychogiopoulou (eds.), *Cultural Governance and the European Union*, London, 2015, p. 178.

<sup>74</sup> The norm draws inspiration from Article 2, Protocol 1 ECHR, somehow mirroring its content with regard to both the right to receive education and the right of parents to ensure education and teaching of their children in conformity with their convictions. It extends the right to education to access to vocational and continuing training and adds the principle of free compulsory education.

further establishes that “the Union shall respect cultural, religious and linguistic diversity” (Article 22). However, it lacks a specific provision on protection of minority.

Despite the various attempts to introduce in the final draft of Charter a separate, *ad hoc* norm on protection of minority rights, including minority language – attempts coming, in particular, from the European Parliament and the Committee of the Regions – the text only contains one single reference to minority, under Article 21(1), relating to non-discrimination<sup>75</sup>. Drawing from Article 14 ECHR, the CFREU mentions the “membership of a national minority” within the list of possible grounds of discrimination.

The difficulties and the obstacles in setting up a comprehensive minority protection and cultural diversity framework under EU law are also witnessed by the “*Minority Safepack Initiative*” and its troubled history<sup>76</sup>. In short, it was first launched in 2013 as a citizens’ initiative, showing the awareness of Europeans for the need by the EU to improve the protection of persons belonging to national and linguistic minorities and to strengthen cultural and linguistic diversity in the EU through the adoption of a series of legal acts. One of the proposed ways to promote cultural and linguistic diversity focused on the protection of the use of regional and minority languages in the areas of public relevance, including, in particular, education.

The initiative was rejected by the European Commission in 2013, which denied the registration on the ground that it fell manifestly outside its competence<sup>77</sup>. The issue generated litigation before the General Court, where the organisers of the initiative successfully contested the Commission’s decision, which was indeed annulled in 2017, on the ground that the Commission had failed to comply with its obligation to state reasons<sup>78</sup>. Following the judgment, the Commission partially registered the

<sup>75</sup> For an analysis of the discussion on minority rights in the drafting phase of the Charter, see SCHWELNUS, “‘Much ado about nothing?’ Minority Protection and the EU Charter of Fundamental Rights”, *conWEB – webpapers on Constitutionalism and Governance beyond the State*, 2001, no. 5, pp. 7 and ff. See also MORIJN, “The EU Charter of Fundamental Rights and Cultural Diversity in the EU” in Psychogiopoulou (eds.), cit., pp. 151 ff.

<sup>76</sup> On this topic, see CREPAZ, “The Minority Safepack Initiative – A European Participatory Process Supporting Cultural Diversity”, *European Yearbook of Minority Issues Online*, 2020, Volume 17, Issue 1, pp. 23-47. Further information can also be found on the official website of the initiative: <http://www.minority-safepack.eu>

<sup>77</sup> Commission Decision C(2013) 5969 final of 13 September 2013 refusing the request for registration of the proposed European citizens’ initiative entitled ‘Minority SafePack – one million signatures for diversity in Europe’.

<sup>78</sup> Judgment of the General Court of 3 February 2017, *Minority SafePack — one million signatures for diversity in Europe v Commission*, Case T-646/13, ECLI:EU:T:2017:59.

initiative<sup>79</sup>. This latter was opposed again, this time by Romania, which brought proceedings before the General Court seeking the annulment of the Commission's decision, invoking, *inter alia*, and once again, competence-related issues. The initiative "survived", with the General Court dismissing Romania's action in 2019<sup>80</sup>. The decision, however, had been appealed by Romania, although without success as, on 20 January 2022, the appeal was finally dismissed by the CJEU<sup>81</sup>.

The initiative, meanwhile, gained the required collection of signatures and obtained the support of the European Parliament<sup>82</sup>. It was thus addressed to the European Commission, which made its legal-political position clear in January 2021<sup>83</sup>. It pointed out, in particular, its intention not to propose any legal acts with regard to all the nine areas of the initiative that it had previously registered. Such conclusion has been criticised by the organizing committee of the initiative, which expressed "strong disappointment" for the Commission's choice<sup>84</sup>.

This outcome highlights the reluctance, in the EU, for legislative tools dedicated to the protection of minorities and the promotion of their cultural and identity rights. As many have observed, the initiatives of the EU with regard to minority protection are to be found mainly in the framework of its enlargement policy, although, even there, they appear as unsatisfactory.

### 3.1. – Education and Cultural Rights of Minorities in the EU Enlargement Policy.

The EU has limited competence and capacities to intervene in the protection of cultural diversity and educational rights of minorities. As a result, its policies have been considered quite marginal and wanting, lacking effectiveness and coherence. One of the contexts in which the EU has displayed a certain emergence of a specific

<sup>79</sup> Commission Decision (EU) 2017/652 of 29 March 2017 on the proposed citizens' initiative entitled 'Minority SafePack – one million signatures for diversity in Europe'.

<sup>80</sup> Judgment of the General Court of 24 September 2019, *Romania v Commission*, Case T-391/17, ECLI:EU:T:2019:672.

<sup>81</sup> Judgment of the Court of Justice of 20 January 2022, *Romania v. Commission*, Case C-899/19 P, ECLI:EU:C:2022:41. It can be observed that Hungary intervened in the case, asking the Court to dismiss Romania's appeal.

<sup>82</sup> European Parliament resolution of 17 December 2020 on the European Citizens' Initiative 'Minority SafePack – one million signatures for diversity in Europe' (2020/2846(RSP)).

<sup>83</sup> Communication from the Commission on the European Citizens' Initiative 'Minority SafePack – one million signatures for diversity in Europe', C(2021) 171 final, 14 January 2021.

<sup>84</sup> Federal Union of European Nationalists (FUEN), Reaction Of The Mspci Citizens' Committee To Commission Communication C(2021)171, 21 January 2021, p. 1. See also Federal Union of European Nationalists (FUEN), Minority SafePack: The European Commission turned its back on national minorities, 14 January 2021.

attention to minority rights is that of enlargement and accession of future members to the Union.

As it has been observed, “the Union entered the field of minority politics because of the fall of the Berlin Wall”<sup>85</sup>. Minority issues emerged on the EU agenda in the 1990s, following the collapse of the Communist bloc and when a number of new States knocked at the Union’s door in order to seek admission<sup>86</sup>. Against this background, in 1993, the European Council laid down the so-called Copenhagen criteria, outlining the accession conditions to join the EU<sup>87</sup>. Among the “political criteria”, along with democracy, rule of law and human rights, the respect for and protection of minorities was explicitly included, being a matter of particular concern for the EU, given the sensitive political and ethnic issues in various former Soviet countries.

The implementation of such new criterion was assessed by the Commission in the accession process of various candidate countries. A relevant example in this respect is the membership of Latvia and the issue of the protection afforded to non-citizens and Russian-speaking minorities<sup>88</sup>. In its 1997 Opinion on Latvia’s application for Membership of the EU,<sup>89</sup> the Commission highlighted, *inter alia*, the problem concerning cultural and educational rights of minorities, including teaching in Latvian to the detriment of their own national language. It pointed out, in particular, that “in the education field [...] the main criticism concerns the fact that Latvia has not yet introduced legislation on education for the minorities which would provide a solid framework for approaching this matter and planning for the medium term”<sup>90</sup>.

Other examples concern the protection of Roma in various Eastern European countries. In the case of Hungary, the Commission, in its 1997 Opinion on the Hungarian application for membership, focused on educational and linguistic rights of minorities<sup>91</sup>. While it noted that domestic legislation at that time allowed “education to be provided satisfactorily in the minority languages”, it conversely highlighted the problematic situation of Roma, being “still frequently subjected to attacks and dis-

<sup>85</sup> VON BOGDANDY, *cit. supra*, note 66, p. 257.

<sup>86</sup> On this topic, see PENTASSUGLIA, “The EU and the Protection of Minorities: The Case of Eastern Europe”, *European Journal of International Law*, 2001, pp. 3-38.

<sup>87</sup> Copenhagen European Council - 21-22 June 1993, Presidency Conclusions.

<sup>88</sup> On this topic, see OZOLIŅA (eds.), *Inclusion-Exclusion Dilemma. A Portrait of the Russian-speaking Community in Latvia*, Riga, 2016; CHESKIN, “Exploring Russian-speaking Identity from below: The Case of Latvia”, *Journal of Baltic Studies*, 2013, pp. 287-312.

<sup>89</sup> COM(97) 2005 final, 15 July 1997.

<sup>90</sup> *ibid*, p. 18.

<sup>91</sup> COM(97)2001 final, 17 July 1997.

criminary measures”, with the prospect of a “situation [that] is in danger of worsening over the next few years”<sup>92</sup>. This prediction has actually occurred, as the situation of minorities in Hungary has got even worse. More than two decades later, indeed, in 2018, the European Parliament adopted a resolution triggering, for the first time, Article 7 TEU against Hungary, and highlighted, *inter alia*, the persisting harsh social situation of minorities and vulnerable groups. The Parliament specifically put the focus on Roma and asylum seekers: while the former category of people experiences systemic educational discrimination and segregation, the latter is denied access to educational and schooling services<sup>93</sup>.

With regard to the protection of minorities in the EU enlargement policies, it has been observed that, overall, the EU action in this respect has proven to be ineffective and incoherent. Significantly, despite the proclaimed importance of respect and promotion of minority rights, including cultural, educational and linguistic ones, the EU could not rely on a clear theoretical approach for the conceptualisation of those rights, whose protection under EU law was “virtually absent”<sup>94</sup>. The lack of expertise and legal tools in minority rights standard-setting, has also been coupled with that of a proper monitoring mechanism: following a rather general (and often generous) assessment by the Commission of the rights of minorities and other vulnerable groups in a given Country, the absence of a proper follow-up led to the persistence or, over the years, even the worsening, of pre-existing, often systematic, practices of human rights violations, as the Hungarian case shows.

Given the lack in the EU of a system of own standards of assessment, the focus has been gradually put on standards elaborated elsewhere, and especially within the CoE. This emerges, for example, in the assessment of Croatia’s application for the EU membership, where the Commission, in a specific section of its Opinion, dedicated to “Minority rights, protection of minorities and refugees”, explicitly addresses the compliance of educational and linguistic rights and standards with, *inter alia*, the CoE’s FCPNM and ECRML<sup>95</sup>.

Finally, it has been underlined how the reliance by the Commission on various sources of different origin led to an unclear understanding of the respect of minority

<sup>92</sup> *ibid*, p. 20.

<sup>93</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), paras. 51-61 and 72.

<sup>94</sup> TOPIDI, *EU Law, Minorities and Enlargement*, Antwerp, 2010, p. 214; O’NIONS, “Roma Expulsions in Europe: The Elephant in Brussels”, *European Journal of Migration and Law*, 2011, pp. 361-388.

<sup>95</sup> COM(2004) 257 final, 20 April 2004, pp. 24 ff.

within the Copenhagen criteria, its assessment lacking a full and systematic methodology and showing various inconsistencies across time<sup>96</sup>. Other observers have also pointed out issues in terms of impartiality and credibility of the assessment of the minority rights criterion, as the Commission, rather than on external third sources, had relied heavily on information provided by the governments of the candidate Countries wishing to join the Union<sup>97</sup>.

#### 4. – *Concluding Remarks.*

EU law provides for the right to education. Yet, the EU does not have the competence to determine the content or the scope of national educational policies. It can orient, support and coordinate actions for education and promotion of a cultural heritage, which, however, rather than addressing an authentic and genuinely all-around diversity, appears to be exclusively the one of Europeans.

Minorities and marginalised groups of individuals, as migrants or asylum seekers, are not effectively protected when it comes to access to education. Children's right of access to education, regardless of their migrant status, is recognised virtually in all aspects of EU migration law. Virtually, because the EU has no competence to design the content of national provisions on the education system. The right to education can vary depending on the status and the different migratory situation. While non-EU students or child refugees can access education according to EU secondary migration law, the educational rights of asylum-seeking children are definitely "weaker", as observed by the Fundamental Rights Agency ("FRA")<sup>98</sup>.

The Agency highlighted, on a number of occasions, how access to education is severely limited for asylum-seeking children. In addition to practical difficulties (e.g. language barriers, lack of information, low allowances to cover expenses, treatment and integration of traumatized children or children with disabilities), asylum seekers in immigration detention can hardly access education; or when they do, they receive low quality education, provided in accommodation centres rather than schools and by

<sup>96</sup> JANSE, "Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria During the Big Bang Enlargement", *International Journal of Constitutional Law*, 2019, Volume 17, Issue 1, pp. 43–65.

<sup>97</sup> *ibid.*, para. 6. See also MARESCEAU, "Pre-accession", in Cremona (eds.), *The Enlargement of The European Union*, Oxford, 2003, pp. 33–34; HILLION, "The Creeping Nationalisation of the EU Enlargement Policy", Sieps (Swedish Institute For European Policy Studies, Stockholm), 2010; HUGHES and SASSE, "Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs", *Journal Of Ethnopolitics And Minority Issues In Europe*, 2003, Issue 1.

<sup>98</sup> FRA, *Handbook on European Law relating to the Rights of the Children*, Luxembourg, 2015, p. 147.

education staff that rarely receive adequate training<sup>99</sup>. These issues have recently been addressed by the European Committee of Social Rights in a case concerning the living conditions of migrant and asylum-seeking children in reception centres in the Greek islands and elsewhere on mainland Greece<sup>100</sup>. Among other issues, the Committee highlighted the severe obstacles encountered by migrants in accessing educational services. It also pointed out that, despite the effort of other subjects in providing alternative and temporary forms of schooling services, “non-formal education arrangements provided by non-state actors (e.g. NGOs) cannot be a substitute to the integration of migrant children in the public education system”, adding that “access to formal education is crucial for vulnerable children... who may stay for months in poor living conditions on the reception centres located on the islands”<sup>101</sup>. The Committee, therefore, unanimously concluded that there had been a violation of Article 17(2) of the European Social Charter due to the lack of access to education for accompanied and unaccompanied migrant children on the Greek islands.

Unlike the EU, the CoE has established a specific legal framework for the promotion and safeguard of education-related rights of minorities and vulnerable groups. The organisation based in Strasbourg, indeed, has contributed to the protection of cultural and educational rights with the adoption of two *ad hoc* legal tools. However, they have not been ratified by all Member States and they lack a judicial system behind their implementation.

Despite the ECHR’s individualistic dimension, the ECtHR has played an important role in the development of the protection of the right to education, also as associated with other rights as the ones to freedom of expression and non-discrimination. Many violations of educational and cultural rights, however, remain in place, having often a systemic character, on which the Court could not always be able to intervene.

In Europe, in conclusion, there are still significant challenges and hurdles that aliens, minorities and marginalised ethnic groups face in the full enjoyment of their cultural and educational rights. These issues need a greater level of attention and commitment by the European institutions, otherwise the famous, European motto would rather sound as united (but only) in (the European) diversity.

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<sup>99</sup> FRA, “Current Migration Situation in the EU: Education”, Report, May 2017; see also FRA, *Integration of Young Refugees in the EU: Good Practices and Challenges*, FRA, 2019.

<sup>100</sup> European Committee of Social Rights, Decision on the merits: International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece, complaint No. 173/2018, 26 January 2021.

<sup>101</sup> *ibid.*, para. 207.

**Abstract**

Europe is extremely rich when it comes to its vast variety of cultural and linguistic features, which mark the history of European societies and peoples. Such a cultural patrimony, however, is confronted with a number of challenges, particularly with regard to education, which represents the indispensable tool that enables the preservation of cultural and linguistic diversity, and its transmission to future generations. The enjoyment of educational rights is especially problematic for some categories of individuals, such as minorities, discriminated ethnic groups, aliens and migrants, who depend on education as an essential component of the right to participate in the cultural life of a Country and as a significant tool for integration. This chapter addresses the right to education by aliens and minorities in Europe, by examining the relevant legal-institutional frameworks of the EU and the Council of Europe. A variety of legal and policy tools are examined, including *ad hoc* Conventions for the protection of educational and linguistic rights, the European Convention on Human Rights and its related case-law, as well as instruments and initiatives elaborated within the EU, like in the framework of its enlargement policy.



## ACCESS TO EDUCATION FOR MIGRANT CHILDREN: A VITAL STEP FOR THEIR ENJOYMENT OF CULTURAL RIGHTS

*Giulia Ciliberto and Fulvia Staiano \**

SUMMARY: 1. Introduction. – 2. The European Commission’s Action Plan on Integration. – 3. The Case Study of Naples. – 4. Access to Education under International and EU Law. – 5. New Minorities and Vulnerability: Towards a Special Protection of the Right to Access to Education? – 5.1. Enhanced Protection through the Lens of Minority Specific Rights? – 5.2. The Concept of Vulnerability in International Human Rights Law and its Application in the Field of Education – 6. The Expected Impact of the Latest EU Policies on Migrant Children’s Right to Education in Europe. – 7. Concluding Remarks.

### *1. – Introduction.*

In June 2016, the European Commission adopted the Action Plan on Integration of Third-Country Nationals (“2016 Action Plan”).<sup>1</sup> The Plan identified several key priorities to ensure a successful integration of migrants and refugees in the Eu-

\* The present Chapter is the result of the joint efforts and fruitful exchange of ideas of both Authors. However, Sections 3, 4, 5 and 5.1 are more directly attributable to Dr Giulia Ciliberto, while Sections 1, 2, 5.2. and 6 are more directly attributable to Professor Fulvia Staiano.

<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on the integration of third country nationals, COM(2016) 377 (“2016 Action Plan”). On this document, see for instance KOSIŃSKA, *Cultural Rights of Third-Country Nationals in EU Law*, Cham, 2019, p. 224 ff.

BRUNO, PALOMBINO, DI STEFANO, RUOTOLO (eds.), *Migration and Culture: Implementation of Cultural Rights of Migrants*, Rome, CNR Edizioni, 2021, ISBN 978 88 8080 301 0, pp. 183-209.

ropean Union (“the Union”, EU) across wide-ranging areas, including the development of inclusive education. Despite some improvements, specific shortcomings persisted after the termination of the actions funded under the 2016 Action Plan.<sup>2</sup> In November 2020, the European Commission adopted another soft law instrument, the Action Plan on Integration and Inclusion for 2021 – 2027 (“the Action Plan”),<sup>3</sup> which identifies education as one of its priority areas. The Action Plan places a strong emphasis on inclusive and multicultural education as a tool to achieve a durable integration and social inclusion of migrant children and children with a migrant background, as well as of their families. At the same time, the European Commission appears to be aware that access to education remains a challenge for many migrant and refugee children, particularly those pertaining to certain age groups. The concerns of the European Commission match the data gathered by international organizations regarding access to school systems for refugees and third country nationals in Europe. According to these findings, the challenges chiefly relate to *de facto* exclusion from pre-primary and upper secondary school. Notably, such figures also mirror the situation in the urban area of Naples, one of the Italian cities with the highest rate of foreigners.

Following the outline of the main features of the latest Action Plan of the European Commission concerning training and education of migrant children (Section 2), the present contribution addresses the challenges faced by third country nationals in accessing school systems. It takes into account the figures provided by international organizations and those specifically related to the situation of the urban area of Naples, which constitutes our case-study for the identification of the concrete obstacles to migrant children’s access to education on a local level (Section 3). Subsequently, the paper recalls the international and EU legal regimes concerning the right to education (Section 4) and assesses whether migrant children may enjoy the enhanced protection recognised to minorities or to vulnerable individuals (Section 5). Subsequently, the paper questions whether soft law instruments – such as the latest Action Plan of the European Commission – may overcome the factual hurdles faced by migrant children in accessing pre-primary and upper secondary school (Section 6). The last section provides brief conclusions.

<sup>2</sup> Commission Staff Working Document Accompanying the Document - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Integration and Inclusion 2021-2027, COM(2020) 758, p. 5.

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Integration and Inclusion 2021-2027, COM(2020) 758.

## 2. – *The European Commission's Action Plan on Integration.*

On 24 November 2020, the European Commission adopted its Action Plan on Integration and Inclusion for 2021 – 2027.<sup>4</sup> Against the background of the complex and diverse scenario of EU integration policies,<sup>5</sup> the Action Plan essentially reinforces the perspective adopted by the Commission in its 2016 Action Plan on the Integration of Third-Country Nationals.<sup>6</sup> First, the Action Plan confirms the framing of integration as a two-way process that is beneficial for all parties involved (third-country nationals as well as host countries' societies and economies). Second, the Action Plan did not essentially modify the key areas of intervention already determined by its 2016 predecessor. Labour market integration and skills recognition, access to basic services such as housing and health, as well as social inclusion appear in both of these soft law sources as main areas of intervention – together with education, on which this paragraph will focus. The current Action Plan identified access to education as one of the “persisting challenges”<sup>7</sup> in the field of integration and inclusion, and recommended further action in this field. It is interesting to observe that two groups of migrants were singled out by the Action Plan as particularly at risk of exclusion from education – namely, very young children and youth transitioning from school to work.

As for the first group, the new Action Plan reiterated in part the observations of the 2016 Action plan. Early childhood education and care (ECEC) was already identified in this context as a weak area on which Member States' integration policies needed to focus. In 2016, the Commission had committed to remove barriers to the participation of third-country national children to ECEC, framing it as a crucial step towards not only the integration of migrant children and their families but also as a tool in the fight against poverty and social exclusion.<sup>8</sup> Four years later, this objective was reiterated in the Action Plan. Here, the Commission noted the importance of

<sup>4</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Integration and Inclusion 2021-2027, COM(2020) 758.

<sup>5</sup> For an overview of the different conceptions of integration grounding EU immigration law and policy, see MURPHY, *Immigration, Integration and the Law: The Intersection of Domestic, EU and International Legal Regimes*, Abingdon, 2016, p. 149 ff.

<sup>6</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on the integration of third country nationals, COM(2016) 377 (“2016 Action Plan”). On this document, see for instance KOSIŃSKA, *op. cit.*, p. 224 ff.

<sup>7</sup> Action Plan, p. 3.

<sup>8</sup> 2016 Action Plan, pp. 7 -8.

ECEC in creating a diverse society and in promoting the integration of migrant children and their families. However, this time the emphasis of the Commission was not only on access to ECEC *per se* but also on cultural diversity as an essential feature of these services. The objective pursued by the Commission in this area was no longer simply the removal of barriers to ECEC, but to increase the participation of migrant children and children with a migrant background “in high quality and inclusive early childhood education and care”.<sup>9</sup> To this end, the Action Plan also set the goal of adopting a new toolkit on inclusion in ECEC.

A second group singled out by the Action Plan was that of recently arrived young migrants transitioning into adulthood. The Commission noted that a successful integration strategy for this group must encompass a range of services and tools – from language learning programmes to the recognition of qualifications, from vocational training to coaching and mentoring. In this light, the Action Plan included among the objectives pursued by the Commission the improvement of the recognition of qualifications in member States and the further development of “comprehensive and accessible language learning programmes”. Beyond these supporting activities programmed by the Commission, the Action Plan also specifically encouraged Member States to adopt fair, expedited and transparent procedures for the recognition of foreign qualifications and ensure access to language learning also after the initial period of residence of migrants on their territory.

The Action Plan raises crucial points concerning migrant children and adolescents’ access to education as a tool for social inclusion and as a key component of the enjoyment of their cultural rights.<sup>10</sup> Certainly, a full and effective enjoyment of their right to education implies access to culturally diverse schooling and education services. At the same time, an essential precondition for migrant children’s access to multicultural education concerns the elimination of barriers that prevent or hinder

<sup>9</sup> Action Plan p. 10.

<sup>10</sup> The Council of Europe has raised a similar point in its latest action plans – see Council of Europe, Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019); Council of Europe, Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021-2025). For example, in assessing the implementation of the Action Plan 2017-2019, the Committee of Ministers of the Council of Europe noted that education is not only a right, but also serves “to facilitate social inclusion of young people” and recommended Member States to take a wide set of actions in this field – see Recommendation CM/Rec(2019)4 of the Committee of Ministers to member States on supporting young refugees in transition to adulthood, whereas and paras. 13 to 19. Another example is provided under the Action Plan 2021-2015, which identifies the promotion of the “integration of refugees by enhancing their access to education and employment, by facilitating the recognition of their qualifications through the European Qualifications Passport for Refugees and by fostering linguistic integration through education” – see Pillar 3 - Fostering democratic participation and enhancing inclusion (human rights and democracy), action 3.2.

their access to schooling and educational services in general. Yet, precisely the two age groups identified by the Action Plan as particularly in need of integration policies in the field of education – namely, young children and adolescents on the brink of adulthood – face specific hurdles in accessing education and vocational training. A joint report by UNHCR, UNICEF and IOM<sup>11</sup> concerning refugee, migrant and asylum seeker children in Europe highlighted that access to education for children below the age of five and those above the age of fifteen can be significantly hindered by legal and administrative barriers. The same source also identified migrant children in an irregular situation as those most at risk of exclusion from formal education, due to procedural requirements imposed by local authorities or schools.<sup>12</sup> Such figures suggest that the objective of fostering culturally diverse education services should be pursued through policies that also take into account the barriers experienced by migrant children in accessing such services at all. The next paragraph will further illustrate this point by referring to the case of Naples. A brief enquiry on the availability and quality of education services for migrant children in this emblematic city will prompt a broader reflection on the actual degree of implementation of the right to education for this category at regional and local level.

### 3. – *The Case Study of Naples.*

Naples is among the Italian cities with the highest level of third country nationals (including asylum seekers and refugees) and people with a migrant background (also known as second or third generation of migrants).<sup>13</sup> Data show that citizens of non-EU countries represent the 5,7% of the population of the urban area,<sup>14</sup> the majority of which belongs to the Ukrainian, Sri Lankan and Chinese communities.<sup>15</sup> Attention should also be paid to migrants seeking international, European Union or national

<sup>11</sup> UNHCR, UNICEF and IOM, “Access to education for refugee and migrant children in Europe - September 2019”, available at: [https://www.iom.int/sites/default/files/press\\_release/file/access-to-education-for-refugee-children.pdf](https://www.iom.int/sites/default/files/press_release/file/access-to-education-for-refugee-children.pdf).

<sup>12</sup> *Ibid.*, p. 4.

<sup>13</sup> Ministero del Lavoro e delle Politiche Sociali, “La presenza dei migranti nella città metropolitana di Napoli - 2019” (2020), p. 4, available at: <https://www.lavoro.gov.it/documenti-e-norme/studi-e-statistiche/Documents/La%20presenza%20dei%20migranti%20nelle%20aree%20metropolitane,%20anno%202019/RAM-2019-Napoli.pdf>. The data are updated to 31 December 2018.

<sup>14</sup> *Ibid.*, p. 13. In other towns of *Regione Campania* (Casandrino, Palma Campana, San Giovanni Vesuviano, San Giuseppe Vesuviano and Terzigno) the percentage is above 7%.

<sup>15</sup> *Ibid.*, p. 15. OIM, “Rapporto sui cittadini stranieri residenti nella IV Municipalità del Comune di Napoli – Novembre 2019”, p. 5, available at: [https://publications.iom.int/system/files/pdf/rapporto\\_sui\\_cittadini\\_stranieri\\_residenti.pdf](https://publications.iom.int/system/files/pdf/rapporto_sui_cittadini_stranieri_residenti.pdf).

forms of protection – such as refugee status under the 1951 Geneva Convention,<sup>16</sup> subsidiary protection according to EU law,<sup>17</sup> or residency permits on humanitarian grounds under national legal systems.<sup>18</sup> Starting from 2015, EU frontline Member States, including Italy, have recorded a significant increase in land and sea arrivals of people seeking protection.<sup>19</sup> Figures reveal that residency permits issued in Naples pending the evaluation of the application for protection and those issued after the positive outcome of the procedure represent around one in five of the total amount of residency permits, which is higher than the national average.<sup>20</sup>

In the urban area of Naples, the percentage of children under 18 years old amounts to 14,1% of third country nationals,<sup>21</sup> among which few unaccompanied minors hosted in reception centres.<sup>22</sup> As recognised by the European Commission, education is “among the most powerful tools for integration” and access to it “should be ensured and promoted as early as possible.”<sup>23</sup> In this field, the Commission promotes systems of education which take into account the heterogenic composition of school classes.<sup>24</sup> However, the design and functioning of inclusive educational systems require effective access to them, which is not a foregone assumption for all educational stages. Figures concerning Naples show that children from non-EU countries chiefly attend primary school, whilst the fraction enrolled in pre-primary

<sup>16</sup> Convention relating to the Status of Refugees (28 July 1951, entry into force 22 April 1954), 189 UNTS 137. See also Protocol relating to the Status of Refugees (31 January 1967, entry into force 4 October 1967) which lifted the geographical restriction of the scope of application of the 1951 Convention.

<sup>17</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337/9.

<sup>18</sup> The residency permit on humanitarian grounds is provided for in different countries, among which Germany and Italy. As for Italy, in 2018 this form of protection was abolished by the so-called “Decree Law on Immigration and Security” (*Decreto Immigrazione e Sicurezza* - Decree Law No. 113 of 5 October 2018, converted in Law No. 132 of 1 December 2018). In November 2020, the Italian Council of Minister issued a new decree law which basically restored the residency permit on humanitarian grounds (Decree Law No. 130 of 21 October 2020, converted into Law No. 173 of 18 December 2020).

<sup>19</sup> For an overview of the situation concerning the sea route through the Aegean and Mediterranean seas, see the data provided by the United Nation High Commissioner for Refugees (UNHCR), available at: <https://tinyurl.com/y9l4lhrr>. For an overview of the so-called “Balkan Route”, see the data provided by UNCHR, available at: <https://data2.unhcr.org/en/situations/southeasterneurope>.

<sup>20</sup> Ministero del Lavoro e delle Politiche Sociali, “La presenza dei migranti nella città metropolitana di Napoli - 2019”, *cit. supra* note 13, p. 20.

<sup>21</sup> *Ibid.*, p. 15.

<sup>22</sup> *Ibid.*, pp. 21-22. As to 31 December 2019, reception centers in Naples hosted only 39 unaccompanied minors.

<sup>23</sup> 2016 Action Plan, p. 7.

<sup>24</sup> 2016 Action Plan, p. 8; Action Plan, pp. 8 ff.

school, junior high school and high school drastically decreases.<sup>25</sup> These data are in line with the already mentioned findings of UNCHR, UNICEF and IOM on the challenges faced by refugee and migrant children in accessing ECEC and upper secondary school in Europe. According to their figures, the main cause of their difficulties stems from the limited scope of compulsory education which in several States (including Italy) does not cover these age groups.<sup>26</sup>

Beside the high rate of school dropouts, statistics show that in the urban area of Naples allocation of children from third countries is patchy, which is in sharp contrast with data concerning Italy as a whole.<sup>27</sup> These figures should be read in conjunction with the existence of private schools which only enrol children from a certain State (including second generations) – e.g. the private Chinese school in the district of Gianturco,<sup>28</sup> or the unauthorized Sri Lankan school in Naples city centre which was shut down by the competent Italian authorities.<sup>29</sup> This scenario bears the serious risk of a *de facto* school segregation, which runs contrary to the aim of integrating children from non-EU states and with a migrant background. Migrant communities may legitimately establish private specific education institutions, provided that education thereby provided conforms to the minimum standards laid down by States' authorities.<sup>30</sup> However, the set-up of such separate institutions may hinder

<sup>25</sup> Data show the following: 17% of children from non-EU countries attends nursery school; 37,5 % of them attends primary school; 21% of them attends junior high school; 25% of them attends high school. See Ministero del Lavoro e delle Politiche Sociali, "La presenza dei migranti nella città metropolitana di Napoli - 2019", *cit. supra* note 13, p. 17.

<sup>26</sup> UNHCR, UNICEF and IOM, "Access to education for refugee and migrant children in Europe - September 2019", available at: <[https://www.iom.int/sites/default/files/press\\_release/file/access-to-education-for-refugee-children.pdf](https://www.iom.int/sites/default/files/press_release/file/access-to-education-for-refugee-children.pdf)>. See also para. 1 of the present paper. On the challenges faced by refugees in accessing educational systems, see also MARCHISIO, "Diritto all'istruzione e integrazione dei rifugiati", *Ordine internazionale e diritti umani*, 2018, p. 267 ff.

<sup>27</sup> In the urban area of Naples, around 42% of schools have no pupils from third countries, whilst around 54% of schools have less than 15% of pupils from non-EU states. On the contrary, figures concerning Italy show that only 25% of schools have no pupils from third countries, whilst 60% of schools have around 15% of pupils from non-EU states. See *ibid.*, p. 17.

<sup>28</sup> OIM, "Rapporto sui cittadini stranieri residenti nella IV Municipalità del Comune di Napoli – Novembre 2019", *cit. supra* note 15, p. 17.

<sup>29</sup> See e.g. "Napoli, scoperta scuola illegale per i bimbi dello Sri Lanka", 11 September 2015, available at: [https://www.ilmattino.it/napoli/cronaca/napoli\\_scuola\\_illegale\\_bimbi\\_sri\\_lanka-1238978.html](https://www.ilmattino.it/napoli/cronaca/napoli_scuola_illegale_bimbi_sri_lanka-1238978.html); "Italian police shut down illegally run Sri Lankan school", 12 September 2015, available at: <http://www.ada-derana.lk/news/32306/italian-police-shut-down-illegally-run-sri-lankan-school>.

<sup>30</sup> See e.g. UNESCO Convention Against Discrimination in Education (14 December 1960, entry into force 22 May 1962) 429 UNTS 93, Art. 2; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, UN Doc. E/C.12/1999/10, para. 59.

social cohesion, which is the main purpose pursued by the European Commission through its Action Plans.

Notably, the risk of marginalization has worsened because of the Covid-19 pandemic outbreak mostly due to the so-called digital divide – i.e., inequality regarding access to and utilization of equipment for online learning (such as personal computer and internet connection). Local programmes of support in this area aimed at low-income households might not necessarily be accessible for migrant families due to bureaucratic hurdles.<sup>31</sup> Although the closure of schools has negatively affected students worldwide, this measure has furthermore exacerbated the challenges already faced by children from third countries (including asylum seekers and refugees) and second generations of migrants and, hence, has intensified their vulnerability.<sup>32</sup> Even if there are still no conclusive data on the impact of Covid-19 on access to education in the urban area of Naples, it seems reasonable to assume that it raises the same concerns on the perpetration of disparity and the broadening of existing gap.

More generally and notwithstanding its own peculiarities, access to education for migrant children and second generations in the specific area under enquiry mirrors a more general scenario, as confirmed by the already recalled findings of international organizations on the situation in European States. Therefore, the state-of-affairs regarding Naples allows the drawing of wide-ranging considerations which are relevant for the region at stake as well as for other contexts.

Against this background, the following Section outlines the international and EU regimes protecting children's access to education, including for third country nationals and second generation of migrants.

<sup>31</sup> Just by way of example, it is possible to recall that the decision of local authorities in the region of Basilicata to provide low-income families with financial support to purchase IT equipment to allow school-children to access distance learning during the pandemic requires beneficiaries to officially reside on the regional territory, thus *de facto* excluding children of undocumented third-country nationals (who cannot officially register as residents). More information are available at: <https://www.asgi.it/famiglia-minori/basilicata-esclusi-bambini-bonus-pc/>.

<sup>32</sup> See e.g. European Union Agency for Fundamental Rights, "Migration: Key fundamental rights concerns - Quarterly bulletin 3 – 2020", pp. 13-14, available at: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-migration-bulletin-3\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-migration-bulletin-3_en.pdf); YOU ET AL., "Migrant and displaced children in the age of COVID-19: How the pandemic is impacting them and what can we do to help", *Migration Policy Practice*, 2020, p. 32 ff., pp. 36-37, available at: <https://www.unicef.org/media/83546/file/Migrant-and-displaced-children-in-the-age-of-COVID-19.pdf>; OECD, "What is the impact of the COVID-19 pandemic on immigrants and their children?", 19 October 2020, pp. 15-19, available at: [https://www.oecd-ilibrary.org/social-issues-migration-health/what-is-the-impact-of-the-covid-19-pandemic-on-immigrants-and-their-children\\_e7cbb7de-en](https://www.oecd-ilibrary.org/social-issues-migration-health/what-is-the-impact-of-the-covid-19-pandemic-on-immigrants-and-their-children_e7cbb7de-en); Consiglio Italiano per i Rifugiati, "L'emergenza sanitaria Covid-19 e gli effetti sui minori stranieri non accompagnati", 7 Aprile 2020, available at: <http://www.cir-onlus.org/wp-content/uploads/2020/04/L'emergenza-sanitaria-Covid-19-e-gli-effetti-sui-MSNA.pdf>.

#### 4. – Access to Education under International and EU Law.

The term education has a twofold meaning. On the one hand, it refers to the entire process whereby adults transmit social, cultural, spiritual and other values to individuals and groups belonging to the subsequent generation. On the other hand, it covers the narrower concepts of teaching and instruction, which involve the transmission of knowledge within public or private institutions.<sup>33</sup> The right to education is enshrined in several international instruments of universal<sup>34</sup> and regional nature,<sup>35</sup>

<sup>33</sup> DIETER BEITER, *The Protection of the Right to Education by International Law*, Leiden/Boston, 2005, pp. 19-20; HENNEBEL, TIGROUDJA, *Traité de droit international des droits de l'homme*, 12<sup>th</sup> ed., Paris, 2018, pp. 508 509; HARRIS ET AL (eds.), *Harris, O'Boyle and Warbrick. The Law of the European Convention of Human Rights*, 4<sup>th</sup> ed, Oxford, 2018, p. 898. The twofold meaning of the term “education” stems also from the French text of the Art. 2, Add. Prot. 1 ECHR, which distinguishes between “le droit à l’instruction” and the obligation of States to respect “le droit des parents d’assurer cette éducation et cet enseignement conformément à leurs convictions religieuses et philosophiques”. See also *Campbell and Cosans v. The United Kingdom*, Applications Nos. 7511/76 and 7743/76, Judgment of 25 February 1982, para. 33.

<sup>34</sup> Art. 26 of the Universal Declaration of Human Rights (December 1948) UNGA Res 217 A(III) (“UDHR”); Art. 22 of the Convention Relating to the Status of Refugees (28 July 1951, entry into force 22 April 1954) 189 UNTS 137; Art. 5(e)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, entry into force 4 January 1969) 660 UNTS 195 (CERD); Arts. 13 and 14 of the International Covenant of Economic, Social and Cultural Rights (16 December 1966, entry into force 3 January 1976) 993 UNTS 3 (ICESCR); Art. 10 of the Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979, entry into force 3 September 1981) 1249 UNTS 13; Arts. 28 and 29 (20 November 1989, entry into force 2 September 1990) 1577 UNTS 3 (ICRC); Art. 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990, entry into force 1 July 2003) 2220 UNTS 3 (CMW); Art. 24 of the Convention on the Rights of Persons with Disabilities (13 December 2006, entry into force 3 May 2008) 2515 UNTS 3 (CRPD). Other treaties specifically relate to education, such as e.g. the UNESCO Convention Against Discrimination in Education (14 December 1960, entry into force 22 May 1962) 429 UNTS 93; the Convention concerning Minimum Age for Admission to Employment (26 June 1973, entry into force 19 June 1976) of the International Labour Organization (ILO); the ILO Convention concerning Paid Educational Leave (24 June 1974, entry into force 23 September 1976).

<sup>35</sup> Art. 2 of the Additional Protocol to the European Convention of Human Rights (“Add. Prot. ECHR”) (20 March 1952, entry into force 3 September 1953); Art. 17 of the Revised European Social Charter (5 May 1996, 1 July 1999) (RESC); Art. 14(1) of the European Convention on the Legal Status of Migrant Workers (24 November 1977, entry into force 01 May 1983); Art. 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (17 November 1988, entry into force 16 November 1999) (“Protocol of San Salvador”); Art. 17 of the African Charter on Human and Peoples' Rights (27 June 1981, entry into force 21 October 1986) (“the Banjul Charter”); Art. 41 of the Arab Charter on Human Rights (22 May 2004, entry into force 15 March 2008).

as well as in EU law.<sup>36</sup> Some texts also protect the right to vocational training.<sup>37</sup> Hence, education is a broad field which entails complex legal relationships between those who may claim rights and freedoms (pupils, parents, teachers and professors) and duty bearers (national authorities and non-State actors).<sup>38</sup> For the purpose of the present paper, this Section provides a general overview of the regime governing the relation between students, including children from third countries and those with a migrant background, and State parties to international conventions protecting the right to education, with a focus on the instruments which bind Italy.

Broadly speaking, education “is both a human right in itself, and an indispensable means of realizing and promoting other human rights”.<sup>39</sup> It is a precondition for the enjoyment of civil and political rights (such as freedom of information or the right to vote) and for the exercise of economic, social and cultural rights (such as the right to form trade unions).<sup>40</sup> As such, the right to education “epitomizes the indivisibility

<sup>36</sup> Art. 14 of the Charter of the Fundamental Rights of the European Union (CFREU); Art. 14 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection 96 OJ L 180 (“Reception Directive”), which specifically refers to the right to “minor children of applicants [for international protection] and to applicants [for international protection] who are minors” (Art. 14(1)); Art. 27 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted 9 OJ L 337 (“Qualification Directive”), which establishes the obligation of EU Member States to “grant full access to the education system to all minors granted international protection, under the same conditions as nationals” (para. 1). See also Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service 12 OJ L 375; Principle No. 1, European Pillar of Social Rights.

<sup>37</sup> See e.g. Art. 4 of the Convention Against Discrimination in Education; Art. 5(e)(v) CERD; Art. 6 ICESCR; Arts. 43 and 45 CMW; Arts. 24(5) and 27(1)(d) CRPD; Arts. 9, 10, 15(1) RESC; Art. 16 Protocol of San Salvador; Art. 14 CFREU; Art. 14 of the Reception Directive. Vocational training may be defined as “the provision of initial instruction to individuals to help them to acquire the knowledge and skills they need to enter the labour market and hence to achieve personal fulfilment and integration into the community” (European Committee on Social Rights, *Action européenne des handicapés (AEH) v. France*, Complaint No. 81/2012, decision of 11 September 2013, para. 101).

<sup>38</sup> NOWAK, “The right to education”, in Eide, Krause and Rosas, *Economic, Social and Cultural Rights. A Textbook*, 2<sup>nd</sup> ed., Leiden, 2001, p. 246; SSENYONJO, *Economic, Social and Cultural Rights in International Law*, Portland, 2009, p. 357.

<sup>39</sup> CESCR, *General Comment No. 13*, cit. supra note 30, para. 1.

<sup>40</sup> SSENYONJO, cit. supra note 38, p. 355; NOWAK, “The right to education”, cit. supra note 38, p. 245; HENNEBEL, TIGROUDJA, cit. supra note 33, 1227; DE SENA, “Il diritto all’istruzione tra Patto sui diritti economici, sociali e culturali e Banca Mondiale”, in Bestagno (eds.), *I diritti economici, sociali e culturali. Promozione e tutela nella comunità internazionale*, Milano, 2009, p. 63. See also e.g. ECtHR, Application no. 44774/98, *Leyla Şahin v. Turkey* [GC], Judgment of 10 November 2005, paras. 136-137.

and interdependence of all human rights”.<sup>41</sup> Besides providing knowledge and skills, education should facilitate integration into society.<sup>42</sup> As “an empowerment right”, it should be the means through which marginalized and vulnerable individuals participate fully in the economic, social and cultural life of their communities.<sup>43</sup> Moreover, compliance with international norms guaranteeing the right to education contributes to preventing child labour and economic exploitation of minors, both expressly prohibited under international law.<sup>44</sup> On the one hand, education may neutralise these conducts, which, on their part, obstruct the full enjoyment of this right. On the other hand, education improves future employment prospects.<sup>45</sup> Ultimately, education contributes to the development of human dignity.<sup>46</sup> In order to achieve such aims, educational systems should safeguard pluralism. This implies respecting students’ cultural identity, language and values via a balanced approach which reconciles cultural differences through dialogue.<sup>47</sup> In the words of Ringelheim, “education can both be a means of identity preservation and of social inclusion”.<sup>48</sup>

Moving to States’ obligations under the relevant international treaties, it should be preliminarily recalled that, according to the well-known tripartite typology developed by Eide,<sup>49</sup> the right to education implies three types of obligations. The obligation *to respect* gives rise to the negative duty to abstain from interfering, directly or indirectly,

<sup>41</sup> CESCR, *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, UN Doc. E/1992/23, para. 2.

<sup>42</sup> See e.g. *Ponomaryovi v. Bulgaria*, Application No. 5335/05, Judgment of 21 June 2011, para. 56.

<sup>43</sup> CESCR, *General Comment No. 13*, *cit. supra* note 30, para. 1. See also PUSTORINO, *Lezioni di tutela internazionale dei diritti umani*, 2019, 192.

<sup>44</sup> NOWAK, “The right to education”, *cit. supra* note 38, p. 262. See e.g. the ILO the Convention concerning Minimum Age for Admission to Employment (26 June 1973, entry into force 19 June 1976); the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (17 June 1999, entry into force 19 November 2000); International Labour Conference, Declaration on Fundamental Principles and Rights at Work, 18 June 1998, para. 2(c).

<sup>45</sup> FREDMAN, “The right to education”, in *Id.*, *Comparative Human Rights Law*, 2018, 365-368.

<sup>46</sup> NOWAK, “The right to education”, *cit. supra* note 38, pp. 249-251. See also UN Committee on the Rights of the Child, *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, UN Doc. CRC/GC/2001/1, para. 2. As Nowak pointed out, due to the significant number of State parties to the ICRC, the Convention “can be regarded as the most universally accepted standard in this field” (Nowak, *ibidem*, p. 251).

<sup>47</sup> ICRC, Art. 29(1); CRC, *General Comment No. 1*, *ibidem*, para. 4. See also HARRIS ET AL (eds.), *cit. supra* note 33, pp. 905-907; NOWAK, “The right to education”, *cit. supra* note 38, p. 251.

<sup>48</sup> RINGELHEIM, “Between Identity Transmission and Equal Opportunities: The Multiple Dimension of Minorities Right to Education”, in Henrard (ed), *The Interrelation between the Right to Identity of Minorities and Their Socio-Economic Participation*, 2013, 91.

<sup>49</sup> On the tripartite typology, see above all: EIDE, “The International Human Rights System”, in Eide et al (eds.), *Food as a Human Right*, Tokyo, 1984, p. 152; *Id.*, Report on the right to adequate food as a human right, UN Doc. E/CN.4/Sub.2/1987/23 (1987), paras. 66-69.

with the enjoyment of the right to education. For example, States must not deny or limit equal access to education. The obligation *to protect* requires the adoption of affirmative steps to prevent third parties from interfering in any way with the right in question. Beside preventive measures, such obligation includes the duty to investigate and punish wrongdoers, alongside that to redress victims of violations. For example, States must adopt legislation which prohibits private institutions from discriminating at the admission stage. The obligation *to fulfil* demands the adoption of adequate measures meant to secure the full realization of the relevant right, including providing the right to education when individuals or groups are unable, for reasons beyond their control, to realize the right themselves by the means at their disposal.<sup>50</sup> State could comply with this duty by e.g., developing a system of scholarship.<sup>51</sup>

The right to education implies both immediate obligations (such as the prohibition of discrimination) and progressive or programmatic obligations which mostly rely on States' available resources (e.g., the introduction of free education).<sup>52</sup>

Non-discrimination and equality are structural principles of international human rights law,<sup>53</sup> and underline all treaty provisions enshrining States' obligations related to the right to education at any level or stage.<sup>54</sup> Formal equality (or quality as consistency) safeguards individuals against direct (or *de jure*) discrimination based on a particular ground, such as ethnicity. Substantive equality, on the other hand, aims at correcting existing inequalities which may also stem from indirect (or *de facto*) discrimination – i.e., general policies or rules which are framed in neutral terms but

<sup>50</sup> The obligation to fulfil imposes a threefold duty: i) the obligation to facilitate individuals in the enjoyment of the relevant right; ii) the obligation to promote public awareness through appropriate education and training programmes, as well as through information campaigns; iii) the obligation to provide a specific right where individuals or groups are unable, on grounds reasonably beyond their control, to enjoy and to realize that right themselves by the means at their disposal. The obligation to provide is meant to safeguard the enjoyment of fundamental rights towards vulnerable and marginalised individuals or groups.

<sup>51</sup> On the obligations stemming from the right to education, see e.g. NOWAK, "The right to education", *cit. supra* note 38, pp. 255-258; SSENYONJO, *cit. supra* note 38, pp. 388-391; NOWAK, "The right to education - Its meaning, significance and limitations", *Netherlands Quarterly of Human Rights*, 1991, p. 418 ff, pp. 421-423. See also CESCR, *General Comment No. 13*, *cit. supra* note 30, paras. 46-47. On the obligation to refrain from interfering from the exercise of the right to education, see also e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136, paras. 133-134.

<sup>52</sup> CESCR, *General Comment No. 13*, *cit. supra* note 30, paras. 13 and 31.

<sup>53</sup> Clifford, "Equality", in SHELTON (ed.), *The Oxford Handbook of International Human Rights Law*, 2013, 420 ff. The legal status of the principles of non-discrimination and equality as customary international law is contentious. On this regard, it is worth recalling that the Interamerican Court of Human Rights ascribed the status of *jus cogens* to both principles: Interamerican Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)*, 17 September 2003, para. 101.

<sup>54</sup> NOWAK, "The right to education", *cit. supra* note 38, pp. 258-261; SSENYONJO, *cit. supra* note 38, pp. 391-395; HENNEBEL, TIGROUDJA, *cit. supra* note 33, 1236-1238.

disproportionately affect a particular group, or factual situations of inequality that are not properly dealt with.<sup>55</sup> Notably, substantive equality is commonly couched as equality of opportunity, which aspires at levelling the starting point to allow individuals to set off under similar conditions.<sup>56</sup> In the field of education, it requires, wherever necessary, the implementation of special measures towards disadvantaged individuals and groups (e.g., policies encouraging their enrolment).

The last remark on States' obligations concerns the so-called "four A" features of education: availability, accessibility, acceptability, and adaptability. Generally speaking, availability relates to the existence and functioning of educational institutions and programmes. Accessibility requires these institutions to be accessible to all, without discrimination of any kind. In this regard, the UN Special Rapporteur on the right to education pointed out the difference between the unreached and the excluded – i.e. between those whose access to education is barred by social pattern (such as asylum-seeking and refugee children) and those who are formally prevented from participating in programs (e.g., on the ground of nationality).<sup>57</sup> Acceptability obliges schools, institutions and curricula to comply with minimum educational standards and criteria which are acceptable to students and their parents or legal guardians. Lastly, adaptability requires education to adjust to the changes and developments of societies and, hence, to take into account the different needs of students according to their cultural background.<sup>58</sup>

The elements of accessibility and adaptability are central for the purpose of the present paper. Indeed, whilst the latest Action Plan focuses mainly on the feature of adaptability, the European Commission has somehow devalued the challenges concerning accessibility to educational institutions and programs by children from third countries and those with a migrant background.

Against this general overview, the wide ambit of application of the principle of non-discrimination is particularly relevant in light of the following two considerations. First, few international norms and instruments pay attention to the specific situation of the educational rights of migrants, refugees and asylum-seekers and simply reiterate the obligation of Contracting parties to accord to these categories the

<sup>55</sup> CLIFFORD, *cit. supra* note 53, 421, 427-428; HENNEBEL, TIGROUDJA, *ibid.*, 761-763.

<sup>56</sup> CLIFFORD, *ibid.*, 428-429; HENNEBEL, TIGROUDJA, *ibid.*, 749-751. Substantive quality may also be construed as equality of outcomes, which requires equalizing results (e.g., by setting reserved quotas). On the shortcomings related to this approach see e.g., CLIFFORD, *ibid.*; HENNEBEL, TIGROUDJA, *ibid.*

<sup>57</sup> Commission on Human Rights, Preliminary report of the Special Rapporteur on the right to education, *ibidem*, para. 58.

<sup>58</sup> CESCR, *General Comment No. 13*, *cit. supra* note 30, para. 6; Commission on Human Rights, Preliminary report of the Special Rapporteur on the right to education, 13 January 1999, E/CN.4/1999/49, paras. 50 ff.

same treatment as is accorded to citizens.<sup>59</sup> Second, the content of the right to education varies from treaty to treaty. For the purpose of the present paper, the main shared characteristic is the frequent absence of a textual reference to ECEC.<sup>60</sup> Moreover, not each and every convention requires primary education to be free and compulsory. This obligation is enshrined in several international human rights norms which affirm the right to education, such as Art. 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 28(1) of the Convention on the Right of the Child, Art. 4(a) of the UNESCO Convention Against Discrimination in Education, and Art. 17(2) of the Revised European Social Charter. On the contrary, Art. 2 of the Additional Protocol to the European Convention of Human Rights (ECHR) and Art. 14 of the Charter of Fundamental Rights of the EU (CFREU) – both protecting the right to education – do not establish such duty. However, the European Court of Human Rights clarified that, although there is no obligation upon Contracting parties to have educational systems, national authorities must guarantee the right of access to educational institutions existing at a given time.<sup>61</sup>

Differences concern also secondary and higher education. Secondary education must be made generally available and accessible under Art. 13(2)(b) ICESCR, Art. 4(a) of the UNESCO Convention Against Discrimination in Education, Art. 28(1)(b) of the Convention on the Right of the Child. At the regional level, Art. 17(2) of the Revised European Social Charter requires States parties to make it free and compulsory, whilst the ECHR and the CFREU omit any reference. Higher education must be accessible to all under international treaties with a universal character,<sup>62</sup> whilst the instruments adopted by the Council of Europe and the European Union are silent on this matter.

Notably, EU secondary law in the field of asylum governs some aspects of the right to education. The relevant norms establish the right to education to minors seeking for international protection, children of applicants for international protection, and minors granted international protection.<sup>63</sup> These norms of secondary EU law trig-

<sup>59</sup> MUÑOZ, The right to education of migrants, refugees and asylum seekers, UN Doc. A/HRC/14/25 (2010), para. 27.

<sup>60</sup> DIETER BEITER, *cit. supra* note 33, p. 20.

<sup>61</sup> *Case “Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium” v. Belgium (Merits) (Belgian Linguistic Case No. 2)*, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgment of 23 July 1968, p. 27 (para. 4).

<sup>62</sup> See e.g. Art. 13(2)(c) ICESCR; Art. 4(a) of the UNESCO Convention Against Discrimination in Education, and Art. 28(1)(c) ICRC.

<sup>63</sup> See respectively Reception Directive, Art. 14(1); Qualification Directive, Art. 27(1). See also KOSIŃSKA, *Cultural Rights of Third-Country Nationals in EU Law*, 2019, pp. 193-195.

ger the application of Art. 14 CFREU, as according to Art. 51 of the Charter its provisions are addressed to EU Member States “only when they are implementing Union law” – i.e., any time a State acts within the scope of EU law.<sup>64</sup>

Within this fragmented scenario, the principles of non-discrimination and substantive equality play a pivotal role in ensuring access to education on an equal footing. All instruments impose the prohibition of unjustified different treatment which, ultimately, results in the obligation to grant effective access to all stages of education to all individuals, including children from third countries unlawfully present in the territory.<sup>65</sup>

Against this background, the case study of Naples and the figures gathered by international organizations highlight the existence of *de facto* shortcomings which hinder third-country national children’s access to ECEC as well as to secondary levels of education. The next two paragraphs will reflect on possible ways to remedy such shortcomings. A special attention will be paid to two issues. First, a reflection will be carried out on the theoretical appropriateness of extending the concept of minorities (and thus the scope of application of positive state obligations towards them under international human rights law) so as to include migrant children and children with a migrant background. Second, the concept of vulnerability in the ECtHR jurisprudence and its potential to foster migrant children’s access to education will be discussed. This twofold analysis will support a reflection on whether the notions of minority and vulnerability, if applicable at all, require States to implement special measures to the benefit children from third countries and those with a migrant background, so as to fill the highlighted gaps.

### 5. – *New Minorities and Vulnerability: Towards a Special Protection of the Right to Access to Education?*

Formal legislative barriers or segregation policies are not the only obstacles hindering access to education. Against general rules which acknowledge participation to school programmes and vocational training on an equal foot, socially produced patterns may still thwart attendance of children from third countries and those with a migrant background – as confirmed by the case law of Naples and, more generally, by the data reported by international organizations. Under certain circumstances, international law instruments require States to adopt special measures of protection

<sup>64</sup> CJEU, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, judgment of 26 February 2014, para. 19. See also LAZZERINI, *La Carta dei diritti fondamentali dell’Unione europea: I limiti di applicazione*, Milano, 2018, pp. 183 ff.

<sup>65</sup> HENNEBEL, TIGROUDJA, *cit. supra* note 33, 1235. See also e.g., European Committee on Social Rights, *EUROCEF v. France*, Complaint No. 114/2015, Decision of 24 January 2018, paras. 49 ff.

through the implementation of practical actions to give full effect to the rights of specific groups and their members – namely, minorities and particularly vulnerable groups or individuals. The next Sections explores whether these notions apply to the case at hand and, hence, whether States – including Italy – are bound to grant an enhanced protection to children from third countries and those with a migrant background in the field of education.

### 5.1. – Enhanced Protection through the lens of Minority Specific Rights?

As is well known, there is no generally accepted definition of minority. However, there is broad consensus on the elements that represent its basic features. In its 1979 study, Capotorti identified objective and subjective criteria. The first objective criterion is the distinctive characteristic of a group (e.g., ethnicity, language, or religion), that differs the group itself from the rest of the State's population. The second objective criterion is the numerical inferiority of the group compared to the rest of the population, which can itself consist of various population groups. The third objective criterion consists in the non-dominant position of the group. The fourth and last objective criterion is the nationality of the members of the group, who must be citizens of the residing State. The subjective criterion refers to the will of the members of the group to preserve their identity.<sup>66</sup> According to the study of Capotorti, and in particular to the third objective element thereby identified, the notion of minority applies solely to the citizens of the residing State, thus excluding non-nationals – such as migrants.

The nationality requirement has been contested by scholars and treaty-bodies. Both have based their stance chiefly on Art. 27 of the International Covenant on Civil and Political Rights (ICCPR), which is commonly deemed as the most important provision on the protection of minorities' rights.<sup>67</sup> Scholars have argued that the wording of Art. 27 ICCPR refers to "persons" and not "nationals", which suggests that the norm "provides a 'human' rather than a 'citizen's' right".<sup>68</sup> This interpretation

<sup>66</sup> CAPOTORTI, Study on the rights of persons belonging to ethnic, religious and linguistic minorities, 1979, E/CN.4/Sub.2/384/Rev.1, 95-96.

<sup>67</sup> International Covenant on Civil and Political Rights (16 December 1966, entry into force 3 January 1976) 993 UNTS 3 (ICCPR), Art. 27: "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."

<sup>68</sup> WOLFRUM, "The Emergence of 'New Minorities' as a Result of Migration", in Brölmann, Lefebvre Zieck (eds), *Peoples and Minorities in International Law*, 1993, 153, 161. See also NOWAK, "The Evolution of Minority Rights in International Law", in *ibidem*, 103, 116; TOMUSCHAT "Protection of Minorities

is also supported by the UN Human Rights Committee, which in its General Comment No. 23 on Art. 27 ICCPR has expressly acknowledged that the terms of the provision indicate that “individuals designed to be protected need not be citizens of the State party”.<sup>69</sup>

Hence, in general so-called “new minorities” also encompass aliens – such as asylum seekers, refugees, labour migrants, and Roma people – provided that the other criteria are fulfilled. A rather strong presumption applies to the requirements of numerical inferiority and non-dominance, whilst some doubts surround the existence of distinctive features that differ the relevant group from the rest of the State’s population, alongside the will of its members to preserve their identity. Firstly, aliens as a whole, as well as subcategories of foreigners (such as asylum seekers, refugees, migrant workers) are far from sharing homogeneous distinctive features which distinguish them from the remaining population. Moreover, the attempt to identify various specific groups within each subcategory of aliens on the account of their typical characteristics (e.g., ethnicity, language, or religion) may prove to be challenging, if not impossible at all. Secondly, even if the identification of this separate groups will prove successful, it will still be necessary to assess whether their members wish to preserve their distinctive identity within the residing States’ community or, on the contrary, if they prefer “to mix rather quickly with the remainder of the population”.<sup>70</sup> Ultimately, it cannot be totally excluded that groups of aliens fall within the definition of minority as it depends on a (rather complex) case-by-case assessment. Roma

under Article 27 of the International Covenant on Civil and Political Rights”, in Bernhardt (ed.), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler*, 1983, 949, 960-962; BARTOLE, “Una Convenzione Quadro per la Tutela delle Minoranze Nazionali”, in Bartole, Rason, Pegoraro (eds), *La tutela giuridica delle minoranze*, 1998, 11, 17.

<sup>69</sup> UN Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, para. 5.1. Besides, the UN Human Rights Committee also supports the irrelevance of a certain degree of permanence of the group in the residing State: “Article 27 confers rights on persons belonging to minorities which “exist” in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term “exist” connotes. [...] Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.” (para. 5.1). This stance is not supported by scholars, who still contend the necessity to fulfil the stability requirement to qualify a group as minority: see e.g., NOWAK, “The Evolution of Minority Rights in International Law”, *cit. supra* note 68, 116. On the *General Comment No. 23*, see e.g., POCAR, “Note sulla giurisprudenza del Comitato dei diritti dell’uomo in materia di minoranze”, in BARTOLE, RASON, PEGORARO (eds), *ibid.*, 32.

<sup>70</sup> WOLFRUM, *cit. supra* note 68, 163. See also TOMUSCHAT, *cit. supra* note 68, 961.

people represents the exception to this individualized examination, as they have been consistently recognised as a minority in need of special protection.<sup>71</sup>

These complications affect the qualification of children from third countries or children with a migrant background as well. It is rather straightforward that these two categories do not fall as such within the definition of minority. Their multifaceted composition does not allow the identification of distinctive features that differ children from third countries or children with a migrant background from the rest of the State's population. Secondly, as outlined above, it is arduous to assess whether the community or the group to which they belong (e.g., asylum seekers, refugees, migrant workers) may qualify as a minority and, hence, whether children from third countries or children with a migrant background will benefit from an enhanced protection due to their membership to such (alleged minority) groups or communities.

Despite these hurdles, should children from third countries and children with a migrant background fall within the definition of minority, they would be entitled to minority specific rights. Before questioning the effectiveness of such regime regarding the right to access school systems, two remarks are needed.

First and foremost, broadly speaking the protection of minorities under international law is provided by both human rights treaties and instruments safeguarding minority specific rights. In Europe, two legally binding instruments have contributed to the development of the latter: the European Charter for Regional or Minority Languages<sup>72</sup> and the Framework Convention for the Protection of National Minorities (FCNM), both adopted under the auspices of the Council of Europe.<sup>73</sup> The first only concerns linguistic rights and, hence, is not relevant for the purpose of the present paper. The second, on the contrary, enshrine a rather comprehensive set of minority rights and the complementary States' obligations, alongside establishing a non-judicial supervisory body – the Advisory Committee. The FCNM does not define “national minorities”, but the Advisory Committee has clarified that the Convention also covers non-citizens and non-long-term residents.<sup>74</sup> However, as suggested by its

<sup>71</sup> See e.g., OSCE, *Report and recommendations on the Situation of Roma and Sinti in the OSCE Area* (2000), available at [www.osce.org/hcnm/42063](http://www.osce.org/hcnm/42063); European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey. Roma – Selected findings*, 2016, available at: [www.fra.europa.eu/en/publication/2016/second-european-union-minorities-and-discrimination-survey-roma-selected-findings](http://www.fra.europa.eu/en/publication/2016/second-european-union-minorities-and-discrimination-survey-roma-selected-findings); RINGELHEIM, *cit. supra* note 48, 103.

<sup>72</sup> Council of Europe, European Charter for Regional or Minority Languages (5 November 1992, entry into force 1 March 1998), ETS No. 148.

<sup>73</sup> Council of Europe, Framework Convention for the Protection of National Minorities (1 February 1995, entry into force 1 February 1998) ETS No. 157.

<sup>74</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, *Thematic Commentary No. 4 - The Scope of Application of the Framework Convention for the Protection of National Minorities*, 27 May 2016, ACFC/56DOC(2016)001, 13-14.

name, the FCNM set forth programmatic norms which are not directly applicable within national legal orders. Moreover, States parties enjoy a wide margin of appreciation in deciding the means to reach the objectives identified in the FCNM.<sup>75</sup>

The second remark concerns the two pillars of the protection of minorities, namely non-discrimination and the preservation of the minority identity.<sup>76</sup> For the purposes of the present paper, these themes pertain to two different moments. The former is relevant *vis-à-vis* accessibility to education for migrant children – i.e., it concerns the right *to* education. The latter relates to the adaptability of educational institutions and programmes – i.e., to the rights *in* education, which refers to a situation which chronologically follows accessibility to ECEC and upper secondary school.

As introduced in the previous Section, under international human rights law States shall adopt affirmative actions to ensure the full and effective enjoyment of the right to education, including its accessibility to everyone without discrimination of any kind. This obligation is intertwined with the principle of substantive equality, construed as equality of opportunities.

This interpretation is further confirmed by Art. 12(3) of the FCNM, which requires States parties to “promote equal opportunities for access to education at all levels for persons belonging to national minorities.” This provision should be read in conjunction with Art. 4(2) FCNM, which affirms the commitment of States parties to “to adopt, where necessary, adequate measures in order to promote [...] full and effective equality between persons belonging to a national minority and those belonging to the majority.” To this end, States must take in due consideration the specific conditions of members of minority groups. Therefore, according to these norms States need to ensure that all children, including those belonging to minorities, are duly enrolled in educational institutions and attend programmes and classes.<sup>77</sup> The effective enjoyment of the right to education on equal foot may also require States to implement minority education strategies which suit the peculiar situation of children from third countries and children with a migrant background. Their distinctive condition may hence justify special measures to properly deal with their factual situations of inequality, as long as such differential treatment is meant to overcome persisting inequalities and does not amount to an unjustified privilege.<sup>78</sup>

<sup>75</sup> HENNEBEL, TIGROUDJA, *cit. supra* note 33, 325.

<sup>76</sup> RINGELHEIM, *cit. supra* note 48, 91; HENRAD, Minorities, International Protection, in Peters, Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, 2013, para. 21.

<sup>77</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, *Thematic Commentary No. 1 - Education under the Framework Convention for the Protection of National Minorities*, 2 March 2006, ACFC/25DOC(2006)002, 21-22. 21-22.

<sup>78</sup> CESC, Limburg Principles on the Implementation of the International Covenant on Economic,

These interventions are costly and require the allocation of budgetary resources, so States may refuse to invest in this field. Notably, funding and financial activities provided under the latest Action Plan of the European Commission may supplement public funds and, hence, contribute to the design and implementation of initiatives targeted to foster equal access to education to ECEC and upper secondary school for children from third Countries and those with a migrant background, including in the urban area of Naples.

## 5.2. – The Concept of Vulnerability in International Human Rights Law and its Application in the Field of Education.

An in-depth analysis of the complex causes that hinder the full enjoyment by migrant children and children with a migrant background of their right to education is beyond the scope of this chapter. However, it can be hypothesized that several factors might be at play in this context – including for instance migrant status, socio-economic situation, language barriers, and so forth<sup>79</sup> – and might interact in generating varying levels of vulnerability for migrant children and children with a migrant background. On the one hand, this might lead to qualify them as vulnerable groups because of the disproportionate impact of such factors on their right to education. On the other hand, the mentioned factors might affect specific children in significantly different ways depending on their personal circumstances – thus leading to a case-by-case characterization as vulnerable individuals rather than as members of a vulnerable group. These observations recall the dual nature of the concept of vulnerability as construed by legal scholarship. Fineman first theorized the notion of vulnerability as a universal and inherent feature of the human condition, to criticize assumptions of legal subjects as self-sufficient, autonomous and entirely independent.<sup>80</sup>

The references to the concept of vulnerability in the ECtHR jurisprudence – especially in relation to the principle of non-discrimination established by Art. 14 ECHR – has been the subject of specific scrutiny.<sup>81</sup> It is interesting to observe that a

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Social and Cultural Rights, 2 October 2000, UN Doc. E/C.12/2000/13, para. 39; CLIFFORD, *cit. supra* note 53, 439-443.

<sup>79</sup> For a broader analysis of possible causes of early leaving from education, see European Commission/EACEA/Eurydice/Cedefop, 2014. *Tackling Early Leaving from Education and Training in Europe: Strategies, Policies and Measures*. Eurydice and Cedefop Report, Luxembourg, 38 -40.

<sup>80</sup> FINEMAN, “The Vulnerable Subject: Anchoring Equality in the Human Condition”, *Yale Journal of Law and Feminism*, 2008.

<sup>81</sup> HEKKILÄ and MUSTANIEMI-LAAKSO, “Vulnerability as a human rights variable: African and European developments”, *African Human Rights Law Journal*, 2020; NIFOSI-SUTTON, *The Protection of Vul-*

significant component of this jurisprudence related to children's right to access education – as recognized by Art. 2 of Protocol no. 1 to the ECHR. This case law, however, did not concern migrant children or children with a migrant background. Rather, the ECtHR examined forms of educational segregation against Roma children. In the landmark judgment of *D.H. and Others v. the Czech Republic*,<sup>82</sup> for instance, the ECtHR recognized a breach of the mentioned provisions on the grounds of the qualification of Roma as a vulnerable minority. Such a vulnerability, in its view, stemmed from “their turbulent history and constant uprooting”<sup>83</sup> and required States Parties to give “special consideration [...] to their needs”.<sup>84</sup> These concepts were consistently reaffirmed in the subsequent jurisprudence of the ECtHR concerning Roma children's access to education in conditions of equality and non-discrimination.<sup>85</sup> It has been rightly observed that in this case law the ECtHR understood vulnerability as the result of historically rooted prejudice and hostility.<sup>86</sup> Such a construction appears to be ill-fitted in relation to the different matter of migrant children's access to education in the Neapolitan urban area. At present time, indeed, there are no clear indications that the highlighted difficulties experienced by this group are the result of a formal policy remotely similar to the one scrutinized in the case of *D.H. and Others* and in the subsequent jurisprudence of the ECtHR. Here, indeed, the ECtHR examined formally neutral provisions on the placement of pupils with special educational needs in separate schools or classes which disproportionately or exclusively impacted Roma children and amounted to discrimination on the grounds of ethnic origin.

*nerable Groups under International Human Rights Law*, Abingdon and New York, 2017, 218 – 253; Ippolito and Iglesias Sánchez (eds.), *Protecting Vulnerable Groups: The European Human Rights Framework*, Oxford and Portland, 2015; ARNADÓTTIR, “Vulnerability under Article 14 of the European Convention on Human Rights Innovation or Business as Usual?”, *Oslo Law Review*, 2013; PERONI and TIMMER, “Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law”, *International Journal of Constitutional Law*, 2013.

<sup>82</sup> *DH and Others v. The Czech Republic*, Application No. 57325/00, judgment of 13 November 2007.

<sup>83</sup> *Ibidem*, para.182

<sup>84</sup> *Ibidem*, para. 181.

<sup>85</sup> *Sampanis and Others v. Greece*, Application No. 32526/05, judgment of 5 June 2008; *Oršuš and Others v. Croatia*, Application No. 15766/03, judgment of 16 March 2010; *Sampani and Others v. Greece*, Application No. 59608/09, judgment of 11 December 2012; *Horváth and Kiss v. Hungary*, Application No. 11146/11, judgment of 29 January 2013; *Lavida and Others v. Greece*, Application No 7973/10, judgment of 28 May 2013. *Horváth and Kiss v. Hungary*, Application No. 11146/11, judgment of 29 January 2013.

<sup>86</sup> PERONI and TIMMER, *cit. supra* note 81, 1067 – 1065.

A second understanding of vulnerability, however, is observable in the jurisprudence of the ECtHR and more specifically in what have been described as “maldistribution cases”.<sup>87</sup> In this context, the vulnerability of individual applicants was assessed not against the background of historical stigma but rather in the light of a number of different factors fostering social exclusion or disadvantage which – when referred to the context of migration and asylum – included insecurity as to the determination of refugee<sup>88</sup> or residence status.<sup>89</sup> The question of whether this construction of vulnerability may be fruitfully applied to some categories of migrant children – such as for instance those living in poverty, children of undocumented parents, or unaccompanied minors – has been underexplored so far, especially in relation to their right to access education.<sup>90</sup> In principle, it may be argued that migrant children are placed at the intersection of several sources of vulnerability (such as age, migratory status, ethnic origin, economic status, and so forth). In practice, however, such discourses risk to essentialize migrant children by overlooking the diversity of this very heterogeneous category and – applied to the field of education – the specific needs of individuals.<sup>91</sup> These reflections are not merely theoretical. The adoption of a vulnerability-based approach by the ECtHR affects its interpretation of the scope of positive state obligations towards individual applicants.<sup>92</sup> Most notably for the purpose of this contribution, in the case of *Oršuš and Others v. Croatia* the ECtHR noted that “the vulnerable position of Roma/Gypsies” required to give “special consideration [...] to their needs [...] both in the relevant regulatory framework and in reaching decisions in particular cases” This approach led the ECtHR to identify a violation of Art. 14 ECHR in conjunction with Art. 2 Prot. No. 1 despite its acknowledgment of the Croatian authorities’ efforts to ensure access to schooling for Roma children. The ECtHR indeed held that “there were at the relevant time no adequate safeguards in place capable of ensuring that a reasonable relationship of proportionality between

<sup>87</sup> PERONI and TIMMER, *cit. supra* note 81, 1067 – 1070.

<sup>88</sup> *M.S.S. v. Belgium and Greece*, Application No. 30696/09, judgment of 21 January 2011.

<sup>89</sup> *Chowdury v. Greece*, Application No. 21884/15, judgment of 30 March 2017, para. 97.

<sup>90</sup> Scholarly contributions, on the other hand, have tackled this question with reference to migrant children in detention. On this matter, see for instance BEDUSCHI, “Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts”, Boston University International Law Journal, 2018; TODOROV, “H.A. and others v. Greece – restrictive acknowledgement of irregular migrant vulnerability”, available at: <https://strasbourgobservers.com/2019/03/29/h-a-and-others-v-greece-restrictive-acknowledgement-of-irregular-migrant-vulnerability/>.

<sup>91</sup> More broadly on the risk of essentialism within the ECtHR case law on vulnerability, see PERONI and TIMMER, *cit. supra* note 81, 1071- 1072; BAUMGÄRTEL, “Facing the challenge of migratory vulnerability in the European Court of Human Rights”, *Netherlands Quarterly of Human Rights*, 2020.

<sup>92</sup> PERONI and TIMMER, *cit. supra* note 81, 1076-1079; BAUMGÄRTEL, *ibid.*, 25.

the means used and the legitimate aim said to be pursued was achieved and maintained”, and that therefore “the placement of the applicants in Roma-only classes at times during their primary education had no objective and reasonable justification”.

The reflections carried out in this paper suggest that the human rights framework applicable in the European legal space concerning the protection of minorities on the one hand and of vulnerable subjects and groups on the other might offer – if further developed – perspectives of protection of migrant children’s right to education. At the current stage of development of this system, however, it is not possible to draw definite conclusions on the matter. In the light of these considerations, it is worth exploring whether the latest Action Plan could still play a valuable role in fostering access to education for migrant children. The influence of such soft law instrument in EU Member States legal regime may inspire the adoption of national and/or local policies in the field of education and training which may indirectly improve access to ECEC and upper secondary school for children from third Countries, including in the urban area of Naples.

#### *6. – The Expected Impact of the Latest EU Policies on Migrant Children’s Right to Education in Europe.*

EU institutions – including the Commission – enjoy a limited competence in the field of migrants’ integration. Art. 79(4) of the Treaty on the Functioning of the European Union (TFEU) explicitly rules out the possibility of adoption of legislation at EU level aimed at harmonizing the laws and regulations of Member States in this area. Rather, the same provision establishes that the European Parliament and the Council may adopt (through the ordinary legislative procedure) “measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories”. It has been aptly noted that the provision under comment did not aim to reduce EU competence in the field of integration. In fact, this provision might also be interpreted as neither undermining EU institutions’ implicit power to legislate on integration measures as part of the conditions of residence – pursuant Art. 79(2)(a) TFEU – nor as excluding the competence of the Court of Justice of the European Union (CJEU) to adjudicate on the proportionality of integration measures adopted by Member States.<sup>93</sup> Nevertheless, a literal and contextual interpretation of the mentioned provisions of Art. 79 TFEU suggest that – beyond the possibility to adopt EU legislative acts concerning

<sup>93</sup> WILDERSPIN, “Chapter 3: Judicial Cooperation in Civil Matters”, in Kellerbauer, Klamert and Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford, 2019, pp. 848-850.

integration requirements as part of the conditions of entry and residence of third-country nationals – the competence of EU institutions in the field of integration is conceived at best as a supportive one. As a consequence of ruling out any shared competence of EU and Member States in such areas, the matter of migrant children's education appears to have been entrusted to soft law instruments, including communications of the Commission.<sup>94</sup>

These observations prompt questions concerning the expected impact of the Commission's Action Plan on access to education of migrant children and children with a migrant background. This contribution has considered the Neapolitan case as a telling illustration of the broader obstacles faced by migrant children in accessing education services at all, let alone in receiving culturally diverse schooling. This analysis has shown how a careful consideration of problems of exclusion from education as well as educational segregation must necessarily be a part of any policy aimed at ensuring multicultural education and vocational training. Against this background, the extent to which the guidelines provided by the Commission will be able to increase migrant children's access to education at national and local level may be assessed in the light of two main considerations. First, the lack of legislative competence of the EU in this area should not lead to the conclusion that the Commission's recommendations in the Action Plan are destined to remain dead letter. Broader enquiries concerning the effects of EU soft law instruments in Member States' domestic orders have shown that such sources are capable of fostering the adoption not only of non-binding instruments at national level but also - in some cases - of binding domestic law (a process that has been described as the "hardening out" of EU soft law).<sup>95</sup> Second, while the role of funding and financial incentives in promoting compliance with EU policies and increasing European integration is debated<sup>96</sup>, in the Action Plan the Commission has recommended Member States to "make full use of EU funding [...] to support programmes and measures related to education, skills and language training"<sup>97</sup>. A specific mention in this context has been made to the European Social Fund Plus, the Asylum and Migration Fund and the European Regional

<sup>94</sup> See for instance ACOSTA ARCARAZO, "EU Integration Policy: between Soft Law and Hard Law", KING Project – EU Policy Unit Desk Research Paper n. 1/July 2014, [http://king.ismu.org/wp-content/uploads/AcostaArcarazo\\_DeskResearchInDepthStudy.pdf](http://king.ismu.org/wp-content/uploads/AcostaArcarazo_DeskResearchInDepthStudy.pdf).

<sup>95</sup> HARTLAPP, "Soft Law Implementation in the EU Multilevel System: Legitimacy and Governance Efficiency Revisited", in Behnke, Broschek and Sonnicksen (eds.), *Configurations, Dynamics and Mechanisms of Multilevel Governance*, Cham, 2019.

<sup>96</sup> VAN WOLLEGHEM, "Where is the EU's Migrant Integration Policy Heading? A Neofunctionalist Take on Three Multiannual Financial Frameworks", *International Review of Public Policy*, 1/2019; VAN WOLLEGHEM, *The EU's Policy on the Integration of Migrants: A Case of Soft-Europeization?*, Cham, 2019.

<sup>97</sup> Action Plan, p. 11.

Development Fund. It remains to be seen whether and to what extent Member States will actually take advantage of EU funding to draft and operationalize programmes specifically aimed at ensuring migrant children's full enjoyment of their right to education.

### 7. – *Concluding Remarks.*

The previous initiatives of the Commission (and of the EU more generally)<sup>98</sup> in the field of integration of third countries' citizens and people with a migrant background proved to be rather ineffective. This conclusion is confirmed by the recent findings of international organizations and, at the local level, by the data concerning the Neapolitan urban area. In particular, the case-study of Naples highlights specific shortcomings which hinder access to education for migrant children, including high rate of school dropouts (also due to the limited scope of compulsory education under Italian law) and *de facto* school segregation. Similar hurdles may undermine the full implementation of the latest Action Plan and other policy documents dealing with migrant children's access to education, such as the forthcoming EU Strategy on the Rights of the Child.<sup>99</sup>

Acknowledging these difficulties, the present contribution has reflected on the capability of the international and regional human rights framework applicable in the European legal space to foster an effective enjoyment of the right to education by migrant children and children with a migrant background. This analysis has revealed that while specific attention has been paid to children belonging to minorities on the one hand and to the concept of vulnerability on the other, the discussed legislative and judicial approaches might not be necessarily fitting for migrant children – particularly with reference to their qualification as (members of) a minority group, as well as to the

<sup>98</sup> See e.g. Council conclusions of 26 November 2009 on the education of children with a migrant background (2009/C 301/07) OJ C 301/5, which invited EU Member States to take appropriate measures at local, regional and national levels including “increasing access to high quality early childhood education and care”; Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 27 November 2012 on the participation and social inclusion of young people with emphasis on those with a migrant background (2012/C 393/05), OJ C 393/15, which identified “providing equal access to quality education and training” and “facilitating smooth transitions from education to the labour market” as a key priority to enhance the participation and social inclusion of young people with a migrant background.

<sup>99</sup> For more information, see please visit the webpage of the European Commission on the public consultation on the EU strategy on the rights of the child (2021-24), available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12454-Delivering-for-children-an-EU-strategy-on-the-rights-of-the-child/public-consultation>.

construction of positive state obligations in relation to the right to education in conditions of equality and non-discrimination. A specific attention has been paid in this context to the ECtHR jurisprudence on the right to access of education enshrined in Art. 2 of Prot. No. 1 to the ECHR. While key principles concerning the scope of positive state obligations *vis-à-vis* vulnerable children have been established in this context, the concept of vulnerability adopted in this context was strictly linked to the historically-rooted discrimination and disadvantage of Roma people in Europe. Therefore, further reflections will be necessary to understand whether the highlighted potential of this legal framework to eliminate some of the barriers experienced by migrant children in accessing education will be actually fulfilled.

To conclude on a positive note, the soft law character of the Commission's Action Plan should not lead to dismiss it as an ineffective declaration of intents. In addition to our considerations on its potential impact at national and local level in this contribution, we might add that EU policies promoting more inclusive systems of education could indirectly bolster access to ECEC and upper secondary school for children from third countries. Ensuring that school programmes “are equipped to serve culturally and linguistically”<sup>100</sup> diverse pupils and students may boost schools' attractiveness and foster national or local policies aimed at ensuring migrant and refugee children's effective enjoyment of their right to education. Equipping teachers “with the necessary skills and resources to teach in multicultural and multilingual classrooms and to support children with a migrant background”<sup>101</sup> through funding and financial incentives (such as those provided under the latest Action Plan) may overcome factual obstacles and serve the purpose of creating a more welcoming environment. A similar outcome would advance social cohesion to the benefit of third country nationals and host communities and, ultimately, it would help to counter the marginalization of vulnerable individuals and groups who have also experienced (and are still experiencing) the gravest challenges stemming from the Covid-19 pandemic outbreak.

<sup>100</sup> Action Plan, p. 8.

<sup>101</sup> Action Plan, p. 8.

**Abstract**

In June 2016, the European Commission adopted an Action Plan on the Integration of Third-Country Nationals. The Plan identified several key priorities to ensure a successful integration of migrants and refugees in the EU across areas, including education. Despite some improvements, specific shortcomings persisted after the termination of the actions funded under the 2016 Action Plan. In November 2020, the European Commission adopted its latest Action Plan on Integration and Inclusion for 2021 – 2027, which places a strong emphasis on inclusive and multicultural education as a tool to achieve the integration of migrant children and children with a migrant background. At the same time, the European Commission appears to be aware that access to education remains a challenge for many migrant and refugee children, particularly those pertaining to certain age groups.

Against this background, this contribution reflects on the capability of the multi-level legal framework applicable in the European legal space to secure a full and effective access to education for migrant children and children with a migrant background. After providing an overview of the most relevant aspects of the Action Plan on the matter, the contribution will consider the Neapolitan case as a telling illustration of the unsatisfactory rates of participation of these children to all levels of education. In the light of these discrepancies, it will then move on to consider whether and to what extent international and regional human rights law might offer some remedies. Lastly, it will assess the actual perspectives of the Action Plan to produce a durable impact on migrant children's access to education at national and local level.



# 9. THE SCHOOL AS A PLACE FOR SOCIAL INCLUSION AND ENHANCEMENT OF CULTURES AND IDENTITIES. A READING OF ARTICLE 38 OF THE ITALIAN 'CONSOLIDATED IMMIGRATION ACT'

*Luana Scialpi*

SUMMARY: 1. Introduction. – 1.1. The Right to Education in International Law. – 1.2. The Right to Education in Europe. – 1.3. The Right to Education in the Italian legislation. – 2. Recognition of the Cultural 'Double Belonging' of Foreign Children as a Value for the Society. – 2.1. A Different Interpretation of Art. 38, para. 3, of the 'Consolidated Immigration Act'. – 3. Intercultural Dialogue for an Inclusive School. – 4. Conclusion.

## *1. – Introduction.*

When talking about education and inclusion of foreign minors it is necessary to dwell on how much the law plays a fundamental role, due to the fact that it relates also to relational aspects concerning not only the individual, but also the collective dimension of the aspects of the migration phenomenon. Otherwise, we could not hope to overcome social discrimination, since the recognition of rights by the State is the means to eliminate social inequalities.

The present contribution aims to interpret what is regulated in Article 38 of the Legislative Decree No. 286 of 25 July 1998 – also known as “Consolidated Immigration Act”, entitled “Education of foreigners. Intercultural education”, considering

the social changes of the community with which we all live and coexist. The regulation is in Title V, Chapter II, of the Consolidated Immigration Act, dealing with “Provisions on education and the right to study and work”, while Title is dedicated in general to the provisions on health, as well as education, housing, participation in public life and social integration.

The right to education and training of children of foreign origin is covered both by education and training legislation and both by immigration legislation.

The relevant legislation does not always cover all possible cases. Moreover, in many cases the legal provisions may be interpreted in different ways.

In any case, among the various possible interpretations, preference shall always be given to the one that complies with the Constitution and with international and EU law obligations, since, in the case of minors, the principle of the best interests of the child must always be taken into account<sup>1</sup>.

### 1.1. – The Right to Education in International Law.

Before examining the impact that Article 38 of Consolidated Immigration Act has in the Italian system, it is necessary and essential to evaluate the regulatory context in which the rule is inserted. Starting from the last century, the right to education has been identified both in the international law and in the Italian law as a fundamental and inviolable right of every individual.

Many legal instruments recognise and protect this right, since it plays a fundamental role in the development of the person, the protection of which is linked to the improvement of the living conditions of the individual and consequently of the community.

The right to education (or the right to receive education) was formally recognised at first in the Universal Declaration of Human Rights of 1948, still the cornerstone act when it comes to human rights. Article 26 reads as follows:

“1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and

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<sup>1</sup> ASGI, *Minori stranieri e diritto all'istruzione e alla formazione professionale*, action carried out within the project “In.Media.Res - Integrazione Mediazione Responsabilità” FEI 2012 - Action 5/2012 – PROG.103507 - CUP E15F12000190007.

shall further the activities of the United Nations for the maintenance of peace. 3. Parents have a prior right to choose the kind of education that shall be given to their children.”<sup>2</sup>.

This article contains all the elements that characterise the right to education, as it should be recognised to every individual. The concepts of compulsory and free education, the duty of states to make education accessible to all are stated. The targeting of education for the construction of a better future, which should aim at the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms, is proclaimed too.

To complement this Article, the following Article 27 enshrines the right for all to take part in the cultural life of the community:

“1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”.

Article 13 of the International Covenant on Economic, Social and Cultural Rights of 1966 follows the same idea, defining more explicitly the content and purpose of the right to education and including it among social rights. The States parties to the Covenant recognise the right of every individual to education, which must aim at the full development of the human personality and its dignity, so as to place all individuals in a position to participate effectively in the life of a free society.

In particular, the first paragraph of Article 13 reads as follows:

“The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”

Its second paragraph defines in detail what the cornerstones of an education system should be, in line with the contents and aims of the educational process defined above:

“The States Parties to the present Covenant recognize that, with a view to achieving the

<sup>2</sup> Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.”.

The United Nations Convention on the Rights of the Child, concluded in 1989, is also of considerable importance, by recognizing a series of rights concerning every aspect of the child’s existential condition and therefore affect all the social formations in which their growth takes place, from school to the family environment. For the first time, reference is made to the need for States to guarantee educational guidance plans for all and to implement policies to combat the phenomenon of early school leaving, and the dignity of the child is invoked to curb school discipline<sup>3</sup>.

More specifically, its Article 28 sets out the actions that all States parties to the Convention undertake to take in order to guarantee the enjoyment of this right:

“1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account

<sup>3</sup> MARCHISIO, “Diritto all’istruzione e integrazione dei rifugiati”, *Ordine internazionale e diritti umani*, 2018, pp. 267-275.

shall be taken of the needs of developing countries.”<sup>4</sup>.

Article 29 specifies the aims to be pursued by education:

“1. States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment. 2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”.

While the right to education as a fundamental right is not likely to change, the way it is interpreted may evolve over time. Without questioning the importance of access to education, the international community has chosen to focus on its purpose and content. This change in orientation is probably reflected in a paradoxical observation: although studies agree on better access to education for young people, at the same time the education provided today no longer seems adequate to meet present and future challenges. Therefore, states are now committed to focusing their efforts on access, equity, inclusion, quality and learning outcomes in the perspective of life-long learning.

## 1.2. – The Right to Education in Europe.

The importance and the quality of education in Europe has its roots in several legal acts.

Article 2 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 by the member States of the Council of Europe, states that:

<sup>4</sup> Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”<sup>5</sup>.

In its essence, it reaffirms the need to safeguard educational pluralism, which is considered essential for the preservation of a democratic society.

Moving to the EU, it is important to refer, chronologically, to key acts and documents concerning school education and education systems in general, focusing on research objectives related to social inclusion.

In the Resolution of the Council and the Ministers for Education meeting of 14 December 1989 on measures to combat school failure, the Council states that school failure is still affecting too many pupils, particularly children from socially and culturally under-privileged groups. It highlights that the development of a multicultural dimension in education systems would allow failure at school to be challenged more effectively. Strengthening pre-primary education is seen as one action which would lead to better school performance, especially for children with a disadvantaged background. Another measure is the development of teaching of the languages and cultures of children of Community and foreign background.

A further element is to be found in the Charter of Fundamental Rights of the European Union of 7 December 2000, and in particular in its Article 14, which universally (“*to everyone*”) guarantees the right to education and access to continuing vocational training through the guarantee of compulsory education. Article 14 reads as follows:

“1. Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free compulsory education. 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.”<sup>6</sup>.

On 14 February 2001, the Education Council of the EU adopted a report to be submitted to the European Council, on the basis of the indications contained in the

<sup>5</sup> Available at: [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

<sup>6</sup> Charter of Fundamental Rights of the European Union, 2000/C 364/01, available at: [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf).

EU Commission's report of 31 January 2001 and concerning concrete future objectives of education systems.<sup>7</sup> The Council states that education and training systems should aim to contribute to the creation of an inclusive society by ensuring that structures and mechanisms are in place to remove discrimination at all levels. In this context the Council asserts that specific regard has to be paid to vulnerable groups such as people with special educational needs. The Council aims at increasing the level of literacy and numeracy and wants to establish inclusive and coherent education and training systems. It sees the need for a strategy which overcomes traditional barriers between various parts of formal education and training and non-formal and informal learning. As the Commission did, the Council states that the way in which education and training systems are organised can make access more difficult. It poses the question of flexibility without giving concrete recommendations in this regard<sup>8</sup>.

The subject of education quality is also mentioned in the consolidated versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union. Article 165 states:

“The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity”.

As far as the subject of this contribution is concerned, it would seem appropriate to refer to key EU acts and documents giving special attention to integration of migrants and their access to school education<sup>9</sup>:

- Regulation 1612/68/EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community. Article 12 of this regulation stipulates access to education of children of migrant workers.

<sup>7</sup> Report from the Commission of 31 January 2001, “The concrete future objectives of education systems”, COM(2001) 59, available at: <https://eur-lex.europa.eu/legal-content>.

<sup>8</sup> Report from the Education Council to the European Council – The concrete future objectives of education and training systems, Council document 5980/01, 14 February 2001, available at: <https://www.europarl.europa.eu/legal-content>.

<sup>9</sup> For a careful and comprehensive examination of the legislation and interventions at European level, refer to CARRERA, GEYER, “EU Policy on Education: The Impact on the Social Inclusion of Vulnerable Groups”, CEPS Special Report, September 2009, available at: [http://aei.pitt.edu/14573/1/Included\\_EU\\_Policy\\_on\\_Education.pdf](http://aei.pitt.edu/14573/1/Included_EU_Policy_on_Education.pdf).

- Resolution of the Council and of the Ministers of Education, meeting within the Council, of 9 February 1976 comprising an action programme in the field of education. This action programme dealt with measures in the field of education for migrants' children.
- Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers. This directive aims at improving the conditions of free movement for workers within the European Community relating in particular to reception and compulsory education of their children.
- European Parliament Resolution on the education of the children of migrant workers; European Parliament resolution on the implementation of directive 77/486/EEC on the education of the children of migrant workers; European Parliament resolution on the application of directive 77/486/EEC on the education of the children of migrant workers.
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. Article 10 deals with access to education.
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of thirdcountry nationals who are long-term residents. This directive aims to promote economic and social cohesion and allow for better integration of third-country nationals who are long-term residents in one of the member states.
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Article 27 deals with access to education.
- Council Conclusions of 19 November 2004 on an immigrant integration policy in the EU, 14615/04. Between the various principles one is dedicated to the role of education and states: "Efforts in education are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society."
- European Parliament resolution on integrating immigrants in Europe through schools and multilingual education, 13 October 2005, 2004/2267.

The Europeanisation of policies having an impact on the social inclusion of vulnerable groups in the area of school education is experiencing a dynamic transformation which tries to keep pace with the evolving social, cultural and diverse realities which characterise the Europe of today.

### 1.3. – The right to Education in the Italian Legislation.

The right to education and training of minors with non-Italian citizenship is governed partly by the legislation on education and training and partly by the legislation on immigration (in particular Legislative Decree no. 286 of 25 July 1998 and its implementing regulation Decree of the President of the Republic No. 394/1993).

Before going to the specific regulations for foreigners in terms of education as enshrined in Article 38 of the Consolidated Immigration Act, trying to read them with a humanly and socially inclusive perspective, beyond the regularity on the territory, it is necessary to point out that these regulations belong to a broader regulatory context, namely in Articles 2, 3 and 10, paragraph 2, of the Italian Constitution.

The recognition and guarantee of the inviolable rights of man under Article 2 of the Constitution, and the consequent demand for the fulfilment of the mandatory duties of political, economic and social solidarity, does not apply exclusively to freedom rights, but also to so-called social rights. Moreover, if Article 2 of the Constitution concerns all men, it inevitably follows that equality in the enjoyment of these rights must involve everyone without distinction. Therefore, the principle of equality under Article 3 of the Constitution also applies to foreigners. Finally, Art. 10, paragraph 2 of the Constitution provides the “*extent to which access to and enjoyment of social rights contribute to defining the legal status of the foreigner*”, prescribing a reservation of the law on the matter, which provides for compliance with international standards and treaties.

The Constitutional Court has made it clear, since the late 1960s, that the fundamental or inviolable rights provided for by the Constitution are also due to foreigners and that where the rules of law differentiate the legal regime of the latter from that of the Italian citizen, the minimum core of such rights must always be recognised for every individual<sup>10</sup>.

Among the constitutional provisions that need to be referred to further, there is Article 9 of the Constitution, which provides that “*the Republic shall promote the development of culture*”. This principle is made explicit in all the constitutional provisions on education, since culture is the result of education, i.e. the dissemination and acquisition of knowledge and aptitudes.

The principles enshrined in the Constitution apply without discrimination to every individual, including foreigners, who are fully entitled to enjoy the social rights necessary to express their personality, both as individuals and in social groups.

<sup>10</sup> Corte Costituzionale, 8 July 1971 No. 168; Corte Costituzionale 14 July 1978 No. 181/1976; Corte Costituzionale 27 February 1973 No. 14; Corte Costituzionale 17 July 2001 No. 252/200.

In particular, the Italian Constitution dedicates Articles 33 and 34 to education and training. Article 33 states that culture is a right of freedom.

Article 34 of the Constitution affirms the universality of the right to study. In fact, the phrase in paragraph 1 of Article 34 of the Constitution, “*the school is open to all*”, reminds us that the right to education, and consequently to everything that follows from it (access to educational services and participation in the life of the school community), has no connection with the status of a citizen or with the possession of a permit to stay<sup>11</sup>.

By stating that schools are open to all, the constitutional provision universalises a right that, while maintaining its individual character, is necessary for the smooth functioning of a democratic state, especially when it comes to ‘foreign students’ and in particular minors.

Access to school is the first step on a social ladder. Culture and education were already understood at the time of the Constituents as a powerful tool for individual affirmation. Today it must be understood as the individual affirmation of those who coexist in a group of different individuals, bearers of different cultures and, therefore, promoters of a wider social development.

It is on the basis of these assumptions that Legislative Decree No. 286/1998 TUI, recognises certain inviolable rights of foreigners, beyond the possession or otherwise of a permit to stay, including the right to education. The ownership of this right by the foreigner is based on the establishment of a relationship with the Italian territory, which does not depend on the regularity of his stay. It is by virtue of this relationship with the territory that the person, irrespective of his legal status, develops economic and personal relationships that make him part of the community living there<sup>12</sup>.

In fact, the first paragraph of Article 38 TUI reads: “*Foreign minors present in the territory are obliged to go to school; they are subject to all the provisions concerning the right to education, access to educational services, participation in the life of the school community*”.

The rule confirms that it is not necessary for the foreign child to possess a valid residence permit. What matters is the link with the territory of the State.

This innovative wording of this provision was introduced by the Italian legislator, after Law no. 40/1998, and followed by the adoption of the Consolidated Act

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<sup>11</sup> MASTROPAOLO, “Gli stranieri di fronte all’istruzione”, in Giorgis, Grosso, Losana, *Diritti uguali per tutti? Gli stranieri e la garanzia dell’uguaglianza formale*, Milano, 2017, p. 195; GROSSO, “Straniero (Status costituzionale dello)”, *Digesto*, IV ed., vol. XV, Torino, 2000, p. 173.

<sup>12</sup> CONSITO, ROZZI, “Il diritto alla salute, all’istruzione e formazione e al lavoro”, in Jong, *Tutori volontari di minori stranieri non accompagnati. Materiali per l’informazione e la formazione*, Padova, 2018, pp. 175-177.

on Immigration. In the past, the issue of the education of foreign minors was referred exclusively to ministerial circulars, and not in legislative acts.

The use of the new wording “*present in the territory*”, which is also used in school legislation, leaves no doubt. The legislator established that the right to education also covers minors without a permit to stay and/or whose parents do not have a permit to stay.

The second paragraph of Article 38 continues as follows:

“The effectiveness of the right to education is guaranteed by the State, the Regions and the local authorities also through the activation of appropriate courses and initiatives for the learning of the Italian language”. It implies an obligation for the State, the Regions and the local authorities to guarantee the effectiveness of the right to study also through the activation of appropriate courses and initiatives for the learning of the Italian language, which is the first possible vehicle of integration and a pre-condition for the exercise of the right itself.

Paragraph 3 contains a provision of a programmatic nature, which commits the school community to accepting linguistic and cultural differences as a value:

“The school community accepts linguistic and cultural differences as a value to be placed at the basis of mutual respect, exchange between cultures and tolerance; to this end it promotes and encourages initiatives aimed at welcoming, protecting the culture and language of origin and carrying out common intercultural activities”.

Finally, paragraph 5 is entirely dedicated to school reception and access to training courses for foreigners of older age. These courses must be promoted by the educational institutions within the framework of territorial planning of the various interventions.

Article 45 of Presidential Decree no. 394 of 31 August 1999, Regulations containing norms for the implementation of the TUI of the provisions concerning the discipline of immigration and norms on the condition of the foreigner (pursuant to Article 1, paragraph 6, of Legislative Decree no. 286 of 25 July 1998) is clearer, whereas it provides that: “*Foreign minors present in the national territory have the right to education regardless of the regularity of their position with regard to their stay, in the forms and ways provided for Italian citizens.*”. This provision also provides for a series of measures to avoid discrimination or marginalisation of foreign minors in schools and to promote their integration, avoiding the creation, among other things, of know as “*ghetto*” classes<sup>13</sup>.

<sup>13</sup> The Presidential Decree no. 394/1999, containing the regulation implementing the TUI, in art. 45,

While there is no doubt about the recognition of this right, problems arise as to whether it is actually guaranteed in everyday practice. This guarantee is often lacking, especially if the child's coming of age does not coincide with the acquisition of a residence permit.

In the past, but unfortunately still today, doubts have arisen concerning, for example, what happens to the study path of a foreign student once he has reached the age of majority. The regulations do not provide for anything specific, but this cannot and must not imply that, on reaching the age of majority, the foreign student, who does not have a residence permit, must abruptly interrupt the scholastic pathway undertaken while still a minor, and not yet completed<sup>14</sup>.

In the absence of a legal provision governing the right of an adult foreigner without a residence permit, the same can in any case be deduced from the legislation, which must be interpreted through the constitutional, community and international principles that guarantee, without age limits, the right to education.

Moreover, there is already in the provision of Article 2, paragraph 1, TUI, a rule-principle, in accordance with the provisions of internal legislation, international conventions and principles of international law: "A foreigner, however present at the border or in the territory of the State, is recognised the fundamental rights of the human person provided for by the rules of domestic law, international conventions in force and the generally recognised principles of international law". Furthermore, in paragraph 5, we read: "A foreigner is recognised as having the same treatment as a citizen with regard to the judicial protection of rights and legitimate interests, in relations with the public administration and in access to public services, within the limits and in the manner provided for by the law".

par. 1 and 2, provides that foreign minors present in the national territory have the right to education regardless of the regularity of their position with regard to their stay, in the forms and ways provided for Italian citizens. Moreover, it establishes that the enrolment of foreign minors in Italian schools of all levels takes place in the ways and under the conditions provided for Italian minors and can be requested at any time during the school year. In addition, it provides for the conditional enrolment of foreign minors who do not have any personal documentation or who have irregular or incomplete documentation, without prejudice to the attainment of the final qualifications for courses of study at schools of all levels which, in the absence of negative checks on the declared identity of the pupil, are issued to the person concerned with the identification data acquired at the time of enrolment. As regards the latter aspect, when enrolling a foreign or EU child, the school is required to ask the parent or person exercising parental authority for the same personal, health and educational documentation as is required for the enrolment of Italian students, but any enrolment with reservations does not in any way affect the right to attend school; cfr. *DE FUSCO*, "Sul diritto all'istruzione come veicolo di integrazione delle seconde generazioni dell'immigrazione italiana", *Osservatorio Costituzionale*, Roma, 6 February 2018, AIC, pp. 13 – 26.

<sup>14</sup> See ROZZI, CONSOLE, "Minori stranieri e diritto all'istruzione e alla formazione professionale", "In.Media.Res – Integrazione Mediazione Responsabilità", available in [www.Asgi.it](http://www.Asgi.it).

Lastly, on the subject of access to education for foreign minors, reference is made to Law no. 47/2017 (the so-called *Zampa Law*), which provides for new regulations on the protection of unaccompanied foreign minors. The Zampa Law integrates and modifies the rules set out in a number of regulatory texts, including the TUI, providing for greater protection of the right to education of unaccompanied minors.

In fact, in art. 14, paragraphs 3 and 4, the law reinforces, for this category of minors, the right to education under art. 38 of the Consolidated Immigration Act. The law requires schools and training institutions accredited by the regions, to activate, from the time of the child's placement in the reception facilities, measures to encourage the fulfilment of compulsory education, such as, for example, the establishment of special agreements, promotion of specific apprenticeship programs and specific projects involving cultural mediators.

The Italian State legislation described so far would seem to guarantee a fair level of effectiveness of the right to education, upbringing and school inclusion of foreign minors. However, restrictive interpretations of the aforementioned regulations are frequent. Often these interpretations are due to the insufficiency and uncertainty of the resources allocated for these purposes; to the difficulties in applying all the contextual measures identified by the Consolidated Act on Immigration and, last but not least, to the (in)competences and (ir)responsibilities of the different actors involved.

In all cases where different interpretations of a legal provision are possible, the one that is most in line with the above-mentioned constitutional, EU and international principles guaranteeing all minors the right to education and training, without any discrimination based on citizenship, regularity of residence or any other circumstance, in compliance with the principle of nondiscrimination and the "*best interests of the child*", shall be adopted.

In conclusion, having established that the international and European regulations, as well as the national one, recognise the right to education/schooling as a fundamental human right, beyond the regularity or not on the territory of the minor or not minor, unaccompanied or accompanied, and in this last case, by regular or not regular, what we want to bring out here is how important it is for society, the effective guarantee of this right. Only in this last case will it be possible to understand the absolute value of the foreign presence within the school-society.

## 2. – *Recognition of the Cultural ‘Double Belonging’ of Foreign Children as a Value for the Society.*

The analysis of the previous paragraph shows that education is now widely recognised in international, European and domestic law as a means by which all individuals can become aware of their rights and thus contribute to ensuring democracy and peace. The commitment shown by States, international, intergovernmental and non-governmental organisations to guaranteeing the enjoyment of the right to education confirms its universal character and essential to the enjoyment of other human rights.

Although the issues of equal access to education and schooling, equal opportunities and social mobility have been addressed in various ways and with different results, there are still many cases of marginalisation and discrimination that prevent refugees and foreigners, in particular, from exercising their rights, including their right to study, and the benefits enshrined in the abovementioned regulations<sup>15</sup>.

Social inclusion is difficult to analyse and assess, since it involves multiple aspects. Even more, when the groups involved, i.e. foreign children, belong to vulnerable categories, since in many cases human rights are not adequately guaranteed to them.

The legal framework of the condition of foreign minors is particularly complex because of the need to reconcile specific requirements, namely, being a minor and being a foreigner and, consequently, also having different cultural needs, that of the country of origin and that of the country of arrival.

These children live with all the problems due to the so-called “*double belonging*” or, today, it would be more appropriate to say “*multiple belonging*”.

Until recently, the issue of dual belonging was linked to the so-called second generations, but this categorisation is no longer relevant, given that there are now also third generations. However, the problems associated with identity issues are the same.

The young people under consideration, living between two different cultures, are called upon to make the most of this double belonging, ‘exploiting’ in a positive way both the link with the original family culture and the link with the new reality towards which they are projecting their future.

By analysing the underlying issues, it should be remembered that children and/or adolescents of foreign origin, in most cases, did not choose to “*migrate*” on their own and are therefore not the authors of a project that is actually chosen for them by others. The same thing happens also to those who were born here.

<sup>15</sup> MARCHISIO, *cit. supra*, p. 275.

To achieve their goals, they must learn appropriately and master the language and symbolic references of the host culture, while at the same time maintaining and ‘honouring’ the ties and values belonging to the cultural origins of their family.

Foreign children are somehow under constant stress and strain, being forced to reconcile the contradictory and conflicting inner dynamics that they have to live with, and showing the consequences of this conflict in their families, schools, and in the society as a whole.

To ‘succeed’ in growing up, they need a ‘*double authorisation*’, from the family of origin on the one hand, that must grant to their children the possibility and/or recognize the need to be different from them. On the other hand, schools, training institutions and the host community, in particular their peers, should succeed in valuing and legitimising the belonging, the knowledge, the linguistic-cultural skills of minors of foreign origin, considering them as an important asset for the individual, for the group and for the community in which they are inserted<sup>16</sup>.

In this context, it can be maintained that the right to social inclusion of foreign minors passes through the undeniable right to education. It follows that schools become a central place for setting up and sharing common rules, as they can act by activating a daily life practice built on the respect of democratic forms of coexistence, and they can transmit the knowledge indispensable for the acquisition of self-awareness and the formation of active citizenship<sup>17</sup>.

The presence of foreign students and/or students of foreign origin in school, training institutions and universities environments inevitably forces us to reflect on what we are and what we are teaching; on the needs of “*all*” students; on our way of relating to the Other. It forces us to rethink ourselves, our cultural traits and values, the similarities and differences with those of other peoples, the building blocks of our own and others’ identities.

The process of including foreigners often comes up against attitudes of closure, feelings of exclusion, enmity and, even worse, immigration policies that ignore the universal principles enshrined in our Constitution.

On the other hand, if the creation of a society based on intercultural dynamics with a low level of conflict depends on the effective inclusion of the Other, special attention must be paid to children of foreign origin and their inclusion with a view to social cohesion.

<sup>16</sup> FAVARO, “Prove di integrazione. Le ragazze e i ragazzi delle terre di mezzo”, in *Una generazione in movimento. Gli adolescenti e i giovani immigrati*, Acts of the 8th National Conference of Intercultural Centres, Milano, 2007.

<sup>17</sup> PARRINELLO, “L’inclusione sociale del minore immigrato: il limite del multiculturalismo”, *Diritto di Famiglia e delle Persone*, 2020, p. 1537.

It is clear and evident that school alone is not enough and we need to look at the 'Other' with a different approach and a different outlook, seeing the foreign student not as a person with needs but as a person with rights. No more and no less than we are.

The presence in Italian schools of students coming from elsewhere, or in any case, even if they were born in Italy, carrying different cultures because they are the children of foreign citizens, poses a complex challenge to the whole legal system and consequently to the school and family system. In fact, the school, together with the family, is the place delegated to education and, therefore, must promote a policy of inclusion that involves first the class group and, subsequently, the family group and society beyond the entrance.

This is an inclusive process based on effective access to the rights and means of protection provided by the legal system. In the case of minors, it is clear that the right to education has a prominent position. Like all so-called "*social*" rights, the right to education "*is based on the effective assumption of social reality, its complexity, differences and inequalities*". The right to education, which is related to human dignity and the principle of equality, is a "*priority objective of social policies for future generations*", and its accessibility must therefore be fully guaranteed also for young foreigners living in Italy<sup>18</sup>.

It is clear that, on a subjective level, the encounter with diversity can be, and indeed is, a mutually tiring experience, maybe problematic and disturbing, but enriching all the persons involved. It is just as important to work on differences as it is to work on similarities, on the level of encounters and exchanges, but also on the difficulties and clashes, remembering however that ethnic and cultural purity is only a myth and that what actually occurs is the mixing, which gives rise to new identities.

However, the experience of migration must also be seen in its richness and cultural advantage. The meeting between persons belonging to those who belong to different cultural worlds and languages may reveal its highly positive nature, when it allows the individuals to have access to several cultural codes, to adopt multiple relational strategies, to increase the ability to play different roles and identities depending on the contexts<sup>19</sup>.

It is clear that the dynamics are innumerable and it is necessary to assess each individual variation, since the school is not just a place, but is actually a microcosm

<sup>18</sup> DE FUSCO, *cit. supra*, p. 3-4.

<sup>19</sup> COLOMBO, SEMI, *Multiculturalismo quotidiano. Le pratiche della differenza*, Milano, 2007.

that in some way represents society, where the practices and ideas of teachers, parents and students reflect and at the same time risk reproducing aspects of the common mentality, the dominant ideology and social reality<sup>20</sup>.

## 2.1. – A Different Interpretation of Art. 38, para. 3, of the ‘Consolidated Immigration Act’.

Training represents a decisive turning point in reducing the gap between theoretical reflection and educational practice. This is because social fragmentation, the non-recognition of differences, forms of discrimination, ethnic-cultural stereotyping, require jurists, researchers, educators, teachers and all actors to work on reflexivity and investigation into the representations that guide actions, words, attribution of meanings and construction of educational contexts, as places of life and growth.

It is precisely the meaning should be given nowadays to Article 38 of the Consolidated Immigration Act, with particular reference to its paragraph (3), stating:

“The school community welcomes linguistic and cultural differences as a value to be placed at the basis of mutual respect, exchange between cultures and tolerance; to this end, it promotes and encourages initiatives aimed at welcoming, protecting the culture and language of origin and carrying out common intercultural activities”.

Article 38 of the Consolidated Immigration Act stipulates, among other things, that the school community must accept linguistic and cultural differences as a value.

It is argued that this provision would, in abstract, foreshadow a high level of protection of the cultural right to education of members of the new minorities in its various meanings. One positive meaning would be linked to the right to receive a culturally plural education; the negative one would lead to the right not to be assimilated through compulsory education. However, in practice, the model of intercultural education is difficult to put into practice and the school system is one of the areas where the greatest influences of the majority culture persist<sup>21</sup>.

In the writer’s opinion, although it is true that in practice the application of the rule encounters considerable limits, it is nevertheless considered that much more is enshrined in the legislation. It is an open rule that should be read as an invitation to the school community, which can then be extended to the whole community. It is an invitation to welcome anyone while their diversity, exactly where, until now, the greatest difficulties have been encountered by foreign minors

<sup>20</sup> MC NAUGHTON, *Doing Foucault in early childhood studies*, New York, 2005.

<sup>21</sup> CAVAGGION, *Diritti culturali e modello costituzionale di integrazione*, Torino, 2019, p. 322.

The possibility of being in classes where it is possible to get to know diversity should be seen as is a gift, an added value to our training and education, useful also for discovering (many) similarities and differences. The possibility of a direct confrontation with the ‘Other’ is the greatest opportunity that this changing society is giving us and is giving to all our young people, of any geographical origin.

We must be prepared for this comparison, because it is decisive for the construction of the individual’s identity, for his/her growth and for what he/she will be able to bring to the community in the future.

It is impossible not to be agree with those who have argued that “*children of migrants are the leading figures of modernity, of all the children of tomorrow*”, and those who manage to experience a balanced process of transculturation find themselves in a condition of greater self-affirmation, greater awareness of the cultural nature of lifestyles and beliefs, leading to greater freedom of choice, creativity and self-identification<sup>22</sup>.

Exploring these issues can enable all workers to implement preventive training and educational practices during such an important period of life of discovery and identity formation for these minors.

Welcoming is an experience that must be carried out “*in the here and now*” of daily vicissitudes, but it is also a reference horizon that continually drives and sets in motion the fight against exclusion through the search for new ways of welcoming diversity and making it an element of educational and social cohesion.

### 3. – *Intercultural Dialogue for an Inclusive School.*

For the Italian school system, the inclusion of children (and young people) of foreign origin represents a crucial challenge.

For the children of foreign nationals, school is one of the first opportunities to meet the culture and institutions of the country they have moved to, a place of inclusion, where they can overcome the inequalities linked to arriving and/or growing up in a foreign country and entering into a new educational pathway.

In the writer’s opinion, it is essential to continue to follow and prepare social policies with an “*inclusive*” spirit because it is the only way to overcome any phenomenon of marginalisation and ghettoisation.

At the same time, this attitude may enrich and reinforce the content of human rights, which are an “*ideological-normative galaxy in wide expansion, and with a*

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<sup>22</sup> PASTORI, “Le nuove sfide identitarie dei bambini nella migrazione nelle parole di educatrici di scuola dell’infanzia, Ricerche di Pedagogia e Didattica”, *Pedagogia Interculturale, Sociale e della Cooperazione*, 2010, p. 3.

*precise objective: to increase the protection of the dignity of the person. Human rights represent the generous (and in part, perhaps, illusory) attempt to introduce some rationality into the political institutions and societies of all states”*<sup>23</sup>.

The gradual widening of recognition, both in legislation and in case law, of the social rights of foreign minors (but also of young adults), especially the right to education, depends on the qualification of those rights as fundamental, inviolable and universally recognised.

But, the issue of social and cultural integration of minors of foreign origin cannot be settled exclusively through school success. It can be considered an important element in providing answers to the migration phenomenon, to cultural conflict and confrontation, an element on which schools and educational contexts can try to apply new reflections and new practices for these new generations.

The intercultural approach is certainly the method to adopt, in order to avoid fuelling conflicts, misunderstandings and difficulties both for the children of immigration and for the natives. Interculturality expresses itself when it produces new sets of meanings, when it translates the value systems that are manifested in everyday events and creates practical solutions from these translations, so that the interaction does not turn into a dysfunctional and ineffective clash for all the interlocutors.

The term intercultural education first appeared officially in Italian schools with Ministerial Circular No. 205 of 26 July 1990, which dealt with the inclusion of foreign students in classes and consequently with intercultural education. The circular provided also indications on the intercultural value of all disciplines and interdisciplinary activities, by stating that

“intercultural education is based on the awareness that the values that give meaning to life are not all in our culture, but neither are they all in the cultures of others; not all in the past, but neither are they all in the present and the future. Educating for interculturality means building a readiness to know and be known while respecting everyone's identity in a climate of dialogue and solidarity”<sup>24</sup>.

Intercultural education has its primary aim in intervening on aspects of preconceptions, stereotypes, prejudices, identity blocks and even negative experiences.

<sup>23</sup> TALAMO, “La tutela del diritto all’istruzione del migrante minore”, available at: [www.iusinitinere.it](http://www.iusinitinere.it), 26.03.2019.

<sup>24</sup> CARATÙ, “Educazione interculturale ed educazione alla diversità: insegnare il relativismo culturale in classe”, available at: <https://www.orizzontescuola.it/educazione-interculturale-ed-educazione-alla-diversita-insegnare-ilrelativismo-culturale-in-classe/>, 3 June 2020.

Teaching, and learning from each other, may lead to a global understanding, also on a personal level (values, certainties and behaviour)<sup>25</sup>.

When differences have to be highlighted, they must be treated with particular care, since the risk of stigmatisation, prejudice, categorisation, the construction of otherness and difference can mark the relationship between adults in the school, as well as children's lives at an early stage, operating in the process of elaboration of their own image, and resulting in low self-esteem, rejection of cultural origins and a desire for mimicry.

The educational action should be somehow reconsidered, to make an effort for changing our mentality with regard to the concepts of citizenship, national community and therefore the image of parent/child from "*foreigner or non-EU citizen*" to "*fellow citizen*".

There is also a need to make a more accurate use of languages, to seek and preserve the encounter between historical individualities, educators and parents who can get to know each other and dialogue within the common planning of children's education.

At last, we should become aware of the fact that young people are already immersed in identity-based and discriminatory discourses; therefore, they should be educated to cultural decentralisation, for developing a reflexivity on the difference and on the plurality of points of view, as a way of preventing and deconstructing stereotypical and prejudicial images.

For a better understand of the connections between the identity issues of minors of foreign origin and intercultural planning, it is necessary to investigate the concept of identity in the plural, that is, composed of a plurality of belongings. These belongings are visible through the values, lifestyles, roles assumed and shared by any of all groups to which everyone belongs to, for acquiring knowledge, emotions and feelings leading to a continuous growth of one's own knowledge and experiences. The plurality of belongings becomes a cardinal element in the construction of identity, constituting identity itself<sup>26</sup>. Today's students, in a way that is different from their parents', belong to cultures 'in movement', moving beyond the idea of culture of origin, and considered as a homogeneous container, a crystallised external reality

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<sup>25</sup> LAGRECA, "Dalla paura dell' 'Altro' che allontana, all' Intercultura come progetto che avvicina", available at: <https://www.edscuola.eu/wordpress/?p=94318>, 24 August 2017.

<sup>26</sup> BOLOGNESI, "Identità e integrazione dei minori di origine straniera. Il punto di vista della pedagogia interculturale", *Ricerche di Pedagogia e Didattica*, 2008, Educazione Sociale, Interculturale e della Cooperazione, <https://doi.org/10.6092/issn.1970-2221/1534>, 3, 2008, p. 10.

“whose existence we must take note of as we take note of the existence of mountains, rivers and lakes”<sup>27</sup>.

Edgar Morin, in one of his last essays, identified how encounters and cultural exchanges, common coexistence and the multiplicity of belongings generate new forms of identity:

“Unity, cross-fertilisation and diversity must develop against homogenisation and closure. Crossfertilisation is not only a creation of new diversities from encounters; it becomes, in the planetary process, a product and producer of reunion and unity. It introduces complexity into the heart of mestizo identity (cultural or racial). Of course, everyone can and must, in the planetary era, cultivate his or her own poly-identity which allows the integration of different identities: family, regional, ethnic, national, religious or philosophical, continental and terrestrial. But the mestizo can develop a poly-identity from his family bipolarity - ethnic, national, if not continental bipolarity - and thus within himself a fully human complex identity”<sup>28</sup>.

Any confrontation with difficulties and in difficulties, in relational dimensions, can also be resolved in a positive way. Often, in fact, the dynamics of school inclusion have followed a “*compensatory*” type of approach, emphasising above all deficiencies and gaps and giving very little recognition to the knowledge acquired and the skills of each individual, for example, in their mother tongue. On the contrary, diversity represents an opportunity for enrichment for everyone, as it allows them to experience the variety of codes at an early age and to grow up more open to the world. Pupils of foreign origin are an opportunity for change for society as a whole<sup>29</sup>.

This new social scenario should lead to the design of new education policy. Schools are the privileged cultural and educational agency for building a pluralist and socially cohesive democracy, and an example of inclusive citizenship. They are essential means of maturing, both personally and collectively. It is clear that the education system has been undergoing a constant change for decades; now, this cultural change needs some sort of new key-concepts to facilitate not only the actors involved, but also all of us, for managing this change.

The school system has new and important reasons to invest in migrants’ cultural capital. Firstly, because their participation ensures a demographic change even

<sup>27</sup> BAUMAN, quoted by MOSCARDINO, “Che cosa intendiamo per cultura”, in Maroni, *Riflessi. Dietro lo specchio adolescenti stranieri*, Milano, 2010, pp. 3-31, p. 27.

<sup>28</sup> MORIN, *I sette saperi necessari all’educazione del futuro*, Cortina, 2001, pp.79-80.

<sup>29</sup> FAVARO, “Bilinguismi al plurale: per scelta, per nascita, per migrazione. Repertori e pratiche linguistiche nelle scuole e nei servizi educativi per l’infanzia”, *Italiano Lingua Due Riviste UniMI*, n. 1/2020, pp. 288-304.

in school cohorts (i.e rural schools, surviving thanks to the contribution of migrant users, or evening classes, sections of technical-professional institutes, etc.). Secondly, because the “*fusion*” of young people’s linguistic, cultural and symbolic baggage, which occurs precisely at the time of adolescent education, seems to be producing an interesting mix in multi-ethnic classes for the purposes of building an “*internationalised*” mentality, suited to cosmopolitanism<sup>30</sup>.

The inclusion in schools of students with a cultural background different from that of the host country is a resource for all. Getting in contact with different cultures and languages is enriching for children and young people. It is also an opportunity that can involve teachers and families, thus fostering the integration process also outside school.

When discussing the presence of the ‘Other’, fear and the absence of suitable tools to establish a dialogue lead us to look at things and events from a conflictualist perspective; but this is not necessarily the case, since all indicators of inclusion used in both European and Italian contexts include school participation (for minors) or educational participation (for adults) as elements of stability and positional improvement of migrants.

But, this issue comes with some problems.

Indeed, the theme of cultural diversity requires a difficult twist of the gaze that allows us to enter into relation with the paths of otherness, with the horizon of meaning that generates the relationship with the ‘Other/Stranger’, in the structurally enigmatic sense that highlights, at the same time, the traits of obscure threat or of enrichment and unexpected novelty.

The need emerges for a reflection that, on the one hand, allows us to get to know different cultures, identifying and removing the prejudices that prevent us from meeting them; on the other hand, it allows us to better understand, through the comparison of cultures, the values and salient aspects of our own culture.

The impact with different languages and cultures, which in some respects is still abrupt, allows us to reflect again and again on the great theme of diversity.

However, diversity among foreigners and by foreigners is only the latest of many other diversities already present. In fact, besides ethnic-cultural diversity, there is also gender or generation diversity, diversity between the richer and the poorer, or between the religious and the non-religious. Each of these diversities corresponds to very precise cultural traits that are decisive for the definition of individual identity

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<sup>30</sup> COLOMBO, *cit. supra*, p. 164.

and give rise to intercultural conflicts and incidents, but also to exchanges and dialogues, just as in the case of the encounter/clash between people of different ethnicities or nationalities<sup>31</sup>.

It emerges that intercultural education is not a subject to be addressed only when the presence of foreigners in the classroom or in society obliges us to find some way of dealing with the difficulties and tensions it generates. Instead, it must be a major educational goal that is valid in all cases and that schools, as the training agent par excellence, must set themselves in order to train young people who are capable of living peacefully and democratically in the face of any kind of diversity.

Those who educate must be concerned with indicating courses of action, in constant interaction with the local area, with local administrators and associations and voluntary groups. Moreover, interaction with families is fundamental, precisely in the field of civic education, which in this context becomes a fertile co-education where the responsibility of teachers-educators, the rights of children and adolescents and the rights-duties-responsibilities of parents must meet, not clash.

Indeed, the school, thanks to the multiple human relations that are generated and developed there, has both an important role in the management of intercultural relations, but also the enormous opportunity to be able in some way to highlight diversity in order to enhance its absolute value.

After all, only a reciprocal daily exchange, such as the one that the school can allow, guarantees effective “*knowledge*” through the multiple experiences of everyday life. It follows that the “*homologation*” that has often characterised and still characterises encounters with the Other must today make way for interculturality, as a dynamic of mutual recognition between identities and cultures that together define and enrich each other<sup>32</sup>.

#### 4. – Conclusion.

The care of foreign minors is a reality full of ambivalence and for this reason it is an interesting area of work in the framework of socio-cultural integration processes, as it represents a significant window through which to look at many other dynamics. It is necessary to go through this reality, welcoming and listening to the

<sup>31</sup> D’APRILE, *Xenia*. *La sfida educativa di una inter-cultura scolastica*, Bergamo, 2018; available also in “Tra accoglienza e diffidenza. Problemi delle migrazioni nell’età della globalizzazione”, *Rivista Formazione, Lavoro, Persona*, November 2017, pp. 101-109.

<sup>32</sup> LAGRECA, *cit. supra*.

many aspects that make the condition of the foreign child (accompanied or not) particularly complex. Lastly, a multidimensional approach is needed<sup>33</sup>.

This is because every human being is endowed with a composite identity, regardless of the fact that he or she was born in a multilingual and multi-religious context. In any case, it is foreign children who are faced with a particularly difficult challenge: being torn between two worlds, the country of origin and the host society. This leads to many difficulties. And it is always these minors who have the task of overcoming them, often in an environment where they do not have the support of their parents and where the state does not always adopt adequate integration policies<sup>34</sup>.

Migrant children are generally asked to adapt quickly and to find their place within references, implicit or explicit rules. Migration is not only an opportunity. It is also a fatigue. Identity fatigue is aimed at finding a balance between origins and the future, between family history and individual projects, between obligations and collective constraints and not least personal desires. The foreign minor thus finds himself having to try to propose his own identity through an extremely complex operation. In this reality, the foreign child tries to recompose the lacerations he or she experiences, adopting various strategies<sup>35</sup>.

In this particular historical and cultural moment, in which new walls and barriers are erected daily for religious, ethnic, political, economic reasons, in which the foreigner is chased away, expelled, mortified, experienced as disturbing, considered an intruder, an invader of other people's spaces and resources, the juridical, social and pedagogical challenge in an intercultural sense concerns the opportunity to think about the concept of reception, beyond the often desultory political option of refusal-rejection, but rediscovering the beauty and the opportunity of a philosophy of hospitality<sup>36</sup>.

All this should make us reflect on the fact that perhaps it would be appropriate and useful to educate on interculturalism not only when there are foreign students in the classroom, because diversity is not something new that we should consider only when and because we find it next to us, nor is it a problem to be faced. Diversity does not lie in being a foreigner, diversity was not brought by foreigners. It was already there. It is a characteristic of society and of the whole world that has always manifested itself in different ways and at different times.

<sup>33</sup> AUGELLI, "Cosa è chiamata a fare la scuola?", in *La scuola incontra i minori stranieri non accompagnati: soggetti, compiti e diritti*, 2020, p. 39, available in: <http://hdl.handle.net/10807/153310>.

<sup>34</sup> GARELLI, "Religione e politica in Italia: i nuovi sviluppi", *Quaderni di Sociologia*, 66, 2014, pp. 9-26.

<sup>35</sup> FAVARO, *Come un pesce fuor d'acqua. Il disagio nascosto dei bambini e dei ragazzi stranieri*, Cestim, Edizioni Angelo Guerini e Associati SpA, Milano, 2002.

<sup>36</sup> D'APRILE, *cit. supra*, p. 102.

But when cultural and human diversities meet and interact, affinities and differences emerge. This makes it possible to recognise each other as equal and different, to the point of understanding that humanity is “*one*” and that, if anything, the ways of living are different

### **Abstract**

When talking about education and inclusion of foreign minors it is necessary to dwell on how much the law plays a fundamental role, since education relates also to relational aspects concerning not only the individual, but also the collective dimension of the aspects of migration, to overcome social discrimination.

The presence in Italian schools of students of foreign origins, or in any case, even if they were born in Italy, carrying different cultures because they are the children of foreign citizens, is a complex challenge to the legal system and to the school and family system.

A new meaning should be given to Article 38 of the Consolidated Immigration Act, in particular to its paragraph (3).

The care of foreign minors is a reality representing an interesting workspace in the framework of socio-cultural integration processes, as it can be a significant perspective from looking at other dynamics.

The legal framework of the condition of foreign minors is particularly complex; they need to reconcile different instances - being a minor / a foreigner /a bearer of different cultural needs, from the country of origin and from the country of arrival. A new perspective is necessary to reinterpret international and national rules, to guarantee a full enjoyment of the right to education to foreign minors, by enhancing their cultural diversities, and by recognising them as an added value in our society.



# **BANGLA-STORIES: AN INTRODUCTION TO THE BANGLADESHI COMMUNITY IN PALERMO THROUGH THEIR LEGAL EXPERIENCE OF THE ASYLUM PROCEDURE**

*Valentina Grillo*

SUMMARY: 1. Introduction. – 2. International Protection in Italy: an Experience of Social Exclusion? – 3. Experiencing Social Exclusion. – 4. Cultural Rights between Inclusion and Integration: Grounds for Further Research.

## *1. – Introduction.*

The title of this contribution, *Bangla-stories*, is used as a signpost for different ideas. The term *Bangla-stories* refers, on the one hand, to Bangladesh,<sup>1</sup> a South Asian country from which in 2019 twelve thousand people migrated to Italy.<sup>2</sup> According to the International Organization of Migration (IOM), in 2017 more than 8,000 Bangladeshi nationals disembarked in Southern Italy and 9,000 lived in Sicily, mainly in

<sup>1</sup> Previously part of the British Empire in India, in 1947 Bangladesh became “East Pakistan”. At the time of partition of India, it was part of the newly established Dominion of Pakistan. This lasted until 1971 when, inspired by Bengali nationalism, the one-year Liberation War resulted in Bangladesh becoming an independent nation.

<sup>2</sup> ISTAT, *Iscrizioni e cancellazioni anagrafiche della popolazione residente anno 2019*, Report, 2019, available at: [https://www.istat.it/it/files/2021/01/REPORT\\_MIGRAZIONI\\_2019.pdf](https://www.istat.it/it/files/2021/01/REPORT_MIGRAZIONI_2019.pdf).

BRUNO, PALOMBINO, DI STEFANO, RUOTOLO (eds.), *Migration and Culture: Implementation of Cultural Rights of Migrants*, Rome, CNR Edizioni, 2021, ISBN 978 88 8080 301 0, pp. 237-258.

Palermo.<sup>3</sup> On the other hand, the word ‘stories’ is used to describe an account of past events in someone’s life, which takes on a double meaning in this context: firstly, it accounts for the so-called testimony that asylum seekers are asked to make once they arrive in Italy, an experience shared by many Bangladeshi migrants; secondly, it points to the importance of bringing a human perspective to the study of migration and of focusing on people’s lived experiences.<sup>4</sup>

In many asylum applications, Bangladeshi applicants are considered neither credible nor consistent with regards to the standards for international protection and have a high rejection rate – in terms of international protection 93% of the 1,340 applications filed in 2019 were rejected.<sup>5</sup> A number of researchers have examined this issue, notably in 2018 Ricca and Sbriccoli, who propose a legal solution to the experiences of asylum seekers in Italy, namely the recognition of the principle of ‘humanitarian protection’. In recent years, some Territorial Commissions in Italy have recognised such claims made by Bangladeshi applicants.<sup>6</sup> Others have in turn launched some programmes to prevent labour exploitation and trafficking of Bangladeshi migrants in collaboration with associations working against trafficking networks.<sup>7</sup>

<sup>3</sup> IOM, “Current Migration trends from Bangladesh to Italy”, IOM Italy Briefing, 1, 2017; Osservatorio Migrazioni, Istituto di Formazione Politica “Pedro Arrupe” - Centro Studi Sociali, in Greco, Tumminelli (eds.), *Migrazioni in Sicilia 2019*, Sesto San Giovanni, 2020.

<sup>4</sup> The Bangladeshi community is addressed in different ways in Italy. “Bangladesi” would be the most accurate, though it is less commonly used than “Bengalese”. Last but not least, the word “Bangla” is used as a shortened form of the country’s name and it may acquire equivocal significations: ranging from a pejorative connotation to a slang-word to refer to the community and its businesses. For instance, the grocery stores run by Bangladeshi nationals that are usually open 24 hours in several Italian cities are often called “Bangla Stores” or simply “Bangla”. The term is used by many Bangladeshi nationals to refer to their community in an informal way, hence the author’s decision to include it in the title of this contribution.

<sup>5</sup> AIDA, *Country Report: Italy*, 2019, available at: [https://asylumineurope.org/wp-content/uploads/2020/05/report-download\\_aida\\_it\\_2019update.pdf](https://asylumineurope.org/wp-content/uploads/2020/05/report-download_aida_it_2019update.pdf).

<sup>6</sup> The Territorial Commissions are Commissions for the Recognition of International Protection in Italy, coordinated by a National Commission in Rome. They are in charge of processing asylum applications, usually after having interviewed the asylum seeker at least once, most of the time with the help of an interpreter. The initial asylum application, however, is filed at the “Questura” - a branch of the Department for Immigration located at some of the main police stations – which then forwards it to a Territorial Commission.

<sup>7</sup> Trafficking is a crucial phenomenon in relation to asylum applications, as explained in the report drafted by NOTRATTA (2014), and Bangladeshi nationals may already be in touch with this type of network at the time of departure from their country of origin, typically by contracting a high interest loan to fund their journey. Many of them are also included in informal job networks that develop in the community, including Pakistani nationals as well.

The purpose of this contribution is to outline the most common legal procedures in the field of international protection in Italy, based on extensive working experience in Southern Italy. Legal anthropology provides researchers and case-workers with a fundamental basis to look into asylum law: constructive instruments derived from this field may be used to investigate people's perspectives and eventually recognise their right for international protection.<sup>8</sup> In Palermo, the various Bangladeshi communities form the largest group within the migrant population. According to migration records, it is possible to identify those who arrived from Libya after the fall of Ghaddafi in 2011. At the time, there were 36,000 Bangladeshi nationals living and working in Libya. Some of them were able to return to Bangladesh through international programmes, while those who could not access these programmes migrated by sea, eventually reaching Italy. Other Bangladeshi nationals arrived in Libya after 2011 with the aim to migrate to Italy and work in temporary jobs, whereas a third group uses the "Libyan route" to settle permanently in Italy or other European countries.<sup>9</sup> Typically, migrants from Bangladesh are male, over 25, and have a low education level.<sup>10</sup> They mainly come from Dhaka, Chittagong, Maradipur and Sylhet.<sup>11</sup> However, beyond these common demographic characteristics, the community is so broad and diverse that addressing it as a homogeneous entity constitutes a limit. As this contribution will show, anthropology cannot look at culture as "billiard balls" that remain unaltered after colliding against each other, and this specific situation of migration is no exception.<sup>12</sup>

The present contribution will provide an introduction to Bangladeshi communities' experiences in Palermo, where they may find several opportunities to exercise their cultural rights, despite the legal challenges faced by many to secure their stay in Italy. The theoretical approach that grounds this paper draws upon cultural and social anthropology, as well as a critical approach to migration studies. It gives prominent consideration to legal issues that, combined with the study of systems of power,

<sup>8</sup> GOOD, *Anthropology and Expertise in the Asylum Courts*, London, 2007, Routledge.

<sup>9</sup> SESANA, "Ecco perchè cresce il numero di bengalesi che arriva in Italia", *Altraeconomia*, 20 August 2017, available at: <https://altreconomia.it/migranti-bengalesi/>.

<sup>10</sup> *Cit. supra*, note 3

<sup>11</sup> *Cit. supra*, note 9

<sup>12</sup> WOLF, *Europe and People Without History*, London-Berkeley, 1982, p.7.

serve as base to critically examine notions of cultural rights, inclusion and integration.<sup>13</sup> Ultimately, this paper is inspired by the understanding of migration put forward by the Autonomy of Migration framework.<sup>14</sup> In this regard, the experience of migration is conceived as a transformative process that resists to forms of power exerted in the management of migration and borders.<sup>15</sup>

Only an overview of the most common legal instruments to recognise international protection will be given here. For instance, victims of trafficking may be eligible for a special permit in Italy. This will not be addressed here. Besides, it is too soon to draw conclusions on the social dynamics of the different communities present in Palermo. This contribution will first outline the legal instruments for international protection in Italy, as a whole, before turning to three claims made by Bangladeshis. The purpose of this paper is to investigate how Bangladeshis may perceive social exclusion through the experience of seeking asylum.

The choice to work with the Bangladeshi community was initiated by a paradox I have observed as part of my work in southern Italy, where I was involved in the Refugee Status Determination (RSD) procedure: while Bangladeshi claims for international protection were unconventional, and thus appeared to be legally interesting, they were often disregarded by many of the caseworkers interviewing them. This research focus also shows the importance of anthropology in order to grasp some crucial aspects of asylum applications. Although the interview in the RSD procedure might provide a positive space for dialogue and investigation, many potentially relevant social dimensions are ignored or remain marginal. For instance, the fact that Bangladeshi nationals are often part of a network of labour exploitation is rarely discussed. How is this possible? The next section partly answers this question by explaining on which basis some claims might be denied.

## 2. – *International Protection in Italy: an Experience of Social Exclusion?*

In recent years, requests for international protection have been described in terms of multiple obstacles faced by asylum seekers who receive a permit to stay during their application.<sup>16</sup> In case of rejection, migrants in Italy have few other options to

<sup>13</sup> HARREL-BOND and VOUTIRA, “Anthropology and the Study of Refugees”, *Anthropology Today*, 8, 4, 1992, pp. 6-10.

<sup>14</sup> MEZZADRA, “The Right to Escape”, *Ephemera*, 4, 3, 2004, pp. 267-75; DE GENOVA, *The Borders of “Europe*, Durham and London, 2017.

<sup>15</sup> GONZALES et al., *Undocumented Migration*, Cambridge and Medford, 2019.

<sup>16</sup> FASSIN, “Refugees, Anthropology, and Law”, in John Wiley & Sons, *The International Encyclopedia of Anthropology*, Wiley Online Library, 2018.

regularise their status. This is partly because, as explained by Tapta, a 28-year-old man from Sylhet, who arrived in Palermo 20 years ago:<sup>17</sup>

“over the past few years, let’s say the last 10 years, for those who arrive have the only option is to apply for international protection, the asylum request. Two years ago, it was fine because many people were recognised to be eligible for the so-called humanitarian protection. Otherwise, it is very unlikely that Bangladeshis are recognised as refugees or eligible for subsidiary protection. Although the Territorial Commissions stopped recognising humanitarian protection, tribunals in the second degree of judgement recognised this in the form of the ‘special case permit’. So, everybody who arrived in Italy asked for asylum”.

International protection in Italy is recognised in the form of refugee status and subsidiary protection. The former, based on the Geneva Convention Relating to the Status of Refugees, which Italy has signed and ratified, is granted to people who can prove a well-founded fear of persecution for five reasons – race, nationality, religion, political opinion and belonging to a social group.<sup>18</sup> The agent of persecution might be the State or non-state actors whose persecution is not impeded by the (unwilling or unable) State in the country of origin. Subsidiary protection may be granted to people who risk being sentenced to (a) death penalty, (b) tortured or exposed to inhuman and degrading treatments or come from a country where there is a (c) situation of “generalised violence”.<sup>19</sup> In addition to these two forms of protection – which differ in terms of rights, possibility of conversion to other permits and duration – the other available option is the so-called “humanitarian protection”. This last form of protection is peculiar to the Italian system of immigration law. It was introduced on the basis of the right of asylum, as well as article 10 of the Constitution, which states the following principle:

“The Italian legal system conforms to the generally recognised rules of international law.

The legal status of foreigners is regulated by law in conformity with international rules and treaties. Foreigners who are, in their own Country, denied the actual exercise of those democratic freedoms guaranteed by the Italian Constitution, are entitled to the right of asylum in the Republic, under conditions provided by law. Foreigners may not be extradited for political offences.”<sup>20</sup>

<sup>17</sup> Interview conducted in Italian. All quotes are translated into English by the researcher. Names of interviewed people have been changed to preserve their anonymity.

<sup>18</sup> Law, 28 January 2008, n.25 of the European Directive 2005/85/CE.

<sup>19</sup> Law, 21 February 2014, n.18 of the European Directive 2011/95/UE.

<sup>20</sup> Senato della Repubblica, *Constitution of the Italian Republic*, 2021, available at: [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

Humanitarian protection was abolished in 2018 but it has been partially re-introduced in the form of the so-called “special protection” status.

Refugee Status Determination requires the identification of five elements: the fear of persecution; evidence that this fear is well-founded; persecution; seriousness of persecution - including the multiplicity of discriminatory acts; and the agent of persecution. Theoretically, as emphasised by one expert during an interview, several Bangladeshi applications could be eligible for protection. The *Refugee Status Determination* (RSD) procedure is usually pursued through a first application (called C3) at the police station or at the border post. This form is then forwarded to the Territorial Commission, which initiates the Recognition of International Protection process. The asylum seeker subsequently receives an invitation to an interview with an Italian officer (also called a caseworker), during which they must explain why they left their country of origin. Case analysis proceeds on the basis of this recorded interview and other testimonies.<sup>21</sup> Each relevant fact that the asylum seeker addresses during the interview – which may have taken place several times and over different periods of time – will be assessed by the caseworker. Finally, the assigned caseworker presents the case to the relevant Commission and a decision is made collegially (by the President and the members of the Territorial Commission).<sup>22</sup>

The next section will present three claims specifically related to Bangladeshi nationals. While it is impossible to determine the main claims made by Bangladeshi asylum seekers, as decisions are made on a case-by-case basis, three specific cases will be presented below as an illustration.<sup>23</sup>

<sup>21</sup> Since the so-called Minniti Reform, i.e. Decree n.13/2017, the interview should be video-taped, though this has never been put into practice.

<sup>22</sup> In Italy, there are more than twenty Territorial Commissions. Before Decree n. 13/2017, the members of Territorial Commissions were a UNHCR representative, a police officer, a provincial representative nominated locally and a Vice-Prefect. In July 2018 specialised officers from the Ministry of the Interior substituted the previous members. These will be designated as caseworkers or interviewers.

<sup>23</sup> The data was collected between the end of 2020 and beginning of 2021 both through narrative and face-to-face interviews with Bangladeshis, informal talks and e-interviews with experts who have worked in the field of international protection. In addition to that, the author has been studying Italian Immigration Law since 2016 and has worked in this field in southern Italy. She also started studying Bangladeshi language in 2018, earning a Diploma in Language and Civilisation at the INALCO Institute (Paris), in 2021. This contribution started with the intent to investigate the community experience of social exclusion in the field of international protection. However, this research acquires a different profile through the exploration of everyday life, especially in relation to the process of regularisation in the Bangladeshi community in Palermo.

Before delving into these examples of claims made by Bangladeshi applicants, however, it is important to emphasise a general issue that is often mentioned by asylum seekers in recounting their experience of asylum procedures. Bangladeshi applicants are commonly challenged in the RSD procedure to elaborate and narrate events and past experiences (of discrimination) by following a specific style, i.e., in the form of a testimony. Therefore, legal assistance and the preparation of the testimony beforehand are fundamental steps to accomplish before the interview, though this type of guidance is not always available to applicants. Combined with the limited time available at some Territorial Commissions, this results in accounts that are unclear and, therefore, deemed to lack credibility. Besides, as emphasised by Giovanni, a legal expert interviewed as part of this research project, it may occur that the caseworker gives more room to the so-called “Country of Origin Information” (from now on referred to as C.O.I.) than to details of the applicants’ personal experience. In such cases, they may be rejected for failing to produce a coherent testimony motivating the fear of persecution.

#### a) Political Opinion

This type of claim concerns, as per the UNHCR Guidelines on International Protection No.10, “any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged”.<sup>24</sup>

Giovanni, a legal expert, explains how this could apply to many applications of Bangladeshi citizens supporting the Bangladesh Nationalist Party (BNP) back in their country.<sup>25</sup> This political affiliation may expose people in Bangladesh to punishment or continuous harassment and marginalisation, especially given the broad consensus enjoyed by the ruling party, the Awami League. The role of the caseworker, as Giovanni explains, is to conduct the C.O.I. research. From this research, it emerges that the ruling party in Bangladesh marginalises members and supporters of opposition parties. One of the most used search engines for the C.O.I. describes the role of the main opposition party, the BNP, as follows:

“In 2018, the BNP agreed to peacefully participate in the general election, yet failed to regain popular support. With most of its leaders and activists either in hiding or in jail, the

<sup>24</sup> UNHCR, “Guidelines on International Protection N.10”, 2014, p.51, available at: <https://www.unhcr.org/publications/legal/529efd2e9/guidelines-international-protection-10-claims-refugee-status-related-military.html>.

<sup>25</sup> Names of interviewed people have been changed to preserve their anonymity.

party was almost invisible during the campaign and on the day of the vote.”<sup>26</sup>

The expert explains that the main problem in most Refugee Status Determination (RSD) procedures is related to matters of credibility of the applicant. He clarifies that it is not sufficient to determine through the C.O.I. that the situation in the country is unstable or, in this case, politically dangerous. Despite this assessment, most claims are considered “not credible” if the applicant is unable to explain the political agenda of the party or does not hold a specific position in the party. The use of strict cultural codes in making such decisions, specifically around proof of adherence to political ideals, opens up a broader debate.

Giovanni highlights another interesting point. He explains that although each RSD procedure is conducted on a case-by-case basis, the decisional criteria to establish applicants’ credibility for political claims appear to be distant from the social and political reality of their country of origin. In other words, the political system in place in Bangladesh cannot be understood from a Western point of view, since belonging to a political party is also associated with a form of

“religious belonging, social identification and this identification is often not grounded on education; being part of a group depends on the people you go out with, in which family you were born, patron-client dynamics [...] if in a rural area the dominant party corresponds to a family [...] it is more or less normal that belonging to that party is motivated by other reasons that are not necessarily related to political ideals [...] there are two parties and there is also a third one, the Islamic Party, whose name I forgot. In that case, it makes sense to look for a personal participation and motivation [...] the interviewer in the RSD procedure cannot expect that the interviewee knows each political detail [...] anyway, the political claim of Bangladeshis is usually rejected.”

This is confirmed in the discussion of cultural and moral dynamics based on patron-client relationships, which shape certain forms of power.<sup>27</sup> In the case of Bangladesh, Gardner explains that poor people need social protection by certain “richer patrons”.<sup>28</sup> These actors, who are mentioned in a *Tribunale di Brescia* (2017) sentence as “boro lok” (বড় লোক that literally means “big man”), give social protection

<sup>26</sup> Immigration and Refugee Board of Canada, “Bangladesh: Bangladesh Nationalist [National] Party (BNP), including its structure, leaders, factions, associated organizations, activities, membership and membership documents; treatment of members and supporters by the authorities (2017-May 2019) [BGD106255.E]”, 22 May 2019, available at: <https://www.ecoi.net/en/document/2017218.html>.

<sup>27</sup> SCOTT, *Weapons of the Weak*, Yale, 1985.

<sup>28</sup> GARDNER, *Global Migrants, Local Lives: Travel and Transformation in rural Bangladesh*, Oxford, 1995.

at a cost: not only economic, but also political obligations are attached to this type of arrangement.<sup>29 30</sup> This explains how Bangladeshi nationals often find themselves belonging to a political party, without having a direct political interest or claiming ideological adherence to its principles.<sup>31</sup>

## b) Religion

As clarified by the UNHCR, the claim based on religious grounds “covers also notions of identity, or way of life. It dovetails with Article 18 ICCPR and includes broader considerations of thought and conscience, including moral, ethical, humanitarian or similar views.”<sup>32</sup>

Thus, it is not only limited to religious belief systems. With regard to this specific claim, people from Bangladesh may experience persecution because of their religion. For instance, freedom of religion is guaranteed by Constitution and Hindu communities are respected and tolerated in the country. Nevertheless, especially during elections or moments of unrest, Hindus may be exposed to episodes of violence. As explained during the expert interview with Giovanni:

“it is important that the story relates to a specific rural area, for example, or a specific context. To put it more clearly, not all Hindus risk persecution in Bangladesh. However, it may happen in some areas, especially in the dichotomy between cosmopolitan cities and traditional countryside. I remember that, although this is quite uncommon as a claim, the Territorial Commission granted refugee status to a Bangladeshi applicant who feared attacks by Islamic groups in his village.”

During the RSD procedure, the decision of the Territorial Commission needs to incorporate other criteria as well. For instance, it has to verify whether the “internal protection alternative” is applicable, as required only recently by Decree n.113/2018. Under this disposition, if the episode of persecution happened in a specific localised context, it should also be demonstrated that the asylum seeker cannot settle in another region of their country of origin. Since religious claims tend to be crucially related to where they took place, the asylum seeker needs to show, additionally, that it would be

<sup>29</sup> Tribunale di Brescia, 16 January 2018, RG n. 14904/2017, available at: <https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-2-2018/umanitaria-3/247-trib-bs-16-1-2018/file>.

<sup>30</sup> GARDNER and AHMED, “Place, Social Protection and Migration in Bangladesh: A Londoni Village in Biswanath”, *Development Research Centre on Migration, Globalisation and Poverty*, 2006, p.5.

<sup>31</sup> JACKMAN, “Violent Intermediaries and Political Order in Bangladesh”, *Eur J Dev Res*, 31, 2019, pp. 705-723.

<sup>32</sup> *Cit. supra*, note 24.

impossible for them to settle somewhere else in the country, for instance, if they run a local business and no other part of the country would be a “reasonable” alternative.<sup>33</sup>

### c) Membership to a Particular Social Group

The UNHCR Guidelines explain that membership to a particular social group “should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>34</sup>

Persecution based on the belonging to a particular social group requires that this group be identifiable and perceived as such from outsiders, e.g., through specific characteristics. Besides, members of this group do not necessarily need to recognise themselves as part of the group but still share an internal characteristic that makes them part of it. Membership to a particular social group is defined as:

“a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”

With regard to Bangladeshi applicants, Giovanni mentions the example of the Bedes, a nomadic group who live on boats.<sup>35</sup> As he clarifies:

“they are recognised as refugees because in the past they used to have a specific role in Bangladesh, but with the modernisation of the country they started being marginalised.”

A claim that is more common among Pakistani applicants, but that may also theoretically apply to Bangladeshi nationals, regards membership to religious extremist movements. For instance, in different regions of rural Bangladesh, Islamist militant

<sup>33</sup> See more UNHCR, “the Guidelines on International Protection: Internal Flight or Relocation Alternative” within the Context of Article 1 A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees”, 2003, available at: <http://www.refugeelawreader.org/en/en/english/section-ii-international-framework-for-refugee-protection/ii2-the-1951-geneva-convention/ii21-criteria-for-granting-refugee-protection/ii215-internal-protection-alternative/unhcr-documents-13/7781-unhcr-guidelines-on-international-protection-internal-flight-or-relocation-alternative-within-the-context-of-art-1a2-of-the-1951-convention-and-or-1967-protocol-relating-to-the-status-of-refugees-july-2003/file.html>.

<sup>34</sup> *Cit. supra*, note 24.

<sup>35</sup> See more, DAS, “Rough sailing for Bangladesh river-gypsies”, *Aljazeera*, 22 January 2013, available at: <https://www.aljazeera.com/features/2013/1/22/rough-sailing-for-bangladesh-river-gypsies>.

groups recruit students through some Koranic Schools.<sup>36</sup> Although the role of Koranic Schools (also called madrasa) has been at the heart of a global controversy, especially in relation to their instrumentalisation by international actors to justify political decisions, most notably after September 11, various sources confirm the relation between some madrasa and religious extremism.<sup>37</sup> This may overlap with the political participation of some students in parties such as the Islamist Jamaat-e-Islami.<sup>38</sup> In case students reject such forms of engagement, they might fear persecution on various grounds. Students refusing to attend such Koranic Schools may be associated to groups who oppose the activities of the militants, and thus identified as a “members of a specific social group” under threat. This case is theoretically also based on political opinion, as well as religion, highlighting the fact that forms of persecution may be related to overlapping grounds under Article 1 of the Geneva Convention.

#### d) Debt and Other Economic Matters

Bangladeshis are often categorised as “economic migrants”. Within the field of international protection, their claims tend to be underestimated, in part due to the strict division between “refugees” and “economic migrants”. Nevertheless, this did not prevent authors like Ricca and Sbriccoli from highlighting the dangers many people migrating to Italy are exposed to because of the risk of being trafficked.<sup>39</sup> Thus, they argue, a form of protection might be granted to several Bangladeshis migrating to Italy, simply because of the type of network enabling their journey. This issue will however not be treated extensively in this paper due to a lack of materials on the subject. The analysis will instead focus on the minimal emphasis laid on the economic context in the RSD procedure and during the interview. Owing to their perceived categorisation as “economic migrants” Bangladeshi nationals are subjected to exclusionary practices that objectify people, or rather, need them as subjectivities.<sup>40</sup> The French philosopher Foucault analyses mechanisms of “exclusion/inclusion” in the process of marginalisation and segregation, and more generally in the construction of social phenomena, where the architectural gaze of surveillance rules

<sup>36</sup> EASO, “Bangladesh”, 2017, available at: [https://coi.easo.europa.eu/administration/easo/PLib/Bangladesh\\_Country\\_Overview\\_December\\_2017.pdf](https://coi.easo.europa.eu/administration/easo/PLib/Bangladesh_Country_Overview_December_2017.pdf).

<sup>37</sup> MUMTAZ, “Madrasa education in Pakistan and Bangladesh.”, *Religious Radicalism and Security in South Asia*, 2004, Asian-Pacific Center for Security Studies, pp.101-115.

<sup>38</sup> MUMTAZ, “Views from the Madrasa: Islamic Education in Bangladesh”, in Mumtaz and Nelson (eds.), *The National Bureau of Asian Research*, 2009.

<sup>39</sup> RICCA and SBRICCOLI, “Processi Culturali e Spazi Giuridici. Dal Bangladesh all’Italia: migrazione, protezione umanitaria e reinterpretazione del divieto di patto commissorio”, *Questione Giustizia*, 2017, pp.179-215.

<sup>40</sup> FOUCAULT, *Madness and civilization: A history of insanity in the age of reason*, London, 1965.

through dividing practices.<sup>41</sup> This becomes very relevant in the field of international protection that enforces immigration and asylum law as a scientific set of rules in refugees' everyday lives.

Giovanni highlights the perceived division between different categories of migrants and the exclusion of economic matters during RSD procedures in Italy. This might have led to several Bangladeshis avoiding any reference to the matter of debt during their testimony at the Territorial Commissions. Generally speaking, economic concerns are rarely mentioned during the RSD procedure. Giovanni explains that:

“in 2017 the Minniti Government asked the Territorial Commissions to collect further information in order to explore the debt of Bangladeshis. According to the Government, this could have been a ground to recognise international or the humanitarian protection. Claims grounded on the issue of lending money at unreasonably high rates of interest in Bangladesh is strictly connected to the network of unregistered jobs in Italy. Several Bangladeshis could pay back the debt for their journey only through unregistered jobs provided within the Bangladeshi community in Italy [...] this is a big challenge also for many other migrants from that region, such as people coming from Nepal who are asked to pay back their debt, which is not generally recognised (by the refugee authorities)”.

In addition to these issues, many other reasons force people to leave Bangladesh. Flooding or climate change are among them, but these are not always recognised as grounds for asylum by some authorities. The Tribunale di Genova in 2017 and other Tribunals did, however, extend humanitarian protection to victims of natural disasters.<sup>42</sup>

It is also worth highlighting that this scenario is a more or less indirect outcome of European policies in the field of migration; namely, the categorisation of migrants, with a sharp division between economic migrants and asylum seekers. For instance, this has been introduced as a technical procedure within the *Hotspot Approach* in Italy, and other countries. Such political approaches should not theoretically influence the law and its application. They seem to be irrelevant, for instance, in the decisions of several Italian Tribunals and how some judges apply asylum law. Another Tribunale di Genova (2016) sentence is worth mentioning at this point, in that it shows the importance of including economic factors in RSD procedures and demonstrates that territorial commissions and tribunals differ significantly in terms of legal interpretation in the field of international protection. Although it is evident that economic reasons do not constitute sufficient motivations in order to grant asylum, the

<sup>41</sup> FOUCAULT, *History of madness*, Khalfa (ed.), Abingdon, 2006.

<sup>42</sup> Tribunale di Genova, Accoglimento Totale of 7 November 2017, RG n. 2233/2017, available at: <https://www.a-dif.org/2017/11/19/lattuale-situazione-socio-politica-del-bangladesh-giustifica-la-protezione-umanitaria/>.

sentence of the Tribunale di Genova extended humanitarian protection to a Bangladeshi asylum seeker based on the cumulation of various reasons that led the applicant to leave Bangladesh.<sup>43</sup> This decision considers both the threats received by the applicant due to his political affiliation and economic reasons, which are accounted for in relation to the general situation of the country, as well as the personal and family situation of the asylum seeker. This case emphasises the importance of one last aspect of the Italian juridical system. Before the so-called Minniti Reform – Decree n.13/2017 – all negative decisions (or insufficient recognitions) by the Territorial Commissions could be appealed through the Tribunal, whose decision could eventually be appealed again in the so-called “second grade of judgement”, at the Corte d’Appello. The Corte di Cassazione, which delivers the third and final level of judgement, was rarely seized, as its decisions concern only legal matters. The Minniti Reform abolished the second grade of judgment, namely, the “appello”, and the legal effects of the Territorial Commissions’ negative decisions, e.g., expulsion, were no longer suspended. Several academic contributions highlight the serious impact of this reform on the protection and respect of asylum seekers’ rights in Italy.<sup>44</sup>

### 3. – *Experiencing Social Exclusion.*

Within a large migrant population in Palermo, people from Bangladesh are the majority. Tapta explains that:

“it is hard to assess how many Bangladeshis are in Palermo since there are those who are documented and those who are not. Besides, there are so many people who arrived over the last years both from Libya and the Balkan route. However, there are many who, once they’ve obtained Italian citizenship, went away to northern Europe and mainly to the UK.”

This description differs quite a lot from the one provided by institutional actors on the Bangladeshi community. As Giovanni points out:

“migrants are oppressed by bureaucratic matters in Italy and this creates very hard consequences in their lives: how they interact with the social context and so on. [...] However,

<sup>43</sup> Tribunale di Genova, Accoglimento Parziale of 28 September 2016, RG n. 2069/2016, p. 4, available at: <http://briguglio.asgi.it/immigrazione-e-asilo/2016/novembre/trib-genova-asilo-16.pdf>.

<sup>44</sup> See among others, DEL ROSSO and PISONI, *Garanzie e principio di effettività del processo nella tutela del richiedente asilo*, 2019, available at: [https://www.questionegiustizia.it/articolo/garanzie-e-principio-di-effettivita-del-processo-nella-tutela-del-richiedente-asilo\\_06-03-2019.php](https://www.questionegiustizia.it/articolo/garanzie-e-principio-di-effettivita-del-processo-nella-tutela-del-richiedente-asilo_06-03-2019.php); PANICO, *Decreto Minniti-Orlando: cartellino rosso ai migranti (ed alla legge)*, 2018, available at: <https://www.meltingpot.org/Decreto-Minniti-Orlando-cartellino-rosso-ai-migranti-ed.html#.YDOmBC1aYWo>.

they do not look so open, many among them cannot speak Italian and they have difficulties to follow their legal procedures. They are obsessed with the recognition of a permit to stay [...] it is, however, also true that also among case-workers the Bangladeshi community is not sufficiently taken into consideration.”

He explains that communication with Bangladeshis is, overall, difficult during the RSD procedure. This is because, according to him, they seem to be simply interested in getting a residence permit. He adds that the choice of interpreters can sometimes be an issue as well. In particular, he mentions one asylum seeker bringing a political claim, who refused to be interviewed with a certain interpreter because he had recognised her and knew that she was associated with a certain party. This shows an important principle in RSD procedures: asylum seekers always have the right to ask for an alternative interpreter, since particularly sensitive matters are dealt with during the interview and issues of protection need to be respected. Giovanni appears surprised that many interpreters working at the Territorial Commissions are women. According to him, the profile of most of these interpreters contrasts with the rest of the community. Many of them are migrants of second generation, who speak Italian fluently and appear to experience tension between life in Italy and close contact with their culture of origin. In this regard, Giovanni stresses that:

“in relation to the community of origin: the bigger and more stable this is, the more the cultural schemes are reproduced in the country of arrival [...] people from Mali appeared to be less rigid in experimenting, for example, with their behaviours and in the definition of their identity. They were for sure influenced by their country of origin, but since their community was weaker because there were only a few of them in southern Italy, they had still some limitations but seemed less influenced socially and therefore motivated to explore new ways of life, which does not mean abandoning traditions, [...] but to have the possibility to change and grow. On the one hand, they do not have a community supporting them, but they have other liberties.”

This contribution has summed up the experience of asylum procedures in legal terms. Using this as a foundation, it will now attempt to show the importance of people’s perspectives and direct experiences once they settle in Palermo. As Tapta describes one of the city’s main streets, he explains that there are Bangladeshi

“shops, call centres, fast-food restaurants, jewellery shops, barbers ...so overall, they are present. New generations are included: there is no difference between Italians and Bangladeshis of second generation. They attend university, live, and perceive reality as if they were from Palermo, there is no difference! I am very proud of those who study at the university, for those who can afford it, of course. Their parents or those who did not grow up here are not used

to language or culture, work for a very low income in relation to the average income, so they will send children to university depending on how many members there are in the family”.

In this context, economic enterprises depend on community networks.<sup>45</sup> However, national laws do not seem to encourage strategies for entrepreneurship for migrant groups. This not only poses an economic difficulty, but also impacts legal procedures of regularisation, which constitute a further hurdle in Bangladeshi nationals’ everyday life experiences, as Tapta explains:

“[T]here is also the big limit of regularisation, until you regularise your status, you unfortunately have to be isolated and cannot have independence and freedom; not until you are regularised can you feel at home; you will always fear controls and deportation; you cannot have the certainty of a life here.

Before, it was different because Bangladeshis could apply for the so-called ‘sanatoria’, but this happened when I arrived here and a couple of years after...on the contrary, in the past few years, 10 years, the only way is seeking asylum. Two years ago, many Bangladeshis obtained humanitarian protection because for Bangladeshis it is hard to obtain any other form of international protection.

However, since 2018 the humanitarian protection status has been abolished and the commissions did not recognise this anymore, whereas tribunals in the second degree of judgment gave them the so-called ‘special case’. Lately there has been the mini-sanatoria as well”.<sup>46</sup>

Tapta highlights two concrete examples illustrating the generalised atmosphere of political hostility towards migrants and the moment of exception that characterised migrants’ experiences during the COVID pandemic.

Negative attitudes toward migrants within the Italian general public have led, for instance, the Italian Government to close its ports to all boats of incoming migrants in 2018. Moreover, in October of the same year, the Government approved Decree

<sup>45</sup> ERIKSEN, *Ethnicity and Nationalism*, New York, 2010, p.163.

<sup>46</sup> The term “sanatoria” may be translated here as “regularisation”. Interestingly, it comes from the Latin term “sanus”, meaning healthy and uninfected. Legally, Tapta probably referred to the Martelli Law that in 1990 introduced the possibility for migrants to regularise their stay, independently from their employment status (KABIR and MIZANUR RAHMAN, *Moving to Europe: Bangladeshi Migration to Italy*, 2012, available at: [https://www.files.ethz.ch/isn/137192/ISAS\\_Working\\_Paper\\_142\\_-\\_email\\_-\\_Moving\\_to\\_Europe\\_-\\_Bangladesh\\_Migration\\_to\\_Italy\\_07022012143721.pdf](https://www.files.ethz.ch/isn/137192/ISAS_Working_Paper_142_-_email_-_Moving_to_Europe_-_Bangladesh_Migration_to_Italy_07022012143721.pdf)). The “mini-sanatoria” refers to the so-called “Relaunch Decree” of May 2020 approved by the Italian Government to regularise the status of migrant workers. Various aspects of this legislation were criticised, since within two months, 32,000 applications were filed. Out of these, 91% were submitted by domestic workers (European Commission, “Migrant regularisation in Italy: a contested measure”, 2020, available at: <https://ec.europa.eu/migrant-integration/news/migrant-regularisation-in-italy-a-contested-measure>).

n.113/2018 on urgent dispositions regarding international protection and immigration, as well as public security, and other measures. In reality, the Decree had nothing to do with safety and rescue operations at sea. Instead, it affected migrants' lives in different domains: humanitarian protection, border procedures, return to safe third countries, assistance, housing, and other procedures in the domain of international protection. All other measures taken in the management of ports, including their inaccessibility for NGOs rescuing people at the Central Mediterranean Sea, were based on national decisions that often encountered opposition from local authorities.<sup>47</sup> They are part of a political scenario that has been characterised in the past three decades by a broad diffusion of neo-nationalist policies, inspired by right-wing parties in Italy and throughout Europe.<sup>48</sup> In addition to what Tapta mentioned in the passage quoted above, these are other examples that reflect an atmosphere of aversion towards foreigners in Italy. On the European level, these measures were also legally supported by the shift from the *Triton operation*, which mandated that Italy disembark rescued migrants on its territory, to the *Themis operation*. This was a political decision within the "solidarity debate" in Europe – which has been often discussed in relation to the Dublin principle, according to which European member states are supposed to equally share the "burden" of receiving migrants, and its related Regulation n. 604/2013.

The second point raised by Tapta touches on migrants' experiences during the COVID-19 pandemic. Within national discourses, the presence of refugees and migrants on the national territory constitutes an exception to the national order of things, as they are not citizens but reside there; theoretically they are not included but are accepted as members of the national whole.<sup>49</sup> During the COVID-19 pandemic, the Italian Government established what Tapta refers to as the "mini sanatoria", a new procedure that was introduced in May 2020, during the first lockdown in Italy in order to regularise the stay of many undocumented labour migrants. This decree introduced two procedures. Undocumented migrants shall, according to the Decree, ask for a six-month job seekers' residence permit or employers shall regularise employees through employment contracts.<sup>50</sup> Some migrant workers were able to apply for this special permit. This was, nevertheless, not accessible to all workers: only those working in the agricultural and farming sectors, as well as caregivers were

<sup>47</sup> See Palermo or, for example, the mayors of Siracusa and Trapani. Find more under WINTOUR, TONDO and KIRCHGAESSNER, "Southern mayors defy Italian coalition to offer safe port to migrants", *The Guardian*, 11 June 2018, available at: <https://www.theguardian.com/world/2018/jun/10/italy-shuts-ports-to-rescue-boat-with-629-migrants-on-board>.

<sup>48</sup> BANKS and GINGRICH, *Neo-nationalism in Europe and beyond*, Oxford, 2006.

<sup>49</sup> MALKKI, *Purity and Exile*, Chicago, 1995, p. 5; AGAMBEN, *Homo Sacer*, Stanford, 1998, p.24.

<sup>50</sup> *Cit. supra*, note 46.

eligible to apply (together with their employer) for the regularisation of their employment and residence status.<sup>51</sup> As explained by Tapta,

“these sectors are important because many migrants are employed in these types of occupations. But many other fields of employment, such as restaurants or petrol stations and other sectors in which migrants are supporting the Italian society were not included. So, those who were irregularly employed in these sectors could not benefit from this regularisation program. Those applications were submitted from 1 June until 15 August 2020: they have not been processed yet!”.

Overall, this and other examples show the direct experience of social exclusion and the process of subjectification of migrants, especially of Bangladeshi nationals, in some areas of legal procedures. From the perspective of the Bangladeshi interviewed, exclusion was experienced in yet another aspect regarding the RSD procedure, namely the requirement to give an address where they may be contacted (also because of the new regulations introduced by Decree n.13/2017). This challenges many people who have no registered lease because their landlords are not willing to process it. As the socio-legal anthropologist Coutin argues, there are several dimensions to migrants’ “non-existence” and this is achieved and nullified in various ways by migration policies.<sup>52</sup> With regard to this specific case, residence and its registration allow migrants to access medical assistance, and other fundamental rights – at least in principle. In practice, many Bangladeshis cannot access all these services. As Tapta explains:

“even a Bangladeshi who lives with me, in 2018, he requested the residence permit with an officially registered renting contract. Still today, he has not received any documentation on that. [...] so, this creates many problems for people, especially when they receive a negative decision from the territorial commission. I also dealt with people who wanted to go back to Bangladesh and this happens because, after the abolishment of the humanitarian protection, people are unable to regularise their stay in Italy. On top of this, the numerous difficulties in finding a job pushed people to go back.”

<sup>51</sup> Several aspects of this decree were criticised. According to the Association for Juridical Studies on Immigration (ASGI), for instance, the second option cannot be sufficient without supporting measures (*ibid.*).

<sup>52</sup> COUTIN, *Legalizing Moves: Salvadoran Immigrants’ Struggle for US Residency*, Ann Arbor, 2000.

#### 4. – *Cultural Rights between Inclusion and Integration: Grounds for Further Research.*

As explained by Gonzales et al., the difference of approaches between scholars studying migration lies in the distinction established by some in matters of exception, bare life and sovereignty, while others focused on the autonomy of migration as a process.<sup>53</sup> This contribution incorporates the latter. It understands migration as a transformative power that results from the complex interaction of external and internal factors, which exert an influence within a larger system of power. For instance, inspiration needs to be drawn from “what migrants actually do” to study the processes of social change.<sup>54</sup> In keeping with this theoretical understanding of migration, further research needs to account for migrants’ everyday life “not merely as a process of transition within a cultural enclave, but in the dramatic context of uprootedness where a people’s quest for survival becomes a model for social change”.<sup>55</sup> It also needs to address the fact that at the beginning of the twenty-first century, as emphasised by Glick-Schiller and Çaglar terms like “citizenship” were contested in numerous countries, where researchers proposed the notion of “cultural citizenship and cultural rights to validate as equal members of the state those marked as culturally different from the dominant national culture”.<sup>56</sup>

Within the context of Palermo, cultural rights cannot be addressed in a straightforward manner from the perspectives of Bangladeshis. According to the experience of each migrant, legal procedures must be dealt with as a first step, although they might be unnecessary in practical terms for most daily activities. For instance, Tapta speaks on this issue as follows:

“it is very important that everyone of us is able to celebrate even outside and in public spaces: important ceremonies for the community and this is rather a step to inclusion rather than integration. [...] With regard to education, there are Tamil schools in Palermo, Bangladeshi schools were closed, but there used to be some in Palermo. There is a Tamil school that organises Tamil courses and support is given to students for homework. Rights are not lacking at all in this regard.”

<sup>53</sup> *Cit. supra*, note 15.

<sup>54</sup> WALTERS, “Acts of Demonstration: Mapping the Territory of (Non-)Citizenship”, in Isin and Neilson (eds.), *Acts of Citizenship*, London, 2008, pp. 182-206.

<sup>55</sup> *Cit. supra*, note 13.

<sup>56</sup> GLICK-SCHILLER and ÇAGLAR, *Migrants and City-Making*, Durham, 2018, p.150.

The discussion focused mainly on religious festivities and the Bangladeshi Mosque established in one neighbourhood of Palermo. In addition to this, the education of the second generation of Bangladeshi appears to be a crucial aspect, along with the celebration of Liberation Day, celebrated each year on December 16 in an open and public space in Palermo. Among the events taking place there is public speech by a political representative of the Bangladeshi nationals in the city of Palermo. This is held entirely in Bangladeshi, with the only exception of the intervention of other Italian representatives. Movies, concerts and cultural events are organised to celebrate the end of Colonial Times under Pakistani rule.

In terms of political participation, the representatives of migrant communities in Palermo are actively involved in the decision-making process at city level. This is institutionally guaranteed since 1999, when the so-called “Migrants Council” was created.<sup>57</sup> This institution has received various criticisms.<sup>58</sup> However, it exemplifies one of the outcomes of the local authorities of Palermo challenging the national tendency to indiscriminately fight against undocumented migration, representing instead an example of multiculturalism. More specifically, this council - which is now known as the “new Council of Cultures” - is integrated into the local administrative structure as a fourth institution, after the communal government, the communal council and the circumscriptions. It represents seven geographical areas: Central Asia, Eastern and Western Asia, West Africa, North Africa, East and Central Africa, Countries Members of the European Council and Americas and Oceania.<sup>59</sup>

In the scenario observed in Palermo, there is a broad space for further investigation on the social reality of the Bangladeshi community in relation to their experience of regularisation procedures, social interactions, and in-depth reflections on notions such as inclusion and integration. Through the example of interpreters and through Taptu’s words, it emerges that it is far too simplistic to talk of one “Bangladeshi community”. The term has however been used for the sake of clarity and this choice was being made while keeping in mind the limitations of the “ethnic lens”.<sup>60</sup> There are indeed different groups, such as new arrivals who are still undocumented, migrants who have obtained their papers and have more access to certain parts of Italian

<sup>57</sup> LO PICCOLO and SCHILLECI, *A sud di Brobdingnag*, Milano, 2003.

<sup>58</sup> See, for example, Redattore Sociale, “Nasce la Consulta delle culture di Palermo”, Redattore Sociale, 17 May 2013, available at: [https://www.redattoresociale.it/article/notiziario/nasce\\_la\\_consulta\\_delle\\_culture\\_di\\_palermo](https://www.redattoresociale.it/article/notiziario/nasce_la_consulta_delle_culture_di_palermo).

<sup>59</sup> Comune di Palermo, “Consulta delle culture - Ufficializzati i nuovi 21 eletti”, 2018, available at: <https://www.comune.palermo.it/noticext.php?id=18964>.

<sup>60</sup> GLICK-SCHILLER and ÇAGLAR, “Locating migrant pathways of economic emplacement: Thinking beyond the ethnic lens”, *Ethnicities*, 13, 4, 2013, pp. 494-514.

social life, “second generation” migrants, and many others. In such a context, Tapta’s reflections on integration and inclusion reinforce the importance of further research in this field. According to his understanding of integration:





“Once I thought the two words meant the same. Then, after some projects, I realised that there is a difference between integration and inclusion. For me, integration involves the adoption of another culture and living in that culture; whereas inclusion is to keep my culture and be open to that of other people so that you have some links between the two cultures. This is the difference for me. The Bangladeshi community, for its strong identity, with a proper dominant culture, and centrality of its culture ...it could never integrate in the sense of abandoning and dissociating from their culture to join the local one, Bangladeshis would rather keep their culture and give only some space to the local one and in this sense we can talk of inclusion. I do not know if you can talk of integration”.

Law can be a tool for anthropologists to engage with and highlight the Western roots buried in legal categories, while anthropology may help in employing the law and rights, as well as in exploring several issues in the domain of refugee law.<sup>61</sup> Within global challenges, such as the management of migration in times of social distancing due to the COVID-19 pandemic, anthropology offers a solid basis to discuss the intrusion of hegemonic discourses in people’s lives, and the importance of a human perspective on the “order of things”. The purpose of this contribution is to present legal procedures in the field of international protection, which constitutes the main legal recourse to begin the process of regularisation in Italy. Bangladeshis may, therefore, face social exclusion firstly in terms of legal recognition. This paper argues that the legal framework of reference is an initial basis to understand the logics of social exclusion at play during the process of regularisation<sup>62</sup>, though in reality, social exclusion is a much more layered human experience. For this reason, this project will be pursued further with the Bangladeshi community of Palermo, as more research is needed in order to understand their points of view. The call for a shift in perspective demanded by Gonzales et al. (2019), towards citizenship as a practice of contestation and as a way of claiming belonging, is heeded in this contribution. Yet, the question of how Bangladeshi communities in Palermo put this into practice still remains open.

<sup>61</sup> *Cit. supra*, notes 8 and 13.

<sup>62</sup> It will also include the applications of Bangladeshi nationals who are originally from Myanmar, e.g., Rohingya. Some refugees from Myanmar who received shelter in Bangladesh at the end of the 1970’s and in the 1990’s obtained Bangladeshi citizenship. Some among them have recently migrated to Italy as Bangladeshi citizens.

## Annex 1

ASIA CENTRO	ASIA ORIENTALE E ASIA OCCIDENTALE	AFRICA OCCIDENTALE	PAESI MEMBRI DEL CONSIGLIO D'EUROPA
 <b>AKTAR Sumi Dalia</b> 17/11/1990 BANGLADESH	 <b>AHMED Nasir</b> 15/01/1973 BANGLADESH	 <b>KOBENA</b> Ouattara Ibrahima 09/12/1984 COSTA D'AVORIO	 <b>BODOGA Vasile</b> 25/05/1973 ROMANIA
 <b>ARULNESAN Thayaraj</b> Detto <b>Dott. Thay</b> 05/05/1982 SRI LANKA	 <b>DARWISH Zaher</b> 21/06/1963 GIORDANIA	 <b>MENSAH</b> BOAMPONG Daniel 14/01/1988 GHANA	 <b>CUCU Ovidiu</b> 04/10/1957 ROMANIA
 <b>HUSSAIN Iqtidar</b> 01/01/1972 PAKISTAN	 <b>MINION Edna</b> 27/12/1959 FILIPPINA	 <b>MINKAH</b> Alexander Osei 26/11/1964 GHANA	 <b>GRZYWNOWICZ</b> Danuta Jadwiga 04/04/1970 POLONIA
 <b>MD Alamin</b> 06/04/1985 BANGLADESH		 <b>SILVA Elizangela</b> 16/09/1977 CAPO VERDE	
 <b>SARDAR Dost</b> Muhammad Khan 14/08/1964 PAKISTAN	AFRICA SETTENTRIONALE	AFRICA ORIENTALE E AFRICA CENTRO	AMERICHE E OCEANIA
 <b>SK Zahidul Wahid</b> 21/02/1986 BANGLADESH	 <b>ABDIA Nesrine</b> 09/05/1979 TUNISIA	 <b>SAHYE</b> Yogendranath 05/11/1967 MAURITIUS	 <b>DE OLIVEIRA</b> PECORELLA Dasililla 29/10/1980 BRASILE
 <b>THIYAGARAJAH</b> Ramani 21/08/1986 SRI LANKA	 <b>LAOUAR</b> Mohamed 08/11/1965 ALGERIA		

Available at: <[https://www.comune.palermo.it/js/server/uploads/\\_10072018134457.pdf](https://www.comune.palermo.it/js/server/uploads/_10072018134457.pdf)>

## Abstract

The title of this contribution, Bangla-stories, is used as a signpost for different ideas. The term Bangla-stories refers, on the one hand, to Bangladesh, a South Asian country from which in 2019 twelve thousand people migrated to Italy. According to the International Organization of Migration (IOM), in 2017 more than 8,000 Bangladeshi nationals crossed the Mediterranean Sea and disembarked in Southern Italy. On the other hand, the word “stories” is used to describe an account of past events in someone's life, which takes on a double meaning in this context: firstly, it accounts for the so-called testimony that asylum seekers are asked to make once they arrive in Italy, an experience shared by many Bangladeshi migrants; secondly, it points to the importance of bringing a human perspective to the study of migration and of focusing on people's lived experiences.

The choice to work with the Bangladeshi community was initiated by a paradox I have observed as part of my work in southern Italy in the Refugee Status Determination (RSD) procedure: while Bangladeshi claims for international protection were legally interesting, they were often disregarded by the case-officers interviewing them. Although the interview might provide a space for dialogue and investigation, many potentially relevant social dimensions are ignored.

The purpose of this contribution is to outline legal procedures in the field of international protection in Italy, based on extensive working experience in Southern Italy. In Palermo, the various Bangladeshi communities form the largest group within the migrant population. Typically, migrants from Bangladesh are male, over 25, and have a low education level. They mainly come from Dhaka, Chittagong, Maradipur and Sylhet. However, beyond these common demographic characteristics, the community is so broad and diverse that addressing it as a homogeneous entity constitutes a limit.

# 11.

## CULTURAL OBJECTS AND CONFLICTS OF JURISDICTION IN CROSS-BORDER CASES: A READING OF NEW ARTICLE 7(4) BRUSSELS IA REGULATION

Stefano Dominelli

*SUMMARY:* 1. Introduction: the Relevance of Rules on International Jurisdiction in Light of Fragmented Conflict of Laws Solutions. – 1.1. A Mobile Connecting Factor in Conflict of Laws for Property Rights. – 1.2. Uniform Substantive Solutions in International Treaties. – 1.3. The Continuous Relevance of Conflicts of Jurisdiction Rules: Scope of the Present Investigation. – 2. Cultural Objects in European International Civil Procedure: Non-Specific Rules Open to Litigants. – 3. Article 7(4) Brussels Ia: the forum rei sitae for Recovery of Looted Cultural Objects. – 4. Closing Remarks: European International Civil Procedure and Cultural Property Protection in the era Globalization and Migrations.

### *1. – Introduction: the Relevance of Rules on International Jurisdiction in Light of Fragmented Conflict of Laws Solutions.*

Broadly speaking, the scope and function of private international law *lato sensu*<sup>1</sup> is to solve conflicts of jurisdiction<sup>2</sup> and of laws for private law claims having a (significant) connection with more than one legal system. It is commonly acknowledged that

<sup>1</sup> MOSCONI, CAMPIGLIO, *Diritto internazionale privato e processuale. Parte generale e contratti*, 9th ed., Milano, 2020, p. 3.

<sup>2</sup> To the extent specific rules on international civil procedure limit themselves in the allocation of

unilateral<sup>3</sup> regulation of private international law and of international procedural law may lead to incoherent solutions at the international level<sup>4</sup>, with possible negative consequences as per the cross-border recognition and enforcement of foreign decisions in the territory of the requested State<sup>5</sup>. The field of “cultural heritage” protection<sup>6</sup>, specifically declined in the rules concerning cultural objects under the specific theme of restitution actions for looted property, is an apt case study of how fragmented conflict of laws rules lead to diverse solutions depending on the court seized.

international jurisdiction, domestic ordinary rules of civil procedure find full application; on the contrary, if (national or supra-national) rules of conflicts of jurisdiction also determine territorial competence, the applicability of national rules of civil procedure is further eroded. In given circumstances, it has been the case that the same rule, over time, has been interpreted at first as a mere rule on jurisdiction and subsequently as a rule on territorial competence. This has recently been the case, in Italy, for Article 33 of the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air. With *Ordinanza* number 24632 of 5 November 2020, the Italian *Corte di cassazione*, by conforming to the case law of the Court of Justice of the European Union, changed its previous understanding of the provision at hand – establishing jurisdiction in cases of damages and death to passengers – to argue that it not only identified the competent State Party, but it also conferred local competence within said State.

<sup>3</sup> In the scholarship see GIULIANO, *La giurisdizione civile italiana e lo straniero*, Milano, 1970, p. 6, in part. p. 9 where the Author notes how the limits imposed on the autonomy by treaties contributed to reaffirming the underlying freedoms of States under general international law, and MORELLI, *Il diritto processuale civile internazionale*, Padova, 1938, p. 145.

<sup>4</sup> See MANCINI, “Utilità di rendere obbligatorie per tutti gli Stati sotto forma di uno o più trattati internazionali alcune regole generali del diritto internazionale privato per assicurare la decisione uniforme tra le differenti legislazioni civili e criminali”, in *Antologia del diritto internazionale privato*, Milano, 1964, p. 54.

<sup>5</sup> On the relationship between State sovereignty, and recognition and enforcement of foreign decisions, see *ex multis* TUO, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, Padova, 2012, p. 1; VON MEHREN, “Recognition and Enforcement of Foreign Judgments. General Theory and the Role of Jurisdictional Requirements”, in *Recueil des Cours*, 167, p. 13, p. 51; ADOLPHSEN, *Europäisches Zivilverfahrensrecht*, Heidelberg, 2011, p. 159; MICHAELS, “Recognition and Enforcement of Foreign Judgments”, in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford, 2012, VIII, p. 672; MORELLI, *Diritto processuale civile internazionale*, Padova, 1954, p. 1; HODD, “International” Rules in an Internal Setting”, in Abou-Nigm, McCall-Smith, French (eds), *Linkages and Boundaries in Private and Public International Law*, Oxford, 2018, p. 53, p. 62, and ZEYNALOVA, “The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?”, *Berkeley Journal Of International Law*, 2013, p. 150. More recently, on the general subject of the relationship between public and private international law, see FRANZINA, “The Integrated Approach to Private and Public International Law - A Distinctive Feature of Italian Legal Thinking”, in Bartolini (ed), *A History of International Law in Italy*, Oxford, 2020, p. 262.

<sup>6</sup> Specifically on the different approaches and competing interests in the field, see for all FRANCONI, “Public and Private in the International Protection of Global Cultural Goods”, *The European Journal of International Law*, 2012, p. 719, and MERRYMAN, “Two Ways of Thinking About Cultural Property”, *The American Journal of International Law*, 1986, p. 831; “Separating” “art law” from “cultural heritage law”, ROODT, *Private International Law, Art and Cultural Heritage*, Cheltenham, 2015, p. 1.

The legal issues following the coexistence of different domestic private international law rules applicable to cultural objects and restitution actions become apparent if one looks at practical cases, such as the French decision in *Duc de Frias v. Baron Pichon*<sup>7</sup>. Here, Spanish cultural objects were sold to a French buyer, who acted in good faith and was unaware that the goods were unalienable “cultural goods” in their country of origin. Under Spanish substantive law, the sales was a *non dominio*, thus invalid, whilst under substantive French law, the principle *possideo quia possideo* would have invalidated the foreign *rei vindicatio*<sup>8</sup>. French courts before which the case was brought, being these the courts where the property was at the moment located, had to decide which law was applicable, ultimately opting for their own domestic law and ruling in favour of the French buyer, as the connecting factor adopted in conflict of laws was the location of the property, thus a connecting factor mobile in nature<sup>9</sup> (rather than being a non-movable connecting factor based, for example, on the State of origin of the cultural object).

### 1.1. – A Mobile Connecting Factor in Conflict of Laws for Property Rights.

As the *Duc de Frias v. Baron Pichon* case shows, lack of uniformity in (substantive and) private international law may jeopardise the protection afforded by the State of origin to cultural objects. There are a number of different scenarios that can (briefly) be reconstructed to juxtapose the complexities in the field, and to stress how important the correct identification of the competent court becomes. Without addressing the contractual aspects related to a possible sales of cultural objects, governed by the applicable *lex contractus*, it appears more interesting to focus on property rights over the cultural object. As noted in the scholarship, EU private international law ‘excludes property law from its scope [and refers] to the *lex rei sitae* [...], with the consequence that the] Rome I Regulation [...] allows parties to choose the applicable law to their contract, but not to the property effects resulting from that

<sup>7</sup> *Tribunal Civil de la Seine*, 17 avril 1885, *Duc de Frias v. Baron Pichon*, in *Journal du droit international*, 1886, p. 593 (writing that “l’intérêt d’ordre social qui a dicté la règle posée par l’art. 2279 du [then applicable] *Code Civil*, exige que la loi française soit seule applicable”). Commenting the case, CRESPI REGHIZZI, “Profili di diritto internazionale privato del commercio dei beni culturali”, in Catani, Contaldi, Marongiu Buonaiuti (a cura di), *La tutela dei beni culturali nell’ordinamento internazionale e nell’Unione europea*, Macerata, 2020, p. 149, and KOWALSKI, “Restitution of Works of Art Pursuant to Private and Public International Law”, in *Recueil des Cours*, 288, p. 9, p. 213.

<sup>8</sup> For an evolution on the rules on restitution of stolen properties, see for all KOWALSKI, *Restitution of Works of Art Pursuant to Private and Public International Law*, cit., p. 24.

<sup>9</sup> *Tribunal Civil de la Seine*, 17 avril 1885, *Duc de Frias v. Baron Pichon*, cit. Other than the already quoted scholarship – see LAGARDE, “La restitution internationale des biens culturels en dehors de la Convention de l’UNESCO de 1970 et de la Convention d’UNIDROIT de 1995”, *Uniform Law Review*, 2006, p. 84, p. 88, and SIEHR, “International Art Trade and the Law”, in *Recueil des cours*, 243, p. 13, p. 83.

contract<sup>10</sup>. In this sense, the *lex contractus* governs the *title* (the contract), whilst property rights are in general<sup>11</sup> governed by the *lex rei sitae*<sup>12</sup>. This last law determines the modalities of acquisition<sup>13</sup>, or – in other words – if the title (the contract) can indeed transfer the property<sup>14</sup>. Of course, this raises little problems for immovable properties, but for movable properties the “mobility” of the connecting factor paves the way to problematic scenarios where the *lex originis* envisages limits to the transferability that are not in the substantive law of the State where the property has been transferred to.

Courts, if they apply the *lex rei sitae* as connecting factor for property rights, will fix the mobile connecting factor at the relevant time where the assumed transfer of property takes place, and the localization of the State will be addressed accordingly<sup>15</sup>. This means that if the transfer takes place in the State of origin (whatever this might mean<sup>16</sup>) of the cultural goods, the applicable *lex originis* will rule for the impossibility of the transfer of property rights<sup>17</sup>. On the contrary, if the *de qua* transfer of property takes place in another country whose substantive law, applicable as *lex rei sitae*<sup>18</sup>, allows the new putative proprietor to invoke the *possideo quia possideo* rule for acquisitions *a non domino*, courts will apply this latter law and rule in favour of the buyer. This will most probably be the case if the court seised is not of

<sup>10</sup> AKKERMANS, “*Lex Rei Sitae* and the EU Internal Market – Towards Mutual Recognition of Property Relations”, *European Property Law Journal*, 2018, p. 246, at p. 254 f.

<sup>11</sup> Cf SIEHR, *International Art Trade and the Law*, cit., p. 74.

<sup>12</sup> Advocating in favour of a limited *lex originis*, SYMEONIDES, “A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property”, *Vanderbilt Journal of Transnational Law*, 2005, p. 1177, p. 1183.

<sup>13</sup> In the Italian case law, see already *Corte di cassazione* 21 December 1993, n. 12663, in *Mass.*, and *Corte di cassazione* SU 1 October 1980, n. 5338, *Rivista di diritto internazionale privato e processuale*, 1981, p. 928.

<sup>14</sup> CRESPI REGHIZZI, “Profili di diritto internazionale privato del commercio dei beni culturali”, cit., p. 158.

<sup>15</sup> Cf ROGERSON, “Public Policy and Cultural Objects”, *The Cambridge Law Journal*, 2002, p. 246.

<sup>16</sup> On the complexities, see MARRELLA, “Proprietà e possesso di beni mobili di interesse culturale nel diritto internazionale privato italiano”, in Marrella (a cura di), *Le opere d’arte tra cooperazione internazionale e conflitti armati*, Padova, 2006, p. 107, p. 120.

<sup>17</sup> This regardless of whether the court is that of the State of origin or of another State. For this last hypothesis, applying Article 22 disp. prel., see *Tribunale di Torino* 25 March 1982, *Rivista di diritto internazionale privato e processuale*, 1982, p. 625.

<sup>18</sup> Or as *lex loci actus*, if the chattel was at the place where the agreement was concluded (see KOWALSKI, *Restitution of Works of Art Pursuant to Private and Public International Law*, cit., p. 221, writing that “*Winkworth v. Christie, Manson & Woods Ltd.* provides an “excellent example” of the principle that if the *lex loci actus* enables non-owners to pass good title, the previous title is overridden”).

the State of origin of the cultural objects<sup>19</sup>. However, this has also been the case in some circumstances where the seised court was that of the State of origin of the cultural object. If the conflict of laws rules adopts as connecting factor that of the *rei sitae* as well, these courts might apply the (foreign) law of the State where the goods were at the time of the transfer<sup>20</sup>.

## 1.2. – Uniform Substantive Solutions in International Treaties.

To overcome the abovementioned issue which might promote *forum shopping*, as well as to increase the possibility of restitution of both stolen or unlawfully exported cultural objects abroad despite the general adoption of the *lex rei sitae* for a special category of goods which usually falls within the general (private international law<sup>21</sup>) provision of movable properties, States and international organizations have adopted, over time, uniform material law.

At the international level, Article 7(b)(ii) of the 1970 Paris Convention<sup>22</sup> provides that State parties “*at the request of the State Party of origin, [take] appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser ...*”. However, specifically having regard to the procedure, the provision makes clear that “*Requests for recovery and return shall be made through diplomatic offices*”, even though actions for recovery of lost or stolen items brought by the rightful owners must be allowed by State parties (Article 13(c)).

<sup>19</sup> In the Italian case law, on the inapplicability of the 1970 Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, before its entry into force, see *Corte di cassazione* 24 November 1995, n. 12166, in *Rivista di diritto internazionale privato e processuale*, 1997, p. 427. Already commenting on the first judgments on the merits before the decision by the Supreme court, FRIGO, “Trasferimento illecito di beni culturali e legge applicabile”, *Diritto del commercio internazionale*, 1988, p. 611.

<sup>20</sup> See *Winkworth v. Christie Manson and Woods Ltd. and Another*, [1980] 1 ER (Ch) 496, [1980] 1 All ER 1121, where Japanese art works were at first stolen in England and sold in (and sent to) Italy. The former proprietor seised British courts, yet these applied Italian law ruling in favour of the Italian buyer in good faith. Commenting on the decision, see, other than the already quoted literature, ROWE, “Stolen Property in the Conflict of Laws”, *Canterbury Law Review*, 1980, p. 71, and SIEHR, “The Protection of Cultural Property: The 1995 UNIDROIT Convention and the EEC Instruments of 1992/93 Compared”, *Uniform Law Review*, 1998, p. 671, p. 672.

<sup>21</sup> For Italy, MARRELLA, “Proprietà e possesso di beni mobili di interesse culturale nel diritto internazionale privato italiano”, cit., p. 125. Cf SZABADOS, “In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications”, *International Journal of Cultural Property*, 2020, p. 323, p. 326.

<sup>22</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, done in Paris, 14 November 1970.

More advanced is the system established by the 1995 Unidroit Convention<sup>23</sup>, according to which, more clearly, “*The possessor of a cultural object which has been stolen shall return it*” (Article 3(1)). On the side of unlawful export, upon request of the interested State of origin, the court “*or other competent authority ... shall order the return ... if the requesting State establishes that the removal of the object from its territory significantly impairs*” the physical preservation of the object or of its context; the integrity of a complex object; the preservation of information of, for example, a scientific or historical character; the traditional or ritual use of the object by a tribal or indigenous community; or establishes that the object is of significant cultural importance for the requesting State (Article 5(3)). A more stringent rule which, on a purely international arena, helps to understand the (relatively) small number of States for which the Unidroit Convention is currently applicable: as of January 2021, in light of the information available on the official webpage of the organization, Contracting States are 48.

Similarly, European Union law, at the regional level, has also introduced rules in the subject matter, which have been currently recast in Directive 2014/60/EU on the return of cultural objects *unlawfully removed* from the territory of a Member State<sup>24</sup>. Limiting its scope of application to unlawfully removed cultural objects, the directive also establishes a procedure for return (and substantive rules as per the principle of *possideo quia possideo*<sup>25</sup>).

### 1.3. – The Continuous Relevance of Conflicts of Jurisdiction Rules: Scope of the Present Investigation.

Despite uniform international law regulating the return of cultural objects, whose analysis transcends the scope of the present investigation<sup>26</sup>, the issue of determining the competent court remains open and actual. The Unidroit Convention has

<sup>23</sup> Unidroit Convention on Stolen or Illegally Exported Cultural Objects, done in Rome, 24 June 1995.

<sup>24</sup> Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast), in OJ L 159, 28.5.2014, p. 1.

<sup>25</sup> See Directive 2014/60/EU, Art. 10, according to which it is for the possessor the *onus probandi* of his due diligence to obtain fair compensation (in the scholarship see FRIGO, “La trasposizione nell’ordinamento italiano della direttiva 2014/60 sulla restituzione dei beni culturali che hanno illecitamente lasciato il territorio di uno Stato membro”, in Catani, Contaldi, Marongiu Buonaiuti (a cura di), *La tutela dei beni culturali nell’ordinamento internazionale e nell’Unione europea*, Macerata, 2020, p. 63, p. 66).

<sup>26</sup> For a study on which, other than the already quoted scholarship, see *ex multis* CALVO CARAVACA, “Private International Law and the UNIDROIT Convention of 24th June 1995 on Stolen or Illegally Exported Cultural Objects”, in Mansel, Pfeiffer, Kronke, Kohler, Hausmann (eds), *FS Jayme*, München,

a geographical scope that is limited; even more so EU law, which additionally is only applicable to unlawfully removed cultural objects from the territory of a Member State. The scope of application of both legal frameworks does not seem sufficiently universal to discourage *forum shopping* in a broader sense.

Additionally, both the Unidroit Convention and EU law mention rules on competence. According to Article 8(1), and (2) of the Unidroit Convention,

“A claim ... and a request ... may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States. The parties may agree to submit the dispute to any court or other competent authority or to arbitration”<sup>27</sup>.

On its side, the EU Directive provides that “*The requesting Member State may initiate, before the competent court in the requested Member State, proceedings against the possessor...*” (Article 6).

Against this conflict of laws background, the following work will concentrate on the new *forum rei sitae* introduced by the Brussels Ia Regulation<sup>28</sup> in Article 7(4). Also by taking into consideration the limits the regulation undergoes both under the material and the geographical scope of application, it will be addressed to what extent the coordination between the Brussels Ia Regulation and the EU Directive on the return of cultural objects should shape the scope of application of Article 7(4) Brussels Ia. As is known, the directive is applicable to the unlawful removal of cultural objects from the Member State classifying the object as a “cultural object”, whilst Article 7(4) Brussels Ia Regulation is silent on this. The new *forum rei sitae* will be

2004, p. 87; CARRUTHERS, “Cultural Property and Law - An International Private Law Perspective”, *Juridical Review*, 2001, p. 127; Francioni, Del Vecchio, De Caterini (a cura di), *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, Milano, 2000; FRIGO, “La Convenzione dell’UNIDROIT sui beni culturali rubati o illecitamente esportati”, *Rivista di diritto internazionale privato e processuale*, 1996, p. 435; ID, “Profili relativi alla circolazione e alla restituzione dei beni culturali in ambito internazionale”, in Camarda, Scovazzi (eds), *The Protection of the Underwater Cultural Heritage. Legal Aspects*, Milano, 2002, p. 7; ID, *Tutela internazionale dei beni culturali*, in AA.VV., *Istituzioni di diritto internazionale*, 5th ed., Torino, 2016, p. 513; GARDELLA, “Nuove prospettive per la protezione internazionale dei beni culturali: la Convenzione dell’UNIDROIT del 24 giugno 1995”, *Diritto del commercio internazionale*, 1998, p. 997; JAYME, “Globalization in Art Law: Clash of Interests and International Tendencies”, *Vanderbilt Journal of Transnational Law*, 2005, p. 927, and MONACO, “Primo commento della Convenzione di Roma sui beni culturali rubati o illecitamente esportati”, *Rivista di studi politici internazionali*, 1995, p. 500.

<sup>27</sup> On provisional measures, see also Art. 8(3).

<sup>28</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, p. 1.

analysed in light of the notion of “civil and commercial matters” to determine the typologies of actions falling within its scope of application – more specifically to advocate, on the one side, for the exclusion of proceedings under Directive 2014/60/EU, as suggested by recital 17 Brussels Ia Regulation, and, on the other side, for the inclusion of States civil actions over State-owned properties. Also, the active and passive personal scope of application of Article 7(4) Brussels Ia will be explored in the context of globalization and free movement of persons.

## 2. – *Cultural Objects in European International Civil Procedure: Non-Specific Rules Open to Litigants.*

In its pathway to create a European judicial space where free movement of decisions is granted, the European Union (over time) has adopted a number of rules to ensure uniformity of international civil procedure between Member States<sup>29</sup>. Neither the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters<sup>30</sup>, nor the Brussels I Regulation<sup>31</sup> contained a specific provision concerning cultural objects<sup>32</sup>. Despite the absence of special heads of jurisdiction, the instruments did contain *some* general heads of jurisdiction which still remain available today, and must thus necessarily be reminded.

If the claim relates to *rights in rem over immovable properties*, Article 24 of the current Brussels Ia will be applicable, according to which –regardless of the domicile of the parties–, exclusive jurisdiction rests with courts of the Member State in which the property is situated. For *movable* properties, the Brussels regime pre-2015 did not provide litigants with a *forum rei sitae*. Meaning that property actions over movable objects could have been started at the (European) domicile of the defendant; contractual actions could have eventually been started also (and alternatively) before

<sup>29</sup> On the evolution of the competences of the European Union in the field of judicial cooperation in civil and commercial matters, see *ex multis* CARBONE, TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, Torino, 2016, p. 2, and SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n.1215/2012 (rifusione). Evoluzione e continuità del “Sistema Bruxelles-I” nel quadro della cooperazione giudiziaria europea in materia civile*, Milano, 2015, p. 1.

<sup>30</sup> 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version), in OJ L 299, 31.12.1972, p. 32.

<sup>31</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 12, 16.1.2001, p. 1.

<sup>32</sup> GEBAUER, “A New Head of Jurisdiction in Relation to the Recovery of Cultural Objects”, in Ferrari, Ragno (eds), *Cross-border Litigation in Europe: the Brussels I Recast Regulation as a Panacea?*, Milano, 2016, p. 31.

the *forum solutionis*, whilst actions in tort before the courts of the place of the harmful event – even though some courts denied the applicability of such a head of jurisdiction for *rèi vindicatio* where the possessor of the cultural object was not involved in the illicit conduct<sup>33</sup> (thus leaving the plaintiff with the sole *actor sequitur forum rei*). Moreover, if the movable object was removed from one of these States, jurisdiction to adjudicate and to issue provisional measures was granted to different courts. In addition, general rules on prorogation of jurisdiction were also applicable to proceedings involving (cultural) movable objects, and immovable (cultural) object for actions *in personam*. Express choice of court agreements could have been concluded by the interested parties, and tacit prorogation by way of procedural behaviour could have granted jurisdiction to yet a different court.

The introduction in the Brussels Ia Regulation of a specific alternative head of jurisdiction for cultural objects based on the presence of the object should, in case of recovery actions, ease the task of identifying the competent court and assist the party seeking restitution with a forum “close” to the good to be eventually seized following a decision on the merits.

### 3. – 3. Article 7(4) Brussels Ia: the *forum rei sitae* for Recovery of Looted Cultural Objects.

According to Article 7(4) Brussels Ia Regulation, in addition to the *actor sequitur forum rei*, a person domiciled in a Member State of the European Union may be sued in a State other than that of domicile for a “civil claim for the recovery, based on ownership, of a cultural object as defined in ... [now: Directive 2014/60/EU] initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised”. In other words, this special additional forum is only open for *rèi vindicatio* claims<sup>34</sup>.

The final text that has found its way into the recast of the Brussel Ia Regulation is quite different from the first proposal made by the European Commission<sup>35</sup>. The

<sup>33</sup> MANKOWSKI, “Article 7”, in Magnus, Mankowski (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Köln, 2016, p. 121, p. 344. See also GILLIES, “The Contribution of Jurisdiction as a Technique of Demand Side Regulation in Claims for the Recovery of Cultural Objects”, *Journal of Private International Law*, 2015, p. 295, p. 305.

<sup>34</sup> LEANDRO, “Prime osservazioni sul Regolamento (UE) n. 1215/2012 (“Bruxelles I bis”)”, *Giusto processo civile*, 2013, p. 583, p. 595.

<sup>35</sup> GEBAUER, “A New Head of Jurisdiction in Relation to the Recovery of Cultural Objects”, cit., p. 32 f.; MANSEL, THORN, WAGNER, “Europäisches Kollisionsrecht 2012: Voranschreiten des Kodifikationsprozesses – Flickenteppich des Einheitsrechts”, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2013, p. 1, p. 9, stressing how the *forum rei sitae* was strongly supported by Cyprus during the legislative process, and MANKOWSKI, “Article 7”, cit., p. 151.

Commission originally sought to introduce a broader forum on *rights in rem* or possession in moveable property<sup>36</sup>, recognising jurisdiction to the courts for the place where the property was situated<sup>37</sup>. A forum that was also applicable against defendants non-domiciled in a EU member State.

However, a general “movable head of jurisdiction” for *rights in rem* has been criticised<sup>38</sup> for the following considerations. Displacement of movable goods in another State generally determines a change in the applicable law to *rights in rem*. Adopting the same mobile connecting factor as ground for jurisdiction would lead to the re-allocation of international jurisdiction as well based on the location of property – possibly encouraging “a party to displace the assets in order to initiate proceedings in a Member State that he considers more favourable to his interests”<sup>39</sup>. Article 7(4) Brussels Ia was consequently limited to actions *in personam* for the recovery of cultural objects<sup>40</sup>. “Actions based on ownership” is a wider notion than “actions in property”<sup>41</sup>.

Furthermore, Article 7(4) Brussels Ia Regulation, whilst still introducing a *forum rei sitae*, addresses the concerns for a head of jurisdiction being excessively open to litigation tactics. Where proposed Article 5(3) was open to “*rights in rem* or possession claims”, final Article 7(4) Brussels Ia is only open if the action for recovery is started by a person claiming the right to recover the object. Thus, not *any party*<sup>42</sup> may make recourse to Article 7(4), unless under the applicable law they can prove at a preliminary stage they have a valid title to seek recovery of the cultural object.

<sup>36</sup> Highlighting how proposed Article 5(3) was nonetheless specifically inspired by cultural objects case law, albeit being framed in more extended boundaries, HESS, “The Proposed Recast of the Brussels I Regulation: Rules on Jurisdiction”, in Pocar, Viarengo, Villata (eds), *Recasting Brussels I*, Milano, 2016, p. 91, p. 106.

<sup>37</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), Brussels, 14.12.2010, COM(2010) 748 final, 2010/0383 (COD), Art. 5(3).

<sup>38</sup> Advocating against a provision like proposed Article 5(3), but suggesting that a similar rule could have been maintained for cultural objects only, FRANZINA, “The Proposed New Rule of Special Jurisdiction Regarding Rights in Rem in Moveable Property: A Good Option for a Reformed Brussels I Regulation?”, *Diritto del commercio internazionale*, 2011, p. 789, p. 803.

<sup>39</sup> CRESPI REGHIZZI, “A New Special Forum for Disputes Concerning Rights in Rem over Movable Assets: Some Remarks on Article 5(3) of the Commission’s Proposal”, in Pocar, Viarengo, Villata (eds), *Recasting Brussels I*, Milano, 2016, p. 173, p. 176.

<sup>40</sup> GILLIES, “The Contribution of Jurisdiction as a Technique of Demand Side Regulation in Claims for the Recovery of Cultural Objects”, cit., p. 309 f. Also stressing that actions against the person seized of stolen cultural property is a jurisdiction *in personam*, SIEHR, *International Art Trade and the Law*, cit., p. 73, and MANKOWSKI, “Article 7”, cit., p. 347.

<sup>41</sup> MANKOWSKI, “Article 7”, cit., p. 347.

<sup>42</sup> Which raises questions as to whether the head of jurisdiction might also be open to a possible perspective defendant seeking a negative declaratory judgment declaring him or her the rightful possessor of the cultural object (see MANKOWSKI, “Article 7”, cit., p. 348).

Article 7(4) Brussels Ia Regulation has a number of limits to its scope of application, namely *ratione personae*, *ratione materiae*, and a (possible) *ratione loci*.

As all alternative heads of jurisdiction contained in Article 7, also the forum on looted property only finds application if the defendant is domiciled in a Member State of the European Union bound by the regulation<sup>43</sup>. This has a first consequence and a significant impact: it suffices that the defendant is domiciled in a third State for the new special rule not to be applicable under EU autonomous law. If the action for the return of the cultural object, for example, is started against an auction house in the United States or, after Brexit, against a defendant in the United Kingdom, domestic rules on international civil procedure of the seised court return applicable jeopardising uniformity of law. On the other hand, consistently with the general scheme of the Brussels Ia Regulation, no relevance bears the domicile of the plaintiff: EU uniform rules on international civil procedure will be applicable to claims over movable properties regardless of whether the person starting proceedings is domiciled in a Member State (whilst, for actions *in rem* over immovable properties, the exclusive head of jurisdiction under Article 24 Brussels Ia Regulation is applicable regardless of the domicile of any of the parties involved in the proceedings).

Concerning the material scope of application of Article 7(4) Brussels Ia, two elements must be highlighted. In the first place, the Brussels Ia Regulation scope of application, in general, is limited to “civil and commercial matters”, as prescribed by its Article 1. Whereas there is no express definition of this (autonomous) notion, it postulates that parties to a proceedings have acted on a level playfield, in the sense that a State or its organ do not make recourse to powers that are generally not granted to private parties. This raises the issue of whether return actions started by States on grounds of violations of domestic legislation to export cultural objects might fall within the scope of application of Article 7(4) Brussels Ia. An answer to the question, albeit unclear, is given by recital 17(2) of the Brussels Ia Regulation itself, according to which proceedings under Article 7(4) “*should be without prejudice to proceedings initiated under Directive [2014/60/EU]*”. Such a “non-interference” principle enshrined in recital 17 Brussels Ia can only be understood in light of the nature of public actions for the return of cultural objects under the directive<sup>44</sup>, as the State does not act as a private party. In the second place, and supporting the idea that public actions

<sup>43</sup> In general, see *ex multis* MANKOWSKI, “Article 7”, cit., p. 149 ff.

<sup>44</sup> Cf MANKOWSKI, “Article 7”, cit., p. 346. Cf LEANDRO, “Prime osservazioni sul Regolamento (UE) n. 1215/2012 (“Bruxelles I bis”)”, cit., p. 594, highlighting the parallelism between private actions under the Brussels Ia Regulation and State actions the directive. See also SZABADOS, “In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications”, cit., p. 333, more broadly speaking of actions under the directive that cannot be started by “private persons”.

for the return of cultural objects should not fall within the scope of application of the provision at hand, Article 7(4) Brussels Ia is applicable only to “*a civil claim for the recovery*” that is “*based on ownership*”. Most often, States starting public procedures for the return of given cultural objects are not based on a property title *stricto sensu*<sup>45</sup>. Hence, the lack of an action in property leads to the conclusion that procedures under Directive 2014/60/EU should not fall within the scope of application of Article 7(4) Brussels Ia. This, of course, save the State *is* the owner of a given cultural object.

The disentanglement of the geographical scope of application of Article 7(4) Brussels Ia Regulation seems less straightforward. This complexity is based on the relationship between the regulation and Directive 2014/60/EU. Whereas the latter provides rules on the return of cultural objects unlawfully removed from the territory of a Member State, it should preliminarily be said that it contains no special rule on jurisdiction suited to oust Article 7(4)<sup>46</sup> Brussels Ia under the *lex specialis* mechanism adopted by Article 67 Brussels Ia<sup>47</sup>. Nonetheless, the connections and the need for coordination between the two instruments are fundamental. The Brussels Ia Regulation offers no autonomous definition of “cultural object” for the purposes of Article 7(4), making a *renvoi* to Directive 93/7/EEC, and now<sup>48</sup> Directive 2014/60/EU.

Article 1 Directive 2014/60/EU reads as follows: “*This Directive applies to the return of cultural objects classified or defined by a Member State as being among national treasures, as referred to in point (1) of Article 2, which have been unlawfully removed from the territory of that Member State*”. The question, in terms of relationships between the directive and the Brussels Ia Regulation, is whether the “European unlawful removal” also conditions the scope of application of Article 7(4) Brussels Ia. Under the directive, the “cultural” quality of a good depends on the qualification

<sup>45</sup> Cf CRESPI REGHIZZI, “Profili di diritto internazionale privato del commercio dei beni culturali”, cit., p. 166, speaking of “second degree property”, and ROGERSON, “Public Policy and Cultural Objects”, cit., p. 246.

<sup>46</sup> MANKOWSKI, *Article 7*, cit., p. 345.

<sup>47</sup> In the scholarship, see MANKOWSKI, “Art. 67 Brüssel Ia-VO”, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Band I, Brüssels Ia-VO*, Köln, 2016, p. 1215; ID, “Article 67”, in Magnus, Mankowski (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation, Köln, 2016, p. 1020*; KROPHOLLER, VON HEIN, *Europäisches Zivilprozessrecht: Kommentar zu Eu-GVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, Frankfurt am Main, 2011, p. 719, and BORRÁS, DE MAESTRI, “Articolo 67”, in Simons, Hausmann, Queirolo (eds), *Regolamento Bruxelles I. Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, München, 2012, p. 928. For further references in the case law and in the scholarship, see QUEIROLO, TUO, CELLE, CARPANETO, PESCE, DOMINELLI, “Art. 67 Brussels I bis Regulation: An Overall Critical Analysis”, in Tuo, Carpaneto, Dominelli (eds), *Brussels I bis Regulation and Special Rules: Opportunities to Enhance Judicial Cooperation*, Rome, 2021, p. 13-153.

<sup>48</sup> Directive 2014/60/EU, Art. 20 (“*Directive 93/7/EEC ... is repealed ... References to the repealed Directive shall be construed as references to this Directive ...*”).

as such from the State of origin, whilst the additional element of the European unlawful removal seems constructed as being irrelevant for the qualification in itself, being rather necessary to set the scope of application of the instrument. If, as written in Article 7(4) Brussels Ia, what matters is a “*a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC*”, the additional geographical origin of the unlawful removal (that limits the scope of application of the instrument within which the definition is to be found) should bear no consequences for the purposes of Article 7(4) Brussels Ia<sup>49</sup>. Such interpretation would lead to the consequence that the latter provision is applicable to cultural objects defined as such by a Member State, regardless of the place it has been unlawfully removed.

Not only a literal cross-interpretation of Article 7(4) Brussels Ia Regulation and of Article 1 Directive 2014/60/EU *could* point towards the idea that the first should be applicable regardless of the place of unlawful removal; some private international law approaches –deployed in other areas and in diverse contexts– might to some extent suggest that this interpretation could be adopted by the Court of Justice of the European Union as well, should it be ever called to rule on the matter. It is quite common that European private international law and European substantive law adopt same notions and terminology. Less frequent is the case this parallelism in notions is pursued by a *renvoi* of one branch to another. The approaches that will be recalled below show a “conceptual autonomy” between conflict of laws and material law – yet, the transposition of such approach, it must be said – should be careful and should not be applied *sic et simpliciter* in the field of cultural objects as, as mentioned, the starting point of the reasoning, i.e. parallel notions rather than a *renvoi*, seems evidently different.

The first case of coordination between substantive and private international law that might help the interpretation of the notion of “cultural objects” between Brussels Ia and Directive 2014/60/EU, can be traced in consumer legislation. Under Brussels Ia, according to Article 17, a consumer is a natural person that concludes a contract for a purpose regarded as being outside his trade or profession<sup>50</sup>. This provided that (a) it is a contract for the sale of goods on instalment credit terms; (b) it is

<sup>49</sup> Also advocating for a non-extension of the limits of EU material law to the Brussels Ia Regulation, albeit on different grounds, see MANKOWSKI, “Article 7”, cit., p. 347, noting that claims by States (governed by the directive) are fundamentally different from claims by private persons (falling within the scope of application of the Brussels Ia Regulation) – thus being a different understanding of the two normative instruments preferable. According to the A., the referral of the Brussels Ia Regulation in favour of EU material law should be restricted to the definition of cultural object *stricto sensu* and should not comprise the spatial or temporal dimension of the directive.

<sup>50</sup> See Judgment of the Court, 20 January 2005, Johann Gruber v Bay Wa AG, Case C-464/01, para.

a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or (c) in all other cases, the contract has been concluded with a professional who pursues his activities in the Member State of the consumer's domicile. In *Pillar Securitisation Sàrl*<sup>51</sup>, the Court of Justice of the European Union has addressed a coordination matter between substantive law and corresponding notions in Brussels Ia. A natural person took a loan of over 1.000.000,00 euro to buy shares of the company where she was employed. Consistently with a choice of court agreement contained in the contract, Pillar Securitisation started proceedings before courts in Luxembourg following default in repayment. Domestic courts argued that they lacked jurisdiction over the natural person, as actions against a consumer may only be started before the court of her domicile according to the Brussels rules<sup>52</sup>, hence the supreme court referral to the Court of Justice of the European Union. Pillar Securitisation advocated that the notion of "consumer" in international civil procedure should refer to the same notion contained in Directive 2008/48 on credit agreements for consumers<sup>53</sup>: such instrument is applicable to credit agreements below 75.000,00 euro, unless the domestic law transposing the directive sets a higher threshold. As the applicable law did not foresee a higher level of protection, Pillar Securitisation argued that the specific contract was not a "consumer loan". In the Court's eye, the relevant concept of consumer "*is defined in broadly identical terms*

42; MANKOWSKI, " "Gemischte" Verträge und der persönliche Anwendungsbereich des Internationalen Verbraucherschutzes", *Praxis des internationalen Privat- und Verfahrensrechts*, 2005, p. 503; CRESCIMANNO, "I "contratti conclusi con i consumatori" nella Convenzione di Bruxelles: autonomia della categoria e scopo promiscuo", *Europa e diritto privato*, 2005, p. 1135; Judgment of the Court, 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16, para. 32; MUIR WATT, "Facebook face au consommateur "professionnel" ", *Revue critique de droit international privé*, 2018, p. 595; LUTZI, " "What's a consumer?" (some) clarification on consumer jurisdiction, social-media accounts, and collective redress under the Brussels Ia Regulation", *Maastricht Journal of European and Comparative Law*, 2018, p. 374; FRIGO, "Recognition and Enforcement of Judgments on Matters Relating to Personality Rights and the Recast of the Brussels I Regulation", in Pocar, Viarengo, Villata (eds), *Recasting Brussels I*, Milano, 2012, p. 341; BOGDAN, "Defamation on the Internet, Forum Delicti and the E-Commerce Directive: Some Comments on the ECJ Judgment in the eDate Case", *Yearbook of Private International Law*, XIII, 2011, p. 483; CARREA, "L'individuazione del forum commissi delicti in caso di illeciti cibernetici: alcune riflessioni a margine della sentenza Concurrance Sàrl", *Diritto del commercio internazionale*, 2017, p. 543; GARDELLA, "Diffamazione a mezzo stampa e Convenzione di Bruxelles del 27 settembre 1968", *Rivista di diritto internazionale privato e processuale*, 1997, p. 657; STADLER, "Die Crux mit der Mosaiktheorie", *Juristenzeitung*, 2018, p. 94; ZARRA, "Conflitti di giurisdizione e bilanciamento dei diritti nei casi di diffamazione internazionale a mezzo Internet", *Rivista di diritto internazionale*, 2015, p. 1234.

<sup>51</sup> Judgment of the Court, 2 May 2019, Pillar Securitisation Sàrl v Hildur Arnadottir, Case C-694/17.

<sup>52</sup> Brussels Ia Regulation, Art. 18(2) ("*Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled*").

<sup>53</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, in OJ L 133, 22.5.2008, p. 66, Art. 2(2)(c).

*in both instruments*". However, no limitation to the scope of application similar to the one provided for in the credit agreements directive is to be found in the rules on international jurisdiction. The definition in the Brussels rules is autonomous from that of material law, even though some consistency and coordination between the branches of law must be assured<sup>54</sup>. To distinguish the two concepts, the Court has emphasized the different goals of the directive and of the Brussels rules: the directive seeks to ensure effective protection of consumers against the irresponsible granting of credit agreements; rules on jurisdiction provide for protective fora without harmonization of substantive law<sup>55</sup>. This leads to the disconnection between material and private international law concepts. Where a credit agreement is not a "consumer contract" under the directive, the same contract might still be treated as contract concluded by a weaker party as per heads of jurisdiction.

Similar approaches have been followed in *Nogueira et al*<sup>56</sup>, where the Court of Justice of the European Union was called to settle the relationship between heads of jurisdiction in the Brussels Ia Regulation and Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation<sup>57</sup>, the latter providing in its consolidated version that air carrier operators "*shall nominate a home base for each crew member*"<sup>58</sup>. The case concerned actions brought by crew members against Irish companies. Employees were of different Member States, and in their home countries they signed the working contract, all of which written in English, containing choice of court agreements in favour of Irish courts, and providing for the application of Irish

<sup>54</sup> Judgment of the Court (Ninth Chamber), 5 December 2013, Walter Vapenik v Josef Thurner, Case C-508/12, para 23.

<sup>55</sup> Judgment of the Court, 2 May 2019, Pillar Securitisation Sàrl v Hildur Arnadottir, Case C-694/17, para 37 ff.

<sup>56</sup> Judgment of the Court (Second Chamber) of 14 September 2017, Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company, Joined Cases C-168/16 and C-169/16, on which see MANKOWSKI, "Zur internationalen Zuständigkeit in Arbeits-sachen bei fliegendem Personal ("Nogueira u.a.")", *Entscheidungen zum Wirtschaftsrecht*, 2017, p. 739; WINKLER, "Internationale Zuständigkeit für arbeitsrechtliche Klagen von Flugpersonal - Gewöhnlicher Arbeitsort und Begriff der Heimatbasis", *Europäische Zeitschrift für Arbeitsrecht*, 2018, p. 236, and TUO, "La nozione di "luogo di abituale svolgimento dell'attività lavorativa" ancora al vaglio della Corte di giustizia UE: il caso degli assistenti di volo", *Il diritto marittimo*, 2018, p. 403.

<sup>57</sup> Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation, in OJ L 373, 31.12.1991, p. 4, as amended.

<sup>58</sup> Regulation (EC) No 1899/2006 of the European Parliament and of the Council of 12 December 2006 amending Council Regulation (EEC) No 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation, in OJ L 377, 27.12.2006, p. 1, Annex III, Subpart Q, point 3.1.

law. Proceedings were started in Paris, as the employees were assigned to Charleroi Airport, this being their “*home base*”, where, by contract, had an obligation of nearby residence. The Court concluded for the formal autonomy of the definitions employed in the Brussels I Regulation, namely the concept of “*place where activities are habitually carried out*”, from that of “*home base*” in other EU acts - yet, this last one may exercise an indirect influence as they can constitute an *indiciu* courts must address on a case by case approach<sup>59</sup>.

Another similar approach has been adopted in the context of the MIFID Directive<sup>60</sup>, the directive on Market in financial instruments, whose Article 4 establishes three categories of clients. The definition of “*consumer*” takes into consideration elements such as previous financial operations of the weaker party. In *Petruchová*<sup>61</sup> the case concerned actions brought by a Czech private investor against a company in Cyprus, whose courts were prorogated by a choice of court agreement. Proceedings were commenced in Czechia, the place of domicile of the weaker party. Considering the number and entity of the online financial operations, the weaker party would not have been classified as “*consumer*” in the context of the MIFID. Yet, the Court argued for the autonomy of the notion of “*consumer*” for the purposes of Brussels Ia – thus being irrelevant the commercial and legal knowledge of the party in a given case, being relevant only the contraposition between economic operator and non-professional purpose in concluding a contract<sup>62</sup>.

What emerges from the above is that when the Brussels Ia Regulation has to be coordinated with material law, a principle of consistency has generally to be sought – nonetheless, international civil procedure has its own specific policies which must be pursued even at the cost of a disconnection in interpretation between private international law and material law. As mentioned, such approach has been adopted in circumstances where comparable concepts have been used in different areas of law, whereas in the field of protection of cultural property, Article 7(4) Brussels Ia Regulation is different in that it makes a *renvoi* to material law. The necessity to preserve

<sup>59</sup> Judgment of the Court (Second Chamber) of 14 September 2017, Sandra Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company, Joined Cases C-168/16 and C-169/16, para. 61.

<sup>60</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, in OJ L 145, 30.4.2004, p. 1, as repealed by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, in OJ L 173, 12.6.2014, p. 349.

<sup>61</sup> Judgment of the Court (First Chamber) of 3 October 2019, Jana Petruchová v FIBO Group Holdings Limited, Case C-208/18.

<sup>62</sup> Judgment of the Court (First Chamber) of 3 October 2019, Jana Petruchová v FIBO Group Holdings Limited, Case C-208/18, para. 41 ff, on which see LEHMANN, Consumer vs. Investor: Inconsistencies between Brussels I bis and MiFID, *EAPIL Blog*, 17 February 2020.

the *effet utile* of the newly introduced *forum rei sitae* might however contribute in interpreting Article 7(4) as making reference, as the text seems to suggest, only to the notion of “cultural object” – i.e. to the classification approach – in Article 1 Directive 2014/60/EU, being irrelevant for the purposes of the rule on international jurisdiction and territorial competence of the Brussels Regulation the limitation imposed by the directive on its own scope of application consisting in the fact that unlawful removal should have taken place in a Member State.

If one accedes to the interpretation that Article 7(4) is not conditioned by the geographical scope of application that limits Directive 2014/60/EU, the consequence is that the *forum rei sitae* finds application for “cultural objects” classified as such by a Member State, irrespective of whether the unlawful removal takes place. Such interpretation would extend the scope of application of Article 7(4) in a limited way: the substantive law definition of “unlawful removal” is already quite broad, as it covers both illicit export and non-return of the good at the end of lawful removal<sup>63</sup>. Hence, an expansion of the scope of application of Article 7(4) Brussels Ia, if accepted, might acquire more a “fill the gap” role.

#### 4. – Closing Remarks: European International Civil Procedure and Cultural Property Protection in the era Globalization and Migrations.

If private international law can contribute to promoting internationally coordinated approaches to legal issues<sup>64</sup>, Article 7(4) Brussels Ia Regulation seems to follow such a line.

To some extent, from an “historical” point of view, the focal point of traditional rules in public international law has been the role of States concerning their duty to protect cultural heritage, and seek restitution of unlawfully stolen cultural objects<sup>65</sup>.

Complementary individual restitution actions based on private law may contribute in a broader cultural heritage protection policy – requiring though clear and effective rules on jurisdiction in civil and commercial matters.

<sup>63</sup> Directive 2014/60/EU, Art. 2.

<sup>64</sup> See in particular CORNELOUP, “Can Private International Law Contribute to Global Migration Governance?”, in Muir Watt, Fernández Arroyo (eds), *Private International Law and Global Governance*, Oxford, 2014, p. 301; CORNELOUP, HEIDERHOFF, HONORATI, JAULT-SESEKE, KRUGER, RUPP, VAN LOON, VERHELLEN, *Children on the Move: A Private International Law Perspective*, Brussels, 2017; ID, *Private International Law in a Context of Increasing International Mobility: Challenges and Potential*, Brussels, 2017. With specific regard to cultural heritage law, see for all ROODT, *Private International Law, Art and Cultural Heritage*, cit., p. 34 ff.

<sup>65</sup> Cf GILLIES, “The Contribution of Jurisdiction as a Technique of Demand Side Regulation in Claims for the Recovery of Cultural Objects”, cit., p. 299.

The newly introduced *forum rei sitae* surely contributes in fulfilling a *lacuna*<sup>66</sup> in the European normative framework inspired by a principle of proximity between the court and the relevant object. However, in the current era of globalization and migrations characterized by a high level of in-coming and out-going number of persons which may bring along cultural objects in the European judicial space, Article 7(4) Brussels Ia suffers from some application limitations.

On the one side, whilst any plaintiff acting in a private law capacity might invoke the *forum rei sitae* contained in the Brussels Ia Regulation despite not being domiciled in a Member State of the European Union, the general limit *ratione personarum* of the instrument remains. The defendant must be domiciled in an EU Member State. Should this not be the case, the special *forum rei sitae* will not find application, even if all other conditions are respected. Even though this appears to be inconsistent with the principle of proximity between the court and the case, it is consistent with the choice the EU lawgiver has made in terms of “exorbitant” heads of jurisdiction. A choice deliberate in nature, as the proposed Article 5(3) was not supposed to be constrained by the European domicile of the defendant.

On the other side, despite any argumentative narrative that may support an interpretation of Article 7(4) Brussels Ia Regulation so as to “disconnect” it from the “unlawful removal from a Member State” under EU material law, it still remains that the characterization of cultural objects – as resulting from the interplay between substantive law and international civil procedure – is limited to goods which are classified as cultural objects by a Member State as being among the national treasures possessing artistic, historic or archaeological value under national legislation or administrative procedures<sup>67</sup>. Differently said, Article 7(4) is not “open” for unlawful removal of “non-European” cultural objects. Even if these are illicitly removed from one Member State and brought into another one.

Nonetheless, in spite of these limits, Article 7(4) Brussels Ia Regulation appears to be a step forward from the previous legal framework, in that it harmonizes rules on jurisdiction for *rèi vindicatio* between the Member States – yet, due to its applicative limits, it seems more likely that, against the backdrop of globalization and migration, it is more suited, for now, to contribute to a regional, rather than global, governance of private interests on the international arena of looted property protection.

<sup>66</sup> MANKOWSKI, “Article 7”, cit., p. 345.

<sup>67</sup> Directive 2014/60/EU, Art. 2.

**Abstract**

Against the background of international law treaties tackling the phenomenon of wrongful removal of cultural objects broadly speaking, the work dwells on the first main interpretative questions that arise under the Brussels Ia Regulation following the introduction of a new *forum rei sitae* for *rèi vindicatio* actions. New Article 7(4) Brussels Ia Regulation is analysed, and juxtaposed to EU material law, to define its material, personal, and geographical scope of application.



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