

Substantive Equality, Positive Action and Roma Rights in the European Union

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Executive summary

The briefing puts forward the argument that the European Union (EU) should take legal steps to ensure the social inclusion of Roma across Europe. So far the EU has developed a two-pronged approach towards its Roma minorities. On the one hand, it has adopted and requires the implementation of anti-discrimination legislation. On the other hand, it has been working to improve its member states' policies on employment and social inclusion through the soft-governance instrumentarium of the Open Method of Coordination (OMC). While recognizing the benefits of the anti-discrimination *acquis*, the briefing reflects on its insufficiencies vis-à-vis the Roma. It criticizes the fact that the EU has failed to impose positive obligations on its member states to ensure substantive equality for the excluded Roma minorities. It calls for the EU to bring its internal anti-discrimination standards up to the level of international human and minority rights law. The briefing also looks at the EU's soft governance approach to social inclusion. It concludes that the EU's policy goals cannot compensate for the lack of positive legal duties. On the contrary, the deficiency of legal certainty renders Roma communities dependent on the political climate within the member states, which is unacceptable when it comes to the realization of human rights.

Introduction

Within the eastern enlargement of the EU Roma issues acquired salience on the EU accession agenda. As part of its membership conditionality, the European Commission (the Commission) put constant pressure on the Central and East European (CEE) candidate countries to improve the abysmal situation of their Roma communities and to adopt and implement special Roma-targeted policies. However, the EU failed to set up an effective developmental framework within its enlargement policy. The common narrative of the EU's eastwards expansion as a profound transformative experience has matched the truth only in part. For the Roma in CEE, the EU enlargement has not resulted in improved living conditions. Direct conditionality targeting national governments failed to solve



Young Roma couple, Romania. Mikkel Ostergaard/Panos Pictures

the structural problems related to Roma underdevelopment.¹

With Bulgaria and Romania joining the EU in 2007, the eastern enlargement made Roma the EU's biggest ethnic minority – amounting, according to various estimates, to 7–10 million people. The Roma became also the fastest growing ethnic group in Europe. Thus, from a peripheral external problem, which became of increasing importance during the accession process, the Roma question became a European domestic concern. Although the EU had no explicit competence to deal with minorities and minority rights internally, it did not completely remove the Roma from its agenda. Without a special policy on Roma, it now addresses Roma issues through two approaches: (1) a legal approach reflecting the EU's anti-discrimination *acquis*; and (2) a policy approach stemming from its strategies on employment and social inclusion through the soft of governance method of the Open Method of Coordination. The policy approach has been further reinforced, especially vis-à-vis the CEE states, through the allocation of European structural funds, in particular the European Social Fund, to employment and social inclusion priorities.

Both approaches have advantages and disadvantages. While boosted by EU law, the anti-discrimination approach is narrow in scope. The policy approach, on the other hand, is broader but lacks clout as it is based on soft-law measures.

The anti-discrimination approach is based on the philosophy of distributive justice and formal equality. It promises equal treatment to everybody (even though some groups are 'less equal' than others). The EU's anti-discrimination *acquis* has imposed legal obligations on the member states whose fulfilment is guarded by the Commission, national courts and the European Court of Justice (ECJ). Yet the anti-discrimination approach touches only the surface of Roma problems and cannot in itself lead to significant changes in the life of the millions of Roma in the EU.

The EU policy approach is characterized by other elements, which correspond to the idea that in order to achieve effective as opposed to formal equality, unequals should be treated unequally – i.e. substantive equality. It allows, therefore, for identity-based programmes and actions with the aim of enhancing Roma integration and social inclusion. However, these policy measures are not grounded in legal obligations and therefore are not binding on EU member states. In that sense, Roma social inclusion projects are, by and large, dependent on the political climate in the member states and the political will of the governments in power.

In order to promote the inclusion of marginalized communities in Europe, and of Roma in particular, the EU should grant legal force to its social inclusion policy objectives. However, at the present stage, the latter is far from possible: the EU lacks competences, other than an incentivizing role, in member states' welfare issues. What could be done on the basis of the existing treaties is to put forth a general duty on member states to move towards the realization of substantial equality. This would also require the EU to make positive action measures not only allowable but compulsory. The latter could be introduced on the basis of Article 13(1) of the European Community (EC) Treaty. This briefing therefore calls for the introduction of a legal obligation on member states to guarantee Roma inclusion, in particular.

The EU anti-discrimination *acquis*

At the heart of the EU's anti-discrimination *acquis* is Article 13 of the EC Treaty. This provision was introduced in 1997 with the Treaty of Amsterdam. Article 13 provided a legal ground for the EU to pass laws in order to combat discrimination based, *inter alia*, on racial or ethnic origin. In 2000 the EU passed two directives implementing the principle of equal treatment – the Racial Equality Directive² and the Employment Equality Directive,³ collectively known as 'Equality Directives'. These had to be transposed into member states' domestic laws by July and

December 2003, respectively. The new member states had to transpose them by the accession date of 1 January 2007 for both Bulgaria and Romania.

The new European anti-discrimination framework and, in particular, the Racial Equality Directive, has been an important legal development for minorities in the EU. The Directives have introduced a clear, comprehensive and uniform EU model of negative discrimination – i.e. ensuring that individuals are not treated differently because of their race or ethnic origin. Even though not targeting Roma in particular, the Directives have provided an important legal tool for combating direct and indirect discrimination experienced by Roma on a daily basis. They bind member states to grant individual victims of discrimination the right to make a complaint before judicial or administrative body. The Directives have introduced important legal techniques, such as the shift of the burden of proof in cases of discrimination, the possibility for non-governmental organizations (NGOs) to engage on behalf or in support of victims of racial discrimination, and the requirement for a deterrent effect in the remedies. Thanks to the EU anti-discrimination *acquis*, which was transposed into national legislations, domestic courts have a tool at their disposal which should allow them to condemn some widespread and disgraceful practices, such as keeping Roma away from public places like shops, restaurants, bars, and swimming pools; declining, directly or indirectly, Roma job applicants solely because of their ethnic origin; segregating Roma children in separate Roma schools; and placing Roma women in separate wards in hospitals.

The insufficiencies of the non-discrimination approach

Achievements like the above are important but they constitute only the first step in addressing the situation of Roma communities. The anti-discrimination body of law falsely assumes that the most excluded individuals in society, the Roma victims of racial discrimination, might seek *post factum* justice and initiate legal proceedings after the damage has already been done. Bearing in mind the total marginalization of Roma from social and economic life, only a very limited group of relatively well-integrated Roma individuals will in practice be able to vindicate their rights before state's administrative bodies and courts of law. In fact, most of the cases submitted to the domestic courts so far have come from human rights NGOs rather than individual victims. Only rarely would Roma victims of discrimination initiate legal proceedings against employers or companies unless supported by those NGOs. Litigation is a lengthy, complex and expensive process and therefore affordable only *de jure* rather than *de facto* for the millions of poor, unemployed and uneducated Roma. Moreover, many Roma do not trust the judicial system, which has often discriminated against those Roma who have had

contact with it. For example, in relation to a tragic work accident entailing the death of a Roma man, a Bulgarian prosecutor has put forward the following explanation: 'Knowing the psychology of this population [i.e. the Roma] ... it was impossible to restrain them.'⁴ It is also worth noting that there are no Roma judges or even court administrators. Finally, one simply has to recall the disproportionate representation of migrants and minorities, including Roma, among prison inmates throughout the EU member states to figure out that Roma would not wholeheartedly expect the courts to adjudicate in their favour. As a result, nearly all cases of discrimination remain unchallenged by the Roma victims and therefore racism and discrimination remain widespread and largely accepted.

Following the Racial Equality Directive's entry into force, its transposition has been a lengthy process while its implementation in almost all member states has been scant or non-existent. In order to stimulate the implementation of the Directive in the member states the Commission could start funding strategic litigation projects. Instead, its anti-discrimination funding so far has been used either for awareness-raising initiatives (including the famous yellow diversity truck) to inform people about their right not to be discriminated against, or for training courses for NGOs and lawyers without involving follow-up legal work.

Also, in order to challenge the status quo, the new independent anti-discrimination bodies set up under the Racial Equality Directive should specifically look at Roma as a target group and support them in fighting discrimination.

Substantive equality and positive action

A number of reports prepared by NGOs and by organizations such as the United Nations Development Programme (UNDP), World Bank, Council of Europe and Organization for Security and Cooperation in Europe (OSCE), have divulged the vicious circle of extreme poverty, racism, and the systemic and structural discrimination experienced by the members of Roma communities. Even if, by a miracle, all Roma suddenly started challenging the degrading discrimination to which they are subjected on a daily basis, the Roma situation would not change significantly and nor would societies become more tolerant and inclusive, let alone multicultural. The second step towards realizing Roma integration in all spheres of social life should involve a positive obligation on the part of the EU member states to ensure substantial equality. It is governments that should ultimately be held responsible for removing the obstacles hampering Roma access to fundamental rights and participation in mainstream society. Only they have the necessary power and financial means to remove those obstacles and support and facilitate Roma access to employment, education, housing, health care and other public services. This would not be unprecedented under

EU law. For example, Article 1 of the Revised Sex Equality Directive⁵ calls for the member states to 'actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities' in the relevant areas covered by the Directive. The EU should improve the racial equality standards following the sex equality paradigm. While the gender equality legislation provides for an obligation to ensure equality between women and men, the EU racial equality *acquis* does not contain an explicit general positive duty on member states to ensure equal opportunities beyond the provision of individual remedies. The eradication of discrimination, and particularly of indirect discrimination, necessitates not only the negative obligation to abstain from discriminatory actions and the provision of individual remedies. It also involves proactive actions to change discriminatory systems through broader social reforms and positive action measures.

Specifically, governments should always take into account Roma needs when adopting laws and policies, especially when dealing with education, employment, health care and housing, so that the latter reflect and respond adequately the situation of Roma. In addition, they should monitor and assess whether existing laws, policies or practices – for example, social protection provisions, housing or health care administrative regulations, conditions for employment in public administration, etc. – have a negative impact on Roma and thus discriminate against them indirectly.

Along these lines the Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles has said that governments should take measures to 'ensure that seemingly neutral allocation criteria do not negatively affect Roma populations'.⁶ Similarly, the EU Network of Independent Experts on Fundamental Rights has recommended that the governments should ensure that apparently neutral regulations, criteria or practices do not have a disproportionate impact on Roma.⁷

On the basis of adequate monitoring of the situation of Roma and the impact assessment of relevant laws and policies, the governments should adopt, where necessary, a preferential treatment towards the members of Roma communities. The purpose of this treatment should not be to grant privileges but to correct structural inequalities and to provide Roma with the same opportunities and chances in life as the other members of society. The content and scope of any affirmative action measures treating Roma preferentially should be carefully elaborated with the active involvement of communities. Otherwise positive action measures could lead to controversies. For example, many Roma fear that affirmative action and, in particular, a rigid quota for Roma, might generate discontent against Roma among majority populations. Also, there is a chance that affirmative action, especially in the context of education and employment, would benefit only the well-integrated

and educated Roma while the poorest Roma would remain excluded. In addition, there might be an abuse of the preferential treatment system, as has happened in the Macedonian universities with the introduction of the Roma quota system.⁸ The question of who is Roma and who should benefit from affirmative action schemes therefore needs to be addressed with the active participation of representatives of Roma communities.

Without positive action measures, the total marginalization, endemic poverty, structural unemployment, low education and, ultimately, the gap in opportunities between Roma and non-Roma, could never be overcome. For example, state-subsidized training courses for Roma could be initiated so that Roma children could overcome the barriers of substandard education; courses for professional development followed by job growth schemes for Roma would give Roma men and women some work experience, which would improve their chances of accessing and remaining in the labour market. There could also be preferential access to credit for Roma businesses or for businesses employing Roma; fully or partially subsidized housing, over a limited period, for Roma families wishing to move into mixed areas; the appointment of a number of qualified Roma to public institutions to increase the visibility of their ethnic group as a whole.

According to the EU Network of Independent Experts on Fundamental Rights, positive action measures are 'the only adequate answer which may be given to the situation of structural discrimination – and, in many cases, segregation – which this minority [the Roma] is currently facing'.⁹ The European Commission itself has acknowledged that the 'disadvantages experienced by some communities, e.g. the Roma, are so wide-scale and embedded in the structure of society that positive action may be necessary to remedy the nature of their exclusion'.¹⁰ The EU should build on this experience and move towards a legal provision obligating the governments to adopt positive action measures treating favourably the poorest of the poor Roma. What is more, the EU Network of Independent Experts on Fundamental Rights has called for a special Roma Integration Directive, based on Article 13, aiming to achieve, *inter alia*, the desegregation of Roma, especially in housing, education, and employment.¹¹

Ethnic data and positive action

Positive action measures are linked to questions of ethnic data collection and processing of personal data. Ethnic data makes it possible for decision-makers to understand the extent to which Roma are affected by discrimination and to decide on relevant measures to overcome it. Importantly, ethnic information about the negative or non-existent impact on Roma of apparently neutral provisions or decisions could reveal that the government, its agents or even private companies discriminate indirectly against the Roma. For example, if no Roma are employed in ministries

or municipal authorities, this could mean that some entry requirements discriminate indirectly against Roma. Ethnic statistics could expose otherwise hidden discrimination and could therefore prompt positive action measures explicitly targeting Roma. In order to diversify the workforce, for example, the state and other employers could offer Roma candidates training courses (for instance, an English course if there is a requirement for the candidates to speak English), or could even set up a hard or flexible quota for Roma until the aim of diversity of the workforce has been fulfilled; or the government could launch a national programme encouraging companies that employ Roma.

Furthermore, the availability of information related to ethnicity is crucial for the *exercise* of the right not to be subjected to discrimination. It can give a *legal claim* in the hands of the Roma and can facilitate the attacking of the so-called 'disparate impact discrimination'.¹² The Racial Equality Directive's Preamble (Recital 15) expressly allows for the use of statistics to establish cases of indirect discrimination. What is more, it implies that other ethnic data could be brought into play as well.

The Racial Equality Directive does not include a provision on data collection. It is worth comparing it in this respect with the Revised Sex Equality Directive (Art. 8 (b) 4). The latter calls on the member states to encourage employers to provide 'at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking. Such information may include statistics on proportions of men and women at different levels of the organization'. There is a need therefore for the EU acquis related to racial discrimination to be brought up to the level of its sex equality body of laws.

The collection of ethnic data and its automatic processing has been restricted due to concerns over the individual right to privacy and potential abuse of personal data. The Constitutions of several member states, for example Germany, explicitly prohibit data collection along ethnic lines. Such concerns have also come from some minority representatives who fear negative attitudes and racism towards Roma who have disclosed their ethnic origin. With due regard to international standards such as the EU Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data,¹³ and the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,¹⁴ governments should provide safeguards before processing personal data. Also, the right of members of Roma communities to freely choose to be treated as belonging to a national minority or not has to be respected, as provided by the Framework Convention on National Minorities (FCNM, Article 3).

Ethnic data collection has been steadily recommended by Roma NGOs and human rights bodies, such as the Advisory Committee under the FCNM and the European Commission itself in its Regular Reports to the candidate

countries. Often, such recommendations have not been followed on privacy protection grounds. It should be noted, however, that any information which is made anonymous in order to be used for statistical purposes should not be considered as personal data (see Article 2, EU Directive on personal data) and thus subjected to the restriction on data collection and processing under national law. There are also other means of ethnic data collection, such as sociological methods and representative samples, that could be used by policy-makers in order to adopt adequate Roma policies.

As to the unwillingness of state bodies or other employers to collect and process data on the basis of which affirmative measures could be adopted, it must be borne in mind that the EU Directive on personal data allows member states to process sensitive data, as related to the ethnic origin of the individual, when there is an explicit consent to the processing of those data, or when it is necessary for the establishment, exercise or defence of legal claims.¹⁵

Compulsory positive action and international human rights law

Compulsory positive action measures are not alien to international human rights standards, to the elaboration of which all EU member states have contributed. The Human Rights Committee (HRC) has acknowledged that the principle of equality imposes legal obligations on states 'to take affirmative action measures in order to diminish or eliminate conditions which cause or help perpetuate discrimination prohibited by the Covenant [the International Covenant on Civil and Political Rights]'.¹⁶

Also Article 2(2) of the International Convention for the Elimination of Racial Discrimination (ICERD) sets out that:

'States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development [...] of certain racial groups or individuals belonging to them, for the purpose of guaranteeing the full and equal enjoyment of human rights.' (emphasis added)

What is more, in 2000 the Committee for the Elimination of Racial Discrimination (CERD) issued a special recommendation on discrimination against Roma in which it recommended that states parties adopt positive action measures. For example, it recommended them to 'take special measures to promote the employment of Roma in the public administration and institutions as well as in private companies' (emphasis added).¹⁷

Furthermore, the minority rights regime in Europe that emerged during the 1990s also included positive action measures in order to achieve non-discrimination and

effective equality among ethnic groups. For example, the Council of Europe's FCNM prescribed a number of positive action obligations for its states parties, in order 'to promote, in all areas of economic, social, political, and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority';¹⁸ and Article 4(3) of the FCNM makes clear that the measures adopted in accordance with this latter provision shall not be considered to be an act of discrimination. The FCNM Advisory Committee has dedicated a lot of its work in recommending measures for Roma inclusion, including positive actions.

However, the Racial Equality Directive (Article 5)¹⁹ allows, but does not require member states to maintain or adopt specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin, with the aim of ensuring full equality in practice. Under EC law, positive action is regarded only as an exception to the equal treatment principle. In other words, governments may be at risk of breaching EC law if they engage in positive action measures; however, if they do not engage at all in positive action measures, even with regard to the most excluded and discriminated groups, they are on the safe side. Omitting not to integrate does not amount to a violation of the EU anti-discrimination *acquis*; integrating too much, however, does. In its sex equality jurisprudence, which is expected to be applied, *mutatis mutandis*, to racial equality cases, the ECJ has only restricted member states' competence to adopt and implement too generous positive action measures (i.e. it has placed a ceiling on positive action). However, neither EC law nor the ECJ's case law have put in place an obligation to adopt positive action measures, at least as a minimum common denominator for substantive equality (i.e. it did not place a threshold on positive action).

Thus the EU has left the problem of the inclusion and integration of marginalized groups to the discretion of member states: if they wish, they will adopt and implement special programmes and policies for Roma inclusion, if they do not, they will not adopt and implement any programmes and policies whatsoever. Some authors have rightly expressed a concern about the existence of ceiling on positive action, warning that if the ECJ uses the sex equality standards on positive action for race equality issues, it may eventually restrict the identity-based measures for ethnic minorities.²⁰ In this way, there may be a danger that the EU would interfere in complex ethnic issues that are better understood – and perhaps more suitable to be tackled – by local or national authorities within their local context and politics. Thus the EU should allow a broader scope (i.e. higher ceiling) for member states to adopt positive action measures for ethnic minorities like the Roma, who suffer from widespread marginalization.

To be sure, there is a theoretical possibility that the ECJ could strike down any Roma-only targeted programmes in CEE (i.e. Roma job growth projects or subsidized housing

for Roma) that go too far. Yet a much bigger problem is not that the EU and the ECJ, in particular, would eventually restrict the governments from adopting positive action schemes for the Roma, but that the governments won't adopt and implement them and thus won't achieve real equality in their societies.

EU law should come into line with international human rights standards on racial discrimination. In order to make its principle of non-discrimination and equality meaningful, the EU should place a positive duty on member states to integrate their vulnerable and marginal groups, and especially their Roma communities. The current approach – a ceiling without a threshold – somehow naively takes it for granted that governments would be naturally inclined to promote the integration of their most vulnerable citizens and does not challenge at all their political will to do so.

Equality 'à la carte' – Roma on the EU's policy agenda

Instead of placing any legal obligations on its member states to ensure substantive equality, the EU has put forward policy recommendations and guidelines. To be sure, the latter have embraced the idea that deeply rooted social inequalities and disadvantages linked to racial or ethnic origin should be overcome through special measures, going beyond the principle of formal equality. Neither the European Council of Lisbon of 2000, nor the re-launched Lisbon Strategy of 2005, referred to Roma or any other ethnic minorities. Yet, the European Commission has linked the integration of Roma in the EU to the agenda for growth, jobs and competitiveness. European Commission rhetoric often maintains that, the greater the participation of Roma in the labour market, the closer the European Commission would be to achieving its objectives of higher level of employment and social protection, raising the standard of life, and economic and social cohesion.²¹ In January 2006 it established a High Level Group on Social and Labour Market Integration of Ethnic Minorities to identify practical ways of using EU policies and programmes to promote the integration of disadvantaged ethnic minorities, including the Roma, into the labour market. The Commission singled out two focus groups of particular concern: immigrant communities and the Roma.²² A number of EU funding calls emphasize the Roma as a priority group. For example in June 2006 the European Commission launched a call for proposals for a 'European-level NGO representing and defending the rights of Roma people'.²³ The Commission has encouraged the new member states with substantial Roma communities, such as Hungary, Slovakia and the Czech Republic, to include Roma in their National Action Plans (NAP) on Social Inclusion (2004) and subsequently in their National Reform Programmes (NRP) (2005). Furthermore, it did not turn a blind eye to the initiative

under the bold heading 'Decade of Roma Inclusion' (2005–15) launched by the World Bank and the Open Society Institute (OSI). The Decade is aimed at ensuring substantive equality and redressing the multi-faceted disadvantages experienced by Roma. The Action Plans elaborated under its aegis have included a number of positive action measures for the Roma. The Commission referred to those Action Plans in May 2006 in its Monitoring Reports on Bulgaria and Romania.²⁴ More importantly, Commissioners Vladimir Špidla and Danuta Hübner urged CEE governments to make use of EU structural funds for the implementation of the Decade of Roma Inclusion. Redistribution of EU funds in programmes targeting the Roma is now being channelled through the EU structural funds, as has been done during the accession process within the PHARE programme. As the new member states are the biggest recipients of EU structural funds, the Commission can use not only the OMC, but also the EU's financial muscle to strengthen Roma inclusion policies in new member states with a sizeable Roma population. Along these lines, the Commission can prop up the aim of Roma inclusion in their National Strategic Reference Framework (NSRF) Strategies, which set the major development policy objectives and priorities to be supported under the structural funds.

Nevertheless, the Roma-related measures pushed by the Commission are of a soft-law nature and are not based on legal obligations. EU law does not oblige member states either to accommodate Roma needs as an integral part of their policy-making or to adopt and implement special programmes for Roma and other vulnerable ethnic minorities. In social inclusion matters, the EU cannot adopt directives and regulations. After the allocation of the structural funds to particular priorities it has mostly an advisory and coordination role exercised through the OMC.

EU member states and acceding countries with sizeable Roma populations – such as Bulgaria, the Czech Republic, Hungary, Romania and Slovakia – have pledged on a number of occasions their political commitment to Roma issues. Most of those countries have been adopting, since the beginning of the accession process in 1997, a plethora of Roma National Strategies, Roma Action Plans, National Action Plans for Social Inclusion, National Reform Programmes, and numerous national and local thematic plans for Roma housing, employment, education, health care and so on. There has never been a legal guarantee that they would actually implement those plans and policies. The accession process taught some important lessons about Roma policies. To be sure, during the whole accession process the Commission kept on repeating that there was, nevertheless, a gap between the political intentions of the governments in CEE and their actual outcome. In the case of Slovakia, the Commission stated in 2000 'in spite of some progress recorded there appears to exist, in general, a

gap between the good intentions and their actual implementation. As a result, practical improvement in the daily life of the minorities is very minor if not unnoticeable.²⁵ The following year it stated again: ‘The gap between good policy formulation and its implementation on the spot, as observed in last year’s report, has remained.’²⁶ A similar statement is repeated in the Comprehensive Monitoring Report in 2003: ‘The gap between good policy formulation and its implementation on the spot has not significantly diminished.’ This was the final Report on Slovakia’s Progress towards Accession ... and then the accession finally came.²⁷ Now that the accession carrot has been eaten, and these are no longer candidate countries, there is much less likely to be improvement. During the enlargement process, the stake was entry to the EU; the present incentives for member states are minimal. There’s not much that the European Commission can do under the OMC if a member state fails to fulfil its otherwise ambitious plans. The OMC was not designed to be an enforcement tool. It was conceived as a process of policy learning and exchange of best practices between member states only coordinated by the Commission in an area outside of EU competences. This is in sharp contrast to the traditional method, by which the EU adopts legally binding acts – Regulations and Directives – and, if a member state fails to transpose them into domestic laws and policies, the Commission initiates the so-called infringement procedure. Ultimately, this involves a decision of the ECJ and, potentially, heavy fines if the member state does not comply with the judgment when an infringement of its obligations has been found.

So far, the EU has approached the question of social inclusion of marginalized communities, including the Roma, through a purely policy perspective, rather than as a matter of the fulfilment of human rights obligations. In that sense, we are witnessing a reformulation of the Roma question from a human rights issue into a policy goal issue. EU discourse and practices on Roma are moving from human rights to social policy. While individuals and groups can be entitled to rights, and can therefore have certain legitimate expectations towards their governments, no one can be entitled to a particular policy. On the contrary, one becomes dependent on decision-makers’ discretion as to whether a particular policy is adopted or not. Constructing an issue in the language of human rights also gives it a high political priority, especially in a union of liberal democracies such as the EU.

Notes

1 See for example, UNDP, *Faces of Poverty, Faces of Hope. The Magnitude of the Challenge*, UNDP, 2005. Available at <http://vulnerability.undp.sk/publications.php>; Jennifer Tanaka, ‘Economic Development Perspectives of Roma – Looking Critically at Reality and the Social Impact of Development Measures’, Budapest: EUMAP/OSI, 2005. Available at <http://www.eumap.org/journal/features/2005/romadec/tanaka.pdf>; Tarki Report, quoted by the Roma Press Center, 19 June 2006. Available at <http://www.romapage.hu/europa/hircentrum/article/106762/191/>

2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 P. 0022 – 0026 (hereafter Racial Equality Directive).

3 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016 – 0022, (hereafter Employment Equality Directive).

4 Sofia District Court, Decision of 5.01.2006, Civil Case N 2996/2005.

5 Directive 2002/73/EC of the European Parliament and Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Official Journal 2002L269/15 (hereafter Revised Sex Equality Directive).

6 Gil-Robles, A., *Final Report on the Human Rights Situation of the Roma, Sinti, and Travellers in Europe*, Strasbourg, Council of Europe, Office of the Commissioner for Human Rights, 15 February, 2006, p. 19.

7 EU Network of Independent Experts on Fundamental Rights, ‘Thematic Comment No. 3: The protection of minorities in the European Union’, 25 April 2005, p. 23, Available at: http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf#search=%22roma%20minorities%20thematic%20comment%20no3%20eu%20network%20of%20independent%20experts%20%22

8 Dalipovska et al., *Equal Access of Roma to Public Administration (Ednakov pristap na romite vo javna administracija)*, Skopje, 2004, p. 8.

9 On indirect discrimination as disparate impact discrimination see De Schutter, de Schutter, O., ‘Three models of equality and European anti-discrimination law’, *Northern Ireland Legal Quarterly*, vol. 57, no. 1, pp. 9–13.

10 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23/11/1995.

11 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, Council of Europe, 28/01/1981.

12 On positive action and data protection see De Schutter, *op. cit.*, pp. 22–30.

13 EU Network of Independent Experts on Fundamental Rights, *op. cit.*

14 European Commission, Proposal for a Decision of the Year of Equal Opportunities, 2005, emphasis added.

15 EU Network of Independent Experts on Fundamental Rights, *op. cit.*

16 HRC, General Comment 18, Non-Discrimination, para. 10.

17 CERD, General Recommendation 27, Discrimination against Roma.

18 FCNM, Article 4(2), emphasis added.

19 The same holds true of the Employment Equality Directive (Article 7, para. 1).

20 See for example, Caruso, D., ‘Limits of the classic method: positive action in the European Union after the new equality directives’, *Harvard International Law Journal*, vol. 44, no. 2, 2003, pp. 331–86.

21 See, for example, the Preamble of the Racial Equality Directive, Recital No. 9.

22 European Commission, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/149&format=HTML&aged=1&language=EN&guiLanguage=en>

23 European Commission, http://ec.europa.eu/employment_social/emplweb/tenders/tenders_en.cfm?id=405

24 May 2006 Package on Bulgaria and Romania, available at: http://ec.europa.eu/enlargement/key_documents/reports_2006_en.htm

25 Regular Reports on Slovakia, 2000, http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/sk_en.pdf

26 Regular Report on Slovakia, 2001, http://europa.eu.int/comm/enlargement/report_11_01/pdf/en/sk_en.pdf

27 After the accession, the 2004 the Slovak anti-discrimination law allowed the adoption of positive action measures. Positive action in Slovakia would have allowed for special employment programmes and educational opportunities for the Roma. However, the government headed by Mikuláš Dzurinda brought a case before the Constitutional Court asking the judges to declare the affirmative action provision unconstitutional as it infringed upon the principle of equal treatment. On 18 October 2005 the Court struck down the challenged provision of the anti-discrimination law. As the EU lacks a compulsory positive action provision, it cannot oblige the Slovak government to keep the provision and adopt positive action measures desperately needed by the Slovak Roma.

working to secure the rights of minorities and indigenous peoples

Recommendations

1. After transposing the Racial Equality Directive, EU member states should effectively implement it.
2. The EU and its member states should support, through training and legal assistance schemes, the practical implementation of the anti-discrimination *acquis*. Test litigation, specifically targeting Roma, should be generously supported by both the European Commission and the member states.
3. The new independent bodies should specifically look at discrimination against Roma.
4. The Racial Equality Directive should include a general positive duty on member states to take measures necessary to promote substantial equality, including between Roma and non-Roma.
5. The EU should impose an obligation on member states to take into account the specific situation of Roma when drafting and implementing laws and policies.
6. Governments should start assessing whether existing laws, policies and practices – especially with regard to education, employment, social protection, health care, and housing – negatively affect Roma and thus discriminate against them indirectly.
7. Governments should improve their ethnic data collection in order to gain better understanding of discrimination experienced by Roma and adopt adequate measures to overcome it.
8. The EU anti-discrimination *acquis* should place a minimum common denominator on positive action. It should state that ‘with a view to ensuring full equality in practice, the principle of equal treatment requires member states to maintain or adopt specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin’.
9. The adoption, implementation, monitoring and evaluation of those positive action measures should be done with adequate Roma participation, going beyond a mere consultation.

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