Volume 5 · Number 2 · 2019

intersections
East European Journal of Society and Politics

# Enforcing Equality?
## Promises and Limits of Legal Responses to Systemic Inequalities

Intersections.

EEJSP

H-1453
Budapest,
PO Box 25.



The current issue was supported by:

Centre for Social Sciences
Hungarian Academy of Sciences
mtatk

PUBLISHED BY:
Centre for Social Sciences
Hungarian Academy of Sciences
Zsolt Boda
Director General

intersections.tk.mta.hu

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**ZSOLT KÖRTVÉLYESI** *

# Enforcing Equality? Promises and Limits of Legal Responses to Systemic Inequalities

Intersections.EEJSP
5(2): 4–10.
DOI: 10.17356/ieejsp.v5i2.566
http://intersections.tk.mta.hu

* [kortvelyesi.zsolt@tk.mta.hu] (Centre for Social Sciences, Hungarian Academy of Sciences, Budapest)

Inequalities are rising, with social divisions being increasingly presented as cultural, ethnic, religious or racial, as resulting from unchangeable traces and/or deep historical roots, revolving around essentialist visions of groups of people. The call for recognition of diversity has been transformed to identitarian nativism.[1] At times, what surfaces is an anti-Enlightenment vision that seeks to reverse the long march towards the equalizing universal ideal of shared humanity. The impact of this trend on law could not be more pronounced. It seems timely to revisit law's potential in fighting inequalities, assess what has been achieved and what innovative solutions can help equality struggles. The present thematic section focuses on law's potential in fighting systemic inequalities, taking a wide approach that considers not only problems of implementation but also wider questions of political mobilization.

Views diverge on what law is contributing to equality. I will briefly refer to two accounts to illustrate the spectrum. The traditional critical view, usually of a Marxist bent, treats law as the language that power speaks.[2] When power was to make concessions, it is essentially a tool to sweeten the pill, make law enforcement more efficient by voluntary rule-following. Many critical accounts continue to voice this view. Others argue that the very logic of law or, more specifically, of the rule of law has some basic equalizing effect. Marxist historian E. P. Thompson went as far as stating that 'the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.' (Thompson, 1990 [1975]: 266.) Remarkably, he reached this conclusion in a book discussing particularly harsh anti-poor legislation history.

Law does seem to have a universalizing potential.[3] It pushes decision-makers in the direction of transparent and general rules (also assuming their capacity to achieve this) combined with the control by independent judges. Fighting arbitrariness also means that decisions should be justified and held against other comparable decisions. Justification and comparison call for a basic notion of non-discrimination: departure

[1] The term was earlier used to describe (critically) the view on the united voices of the oppressed natives that can only be really understood and expressed by natives themselves. See, e.g., Kuper (1994: 543, cited in Werbner, 2012: 158). In the sense that I use it here, with similar overtones of unity and oppression, covers a wide range of (changing) ideologies. On the trend of what he calls a move from nationalism to 'civilizationism', including Christian identitarian elements but also liberal features, see Brubaker (2017).

[2] See, most famously, Marx (1975 [1842]).

[3] On a basic level, laws should be cast in general terms (targeted laws would undermine the separation of powers doctrine), applied in a uniform matter (lack thereof would undermine the idea of one unified legal system and impartial application). This also means that grounds of (legal) inequality have to be spelled out, making contestation easier. For an account of the underlying morality, see Fuller (1969, esp. Ch. II).

from earlier precedent requires justification. It remains true, however, that the legitimizing effect formal rules have can also be detrimental to mobilizing resistance and political challenge, sometimes outweighing the said rule of law benefits: people tend to accept the legitimacy of law, and are less likely to act against it, partly because of the ceremonial force of formal state norms.[4] The relationship between legal challenges to existing practices, e.g. in the form of human rights litigation, and political mobilization continues to be contested when discussing contemporary equality struggles (see later).

In a more specific field within the realm of equality, minority rights protection, one point of contention is the inherent tendency of Western legal systems to neglect claims that are not easy or possible to be individualized, i.e. presented as a matter of individual rights or individual harm (with prominent exceptions as collective claims made by states, corporations, or churches). While this can be a feature and important guarantee for liberal accounts seeking protection for individual freedom — and there are good arguments for limiting law to what law is good at doing and constraining our expectations[5] — from other angles it seems to be a shortcoming. In the case of claims made on behalf of wronged indigenous communities, it presents itself as a cultural bias, often preventing non-individualized claims to proceed. More relevant for the Central and Eastern European region, for ethnic and national minorities, the individualist filter makes it hard or impossible to counter systemic injustices. The practical requirements of providing proof and establish actual violations can make it prohibitive to challenge discriminatory patterns through litigation.

It is this insight that motivates the on-going research — hosted by the Centre for Social Sciences of the Hungarian Academy of Sciences and funded by the National Research, Development and Innovation Office — on how procedural instruments can bridge the gap between minority claims and legal guarantees.[6] The hypothesis is that aggregating minority claims on the procedural level, even if the underlying rights are purely individual ones, can go a long way towards providing remedies for wider inequalities and systemic wrongs. More specifically, class action type collective procedures can aggregate minority claims, even if these are cast in purely individual terms, which would in itself make these cases more likely to succeed, resulting in a more minority-friendly legal and, as a result, political and social environment. To bring an example for why procedural aggregation matters, when the United States Supreme Court ruled in 2011 on not certifying the class of 1.5 million women employed by Walmart at the time or earlier, alleging discrimination in promotion and pay, that effectively shut down the road to effective remedy for the victims and robust incentives for reform.[7] A lot will depend on non-procedural elements, e.g. the actual standards of discrimination (outcome-based or requiring intent), but procedural rules can also play a key role in bringing about change.

[4] For a classical account, see Max Weber (1978: 37): 'the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner.'

[5] See a recent account by Hannum (2019).

[6] For more information, see https://jog.tk.mta.hu/en/enhancing-minority-rights-using-group-litigation.

[7] For a more recent account on the current state of affairs, see Saniato (2019).

The power of numbers can boost the transformative potential of law (as opposed to its strong potential to preserve the status quo), as exemplified by cases in the wake of the *#MeToo* movement. Charges against Bill Cosby went unnoticed and remained moot for decades, up to the point where a critical mass of women decided to speak up and present their cases not as isolated allegations but part of a pattern, changing public perceptions, prominently including those of criminal justice officials.

It is this line of inquiry that the first study in this special section addresses. András László Pap inquires about the potential of the harassment-based anti-discrimination approach, focusing mostly on cases from Hungary. He argues that the legal instrument which is part of the European anti-discrimination field, while not a magic solution for all ills that members of minority communities face, can go a long way in addressing cases of institutional discrimination. The approach extends the reach of anti-discrimination litigation and brings benefits in areas such as providing evidence. By the same token, however, the approach is also fraught with dangers: lowering the standards of proof creates due process concerns on the other side, for the alleged perpetrators, and it can also end up putting too much of a constraint on free speech. Pap illustrates these threats with how US universities have been dealing with campus rape and campus speech cases. Applying specific measures outside of their original intended scope where deviation from general rules is warranted can lead to solutions that are seemingly beneficial for the original goals of addressing equality and dignity based concerns. At the same time, however, the same approach might violate other human rights considerations, rearranging the field in an undesired way and ultimately undermining the cause, not only legally, but also politically, leading to public backlash.

A more basic limitation of anti-discrimination legislation is under-enforcement. Alexander Osipov in his study of Russia and Ukraine documents how what should be legal guarantees remain empty declarations. The anti-discrimination framework that, in many jurisdictions, sustains a rich field of case law, remains largely sterile both in Russia and Ukraine. This underlines the well-known but rarely followed-through observation from comparative law literature on the low success rate of copy-paste solutions (see, e.g., the critique in Legrand, 1997). The practice of resolving disputes in informal ways rather than through formal legal procedures means that a key (extra-legal, cultural, social) precondition is missing, which renders discussions around the subtleties of definitions and approaches to a great extent futile. Equality as a legal principle can play out very differently in authoritarian regimes that employ ethnicity as a ground for fighting extremism (often excessively) and co-opting minorities (in fact, minority leaders) through patronal relationships. Where fear of repression or just governmental influence discourages private actors to challenge state (sanctioned) policies, anti-discrimination enforcement might be limited to isolated instances of non-state discrimination. This limited approach might risk avoiding addressing deeper, structural forms and causes of discrimination and might amount to little more than window-dressing, yielding some successes at the margins while maintaining larger discriminatory patterns unchallenged. This means that the transformative potential of enforcing equality is not only lost, but is transformed to a pacifier, supporting the status quo instead of challenging existing power relations. The state-controlled ethnic space, inherited from the Soviet times, blocks the emergence

of a decentralized instrument — i.e. a tool that can be used by non-state actors to enforce equality — like anti-discrimination litigation. It plays, rather, into the common authoritarian reflex that seeks to relegate ethnic inequality claims to the field of 'fighting extremism' to isolated cases threatening 'social peace', as opposed to structural causes undermining equality. This is in line with centrally declared 'national programmes' and a criminal law approach where centralized filtering is secured through public prosecution. Civic engagement and civil society organizations that are so central to a functioning democracy prove also essential for rights enforcement in the field of ethnic discrimination. These are the contextual elements that can end up turning a minority-protection instrument into a tool suppressing pluralism instead of helping diversity, and democracy can suffer as a result.[8] All this is aptly illustrated by the case of Lidiya Bainova who was accused of extremist activities (a crime under Russian law) for speaking out exactly against the type of discrimination that equality measures should seek to remedy. If anything, this approach seems to be replicated in other countries in the Eastern and Central European region, a worrying trend.

Our third study, by Eszter Kováts, tracks a regional trend equally worrying for the proponents of equality. The study documents the political context of what is usually interpreted as anti-gender and even anti-human rights engagement, through discussing the Hungarian cases of government attacks on gender studies (practically banning the discipline as a university programme) and the Council of Europe Convention on preventing and combating violence against women and domestic violence ('Istanbul Convention'). She argues that under the surface, these controversies are not proxies for voicing genuine anti-women's rights convictions, but serving the goal of demonstrating a wider threat, of presenting the image of an enemy, and of an on-going cultural war. This explains how usually uncontroversial topics like fighting domestic violence can become politically controversial and the basis of ideological attacks. The direct lesson is that focusing on direct messages while accepting the 'culturalist' framing of anti-human rights attacks merely reinforces the sense of the threat, easily undermining the goals of human rights activism.

An approach that can be helpful in challenging this framework is what Nancy Fraser calls 'perspectival dualism', the recognition of both the cultural and the economic aspects as well as their interrelations. This approach also challenges the individualist approach to/of human rights (see earlier) and the universalist language that tends to hide the centre-periphery power asymmetry (a point also raised by Farkas, see below). The proposed perspective probably questions the legal approach in a more fundamental way as well. If, along Fraser's critique of grounding recognition claims in the human psyche, the psychological foundations of identifying harm and rights violations might be misleading – and in many respect this is reproduced in human rights debates about the usability of the concept of vulnerability[9] – that may undermine the notion of psychological harm that is a routine part of legal remedies, in many cases sanctioning rights violations.

[8] Also confirming Will Kymlicka's insight that securitizing always undermines minority rights (Kymlicka, 2007: 119—120). In the current Russian case, the twist is that seemingly minority-focused measures do the trick.

[9] For a short account, see Andorno (2016), as against, among others, Ricoeur (1996) or Turner (2006).

Fraser's insight into recognition/redistribution is an important reference point in the contribution of Lilla Farkas (who adds that the redistributive, class-aspect had been raised earlier by Júlia Szalai[10]), reviewing two volumes that discuss Roma rights. Crucially, the overview raises what often goes unchallenged, the very notion of 'Roma rights'. Not simply the theoretical debate, but the question of who defines what qualifies for funding, advocacy and litigation. Farkas stresses the importance of local stakeholders and even local contribution to funding, as a guarantee of sustainable efforts, but also notes how, in reality, Western donors have played a crucial role in shaping the agenda. This raises questions of independence from the domestic political context, a double-edged sword considering domestic responsiveness, or even responsiveness to local actors, and also of the limits of 'importing' anti-discrimination law. To put it bluntly, the question is to what extent *Brown* (the leading racial desegregation case in the US) can be replicated in Europe (*D.H. v. Czech Republic,* the most cited European desegregation case). This goes back to debates about the correct understanding of what role court cases like *Brown* played in bringing about change (adding the current – devastating – state of school segregation in the US[11]), but also about the question we addressed earlier on the possibility of what have been often termed 'legal transplants'. For instance, the two countries in Osipov's study, Russia and Ukraine are usually perceived as having different attitudes towards international human rights standards. While the findings there might not question agendas of external equality promotion altogether, it raises important questions about the possible short-term effects as well as about the right instruments to further equality. Similarly, in the case of Roma rights, the decision to focus on certain rights and certain approaches to promote these (in this case school desegregation litigation) should be reflective of the domestic and local context, not (or not primarily) on higher-level agendas.

It is this context that the final contribution to the special section focuses on. Lídia Balogh reviews a book that presents a rich field of civil activism in the Central and Eastern European region, where some movements could be labelled as anti- while others as pro-human rights, e.g., mobilizing against the UN Convention on the Rights of the Child in Russia, making gender-equality claims on behalf of Polish fathers, or the home birth movement in Hungary. While Balogh raises doubts whether these movements are rightfully presented as examples of the same phenomenon, the overview of this diversity itself seems useful in that it challenges the reader to think through the advantages of the political, grassroots approach to claim-making, often used as platforms for middle class privileges, illustrated with the example of the anti-vaccination movement in the Czech Republic.

To finally return to the critique of law, Farkas also hints at how far the critique of the legal approach can go, raising the existential question of human rights whether

[10] See also our special issue from last year: 'Recognition, Rights, Redistribution. In Honor of Júlia Szalai', *Intersections,* 2018/1, https://intersections.tk.mta.hu/index.php/intersections/issue/view/13.

[11] On the changing legal landscape: 'After decisive breakthroughs in the 1960s and early 1970s [...b]y the 1990s the courts were ending desegregation plans and segregation began to creep up year after year after year. Since the early 1980s, few federal funds were available to support voluntary integration and even those voluntary local efforts were undermined by the Supreme Court's decision in the 2007 *Parents Involved* case.' Orfield et al. (2019: 33).

there are 'more political, emancipatory' approaches with more potential that could and should be used. Proceeding with more caution, even if political approaches are proposed as alternatives, would we not risk too much by giving up on the role that human rights have undeniably played in mobilization so far? While the human rights approach to equality has serious limitations — some of which we have seen above — and it might even prove to be counterproductive at times, there is no guarantee that giving up on the rights focus will lead to gains on other levels.

Law is but one of the tools to raise and voice issues, present them as salient, shape public discussions and political agendas, but it is far from bringing about change in itself. Sustained extra-legal activity is necessary sometimes even before litigation starts, and it is key to actual structural changes. The call in the articles for a broader view of equality can be read as in line with the calls for the emancipation of social-economic rights and for a more sensitive approach to social and economic inequalities when making and applying law — a claim that remains controversial but is nevertheless backed up by key UN and EU human rights instruments. But the same call, less controversially, can also remind us to acknowledge the limits of law:[12] to see more clearly what law can realistically achieve, what activists can aim at through law and human rights enforcement, and where equality struggles should look beyond the legal realm. There are merits to the wilful ignorance of law, but we should all the while be cognizant of the resulting confines.[13]

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[12] For an illustrative collection around this dilemma, see, e.g., Claes et al. (2009).

[13] For a qualified criticism of 'shallower' approaches to judicial decision-making, see Sunstein (2007–2008).

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**ANDRÁS LÁSZLÓ PAP** *

# Harassment: A Silver Bullet to Tackle Institutional Discrimination, But No Panacea for all Forms of Dignity and Equality Harms

Intersections.EEJSP
2(5): 11-35..
DOI: 10.17356/ieejsp.v5i2.497
http://intersections.tk.mta.hu

* [pap.andras.laszlo@tk.mta.hu] (Centre for Social Sciences, Hungarian Academy of Sciences; Faculty of Law Enforcement, National University of Public Service)

## Abstract[1]

Using Hungarian case law, this essay first explores the singular potential in the anti-discrimination legal concept of 'harassment', as it is perceived under EU law, to tackle institutional discrimination. Following this, the author turns to the risks and limitations of the practical operationalization of institutional discrimination in human rights litigation, as well as the uniqueness and subsequent challenges the subjectified standards of evidence for harassment may pose for due process/fair trial, as demonstrated by harassment cases in American universities.

*Keywords:* harassment, institutional discrimination, subjectivity, identity, #MeToo, dignity.

[1] The research has received funding from the People Programme (Marie Curie Actions) European Union's Seventh Framework Programme under REA grant agreement No. 609427. Research has been further co-funded by the Slovak Academy of Sciences SASPRO-Programme. The research was also supported by the 'DEMOS – Democratic efficacy and the varieties of populism in Europe' H2020 RIA project, as well as the 129018 and 129245 Hungarian National Research and Innovation Grants.

This essay is structured as follows: After proposing a set of definitions concerning 'structural inequalities', 'structural discrimination', 'institutional and institutionalized discrimination' and 'harassment', I turn to exploring the unique potential in the anti-discrimination legal concept of 'harassment,' as it is perceived under EU law, to tackle the phenomenon of institutional discrimination, that is, exclusion rooted in institutional culture, or operational patterns. I will argue that the peculiarity of 'harassment' is that it is focused on the existence of an 'intimidating, hostile, degrading, humiliating or offensive environment', but it does not require a comparator and it allows entire organizations or subunits to be sanctioned along with individuals. Using Hungarian case law (NGO actio popularis litigation), I will show that the flexibility of anti-discrimination law, its unique terminology and conceptualization enables an activist interpretation to broaden its scope to cover novel, subtle and complex inequalities and grievances such as police raids, ethnic profiling, banning pride events and even hate speech. The cases cover a broad range of discrimination in terms of grounds and protected characteristics.

The second part of the article investigates the conceptual complexity, as well as the limitations and risks involved with the concept of harassment. While arguing that it indeed can be a silver bullet to tackle institutional discrimination, I will argue that it is no panacea for all forms of discrimination and social injustice: not every form of institutional discrimination can be conceptualized as harassment, not every form of discriminatory harassment will lead to institutional discrimination, and not every form of harassment amounts to discrimination.

A separate discussion is focused on the conceptual and procedural features of harassment, pointing out that legal standards relying solely on the subjective feeling of the complainant in regards of an intimidating and humiliating environment are not without risk. While it is a powerful and empowering tool for victims and members of marginalized communities, it can lead to lawlessness if there are no constraints to sanctioning based on declarations of feelings. Hence, if a petitioner can assume standing, that is, a protected personality trait or characteristic (for which in several instances of anti-discrimination legislation there is an open-ended list) it is a daunting task for the judiciary and equality bodies to set up standards and due process/fair trial guarantees.

Pointing to the confusing feature of harassment which blends discriminatory, criminal and labor law transgressions, the article discusses the specific case of a gender-based (sexual) discrimination in the *#MeToo*-era in this context, with a special focus on American higher education cases, which are arguably the frontline for (sexual) harassment cases.

The article concludes that no systemic concerns have been raised in regards of harassment charges applied in regards of other protected characteristics. Sexual harassment related occasional backlashes dominate, if not monopolize public discussion and both shift the attention from other forms of harassment, and reduce and misguide the perception of harassment, a truly unique analytic concept and a legal term which binds dignity, equality and identity claims in a complex and unique fashion, able to sanction simultaneously discrimination, employment law and criminal transgressions. The article also adds that the complexity of harassment may prove to be its self-limiting weakness, as if direct or indirect discrimination can be argued in a case, counsels would likely have it easier with any judge going down those roads.

## *1. Institutional, institutionalized and structural discrimination, and harassment: terms and definitions*

Before turning to the analysis of the intricacies of the legal concept of harassment and its potential to offer remedies for various forms of social injustice, an exploration of terminology is in place.

In social science literature, there are dozens of definitions for conceptualizing structural inequalities, marginalization, discrimination, etc. This assessment focuses on law and legal conceptualization and terminology. *Structural discrimination* is the most general phenomenon or process, and it is also the one least feasible to encapsulate in legal terms. Hence, structural discrimination is not a legal term, it is used in social sciences to describe general, systematic forms of exclusion that goes beyond the actual workings of individual organizations and institutions. It calls attention to the fact that exclusion is based on forms of social communication, constant and recurrent habits and patterns that appear in the shape of attitudes, norms, value systems and choices that result in the exclusion and systematic disfavoring of certain groups. It does not require intentional behavior, fault or intent, and might not even be apparent in formal rules of social institutions. Consider segregated housing, the negative and biased media representation of minorities, the low number of women in political bodies or senior positions in the business world or academia.

Moving to *'institutional'* and *'institutionalized' discrimination*, which I use as synonyms, several definitions are available in the literature, but so far there has been no conclusive, generally acceptable theoretical and analytical differentiation between the two terms. Dovidio (2010) emphasizes that institutional discrimination is a rule, a convention or practice that systematically represents and reproduces group-based inequality. McCrudden (1982) argues that the gist of the phenomenon is that exclusion has become so institutionalized that there is no further need for individual decisions and actions to make an institution's operation effectively exclusive. The point is that due to operational mechanisms, the system itself discriminates, and there is no need for specific decisions for exclusion, intention or bias. According to Haney-López (1999: 1717), and what has been termed as new institutionalism, a trend that goes beyond the rational choice theory of institutional sociology, institutional discrimination is a practice that directly or indirectly confirms the social status of disadvantaged groups, and 'institutions' are not necessarily organizations, but can be social practices, as well.

In the social sciences conceptualization institutional discrimination is simply used as a synonym for structural or institutionalized racism. For the purposes of this essay, the most important aspect of institutionalized discrimination is that it is not necessarily a result of deliberate discriminatory procedures or attitudes, but that of an institutional culture, an operational pattern that in effect disfavors certain social groups.

As for *harassment:* it is a truly unique concept in law. It may refer to a wide variety of behavior which can be sanctioned both by civil and criminal law. Criminal harassment usually entails targeting someone else with behavior which causes alarm or distress, or what is meant to alarm, annoy, torment or terrorize, and creating

reasonable fear in the victim for their or their family's safety. Commonly referred to as stalking, criminal harassment may include the repeated following of a person, or communication in a way that could arouse fear. Criminal harassment also includes uttering threats.

But harassment is also part of the anti-discrimination legislation. Anti-discrimination law habitually relies on the distinction between direct and indirect discrimination. Consider for example the EU's Race Directive:

> Direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin)

Although strictly speaking no actual disparate treatment is taking place, in order to broaden the concept of discrimination, harassment is usually also included within the legal conceptualization. According to the aforementioned EU Directive, 'harassment shall be deemed to be discrimination [...] when [...] conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.'

Thus, harassment is a distinct type of discrimination. Its gist is that the harasser creates or tolerates an intimidating, hostile, degrading, humiliating, offending environment that violates the human dignity of the victim. The phenomena of mobbing (harassment at the workplace) and bullying (used in connection to school and educational environments) are also recognized as such. One of the distinctive and most important features of harassment is that it is (also) the employer or a (representative of a) collective entity that can be held responsible for providing a harassment-free environment or procedure, thus it is not (only) individuals, such as police officers or employees, who can engage in this form of discrimination, but the employer, and even an entire organization as well.

There is also a third dimension how harassment surfaces, and due to its massive media representation and presence in public discourse, one of such areas will be in the center of the last section of this essay: when employers conduct disciplinary proceedings against employees or terminate contracts based on allegations of various forms of sexual harassment, following internal guidelines or policy decisions that are only indirectly connected to or based on legislative frameworks. These cases will not involve institutional discrimination directly, but it arguably involves systematic tolerance (and even encouragement) of certain conduct and a pervasive corporate culture which can be seen as form of institutional discrimination.

Harassment can be both a one-time occurrence and a pattern of procedures, or a series of continuous, recurring activities. Its corollary feature is that it does not assume an individual intention, guilt or prejudice and does not (or does not only) sanction the behavior of actual harassers or individuals participating in these

procedures, but the organization, the unit or the whole institution that allows for an intimidating, hostile, degrading, humiliating or offensive environment.

## *2. Operationalizing institutional discrimination as harassment*

The following pages turn to demonstrating the unique potential in the anti-discrimination legal concept of 'harassment,' as it is perceived under EU law, to tackle the phenomenon of institutional discrimination. To accentuate the peculiarity of 'harassment': it is focused on the existence/creation/tolerance of an 'intimidating, hostile, degrading, humiliating or offensive environment', but it does not require a comparator (direct discrimination is defined as unfavourable by comparison to someone in a similar situation), and it allows entire organizations or subunits to be sanctioned along individuals. Using Hungarian case law built on NGO *actio popularis* litigation, I will show how an activist interpretation to broaden the scope of harassment to cover police raids, ethnic profiling, administrative bigotry, such as banning pride events, and even hate speech may open novel avenues for human rights litigation, even tackling cases where no other legal remedies would be available. Arguably, the extraordinary potential and these litigation strategies are exportable throughout the Europe (and maybe even beyond), and can be used as a silver bullet.

In the following I will cite a few cases where Hungarian human rights NGOs convincingly used harassment at some point in litigation to for example combat ethnic profiling and hate speech by local politicians: in all cases where no alternative argument for legal remedy was available. Again, let us be reminded that a defining element of institutional discrimination is that it concerns the aggregate effect of formally legal actions and procedures.

In a 2011 case launched before Hungary's equality body (EBH/865/2011), the Hungarian Helsinki Committee (HHC) successfully argued that in the village of Rimóc (in Northern Hungary), 97 per cent of the 150 bikers stopped and penalized for the lack of bicycle accessories between 1 January and 5 September, 2011 were Roma (Helsinki, 2012). The case ended in a settlement between the Nógrád County Police Headquarters and the HHC. A similar project was launched in 2016 targeting the Budapest Metropolitan Police's stop and search practices concerning 400 homeless people (EBH/17/2016). Here too, settlement negotiations and an agreement was concluded, police undertook to issue a memorandum declaring that it is discriminatory to carry out general identity checks of homeless and socially disadvantaged people.

A series of complex raids on Roma in the northern city of Miskolc triggered considerable attention. Various Hungarian and European NGOs and authorities conducted a complex investigation of the practice of coordinated raids by the police the city health and social departments, child protection services, and the water and gas suppliers in the segregated areas of the city in between 15 April 2013 and 17 April 2014 involving more than 2700 properties and approximately 4500 people, examining residency documentation, livestock conditions, sanitation, etc. (AJB-1474/2014). According to the ombudsman and his deputy in charge of nationalities (minorities), the high security inspections lacked appropriate constitutional reasons and posed an unnecessary and disproportionate restriction on the right to privacy of the inspected people who were mainly socially disadvantaged and Roma. The reoccurring

inspections were focused on the segregated areas of Miskolc and were held to lead to direct discrimination based on social origin and financial status and indirect discrimination based on ethnic origin, as well as the style of communication of the inspectors was found to be offensive, abusive and humiliating. Although a report by the parliamentary commissioner (ombudsperson) for fundamental rights repeatedly stated that the raids were considered to be intimidating, the provision of harassment was not actually used in the findings. Relying heavily on the ombuds-report, the Hungarian Civil Liberties Union successfully argued the case at court. The 57-page-long landmark anti-discrimination decision issued by the Miskolc Regional Court on 2018 December 12 actually held that the authorities' behavior amounted to harassment (and ordered the city of Miskolc to pay app. 33000 Euros to charity working on desegregation and social work.) The court focused special attention on the adjacent communication on behalf of the local government, finding exclusionary, racist statements, which were also found to amount to (discriminatory) harassment.

Harassment has also been applied by the Budapest Court of Appeal in 2014 declaring that the practice of the police repeatedly banning Gay Pride March amounts to institutional harassment. The court declared that the Metropolitan Police committed direct discrimination and harassment based on sexual orientation in 2012 when they banned the march claiming it disrupted traffic in Budapest. In previous years, the police consistently issued similar bans, and all have been overruled by the court, not to mention that various other events were permitted with roughly the same routes with significantly more participants. (One of these was a GONGO-march partially financed by the government with more than a hundredfold number of participants.) The trial court found that the police engaged in harassment, because their decision led to the creation and strengthening of a hostile, degrading and humiliating environment for a group of people with regard to their sexual orientation, and such practices can increase homophobia (Háttér, 2014).

Another set of cases concerned hate speech by local politicians. Before 2012, the coming into force of the new constitution (and subsequent criminal and civil legislation), the significance of these strategic lawsuits was that according to the Constitutional Court neither criminal, nor civil law provided adequate measures to combat racist hate speech.[2] Even though not all cases led to victory, the Equal Treatment Authority (ETA), Hungary's equality body and the courts had no conceptual problems with considering this approach to invoke harassment.

The first notable case concerned racist hate speech by the mayor of a small town, Edelény. At the public meeting of the city council in 2009 that was broadcasted on the city television, Mayor Oszkár Molnár made the following statement:

> It is no secret that in the neighboring villages where mostly the Roma live, for example in Lak and Szendrőlád, pregnant women deliberately take pills to give birth to loony children so that they can claim double the amount of social

[2] 30/1992. (V. 26.) AB határozat, ABH 1992; 36/1994. (VI. 24.) AB határozat, ABH 1994; 18/2004. (V. 25.) AB határozat, ABH 2004; 95/2008. (VII. 3.) AB határozat, ABH 2008; 96/2008. (VII. 3.) AB határozat, ABH 2008. In 2008 the specialized ombudsman for minority rights, a pioneer advocate for the cause, prepared a – never adopted – draft-legislation expanding the scope of harassment explicitly to hate speech: A kisebbségi biztos javaslata a gyűlöletbeszéd elleni fellépésre, *Fundamentum* 12(2): 125–127 (2008).

> benefits and that during the pregnancy – this is new information, but I have checked it, it's true – women beat their stomachs with rubber hammers so that they would have handicapped children [...].

The statement was repeated several times in the media, it was made public on the video news website of the national television channel RTL Klub and could be viewed on YouTube. The ETA found it to be a harassment of Roma mothers and pregnant women (EBH/1475/2009). On repeated appeal, the Supreme Court overruled this decision on the grounds that even if the mayor's statements constitute harassment (which it did not rule out), there is a procedural obstacle as the statements were not made with reference to the residents of the local municipality, and the mayor can only be held responsible for discrimination in relation to them.

In 2011 the Supreme Court passed a similar review of a decision of the Equal Treatment Authority (Kfv.III.39.302/2010/8). The case was the following: After the violent death of the 14-year-old Nóra Horák in 2008 there was strong hostility against the Roma among the locals in the town of Kiskunlacháza. The city council organized a meeting with the title 'Demonstration for life against violence' where Mayor József Répás said the following:

> The rapists, the thieves, the murderers should be frightened! There is no place for violence in Kiskunlacháza, there is no place for criminals, we have had enough of the Roma violence! Kiskunlacháza and Hungary belong to the peaceful and law-abiding citizens. We will no longer let them steal our belongings, beat up the elders and deflower the children. We are still in majority.

According to the ETA, the statement caused significant fear in the Roma, because the mayor's words increased the already present hostility. The mayor published an article in the local newspaper of the city council with the title 'We have had enough!' that was published in one of the national daily newspapers. In the article, he stated that

> [s]everal brutal crimes have been revealed that had been committed by perpetrators with verified Roma origin. Still, the leftist, liberal media and the government talks about racism [...] I am sorry to say that today there is an institutionalized racism against Hungarians in Hungary. [...] We must stop the terrorizing of the society, the deliberate creation of fear. We cannot let people hide behind the mask of minority and enjoy more rights than the majority. The basis of a normal society is that people feel safe. It should be a world in which if I leave my home in the evening, later I arrive home safely, and not in a body bag.

Based on the petition of the Hungarian Helsinki Committee the ETA found that the mayor violated the principle of equal treatment with regard to the Roma residents of the town and committed harassment (EBH/187/1/2010). The Supreme Court, again, refused to recognize the scope of the antidiscrimination law. However, in retrial, the Budapest-Capital Administrative and Labour Court stated that the speech and writings of the mayor do not fall under the freedom of expression and constitute unlawful conduct (Helsinki, 2014).

In 2015 the Hungarian Helsinki Committee initiated a lawsuit against Budapest 8th District City Council and Mayor Máté Kocsis because of the harassment of refugees who had come to Hungary. The mayor made a rudely generalizing and inflammatory post public on Facebook. Mr. Kocsis wrote that

> [o]ur recently renewed Pope John Paul II Square has been completely destroyed by the migrants. They have built tents and fires in the park, they throw away their litter, run around madly, they knife people and destroy things. Never has there been so much human excrement in a public space. [...] We will protect the public property and we will guarantee the safety of our citizens with all legally available means.

According to the plaintiff, the majority of the statements were unfounded and inflammatory, capable of inciting hostile emotions, talking about not individual refugees, but generalizing the statements, stigmatizing all migrants regardless of their individual behaviour and attitude, picturing them as threats to Hungarian society, thereby detracting their social assessment. The Facebook post clearly violates the obligation of public authorities to provide equal treatment. When assessing whether the behaviour of the defendant led to the creation of an intimidating, hostile and degrading environment one must take into consideration the already extremely hostile public attitude against migrants that was proved by the atrocities against asylum seekers, the people helping them or the people who were believed to be refugees. In 2016 the Regional Court of Budapest Capital (P.22.427/2016/10), not contesting the applicability of harassment, rejected the petition on procedural grounds, arguing the city council's relationship to the asylum-seekers does not fall within the scope of the anti-discrimination act. As of October 2018, the case is on retrial and pending.

Also in 2016 in another lawsuit initiated by the Hungarian Civil Liberties Union (HCLU) the ETA found that János Majoros, the mayor of Mezőkeresztes committed an act of harassment against the Roma with his public letter published in the July 2015 issue of the local newspaper (EBH/459/5/2016). The article of the title was 'Let's stop the decrease of real estate prices' and the mayor named two reasons for the decrease. One was that people with no income managed to acquire properties in the town and they sub-let these, the other that buyers of the real estates who were paying in instalments did not pay the full amount of the price. Two paragraphs later the mayor suggested a solution to the problem and asked the people of the town that if they could, they should not sell their properties to persons of Roma origin. The public letter was also published on the website of the city council. According to the ETA 'the mayor's warning, that people should not sell their properties to Roma people is in itself degrading and violates their human dignity, but in its context the warning can create a hostile, offending and humiliating environment for the Roma' (HCLU, 2016). There was also an ombudsman report (AJB-703/2017) in the same case coming to similar conclusions.

Möschel (2019) points to two Italian cases. The first involved politicians' statements and posters from the *Lega Nord* and Silvio Berlusconi's party, which warned against voting for a certain candidate in Milan's mayoral elections because he would transform that city into a 'gypsy-town' and into Europe's largest mosque. Following NGO litigation, the court (Tribunale di Milano, Sezione I civile, 26 May 2012, no. 34318/11.) found racial harassment with regard to the comment about

Roma (but not concerning the mosque). In another *actio popularis* case against the local branch of the *Lega Nord* of a small Northern Italian town, Saronno, statements contained on seventy posters hung up in the municipal territory claiming that the town did not want to any illegal immigrants while the government organizes an invasion, the Milan Tribunal rejected discrimination claims (due to the restricted personal scope of the law), but held that the statements were clearly very offensive and humiliating and not only had the effect of violating the dignity of foreigners, asylum applicants and people having a different ethnicity than Italian citizens but also favoured a hostile and intimidating climate against them (Tribunale di Milano, Sezione I civile, 22 February 2017, no. 47117/2016.)

Recognizing hate speech as a form of harassment is not unprecedented in other jurisdictions. Schindlauer (2018: 84–85) points to three Bulgarian cases. In the first, Deputy Prime Minister for Economic and Demographic Policy Valeri Simeonov, who also served as the Chair of the National Council for Cooperation on Ethnic and Integration Issues was found to be guilty of harassment by the Burgas District Court (*K. B. and O. I. vs Valeri Simeonov*, Decision No. 1151, case No. 7094/2016, 31 July 2016), after stating in the National Assembly in 2014 that '[i]t is an undeniable fact that a large part of the gypsy ethnicity lives outside of any laws, rules and general human norms of behaviour.' The Supreme Administrative Court similarly established harassment in 2017 (*N.A. vs Mediapool Ltd.*; Decision No. 2171, case No. 12401/2015, 21 February 2017) when an online news portal failed to delete anti-Turkish hate speech comments for an entire month, and in a 2019 judgment as well, when a national TV company having failed to moderate anti-Roma hate comments on its website (*NN vs NN* Decision No. 13542, case No. 10756/2015, 12 December 2016).

Returning to Hungary, another significant decision, targeting different social phenomenon, by the Curia, the supreme court of Hungary (Pfv.IV.21.274/2016/4) concerned litigation initiated by the Hungarian Civil Liberties Union, arguing that the failure of the police to dissolve marches organized by far-right paramilitary organizations in the Roma-inhabited part of the town of Gyöngyöspata amounted to harassment. (This case too was based on a report of the ombudsman.)

Conceptualizing the lack of appropriate law enforcement action as a form of discrimination is in line with the European Court of Human Rights' practice in seeing under-policing of hate crimes as a form of discrimination (although harassment is not used in the decisions, see for example *Balázs v. Hungary* [Application no. 15529/12, 20 October 2015], *R. B. v. Hungary* [Application no. 64602/12, 12 April 2016], *Király and Dömötör v. Hungary* [Application no. 10851/13, 17 January 2017]).[3] In the *Balázs* case the Court pointed out that treating racially induced violence and brutality on an equal footing with cases that have no racist overtones turns a blind eye to the specific nature of acts which are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute discrimination, that is, unjustified treatment irreconcilable

[3] The third-party intervener, the European Roma Rights Centre submitted that this was a case of institutional racism against Roma within the State bodies, evidenced by the failure of the authorities to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin.

with Article 14 of the Convention. The vigour and impartiality required for the investigation of attacks with potential racial overtones is needed because States have to continuously reassert society's condemnation of racism in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Furthermore, when it comes to offences committed to the detriment of members of particularly vulnerable groups, vigorous investigation is required.[4] In the *Gyöngyöspata* case, while the high court rejected harassment-arguments regarding ethnic profiling of Roma in stop and search practice, it did accept the under-policing claims and ruled that such practices amount to discrimination in the form of harassment.

In another noteworthy case, the administrative court rejected appeals (6.K.31.719/2017/14) against the ruling of the equality body where it held that the city council of the town Tiszavasvári was guilty of harassment when it signed an agreement and cooperated in organizing marches with a far-right paramilitary organisation to 'regulate' its Roma population.

## *3. Assessing harassment: conceptual peculiarities, practical limitations, procedural risks*

So far I have shown that an activist interpretation of harassment may use it as a tool to broaden the scope of anti-discrimination protections to include a number of complex inequalities involving all sorts of discrimination in terms of grounds and protected characteristics (such as race, ethnicity, sexual orientation, social status, class, etc.).

This second part of the article argues that while harassment may indeed be a useful and unique tool to tackle institutional discrimination, it is not a panacea for all forms of discrimination and social injustice, because (i) its scope and application terrain is inherently limited (as not every form of institutional discrimination can be conceptualized as harassment, not every form of discriminatory harassment will lead to institutional discrimination, and not every form of harassment amounts to discrimination); (ii) the very concept of harassment as it encompasses and blends criminal, labour and antidiscrimination law dimensions is not entirely uncontroversial; and (iii) the uniqueness of its operational principle relying on subjectivity also carries risks. Hence, the second part of the article focuses on the limitations and controversies involved with the concept of harassment. While earlier discussions

[4] The Court held that for the investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means; the authorities must have taken all reasonable steps available to them to secure the evidence concerning the incident. When investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. This obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and is not absolute. The authorities, however, must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence.

involved a diverse set of grounds for discrimination, the subsequent analysis focuses on cases involving gender-based (sexual) discrimination. The case of sexual harassment is arguably special and particular for several reasons: (i) the way how the blending of criminal, labour and anti-discriminatory conceptualization of harassment are operationalized in legal practice in this field has not (yet) been applied in other fields involving other grounds of discrimination. Also, (ii) socio-political developments, such as the *#MeToo* movement put sexual harassment in the centre of public discussion, also accentuating the potential dangers and occasional backlashes in legal practice. Furthermore, a prominent and widely publicized field of sexual harassment case law relates to a very particular area, American higher education institutions, which arguably can leave faculty and students without adequate legal protection.

Despite this atypical nature of sexual harassment (which carries the danger of reducing and monopolizing discussions) it is still a useful case to demonstrate the complexities of the legal concept of harassment, as it has been the leading example of how dignity, equality, and identity claims are bridged and blended, which is a general and unique defining feature of harassment. Let us now turn to the discussion of these issues.

### *3.1 Harassment and institutional discrimination: inherent and implied limitations*

The previous pages have argued that harassment can serve as a unique tool to counter various forms of exclusion and social inequalities, cases of institutional discrimination in particular, which would not easily be covered by the classic, 'direct' or 'indirect' forms of discrimination. This nevertheless does not cover all forms of discrimination-related injustice for the following obvious reason: besides (i) cases where institutionalized discrimination is harassment; (ii) there are forms of institutionalized discrimination that cannot be conceptualized and operationalized as harassment; and (iii) there are various forms harassment that amount to discrimination, but not institutional discrimination; and (iv) there are also forms harassment that are not discriminatory.

The previous section brought examples for successfully argued cases for (i), and as a thought experiment we can extend the list of potentially successful similar cases where there is direct personalized emotional harm petitioners can argue to have been induced by identifiable agents in direct interaction with them. Consider judges sitting in courts treating marginalized defendants in a degrading manner; non-inclusive practices in cafeteria offerings (not providing Halal or Kosher food) in schools or prisons (where going out or ordering in is not an option); allowing to display, or in other cases prohibiting religious symbols or clothing in certain public venues; or (in the light of American student-grievances) even not having trigger warnings and 'safe spaces' safeguarding from 'microaggressions' in the classroom.[5] Intimidation in the educational context has also been claimed to be caused by instructors using slang or examples or exam questions that are unknown to students from certain socioeconomic or cultural backgrounds; holding office hours or scheduling significant

[5] These would include the prohibition of discriminatory language as well as hand gestures and other forms of intimidating disagreement.

learning opportunities or exams not only during religious holidays, but also at times commonly used for work-study jobs or athletic practice.

It is not easy to distinguish these cases in a theoretically sound way from (ii), institutionalized discrimination that cannot be operationalized as harassment in the anti-discrimination legal logic and term. In some cases litigators would just either be in, or out of luck arguing for it. Harassment presupposes a certain litigable action, practice or behaviour which distinguishes it from 'simple' structural discrimination conceptually encoded in the workings of an institution. The more distant, indirect the attributable action and the general the harm will be, the more chances for a successful litigation will decrease. Also, it may be very difficult, sometimes even impossible to establish and measure personal harm caused by intimidation, fear and degradation. Hence, the following phenomena probably fall under the cluster of *non-harassment institutional discrimination:* the systematic under-qualification of hate crimes (when the investigation and the indictment is based on less serious charges); residential or educational segregation (including the case when Roma children are classified as students with special needs, or when standardized tests that are used for classification contain racial or ethno-cultural bias); the legal framework that engages in (racially discriminatory) gerrymandering and enables abuse (in the form of ethno-corruption) in electoral law (see, for example, Pap, 2017); the well-documented instances of the displacement of Roma children from their families to state care; when the organizers of academic events set up 'manels' (panels consisting only of males); the negative media representation of minorities, etc. The ever-long list of bias encoded in legislation, be it direct or embedded in terminology in a subtle way also belong here and to bring examples from a variety of jurisdictions, it can arguably include rules on jury selection; three-strikes- and drug laws; sentencing guidelines; custody decision patterns (including the accumulation of child support debts for incarcerated African American males); the cis-heterosexual conceptualization of marriage; citizenship laws irregularizing certain populations; the legal acceptance of prostitution; culturally biased public holiday-policies, etc. One may even bring here an insensitive approach in memory politics, the way how history in books is represented, or the lack of reflection on certain authors' involvement with slavery, the holocaust, but also not renaming street names, college buildings, fraternities, sports clubs or removing monuments and statutes for similar reasons. The use of historical flags such as the American confederate (*Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. [2015]) or the Hungarian 'Árpád stripes' (reminiscent of the Hungarian Arrow Cross Party of 1944–45 and therefore having fascist connotations) can arguably be intimidating, offensive and degrading for certain groups of the population, but it would likely be difficult to litigate such cases.

As for (iii), *non-institutional discrimination harassment*, here the criteria is that discrimination is committed by a particular action and not a general pattern or operational mechanism. Besides 'classic' sexual harassment or bullying, this could include the case one of my colleagues told me about, when a Roma plaintiff made a complaint for a hate crime and the police officer who recorded the complaint was wearing a T-shirt with the inscription of a music band that can be connected to extreme right organizations. I believe that the criterion for creating a humiliating, degrading environment was also fulfilled by the poster campaign of the Hungarian

government in 2015 against migrants – who were, in reality, mostly refugees and asylum seekers.

The *Handbook on European non-discrimination law*, published by the EU's Fundamental Rights Agency (FRA) in 2018 brings a number of further examples (FRA, 2018: ch. 2.4). Such was the case before the Hungarian Equal Treatment Authority, where a complaint was made about teachers who threatened Roma students that their misbehaviour at school will be notified to the 'Hungarian Guard', a paramilitary far-right organization. It was found that the teachers had implicitly endorsed the racist views of the Guard and created a climate of fear and intimidation, amounting to harassment (EBH/654/2009, cf. FRA, 2018: 66–67). In 2012 the Grand Chamber of the European Court of Human Rights issued its judgment in the case of *Catan and Others v. Moldova and Russia* (nos. 43370/04, 8252/05, and 18454/06) in a case concerning Moldovan nationals living in the Moldovan Republic of Transdniestria (MRT), a separatist entity that split from the Republic of Moldova in 1990 but that has not been recognized by the international community, ruling for the applicants who claimed that the MRT's prohibition of using Latin scripts in education, and allowing a systematic campaign of vandalism in the school, along with arresting and profiling protesting parents and threatening them with the loss of their jobs and parental rights amounted to a systematic campaign of harassment and intimidation of those participating in schools using Moldovan as the language of instruction. A separate, repeated discussion is needed to discuss (iv) the scenario where the legal term and concept of harassment is used to sanction behaviour that is not actually discrimination.

### *3.2 Harassment and discrimination: overlapping but not interchangeable; bridging dignity, identity and equality claims*

The conceptual peculiarity of harassment is twofold. As described above it blends transgressions sanctioned by three different fields of law: criminal, anti-discrimination and employment law when employees face disciplinary proceedings based on allegations of (mostly, but not necessarily limited to) sexual harassment, following internal guidelines or policy decisions that are only indirectly connected to or based on legislative frameworks.

The second uniqueness of harassment relates to the complexity of the relationship between identity, equality and dignity claims and policies, and the way in which law conceptualizes and merges the three (and this is also intertwined with the intricate relationship between identity recognition and identity politics: the politics of recognition targeting cultural and symbolic injustice and identity politics). This feature of harassment is an attributable to legislative developments pertaining to gender and sexual harassment in particular but there is no legal indication that it would not be a generally applicable feature of harassment irrespective of the ground (i.e. the protected personality trait or characteristic).

Fraser (2000) shows how, at least in the case of gender, equality includes both recognition and redistribution (thus: equality) claims, and in political (and often legal) discourses (even concerning discrimination) there is a shift from equality to dignity, and, confusingly often also an uncritical, unreflected and unexplored blending of the two. What we actually see here is an interesting back-and-forth bouncing, rondo-like

recognition of these commitments. Since Catherine McKinnon's (1979) seminal work in the 1970s, it has been widely recognized that that dignity harm can be conceptualized as a form of discrimination, and by the 1990s in Europe several legislative documents formally recognized and acknowledged this link, in particular in the context of gender based discrimination and sexual harassment. A 1991 Recommendation by the European Commission on the protection of the dignity of women and men at work (Commission Recommendation 92/131/EEC of 27 November 1991) held that

> sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct. [...] It is unacceptable if such conduct is unwanted, unreasonable and offensive to the recipient; [...] and/or [...] creates an intimidating, hostile or humiliating working environment for the recipient. [...] Sexual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive, although one incident of harassment may constitute sexual harassment if sufficiently serious. [...] conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, is unacceptable if [...] creates an intimidating, hostile or humiliating work environment for the recipient; and that such conduct may, in certain circumstances, be contrary to the principle of equal treatment.

As we can see, here the language links dignity harms with the concept of discrimination, although not unconditionally, as it uses terms like 'can' or 'in certain circumstances.' Nevertheless, the link and connection between dignity and equality, incentivized and inspired by sexual harassment legislation, has become a standard form discrimination for all protected characteristics. (Note that the cited EU law definition for racial harassment was only adopted in 2000).

This subsection highlighted the first conceptual peculiarity of harassment: its extreme complexity. Not only does it include and blend sanctions from three different areas of law, but the harms it targets and aims to remedy are also very diverse and different.

### *3.3 Harassment and subjectivity: inherent risks*

The other conceptual peculiarity of harassment concerns how it operationalizes subjectivity in legal conceptualization in a unique fashion. It is quite atypical, and certainly challenging for legal procedures to incorporate subjective feelings. While it is a powerful and empowering tool for victims and members of marginalized communities to seek remedies in regards of an intimidating and humiliating environment, without proper guidelines for legal standards and procedures, the reliance on subjectivity is not without risks. Hence, if a petitioner can assume standing, that is, a protected personality trait or characteristic in relation to which harassment charges can be brought (and for which in several instances of anti-discrimination legislation there is an open-ended list), it is a daunting task for the judiciary and equality bodies to set up standards and due process/fair trial guarantees. It can,

however, lead to lawlessness if there are no constraints to sanctioning based on declarations of feelings.

For comparison, in asylum law, standards have been developed to ascertain and operationalize objective standards for 'well founded-ness' in its central concept of 'well founded fear of persecution' – on the basis of which refugee status should be granted. Here, there is an intricate system of 'objective', pre-established country-specific fear (that is: persecution)-factors, on the basis of which the subjective feeling of fear from persecution can be established. The asylum-seeker will make a claim and recipient authorities will carry out a validation procedure, first establishing whether the group in question is actually in danger of persecution, and second, whether the claimant is a member of the group. The production and reception of the refugee legal narrative is a complex phenomenon involving several narrators with sometimes conflicting stories and objectives (Zagor, 2014).

Although the 'hostile, intimidating environment' conceptually relies on subjective standards, the law is not entirely silent on benchmarking. Referring to the case law of the European Union Civil Service Tribunal, the FRA Handbook sets forth that for a 'conduct to be considered as harassment, it should be perceived as excessive and open to criticism for a reasonable observer of normal sensitivity and in the same situation' (FRA, 2018: 65). This seems to introduce some sort of objective standards. However, the definition continues, and softens the criteria: 'the harasser does not have to intend to discredit the victim or deliberately impair the latter's working conditions. It is sufficient that such reprehensible conduct, provided that it was committed intentionally, led objectively to such consequences', i.e. that the employer felt this way.[6] According to the FRA, for harassment, 'there is no need for a comparator to prove it, as harassment in itself is wrong because of the form it takes (verbal, non-verbal or physical abuse) and the potential effect it may have (violating human dignity)' (FRA, 2018: 66). This 'potentially occurring effect' unfortunately is an utterly vague description, not helping in crystallizing legal standards.

Having shown general peculiarities of the legal conceptualization of harassment, and also having noted the particular role gender-based discrimination played in the development of its current understanding, the prevalence and relevance of the *#MeToo* movement calls for a separate discussion on sexual harassment. The reasons for this are twofold: (i) sexual harassment provides a vivid example of the legal and political dangers, inherent in the concept of harassment, which stems from the blending of criminal, labour and anti-discriminatory frameworks. It is (ii) also special in the sense that in certain fields, in particular in American higher education cases, legal practice has been quite controversial and (iii) academic, legal and political

[6] The European Union Civil Service Tribunal held for example that an appraisal of the performance of an official made by a supervisor, even if critical, cannot as such be classified as harassment. Negative comments addressed to a member of staff do not thereby undermine his personality, dignity or integrity where they are formulated in measured terms and are not based on allegations that are unfair and lacking any connection with objective facts. It has also held that the refusal of annual leave in order to ensure the proper functioning of the service cannot, as such, be regarded as a manifestation of psychological harassment. Case T-11/03, Afari v. ECB, ECLI:EU:T:2004:77 and Joined Cases F 106/13 and F 25/14, DD v. European Union Agency for Fundamental Rights (FRA), ECLI:EU:F:2016:205, cf. FRA (2018: 140).

discussions on this arguable backlash along the *#MeToo* movement put sexual harassment in the frontline of public debates.

### *3.4 Sexual harassment: From American higher education to the #MeToo movement*

Sexual harassment-related cases, be they legal or 'political/ethical', are often complex and multilayered in the sense that they may involve a form of sexual violence (that is unpermitted or unwelcomed physical advances), yet sexual harassment also includes scenarios in which verbal or other non-physical utterances create the intimidating, hostile, degrading, humiliating or offensive environment. Thus, it involves at least two types of conduct: one that has always been illegal, amounting to even criminal sanctioning in the case of rape, sexual assault or coerced sex, but it may also include speech that in a relatively short period of time became socially and politically unacceptable. Verbal harassment creating an intimidating environment mostly came up in American higher educational contexts, and mostly pertaining to gender identity or sexual orientation, but also in the context of race in the public and legal discourse. As we will see, the line between law and politics is often blurred, as charges for sexual harassment – even if unsubstantiated or confirmed by judicial proceedings, or often even by a mere police investigation – are sufficient reasons to terminate employment contracts. This essay concerns primarily the legal aspect of harassment claims and sanctioning. However, ceasing contracts in the media, the art world or publishing (see, for example, Alter, 2018) over allegations (and not findings or judicial rulings), which are triggered to save the reputation of the employers may have legal relevance in adjacent, indirectly related litigation. Hence 'political correctness', and its manifestation in 'cultural appropriation', the shadow of harassment allegations, or the failure to prevent retaliation and to create 'safe places' will carry property interest.

The case of American higher education is not discussed here because the author would believe that academia is the most important or pervasive context (although few professionals are fully exempt from cognitive biases when it comes to their field). The overall impact of the *#MeToo* movement in Hollywood, or even in politics is much higher and much more visible. Most of these cases are, however, extra-legal in the sense, that contracts are being cancelled, nominations are being withdrawn, resignations are handed in without formal legal procedures. The importance of higher education cases lies in the fact that here the endurance of law is tested within social, cultural and political developments.

The legal, constitutional and policy ramification of sexual harassment procedures will therefore be intricate and robust. The following questions require special attention:

*First*, there is a conceptual and terminological *inconsistency in the legal provision* of harassment as an anti-discrimination clause, which allows for melding verbal transgressions and minor, often culturally ambiguously coded physical advances with criminally sanctionable rape and sexual assault. Kipnis (2015a) points for example to the, in her account troubling, terminology of referring to rape victims as *survivors*, a term previously reserved for holocaust victims. Echoing her assessment of a 'panicky conflation' where 'gropers become rapists', Julia Hartley-Brewer underlines the dangers of generalizations concerning 'rape culture' which is 'characterised by a

"continuum of abuse" – running from locker-room banter to gang rape' (Various Authors, 2017).

In general, there is an inherent difficulty in striking a balance between due process requirements for the accused (harassers) and narrowly tailored commitments to combat secondary victimization and the subsequent chilling effect of silencing and non-reporting (see, for example, Cortina and Berdahl, 2008).

*Second*, as Dobbin and Kalev (2018) show, the *adversarial*, law-based formal *grievance systems are* most often intrinsically *inadequate* for sexual harassment, as victims do not trust the process, they fear social and job-related retaliation,[7] and formal complaints actually rarely lead to the removal of the harasser and the victims will continue to coexist in the same space. Also, in many cases victims are not interested in severe sanctioning, they mostly want the practice to stop. However, the non-legal sanction-based ombuds-type mediation, which employers are incentivized to follow to avoid high profile, public procedures and costly lawsuits, run the risk of depriving victims of legal remedies by forced private arbitration procedures (see the *IBM* and *Uber* cases and Fowler, 2018).

*Third*, in a certain specific environment, such as *higher education*, the location of the most visible and widely discussed harassment cases, there is an inherent conflict between aspirations for an intimidation-free safe place, and academic freedom: which, besides *free speech* being a fundamental constitutional value and an individual right, is also a specific professional, educational value. It is the core of the free speech doctrine in all jurisdictions that up to a certain degree, and here the margin of appreciation is usually quite broad, even offensive, shocking speech should not be censored and outlawed. The required degree of tolerance for artistic and political speech varies depending on the manner, time and place of the speech, and for the workplace the standards may very well be more stringent. There are also certain exceptional content-based limitations on free speech: it is a habitual practice to introduce (even criminal) sanctions on holocaust-denial, blasphemy, or the violation of other, specific, historically rooted sensitivities concerning the dignity of certain communities. One may argue that such exceptional protections need to include verbal sexual (or other protected characteristic-based) harassment. At this point, however, no straightforward judicial or political declarations for this type of exceptionalism have been set forth.

Since, as mentioned above, the field of American higher education is arguably a visible frontline for harassment (legal, or para-legal) cases it is important to provide an overview of the legal and socio-political landscape. American universities have become the social and political laboratory where the delicate interplay between legal and political/cultural responses to changing attitudes and social practices (i.e. political correctness and the emergence of calls for trigger warnings and safe places from 'microaggressions' and other forms of cultural insensitivity) surfaces. University related harassment cases have received the greatest attention (not only from the media, but also in terms of legal practice), and arguably, produced controversial cases and trends, and this was intrinsically connected with debates on the 'snowflake' generation's peculiar role in the commercialized educational sector. True, in the past years higher education culture developed hypersensitivity against any form of an unwelcoming or

[7] A US federal survey indicated that 66 per cent experienced it, see Dobbin and Kalev (2018), quoting Cortina and Magley (2003).

intimidating environment, going well beyond prohibiting discriminatory language and actions.[8]

The legal background for higher educational sexual harassment cases in the US is Title IX of the Civil Rights Act, which states that 'no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance'. Title IX defines sexual harassment as 'unwelcome conduct of a sexual nature' as long as the behaviour is serious enough to impact the victim's access to educational opportunities by creating a hostile environment. Facing federal and civil penalties, schools are required to conduct a 'prompt, thorough, and impartial' investigation into any allegation of sexual assault reported on campus. Thus, an originally antidiscrimination provision, following the interpretation that such conduct may create a hostile environment was expanded to investigate sexual assaults, issues that may include criminal behaviour falling under the competence of the police. It is important to note that these cases will typically involve alleged actual physical contact of some sort (and go beyond non-verbal intimidation).

The Office of Civil Rights (OCR) is the federal agency charged with enforcing federal antidiscrimination statutes, and in 2011, it issued an official correspondence (called Dear Colleague Letter (DCL)) regarding campus *rape*, which laid out the minimum grievance procedures by which schools must comply for cases involving sexual violence (Kirkpatrick, 2016).

The DCL mandated that schools provide notice to students of the procedures and outcomes, perform adequate and impartial investigation into complaints, develop an equitable process in which parties have an equal opportunity to speak and present evidence, and ensure that the proceedings are facilitated by individuals who receive annual training on sexual violence issues. Other than these broad guidelines, the OCR fails to specify how schools should carry out these mandates. As a result, some schools are conducting such disciplinary hearings differently than others. (Kirkpatrick, 2016: 165)

As Kirkpatrick (2016: 165) points out, out of the nineteen-page document, a mere two sentences address due process rights for the accused. 'The document even urges that steps to afford due process rights to the accused should not restrict or delay protections for the Complainant' and 'strongly discourages institutions from allowing the accused to cross-examine the complainant.' Failing to comply, universities risk losing federal funding. Generally discouraging to pay too much attention to the due process rights of the accused, the DCL set forth the so called 'preponderance of the evidence standard,' used in civil cases, requiring (50.01 per cent certainty) to resolve sexual assault accusations. Using a higher burden of proof, such as a clear and convincing evidence standard, applied in criminal cases, the schools arguably would

[8] See for example accounts of Laura Kipnis arguing that feminism became hijacked by melodrama and students are committed to vulnerability and conditioned to infantilization, and that they have no agency in what happens to them, and anyone with a grudge, a political agenda, or a desire for attention can easily leverage the system. She argues that now emotional discomfort is regarded as equivalent to material injury (to be remediated) and the climate on campuses is so accusatory and sanctimonious and chilling that open conversations are practically impossible (Kipnis, 2015a; 2015b; 2017).

be in violation of Title IX. A typical hearing process may end in expelling students and firing professors, and as interim measures banning from campus (if they were living there, forcing them to move) and suspension (with or without pay). The disciplinary process is otherwise the same 'that governs alleged violations of university codes of conduct, such as the plagiarism of a term paper or the theft of a roommate's belongings' (Kirkpatrick, 2016: 166). Most operate like courts, using a panel of decision makers who hear and weigh evidence, determine the facts, and decide sanctions. There is extensive but contradictory judicial practice on these procedures (following litigation contesting school decisions): universities are under no clear obligation to allow the accused to have legal counsel present, although they usually allow a fellow faculty member (called faculty counsel) to be present, and there is also no legal requirement to inform the accused students or faculty of the specific charges or the discovery of any evidence, and the right to cross-examine witnesses or the complainant is also not provided (Kirkpatrick, 2016: 167).

Kirkpatrick (2016: 167) shows how, 'courts even differ as to whether or not hearing committee members need to recuse themselves if they are familiar with the accused or complainant and have a conflict of interest'.[9] In a typical sexual assault hearing, the university will first send notice of the charge to the accused and ask him or her to respond. The accused (and maybe but not always complainant) will then appear before a panel akin to a jury, which is typically comprised of disinterested tenured professors, sometimes along with students, faculty, and staff.

> Panels often use the same Title IX coordinator as investigator, prosecutor, defender, jury, and judge. [...] In addition, the panels are made up of university employees who most likely have an innate interest in the claims [...], as acquitting the accused student carries with it the threat of OCR costing colleges over half a billion dollars in federal funding. (Kirkpatrick, 2016: 172)

Appeal is not always available, but most often there is a fairness hearing review committee, the decision of which then can be appealed to the President, and then Board of Trustees (but only) for procedural errors.

It is a twist that in several cases faculty members can actually be sanctioned for retaliation, even if it merely involves an academic commentary on a case, be it even a mere tweet (see, for example, Smith 2003). Laura Kipnis of Northwestern University provides a broadly cited documentary of what she labels as a witch hunt against her by 'allowing intellectual disagreement to be redefined as retaliation' (in particular attending disgraced philosophy professor Peter Ludlow's dismissal hearing) (Kipnis, 2015a; 2015b; 2017).

In sum, students and professors can be expelled (with very slim chances or re-employed in or able to transfer to another institution) without even a police report ever filed, by a committee the members of which are not impartial (due to their position) and actually lack any formal training in dealing with sexual misconduct,

[9] Citing, for example, Osteen v. Henley, 13 F. 3d 221 (7th Cir. 1993), Winnick v. Manning, 460 R. 2d 545, 549 (2nd Cir. 1972), Dillon v. Pulaski County Special School District, 468 F. Supp. 54 (8th Cir. 2009).

effects of alcohol or even law (Kirkpatrick, 2016).[10] And these judgments are passed not (only) for engaging in alleged physical interaction, but also for a mere commentary. Here and by this, the more general concept and conceptualization of harassment is revisited.

In 2018 the Trump-administration projected that the 6000 colleges and universities conduct an average of 1.18, and the 17000 elementary and secondary schools 3.23 sexual harassment investigations annually (Green, 2018b). The Department of Education foreclosed a proposal to redefine federally regulated sexual harassment narrowing it down to 'unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity.' The proposed rules would hold schools accountable only for formal complaints filed and for conduct said to have occurred on campus, and a higher legal standard to determine whether schools improperly addressed complaints would also be allowed, leaving it in the schools' discretion to choose between 'preponderance of evidence' or 'clear and convincing' evidentiary standards. Secretary DeVos actually rescinded the 2011 DCL, assailing the guidelines as federal overreach that coerced schools into setting up quasi-judicial systems fraught with inconsistencies. The proposed rules would expand the accused perpetrators' right to use mediation, request evidence and cross-examine.[11]

It should be noted that the peculiarity of the higher education cases is not independent from how the business interests in this highly lucrative enterprise, where students are customers and consumer satisfaction is paramount, and avoiding classroom friction with unpopular is an existential necessity for adjuncts, instructors, and part-time faculty with renewable contracts, who make up a majority of teaching staff (Kipnis, 2015a).

The alarming feature of the American cases is how the application of the (essentially legal) concept of harassment is applied in an extra-legal arena in terminating contracts, ending careers, etc. without due process findings and investigations by competent authorities. And this is where we revisit the terrain of politics in the (social) mediatized world, where social progress is often blurred by reductionism, and moral panic.

Lídia Balogh (2017), for example, demonstrates how the European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU (2017/2897(RSP)) provides a continental case for the moral panic-induced conceptual and terminological chaos: first, the European Parliament throughout the text repeatedly uncritically bundles non-criminal conduct such as harassment and other forms of discrimination, with rape, physical violence, forced marriage, female genital mutilation and honour crimes. Sexual harassment and sexual abuse are identified as forms of gender-based violence. Furthermore, as if a grievance competition would be at place, sexual harassment is identified as 'the most extreme [...] form of gender-

[10] It also needs to be added that '[e]ven though most of these cases involve the voluntary consumption of alcohol, the accused male may not use it as a defense whereas the female complainant can escape scrutiny from it' (Kirkpatrick, 2016: 164).

[11] Cf. Green (2018a): 'The Obama administration [...] strongly discouraged parties from personally questioning each other during hearings, believing it would be "traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment".'

based discrimination.' Also, the resolution indiscriminately 'Welcomes initiatives such as the #MeToo movement that aim to report cases of sexual harassment and violence against women; strongly supports all the women and girls who have participated in the campaign, including those who denounced their perpetrators.' Besides endorsing an informal movement (lacking identifiable agents) this unselective support for all women making accusations, in principle includes even fraudulent, malevolent ones, and hence, arguably is problematic.

On a final note on sexual harassment and *#MeToo*, the occasional controversial use, or even as some argue, abuse in relation of sexual harassment can and should be seen as a necessary side effect or externality of the massive shift in how gender equality, gender roles, and the contours of social interaction changes in Western societies, which includes the recognition and rejection of certain deep running particular behavioural patterns.

The detailed discussion of American sexual harassment cases in this article is prompted by several reasons. First, since sexual harassment (and this is the main message of the *#MeToo* movement) is so pervasive and systematic in many facets of the workplace that it may actually amount to institutional discrimination. Second, the *#MeToo* movement, as well as the arguable backlashes seem to dominate, if not monopolize public discussion and actually shifted attention from other areas of workplace related harassment. A third reason lies in the fact that although there are no reports of, or systemic fair trial concerns have been raised regarding harassment-related legal practice applied with regard to other protected characteristics, there is no conceptual or textual gag rule that would limit potential backlashes to sexual harassment.

Summing up this section, harassment is an exceptionally complex and multifaceted legal concept. It may be added, its uniqueness may prove to be its weakness as well, as it may potentially be self-limiting. If there are other feasible alternatives such as direct or indirect discrimination to build the cases on, it will be easier for counsels to argue their case in front of a judge – especially in continental jurisdictions, with less room for judicial activism and savour for abstract, theoretical argumentations. Although the above described institutional discrimination-targeting harassment cases are remarkable, and I believe in a global export-potential, we need to be aware of its limitations. Apparently, institutional discrimination is an important analytical category, but due to its theoretical and doctrinal complexity, its application in public policy planning is likely to be more successful than in human rights litigation.

## *4. Concluding remarks*

To conclude: harassment is a truly unique legal concept which binds dignity, equality and identity claims in a complex and unique fashion, encompassing sanctions for criminal, discriminatory and employment law transgressions, and conceptualizing and operationalizing subjectivity in a singular fashion. The article showed that the concept is no panacea for all forms of social injustice, and has several technical and conceptual limitations. However, the occasional controversial legal practice of sexual harassment (where fair trial procedures potentially lack guarantees) should not blind and monopolize discussion on this multifaceted analytic concept and a legal term, which can work as a unique tool to combat institutional discrimination in regards of a broad

range of protected characteristics in the legal, as well as the broader, political and cultural sense. While the *#MeToo* movement provides a vivid example for the latter, this article overall targeted the former.

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ALEXANDER OSIPOV *

# Agendas of Non-discrimination on Ethnic Grounds in the Post-Soviet Space: The Cases of Russia and Ukraine

Intersections.EEJSP
2(5): 36-59.
DOI: 10.17356/ieejsp.v5i2.486
http://intersections.tk.mta.hu

* [aosipov1@gmail.com] (International Centre for Ethnic and Linguistic Diversity Studies; Centre for the Study of Ethnic Conflict, Queen's University Belfast [visiting])

## Abstract

The article analyses discursive and practical activities by governmental and non-governmental actors in Russia and Ukraine aimed at the conceptualization and promotion of human equality on ethnic grounds as non-discrimination. The author aims at analyzing the reasons why anti-discrimination instruments are in low demand vis-à-vis concerns about ethnic xenophobia and conflicts. The author argues that the given societies have limited incentives and institutional capabilities for the creation and effective application of anti-discrimination mechanisms. The ruling elites have no reason to regard ethnic inequalities as a challenge; civil society activists and ordinary claimants might not treat non-discrimination as an efficient remedy; and there is no commonly accepted image of injustice in inter-group relations. Moreover, the marginality of anti-discrimination agenda in the post-Soviet space begs questions about the said mechanisms' universal applicability, since the latter require pre-conditions that are not guaranteed.

*Keywords:* equality, discrimination, ethnicity, post-Soviet countries, anti-discrimination law.

## *1. Introduction*

Expressions like 'human equality' persist in all international human rights instruments and national legislative frameworks. The character, scale and consequences of related problems and responses to them vary and thus deserve a region-specific analysis. This article addresses the so-called post-Soviet space which can be defined as all former constituent republics of the USSR except for the Baltic States, which are not the Soviet Union's successor states under international law. Most post-Soviet countries have an ethnically diverse population; many have experienced violent ethnic conflict and have a record of ethnicity-based exclusionary and discriminatory practices. The post-Soviet space is also of special interest for other reasons. Social equality in general and, in particular, on ethnic grounds was a key element in official rhetoric throughout the period of communist rule, and nationalities policy for decades was aimed at the equalization of social conditions for different ethnicities as well as the suppression of ethnic hostilities. Therefore, equality agendas that have been developed over decades in a specific way must not be alien to the elites and common citizenry of post-Soviet countries.

The questions addressed below are about how and by whom issues of equality are raised and handled in the region as an agenda of (non)discrimination. The term 'agenda' is understood in a narrow sense as discursive and practical activities aimed at the conceptualization and promotion of human equality on ethnic grounds. Equality can be approached from different perspectives, and this article concerns one of the major frames for the conceptual and institutional organization of equality protection and promotion; that is, the prevention and elimination of discrimination.

The article rests on two case-studies and concerns Russia and Ukraine, thereby facilitating comprehension of the major features of equality agendas in the aftermath of the Soviet Union's breakdown. Russia and Ukraine are the biggest successor states of the USSR in terms of population size, and they have a relatively large proportion of ethnic minorities. Russia has an authoritarian and increasingly repressive regime, while Ukraine is a pluralist (albeit unconsolidated) democracy. While Russia is gradually reducing its cooperation with international and European organizations and denouncing its international obligations, Ukraine is striving to confirm its pro-European choice in the framework of an Association Agreement and through institutional reforms aimed at rapprochement with the EU, including the development of an anti-discrimination framework.

The study is of a multi-disciplinary character; it strives to combine a normative analysis of the respective domestic constitutional and legal provisions of the countries in question with policy analysis of initiatives and actions of public and private actors that deal with ethnic issues. The study addresses the identification and consideration of the major modes of problematizing the issues of ethnic discrimination, related institutional settings, and policy patterns. The empirical basis of the study is the author's analysis of legal norms, case-law, official statements, and documents of civil society organizations from the year 2000 onwards in Russia and Ukraine. The start of the 21st century was a clear landmark in terms of the anti-discrimination agenda in

Europe and worldwide. The 2000 EU Equality Directives[1] and preparations for the World Conference against Racism (2001) mobilized civil society organizations and provided an impetus for professional discussions in the countries in question.

Discriminatory practices and claims of discrimination as such are not scrutinized in this article. It is assumed here that there are legitimate reasons for concern about inequalities on ethnic grounds in both countries, and the issue addressed here are those activities aimed at the amelioration of the situation. There is routine discrimination in the labor market, education and housing against stigmatized groups: basically Roma and people originating from the Caucasus, Central Asia and other countries of Asia and Africa. A specific problem is the ethnic profiling practiced by law-enforcement (see CRI(2019)2, paras. 92–97). In Russia after 2000 the state authorities resorted several times to persecution campaigns against certain groups at the national and regional level (such as Georgians, the Meskhetian Turks, Tadjiks and Chechens) (Compliance, 2008).

## *2. Methodological remarks*

In theory, there can be many ways to conceptualize equality in general and equality on ethnic grounds in particular. A variety of answers may be given to the questions who may be compared with whom, according to what criteria certain kinds of treatment or social asymmetries are assessed as illegitimate, and what goals and pro-equality measures are deemed acceptable (Fredman, 2002: 7–15; Nikolaidis, 2015: 9–49). One of the dominant approaches employed and proliferated worldwide rests on the notion of discrimination.

One can barely talk about a comprehensive and consistent doctrine of non-discrimination; rather, there is a frame with an evolving content. 'Frame' is understood here as a 'scattered conceptualization' (Entman, 1993: 51), or a way to contextualize certain social phenomena and to define their primary characteristics in public communication (Benford and Snow, 2000). The fundamental premise can be denoted as the justicization of inequality; in other words, the basis is judging and overcoming social inequalities by legal means. The framework includes several basic theoretical postulates and respective practical approaches (Bell, 2009; Ellis and Watson, 2005):

(1) Direct discrimination; i.e. unequal treatment of individuals on certain grounds in a similar position without justification must be prohibited.

(2) Indirect discrimination; i.e. equal treatment of people in different positions which causes a respectively worse outcome for a certain category of individuals and which is devoid of reasonable justification must be outlawed and stopped by legal means.

(3) Public authorities must prevent, stop and eradicate discriminatory practices by both public and private persons in public life.

[1] Council Directive 2000/43/EC of 29 June, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November, 2000 establishing a general framework for equal treatment in employment and occupation.

(4) Victims of discrimination must be entitled to contest the latter by legal means, to get redress and compensation.

(5) Since victims of discrimination are usually in a weaker social position than the alleged perpetrators, the standards of proof must be lowered, and the burden of proof shifted from the claimant to the defendant.

(6) For overcoming discriminatory practices and their outcomes, public authorities may undertake special measures, including those that place former victims of discrimination or their descendants in a more favorable position.

Post-WWII international human rights instruments provide only a very general and vague framework (Winant, 2006). The conceptual and practical guidelines for non-discrimination have been elaborated at the domestic level, primarily in the US, and they largely reflect the background situation, challenges and institutional designs of this country. This approach has been expanding to international organizations and other parts of the world.

An important stage in this proliferation was the acceptance of the core ideas and techniques by the European Union and their transposition first to *acquis communautaire* and then to the domestic legislations of member and candidate states (Bell, 2009; Ellis and Watson, 2005; Schiek and Chege, 2008). The 2000 Equality Directives have been transposed into the national legislations of all member and candidate states; the EU has leverage (its Neighbourhood Policy including Association Agreements) regarding transplanting the mechanisms to the Union's eastern neighbors. The Council of Europe also contributes to this process (for more, see McCrudden and Kountouros, 2007; Nikolaidis, 2015).

Techniques and institutional solutions in individual countries designed for tackling inequalities vary, and include the definition of discriminatory grounds; the objectives of anti-discriminatory measures (the prevention of discriminatory treatment, the provision of equality of opportunities or redress of past injustices); their scope; the degree of state intervention; the forms of perpetrators' liability; the attitude towards intention to commit discriminatory acts; and the scope and forms of positive action. General global trends are the placement of focus on substantive equality (equality of opportunities or outcomes) instead of formal equality (equal treatment); lowering of the standards of proof and the shift of the burden of proof to the defendant; and general acceptance of state interventionism and social engineering as necessary conditions for reversing the production of social discrepancies.

A problem is that the notion of discrimination has procedural and material dimensions. Discrimination serves as a system of presumptions and indicators that allows for the resolution of a dispute about fair or unfair treatment by legal means. Along with this, discrimination is often regarded as a conception for modeling certain social relationships; respectively, it prompts simplistic explanations of social asymmetries as outcomes of certain kinds of treatment linked to certain ascriptive characteristics of the treated individuals or social entities. Meanwhile, social stratification is caused by numerous factors, and the correlations between social disparities and ethnic or racial categorizations cannot be easily and effectively comprehended and tackled. The uneven distribution of social capital and the freedom of choice that people enjoy in their interactions cannot be totally overcome or eliminated either by individual complaints or state intervention. The anti-

discriminatory frame generates an important output, which is an ideology that seeks to interpret all disparities and asymmetric interactions between people belonging to different racial or ethnic categories as overall relations of subjugation between 'dominant' and 'subordinate' groups (Bonilla-Silva, 2006; Feagin and Hernan, 1995; Winant, 2006).

In the post-Soviet space there is another frame of equality on ethnic grounds that was generated by Soviet rule also within a modernist approach to nationhood and ethnic diversity. The Soviet approach is also not a comprehensive doctrine, and unlike non-discrimination, it was never fully and consistently embedded either in constitutional and legal provisions nor the programmatic documents of the ruling communist party. Party declarations, official ideological commentaries and the real practices of government demonstrate the contours and content of this approach. It rested on the idea of state social engineering pursued for building communism and thus for creating a manageable and modernized society that shared a common supra-ethnic 'Soviet' identity (Connor, 1984: 214–216).

The promotion of equality on ethnic grounds was necessary, first, for overcoming past distrust of non-Russian peoples towards the Russian majority, and thus for securing minorities' loyalty towards Soviet rule. Second, the equality of social conditions for different regions and peoples was a prerequisite for the modernization and economic development of the country, as well as for forming a loyal population with common cultural habits and skills (Martin, 2001: 1–177). In sum, the real equality policies comprised a limited and inconsistent symbolic recognition of ethnicities' equality and the policies of socio-economic and cultural transformations aimed, *inter alia,* at the equalization of different ethnicities' social parameters. Among the tools of governance were the fight against incitement of hatred or enmity partly through criminal law, and the suppression of all unauthorized activities on ethnic grounds by a variety of means.

One can note that both frames – both anti-discriminatory and Soviet – had much in common. They combine recognition of individual and group dimensions of equality; they lead to the recognition of structural inequalities as a problem; and they ultimately require state action. However, their translation into practice requires certain preconditions that do not necessarily exist. For the anti-discriminatory frame, these are the availability of active claimants ready to contest unfair treatment by legal means; competent and effective judiciary and/or independent anti-discriminatory bodies; and the government's ability and capacity to pursue policies aimed at overcoming disparities. The 'Soviet' approach needs only the latter – the resources and political will for social engineering.

In theory, the anti-discrimination normative framework, as the experience of individual countries shows, can generate three kinds of practices that constitute the anti-discrimination agenda. Two belong to the domain of so-called 'instrumental,' and one to the domain of 'symbolic' politics; in brief, the difference between the two categories is that the first one generates a direct 'resource' effect, while the latter has an 'interpretative' one (Schneider and Ingram, 2008: 207). The first practice is the readiness of public institutions to acknowledge the problem of discrimination and to tackle it through interventions by legal, administrative and judicial means. The second one is the mobilization of law, or the readiness of people who consider themselves the victims to contest *en masse* the alleged violation of equality as discrimination through

legal mechanisms. The third one is the recognition of inequality as a problem that permeates the entire society and that can be interpreted as the complex relationships between the 'dominant' and 'subjugated' ethnic or racial groups. In other words, ethnic categories are deemed social entities and the correlations between ethnic divisions and access to social resources as a kind of class struggle. The question about the acceptance of the anti-discrimination agenda in a given society can be decomposed into separate questions about the existence of the three kinds of practices listed above. While the first one relates to top-down state action, the second one (mobilization of law) concerns bottom-up activities; the third one is about the discursive patterns that stimulate and legitimize the first two kinds of practices and that can be developed on both a bottom-up and top-down basis.

## *3. Top-down approach*

This section concerns law-making, implementation practices and policy measures. The basics in Russia and Ukraine look alike. The constitutions contain general provisions on equality using an open-ended list of grounds. Both countries are parties to the major relevant international – universal and European – human rights instruments. Sectoral legislation contains general provisions about equality before the law and even the prohibition of discrimination. In both countries, discrimination is criminalized; however, the respective provisions are not enforced.

### *3.1 Russia*

Article 19, part 1 of the 1993 Constitution provides that 'all people shall be equal before the law and court', while Article 19, part 2 guarantees the equality of rights and freedoms of man and prohibits limitations of human rights on social, racial, national, linguistic, or religious grounds.

A number of sectoral laws also contain equal rights provisions and prohibit discrimination; however, no piece of legislation contains a definition of discrimination and distinguishes between direct and indirect discrimination as well as other forms of the latter. The legislation contains no other relevant definitions (such as the subject, burden, and standards of proof) and no adequate procedural provisions. Consequently, civil jurisprudence about discrimination exists, but it is ineffective, limited in scope and unrelated to ethnicity or language (Osipov, 2012: 103–104; Smirnova, 2008: 90–121; Valtseva, 2018).

Article 136 of the Criminal Code establishes liability for discrimination and defines the latter as 'violation of rights, liberties, and legitimate interests' using an open-ended list of grounds. Only a few cases had been commenced under this provision until 2011, and none related to ethnic discrimination. According to the official statistics, no criminal cases have been commenced over the last few years (Ovsyannikov, 2019). Since 2011, only organized discrimination by an official has been a criminal offence, while private discrimination constitutes an administrative misdemeanor (Art. 5.62 of the Code of Administrative Violations). Twenty-four cases

were commenced under this article and finalized throughout 2017, and fourteen in the first six months of 2018; reportedly, all concerned discriminatory advertisements.[2]

One specific feature of Russia's approach is the existence of a special law, the Act 'On Countering Extremist Activities', adopted in 2002. It offers a broad approach to defining 'extremism' and 'extremist activities' (both terms are used as full synonyms); the notion is introduced not by definition but by a list of manifestations that range from terrorism to intolerant statements. The notion of 'extremism' since July 2006 has also included discrimination, as this is defined in Article 136 of the Criminal Code; however, this provision of the anti-extremist law remains inactive. Anti-extremist legislation is extensively enforced, but it does not in fact concern cases of non-violent discrimination (Osipov, 2012: 119–120; Verkhovski, 2018: 18–55).

Some cases invoking Article 19 of the Constitution have been considered by the Constitutional Court. None involved race or ethnicity; a few of them concerned inequality on the grounds of language. The most significant ones concerned the use of state languages in the republics within Russia along with Russian (Prina, 2016: 84–87). In 2004, the Constitutional Court upheld the compulsory teaching of the republican state languages along with Russian but made a reservation that the said teaching should not be detrimental to the equal opportunities of pupils.[3] Later on, in 2009, the Supreme Court for the same reason declined a claim for permission to pass the 'uniform state examination' (school graduation tests) in languages other than Russian.[4]

The Strategy of the State Nationalities Policy of the Russian Federation until 2025[5] – the major official doctrinal document in the area of ethnic relations – contains numerous references to equality and non-discrimination. The promotion of equality on a variety of grounds is referred to among the goals (item 17) and equal rights along with the prevention of discrimination among the principles of the state nationalities policy (item 19) in both versions of the document. The provision of equal rights and the prevention of discrimination in the functioning of public bodies drifted from the objectives (item 21) to the main directions of the state nationalities policy in the course

[2] According to statistical data from the Juridical Department under the Supreme Court of the Russian Federation; see No. 1-AP *'Svodnye statisticheskiye svedeniya o deyatelnosti federalnyh sudov obshey yurisdiktsii i mirovyh sudey za 2017 god. Otchet o rabote sudov obshey yurisdiktsii po rassmotreniyu del ob administrativnyh pravonarusheniyah'* (Joint statistical data about the activities of the federal courts of general jurisdiction and magistrate courts for 2017. A report about the work of courts of general jurisdiction on the consideration of cases on administrative violations), available at: http://www.cdep.ru/index.php?id=79&item=4476; No. 1-AP *'Svodnye statisticheskiye svedeniya o deyatelnosti federalnyh sudov obshey yurisdiktsii i mirovyh sudey za pervoye polugodiye 2018 goda. Otchet o rabote sudov obshey yurisdiktsii po rassmotreniyu del ob administrativnyh pravonarusheniyah'* (Joint statistical data about the activities of the federal courts of general jurisdiction and magistrate courts for the first half of 2018. A report about the work of courts of general jurisdiction on the consideration of cases on administrative violations), available at: http://www.cdep.ru/index.php?id=79&item=4758.

[3] Constitutional Court Judgment No. 16-P of 16.11.2004; available at: http://doc.ksrf.ru/decision/KSRFDecision30404.pdf (in Russian).

[4] Supreme Court Judgment No. GKPI09-317 of 21.04.2009; available at: http://vsrf.ru/stor_pdf.php?id=261508 (in Russian).

[5] Adopted by Presidential Decree No. 1666 of 19.12.2012; updated by Presidential Decree No. 703 of 06.12.2018.

of the strategy's update in 2018. However, the Strategy does not specify the mechanisms and public bodies in charge of anti-discrimination measures; the only indicator mentioned in the version from 2018 is the percentage of people who in surveys acknowledge no discrimination against themselves (item 34). The Strategy is a document of programmatic character and is not directly enforceable. Russian Government Order No. 2985-R from 28 December, 2018 'On the plan for realization of the Strategy of State Nationalities Policy in 2019–2021' as well as earlier similar plans envisage only the monitoring of individual complaints and mass-media publications about violations of equality on a variety of grounds and assign this monitoring to the Federal Agency of Nationalities Affairs. The Agency has no special unit for equality issues and has publicized no information about its activities concerning non-discrimination.

In theory, public prosecutors and executive authorities responsible for the supervision of consumer protection, housing, labor relations and advertising can take measures against discriminatory treatment, but the former interfere in only a few exceptional cases usually concerning discriminatory commercials. Officials as a rule do not speak out about the issue of discrimination and inequality in public. Finally, there are no programs for the promotion of equal opportunities.

Over the last few years there has been only one legislative initiative that concerned ethnic discrimination; this was an amendment to the Labor Code that outlawed private advertisements of discriminatory character concerning recruitment.[6]

### *3.2 Ukraine*

The 1996 Constitution declares the equality of all people in their dignity and rights (Article 21) and guarantees equal fundamental rights and freedoms as well as the equality of citizens before the law irrespective of their 'race, color of skin, political, religious and other affiliations, gender, ethnic and social origin, wealth, place of residence, linguistic and other characteristics' (Article 24). Most codes and numerous laws stipulate the principle of non-discrimination and contain a ban on the violation of equality of rights and/or the prohibition of discrimination.

Article 161 of the Criminal Code of Ukraine addresses the violation of equality based on race, ethnicity or attitude to religion. However, like the old Soviet criminal codes it combines in one provision the liability for the incitement of 'national, racial of religious feud and hatred' and 'direct or indirect restriction of rights or granting direct or indirect preferences to citizens.' Regarding this, there are no complete and accurate statistics; according to different sources, article 161 is applied rarely in general, and never with regard to discrimination. According to the data obtained by the Advisory Committee on the Framework Convention on National Minorities, the number of prosecutions rose from two in 2012 to 79 in 2015, while the number of convictions in which a hate motive was proven reached two in 2014 and three in 2015 (ACFC/OP/IV(2017)002, 2018: item 85). The annual report of the Ukrainian Ombudsperson for 2017 reports that about 95 criminal cases involving the motive of hate were opened throughout the year, but only four were submitted to courts (Tshorichna, 2018: 517–518).

[6] Federal Act No. 162-FZ of 02.07.2013.

Ukraine is different from most post-Soviet countries including Russia because it has a comprehensive law against discrimination. Act No.5207-VI 'On the Principles of Preventing and Combating Discrimination in Ukraine' was adopted on 6 September, 2012 and significantly amended by Act No.1263-VII of 13 May 2014. Adoption of the anti-discriminatory law was a requirement of the EU in the course of drafting the Visa Liberalisation Agreement (EU–Ukraine, 2010); similar conditions were also defined for Moldova and Georgia which also sought visa-free entry into the Schengen area for their citizens and association with the EU. Moldova and Ukraine adopted laws against discrimination in 2012 and Georgia in 2014. All three laws follow the EU model of anti-discriminatory legislation.

In particular, the Ukrainian law prohibits direct and indirect discrimination on an open-ended list of grounds which includes race, skin color, ethnic and social origin; defines the scope of this prohibition and exempting positive measures; and defines the competences and obligations of public bodies in the area of prevention and elimination of discrimination. An important novelty was the shift in the burden of proof to the defendant in the 2014 amendments to the Anti-Discrimination Act and to the Civil Procedural Code. Individuals can bring complaints regarding discrimination before courts, administrative bodies and the independent equality body, and respectively claim redress. The law does not outline the procedure for redressing pecuniary or non-pecuniary damage.

The independent equality body and in fact the only public body implementing the law is the Parliamentary Commissioner for Human Rights (Ombudsperson). The Commissioner is authorized to overview the general implementation of anti-discrimination law, provide expert conclusions, take legal action in cases of discrimination in order to safeguard the public interest, and consider individual complaints. However, decisions from the Ombudsperson about individual complaints are not obligatory.

In the year 2013, the Secretariat of the Commissioner received 2,051 petitions related to discrimination; of these, four complaints concerned race and color of skin; 42 ethnic or national origin, and 17 belonging to national minorities; 91 complaints were about the use of languages, including five specifically related to the use of the Ukrainian language (Tshorichna, 2014: 375). Further, the number of petitions decreased, so that in 2014 the Secretariat of the Commissioner received and examined 496 complaints about discrimination and the violation of rights of national or religious minorities; 49 associated with race and ethnicity, and 57 language (Tshorichna, 2015: 272–273). In 2017, there were 373 complaints related to discrimination and minority issues; 37 of them concerned race and ethnicity, and seven language (Tshorichna, 2018: 510, 532). In 2018, out of 616 complaints 43 were about skin color or ethnic origin; the report for 2018 contains no data about language (Tshorichna, 2019: 100, 104–105). The content of most cases involving ethnicity or language is not disclosed; most pertain to access to service, and none had public repercussions.

The only governmental program that can be deemed a positive or special measure is the 'Strategy for Protection and Integration of Roma National Minority into Ukrainian Society till 2020' adopted by Presidential Decree No.201/2013 of 8 April 2013. The Program basically aims to facilitate cultural activities and informational campaigns and does not concern discrimination *per se*. Moreover, it

has been criticized by international institutions (the ODIHR) and civil society organizations as ineffective and non-transparent (ODIHR, 2014: 5).

## *4. Bottom-up approach*

This section addresses the activities of civil societies in both countries. The anti-discrimination framework can be workable if there are people who take legal action or bring complaints in the pursuit of their interests related to the safeguarding of equality. Organized civil society can facilitate such motions and also formulate public needs and promote the public interest with regard to equality issues.

### *4.1 Russia*

There are no statistics concerning individual legal actions or other motions (such as complaints about discrimination to administrative bodies, public prosecution or ombudspersons). The official judicial database[7] shows that over recent years individual plaintiffs have increasingly often employed the term 'discrimination' in claims concerning employment and labor relations, given that the Labour Code interprets discrimination very broadly as any distinction unrelated to the person's working skills. Anecdotal evidence from human rights organizations reveals that the number of cases actually involving treatment based on certain ascriptive characteristics or group belonging is low (less than 10 complaints per year throughout the country). Almost all concern discrimination on grounds other than ethnicity (usually gender, trade union activism, sexual orientation, or religion), and in almost all cases courts have dismissed such claims of discrimination (Valtseva, 2018).

The European Commission Against Racism and Intolerance (ECRI) was informed by the Russian Ombudsman's office that the Ombudsman had received around 200 complaints related to discrimination on all grounds in 2013–2017 (27 in 2017) (CRI(2019)2, para. 12); however, this testimony is not supported by other sources, and there is no information about the content and outcomes of these disputes. The bottom-up mobilization of law more often manifests itself in sporadic complaints (or denunciations) submitted to the public prosecutor about discriminatory commercials or media publications; however, there are neither statistics not estimations of the number of such motions.

Another indication is the difficulties that public interest NGOs encounter when they want to engage in strategic litigation against discrimination on any possible grounds. Respectively, individuals seek support for action against discrimination from human rights organizations in exceptional cases. On the surface, the problem is that potential claimants regard such problems as insignificant, resolve them informally, or seek to defend their violated rights (for example, desiring protection from illegal criminal persecution) when the contestation of discrimination appears to be inadequate.

[7] *Gosudarstvennaya Avtomatizirovannya Systema Rossiiskoy Federatsii 'Pravosudiye'* (The State Automated System of the Russian Federation 'Justice'); available at https://bsr.sudrf.ru. The system contains descriptions of individual cases and does not allow for disaggregation by types of claim.

There are numerous ethnicity-based organizations across Russia, only a few of which refer in their charters or programmatic statements to the protection and promotion of equality among their goals. The charters of leading ethnicity-based organizations contain references to the protection of the rights of persons belonging to the respective groups, but not to the fight against discrimination or for equality. Such provision is lacking even in the charter of the Federal National Cultural Autonomy of Roma – the leading Russian Roma NGO.[8] The Charter of the Federal Jewish National Cultural Autonomy refers to the promotion of tolerance and inter-ethnic dialogue.[9] There are very few organizations of labor migrants, and the only salient one – the Federation of Migrants, a government-orchestrated NGO – also does not have such a provision in its documents.[10]

There are virtually no examples of ethnic organizations' motions for equality and against discrimination except for several specific cases. First, the multi-ethnic republics of North Caucasus (Kabardino-Balkaria, Karachaevo-Cherkessia and Dagestan) have informal power-sharing agreements, and their alleged violation repeatedly invokes protest. For example, the Congress of the Karachai People – a civil society organization that stands for the representation of ethnic Karachais that represent 41 per cent of the population in the Karachaevo-Cherkessian Republic (KCR) – in June 2018 issued statements and petitions and claimed the alleged violation of ethnic proportionality in administrative appointments (Kongress, 2018).

Another case involves the individual and collective protests against the compulsory teaching of state languages other than Russian in the republics of Russia. One of the key arguments of individual claimants and initiative groups in Tatarstan was that this teaching was done at the expense of other school subjects and provided pupils in the republic with a poorer quality education and was thus discriminatory. As mentioned above, this argument was partly endorsed in 2004 by the Constitutional Court of the Russian Federation and in 2009 by the Supreme Court. From a broader perspective, safeguarding formal equality is increasingly used by the state as justification for dismantling minority protection or special measures (Prina, 2016).

Some non-ethnic human rights organizations which defend vulnerable groups or pursue public interests related to fundamental rights have addressed the issue of discrimination, including its ethnic component. This job has been done by small professional organizations to a large extent inspired by the opportunity to be part of an international movement against discrimination and to obtain foreign funding (for an overview see Osipov, 2012: 111–112). Leading NGOs such as the Human Rights Centre 'Memorial' (Moscow), the Anti-Discrimination Centre 'Memorial' (Saint Petersburg) and the Moscow Helsinki Group in the early 2000s had separate programs or projects about ethnic discrimination. The Moscow-based Centre for Social and Labor Rights addresses discrimination on various grounds in employment and occupation.[11] All attempts to select promising individual complaints and to launch strategic litigation actually failed because the number of potential applicants was few, most required protection from ethnic violence, and most cases were lost for formal

[8] http://цыганероссии.рф.
[9] http://фенка.рф/ustav-fenka/.
[10] http://www.fmr-online.ru/history/.
[11] http://trudprava.ru/main/discrimin.

reasons. The non-governmental association 'Lawyers for Constitutional Rights and Freedoms' (JURIX) in 2003–2011 had an educational program and, together with Open Society Institute, conducted research on ethnic profiling practices by the police in Moscow (Open Society Institute, 2006). A coalition against racial discrimination was also established under the aegis of the Moscow-based Centre for the Development of Democracy and Human Rights in 2000, and resumed in 2003. The coalition attracted a low level of public interest and failed to involve ethnic NGOs in its activities. Increasing pressure on independent civil society organizations after 2011 led to the closure of JURIX and the relocation of the Anti-Discrimination Centre 'Memorial' from Russia; the other organizations, under pressure and obliged to register themselves as 'foreign agents,' have had to change their priorities and basically abandon the theme of ethnic discrimination.

### *4.2 Ukraine*

Ukraine has more opportunities for civil society activity, having relatively advanced anti-discrimination legal and institutional frameworks and a lack of state pressure on human rights activists (or at least a much lower degree of such pressure than in Russia). An important indicator of bottom-up initiatives is the number of people that apply to the Ombudsperson. As mentioned above, complaints about discrimination on ethnic or linguistic grounds constitute no more than 12 per cent of the total number, but the amount has oscillated and has generally not grown over the years. However, the number of such complaints is much higher than in Russia.

In other respects, the situation is largely not different from the Russian one. Minority organizations in Ukraine also neglect the issue of equality and discrimination in their founding documents and statements. Exceptions are also few, and most are related to the demands of some organizations that represent the Russian-speaking population for linguistic Ukrainization to be stopped, and ideally to grant the Russian language official status. After 2014, when the war against Russia and the separatist enclaves also backed by Russia broke out, the claims and other politicized activities of Russian minority organizations almost ceased (Equal Rights Trust, 2015: 158–159). Minority organizations usually express their concerns and demands in terms of minority rights without resorting to the language of equality. An important recent case was the adoption of the new Education Act in September 2017[12] which drastically restricted the use of minority languages in the school system and thus brought the issue of equality back to the table. Most minority organizations maintained their silence, but some (mostly Hungarian ones) assessed the law as undermining the equal access of minorities to education (see, for instance, Transcarpathian, 2018). The government also justified the language provision by highlighting the need to secure the equality of opportunities for school graduates (Ministry of Foreign Affairs, 2017). However, these statements have not led to any meaningful discussions among policy-makers and experts.

Numerous NGOs are working against discrimination through counseling, monitoring and awareness-raising. All of the former are non-ethnic organizations;

[12] *Zakon Uktaiiny* No. 2145-VIII *'Pro osvitu'* (The Law of Ukraine 'On Education') of 5 September 2017.

most are highly professional, funded by European or American organizations, and oriented around international and European standards and guidelines. Since 2011, Ukraine has had an NGO Coalition Against Discrimination.[13] This seeks to coordinate activities against discrimination on all grounds and comprises mostly non-ethnic human rights organizations.

## *5. Substitute and additional perspectives*

The issues of discrimination and, even more broadly, of equal rights and opportunities, are being replaced by an adjacent topic – that is, aggression on ethnic grounds. The call to counteract xenophobia, hate speech and hate crime is strong both in Russia and Ukraine, and from authorities and the general public. This is not a surprise since manifestations of enmity are visible, and both countries have a record of mob violence. In both countries ethnic minority NGOs and experts dealing with ethnic relations are prioritizing the issues of xenophobia and putting forward the promotion of tolerance and intercultural dialogue as a remedy. The dynamics in the two countries are, however, different.

Russia has established an effective repressive machinery that has cracked down on all organized radical groups and persecutes all unauthorized activities resembling the fuelling of ethnic, religious or social tensions. The country has a package of 'anti-extremist' legislation that is grounded in the 2002 Anti-extremism Act (with subsequent amendments). The package includes several articles of the Criminal Code: Article 282 defines liability for the incitement of hatred or enmity and the abasement of dignity on an unlimited variety of grounds; other articles criminalize participation in 'extremist' organizations and appeals to 'extremist' activities. Moreover, the administrative legislation defines liability for the demonstration of Nazi symbols and establishes simple procedures for closing down or fining NGOs or media outlets; websites can be blocked without a court decision. This anti-extremist legislation is widely used to intimidate actual or potential opponents of the regime (CRI(2019)2, paras. 44–52; Verkhovsky, 2018: 38–92). Over the last few years, the number of criminal cases and sentences handed down for posts and reposts in social networking services that pose no threat to public order has steadily grown (Robinson, 2018). While in 2011, 82 people were found guilty, in 2014 the number had increased to 258, and in 2017 to 460. The number of those sentenced under part 2 of the same article (that establishes liability for the incitement of enmity involving violence) has decreased: in 2011 there were 35 people, in 2014 nine, and in 2017, one (Human Rights Council, 2018). Since 2011, media publications and internet posts that raise the issue of ethnic discrimination have increasingly been qualified as 'extremism.' For example, 30-year-old Lidiya Bainova, a Khakass activist from Abakan (the Republic of Khakassia in Eastern Siberia), was accused of appeals to extremist activities in July 2018 for publishing a post in which she emotionally wrote about the practices of daily xenophobia and discrimination against the Khakass people (Natsional'ny aktsent, 2018).

In December 2018, part 1 of Article 282 of the Criminal Code was redrafted, introducing administrative prejudice for the incitement of enmity. Criminal

[13] http://antidi.org.ua/.

prosecution for the deeds previously falling within the scope of this article is now possible only after at least one administrative conviction under the new article (20.31) of the Code of Administrative Violations (which penalizes the same deeds) within the preceding calendar year. The amendments have significantly decreased the number of criminal cases under Art. 282 and led to the gradual revocation of previously commenced cases or reversals of convictions, including that of Bainova.

Although the excessive enforcement of 'anti-extremist' legislation is subject to growing criticism (Human Rights Council, 2018), NGOs and experts who deal with ethnic relations prioritize the issues of hate crime and xenophobia; almost all use the language of 'counteraction to extremism' and 'intercultural dialogue.' Ethnic NGOs in their public statements as a rule swear allegiance to the fight against 'extremism'; a large part of the activity of ethnic NGOs, particularly that carried out using public money, aims at 'intercultural dialogue' or at least is rationalized as such.

As mentioned above, Article 161 of the Ukrainian Criminal Code which penalizes both violations of equality and incitement of hatred, is applied to a limited degree. The insufficient ability of the police to prosecute radical nationalist propaganda and vandalism is routinely criticized by minority NGOs, human rights organizations, and even the Ombudsperson (Alternative, 2016; Tshorichna, 2016: 153–155; 2018: 533–534; 2019: 105–107). Respectively, minority NGOs neglect issues of equality; their positive agenda is confined to cultural projects and the promotion of tolerance. Notably, Russia was in a similar situation before the mid-2000s when the state started using anti-extremist legislation as a convenient repressive device, first against radical nationalists and then against all potential opponents. Russia has been pioneering the use of anti-extremist legislation; several other post-Soviet countries (including Belarus, Moldova and Kazakhstan) have pieces of anti-extremism legislation that generally follow the Russian example (Verkhovsky, 2016: 63–72); however, they are not enforced as extensively as in Russia. Ukraine adopted an 'anti-extremist' package with major repressive potential in January 2014, but this was rescinded after the former president Yanukovich's escape one month later.

Another issue that deserves attention is the third kind of practice within the anti-discrimination framework. This is discourse based on the interpretation of discrimination as structural disadvantage or the subjugation of certain vulnerable groups *vis-à-vis* others. Surprisingly enough, these considerations in favor of either minorities or the majority are marginal both in Russia and Ukraine. Generally, the idea of the majority's vulnerability in the face of minorities which 'enjoy unfair privileges' persists in majority nationalist discourse in Eastern Europe (Brubaker, 2011). In Russia, only individual ideologies associated with Russian nationalism have occasionally tried to develop this argument (Delyagin, 2007), but these attempts have had no repercussions. Some Ukrainian nationalist ideologists argue in a similar way that state power has an 'anti-national' character, but these ideas have not evolved into consistent and detailed claims. A growing number of publicists are developing the idea of Ukrainians' vulnerability and subjugation under a situation of Russian linguistic and cultural dominance (see, for instance, Ryabchuk, 2011; Yakimenko, 2017).

## *6. How much can one expect from the anti-discrimination agenda?*

At first glance, the expression of Peter Rutland, 'the presence of absence' (Rutland, 2010), borrowed from Soviet bureaucratic jargon, matches this situation quite well. Those elements that fit the definitions of the anti-discrimination agenda are marginal in both countries, and the demand for non-discrimination has been stimulated by external actors. One may assume that the reasons for this must pertain both to the specific post-Soviet conditions and to the general applicability of anti-discrimination approaches.

In Russia, pieces of legislation pertinent to non-discrimination are virtually not employed, while legislative provisions and executive programs for the promotion of equality do not exist. There have been no new legislative and political initiatives in this area (except for the 2013 amendments prohibiting discriminatory advertisements). Prior to the crackdown on independent civil society organizations, there were projects related to non-discrimination and equality based on ethnic grounds. These were carried out by a few professional NGOs using money from Western donors and had a tenuous public effect.

For Ukraine, the major external factor is EU conditionality leverage. This was the reason for the adoption of the anti-discrimination law and for its subsequent implementation. The promoters of the equality agenda are the equality unit within the Ombudsperson's office, involving limited staff, and several professional NGOs which are striving to use European legal and policy guidelines and are funded by Western donors. A limited number of complaints about ethnic discrimination are brought before the Ombudsperson and courts, and there are a number of civil society projects and initiatives. However, the issues of human equality are not at the top of public agendas, and ethnic discrimination appears to be a marginal issue even against this background. A sign of this is the non-involvement of ethnic activists in activities aimed at the protection of equality.

On the other hand, the public authorities in both countries as well as legal professionals and civil society activists are aware of the notion of discrimination, or this information is easily accessible whenever necessary. In both countries the term 'discrimination' is present in legislation, and to a limited extent in jurisprudence; 'discrimination' is referred to in the major doctrinal official document on ethnic policy in Russia, while Ukraine has a comprehensive act against discrimination. Civil society activists in both countries have been running awareness-raising and advocacy projects; the issue is discussed by legal professionals.

Ukraine has conditions more favorable for the development of an anti-discrimination agenda because it is a competitive democracy and can benefit from EU-led conditionality policy, while Russia has an authoritarian regime, suppresses independent civil society, and limits international cooperation. Nevertheless, the visibility and effect of an anti-discrimination agenda are comparable in both countries. Several dozen complaints about ethnic discrimination go through the Ombudsperson's office and courts per year in Ukraine, while in Russia the available sources report that there are fewer individual motions that address the courts, executive authorities, public prosecution and the federal ombudsperson. Notably, ethnicity-based civil society organizations in both Russia and Ukraine basically neglect the anti-discrimination agenda. Both public authorities and civil society at large

prioritize other issues, such as the fight against hate speech and projects aimed at the promotion of ethnic tolerance.

One can say that the anti-discrimination agenda in Ukraine has occupied small niches of its own in the human rights movement and public ethnic policy, but in no domain does it generate a significant effect. Although Russia lacks the institutional settings available in Ukraine, the impact of the anti-discrimination agenda is comparable.

Do the post-Soviet countries differ from other parts of Europe because of their Soviet legacy? There are few traces of a Soviet legacy in the promotion of equality on ethnic grounds, and these manifest themselves in official rhetoric but not in the state's instrumental policies. Moreover, the difference between Russia and Ukraine, on the one hand, and Central-Eastern European countries, on the other, is not drastic. The former communist countries west of the post-Soviet space and the Baltic States have become EU members; therefore, they have a comprehensive anti-discrimination legal and institutional framework that includes independent equality bodies easily accessible to potential claimants. However, the number of individual complaints made on ethnic or racial grounds remains low and lags behind the number of complaints and suits presented on other grounds.

For example, in 2017 the Hungarian Equal Treatment Authority processed 1,423 submissions on all prohibited grounds; of these, the Authority found infringements in 33 cases, while only four were on the grounds of belonging to a national minority (Equal Treatment Authority, 2018: 11). The Slovak National Centre for Human Rights in 2017 investigated four cases of discrimination, of them in two established discrimination (both on the grounds of ethnicity or race) (Annual, 2018: 9). The Polish Commissioner for Human Rights in its annual report for 2017 referred to only one case of ethnic discrimination, which had been under investigation since 2015 (Summary, 2018: 18–19).

Other countries of continental Europe that have no communist experience generally demonstrate more significant outcomes. For example, in 2017 the Danish Board of Equal Treatment received 294 complaints, of which 44 were related to race and ethnic origin (CERD/C/DNK/22-24, 2019: para. 255). However, ethnicity-based organizations in Europe do not prioritize anti-discrimination goals and rarely resort to the respective legal instruments or launch anti-discrimination campaigns. Notably, the scale of anti-discrimination activities may be much larger in another social context. For example, the number of complaints on the grounds of race, national origin and skin color to only the federal Equal Employment Opportunities Commission in the US in 2017 constituted (respectively) 31,027, 9,438 and 2,833 (Charge Statistics, n.d.).

This situation may be deemed surprising if we regard the frame of anti-discrimination as universally applicable and instrumental in all national environments. If we discard this assumption, everything falls into place.

The ruling elite and civil society must invest in anti-discrimination mechanisms if they have a compelling interest in overcoming disparities or segregation patterns that threaten social stability and governmentality. For most countries in continental Europe, including Russia and Ukraine, this is not the case. The other incentive can be external pressure, such as the conditionality policy of the EU. The need for compliance with external standards, as the recent history of most EU member states and neighbors bound by conditionality – such as Ukraine – shows, might be sufficient

for adopting anti-discrimination legislation, but barely for its consistent implementtation.

From another perspective, bottom-up action against discrimination may not always be the most effective process for an individual claimant seeking to resolve a certain dispute. Bringing a case against discrimination in court may be a complex and time-consuming undertaking; a complaint to an independent anti-discrimination body in Europe is highly likely to bring about no satisfactory outcome since such bodies often do not have enforceable powers (as in Ukraine).

When there is no commonly recognizable image of a victimized category that needs protective measures, and moreover, when the major stakeholders are not ready to accept the very idea of ethnic relations as intergroup domination and subjugation, the moral incentives for both state action from above and juridical activism from below will not be strong enough. On the contrary, the visibility of ethnic enmity and the experience of ethnic conflict push the issues of conflict prevention and violent radicalism to the forefront.

## *7. Conclusion*

Both Russia and Ukraine are lacking conditions for the three kinds of recurrent and large-scale practices which constitute the anti-discrimination agenda: namely, state action, judicial activism, and the widely accepted discourse surrounding illegitimate intergroup subjugation. The ruling political and intellectual elites in both countries have no compelling interest in dismantling a 'color line' (like in the US) and integrating a segregated society because these issues do not pose a problem. 'Traditional' ethnic minorities are not basically suppressed and excluded (or such perceptions are not mainstreamed), and the issues of equality are regarded rather as the symbolic recognition or competition of public narratives than the oppression of individuals because of their ascriptive characteristics. In both countries, the state has no incentive nor resources for social engineering involving the equalization of social conditions. The state apparatus views the issues of immigration as problems of administrative control and integration in terms of immigrants' cultural and linguistic competences rather than of their rights and social opportunities (Karpenko, 2016). The agenda of security and the prevention of violence takes priority and is framed as 'countering extremism,' or 'the promotion of civic unity' overshadows and replaces equality and non-discrimination. The dominant reaction of the general public to sporadic news about individual cases of ethnic discrimination is confidence that private persons including landlords, employers and entrepreneurs have full and unlimited discretion in selecting customers or contracting counterparts.[14]

On the other side, anti-discrimination goals and mechanisms (in the shape promoted by the EU and other international actors) provide weak incentives and limited opportunities for individuals and civil society organizations. Action against discrimination is time-consuming and does not lead to results that can usually satisfy claimants. In part, this can be explained by the state of national legislation, the

[14] A good illustration of this are the comments on a Facebook post of famous economist Andrei Movchan about a discriminatory commercial (May 19, 2018); see https://bit.ly/2RJQilX (in Russian).

executive and the judiciary (i.e., the lack of some legal institutions, the insufficient competences of judges and law-enforcement officials), and the doubtful effectiveness of the entire system in the eyes of ordinary people. It is easier for individuals to protect a certain violated right, or to resolve an issue informally, or to disengage, rather than to make a claim for the recognition of discrimination, and at best receive a tiny amount of compensation for moral damages (Valtseva, 2018).

However, these conditions are not unique to the post-Soviet states; they are present in most other post-Soviet countries, as the effectiveness of their anti-discrimination mechanisms demonstrates. The comparison between Russia and Ukraine is telling inasmuch as a democratic political regime does not play a crucial role in the development of anti-discrimination agenda: the outcomes in authoritarian Russia and democratic Ukraine are comparable, albeit Ukraine has achieved more. In both countries, the issues of discrimination are raised and addressed in practical terms but on rare occasions; thus, non-discrimination occupies its own niche, but it is far from playing any significant role in human rights advocacy and ethnic politics.

It turns out that both for the governments and civil society organizations, the major incentive and resource is external pressure, including moral and financial support from international institutions that are working on the issue of discrimination; when this support is cut off (as in Russia), domestic anti-discriminatory activities fade away.

Post-Soviet political and social systems can be characterized as neo-patrimonialist (Gel'man, 2016; Hale, 2007) in the sense that people pursue life strategies through working towards their inclusion into patronal relationship and clientele networks. The search for such inclusion and respective privileges is a more effective solution than picking fights about equality for ideological reasons through ineffective formal institutions. These considerations also apply to ethnicity-based civil society organizations that usually prioritize cultural projects and seek good relations with the public authorities of their host states. For these purposes, human rights activities may be counterproductive. Many minority NGOs are interested in operating a range of businesses with their kin-states, and their priority is to avoid all that can be detrimental to cross-border cooperation.

One can list other specific circumstances that negatively affect potential anti-discrimination initiatives. Among these are the lack of resources available for civil society organizations; the policies of repression, control and co-optation aimed at civil society in Russia (and other post-Soviet authoritarian regimes); as well as the 'nationalizing' policies (such as in Ukraine) that push the state of ethnic minorities to the margins of public attention. Besides these issues, post-Soviet societies generally elevate concerns about security and stability to the top; this is a reason why the 'fight against extremism' and 'inter-cultural dialogue' preclude concern about equality issues.

Spontaneous processes of social stratification are unlikely to be stopped or reversed by judicial or administrative means without deep state interference in market mechanisms and the curtailment of the freedom of contracts. Moreover, the anti-discrimination agenda might bring about such by-products as an anti-racist ideology, meaning the interpretation of statistical inequalities as inter-group relations of oppression and subjugation. A similar argument occasionally employed by majority nationalists is not yet being developed and still remains marginal in both Russia and

Ukraine. The post-Soviet countries are still staying free of this conflict-prone idea; in part because of the claims of Soviet ideologists that structural inequalities had been overcome long ago.

To sum up, an anti-discrimination framework requires too many societal prerequisites which are not always available. Anti-discrimination also needs strong ideological motivation; i.e., a common belief in structural inequalities and group subjugation that must be overcome; this presumption is not always obvious and taken for granted. However, the propositions made above are not written to deny the instrumental value of anti-discrimination law, which must have its own niche. On the contrary, a set of specific presumptions and procedural rules that are fine-tuned in accordance with the social context must serve as effective tools for resolving certain kinds of disputes about equality.

The question why the agenda of non-discrimination on ethnic grounds is non-existent or marginal in the post-Soviet space should be reformulated and split into several other ones. Is there in principle a coherent approach that is effectively applicable worldwide? Are there reasons to expect that there must always be domestic demand for ethnic equality? Shall such demands for justice on ethnocultural grounds be framed only as issues of racism and discrimination? The answers are unlikely to be positive.

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**ESZTER KOVÁTS** *

# Limits of the Human Rights Vocabulary in Addressing Inequalities – Dilemmas of Justice in the Age of Culture Wars in Hungary

Intersections.EEJSP
2(5): 60-80.
DOI: 10.17356/ieejsp.v5i2.498
http://intersections.tk.mta.hu

* [eszter.kovats@fesbp.hu] (Institute for Political Science, Faculty of Law, Eötvös Loránd University)

## Abstract[1]

As early as 1995, Nancy Fraser problematized the shift of justice claims from redistribution towards recognition (Fraser, 1995). Since then, this shift has proven even more pronounced, displacing redistribution claims and reiterating identities (Fraser, 2000). At the same time, we can see how recognition claims in the form of identity politics became overall present in the social justice activism of the Anglo-Saxon countries, stirring heated controversies there, not only from the Right, but from Marxist, liberal and feminist points of view, too. On the European continent, these debates take the form of mostly right-wing movements mobilizing against 'gender ideology' and 'political correctness', portrayed as imminent danger coming from the US and/or the West.

In my paper I critically engage with the widespread matrix of visualizing political positions and fault lines as being on two axes: economic (left and right) and cultural (liberal and authoritarian), and discuss why placing the attitudes towards 'oppressed minorities' on the cultural axis cuts the related issues from their embeddedness in material conditions. I point out that the cultural axes, the recognition shift, and the human rights paradigm type of articulation of injustices are going into the same direction, namely a culturalist interpretation of oppressions. Empirically based on the controversies around the Istanbul Convention (2017) and the Gender Studies MA programs (2017-2018) in Hungary and theoretically on Fraser's concept of 'perspectivic dualism' as outlined in her debate with Axel Honneth (Fraser and Honneth, 2003), I argue that this culturalist interpretation both of prevailing injustices and of the right-wing contestations actually reinforces the cultural war framework of the Right rather than overcoming it.

*Keywords:* anti-gender movements, gender studies, human rights, redistribution, recognition, Nancy Fraser.

[1] This article is a translated and expanded version of an article I originally wrote in Hungarian, 'Az igazságosság dilemmái a kultúrharcok korában' published in the social theory online journal *Új Egyenlőség*, January 9, 2018. http://ujegyenloseg.hu/az-igazsagossag-dilemmai-a-kulturharcok-koraban/

## *1. Introduction*

Political scientists and analysts often attempt to represent the spectrum of values of competing parties and voters using a two-dimensional coordinate system.[2] On the one hand, the horizontal right-to-left axis of the so-called political compass represents economic issues and the positions taken up with respect to the desirable degree of state involvement. On the other hand, the vertical axis represents cultural and social issues along a conservative/liberal (or authoritarian/libertarian) split.[3] Positions with respect to human rights and the rights of minorities are represented on the vertical axis, as if there were a spectrum ranging from oppression to freedom, and more enlightenment and openness were equivalent to stronger recognition of human rights.

In this two-axis coordinate system, attitudes to women and gay issues are also represented on the vertical axis in the form of a scale of values whereby more engagement with equal rights means more recognition of the idea that women and men, as well as gays and heterosexuals, are equal. In the following, I will argue that this approach is equivalent, from a political science perspective, to what Nancy Fraser calls a 'recognition shift'; namely, 'the struggle for recognition [...] becoming the paradigmatic form of political conflict' in the struggle for justice (1995), including in the feminist movement (Fraser, 2009: 108).[4] With the help of some of Fraser's writings, I aim to demonstrate how this approach to justice, by detaching issues identified as being cultural, such as gender equality, from the economic axis, amplifies the current misleading and hysterical culture war rhetoric that frames these issues of justice as a clash of values between progressives and conservatives. In other words, I will argue that the fact that the political Right carries out attacks against what they call 'human rights fundamentalism' or 'gender ideology' must not be interpreted simply as the political instrumentalization of so-called 'medieval attitudes' such as the sexism and homophobia that prevail in society, or the reaction of 'white heterosexual males' trying to defend their status. I will argue that, instead, the recognition shift itself, positing human rights as the panacea, has contributed to making perceived or real consensuses with respect to human rights vulnerable. My aim is to identify several of the reasons behind the popularity of the increasingly authoritarian and hate-mongering Right – which requires, in my view, critical scrutiny of the progressive agenda and language too.

As we know, since the beginning of the 2010s several European countries have seen the rise of conservative and, in part, fundamentalist social movements that rail against the perceived threat of 'gender ideology' (or 'gender theory'), 'political correctness' and 'human rights fundamentalism'002E Being opposed to women's

[2] See, e.g., https://www.politicalcompass.org/, or any different version of the site.

[3] There is abundant literature in political science about the usefulness of this metaphorical approach concerning whether it contributes to a better understanding or rather obfuscates important aspects of political space. The dimensionality approach being an illustrative example for introducing my recognition/redistribution framework, the paper will not go into details about this epistemological and methodological debate (see Benoit and Laver, 2012).

[4] 'With this shift "from redistribution to recognition" came powerful pressures to transform second-wave feminism into a variant of identity politics. A progressive variant, to be sure, but one that tended nevertheless to overextend the critique of culture, while downplaying the critique of political economy. In practice, the tendency was to subordinate social-economic struggles to struggles for recognition, while in the academy, feminist cultural theory began to eclipse feminist social theory' (Fraser 2009: 108).

reproductive rights, lesbian, gay, bisexual, transgender, and queer (LGBTQ) issues, certain administrative policy instruments (such as gender mainstreaming), as well as the public financing of gender studies programs, the advocates of these platforms tend to depict all political and non-governmental actors, administrative staff, and scientific researchers who focus on these issues as a single homogeneous group and an organized lobby. This claim partly manifests in grassroots or religiously affiliated movements and partly on the agendas of right-wing and populist parties in opposition or in government  The simultaneity of the movements, the different triggers in countries that differ with respect to political landscape, as well as to gender and LGBT policies, indicate that rather than dealing with isolated cases, we are witnessing a transnational phenomenon (Hark and Villa, 2015; Kováts and Põim, 2015; Kuhar and Paternotte, 2017). Civic, religious, or political-party-affiliated mobilizations against 'gender ideology', 'political correctness', or 'human rights fundamentalism' are frequently understood as a conservative backlash against the achievements related to and further progress towards equality between women and men and LGBTQ rights. Adopting this perspective of 'the patriarchy/heteronormativity fighting back' seems as tempting as it is simplifying.

My paper pursues the goal of expanding my former attempt to refute this culturalist interpretation (Kováts, 2018), demonstrating that this interpretation itself comes from this very 'recognition turn' and I propose, relying on Fraser's concept of 'perspectival dualism', a potential way to help us escape the false dichotomy of interpreting the phenomenon as being *for* or *against* equality, and *for* or *against* human rights.

The paper proceeds as follows: First, I will describe the ambiguity of the concept of gender which is necessary for understanding the following empirical material from Hungary, and which moreover illustrates the recognition and individualistic turn. Then I describe the Hungarian case: the attacks of the Hungarian government on the Istanbul Convention (2017) and Gender Studies MA programs (2017–2018). Given the transnational character of the phenomenon,[5] it cannot be explained by national factors only, thus I hope the Hungarian case study will shed light on several developments outside Hungary as well. Finally, I recall Fraser's relevant concepts, connect them to the human rights vocabulary, and using them try to give an alternative theoretical explanation for the phenomenon of 'the Right's attacks on human rights'.

## *2. The polysemy of the concept of gender*[6]

'If a gender quota is necessary for party lists, then what if I identify as a woman – can I run then for a woman's place? And what happens if I identify as one of those plenty of other genders?' – A male politician from the right-wing opposition party Jobbik provocatively asked me this question once, and with this theme we arrived at one of the favorite topics of the Right when it comes to women's rights and gender equality.

[5] This transnational character has been described in the edited volumes I refer to.

[6] This section was published in a slightly edited form on the gender blog of the London School of Economics: https://blogs.lse.ac.uk/gender/2018/11/26/the-consequences-of-the-differing-meanings-of-gender-in-policy-and-activism-for-politics/

The contradiction raised by the politician points to the fact that the gender definition of policy quotas differs from the one necessary for addressing trans and genderqueer people's political claims.

The controversy around *gender* is therefore further complicated in relation to other human rights issues by the fact that there are different definitions of gender in use in policy-making and in social justice activism, born at different times and grounded on different ideological bases, partly disconnected from debates within gender studies, and partly contradicting each other.

First, in the English-speaking context, 'gender' is widely substituted for biological sex in order to avoid associations with sexual intercourse; this started with laws about discrimination, now widespread (Case, 1995). For instance, when we speak about gender quotas, what is meant is the male-female ratio. The interchangeable use of the two terms is exemplified in a debate about the Trump administration's plan to define 'gender as a biological, immutable condition.' Some commentators claimed that this was a deliberate, ideology-driven attempt to conflate the two terms.[7]

Second, the term has come to refer to women: e.g., gender analysis in policy-making is often used to describe how measures affect women – and less, as originally intended, gender relations; i.e., the societal relations between men and women.

Third, it is applied as an analytical category to describe the social quality of distinctions based on sex, the power structures in a given society between men and women, and the roles, possibilities and constraints in society attributed to being born male or female. Such is the gender definition contained in the Istanbul Convention: 3.c) '"gender" shall mean the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men'; and 3.d) '"gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately.'[8]

Fourth, many use it in trans and genderqueer scholarship and activism to mean gender identity: a person's felt sense of identity (Green, 2006: 247), meaning identification (or lack of the former) with being born male or female. This is evidenced by the expression 'gender assigned at birth' to refer to the fact that the former might not correspond to a person's later-defined gender identity, or the practice in core countries with languages with gendered pronouns that when introducing oneself, one should specify the 'preferred pronoun' on the basis that we 'cannot assume one's gender' from appearance.[9] So, in this sense 'gender' does not mean an analytical category for describing the social components and expectations of being a woman or man that are attached by society to our sex (being female or male) as expressed, for example, in the idea that 'girls should do this, boys should do that'.

Therefore, one must not wonder that people not acquainted with social justice activism and gender policy, not to mention with theoretical debates in gender studies, cannot make sense of 'what gender really is.' This ambiguity of the term *within* activism and policy makes the term vulnerable too, and provides clues for actors who

[7] See for instance https://www.forbes.com/sites/julianvigo/2018/10/26/evil-womxn-the-silencing-of-biological-reality-and-the-technology-of-obfuscation/#40d0496f18fd

[8] Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210, signed in Istanbul on May 11, 2011.

[9] Associated with heated debates among feminist and trans scholars and activists. Scientific accounts of these debates from one perspective: Bettcher and Styker, 2016; and from the other: Reilly-Cooper, 2016.

are less interested in disentangling complexities and more in creating a homogeneous *other* from the groups of feminists, LGBT activists, gender-studies scholars, liberal, green and left-wing politicians.

As will be shown below, in the context of the Hungarian government's attacks on the Istanbul Convention and gender studies MA programs, reference is made to *existing* activism that uses a gender definition which does not treat biological sex as a given fact, while regarding gender as a set of roles, expectations and means assigned to biological males and females (the third understanding listed above). Instead, fine-tuning it to its own political agenda, the government attacks the gender definition employed in the kind of activism that regards the separation of sex and gender not as an analytical but a practical one, proposing that gender is independent of bodily reality; that is, the gender one identifies with (the fourth reading above). The government uses this gender definition to denounce feminist claims as harmful; for instance, by suggesting that discussion of gender stereotypes in kindergarten could, as a next step, lead to children questioning their gender identity. It is necessary to understand these nuances to see why the debate in Hungary is not 'old wine (antifeminism, homophobia) in a new bottle, (attacks against the concept of gender)'.

## *3. The Hungarian government's attacks on the Istanbul Convention and Gender Studies*

In contrast to most countries where grassroots and/or religious organizations mobilize against so-called progressive bills by referring to 'gender ideology,' in Hungary it is the government that maintains the perception of danger so that it can pose in the role of the protector of Hungary. Here, mobilization does not occur on the streets, but through NGOs close to the government or outright government-organized NGOs (so-called 'GONGOs': government-operated/sponsored NGOs) and by using the preponderance of government control of the media. Also, compared to other countries, the concept of gender became an enemy later on, only in 2017.[10]

This section analyzes the two main campaigns against what the government calls 'gender ideology' carried out by the former in 2017 in the context of the 'war of independence' against foreign influence. These two campaigns focused on the ratification of the Istanbul Convention and the launch of the Gender Studies MA program by Eötvös Loránd University (ELTE). The government, government media (Polyák and Urbán, 2016), and civil organizations with links to the government (Metz, 2015; Varga, 2016) rallied concurrently against these issues. The following empirical evidence suggests that the phenomenon is more than a political strategy of defining the enemy, and is not just a new form and language of the dismissal of human rights; i.e., a backlash against existing and proposed women's and LGBTQ rights. Government propaganda against 'gender ideology' and 'political correctness' reflects existing legislative and activist phenomena in the United States, the United Kingdom, Canada, and Germany, but pretends that all feminist and LGBT political claims and all forms of gender studies scholarship are only about these. Current events and trends are used and interpreted by government actors to uphold the wartime narrative that serves to

[10] This does not mean that there was formerly no anti-'gender ideology' discourse, but that it remained quite low-key and sporadic. For a chronology, see Félix (2015) and Kováts and Pető (2017).

generate a feeling of being under constant threat, besides other hate campaigns, such as those built on the migration crisis (Kováts and Pető, 2017).

In December 2016, Prime Minister Viktor Orbán announced that 2017 would be the year when Hungary would finally settle its accounts with the interests and objectives represented by Hungarian-born billionaire philanthropist György Soros. Launched soon after, in February 2017, the campaign started with waves of posters and 'national consultations'.[11] In this context, Central European University (CEU), founded by Soros, was also targeted, together with all liberal values, including LGBTQ issues. 'Gender ideology' fits into a string of issues used by the government to distinguish itself from the 'corrupt West'. The campaign against Soros, based on the alleged threat posed by CEU, LGBTQ affairs, NGOs and the wider 'gender ideology', created a new enemy that could be used as an incentive for continued mobilization after the (temporary) attenuation of the migration crisis.

ELTE's Gender Studies program was targeted by government propaganda in February 2017. First, the Youth Christian Democratic Alliance (IKSZ), the youth section of KDNP, the smaller coalition partner, wrote an open letter to the rector of the university complaining against Gender Studies. The group urged the rector to stop bowing to 'pressure from the gender and gay lobby':

> You, the management, have decided to offer a Master's course that is of absolutely no use to Hungarian society, in a misguided topic that is *choked by political correctness* and disguised as science. We believe that Hungary cannot afford the same luxury as certain Scandinavian countries, where *the signs posted on bathroom doors* are among the most important points of public debate, and effort is made to market as many neutral toys and school books as possible, *to avoid influencing the belonging of boys and girls to their own sex*. It must be accepted that there are biological sexes, not social ones,[12] making even the designation of the course false and misleading.[13]

From then on, all forms of government media started churning out propaganda materials against gender studies. In one of her first television interviews, hosted by the government-funded *Echo TV,* the starting question posed to Ágnes Van-Til Kövér, head of the program, was why they had launched a program that *affects only 0.3 per cent of Hungarian society*, by which the reporter was obviously referring to the estimated percentage of transgender people in society.[14] Government-led resistance argued that the traditional family model was under threat and referred to international phenomena related to transgender and queer activism as the supposed curriculum for gender studies, non-binary gender identities, misgendering, but also more broadly such things as political correctness and the recent activism concerning the individualized understanding of intersectionality (Kováts, 2019).

[11] Additionally, the so-called 'Stop Soros Act' had been drafted by February 2018. The Act, which pitched an attack against NGOs funded by organizations affiliated with Soros, among others, was adopted in May 2018 by the new parliament.

[12] In the Hungarian language there is no distinction between 'sex' and 'gender'; the concept is expressed using adjectival forms: biological vs. social sex.

[13] Emphasis added: https://pestisracok.hu/iksz-azelte-kiszolgalja-gender-es-meleglobbi-nyomulasat/

[14] https://www.youtube.com/watch?v=3auaFOI1N20

Initially, the fiery debate and propaganda activities were not followed by government action in 2017. ELTE's MA program was launched as scheduled, with a dozen students in September 2017. However, the second wave of debates started in August 2018 after PM Orbán declared a culture war in his yearly programmatic speech and the final settling of accounts with culture and academia. The terrain thus discursively prepared, the threat of 'gender ideology' seeded, the debate revolved around withdrawing accreditation for the MA program in line with earlier arguments, but with higher political stakes. In mid-October it was announced that the program would be stripped of accreditation; only those who had started the program in 2017 and 2018 could finish it by June 2019 and 2020, respectively.

The Council of Europe Convention on preventing and combating violence against women and domestic violence (the 'Istanbul Convention') was signed by the Hungarian Government in March 2014, but has not yet been ratified. In response to inquiries regularly lodged by women's rights organizations, the government followed a pattern of confirmation ('yes, we will ratify it') and adjournment, creating the impression that the issue was not being followed up within the governmental structure or was not being treated as a priority. In light of this, linking the convention with the charge of 'gender ideology' seems to have come in handy as the ideological anchoring for remaining passive; all the more so because the topic was easy to incorporate into the new mobilization strategy of the government. While the government was correct in expecting that no mass protests would follow if it made a U-turn on the matter of ratification, this shift in discourse made it possible to present itself, once again, as the guardian of national sovereignty and a tireless warrior in the struggle against foreign influence by rejecting yet another international treaty that was incompatible with 'Hungarian values'.

CitizenGO, a transnational conservative organization, published a petition on February 23, 2017, timed to coincide with the attacks against CEU's presence in Budapest and the launching of the gender studies program at ELTE. 'The enactment of the Istanbul Convention could prove to be the Trojan horse of gender ideology for Hungary.' This claim, already widely circulated in other countries, was used as the title of a text that was brought in front of the Parliamentary Committee of the Judiciary together with the then-current status of signatures by representatives of Fidesz, KDNP, and Jobbik one month later. The main argument for opposing the ratification of the Istanbul Convention is that it uses the non-consensual and ambiguous term 'gender'. This reference to, and fight against, gender stereotypes was based on the claim that it might open the way for more radical demands, such as the choosing of one's own gender identity or, as the Human Dignity Center puts it, twisting the above quoted definition of the Convention:

> According to the definition, gender is a social construct that may vary and, basically, is independent of biological reality (the fact that someone is either a man or a woman). Accepting this definition may lead to the denial of natural differences between men and women.[15]

[15] https://go.citizengo.org/rs/907-ODY-051/images/Isztambuli%20Egyezm%C3%A9ny%20%C3%81ll%C3%A1sfoglal%C3%A1s_Emberi%20M%C3%A9lt%C3%B3s%C3%A1g%20K%C3%B6zpont.pdf pp. 4-5.

The Center for Fundamental Rights, a government agency posing as an NGO – a GONGO, by definition (Varga, 2016: 244–245) – published a resolution on the Istanbul Convention entitled 'No to the Gender Convention'[16] and recommended that the government not submit the Convention to Parliament because:

> Even though it is common sense that *there are only two sexes in all creation*, the Convention aims to go against this fact, to do away with the notion of biological sexes and use the concept of gender instead for all legal purposes. *People would stop being simply men and women, and would belong to one of the infinite number of artificially created gender categories.* [Emphasis added]

This clearly distorts the gender definition of the Convention, which does not deny the biological reality of the two sexes as quoted above.

However, as we saw, gender and gender-based violence are not clear-cut policy concepts. In March 2018, 333 conservative NGOs wrote an open letter to the secretary general of the Council of Europe pointing to the ambiguity of the concept of gender in EU documents – explaining, for example, that on some occasions the term does not mean what is written in the Convention ('gender-based violence against women shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately'), but 'violence that is directed against a person of that person's gender, gender identity or gender expression."[17] The shift in meaning that the Right identifies is real. The normative evaluation of this differs, but as we will see, not along the categories of Left and Right or progressive vs. conservative. Also, what we observe in the Hungarian case is that opponents of the concept of gender use their abhorrence of the concept of 'gender identity' to render any gender equality claims suspicious (the 'Trojan horse' argument) and use it as a justification for the necessity of anti-democratic developments.

Ratification of the Convention was postponed, and several government representatives stated that they would never support or ratify it. In the run-up to the parliamentary elections of April 2018, government media repeatedly warned that if the opposition came to power, the latter would ratify the 'Gender Convention'.

[16] http://alapjogokert.hu/wp-content/uploads/2017/05/Nem-a-genderegyezm%C3%A9nyre.pdf
[17] For the letter and the referenced documents see
https://www.irs.in.ua/files/publications/Letter-to-Secretary-General-of-CoE-Thorbjorn-Jagland.pdf

## *4. An attack on human rights?*

When right-wing conservative actors reject the concept of gender, they regard the fight against gender stereotyping as a precursor to the advent of 'choosable gender identities'. It may, therefore, seem that they are using new language for the old anti-feminist aspiration of regarding the sexes as exclusively biological and deriving all gender roles from this. Also, it may seem that this new language is materializing in the creation of a straw man without any real-world reference. However, as exemplified by the italicized parts of the arguments quoted above (in opposition to the Istanbul Convention and the first Hungarian gender studies program), the discourse makes reference to debates and disputes that are (mainly) going on in Anglo-Saxon countries and at the EU-level, primarily about political correctness and the shift in meanings of words associated with transgender and non-binary gender identities, most prominently the process of the individualized and identity-based reformulation of the previously structural category of gender.

It is especially striking in the Hungarian debates about these two cases that no reference is made to women's rights at all. While the failure to ratify the Convention has a negative impact on women in practice by delaying the implementation of infrastructure that is necessary for curbing violence,[18] the discourse against the Convention does not define the place of women in society. Perhaps explicitly stating that there is no money for stopping violence against women, or that it is not a priority, might sound too *politically incorrect* even for this government, so the newly generated discourse might offer an easy way out. As proven by the quotations above, the entire phenomenon can be interpreted as the reception process of activism that defines gender as identity, in line with the government's objective of creating the image of an enemy that can be used for mobilization and to justify their failure to ratify the Istanbul Convention. Obviously, the real political motives behind such communication operations cannot be inferred from written documents or public speeches. In any case, it can be safely established that the phenomenon the government is attacking is not a fictive enemy that lacks a real-life reference, but builds upon manifestations of actual activism and uses these to serve the goals of furthering polarization and fear-mongering. However, such manifestations are, at this stage, imported threats in the Hungarian context involving a copy-paste alt-right: very few Hungarian feminist and LGBT activists have publicly exhibited such views so far. Nevertheless, the phenomena they refer to exists, and is being imported to the activist scene that presents these issues and social justice language as universal (Bajusz and Feró, 2018).

Having uncovered this connection, the most common interpretation (i.e., that we would be facing a new form of anti-human rights movement, anti-feminism, and homophobia) cannot be sustained any more, or must be completed at least, and it must also be acknowledged that this phenomenon is not a kind of backlash against existing women's and LGBT rights; at most, it opposes a certain strand of feminism and LGBT activism. To what extent the lessons of the Hungarian case study can be applied to other contexts and the other forms of right-wing contestations that come under the banner of 'gender ideology', where transgender and genderqueer issues are

[18] One must note that the government has nevertheless implemented certain supportive measures (e.g. has established new crisis centers and shelters) in recent years.

not at the forefront of debate, needs to be examined. No generalizations can be made here; however, it is clear that this type of social justice activism exists in other European countries too and is the target of right-wing critique (e.g. in Germany), so a more thorough analysis is needed about these connections. What the Hungarian case invites us to do, however, is develop a framework of interpretation that goes beyond dichotomic understandings of the phenomenon, as if it involved a fight between progressives vs. conservatives, or egalitarians vs. authoritarians (essentialists vs. post-essentialists; Hark and Villa, 2016). Instead, we need a framework that integrates the embeddedness of the struggle for equality into the global power order, together with the liberal, Marxist and feminist critiques of the observed trends of activism. This framework of interpretation must be suitable for showing how parties that are seemingly opposed to each other act and interact according to the same logic to produce the same result: culture war.

I propose to use Nancy Fraser's conceptual framework for the interpretation. My argument is that the recognition framing of injustices leads to a culturalist understanding of the phenomenon, as if it involved a fight between values, or camps for or against equality. Once we stop cutting the economic axis off the analysis, and stop treating gender issues as solely cultural, we can see that what we face is not a mere cultural, conservative, anti-feminist, homophobic backlash. Reintegrating the redistribution axis with the cultural one (in the sense of perspectival, not substantial dualism) helps to see the flaws in the "recognition shift' and how it has happened that the discourse of the Right has gained traction among wider circles of the population in Hungary and beyond.

## *5. Redistribution and recognition*[19]

I will start with the definition of these two key concepts of justice, as set out in Fraser's well-known article 'From redistribution to recognition? Dilemmas of justice in a "post-socialist age"' (1995). Fraser uses the term redistribution to indicate the socioeconomic injustice ingrained in the political-economic structure of society. It occurs, for example, in cases of exploitation (having the fruits of one's labor appropriated for the benefit of others), economic marginalization (being confined to undesirable or poorly paid work or being denied access to income-generating labor altogether), or deprivation (being denied an adequate material standard of living) (Fraser, 1995: 70–71). Another interpretation of injustice, referred to as recognition issues in the relevant philosophical literature, focuses on cultural or symbolic injustice. These are rooted, according to Fraser, in general patterns of social representation,

[19] Both concepts have had a long career in political philosophy about justice. I take Nancy Fraser's dual and complementary approach as it seems helpful for addressing the problem the paper aims to tackle. Since the publication of her original text Fraser complemented her theory of justice and identified, besides the dimensions of redistribution in the economic sphere and recognition in the socio-cultural sphere, the dimension of representation in the political sphere. For the sake of the clarity of the argument I stick to the original dual theory. Also, I am well aware that she faced substantial criticism (e.g. by Iris Marion Young and Judith Butler), but in my view Fraser either convincingly refuted such claims or she managed to incorporate them into later writings (2000; 2003). For reasons of space I do not discuss these in detai, Fraser's concepts being not the purpose in this paper, but as a useful instrument for overcoming the culture war frame.

interpretation and communication (ibid: 71). Fraser considers that the issues of gender equality simultaneously touch upon issues of recognition and redistribution ingrained in both the political-economic structure of society and its culture.

> '[Gender] is a basic structuring principle of the political economy. On the one hand, gender structures the fundamental division between paid "productive" labour and unpaid "reproductive" and domestic labour, assigning women primary responsibility for the latter. On the other hand, gender also structures the division within paid labour between higher-paid, male-dominated [...] occupations and lower-paid, female-dominated [...] occupations.' (ibid.: 78)

These occupations include jobs that are often 'naturally' held by women, such as nursery workers. The political and economic structure continuously reproduces this inequality.

However, gender is an important component of cultural-valuational differentiation as well. This is exemplified by those social practices that are rooted in the idea that men are superior and women are inferior, and which reproduce this idea on the go. Such practices include sexual harassment and violence, the condescending treatment of women in everyday life, female objectification in the media, the exclusion of women from the public sphere and decision-making bodies, and the disparagement of things coded as 'feminine'. These cannot be considered merely products of the political-economic order and remedied by political-economic redistribution only.

Fraser's theoretical work on justice begins with the idea that a change took place around the end of the twentieth century that turned the struggles for recognition into paradigmatic forms of political conflict. As early as 1995, she took a critical position with respect to this idea and looked for ways to reconcile the various struggles that were sometimes contradictory in their objectives. This remained one of her main issues, also with regard to feminism, inasmuch as how 'the feminist turn to recognition has dovetailed all too neatly with a hegemonic neoliberalism' (2013: 160), and how progressive causes could lend assistance to neoliberal logics (2017).

### *5.1 Recognition yes, identity politics and psychologizing no*

Fraser rejects the idea that identity politics and the politics of recognition would be the same thing. In light of the current debate in the Anglo-Saxon sphere of influence (Lilla, 2017; Fukuyama, 2018), which has started to infiltrate the Central and Eastern European theater as well, it is important to make this distinction, and Fraser's insights from 2000 and 2003 may even seem to have a prophetic character. She lists the following four main reasons.

*First*, identity politics limits the issue of recognition to reinforcing group specificity, thereby reinforcing separatism (according to this logic, for example, the main issue for gay people would be the politics behind the recognition of their gay identity). *Second*, this approach makes it difficult to comprehend that people are members of several groups at the same time and their identity is much more complex than these group identities can describe (meaning that adding up these group identities – for example, white + woman + lesbian – does not move us closer to grasping reality). *Third*, this approach obscures the fact that injustice against unrecognized groups, such as women, gays or blacks, is partly rooted in the injustice of distribution. And finally,

*fourth*, it conceals the internal (power) struggles within these groups by homogenizing them. By way of example, consider what the best course of action is if women are kept in an inferior position within a minority group – should this be counteracted, or there is nothing to be done, as resisting would undermine group identity and objectives? (Fraser, 2000).

Fraser also rejects the idea of deducing the justification of recognition from the individual psyche, and this has several practical ramifications. Certain philosophers who deal with similar topics, such as Charles Taylor and Axel Honneth, discuss the question of recognition in terms of grounding human integrity in the consent of and recognition by other people. According to this view, recognition is needed to avoid hurting the self-esteem of a person in order to allow them to regard themselves as a person of worth, a full member of society, and the equal of others. Thus, a society that regards women as inferior will hurt individuals, which is unjust. As opposed to this, Fraser argues that it is wrong to focus on the psyche. *First,* because such an approach may be exposed to empirical refutation (if a person's self-esteem is not hurt, then others may achieve the same thing without external help). *Second*, because this approach entails that any feeling of any individual is a valid claim for justice and, for example, racist people may claim that their self-esteem is violated (and it can be) if people of other skin colors or cultures are given the same rights. *Third*, because it hampers the focus on social structures and institutions that create and maintain unjust practices (Fraser and Honneth, 2003).

Instead of a grounding in identity politics and psychology, Fraser suggests thinking about this issue as an institutionalized relationship of subordination. Injustice is not significant because it appears at the level of individual self-esteem, but because the institutional models of these cultural values exclude entire groups of people from being able to participate in social interaction as equals. That is, the source of the lack of recognition is not in the disrespectful attitudes of individuals, but in social institutions, and therefore the adequate scale of struggle is changing these institutions. She calls this the status model of recognition, as opposed to the identity model (Fraser, 2000). It is especially important to highlight Fraser's thoughts today, when the perspective that one's privileged position in a particular group determines what they think and whether they are allowed to speak up in particular cases is getting more and more leverage: as if being member of an affected group could override all other considerations. This is what German scholar Paula Villa rightly criticizes as 'positional fundamentalism'; that is, equating individuals with their positions within social structures (their race, their sex, their sexual preference) and making them personally responsible for oppressive societal structures.[20]

### *5.2 No economism, no culturalism, no adding up*

Following the election of Trump in 2016, there were many wake-up calls on the Left, demanding a return to really important issues in order to fight economic inequalities. Some of these voices even urged the Left to drop 'such marginal cultural issues as feminism, racism or the representation of LGBT rights', because, they held, once we

[20] https://www.zeit.de/kultur/2017-02/milo-yiannopoulos-populismus-usa-donald-trump-breitbart-10nach8/komplettansicht

get rid of economic inequalities, all inequalities will vanish. Fraser, who has labeled this approach 'economism', believes – correctly – that it is mistaken.

However, she also rejects the other extreme, culturalism, represented among others by her sparring partner of decades, German philosopher Axel Honneth. This approach contends that economic inequalities have either been already dealt with, or, if not, they are actually due to a lack of cultural recognition (Fraser and Honneth, 2003). The starting point for Fraser's entire theory is criticism of the over-proliferation of cultural framing. For instance, when feminists focus on the phenomenon of so-called 'body shaming' or when politicians make suggestions for improving the situation of women in the symbolic space (for example, representing women on paper money or banning sexist ads), they either neglect the sphere of redistribution altogether or disconnect it from recognition issues.

Fraser rejects the third solution as well; i.e., that economic and cultural issues should *also* be addressed. Central to her argument is the claim that any such substantive dualism must be rejected as the injustices experienced in these two areas cannot be regarded as separable in essence. Looking at the structure of the labor market would make it a question of distribution, while looking at the objectification of women in the media, for example, would make it an issue of recognition; Fraser rejects this view.

### *5.3 Correlation instead of either/or*

Instead of these three approaches (either one or the other, or both), she proposes *perspectival dualism*, by which issues of justice are considered in terms of their connections, since almost all issues have both economic and cultural implications, even though it may seem at a certain point that these issues are purely economic or purely cultural.

Consider the example of a widely publicized demand put forward by women's organizations: namely, that men should do a greater share of housework and providing care. The difficulty with this is easier to understand when looking beyond the cultural framework; that is, the attitudes that essentially regard these tasks as being menial and the duty of women. Women typically work in underpaid sectors, and their responsibilities as caregivers make it less likely that they will be promoted. Furthermore, if they live in a heterosexual relationship, there is a good chance that they earn less than their partner. In fact, market competition pushes employers to regard male parental leave as a nuisance and works against it. Moreover, the ethos of the 'reliable employee' is a person who is always available, has no care giving responsibilities (no sick child or elderly parent), who is taken care of by others. As described by social reproduction theoreticians, the market has an interest in keeping up the structure that treats care work, and more broadly, social reproduction, as an economic externality. In light of this, it is pointless to try and convince men to do more at home or for women to consciously overcome their socialization which acts as a restraint if the systemic conditions for a more just division of labor at home are missing. The problem has no solution at this individual level, and gender equality remains as distant as ever, but the patronizing and to some extent moralizing attitude of activists may trigger an adverse response in those whose material reality is not compliant with this kind of sensitization, and this provides fertile ground for

exclusionary discourses. We must, therefore, consider the issues of redistribution and recognition as an interconnected network that goes beyond mere cultural interpretation. It is then easy to see that the desired development will not come about as a result of changes in the attitudes of individuals.

Fraser argues that the spheres of culture and economy cannot be separated in this respect. The market, for example, relies on cultural patterns that maintain the subjection of certain social groups, such as women. The damaging effects of the porn industry or the market model of sugar daddy/sugar baby websites cannot be explained only through the cultural patterns of contempt towards women. The role of economic processes is also evident. Regarding the latter, for instance, in more and more countries the state is increasingly withdrawing from paying for participation in higher education, thus this option, imported from the United States, is offered as a model (see the sites richmeetsbeautiful or seekingarrangement). On the other hand, the wage gap between the sexes cannot be eliminated until the cultural patterns which render the activities assigned to women less worthy are changed.

## *6. The limits of human rights vocabulary*[21]

The human rights consensus which formed the basis of the post-World War II order in the West is among those things questioned by the forces mobilizing against 'gender ideology' (Pető, 2016), while in the Hungarian context, the term 'human rights fundamentalism' is widespread in the right-wing media. This makes it all the more difficult to address the limits of human rights language, as it can be easily conflated with generally present fear-mongering propaganda. However, human rights as a framework for addressing inequalities and assessing current processes is being criticized from other angles, too.

Fraser situates the human rights paradigm within the recognition shift. As she noted in 2001 (in English translation, 2013), 'struggles for recognition have exploded everywhere – witness battles over multiculturalism, human rights, and national autonomy' (Fraser, 2013: 160). Based on the previous sections, I argue that the human rights paradigm in itself is suitable neither for assessing the nature of gender inequality and injustices faced by women, nor for explaining the phenomenon that the Right regularly questions gender and LGBT equality (e.g. that they would be anti-feminist or homophobic, and against human rights).

A growing body of scholarly literature is criticizing the focus on individual rights[22] and discussing whether human rights and human-rights-committed actors share the responsibility for neoliberalism (e.g. in the form of unholy alliances with capital; Fraser, 2017) or have simply been a 'powerless companion' to market

[21] This section is adapted from Kováts (2018).

[22] And further: 'Whatever its potential in theory, the human rights movement adapted in practice to the new ambiance. For one thing, the idea of human rights followed the transformation of political economy to a global outlook. Further, activists no longer gave priority to the agency of states to launch and manage national welfare, but rather to the rights of individuals to be free from harm and to enjoy a rudimentary government that averts disaster and abjection. In the economic realm, social equality was forsaken as an ideal. In exchange for its cosmopolitanism, and in spite of some initial uncertainty, the new human rights movement foreswore any relationship to post-war egalitarianism in both theory and practice' (Moyn 2017: 5).

fundamentalism (e.g. Moyn, 2014).[23] What seems to be clear is that the human rights framework does not allow for the addressing of systemic questions, including global power inequalities, or as Moyn puts it, 'human rights, even perfectly realized human rights, are compatible with inequality, even radical inequality' (Moyn, 2017: 2). This obviously does not mean that human rights are not essential for justice, but rather that they are not enough, they are non-exhaustive, and need to be complemented. Also, it must be noted that just because certain actors abuse human rights by making some problematic claims referring to them, this is not a shortcoming of the human rights approach, but rather the problem is with those specific claims and actors who put them forward. Still, I would like to highlight three limitations of the human rights vocabulary in assessing current injustices and right-wing mobilizations.

First, as widely discussed in the literature, the universalistic framework of human rights covers up the embeddedness of the agenda in the global context. In East-Central Europe, for instance, the arrival of the human rights approach coincided (in time and partly in terms of actors) with a time of democratic transformations and with the call for 'catching up with the developed West,' i.e., with what adhesion to global capitalism from a semi-peripheric, inferior position required (Gregor and Grzebalska, 2016), while the focus of human rights NGOs is currently strongly influenced by the agenda of Western donors.

Second, the paradigm of human rights focuses on individual rights and treats the economic order as an independent social sub-system and equality between men and women as a cultural issue, severed from its connections with the economic axes. This is in line with Fraser's critique of the recognition turn, and partly explains why the Right often accuses the 'human rights fundamentalism' of neo-liberal individualism.

That the actors mobilizing against 'gender ideology' often identify a connection between the term 'gender' and individualism/neoliberalism, too, is based, as described above, on their idea of gender as freely chosen, not constrained by norms, nature, and biological sex. What makes this right-wing critique more complicated is the fact that the same criticism is raised by feminist and leftist perspectives as well, especially in the Anglo-Saxon countries where the above-mentioned trans/queer identity politics is an important strand of feminist and LGBTQ activism. These critics argue that the identity politics approach turns emancipatory movements into terrains of individual claims for recognition, and that by adopting the logic of neoliberalism instead of collectively addressing systemic problems, this strand fosters individual adaptation. To provide an example, it is convincingly argued that queer politics encourages individuals to reject the categories themselves (man or woman) instead of fighting the narrowly defined gender roles expected of men and women and the system which

[23] 'The real trouble about human rights when historically correlated with market fundamentalism is not that they promote it but that they are unambitious in theory and ineffectual in practice in the face of its success. Neoliberalism has changed the world, while the human rights movement has posed no threat to it. The tragedy of human rights is that they have occupied the global imagination but have so far contributed little of note, merely nipping at the heels of the neoliberal giant whose path goes unaltered and unresisted. And the critical reason that human rights have been a powerless companion of market fundamentalism is that they simply have nothing to say about material inequality.' (ibid.)

sustains them, and that if one does not comply with the expected gender roles, then one does not belong to that sex (Reilly-Cooper, 2016).[24]

Third, human rights language hides the fact – for example, in the form of the popular call among activists for a 'rainbow coalition'– that there might be a conflict of interest between the different claims formulated in human rights language. More and more claims are finding a place under the umbrella of human rights – and if they get there, they become morally non-negotiable.

This is exemplified by the prostitution/sex work debate. The sex-worker approach, anything but uncontested among feminists, also attempts to delegitimize the abolitionist position from a human rights position. The sex work position states that it is a human right to choose your occupation, and that prostitution is nothing more than regular wage work (albeit indeed among the exploitative types). This approach separates the phenomenon of prostitution from the patriarchy and the context of economic and sexual exploitation in which it is embedded. The sex work approach posits that the core problem is that sex work is stigmatized and the objective of the struggle for justice is to eliminate this stigma and legalize the sex trade (a cultural recognition position that takes the economic axis either as irrelevant or as a given, impossible to change). In contrast, the abolitionist approach regards prostitution as the economic exploitation of the female body and therefore seeks to eradicate it (a position uniting the cultural and economic axis in the sense of the Fraserian perspectivic dualism).

For example, Hungary is not just a transit and destination country, but also one of the significant supply countries, serving regional demand in terms of human trafficking. Many Hungarian women are sold to Germany, Switzerland and the Netherlands where there is no local supply to meet the growing demand promoted by legalization, therefore human trafficking from the (semi-)peripheries is growing. Also, there is such extreme poverty in certain parts of Hungary that there are many women who see no other option than prostitution to provide for themselves or their families. So, framing the fact that these trafficked or extremely poor women are selling their bodies *as a choice* and their human right ignores the lived reality of these people (Katona, 2016). Instead of asking questions such as why the demand for prostitution is embedded in the patriarchy, how capitalism is profiting from this, and how the state is failing to effectively address the root causes, some people devote their resources to mitigating the surface and stick to recognition regarding the claim of 'destigmatizing sex work.'

Yet another example illustrates another aspect of this tension: the example of surrogacy.[25] As the development of technology is interlinked with the interests of those in possession of economic resources, the body of the most vulnerable women may be exploited by wealthy heterosexual or homosexual couples as regards the 'right to a

[24] There are plenty of analyses like this, partly by scholars, partly by activists; see, for example, http://bennorton.com/adolph-reed-identity-politics-is-neoliberalism/, http://www.feministcurrent.com/2016/09/27/need-braver-feminists-challenge-silencing/, and https://fairplayforwomen.com/gender-new-youth-tribe

[25] For an overview of the legal and ethical dilemmas involving transnational commercial surrogacy, see Sándor (2018).

child'.[26] This needs to be addressed in a perspectival dualistic way: by addressing patriarchy and economic exploitation at the same time. If we treat it only as a recognition issue (e.g. the recognition of infertile or gay couples' love as having the same value as that of heterosexual fertile couples), then we fall into the trap of discussing it in terms of openness vs. closedness, progressives vs. the Right. Therefore, there are plenty of challenges for those who stand up for human rights and the equality of all humans, irrespective of their sex, sexual orientation, ethnicity, race, etc. Because of the above-mentioned dilemmas and contradictions that have emerged in recent years and decades, human-rights-committed actors sometimes (unwittingly) contribute to the individualization of structural problems. In this age of culture wars, it is time to take stock of what originally emancipative concepts such as human rights, intersectionality, empowerment, and choice have become (Budgeon, 2015) in order to better understand why the interpretation of a 'conservative backlash' is insufficient for grasping what we now face.

## *7. Conclusion*

Conceptual and strategic debates are, of course, nothing new in activism that strives for more social justice. However, in the case of the (desired) 'human rights consensus', certain political positions are labeled illegitimate (exclusionary or phobic) on the basis of moral judgments. The same is true of the inflation of the terms 'racist', 'sexist', 'misogynist', and 'homophobic'. This labeling renders understanding more difficult and obfuscates the debates within progressive movements, including those about the recognition shift.

The strengthening of the demand for populism and anti-politically-correct language occurs in connection with political claims easily labeled and stigmatized. Obviously, human rights are not apolitical in the sense that it is a substantive political claim that there are undeniable rights that cannot be put to the plenum of majority rule. However, it requires a more accurate analysis to decide which rights and how these can become a part of this framework, and what should be put up for debate instead. Also, the disconnectedness of human rights from economic claims should be remedied in order to better understand the structural root causes of injustices, including in the field of recognition, and to better meet people's lived reality and justice claims (Moyn, 2018).

'None of this is to say that human rights activism is irrelevant, any more than it would indict a hammer to say it is useless when another tool is needed' (Moyn, 2017: 6). Moyn also attributes the rise of populist rage to the downplaying of economic

[26] 'People who seek a surrogate have a very specific desire. It is not enough for them to get to know a child or to help to raise a child who is already alive. Nor is it enough to adopt an orphaned child or to have a child with a woman who also wants a child. No, it has to be their own genetic offspring, a newborn baby of whom the buyer has sole custody. This is always concealed in discussions about surrogacy—that it is not only a desire to raise a child, but also a demand that the mother be absent. The surrogacy story follows a slippery logic. It begins by stating that this desire exists and when the people in question have money, it becomes a demand. This demand is reformulated according to suitable argumentation and thus lands in the realm of being a "right". (...) the need becomes a right: suddenly, we are talking about "everyone's right to have a child"—this very specific desire has thus been transformed into a human right.' (Ekman, 2013: 151–152)

inequalities. And, he claims, doubling down on efforts to defend human rights against growing populism is just denouncing the symptoms and ignoring the disease (ibid: 7).

By narrowing the debate around human rights to cultural values, we fail to consider the broader economic and political processes in which they are embedded. Even within the ranks of researchers of social movements, critical voices have begun to appear, saying that there are more than two camps and that the current debates cannot be interpreted simply as a clash between movement and counter-movement, or groups that are *for* and *against* progressive social change (Roggeband, 2018). The antagonism is not between progressives and conservatives, open and closed-minded people, libertarians and authoritarians, those who are tolerant and those who are oppressive, racists and anti-racists, populists and democrats – and all this does not even add up to a spectrum. As long as the issues of recognition are separated from the context of economic justice, this binary thinking about human rights issues – the claim that one must be either for or against equality – is inevitably reproduced. The same is true of the interpretation of a one-dimensional backlash with respect to understanding attacks against human rights. Moreover, by claiming the former we actively contribute to the rhetoric of a culture war and cannot offer an emancipatory option for gender equality that is in contact with the material reality of the people of East-Central Europe, while becoming a popular alternative to the hegemony of the Right.

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## Book Review

# Narrating Roma Rights Activism for the American Public

## Timmer, Andria D. (2017) *Educating the Hungarian Roma: Non-governmental Organisations and Minority Rights.* Lanham, Boulder, New York and London: Lexington Books. xxxvii, 163 pages.

## Bhabha, Jacqueline, Mirga, Andrzej and Matache, Margareta (eds.) (2017) *Realizing Roma Rights.* Philadelphia: University of Pennsylvania Press. viii, 308 pages.

US-based public and private foundations have actively shaped and promoted Roma rights since 1989. The most prominent ones are the United States Agency for International Development (USAID) and the Open Society Foundations (OSF). After the fall of the Berlin wall, USAID disbursed considerable funds for non-governmental organizations (NGO) working for/with the Roma and organized study visits to the US for scores of Roma activists. OSF, on its part has not only funded NGOs in Central and Eastern Europe (CEE) where the bulk of Europe's ten million Roma live but also established international NGOs (INGO) and itself operates as a 'meta-NGO' advocating for Roma rights.[1]

For American executives within OSF 'the Roma issue [was] a rights issue' from the very beginning and the fight against segregated education the vehicle of social integration.[2] Their priorities served as a blueprint for European funders – first and foremost the European Union – while profoundly impacting on the international Romani movement that is highly dependent on these funders. In exceptional cases Roma political leaders successfully forged coalitions with domestic agents (political parties), gaining access to considerable resources and opportunities to shape domestic policies in meaningful ways.

The two volumes reviewed here naturally apply the US-inspired prescriptions in their quest for making sense of the 'Roma issue'. They narrate the deeds of progressives in the CEE from a US perspective for an interested (US) public in different, but equally intriguing ways. Andria D. Timmer offers a bottom-up view, which is essential to ethnographic research based on participatory observation, the methodology she chooses to map what NGOs do to as much as for the Roma in the field of education.[3] Her empirical research on the role of NGOs facilitating Hungarian

[1] The primary purpose of a 'meta-NGO' is to provide support to other NGOs but it can also come to 'govern' the NGOs it funds, cf. Stubbs (2005: 81).
[2] Harding (2006).
[3] For a recent account of NGO anthropology see Lashaw et al (2017).

desegregation policies between 2002 and 2010 is particularly interesting, because uniquely in the regional and issue context these policies resulted from an alliance of progressive Roma leaders and the liberal party in a coalition government with the socialists. Since then, the former has been obliterated from national politics while the latter is struggling to stay afloat in an increasingly authoritarian political environment.

Timmer focuses on Hungary, because this country was considered to be a forerunner in guaranteeing minority rights, adopting and implementing a school desegregation policy. As the author notes, this sadly came to an end following a change in government in 2010. While the choice of Hungary and education is interesting particularly because of the governmental commitment, the book would have benefitted from a more detailed discussion of the research tenets. As it is, the methodological chapter is in want of better-grounded comparative analysis across at least the Roma-dense CEE countries. That could support the research design and the findings more than the anecdotal reference to pure luck and circumstance in ethnography. By delving into education, Timmer bets on everybody's favorite horse. Had she pursued research as originally intended, i.e. in the field of health, she may have found a road less travelled but full of surprising insights.

In contrast, Jacqueline Bhabha, Andrzej Mirga and Margareta Matache take a top-down approach, asking their collaborators to analyze Roma policies and projects, standard setting and litigation over the course of the last three decades. They focus on the regional level and only seldom magnify domestic or local processes and events. This is surprising, because the chapters lead to a proposal seeking to prioritize community organizing. That this proposal is based on critical insights into other social change strategies and tools, rather than into what really works at the community level indicates not a lack of empirical research but an oversight on the part of the editors, who could have dedicated a section to scholarship such as Timmer's. That certain tools have not worked well in a given city or country is not a good enough reason to quickly revert to others. In any case, the authors propose a rather limited overhaul of the Roma rights toolbox, essentially to scale down on legal mobilization.[4]

The pieces assembled in *Realizing Roma Rights* take stock of the efforts of European and US-based actors directed at key international organizations: the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe and the European Union (EU). Whether writing as a representative of the US foreign policy establishment or an US-dominated voice in world polity, OSF the authors are personally vested in the processes they describe and analyze, which is why their positionality matters. Individual experience and participation make their accounts comparable to Timmer's work. Still, most contributors are more than simple observers. They are or have been key figures in policy making and litigation, which implicates their own agency in ways very different from Timmer's, an English teacher in a Roma-only high school. Bearing this in mind, the editors should have perhaps encouraged a more reflexive narrative. As it is, the general lack of auto-critique

[4] Legal mobilization was coined by Scheingold (1974) who inquired into the political uses of the law. While generally understood as a process driven by public interest law organizations in the United States (Handler, 1978) and non-governmental organizations (including trade unions) in Europe (Anagnostou, ed., 2014), in an important contribution Francis Zemans (1983) demonstrated that the use of the law by individuals should also be seen as an important modality of legal mobilization.

undermines the findings of the collective volume and stands in contrast with Timmer's account that becomes the most captivating when up close and personal.

The book that is her doctoral dissertation is structured into five substantive chapters, a preface and conclusions. The Preface introduces the subject matter and the methodology. The title 'Providing Education for Europe's Most Disadvantaged Minority' suggests a much broader scope than what is finally taken. Chapter 1, '*Én Cigány Vagyok!:* On Who Is (And Who Should Be) Considered Roma' begins with a story that naturally lends the author in the actual site of inquiry, foregrounding the protagonists of the narrative, the Roma themselves. It enables Timmer to showcase the discrepancy between self-perceived and attributed ethnic identity, a phenomenon she associates with racialization and coins as the 'Gypsy trope' without however adequately situating her discussion in the broader field of nationalism studies.

Chapter 2 'The Roma in Europe and Hungary' seems insufficient to enable the reader to form an informed opinion about the legal, policy and political salience of the Roma issue at the domestic and European levels. Importantly, the focus on minority rights and the disregard for other frames is not adequately explained. This is unfortunate, because in the field of education the minority rights frame is not the most significant one, especially not for the Roma. Rather, non-discrimination and equal treatment provide the backbone of Hungarian desegregation legislation and enforcement, while social inclusion serve(d) as the basis of policy measures.

Similarly, Chapter 3 showcasing the interventions of educational NGOs seems somewhat impressionistic, far from exhaustive or indeed congruent with the research design: the categories of NGOs introduced in the Preface and the variables on which the analysis is allegedly based. More importantly however, Timmer's hypothesis, namely that the dominant approach educational NGOs adopt is 'to empower a group of individuals who proudly proclaim themselves as Roma or Gypsy and who, once educated, can (1) change negative perceptions of the Roma, (2) fight for Roma rights, (3) increase self-esteem and pride in Roma identity, and (4) increase the visibility of positive examples in the public' (p. 45) is simply unsubstantiated and possibly very far from the truth. Quite the contrary, these objectives characterize very few educational NGOs. The claim that the 'overarching goal of all educational NGOs is to combat segregation [by fighting] against assimilation and negative segregation or support positive segregation and integration' (p. 63) is similarly out of tune with empiria. While in funding applications NGOs may invoke these goals, in reality – as Timmer herself repeatedly notes – they often go the opposite direction as they come to face *massive resistance* from the majority population and local institutions.

Chapter 4 looks at the way NGOs construct the Roma and critically but not surprisingly from an anthropologist-ethnographer finds civil society approaches stigmatizing and/or victim-blaming. The gist of the findings is that: 'in their intervention a large majority of these organizations treat the Roma as a group who are in actuality a problem themselves. [...] they engage in activities that attempt to change the way their beneficiaries perceive and behave in the world. In essence, the Roma have a problem and must change accordingly' (p. 94). A contrary example is described in Chapter 5 that details the author's experiences and observations during participatory research as a faculty member at the Előrelépés ('A step ahead') High

School in a segregated Roma village in an impoverished area close to the Croatian border.

Timmer's conclusion, namely that the Roma are a heterogeneous ethnic minority racialized on the basis of proxies such as poverty, delinquent cultural practices and inferior mental and intellectual abilities is a basic tenet of social science research on racism and well exposed in the Hungarian academic and NGO context.[5] This would deserve more thorough acknowledgement of sources in both realms. Ascribing novelty value to a spin-off of this conclusion, namely that the Roma ethnic group is constructed by Eurocrats, NGOs – and Roma politicians one must add – is also problematic. The constructed and contested nature of a politicized Roma identity has been studied by others before, starting with Nicolae Gheorghe who coined the political process of Roma identity construction as the Roma ethnogenesis and ending with Surdu and Kovats who synthesized earlier accounts of the expert construction critique.[6]

In the Conclusion Timmer proposes to change and expand the frames of desegregation not through the lens of ethnic identity/culture, as that inevitably leads to mis-recognition and the reification of standardized identities. Following Nancy Fraser's theoretical model[7] she concludes that the segregation and lower quality education of the Roma 'should be treated as a question of social status'. In other words, class, rather than race should be 'recognized as the basis of social subordination and the denial of the status of a full partner' (p. 136). Even if not revolutionary, Timmer makes an important point from a US perspective, but she is far from revolutionary in the Hungarian/European context. Her failure to properly reflect on the function of race (ethnic identity) in the US where Fraser's insights originate is unfortunate. Engaging more profoundly with nationalism studies – Brubaker and other social scientist referenced in the book – or tapping into observations made by Wacquant on the 'formidable epistemological obstacle' that 'de-emphasizes class and euphemizes ethno-racial domination' as a cornerstone of the '*academic doxa*' in the US, where it typically goes 'unargued and unquestioned' would have benefitted the argument and the intended public.[8]

Timmer rightly reminds the reader that Hungarian sociologist Júlia – not Judit! – Szalai takes a social class-based approach or rather, she is one of many Hungarian sociologists who made such proposals preceding Fraser. The overlapping nature of class, race and gender-based subordination is a basic tenet of structuralist, left-leaning sociology that dominates the field in Hungary.[9] From István Kemény through János Ladányi – not Ládanyi as he is repeatedly referred to in the book – and Iván Szelényi, to Ilona Liskó, Gábor Havas, Gábor Kertesi and many more. Due to their contribution, Hungarian legislation prohibited segregation based on social class, as well as race and ethnic origin, while desegregation policy was from the start based on

[5] See, most importantly, the debate on 'Who is a Roma', Ladányi and Szelényi (1997), Havas, Kemény and Kertesi (1998), Kertesi (1998), Ladányi and Szelényi (2011). See also Csepeli and Simon (2004) and Krizsán (ed.) (2001).
[6] Gheorghe (1991), Marsh and Strand (eds.) (2006), Simhandl (2006), Surdu and Kovats (2015).
[7] Fraser (2000).
[8] Wacquant (1997).
[9] See, for instance, Balibar and Wallerstein (1991).

social status, not race or ethnic origin, a fact that seriously questions the adequacy of Timmer's diagnosis and proposals. Her factual blunder in this respect is unfortunate, because otherwise her insights into the extremely rare practice of genuine 'positive segregation' are unique and also because according to the bibliography she actually read the work of Hungarian social scientists.

On the flipside, *Realizing Roma Rights* takes a view of Roma rights that is biased towards the equality and non-discrimination frame (Part I is entitled 'The Long Shadow of Anti-Roma Discrimination'), also perhaps because this facilitates the accessibility of the issue for the US audience. Chapter 1 by Elena Rozzi describes the enduring discrimination of Roma children in Italian schools, while Chapter 2 by Alexandra Oprea analyses forced sterilization from the perspective of Critical Race Theory, a paradigm developed by progressive minority academics in the US. The choice of countries, authors and topics in this introductory section is important for several reasons. First and foremost, both papers deal with groups marginalized not only by majority societies but also by Roma ethno-politics. It is very much in keeping with the basic tenets of CRT that their problems should serve as the lens through which the first glimpse into a truly complex field is provided. Other topics could have been selected equally legitimately. For instance, the denial of equal status – citizenship, residence permits, identity documents and the sort – and racial profiling are salient issues both in Italy and Romania, the authors' homelands. However, these general concerns would have glossed over the intersecting axis of discrimination within the Roma community. A second and interesting point is that segregated education and Roma women's rights also happen to be topics prioritized by OSF. Thirdly, the two pieces bridge the geographic divide between Western and Eastern European Roma, a divide artificially created in the 1990s as a political project seeking to limit liability for anti-Romani racism to the countries of the former Soviet bloc.

Part II carries two chapters on US foreign policy as concerns the Roma. Erika Schlager, the liaison officer between the US Commission on Security and Cooperation in Europe (the Helsinki Commission) created by Congress in 1976 to monitor and encourage compliance with the Helsinki Final Act (p. 59) and Roma rights NGOs provides a historic overview about her country's long term engagement with standard setting and diplomatic interventions that at times yielded swift and meaningful results in countries as distant as the Czech Republic and Kosovo. David Meyer and Michael Uyehara inventorize US policy interventions promoting the human rights of the Roma. The portfolio is broad, but the main rationale for interventions is simple. Whether earmarked for projects bolstering Roma political participation or the prevention and punishment of hate crimes the principle objective of funding is to stem Roma migration and human trafficking that could upset regional and international peace and stability (p. 86).

Part III is dedicated to taking stock of European inclusion policies. Andrzej Mirga complements Schlager's contribution in a sobering yet hopeful tone. Mirga, a former expert for the Stanford University based Project on Ethnic Relations and director of the OSCE Contact Point for Roma and Sinti Issues embodies the 'institutional' memory of the Roma political movement. This background makes his conclusions puzzling. Rather than claiming a more accentuated role for Roma NGOs and political organizations Mirga believes that despite its shortcomings, there is 'no

alternative to the central role' of the EU (most prominently the European Commission) and member states (p. 126).

Margareta Matache and Krista Oehlke's piece on Romanian Roma policies counterbalances Meyer and Uyehara's assessment, providing insights critical *vis-à-vis* international organizations, donors, target countries, and NGOs. A former executive director of Romani Criss, Romania's flagship Roma rights and social intervention NGO, Matache is exceptionally well-placed to make this assessment. At the same time, her pivotal role in the NGO-led policy initiatives makes her role as a critic complex and challenging. She identifies non-implementation, the inadequacy of universal measures for Roma needs, short term donor focus, the lack of domestic political will and a thrift between NGOs and Roma communities as factors of policy failure. As with her previous assessment of the impact of desegregation policies (Matache and Dougherty, 2015), here too the reader is left to wonder 'so what'. What if NGOs had done better or connected more to grassroots and measured the impact of their own projects at least? Given that the Roma population in Romania is the most sizable (2 million), that there is a well-established system of minority political representation and given the experience with community outreach the paper could perhaps have provided more nuanced insights for a reform agenda. In light of Criss' financial difficulties, it would have been useful to flag the need for stable resources at the domestic level.

Kálmán Mizsei's paper adds a global perspective to Matache's domestic and Mirga's regional focus. It stands out for other reasons as well. Mizsei writes as a former high-ranking employee of OSF, hired as an outsider to the Roma rights field but an insider to the United Nations' development activities. His task was to review, reform and if necessary shift the gear of the meta-NGO's Roma policy endeavors. Parallel to his proposals to strengthen commitment and develop infrastructure in EU member states for the use of EU funds, Mizsei relies on widely used strategies and tools, such as grassroots engagements and strategic litigation. Portraying the Decade of Roma Inclusion as a precursor of deeper EU engagement in Roma policies, Mizsei's call for reform stops short of proposals that seek to avoid the reification of race/ethnicity and marginalized social status, an objective that integration policies have so far failed to achieve.[10]

Part IV promises a comparative analysis of institutional racism against the Roma in contemporary Europe. Interestingly neither chapter is authored by a European/Roma lawyer, although hate crimes/speech and school desegregation – the issues explored in the book – have been the subject of extensive litigation and scholarly research on the old continent.[11] Will Guy's inquiry into anti-Roma violence and hate speech provides a sociological perspective, which means that important legal debates, reforms and institutions go unnoticed. His focus on the Czech Republic, Slovakia, and Hungary leaves out the bulk of regional jurisprudence on anti-Roma violence, because it emanates from Romania and Bulgaria. Untold are the strategies of Romanian and Bulgarian Roma rights NGOs and lawyers who successfully mobilized domestic anti-discrimination law against hate speech. Europeanization played a crucial

[10] Law and Kovats (2018).

[11] See for instance Rostas (ed.) (2012), Gergely (2009), and O'Nions (2010). For a valuable comparative study of remedies and enforcement concerning desegregation see Bowman and Nantl (2014).

role in ensuring access to justice in these cases thus the expansion of the domestic legal opportunity structures should have merited more thorough inquiry.

The formidable Roma rights advocate, James A. Goldston provides a soul-searching, sincere and apologetic account of desegregation litigation just as institutional changes are finally taking place in the Czech Republic. As a mastermind behind the iconic *D.H. and Others v the Czech Republic* case, the 'European *Brown*' he is well-placed to compare strategic litigation and other social change tools, as well as *massive resistance* against desegregation in the US and the CEE.[12] His piece stands out in terms of auto-critique, apexing in the acknowledgment that 'litigation alone is not the answer' (p. 184) and that social change is in fact up to the Roma themselves. It is hard to disagree with this, but the reader wonders whether the predominantly regional perspective does in fact allow for a thorough discussion of what goes on at the domestic level, which is the site of genuine social change as born out in Timmer's research and the reform proposal inherent in Realizing Roma Rights.

The focus on the 'Roma education cases' handled by the European Court of Human Rights and more specifically, on regional litigation spearheaded by the European Roma Rights Center may conceal the fact that in the CEE school desegregation was not triggered by classic litigation. Thus, while it may be true in the case of *D.H.* and particularly from the perspective of INGOs that '[o]versimplified accounts of Brown's impact may have encouraged some to rely excessively on court-centric advocacy at the cost of other routes to change' (p. 183), a more holistic view could show that litigation played a complementary even though highly visible, sensationalist role in the CEE. Gerald Rosenberg's claim on which Goldston relies that the impact of legal mobilization should or could be measured by looking at judgments and courts alone is controversial enough in the US without the difficulty of transplanting it to the regional level in (Central and Eastern) Europe.[13] It would make the piece more balanced if Goldston embraced a critical perspective not only *vis-à-vis* the US transplant of lawyer/INGO-led desegregation litigation[14] but also of the revisionist critique of reform lawyering and the role of the international legal elite in it.[15] Tapping into critical scholarship on legal globalization that cautions against US legal transplants in transnational private, as well as human rights law could have provided a theoretical frame perhaps more suitable for the objective Goldston set for himself.[16]

Matache's contribution attests to the complementary nature of legal action that undergirded NGO-led advocacy, project based institutional reform, community action and agency enforcement in Romania. Indeed, litigation is not the only social change

[12] Goodwin (2009).

[13] The famous Rosenberg–McCann debate touched upon quantitative versus qualitative research methodologies, as well as the question of what to measure when measuring the impact of public interest litigation. See Rosenberg (1991), McCann (1992), Rosenberg (1992), McCann (1996). Others propose a synergistic model, arguing that both legal and direct political action contributed to social change in equal measure. See Coleman et al. (2005). The same point has been made about Kurdish mobilization in Europe, see Kurban (2014).

[14] This would also set his piece apart from an earlier, European critique of transplanting public interest litigation. Goodwin (2004).

[15] Dezalay and Garth (2006).

[16] Dezalay and Garth (2011–2012).

tool desegregationist use even in the Czech Republic and Slovakia, where the governments have so far failed to adopt desegregation policies and NGOs have not launched large-scale desegregation programs. In Hungary, the government policy triggered institutional reform and relied heavily on 'development' NGOs to facilitate the process as Timmer reminds us. Legal action in Hungary, Romania and Bulgaria buttressed desegregation spearheaded by Roma NGOs, Roma activists and policy makers.[17] Even within INGOs the advocacy and client care budget far exceeded that earmarked for actual litigation. Against this backdrop, one wonders whether Goldston's apologetic tone is in fact warranted and whether it adequately reflects sentiments and experiences at the national level.

Part V is the key section of the book, where aspirations expressed in previous chapters should ideally take their final shape. After almost three decades the 'Roma rights movement' returns to the point where it originally started: 'The Imperative of Roma Community Mobilization and Leadership'. The focus of mobilization is now on the grassroots level, rather than national politics, but this is only a semantic difference, because it is plainly obvious that without gaining political leverage on national and European politics, no lasting change can be achieved locally. Indeed, despite the title of the Chapter, only one of the three papers actually deals with community organizing and even that – the Spanish case study coauthored by Teresa Sordé Marti and Fernando Macias – covers a project funded by the EU.

The continuum between local, domestic and EU level action – even if not direct action so eagerly awaited by many[18] – weaves together the insights of the Spanish activists with David Mark's, a Romanian activist with experience both at the domestic and European level. Political scientist Peter Vermeersch' state of the art account of the political opportunities of Roma activism complete the picture. Missing from this chapter is an account by a seasoned activist who lived through paradigm shifts over the last thirty years and can speak of the long durée. Given the lack of such insight, nothing bridges the gap between these pieces and Mirga's and Matache's contributions in the previous sections. In their descriptive accounts political opportunities in reality play out a very different course from the normative aspirations of Mark and Vermeersch.

It is not specific to Roma rights that old tools, frames and paradigms come to be reinvented every few decades – enough to think of the law and development movement from the 1960s onwards and its successor, the rule of law movement after 1989 – where desegregation litigation originated from.[19] Un-reflexive of these broader debates Realizing Roma Rights proposes an empowerment tool that has been with us

[17] Panayotova (2002), Kanev and Vassileva (2004), Russinov (2011), and Torchin (2008).
[18] See, most recently, McGarry (2017).
[19] See Kennedy (2003). In the early 1970s law and development came to an impasse, because it equated the 'core conception of modern law' with 'that found in the West'. Without recognizing its own limitations, its 'ethnocentric and evolutionist generalizations from Western history' it was imposed as 'essential for economic, political, and social development in the Third World' (Trubek, 1972: 2). Merryman puts it more bluntly: 'The law and development movement has declined because it was, for the most part, an attempt to impose U.S. ideas and attitudes on the third world' (Merryman, 1977: 483). However, in 'the 1990s, law and development, now renamed 'rule of law', became big business. Many agencies began to support legal reform' notes Trubek (2016: 312), reviewing law and development as an academic field of study.

all along. The Spanish case study lays the ground for optimism, but similar efforts have been made before with initial success dissipating and impact proving to be short lived and limited to the few Roma who stood a realistic chance of social progress anyway – because they had had the social and cultural capital needed for a leap forward. It is enough to conjure up Matache's account of desegregation tools in the Czech Republic, Hungary, Romania, Croatia, Bulgaria and Greece or NGO-led desegregation in Bulgaria – whose full history remains untold – to see that in reality tools complement each other and that mobilizing communities is as resource-intensive and complicated as any other method.

Local mobilization is no different in that it cannot succeed on the long run without adequate resources. Resources within the community are as or more important than resources from the EU, national governments or foreign donors, because once the project team leaves, locals ought to sustain achievements. An important difference between political and legal tools in the CEE context is the lack of legal resources indigenous to the community. It remains unreflected in this volume that the participation of Roma activists in legal mobilization is scarce, which inspires criticism about the lack of Roma participation. While desegregation litigation follows a path set by Roma policy makers, this alleged lack of participation is an important driving force behind soul searching. Both the public and academic debate would have benefitted from the book's openness in this regard.

The call for a focus on community organizing is also a call to funders and professionals to invest more in political, rather than legal mobilization. Two important questions remain unanswered in this regard. The first is this: would more intense investment into local political processes be able to deliver change at other levels to the degree expected? The second is this: if political mobilization is preferred and funding for legal mobilization diminishes, is there a risk that the human rights discourse so central to Roma political mobilization is ultimately weakened? A logical step in the direction of more political, emancipatory mobilization would entail questioning the role of human rights in the movement, but that clearly is off limits.

Given these self-imposed constraints, it would perhaps be more useful to advocate for a holistic and complex approach that retains legal mobilization as a significant, if not central tool. This is proposed by donors that also pursue programmatic activities at the local level, such as the OSF Public Health Program, which implemented a successful and long-term access to health program for Romanian Roma, while also using litigation, advocacy and other tools to achieve social change.[20]

Why would one want to pick these books up from the shelf? Both are intriguing, particularly because neither Timmer, nor the editors of the collective volume are lawyers themselves. Their social science background promises a perspective on Roma rights that deviates from the dominant approach, methodology and language in European Roma related, jurisprudence-centric legal scholarship. What a shame then that this promise is not fully realized this time and the reader is left hoping that in the future a sound methodology, more thorough field research,

[20] See Patel and Ezer (2016a; 2016b). See also Zimová (2016).

analysis and finally, more tightly formulated research questions will bring the authors closer to the original goal of their worthwhile projects.

Ever wondered what Roma rights actually mean? Both volumes take this key concept for granted. Mirga provides a studious overview of standard setting, suggesting that the edited volume applies a wide interpretation of Roma rights, conceptualizing them as any and every human right that may pertain to the Roma as a collective and as individuals. The OSCE receives more attention than its contribution would perhaps merit. While not being justiciable, OSCE standards are central to the discussion also because the United States is a member of this international organization and has direct influence on its decision-making processes, a fact that may invoke particular interest in readers based in the US. Second, the OSCE plays a pioneering role in standard setting on Roma rights. Since the time of the political transition, it has functioned as a role model for both the Council of Europe and the EU, even though its mandate has been narrower than the other organizations that replicated reports, soft law instruments and enforcement tools first adopted by the OSCE. This chain of US influence and the centrality of legal mobilization to US perspectives should perhaps have invited reflections. As it is, proposing less legal action for making Roma rights real seems somewhat contradictory.

Timmer is far less meticulous in mapping the legal context of her research. Consequently, her choice of the minority rights framework remains unaccounted for. That she mis-cites the source of the Framework Convention for the Protection of National Minorities as the European Union, rather than the Council of Europe is a small problem. A graver concern is that the study of the very real and troublesome discrepancy between the self-identification of the Roma and the stigmatization of population groups labelled as Roma leads her away from asking whether majoritarian assumptions and presumptions are addressed under domestic and EU law prohibiting racial/ethnic discrimination.[21] Given her disinterest in assimilation the astounding degree of which has occupied Hungarian sociologists since the first national Roma survey (1971), Timmer limits the study of the discrepancy between self and third party identification – what she terms the 'Gypsy trope' – to ethnic data collection. The permissibility and methodology of such data collection has been the subject of perhaps the most intense debate in this country as compared to other European states. Given the centrality of the 'Gypsy trope' to the thesis, it is regrettable that this debate and more particularly, its legal aspects receive a very light touch.[22] It is equally regrettable that the 'Gypsy trope' is far from being a Rom-specific problem. The discrepancy between the two poles of race/ethnicity as a 'category of practice' is a central dilemma of social science research.[23]

Timmer focuses on minority rights and institutions, suggesting that although this frame is a result of Europeanization, it remains inadequate and unimplemented. There are two problematic aspects of this analysis. First, Europeanization imposed minority rights as the first of many Roma-relevant conditionalities prior to accession. The literature dealing with this aspect also canvassed other conditionalities, such as

[21] On which these are, see for instance Lahuerta (2016).
[22] See, for instance, Ladányi and Szelényi (2001). More recently, see Krizsán (2013).
[23] For a literature review, see Loveman (1999).

non-discrimination and social inclusion.[24] The consensus seems to be that taken alone or combined they could not successfully balance out the dangers and risks inherent in the EU's neoliberal economic policies. As Matache notes in the edited volume, although Europeanization inspired the adoption of policies, neither the EU nor national governments saw to the implementation of laws and policies. Timmer echoes this by underlining that NGOs substitute the state and public institutions in the educational sector.

Another aspect of Europeanization on which views converge is that neither ethnic, nor class-based measures are in and of themselves adequate or efficient to achieve social justice for the Roma. While this throws into doubt Timmer's conclusion, it is left regrettably unreflected in the edited volume. Whether discussing social status-based measures or interventions based on racial or ethnic origin the papers do not step out of the dominant policy frames and question whether their class and race based logic does in fact reify class and race based domination, thus becoming part of the problem, rather than a solution.[25]

The implementation of legal standards and policies occupies the authors of both books. Partnering with powerful states in international organizations (IO) and collaborating with Roma-dense countries NGOs are important actors at the local, national and international levels. Whether engaged in standard setting, policy making, the provision of basic services, humanitarian and community work or litigation, they are dependent on IOs and IOs are dependent on them. Timmer presents this cooptation and co-dependency as a key finding, but fails to reference the work of those who had reached identical conclusions before her in relation to domestic NGOs and the EU on the one hand and OSF, its donor organized NGOs and the US/EU on the other.[26] Timmer takes for granted that legally focused NGOs should be key actors at the domestic level, an assumption that is subjected to critical review in *Realizing Roma Rights*.

In comparison to the edited volume, Timmer maintains a more or less evenly critical and analytical approach to her subject matter. This is the strength of her research even if she does not properly follow up on her analytical scheme. For instance, it would have been interesting to find out whether the Chance for Children Foundation, a legally focused Hungarian NGO that inhabits a category on its own became coopted by donors and promoted an image of the Roma as the needy subjects, the victims of marginalization or delinquent cultural others on a par with humanitarian NGOs and projects, such as the 'Gypsy camp run by Zsuzsa' (p. 97). It would be crucial to find out how the case study of the Előrelépés Vocational School in Erdőtelek became the centerpiece of the research when the school is maintained by the Buddhist Church, rather than an NGO. If anything, the shortcomings in this school show that not only NGOs, but also more resourceful civil society organizations are limited by pervasive Romaphobia in Hungarian society. Timmer's focus on the civil sector sidelines the question of whether the Hungarian state is complacent in massive resistance on a par with the Southern states in the US – a phenomenon Goldston brings up in the other volume.

[24] See, for instance, Vermeersch (2004).
[25] Law and Kovats (2018).
[26] Ram (2011) and Sigona and Trehan (2009).

While Timmer does not meticulously adhere to her categorization of NGOs throughout the analysis, an indiscriminate treatment of NGOs characterizes the contributions in Realizing Roma Rights. Still, the protagonists are very different not only because of the venues in which they work, the fields on which they focus or the methods and tools of intervention they use. The resources meta-NGOs, DONGOs, INGOs and domestic NGOs[27] can mobilize varies to a considerable degree even though they all belong to a transnational network advocating for Roma rights.[28] Even though all tap into the rights discourse, few use legal tools (litigation, legal advocacy), but these and other differences remain a black box.

Both books grapple with measuring the outcome, a question that has been the subject of fierce methodological debate in US law and society literature. Recently, actors in the Roma rights movement researched the impact of legal mobilization, particularly in the field of education.[29] The edited volume builds on these initiatives, but given that it fails to define the key term 'realizing rights', the reader is left to assume that the choice of word denotes the lack of rigorous methodology whose undeniable advantage is that it is a 'catch-all' as concerns impact.

Curiously, without promising to or applying a sound methodology to measure the impact of NGO interventions, Timmer provides a convincing case study of changing attitudes among Roma children and adults who come into contact with a school that strives to open up educational opportunities higher than they had originally hoped for. To Timmer, as for radical educationalists and anthropologists, this is the only objective that can justify segregated education (positive segregation).[30] Incidentally, this is also an objective for which international law unequivocally permits segregated education.[31] Timmer's findings lay bare the emptiness or actual harm of positive action measures that ostensibly promote Roma culture but more often than not lead to substandard education. These findings can trigger criticism from both ethnic majority and minority politicians. While the former may see them as undermining the most effective argument for segregated education (negative segregation), the latter may perceive them as threatening the political project of building a positive ethnic identity – an undertaking Timmer is vociferously opposed to. She ends on an acutely politicized note that is as critical of (ethno-)political projects essentializing Roma identity as her academic mentors.

While her argument could be perceived as supporting assimilation, it does in fact build on the ethnic heterogeneity of the Roma and the centrality of their experiences of social marginalization – a byproduct of systematic, institutional racism or 'misrecognition'. These insights are echoed by Alexandra Oprea who – writing for

[27] For NGO categorization, see Weiss and Gordenker (eds.) (1996).

[28] Keck and Sikkink (1998) describe transnational advocacy networks as arising around international treaties at transnational conferences, particularly in the human rights field. Networks include not only NGOs, but also public officials, journalists, etc., both at the national and international level. Linkages between national and international organizations enable network members to promote legal and policy change vis-a-vis their governments through the so-called boomerang effect. See Klímová-Alexander (2005), Vermeersch (2006), Ram (2003) and McGarry (2008).

[29] See Zimová (2016) and Matache and Dougherty (2015).

[30] See Miskovic (ed.) (2013).

[31] Farkas (2014). Thornberry (2016: 378) argues that the UNESCO Convention Against Discrimination in Education does in fact favor a 'majoritarian view' of integration over ethnic separation in schools.

the edited volume – reminds us that the Roma are not only heterogeneous in terms of ethnic identity, but also experience discrimination in diverse manners at the intersections of race, gender, sexual orientation, etc. By constructing the Roma along the vector of race or ethnicity only, identity politics disempowers Roma women, Roma LGBTQI and various other subgroups. Thus, issues such as the forced sterilization of Roma women serve not only to open a debate about intersectional discrimination, but also to voice political claims by Romani feminists.

Rather than presenting benchmarks, indicators and data sets about the improvement or deterioration of the situation of the Roma, Realizing Roma Rights posits a mixed picture of diplomatic, political, legal and community efforts. The reader suspects that the term 'realizing' rights is deliberately chosen to capture even the most miniscule change. Blame for knowing so little about the reality is attributed to European states and the European Union. This conclusion is different from Timmer's only inasmuch as the edited volume works with the assumption that critiquing NGO approaches would be counter-effective. In the end, both books conclude that NGOs are the *conditio sine qua non* for social change and this is what links them to mainstream political science literature on the implementation of human rights.[32]

The books discuss Roma rights without much attention to law, lawyers and legal proceedings. This suggests that the rights discourse can meaningfully benefit the Roma without actual recourse to legal proceedings. Whether Roma communities and individuals use the law on their own volition is not investigated. A closer look at available complaint statistics suggests that rather than fighting for school desegregation, the Roma stand up for their rights when they have no other choice, in other words when the harm directly threatening their livelihood is impending or has already occurred. The Roma take legal action against forced evictions, hate crimes (including forced sterilization) and hate speech. An important difference between these cases and emblematic judgments is that the latter arise from carefully designed litigation led by the international legal elite, whose achievements are better documented.[33]

In light of the rift Charlottesville wrought between US civil rights activists as concerns free speech[34] the example of Roma rights activism in the CEE – where local, rather than international NGOs have advocated for effective protection against Romaphobic hate speech – may provide an interesting case study to explore in the future. It may paint a very different picture about the relationship between the European and US actors than these two books suggest – a picture where domestic

[32] See, for instance, Simmons (2009).

[33] For instance, between 1990 and 2005 approximately two dozen complaints were filed with the Strasbourg Court by Travellers evicted from their caravans by the authorities in the United Kingdom. The strand of litigation financed by the Cardiff Law School is well known, but the legal aid-based complaints and litigation by the Gypsy and Traveller Association is hardly known. In the United Kingdom complaints were collected by the Telephone Legal Advice Service for Travellers at the Cardiff Law School's Traveller Law Research Unit. The legal aid scheme did not fund advice by telephone, nor personal visits to Caravan sites and clients also found it difficult to prove their eligibility for legal aid. *Pro bono* work was declining, given the harsh economic conditions. The Nuttfield Foundation's financial support was supplemented by the Law School and subsequently by the Rowntree Foundation. Cf. Wheeler (1996), see also Clements, Thomas and Thomas (1996).

[34] Goluboff (2018).

legally focused NGOs yield to Roma community needs rather than the frames, agendas and funding priorities of foreign donors and international organizations. That would be a story of local Roma and local NGOs, whose empowerment is the ultimate objective, according to both books.

**LILLA FARKAS** (lilla.farkas@eui.eu)
European University Institute, Florence

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## Book Review

# Fábián, Katalin and Korolczuk, Elżbieta (eds.) (2017) Rebellious Parents: *Parental Movements in Central-Eastern Europe and Russia.* Bloomington: Indiana University Press. 376 pages.

While we are told not to judge books by their covers, this edited volume clearly invites the potential readers to spend a few seconds wondering about the main title, *Rebellious Parents*, and the cover photo: we see decent-looking middle-aged women and men participating at an apparently peaceful street demonstration, with charts hanging from their necks. On the charts, there are the words 'Danger' and 'Gender' on a pictogram of a bunch of dynamite.

Those who followed the media news or the academic publications about social movements in Europe in the last five years will most likely suppose that the book is about the emerging 'anti-gender' discourse and mobilisations. But by looking at the table of contents, it becomes clear that besides those movements opposing 'gender ideology', numerous other issues and related civil society initiatives from Central-Eastern Europe and Russia are discussed in this book. While reading through the eleven case studies in the volume, we can make an inventory, and by the time we reach the concluding part, we will have a list of eight causes: i) parents' claim for political support of traditional family roles, while rejecting the constructivist conceptualization of gender (in Russia and in Ukraine); ii) artificial reproductive technology (ART) patients' claims for recognition, including increased health insurance sources (in Bulgaria); iii) divorced fathers' child custody and visitation claims (in Poland and in the Czech Republic); iv) young fathers' (peer) learning needs about involved parenting (in Poland, in Russia and in Ukraine); v) single (and disabled) fathers' social and welfare support claims of (in Ukraine); vi) parents' claims against mandatory vaccination of children (in the Czech Republic); vii) mentally disabled children's parents' social support and recognition needs (in Estonia, in Latvia and in Lithuania); vii) claims against the (over)medicalization of childbirth (in the Czech Republic and in Hungary).

Both of the editors of the volume, Katalin Fábián (originally from Hungary, currently a professor at Lafayette College in the USA) and Elżbieta Korolczuk (from Poland, currently working at Södertörn University in Stockholm and teaching at Warsaw University) have already provided significant contributions to the academic literature on civil society movements in Central-Eastern Europe, and have a wide regional network among actors in this field.

In the introduction chapter, the editors provide an explanation regarding the title of the volume: 'We use the term "parental movements" because in contrast to parents' movements, which concentrate mostly on legal changes concerning custody, welfare, and health care, the movements examined in this book have broader agendas' (p. 2). They add that in some cases the activists themselves prefer the term 'parental movement', in order to 'stress that they fight on behalf of the family', or because they

intend to 'appear as gender-neutral' (p. 13), or maybe they want to 'obscure the fact that activists are nearly all men (as fathers) or nearly exclusively female (as mothers or those who wish to be mothers)' (p. 13–14). Moreover, the editors offer a series of ways to categorize the wide range of relevant initiatives, and they share numerous highly insightful thoughts about the nature of different parental movements. Curiously, one of the editors' most significant introduction statement is – the reader will realize when reading some of the case studies, how significant it is! – hidden in an endnote (p. 23, endnote 2): 'The emergence and increasing capacity of parental movements worldwide stem also from developments in new information and communication technologies. Following Benedict Anderson's (1983) analysis of reading circles in the early days of the printing press, we can conceptualize some online groups as contemporary imagined political communities.'

The first chapter, by Tova Hojdestrand, presents the grassroots mobilization in defence of traditional and family values in Russia, in the early 2010s. According to the rhetoric of this nationalist movement, international child rights standards (expressed by the UN Convention on the Rights of the Child and manifested by UNICEF) implied 'a disruption of child-parent relations, of social ties and of the entire Russian way of life' (p. 46.)

In the second chapter, Olena Strelnyk presents the results of her research, implemented in 2011–2014, about conservative parents' mobilization in Ukraine, organized by an NGO, The Parents Committee of Ukraine (Roditel'skiy komitet Ukrainy). This movement, just like the similar one in Russia (presented in the previous chapter) is against 'YuYu' (the abbreviated form of the phrase 'juvenile justice' in Ukrainian), i.e. the international children's rights norms, in the name of defending traditional family values – which includes, in their interpretation, the entitlement of parents to apply mild corporal punishment as well.

The third chapter, written by Ina Dimitrova, provides an insight into the online activism of patients of assisted reproductive technologies (ARTs) in Bulgaria. The claims of this movement are, sometimes implicitly, based on the concept of 'deservedness' – which is a disturbing feature from the aspect of equal dignity of humans. In this discourse, the well-educated and well-off majority Bulgarians, who are seeking medical solutions for their infertility, 'deserve' to become parents, and their babies are much needed for the sake of the nation as well, given the 'threat' that ethnic Turks and Roma will outnumber the ethnic Bulgarians in the country.

Elżbieta Korolczuk and Renata E. Hryciuk, in the fourth chapter of the volume, categorize and present a wide range of fathers' initiatives in Poland. The authors identify three main strands: the 'angry fathers' are attempting to enforce their interests in child custody and visitation issues after divorce in a fierce way; the 'fathers' advocates' are supporting divorced fathers in a consolidated way; while 'engaged fathers' are concentrating 'on increasing and deepening the quality of fathering' (p. 125).

The fifth chapter, co-authored by Pelle Aberg and Johnny Rodin, introduce the concept and the history (from 2008) of 'daddy schools' in Saint Petersburg, initiated by progressive middle-class men, aimed at providing seminars for fathers and fathers-to-be to discuss parenting issues. The 'daddy schools' attracted positive attention not just from the media, but also from the regional and local authorities; these grassroots

civil society actors apparently 'succeeded in framing their activities and ambitions as being in line with state interests' (p. 161).

Iman Karzabi, in the sixth chapter of the volume, takes an approach to present fathers' activism in Ukraine which is like Korolczuk's and Hryciuk's in their case study on Poland: she categorizes a broad range of initiatives, and identifies also three strands. Firstly, there is a 'pro-marriage' movement, represented by the International Center of Fatherhood (Mezhdunarodnyj Centr Otsovstva), an Evangelical Christian organisation that promotes the view that fathers have a key role in transmitting the 'traditional family values' to their children. Secondly, there are NGOs aimed at advocating the interests of 'vulnerable families', namely single-father and disabled-and-single-father families – indeed, given the absence of general gender equality norms (promoted e.g. by the EU), single fathers are excluded from certain welfare provisions which are guaranteed for single mothers. Thirdly, there are 'daddy school' initiatives in Ukraine as well; similar to the ones in Russia, presented by Aberg and Rodin in the previous chapter of the volume.

While, according to the findings of Karzabi, there are no post-divorce fathers' initiatives in Ukraine, this is not the case in the Czech Republic. Steven Saxonberg's chapter (the seventh in the volume) provides a critical discourse analysis of the messages posted to the online discussion forum of the website 'Daddy Info' (Tatove.info), in 2010–2012. According to Saxonberg's conclusion, the male participants of this forum apparently 'want to keep all the factors that give them a competitive advantage over women in the labour market, but they want to eliminate the one main area in which they feel disadvantaged: that of child custody.'

The eighth chapter, by Jaroslava Hasmanova Marhankova, addresses a particularly controversial issue: the anti-vaccination movement of parents, as manifested in the Czech Republic. (Notably, resistance towards mandatory vaccination is mentioned in Strelnyk's case study on Ukraine, too; as one of the features of the conservative parents' movement.) Hasmanova Marhankova links this movement the ideology of 'intensive mothering' (Hays, 1996), given the gendered nature of parenting, and the fact that women (mothers) bear the burden and responsibility of decision making regarding their children's health. She highlights the aspect of social class as well, by claiming that vaccine refusal 'serves as a mechanism through which educated, middle-class parents reinforce their privileged position as informed consumers with enough resources to make informed choices and successfully negotiate with health and state authorities' (pp. 243–244).

Egle Sumskiene, in the ninth chapter, introduces the advocacy initiatives of parents of intellectually disabled children (and adults) in the Baltic States. In these countries, the issue of intellectual disability was surrounded by hostile attitudes inherited from the Soviet era, when it was considered as 'a serious threat to the myth of a healthy and productive Soviet society' (p. 255). In the case of parent activism, Sumskiene identifies the 'collective identity of being caregivers' (p. 271) of the founders of relevant NGOs as a key feature which results in emotional synergy and contributes significantly to the strength and political success of this movement.

The topics of last two case studies in the volume are closely connected. The tenth chapter, written by Ema Hresanova, is about the 'natural birth' movement in the Czech Republic, in the early 2010s. (Notably, the Czech natural birth movement is

mentioned also in Hamanova Marhankova's chapter on the Czech anti-vaccination movement, by pointing to conceptual links and to cases of personal overlap regarding the key figures of the two movements.) In the case of the Czech natural birth movement, the issue of planned homebirth is promoted just by a small fraction of radical activists, while there is broad range of claims opposing over-medicalization of childbirth. Katalin Fábián's chapter (the eleventh) aims to analyse a specific aspect, the visual self-representation of the Hungarian home birth activism, with a special focus on the actions organized in relation to the criminal procedure against the protagonist figure of the movement, Dr. Ágnes Geréb, starting from 2010, when she was accused of negligent malpractice. By analysing a set of sensitization campaign posters, Fábián makes an important remark about a group picture of men (apparently, fathers), by highlighting that they are 'diverse in appearance, allowing the viewer to ascribe different economic status and political affiliations (by appearance, such as hairstyle and clothes) to each carrier of the message that asks the reader to consider home-birth an honorable choice.' Apparently, this is relevant regarding the actual composition of home births activists in Hungary, given the ideologically overarching nature of the issue.

Reading through the eleven case studies of the volume is a set of stimulating journeys in nine countries: some scenes visited resemble to other scenes in other countries, while a few sites seem to be rather unique and exotic. And by now, it is a journey back in time, an opportunity to witness the eve of the huge current 'anti-gender' movements (Kováts and Põim, 2015).

Then, after the trip (in the concluding chapter), the editors aim to draw 'Regional and Theoretical Lessons'. This seems to be a challenging and somewhat frustrating endeavour. Firstly, the reader of the volume may still not be convinced that all these movements, just because the participants are (or want to be) parents, should be discussed together or compared to each other; moreover, the territorial scope may seem also seem questionable as a ground for analysis, given the significant differences in the history of these societies before, during and after the era of state socialism. Secondly, the composition of the volume gives the impression of being supply-driven. The most visible aspect of this is the apparent lack of balanced geographical representation within the region: the relevant developments in the Czech Republic are analysed in three chapters; in the cases of Russia and Ukraine in two chapters each; in a single chapter in each of the cases of Bulgaria, Hungary and Poland, while the three Baltic states are mentioned within the framework of a single case study. However, everybody with some practical experience of organizing a conference, or just a conference panel, should know the limits of enforcing a concept. So instead of asking 'why mix all these case studies into one edited volume', we may ask: 'why not?'

Some ethical concerns may be raised at this point. As we have seen, the movements presented in the volume are diverse – for example, from the aspect of democratic and human rights values. In some cases, the case studies' authors did not try to cover their (positive or negative) feelings and judgements towards the claims and arguments of the different movements. As the authors of the chapter presenting the diversity of fathers' movements in Poland reflect on their positions, they 'faced a number of political, moral and epistemological challenges' when they were studying activist groups with whose values they did not sympathise. As for the potential readers

of the book, they would also feel uncomfortable to lean over this collection of movements, and to see some, which are dear to their hearts, to be pinned among movements with disturbing claims. (Presumably, many of the prospective readers identify as feminist and sympathise with the birth movement; moreover, in the specific case of the prospective Hungarian readers, they may recognize friends and familiar faces on the photos in the respective chapter). Finally, the subjects of the case studies, the activists, may also feel that they are in bad company in the volume. However, there is maybe something which would unite the representatives of the presented movements: they would, for very different reasons, reject the label of 'rebellious'.

**LÍDIA BALOGH** (balogh.lidia@tk.mta.hu)
Centre for Social Sciences, Hungarian Academy of Sciences

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BÁLINT MADLOVICS AND BÁLINT MAGYAR*

# From Petty Corruption to Criminal State: A Critique of the Corruption Perceptions Index as Applied to the Post-Communist Region

Intersections.EEJSP
2(5): 103–129.
DOI: 10.17356/ieejsp.v5i2.504
http://intersections.tk.mta.hu

* [madlovba3@gmail.com] (Financial Research Institute, Budapest);
[magyarbalint52@gmail.com] (Financial Research Institute, Budapest)

## Abstract

Offering a decent database easily applicable to cross-country comparison, Transparency International's Corruption Perceptions Index (CPI) has been widely used as a variable for showing the level of corruption. However, surveys of its sources are based on presumptions which mainly apply to bottom-up forms of corruption, namely free market corruption and bottom-up state capture, and therefore it is insufficient for assessing the state of a country plagued by top-down types of the former. We provide an analytical framework that distinguishes four levels of corruption and draws on the experience of the post-communist region. Using this framework to analyze the CPI's survey questions, we explain why the index provides a blurred picture of the region. 'Big data' evidence for top-down corruption in Hungary is also presented, signifying the need for a more refined index.

*Keywords:* corruption, state capture, criminal state, CPI, Hungary.

Should one want to study the variety of corrupt practices, few regions can offer examples as amply as the post-communist one. Indeed, these more than two dozen countries, from Eastern Europe to East Asia, provide particularly fertile ground for corruption due to their difficult past. Communist regimes that rose to power in 1917 and after 1945 halted – and, where it had begun or been developed, reversed – a process which could have resulted in an essential feature of Western societies: *the separation of the three types of social action*. *Political action*, 'embedded in a state structure and [...] legitimate authority [as well as] rule-bound power for giving orders and extracting resources'; *market action*, 'recognized by the contract-based pursuit of acquisitive interests within the framework of legal rules that specify'; and *communal action*, 'defined by a sense of reciprocal obligation among persons who share significant markers of identity and cultural belonging [such as] family, religious group, locality, and so on' – these types, delineated by Offe (2004) and having become separated in a long evolutive process in the West, were united in a single neo-archaic form by communist regimes that abolished private property, the private sphere, and autonomous communities. And, where the separation of social activities is rudimentary, one typically sees, instead of formalized, impersonal networks, informal and personal relations coming to dominate (Ledeneva, 2018; Zhu, 2018).

Informality being a norm does not simply imply endemic corruption vis-à-vis the situation in the more or less democratic states which have been developed since the regime change. It means we have to rethink a basic presumption of corruption research: that corruption is to be understood as a form of *deviance* which governments and formal institutions attempt to eliminate in pursuit of effective and more rational governmentality (Baumann, 2017; Fougner, 2008) – for the former implicitly assumes the supremacy of the formal over the informal; that is, that public officials act and think *primarily* in accordance with their legal position and illegal 'abuses of power' happen only *secondarily*. In an environment of informality, the situation can be reversed: primarily informal networks can take over formal institutions and operate them as façades for power and wealth accumulation (Baez-Camargo and Ledeneva, 2017; Hale, 2015; Jancsics, 2017). This way, corruption may become not a deviance but a *constituting element* of a particular system (Magyar, 2016).

This whole new level of corruption surpasses both free market (everyday or petty) corruption and state capture, for *it conforms to a top-down, rather than a bottom-up, fashion*. No wonder global corruption indicators like Transparency International's (TI) highly popular Corruption Perceptions Index (CPI) are unable to assess it. The CPI is a good example of a corruption index, which we chose to evaluate especially because it is a composite index that aggregates data from several other indexes, all of which dominantly assume the principle of corruption-as-deviance. This can be seen, as we will show, from their survey questions. The former usually refer to either *corruption in general*, which blurs everything from occasional bottom-up to systemic top-down cases, or *corruption in the form of private bribes*, which appear only with bottom-up corruption. Consequently, while the CPI is an extraordinarily important tool and has been of good use to scholars and decision makers, it inaccurately measures the situation in countries where corruption has developed to higher levels than the authors of the survey questions presume.

Our main research aim is to point out the weaknesses of the CPI and of the Western mainstream corruption research it represents.[1] Accordingly, we first review the CPI and the related literature, after which we present our own typology of corruption, developed with the help of a new analytical framework. This is used to point out the structural differences between (1) the bottom–up phenomena TI regards as corruption, and (2) top–down corruption patterns. Big data evidence for a top–down pattern, namely the existence of a criminal state, is presented for the case of Hungary. Finally, the paper concludes by making a couple of suggestions for future corruption research.

We should introduce two caveats before we begin. First, what we present for post–communism in general and Hungary in particular is a objective sociological description. It intends to make no ethical judgment, and we presume that some governments are actually led by informal, private interests, not some peculiar vision of the public good, because this perspective has greater explanatory power (that is, it enables us to create models which can explain more of the known phenomena than some vague rationale for the former such as 'building a national bourgeoisie').[2] Second, we do not expect the CPI to present a detailed sociological account in a single variable. Rather, we believe that the scholars who develop the CPI should pay attention to higher level forms of corruption too, to improve the validity of both its ratings and relative country rankings.

## *1. Transparency and corruption: The hidden presumptions of the CPI*

The CPI measures not corruption itself but the *perception* of corruption; that is, whether survey respondents believe that the corrupt phenomena they are asked about are prevalent in their country. However, to construct such a survey, one must first define corruption to know what phenomena one should ask about. Transparency International[3] starts from the following general definition of corruption: 'the abuse of entrusted power for private gain' involving 'public officials, civil servants or politicians' (TI, 2012). More specifically, TI (2018a) lists the phenomena the CPI attempts to capture. These may be divided into three groups. First, there are *general instances* of corruption where it is not specified who initiates the abuse or whose private gain is served. These include 'diversion of public funds,' and 'prevalence of officials using public office for private gain.' Second, there are *specific instances* like 'bribery,' 'meritocratic versus nepotistic appointments in the civil service' and 'state capture by narrow vested interests.' Finally, the largest group of features the CPI focuses on is *institutional guarantees*: 'ability of governments to contain corruption,' 'adequate laws

[1] For a mainstream typology of corruption, see Vargas–Hernández (2010).

[2] While lecturing, we have been criticized by TI's scholars on the basis that we should not claim that the Hungarian government aims primarily at power and wealth accumulation because the prime minister has provided loftier explanations, including the one we quote here (and which we rule out in favor of stronger models). Yet we do not deny the importance of ideology in *political communication;* that is, in winning over the support of people for such schemes.

[3] Indeed, TI is a very decentralized organization and there are many different views among TI's researchers and organizations in each of its countries of operation. When we talk about 'TI' in the paper, we refer to that part of Transparency's research team which develops and publishes the CPI.

on financial disclosure,' 'legal protection for whistleblowers [and] journalists,' or 'access of civil society to information on public affairs.'

What these three categories have in common is the above-mentioned presumption of corruption as a form of deviance. The approach understands the state by its formal identity: as dominantly an institution for the public good, with some subordinates who deviate from that goal and abuse their position by requesting or accepting bribes and appoint cronies without a legitimate basis. Accordingly, private influence over the content of laws and rules, which is 'state capture,' and influence over their implementation, which is 'administrative corruption,' are the two forms of abuse considered therein (Knack 2007: 2). Also, the questions in the third category imply that the state actually wants to persecute corruption – only it may not have the 'ability' to do so, or it lacks the formal rules which otherwise would overrule informal impacts in general.

It is in accordance with this view that TI makes recommendations for countries, suggesting that formal rules should be tightened for public officials and loosened for civil society (TI, 2018d).[4] Besides focusing on what is formal, it is also typical that these recommendations are directed toward the government. By all means, the idea is less that politicians will take on the recommendations as a form of help in fighting corruption, but it is rather believed they will need to implement them because, if they do not, international actors, countries and global investors will not cooperate with the regime in question (Davis, Kingsbury and Merry, 2012; Fougner, 2008; Hansen, 2012; Löwenheim, 2008). Indeed, the CPI has been a major force for putting corruption on the political agenda, and international actors do take it seriously and anti-corruption measures have been implemented in several countries since TI started to raise its voice (Andersson and Heywood, 2009; TI, 2018c). Yet, whether the recommended changes in formal rules are efficient depends on, first, whether the law indeed has supremacy and, second, whether the recommendations tackle the forms of corruption actually prevailing in the given country. It should also be mentioned that there have been countermeasures against TI as well: in certain places, like Putin's Russia and Orbán's Hungary in the post-communist region, the NGO was identified as a foreign agent and its activity has been openly dismissed by the government as interfering with national sovereignty (Novak, 2017; TI, 2013).

Despite clarity about how TI views the relationship between corruption and the state, it is dubious whether the CPI actually measures factors according to those presumptions. There are two reasons for such skepticism. First, there is no obvious consistency between the definitions of corruption used by the CPI's sources (Andersson and Heywood, 2009: 753–754). Although some of them make it rather clear what experts should assess when they are asked about corruption, many contain only one or two questions about the subject and use more vague or unclear wording. One can argue that this is actually useful since respondents can thereby include in their general assessment a variety of local corrupt practices that TI does not explicitly consider (Ledeneva, Bratu and Köker, 2017: 4). Indeed, the approach is likely to contribute to the plausibility of the suggestive picture the CPI offers about the overall

[4] Indeed, as a reviewer pointed out, TI also gives suggestions to private actors such as NGOs and journalists. Yet we focus on TI's notion of formality in general and of the state in particular.

corruption level of the target under investigation. But, at the same time, the lack of consistency introduces uncertainty into the CPI's results.

The second reason why the CPI might not be commensurate with TI's intentions relates to the methodology it applies for addressing perceptions. One popular claim has been that the CPI indeed inaccurately measures corruption because, instead of using hard data about actual *cases of corruption*, it relies on *perceptions of corruption,* which depend on the subjective views and knowledge of respondents (Andersson and Heywood, 2009: 752–753; Campbell, 2013; Charron, 2016; Kenny, 2006; Lambsdorff, 2006; Olken, 2006). However, TI (2012) is right to argue that official sources about reported bribes or the number of prosecutions implemented cannot say anything about *successful instances* of corruption (that is, cases when law enforcement did not react). Alternatively, the CPI could also build on case studies and legal analyses of institutions. Although there is utility in such models composed of a mosaic of such pieces of research, country experts as well as businessmen who are in a position to notice corruption should have sufficient knowledge about their countries, so surveying them should give a more realistic picture about the corruption level than hard data (cf. Hamilton and Hammer, 2018). Still, it is important to keep in mind the limitations posed by the survey method; namely, that what we want to ask in the surveys and from whom depends on our sociological understanding of corruption.

## *2. Corruption in post-communist countries: An analytical framework*

When assessing the status of corruption in the post-communist region, it can be highly beneficial to break with the underlying presumptions of the CPI. The most misleading of all these is the *a priori* treatment of formal institutions as the norm. It should neither be thought that the state is necessarily a victim of corruption, nor that informal influence over formal institutions is only occasional and/or linked to the action of particular individuals or groups within the state. Indeed, as we shall show in the fourth part of this paper, none of these presumptions hold in the case of Hungary, which indicates they should not be taken for granted.

To create an analytical framework which can be used as basis for cross-country comparison in general and the CPI in particular, we must keep in mind the global range of this index. For even if it is created for the proper analysis of post-communist regimes, the framework must be able to encompass corruption in Western countries as well. Such a wide scope is essential also for clarifying the differences between Western types of corruption, which the CPI generally measures, and the types of corruption which are more common in the post-communist region.

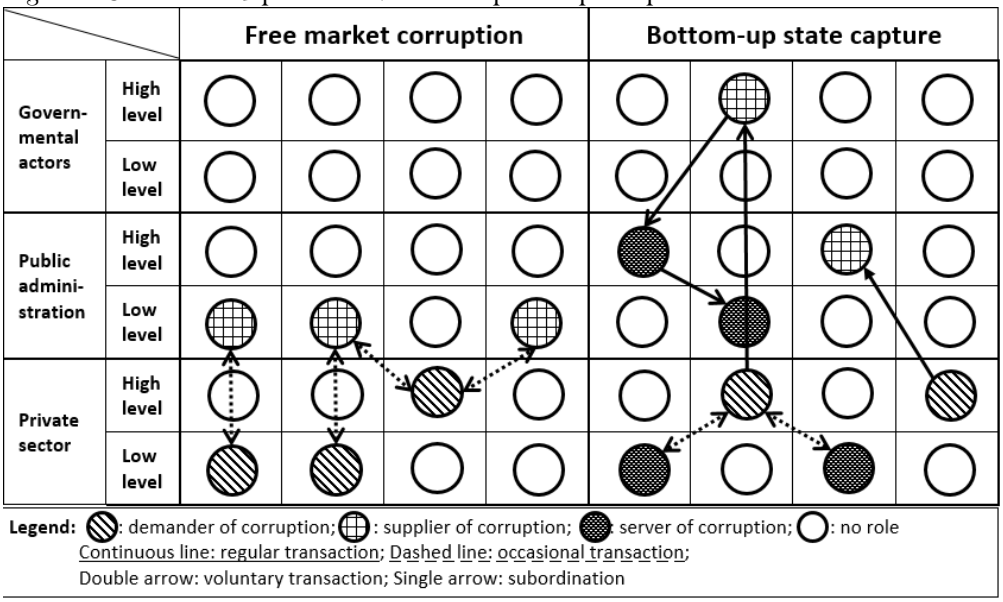
An analytical framework must conceptually delimit the range of phenomena it aims at capturing. For this purpose, we need not change TI's well-established definition of corrupt practices (that is, 'the abuse of entrusted power for private gain.') This means we are solely interested in how the public sector, i.e. political power, is used to attain illegitimate gains. The inclusion of purely private phenomena, as some have suggested (Hough, 2016), is logically possible but unnecessary in the post-communist region, where the rudimentary separation of the spheres of social action has resulted in a high number of government-enmeshed private sectors by Western standards (Karklins, 2005; Lane, 2007).

Next, we need to undertake *sociological disaggregation* of the general definition to isolate its structural elements, which can then be used as the dimensions of the analytical framework. As corruption is, above all, a form of action and cooperation between people, the structural elements can be found by focusing on, first, *the actors* who take part in corruption and, second, the *type of connections* between these actors.

As for the former, we may differentiate three general levels of actors: *private sector*–, *public administration*–, and *governmental actors*. The latter two levels are both part of the public sector, yet their differentiation is crucial. Public administration (bureaucracy) only implements the law, enforces it, and takes part in the regular operation of state institutions, whereas governmental actors make the law and regulate public administration. All three general levels can be further disaggregated into sublevels but here the only distinction we shall make is between *low- and high-level* actors. In the private sector, low level means the ordinary citizen, or small- and medium-sized enterprises, while high level means major entrepreneurs. (If a major entrepreneur routinely colludes with governmental actors, they may also be called an *oligarch,* cf. Magyar, 2016: 75–77.) In public administration, we define low-level actors as administrators whose task is to be in direct, day-to-day contact with private citizens. High-level actors are the bosses of these administrators; i.e., the heads of governmental departments or leaders of state enterprises who regularly remain in the background from the citizens' point of view. Finally, among governmental actors low level refers to regular members of the legislation or the regulatory bodies of local governments who are not part of the executive branch. The executive, in turn, includes the high-level actors of national or local government, like mayors, the prime minister, or the head of state. (Governmental actors include elected officials or people appointed by them, such as non-partisan ministers or under-secretaries.)

Turning to *the types of connections* between these actors, there are three dimensions by which we can classify the former. First, *the actor's role* in corruption: they can be the *demander*, who initiates the corrupt transaction; the *supplier*, who abuses their public position; or the *server*, who is a subordinate with the task of carrying out or facilitating the corrupt transaction (cf. Gambetta, 2002). The second dimension is the *regularity* of connection; that is, whether such transactions between certain actors are made routinely or only occasionally. Finally, every connection between people is either voluntary, between equal parties, or takes the form of subordination, where the will of one party dominates that of the other in the transaction.

Figure 1 Schematic depiction of bottom–up corruption patterns.




Having defined both the actors and the types of connections between them, we can draw up the analytical framework. In Figure 1, the set of circles represent the actors in an ideal–type regime and, with shading and arrows, we have attempted to capture two ideal–type *corruption patterns* – that is, identify which actors from which level have what connection to each other. These schematic depictions should not be understood in an exclusive manner (for instance, by imagining that free market corruption must involve an elite private actor who is connected to two non–elite public administrators; the case that is depicted). Rather, the relationships are to be seen as *examples* of corruption patterns that demonstrate the associated typical structure and forms of transactions.

While it is logically possible to delineate a high number of different corruption patterns in our analytical framework, here we define only four. These are the most prevalent types in, first, TI's Western–based understanding of corruption and, second, the countries of the post–communist region.[5] The first pattern we depict is *free market corruption*, which is the form TI is mostly concerned with. Here, private interests hold illegitimate sway in state and local government decisions concerning the allocation of resources, procurements, concessions, and entitlements. As a result, illegal barter deals are concluded between discrete private actors and members of public administration at various levels of seniority. Free market corruption consists of a series of individual phenomenon: an official responsible for a decision accepts or requests financial or other benefits for handling a case in a manner advantageous to the private actor. A regime may be considered *corrupt* if there is a high occurrence of such incidents or if civil administrative or business matters can only be managed through *bribes*. However, it must be noted that these actions classified under the

[5] In our forthcoming book on post–communist regimes, six forms are differentiated, two of which are now excluded for the sake of brevity.

pattern of free market corruption are *occasional;* that is, happen case-by-case when one decides to take part in a corrupt transaction, and are not organized as a group function on either side. Also, instances of free market corruption are *voluntary* on both sides of the deal. From this perspective it is indifferent whether bribes are requested by members of the public administration or the latter are simply willing to accept them. The *corrupt service* is supplied by members of the public administration who abuse their position, whereas the private actors who accept it have a demand for such transactions. Both parties are free to reject the offer of a corrupt service, although an honest private actor may find themselves in a disadvantaged position vis-à-vis corrupt private actors if they do so.

The term 'free market' as specified in the name for this pattern refers to the fact, first, that it contains voluntary transactions and, second, that it is also *competitive*. As for the latter, where both corrupt supply and demand are widespread, private actors can compete in terms of the size of bribe they offer, and public actors in the amount they ask for (Diaby and Sylwester, 2015). In more monopolistic examples, like that of a public procurement tender, only private actors can compete and the public actor can reap higher rents. Naturally, the illegal nature of such transactions constitutes a structural gap between corrupt supply and demand which often necessitates the existence of a so-called *corruption broker*, who makes a functioning corruption market possible (Jancsics, 2015).

*Bottom-up state capture* means what TI as well as corruption literature simply refer to as 'state capture' (Hellman, Jones and Kaufmann, 2003). In this case, corruption vertically reaches the higher layers of the public sector, namely governmental actors, and begins to show signs of a regular nature. The collusion of actors becomes more complex, not only on the side of the corruption supply but also on the side of corruption demand, given that the partners in corruption from the private sector are in many cases oligarchs or criminals from the organized underworld. We need to distinguish between these two groups: while criminal organizations carry out illegal 'economic' activities supported by illegitimate access, oligarchs, on the contrary, are usually engaged in lawful economic activities, but mostly with illegitimate access.

In spite of its regular nature, bottom-up state capture can be rightfully diagnosed when only some segments of public authority are captured, not the governmental structure *in its entirety*. Also, at this level, *political competition* may still continue. The transfer of political power is still possible under constitutional circumstances, and oligarchs still maintain their relative autonomy as they are not irrevocably tied to specific political actors. In fact, the relationship between these two actors can be described as one of *subordination* (Figure 1) for the will of the oligarch overrules that of the politician who becomes dependent on their financier – hence they are captured.[6]

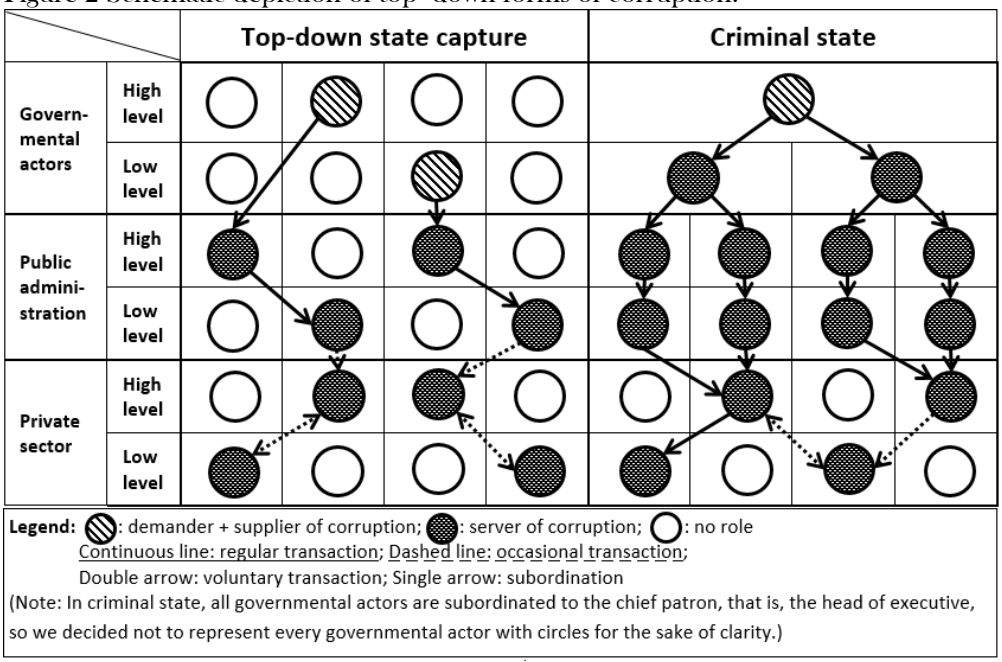
During bottom-up state capture, *servers* of the corrupt transaction enter at both the private and the public administration level. As for the former, servers are subcontractors or suppliers of the oligarch who enter into occasional and voluntary business relations with the latter (and are beneficiaries of the oligarch's illegitimate

[6] For more on such dependence using the example of the anomalies of party financing in Hungary, see Magyar (2016: 6-10).

market position). People in public administrations are in a subordinate position to governmental actors for they are state employees and can be removed if they fail to comply with the formal rules (laws) or the informal commands of politicians.

Both free market corruption and bottom–up state capture contain bottom–up forms of corruption. In such cases, the demander of the corrupt service is situated in the private sector whereas the supplier is either in government or the public administration. In turn, we now depict two top–down forms of corruption in Figure 2; namely *top–down state capture,* and the *criminal state*. In these forms, the roles of supplier and demander are merged: it is the governmental actor who abuses their office and this is done for their own gain. Other beneficiaries, namely those in friendly or (quasi) kinship relation with the actor, are sometimes dubbed 'cronies,' the relationship constituting so–called 'crony capitalism' (Djankov, 2015; Sharafutdinova, 2010; CRCB, 2016b). TI itself used this latter term for Viktor Orbán's Hungary in the 2016 CPI report (TI, 2017). However, in the post–communist region, such corrupt relationships are not voluntary and without subordinate relations, as the term 'crony' ('friend' or 'pal') would typically imply. Instead, these informal ties of relationship tend to be organized into patron–client patterns of subservience; that is, *patronal networks* (Eisenstadt and Roniger, 1980; Hale, 2015). As opposed to traditional networks of *patronage* where actors, in spite of their great disparity in wealth, are engaged in a fundamentally voluntary and mutually beneficial relationship with each other (Boissevain, 1966), in patronal politics the governmental actor is dominant and subordinates actors on the levels below them creating *informal networks* which take over formal institutions and use them as façades.

Figure 2 Schematic depiction of top–down forms of corruption.



In the case of *top-down state capture*, patronal subordination extends mainly to people in the public administration. Similarly to bottom-up state capture, this form is also partial: one ministry or a subdivision of a local government is turned into a racket by its leader who, as a patron, fills up the hierarchy of his domain with his clients. This process may be called *patronalization*, which leads to the captured part of *the state apparatus beginning to be operated by the informal network* which systemically operates through informal rules instead of formal ones. Also, the top-down nature changes the medium of corrupt exchange: while in the case of bribery we can speak of *kickback money* offered by a private actor to a public one to abuse their position, now we can speak of *protection money* requested from the subordinated servers of the patronal network.

Still, top-down state capture faces several limitations due to the fact that the patron does not possess the monopoly of political power (Wedeman, 2018). The ability of the former to use the government is limited: they rule over only a certain part of the state and cannot patronalize other parts. First, this makes linked corruption activity, in which the cooperation of several state institutions would be necessary, less attainable. Second, the patron's position is dependent on political events. An opposition victory can easily remove them, making it practically impossible to further sustain their patronal network. This is particularly true in post-communist countries where competition between political parties is indeed often a façade for competition between patronal networks (Hale, 2015: 66–76). Finally, the lack of a power monopoly means that the patron can hardly disable institutional checks. Constitutional limits on power concentration as well as effective law enforcement have the ability to contain informal networks and prevent the patron from yielding exclusive political power and making the entire state their private domain (Hale, 2011; Zhu, 2017, 36–39).

The final type of corruption we identify is the *criminal state*. Our terminology is similar to that of Friedrich's (2009), although he narrows the meaning of 'criminal state' to states which commit crimes against humanity. In contrast, we call a state criminal if it features a pattern of top-down corruption based on, first, informality and patron-client relations, just like top-down corruption and, second, the possession of unconstrained political power. The latter enables the head of the executive, the *chief patron*, to disable checks and balances and *turn the state into the business venture* of their patronal network, managed through the instruments of public authority.[7]

This pattern of systemic corruption, while not included in the scope of the CPI *per se*, has been noted by local TI organizations. TI Hungary, for instance, uses the terms 'reverse' or 'political' state capture to describe this phenomenon (TI, 2018e). We reject this conceptualization for two reasons. First, use of the terms 'reverse' or 'political' are applicable to any top-down form of corruption, and we may differentiate two of these on the basis of a qualitative (as well as quantitative) change in the pattern of corruption. Second, 'capture' in our understanding is *always partial,* for if we did not understand capture this way, and claimed that state capture can be partial

[7] The definition of criminal state is similar to that of the 'mafia state' of Magyar (2016), but it is not identical to it. As we explain in a forthcoming book, there can be criminal states which are not mafia states, as the corruption pattern of a criminal state is only one of the four components of a mafia state. To mention just one other component now, to be a mafia state a country also needs to be a clan state. Cf. Wedel (2003).

as well as total, this would lead to a confusing situation in which almost any autocracy or dictatorship that replaces a democratic establishment could be described as a situation of state capture.[8] Also, we want to avoid conflating the case when oligarchs capture certain parts of the state – a bottom-up corruption pattern – with the case when it is the ruling elite that turns the entire state into a criminal organization – a top-down pattern of corruption. Such conflation has been typical in the literature (e.g. Innes, 2014) but we believe that, practically, if the definition of capture is narrowed down to partial cases beforehand, this should result in a clearer and firmer distinction between the two situations in general and Western and post-communist forms of corruption in particular.

The criminal state is built by the development of a so-called *single-pyramid patronal network*. First, actors from the public administration are deprived of their autonomy to make corrupt offers to private actors or accept bribes in exchange for favorable treatment. Rather, they are subordinated to the chief patron's will and treat favorably those who are appointed from above; i.e. the clients of the chief patron. Second, a single pyramid means that the multi-pyramid scheme which characterizes the politically competitive landscape of party state corruption comes to an end. When a regime may be described as having the criminal state pattern of corruption, this implies that political opposition, including formal parties and NGOs, have been repressed and essentially turned into what all formal institutions are to the informal network: façades.

Third, the building of the single pyramid network extends to the private sector as well, as subjugated by the legislative and regulatory means the chief patron now disposes of. Drawing upon their monopoly of power, the chief patron breaks down the relative autonomy of major entrepreneurs and oligarchs, aiming to discipline, domesticate and settle them into their own chain of command (Lanskoy and Myles-Primakoff, 2018). As opposed to state capture, when the oligarch is the capturer and the politician is captured, the term 'oligarch capture' would be a more fitting description for this reversed situation in the criminal state. A network of subcontractors and suppliers extends this patron-client relationship to the lower reaches of the private sector as well, which also means that protection monies are collected from both high- and low-level private actors.

A summary of the main characteristics of the four types can be seen in Table 1. The main point we want to make is that corruption may take a top-down form in post-communist countries. Such cases are not characterized by the bottom-up process of private actors approaching the political sphere with their claims, but rather it is the political regime that milks private actors as well as taxpayers by way of contracts and, in the case of a criminal state, by privileges obtained from its subjugated oligarchs. Furthermore, we have added the dimension of the nature of corruption to the table, extending a continuum from the small-scale, low-value transactions of private actors and low-level members of state bureaucracy in free market corruption –

[8] True, capture must also be informal/illegal by definition because it involves collusion, but even this criterion is met by several cases of autocratic turnover which overrode much of the existing legal corpus.

that is, *petty corruption* – to the large-scale, high-value transactions of governmental actors in a criminal state – that is, *grand corruption* (Moody-Stuart, 1997).[9]

Table 1: Main characteristics of the four corruption patterns.

| | *Nature of corruption* | *Direction of corrupt action* | *Distribution of corrupt transactions* | *Form of corrupt networks* | *Economic nature of corruption* | *Entry of suppliers / servers* | *Regularity and scope of corrupt action* | *Medium of corrupt exchange* |
|---|---|---|---|---|---|---|---|---|
| **Free market corruption** | Petty corruption | Bottom-up | Non-centralized | n.a. | Competitive | Voluntary | *Ad hoc* and partial | Kickback money |
| **Bottom-up state capture** | | Bottom-up | Moderately centralized | Parallel verticals | Oligopolistic / locally monopolistic | Coercive / voluntary | Temporary / permanent and partial | Kickback money |
| **Top-down state capture** | Grand corruption | Top-down | Partially centralized | Parallel verticals | Oligopolistic / locally monopolistic | Coercive | Permanent and partial (vassal chains) | Protection money |
| **Criminal state** | | Top-down | Centralized | Single vertical | Monopolistic | Coercive | Permanent and general (vassal chains) | Protection money |

Alternatively, the concept of 'kleptocracy' has been offered to describe the pattern we define as the criminal state (Walker and Aten, 2018; Lanskoy and Myles-Primakoff, 2018). However, as Wedeman (2018: 89) explains, kleptocracy in the recent literature has been dominantly used to define a 'more decentralized and oligopolistic' system of corruption wherein '[the] chief of state and his inner circle do not control [...] oligarchs [...] but instead run their own shadowy "business" empire while playing oligarchs against one another and taking a cut of their gains.' This model does not fit the criminal state pattern we describe. Rather, kleptocracy refers to a specific form of top-down state capture where the head of state wants to abuse state power for his private gain but is limited in opportunities. Also, we would argue that etymologically the term 'kleptocracy' is broader than the 'criminal state,' for the latter more obviously refers to the case when the entire state is subjugated and run as a criminal organization, whereas a kleptocracy only means that elected leaders are primarily interested in stealing.

Describing the state of affairs when the entire public sphere is treated as a private dominion, scholars have also offered the Weberian term 'neopatrimonialism,' or 'sultanism' (Fisun, 2012; Guliyev, 2011; Szelényi, 2016). However, the use of such

[9] We are indebted to József Péter Martin from TI Hungary for calling our attention to this distinction. Also, see Transparency International's definition of 'grand corruption' in TI (2016b).

terms confuses openly admitted, legitimate lordships with essentially informal and *illegal* systems which operate among the façades of democratic institutions. As opposed to a traditional patrimonial regime in which political power 'indeed operates primarily on the basis of discretion,' without formal limits and not requiring reaffirmation from its subjects (Weber, 1978: 229), a democratic system has an elected leader whose tasks and authority are strictly delimited by the constitution. When the chief patron builds a single-pyramid patronal network and informal rules are respected over formal ones, lawfulness is violated – which is the reason why the former disables institutional checks and neutralizes law enforcement bodies, such as the office of the public prosecutor (Magyar, 2016: 50–51).

Second, constitutions usually declare the supremacy of law, and authoritarian governance is sometimes explicitly forbidden. For example, Article (C) Section (2) of Hungary's Fundamental Law reads as follows: 'No one shall act with the aim of acquiring or exercising power by force, and/or of exclusively possessing it.' A criminal state clearly fails to meet such a constitutional criterion, for the chief patron acts with the aim of possessing power exclusively (Vörös, 2017).

Third, besides using the bloodless means of public authority, a criminal state also commits isolated violations of the law which take the form of linked actions of corruption (Magyar, 2016: 260–267). Linked actions combine acts that are unlawful in and of themselves (extortion, fraud and financial fraud, embezzlement, misappropriation, money laundering, insider trading, agreements that limit competition in a public procurement or concession procedure, etc.) with acts that are not unlawful in and of themselves (motions submitted by independent parliamentary representatives, instigation of tax audits, etc.). Thus, accusations of criminality may be made not from an external moral position but according to existing criminal law. This legitimizes, first, calling such state of affairs illegal and, second, treating it as a form of corruption instead of just a peculiar means of governance.

## *3. The detuned detector: The limited scope of the CPI's sources*

The fact that TI views corruption as a form of deviance limits the CPI's ability to generate a reliable picture regarding the prevalence of the various types of corruption, particularly top-down forms. These data sets still offer partial insight into the extent of corrupt transactions that are initiated by private actors, possibly under coercion, and indicate whether these grow into the stage of partial state capture on a systemic basis. But they do not provide a picture of the situation when the initiator of a corrupt transaction is neither a company, nor a low- or mid-level actor in a public authority with the potential to extort, but the criminal state itself. In an environment dominated by the single-pyramid patronal network, it is rather politically-controlled enterprises than oligarchs who hold the state captive, and then collect tax and protection money from private actors and the public authority that they have designated. To offer an example: the CPI surveys entrepreneurs about whether they have to bribe officials to 'get things done'; for example, to win a public procurement tender. But this way the survey disregards situations such as when the entrepreneur *does not even have the chance to bribe anyone* for the winners of public procurement processes are already decided at the top and public officials must simply ratify the chief patron's chosen client as winner. Indeed, such cases are a blind spot for surveys based on the principle

of deviance, such as the CPI. To substantiate our point, we analyzed the questionnaires from the independent surveys of 2017 that the CPI was composed of (TI, 2018b). What we were interested in was seeing, for each survey, which questions referred to which corruption pattern according to our analytical framework. We excluded one survey, that of the African Development Bank Country Policy and Institutional Assessment (AFDB) for this only examined African countries outside of the post-communist region we speak about. The results for the remaining 12 sources can be seen in Table 2.[10]

Table 2: CPI sources with corruption types in focus.
(Source: Authors' compilation on the basis of TI, 2018b)

| *Source** | *Type of respondents* | *Number of questions (total)* | *Number of questions referring to...* | | | | |
|---|---|---|---|---|---|---|---|
| | | | *Corruption in general* | *Free market corruption* | *Bottom-up state capture* | *Top-down state capture* | *Criminal state* |
| BF (SGI) | Experts | 1 | 1 | – | – | – | – |
| BF (TI) | Experts | 2 | 1 | 1 | | – | – |
| EIU | Experts | 8 | 6 | 1 | – | 1 | |
| FH | Experts | 10 | 8 | 1 | | 1 | |
| GI | Experts | 1 | – | 1 | – | – | – |
| IMD | Businessmen | 1 | 1 | – | – | – | – |
| PERC | Businessmen | 1 | 1 | – | – | – | – |
| PRS | Experts | 1 | – | 1 | – | – | – |
| WB | Experts | 3 | 2 | – | 1 | – | – |
| WEF | Businessmen | 6 | – | 6 | – | – | – |
| WJP | Experts | 4** | – | 2 | 2 | | |
| VDEM | Experts | 4*** | – | 2 | 2 | | |

*We use the abbreviations used by TI (2018b).
** The source description mentions 53 questions but specifies only the four categories into which they were grouped.

[10] There is no need to elaborate on the intricate method TI uses to aggregate these indexes at this point, for we are interested in how raw data is collected, not how it is used. On the latter, see TI (2018b).

*** The source description mentions that there were more questions but their results are aggregated into four indexes.

As TI's sources did not base their surveys on our analytical framework, it is understandable that some items do not clearly refer to one certain pattern of corruption but rather to elements which may appear in, or institutional checks which may be effective against, more than one pattern. Consequently, we pigeonholed the questions as follows:

- *Corruption in general.* We included questions here in two cases. First, when the wording was very vague, not specifying the meaning of corruption (any more than the general definition). Examples: 'To what extent are public officeholders prevented from abusing their position for private interests?' (BF (TI)), 'Is the country's economy free of excessive state involvement?' (FH), 'How do you grade the problem of corruption in the country in which you are working?' (PERC). Second, we included here the questions which referred to phenomena which may exist in various (bottom–up as well as top–down) patterns of corruption. Examples: 'Are public funds misappropriated by ministers/public officials for private or party political purposes?' (EIU), 'Is the government free from excessive bureaucratic regulations, registration requirements, and other controls that increase opportunities for corruption?' (FH), 'Bribery and corruption: Exist or do not exist' (IMD).
- *Free market corruption.* Here, we counted questions which referred specifically to bribes required by, or given to, public officials by private actors. Examples: 'Is there a tradition of a payment of bribes to secure contracts and gain favours?' (EIU), 'Experts are asked to assess: The risk that individuals/companies will face bribery or other corrupt practices to carry out business' (GI), 'In your country, how common is it for firms to make undocumented extra payments or bribes' (WEF).
- *Free market corruption and bottom–up state capture.* We counted questions as referring to these two types if they did not specify the structure of corruption but made it clear they perceive the phenomenon as bottom–up. Examples: 'To what extent does the government successfully contain corruption?' (BF (TI)), 'Has the government implemented effective anti–corruption initiatives?' (FH).
- *Bottom–up state capture.* The question we included here referred specifically to large entrepreneurs (oligarchs) who buy influence in the governmental sphere. Example: 'Each of three dimensions should be rated separately: [...] (c) state capture by narrow vested interests' (WB).
- *Bottom–up and top–down state capture and criminal state.* Here we included survey items which asked experts to assess whether governmental actors in the executive or legislative branch use their office for private gain. Examples are the expert assessments asked by WJP and VDEM.
- *Top–down state capture and criminal state.* Questions were put into this category if they referred to top–down forms of corruption, or at least inquired about circumstances which would increase the probability of this. Examples: 'Is there a professional civil service or are large numbers of officials directly

appointed by the government?' (EIU) and 'Does the government advertise jobs and contracts?' (FH).

The results substantiate our claims about the limitations of the CPI. On the one hand, there is inconsistency in the definition of corruption and the scope of the surveys, ranging from asking one general question about corruption to a whole host of questions referring to specific phenomena or actors. On the other hand, the strongest emphasis is put on corruption in general as well as bottom-up versions of corruption, particularly bribes given by firms to public actors. In terms of numbers, we can see that 8 out of 12 surveys dealt with such cases only. Also, in the remaining four surveys, the average proportion of items which may have yielded specific answers to whether corruption involves top-down state capture or the criminal state level was only 37.5 per cent – and even those questions focused either only on jobs and contracts offered by the state or the presence of corrupt executive/legislative actors which makes it impossible to distinguish between the two top-down types (and, in some cases, between them and bottom-up state capture). The idea of top-down patterns of corruption, and specifically of patron-client networks, is entirely missing from the surveys.

One can argue that the emphasis on 'corruption in general' is indeed a solution to this issue, for country experts can include top-down patterns in their country assessment. However, the problem is not that the CPI does not capture these patterns *per se*, but that this method *blurs* different corruption types, or rather countries which are plagued by top-down and bottom-up patterns of corruption. Indeed, our findings suggest the existence of an uncomfortable situation whereby, for instance, a country with endemic free market corruption can be given the same CPI score as one with top-down state capture, or a country with bottom-up state capture the same as a criminal state. Moreover, as a matter of fact, criminal states such as Russia or the post-communist nations of Soviet Central Asia are located at the bottom in terms of TI's country rankings, while Hungary, which is also a criminal state, is ranked as mid-range, in front of Bulgaria or China which are not criminal states in the above-explained sense.[11] Such outcomes that result from unsophisticated inquiries into corruption undermine the validity of TI's country rankings, which do not give the different corruption patterns different weights according to their level of development.

## *4. The unseen face of a criminal state: Evidence from Hungary (2009-2015)*

To show the relevance of the detuned nature of the CPI, we offer evidence from post-communist Hungary of a top-down pattern of corruption: a criminal state. We claim this situation has been mismeasured by the CPI, along with that of countries like Russia and those in Central Asia which are too contaminated by corruption to be analytically fitted into top-down patterns. We focus on a specific period in Hungary,

[11] In Bulgaria, there is no single-pyramid patronal network (but rather competing patronal networks), whereas the Chinese state is led by a formal, bureaucratic patronal network legally, not an informal, corrupt one illegally (Wedeman, 2018).

between 2009 and 2015, using big data analysis of phenomena which points to symptoms particular to the presence of a single-pyramid patronal network.

The reason we choose Hungary as a case study is twofold. First, Hungary is a post-communist country which underwent, in the above-mentioned period, an autocratic turn (Kornai, 2015; Krasztev and Til, 2015; Bozóki and Hegedűs, 2018). This is important because it meant that the country's leadership met the most important prerequisite of a criminal state: a monopoly on political power. No actor had such power in 2009 but this was obtained by Viktor Orbán after he won a constitutional majority in 2010. We hypothesized as early as 2011 that Orbán used this power to build a single-pyramid patronal network (Magyar, 2011), and now we intend to verify this statement through empirical analysis. This leads us to the second reason we selected Hungary as a case; namely, that unlike in Russia or countries in post-Soviet Central Asia, big data about public procurements in Hungary is available. The big data research done by István János Tóth of the Corruption Research Center Budapest CRCB (2016a) offers a unique opportunity within the post-communist region to detect signs of a top-down pattern of corruption in the form of a database that analyzes over 120,000 public procurement procedures between 2009 and 2015. In Hungary, along with the end of the shortage economy following the change of regime in 1989, the common corruption typical of the 'third economy' (Juhász, 1981) became less prominent and also decreased in matters of public administration. The terrain for corruption was mostly concentrated in areas regarding decisions about privatization, state procurement, and the disbursement of EU funds from 2004 onwards. It was here that the centralization of the decentralized system of corrupt transactions and expropriation through a politically-controlled enterprise witnessed significant change after 2010, when Viktor Orbán and his party Fidesz won a two-thirds supermajority in the Hungarian parliament. It is no longer economic actors who bid against each other in corrupt transactions, but the new political elite, the single-pyramid network that designates in advance on different levels those who are eligible to win government and EU tenders. The lower level of the apparatus is paid for in positions, not by 'corrupt concession rights' (Magyar, 2016: 143–149 and *passim*).

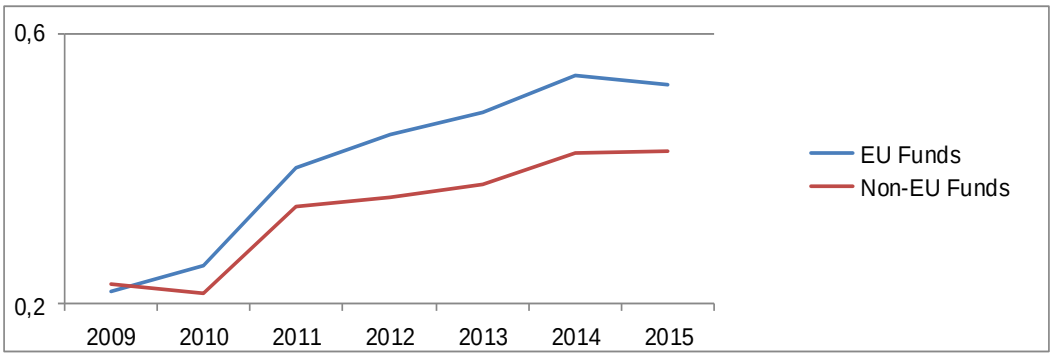
Elaborating on this point, we can see that municipal institutions and authorizations have undergone state centralization and become subject to political monitoring from higher-up to such an extent that the freedom of low-level corruption has been appropriated from them, and the right to exercise it granted instead to the central authority (Hegedüs and Péteri, 2015; Magyar, 2016: 131–132). For major investments, however, the government has nearly unlimited power to officially designate investments of economically-strategic importance, or prioritize them for national security reasons. These priority projects are exempted from regular public procurement procedures, and in 2016 the government gave itself the direct authority to approve tenders exceeding 300 million forints.

Assessing CRCB's data for the 2009–2015 period, we can first see a drastic increase in the corruption risk after 2010.[12] As can be seen from Figure 3, the risk indicator for public procurements related to EU funds which was 0.21 in 2009 had

[12] 'Corruption risk' is a proxy measure that refers to the prevalence of conditions which make corruption possible or likely. According to CRCB, these conditions are a lack of competition and a lack of public notice.

grown to 0.4 by 2011, and peaked at 0.54 in 2014. However, though this fact in itself permits the assumption of a systemic, qualitative change in public procurement, in theory it could also be explained simply by the extent of the occurrence of common corruption or state capture, both centrally directed and non-organized.

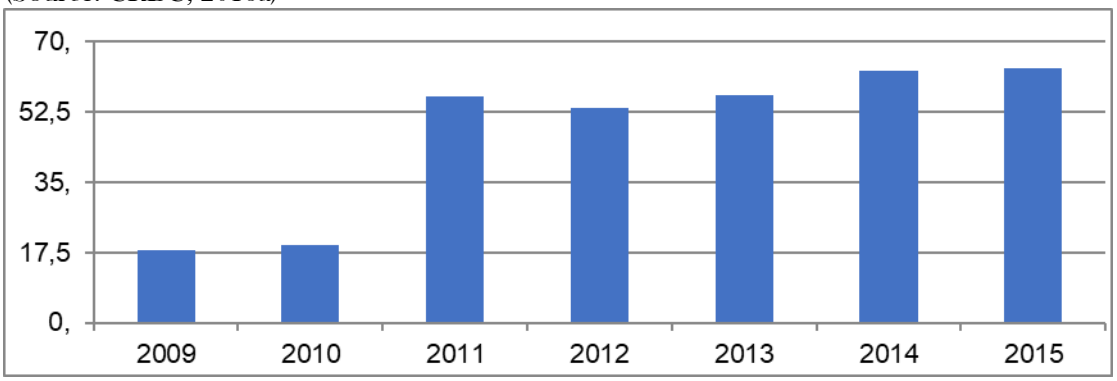
Figure 3: Corruption risk in public procurement, 2009–2015 (N = 118.843).
(Source: CRBC, 2016a)




*Explanation: The value of the corruption risk indicator is '0' if there has been some type of strong competition during the public procurement process, and the latter was preceded by notification, and '1' if the public procurement was implemented without notice and without competition. A value of 0.5 was assigned if only one factor – either competition or notice – was lacking.*

Second, the change in the proportion of non-advertised invitations to tender appears to be disproved by the existence of individual offenders, which supports the theory of a corruption service provider that is not centrally directed. CRCB data shows that while less than one-fifth of all invitations to tender were unadvertised in 2009, the proportion had become more than four-fifths by 2015 (Figure 4). Such a dramatic increase in the rate of unadvertised tenders would necessitate decisions from the mid-level of public administration apparatus at a minimum. At the very least, it can be understood as an evolutionary phase of state capture, since the bulk of non-advertised public procurements presume the existence of smoothly-operating channels of corruption.

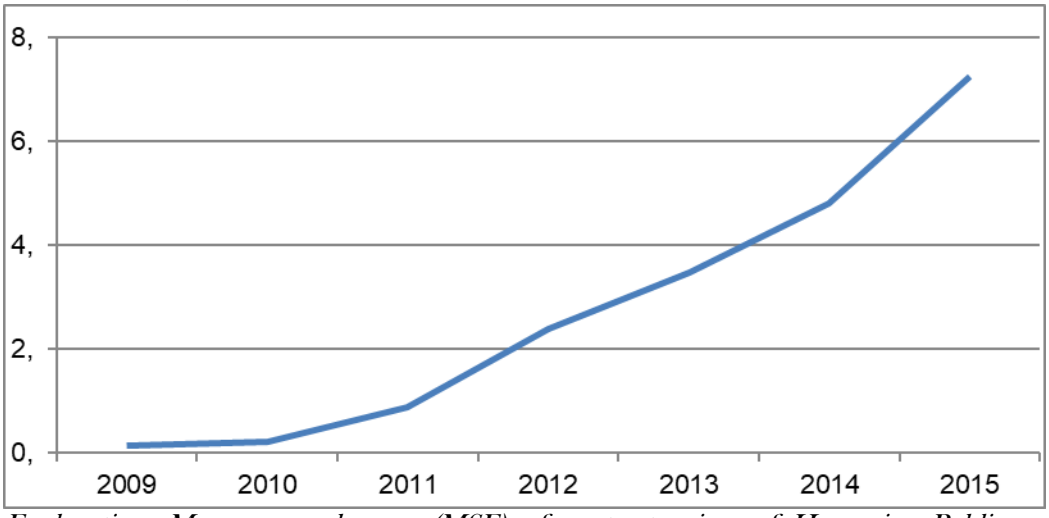
Figure 4: Proportion of public procurement lacking advertised tenders as a percentage of all public procurement, 2009–2015 (N = 121.849).
(Source: CRBC, 2016a)




On the economic side, an examination of overpriced public tender bids suggests a difference between bottom–up state capture and the criminal state in relation to advertised and non–advertised public procurement. Indeed, the decision as to whether tenders should be advertised or non–advertised, or whether open, negotiated, or restricted tenders should be specified for EU or state funds, are decisions made at the level of governmental actors. If the government finds that certain types of public procurement result in significant overpricing and partial deals, then it theoretically possesses all the necessary means to be able to steer tenders in the direction of an open and advertised application process. Considering that submission deadlines can be unrealistically short even for advertised tenders, it can be concluded that some mechanism has allowed the eventual winners to receive regular information required for the tender submission before notification of the former is posted. This could even be called 'tender shorting.' Moreover, this situation exists even before a discussion about invitations to tender and technicalities that are tailor–made for individuals or companies. The technicalities are in fact nothing more than tender personalization, involving use of the technical requirements of a tender to outline the specifics of a bid that has already been selected to win. This involves not a series of isolated incidents, but a wide–scale practice approved from the top.

However, this phenomenon might still fit the pattern of bottom–up state capture, as the collusion of the tender writer and assessor on the one hand and the applicant on the other could be sufficient. Yet out–of–control overpricing, as demonstrated in Figure 5, which has raised the proportion of overpriced bids by 140–320 per cent in the bulk of the cases examined, cannot be explained through the concept of partial, bottom–up state capture.

Figure 5: Price distortion in Hungarian public procurement, 2009–2015.
(Source: CRCB, 2016a)




*Explanation: Mean squared error (MSE) of contract prices of Hungarian Public Procurements according to the theoretical (Benford) distribution by year, first digits, 2009–2015, N = 123,224.*

Prices for public procurement contracts show a much stronger level of distortion in 2015 than at any time prior. This process so greatly distorts bids from normal market prices that it cannot be explained simply by qualitative improvements or just the extent of corruption. Its scale likewise cannot be explained by an increase in the role of inherently more corrupt product markets within all public tenders. The increase in corruption is thus not the result of a spontaneous process.

Indeed, we argue that *out-of-control overpricing* can only occur under certain conditions. A centralized guiding hand and resolve are required to monitor and coordinate the stages of tailoring project planning, invitations to tender, and assessment by a specific person/company. It must also ensure that those eliminated from the tender are unable to win appeals, while also guaranteeing that inspection and law enforcement agencies are unable to levy sanctions on the writers and assessors of the tenders because of their biased decisions. This also means that the managing and supervising public authorities must go beyond actively coordinating the activity of the actors in public administration in a way that guarantees the private use of the funds obtained through the tenders. In this case, they simultaneously also eliminate free market corruption: after all, it is not the assessor, but the review and managing agencies in their totality that award the winner of the tender. The assessor is no longer bought off, but rewarded by being able to retain his or her status.

This type and size of rent collection is only possible with a centrally-controlled, state-run criminal organization, namely the operation of a criminal state. Thus, while earlier data about corruption risk or non-advertised tenders involved only proxies and were not evidence of corruption, the scale of overpricing can serve as an indicator of the functioning of this top-down pattern. Using this method, we can already distinguish – in a way that would be impossible from looking at the CPI data – this regime from other, more ordinary, corrupt regimes. For the former, corruption is an

essential element that defines the system, while for the latter it is only an unpleasant side effect.

## *Conclusion*

In its content, the CPI index of Transparency International shows a clear Western bias. It is based on the presumption that corruption involves deviance from formal state functioning, or the good governance of Western-type liberal democracies (cf. Andersson and Heywood, 2009: 750–752). Taking a closer look at related surveys reveals that they mainly focus on private bribes and give a general picture of the level of corruption which aggregates different understandings – and, indeed, different patterns – of corruption in a unsystematic, uncontrolled manner. Not considering the possibility of top-down patterns of corruption or informal patronal networks using formal state institutions as a façade results in the mismeasurement of countries where such patterns are prevalent, such as in Hungary and other countries in the post-communist region.

In words, TI's officials have noticed that corruption can also take a top-down pattern. In 2015, the executive director of Transparency International Hungary said that 'a centralised form of corruption has been developed and systematically pursued' (TI, 2016a) and TI scholars have used the terms 'crony capitalism' and 'political state capture' to conceptualize this situation. While this is an important step forward in the apperception of the operation of a criminal state, it still perpetuates misunderstanding. The term 'crony' in the context of corrupt transactions assumes parties or partners of equal rank (even if acting in different roles) and implies voluntary transactions – occasional, though repeatable – that can be terminated or continued by either party at their convenience. The term 'political,' on the other hand, overgeneralizes and does not distinguish between two top-down corruption patterns, namely top-down state capture, and the criminal state. Also, in both cases the approach misses the most important feature of top-down patterns of corruption in the post-communist region: the presence of involuntary, patron-client relations.

The implications of our paper can be divided into three areas. In the first place, there are implications concerning the CPI as such. We argue that, while we do regard the CPI an important measure and a good proxy for the corruption climate in general, it could be improved in the following ways. First, its validity would increase if the definitions of corruption used in its surveys were consistent. This is important, first, to be able to tell what the index measures exactly, and second, to be able to give *specific* recommendations for reducing corruption on the basis of the *specific* patterns prevalent in the country in question. Second, the surveys could be based on the analytical framework we have proposed if they included items about phenomena particular to top-down corruption patterns. For example, the existence of top-down state capture and the criminal state could be better assessed by inquiring about the presence of competition among corrupt actors, or about the autonomy of oligarchs and public actors in making corrupt offers. Also, it could be asked explicitly who initiates the corrupt exchange; that is, whether the demander is situated in the private or the public (administrative or governmental) sector. Finally, an end should be put to the emphasis on bribery and 'corruption in general' in the CPI's source surveys. Instead, inquiries about bottom-up and top-down cases should be balanced. This

would be instrumental for better measuring the level of all forms of corruption in the post-communist region, as well as other regions where patronalism as well as top-down patterns of corruption are presumably prevalent (Hale, 2015: 466–471).

The second group of implications is related to more general corruption research. We believe that our analytical framework and corruption typology could be used for comparative analyses as well as case studies, and corruption researchers should be able to assess in countries other than Hungary the bottom-up and top-down forms we have distinguished. Finally, the third group includes implications for anti-corruption measures. As we mentioned in the literature review, one of TI's recommendations for countries with a bad ranking is the tightening of the formal rules for public officials. However, while this may be of use if there is endemic free market corruption in a polity – that is, when corruption indeed involves deviance in state functioning – such a measure would either make no change or even reinforce a criminal state – that is, when corruption is a constitutive element of the system. For cases of the latter kind, such as in Hungary, recommendations should not be made that concern the ruling elite but rather (a) toward private actors and civil society, who can perform the function of watchdog *within the country,* and (b) toward non-criminal governments which can develop *outside the country* more targeted ways to attack single-pyramid patronal networks. One example of an effective targeted attack mechanism is the famous Magnitsky Act, by which the US government is authorized to deny visas and freeze the foreign assets of certain people who belong to criminal states (Magyar, 2016: 283–290).

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DIANA MARIANA POPA *

# New versus Established Migrants in a Competitive Labor Market: A Focus on Central East Europeans in the Netherlands

Intersections.EEJSP
2(5): 130-149.
DOI: 10.17356/ieejsp.v5i2.516
http://intersections.tk.mta.hu

* [dianapopa.upb@gmail.com] (University Politehnica of Bucharest)

## Abstract

The Netherlands is a relatively new, attractive, but less researched destination for Central East European migrants, who compete on the Dutch labor market with more established migrant groups. Relying on data from the European Social Survey, the present article addresses the following questions: What is the employment status of CEE migrants in the Netherlands? How likely is it that CEE migrants will be satisfied with their income in the Netherlands? Does the region of origin influence the likelihood of having a comfortable income in the Netherlands? To this end, the article compares CEE migrants with the dominant migrant groups found in the Netherlands. Findings show that CEE migrants are likely to be satisfied with their income levels in their new host country. Education levels but also region of origin have an impact on the likelihood of living comfortably with the current income level.

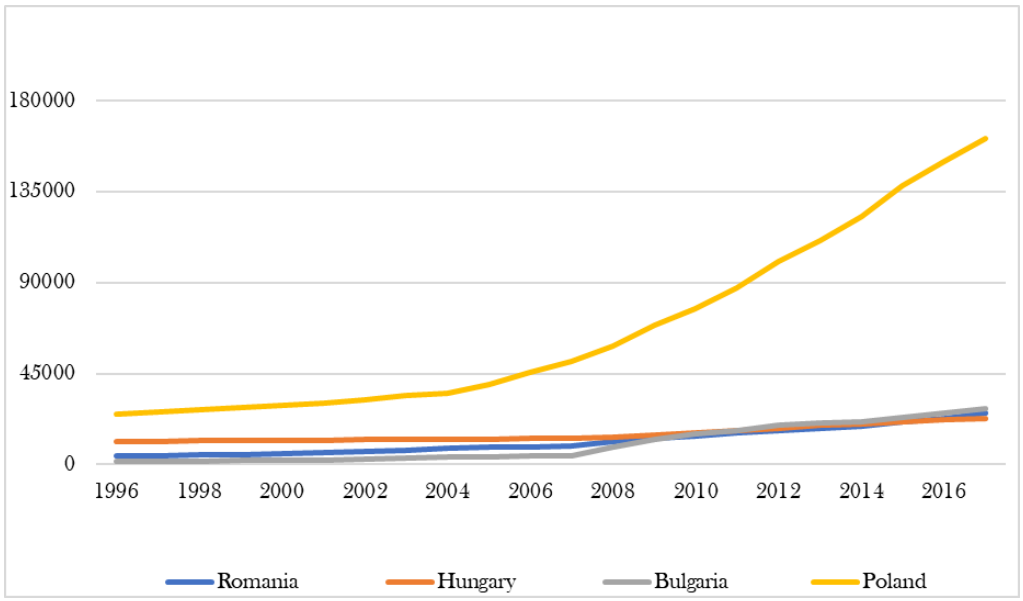
*Keywords:* labor, migrants, Central Eastern Europe, Netherlands.

## *1. Introduction*

Labor migration in Europe has gradually increased after the progressive integration of more countries into the EU, with a strong East-to-West trend. The Netherlands became an attractive destination for CEE migrants thanks to high income levels, but a more discouraging destination (when compared to older destination countries such as Italy, Spain, the UK etc.) due also to the difficulty of learning the Dutch language. Speaking Dutch increases the chances of being hired (admittedly, there are certain sectors where this is not necessary, such as in agriculture), as competition on the labor market, both with natives and other emigrants, is strong.

As a distinct migration destination for CEE migrants, the Netherlands has been less researched due to several reasons: it is a relatively new destination for this migrant group; absolute numbers from each country of origin remain relatively small (in comparison with other destination countries and with the exception of Polish migrants), and many CEE migrants remain undocumented and therefore are not counted in official statistics. Available survey data is somewhat biased, as most of the time questionnaires from national representative samples are administered in the official language of the country, thus limiting the participation of migrants with poor language skills and leading to the possible overrepresentation of better integrated immigrants in such samples (Andre and Dronkers, 2017; Dronkers and Fleischmann, 2010). These elements should be taken into consideration when looking at the number of registered citizens of four CEE origin countries presented in Figure 1, which is based on data from the Dutch Bureau of Statistics (CBS). As Snel et al. (2015) also suggest, the actual number of CEE migrants could be greater.

Figure 1: Trend in number of migrants from Romania, Hungary, Bulgaria and Poland in the Netherlands




Data source: Dutch Bureau of Statistics (CBS)

According to Eurostat data, the largest group of migrants from the EU in the Netherlands were Polish citizens. The number of Poles has risen constantly and sharply after the accession of Poland to the EU in 2004 (Figure 1). However, as Engbersen et al. (2010) noted, a significant increase in the influx of Polish workers was also recorded in the years prior to the 2004 EU enlargement, especially of Poles holding German passports. Being a larger group who stayed longer in the Netherlands, the group of Polish migrants also received much more attention in scientific research.

For all four countries presented in Figure 1, the two age groups with most members are 30–40 and 20–30, in this order. In the case of Poland and Bulgaria, 15 per cent of registered individuals are children of up to 10 years old. In the case of Romania, this group represents 14 per cent of the total, and in the case of Hungary, 10 per cent. This shows that those who migrate are in the middle of their working careers and have young children who they either bring to the host country, or who are born there. In all four countries, first-generation foreigners (*eerstegeneratieallochtoon*) represent the largest group.

The Netherlands now constantly attracts a diverse range of labor migrants. In the period 1955–1973 it did so through systematic government programs. Considering also individuals with a background in the former Dutch colonies, a highly diverse and multicultural landscape has begun to form. Central East Europeans (CEE) began to migrate to the Netherlands on a regular basis a few years after the accession of their respective countries to the EU and the consequent obtaining of formal access to the labor market.

The elimination of work restrictions for Hungarians, Bulgarians and Romanians did lead to an increase in the number of migrants, but not as much as anticipated by Dutch mass media or by Dutch politicians, as Snel et al. (2019) report. As in the case of previous migrant groups, both the public and scientists wondered if CEE migrants would be settlers or temporary guests in their new country (i.e. *guest workers*[1]). Trying to answer the question 'Will they stay or go?' social scientists now look at circular or liquid migration patterns – the transit of individuals who move from county to country in an attempt to optimize benefits thanks to an open market and border policies (Engbersen et al., 2013). The issue of the settlement or temporary stay of specific immigrant groups in specific host countries should therefore not be analyzed in a vacuum, but in relation to general satisfaction with life in the host country and with employment status and income satisfaction; elements which are in turn influenced by (perceived) competition (on the job market) with other migrant groups and with the natives, and according to each migrant group's chances on another host counties' labor market. If general life satisfaction in a specific destination country and income satisfaction are high for a certain migrant group, it can be expected that the migrants in question will quite likely settle.

Satisfaction is influenced by objective and subjective factors (Veenhoven, 1991; Arpino and de Valk, 2017; Verkuyten, 2016). Regarding the satisfaction levels of East European migrants, a recent study (Popa, 2018) showed that East European migrants

[1] This expression was popular between 1955 and 1973 and indicates the assumed temporariness of labour migrants' presence (Minnaard, 2008). It was used in the Netherlands to distinguish new labour migrants from ones originating from the former colonies (Minnaard, 2008).

(from Bulgaria, Poland and Romania) living in the cluster of Protestant countries (Inglehart, 2015) are happier than their counterparts living in countries from the English-speaking cluster or the Catholic cluster. The present article develops this finding and investigates the subjective wellbeing prospects of the larger group of Central East European migrants in one of the countries from the Protestant cluster, namely the Netherlands, in comparison with that of local, more established migrant groups. If East European migrants living in the Netherlands are happier than those living in Italy or Spain (Popa, 2018), how do they compare with the other migrant groups from the Netherlands in terms of prospects for life satisfaction? More specifically, the present article looks at the satisfaction of different migrant groups with their income and the factors influencing this satisfaction.

The research questions addressed by the present article are the following: What is the employment status of CEE migrants in the Netherlands? How likely is it that CEE migrants will be satisfied with their income in the Netherlands? Does the region of origin influence the likelihood of having a comfortable income in the Netherlands?

The remainder of the article is structured as follows: Section 2 reviews the factors likely to influence satisfaction with income: education and employment status; Section 3 presents a comparative analysis of the main migrant groups in the Netherlands together with interpretations that connect the former results to other studies, and Section 4 presents the paper's conclusions.

## *2. Level of education and job status of Central East European migrants in the Netherlands*

Level of education has been used as an indicator of the integration chances of migrants. Comparative studies about migration take into account the educational level of migrants in relation to their fit with the population of the host country, with highly educated migrants being seen as more likely to easily integrate and less educated migrants having a smaller chance of integrating, as human capital theory suggests. However, in relation to employment, research into the relationship between education level and job status still finds contradictory results, as the relation between the two variables is not always that straightforward.

In the Netherlands, Dutch politicians also consider education to be a key predictor of the successful integration of migrants into Dutch society, a low level of education being the often-mentioned characteristic of 'migrant[s] with poor prospects' (Bonjour and Duyvendak, 2017). A high level of education sometimes makes up for a 'poorer' cultural background in terms of the reference values of the host country (Bonjour and Duyvendak, 2017). However, Fleischmann and Dronkers (2010) found no linear relationship between level of education and employment rates as not all education is directly transferable, and sometimes migrants from less developed regions give up jobs in their country of origin in favor of a higher income from jobs with lower status (Lubbers and Gijsberts, 2016), resulting in a downgrading of job status. This also seems to be the case of East European migrants in the Netherlands, a highly skilled economy – previous research has shown that East Europeans found here often register a decline in job-related socio-economic status; a 'de-qualification after immigration' (Snel et al., 2019) and an increase in income satisfaction (Lubbers

and Gijsberts, 2016). In general, this decrease is sharper in the case of migrants with economic motives when compared to migrants with family-relative motives, and this happens due to a mismatch between the human capital migrants obtain in their origin country and the required skills in the host country (Chiswick et al., 2005). Moreover, Chiswick et al. (2005) suggest there is a U-shaped curve showing a downgrade in job status immediately after migration, and a rise after a certain number of years of residing in the host country, with the U-curve being most pronounced in the case of highly skilled migrants. However, a more recent study (Lubbers and Gijsberts, 2016) found a less sharp decline in the case of highly skilled East European migrants and for those who invested time into learning Dutch pre-departure. The authors also found no upward movement in the U-curve among the migrants they studied, perhaps due to the short period of time the respondents had spent in the Netherlands.

Comparing three groups of Central East European migrants – Polish, Romanian and Bulgarian – Snel et al. (2015) found that the Romanian group had the largest share of high-occupational-status individuals and the lowest share of low-occupational-status individuals. The Romanian group also had the largest share of individuals with a high educational level. As the authors conclude, 'in contrast to a previous generation of labor migrants ("guest workers") from the 1960s and 1970s – they are generally well educated' (Snel et al., 2015: 14). Another piece of research on East European migrants in the Netherlands showed that Bulgarians are on average less well educated and considerably less liable to speak English than Polish migrants (Lubbers and Gijsberts, 2016). There is also a gender difference, as the same study found that in the Netherlands, when compared to migrant men, considerably fewer migrant women were employed, and that Polish and Bulgarian women also had lower socioeconomic occupational status than men (Lubbers and Gijsberts, 2016). These results indicate that, given more data about CEE migrants, specific group-level analysis should be conducted, as there are significant differences between individuals from countries of different origin.

The migration of highly skilled individuals could go unnoticed in developed countries because it is not seen as a threat to the economic and social system of the receiving country (Findlay, 2003), but even if the human capital of better educated individuals is more internationally transferable, yielding lower transaction costs tied to migration (Dalen and Henkens, 2009) and the market for professions such as managers, IT specialists, scientists, etc. is global, there are still national regulations in place that in some cases become barriers to the recognition of foreign obtained diplomas and qualifications Faist (2009). Furthermore, the global work force does not develop at the same pace as the global economy, still being 'highly constrained [...] for the foreseeable future, by institutions, culture, borders, police and xenophobia' (Castells, 2000: 247).

As mentioned earlier, research results are still contradictory regarding the relationship between a high level of education and job market success in the case of migrants. Fleischmann and Dronkers (2010) showed that for both first and second-generation immigrants, a high level of education does not influence unemployment rates. Regarding the parent's level of education and unemployment, the two researchers found a connection between having only one native parent and a higher rate of unemployment in the case of men with low educational attainments (Fleischmann and Dronkers, 2010) due to the higher expectations of the latter (who

do not accept jobs that would be taken on by respondents with two migrant parents) (Fleischmann and Dronkers, 2010). Also, a higher educational level (obtained in the origin country) of parents has been shown to have no effect on the unemployment rates of children in the destination country (Fleischmann and Dronkers, 2010) due to the non-transferability of human capital. Another study found that better educated respondents perceive in-group discrimination more often, probably as a consequence of having more contact with natives and a clearer understanding of the disadvantages that their group face (André and Dronkers, 2017); findings which are in line with the integration paradox (Verkuyten, 2016).

## *3. An analysis of competing migrants in the Netherlands*

The discussion about people with a migration background in the Netherlands is especially complex. Having seen how there are now more generations of people with a migration background in the Netherlands from different migration waves, social scientists have begun to wonder who should be seen as a native, and who as a person with a migration background.[2] The four non-Western groups traditionally identified in the Netherlands are of Turkish, Moroccan, Surinamese, and Antillean origin (Gijsberts and Dagevos, 2010) while according to the former authors, migrants from the Surinamese group are in the best position of all the non-Western groups, all having a good command of the Dutch language, with a high proportion of mixed couples. East European countries, Morocco and Turkey are considered countries of emigration (Dronkers and Fleischmann, 2010) which suggests that migrants from these countries come into competition on different local labor markets.

In order to answer the research questions presented above, I make use of data from the European Social Survey, a large-scale cross-national survey based on country representative samples that has been conducted since 2002 every two years in ESS member countries. In total, 37 countries have participated in at least one round of the ESS (according to the ESS website). The data thereby gathered is extremely valuable thanks to the core questions that are addressed in all countries about various topics which facilitate country comparisons. Data can be analyzed for research purposes either longitudinally at country level, cross-sectionally, or in aggregated form for several countries.

The sample described here was selected from the aggregated file of respondents from the Netherlands from the first seven waves of the ESS, conducted between 2002 and 2014. As the article looks at first-generation migrants, respondents who were born outside the Netherlands whose father and mother were also born outside the Netherlands were selected. Respondents born in Aruba, Bonaire, Sint Eustatius and Saba, Curacao and the Netherlands Antilles were not included in the analysis. The resulting sample included 868 cases. Based on their country of birth, respondents were grouped into specific regions of origin: Western Europe; Eastern Europe; Indonesia and Suriname (former colonies); Africa; Asia; USA, Australia, Canada and New Zealand; Turkey and Morocco; Other. The largest groups of respondents in the sample are: Former Colonies – 22.1 per cent, Western Europe –

[2] In the following analysis I use a general classification of migrants, also considering the data that is available.

21 per cent, Turkey and Morocco – 19.4 per cent. These three migrant groups were compared with migrant respondents from Central Eastern Europe (10 per cent of respondents in the sample). The four main groups for comparison include 629 cases. The composition of the regions is as follows:

- Western Europe: Austria, Belgium, Switzerland, Germany, Denmark, Spain, Finland, France, United Kingdom, Greece, Ireland, Italy, Norway, Portugal, Sweden;
- Central- Eastern Europe: Czechoslovakia, Yugoslavia, Albania, Bosnia and Herzegovina, Bulgaria, Czech Republic, Croatia, Hungary, Poland, Romania, Serbia, Slovenia, Slovakia, Ukraine, Serbia and Montenegro;
- Turkey and Morocco;
- Indonesia and Suriname (Former colonies).

There are statistically significant differences ($p<0.01$) between the age averages of individuals in the four migrant groups, with the East European group having the lowest age average of 40.2 years and members of the Former Colonies group having the highest average age, at 53.9 years.[3] Previous research (Gijsberts and Dagevos, 2010) about migrant groups in the Netherlands also confirmed that East European migrants are on average younger than other migrant groups and than the natives. The gender distribution is similar for the Western Europe, Former Colonies and CEE groups, with female respondents being in the majority (62.1 per cent, 58.9 per cent and 52.9 per cent, respectively) while in the group of migrants from Turkey and Morocco 58.9 per cent of respondents were male.

### *3.1 Duration of stay*

At the time of questioning, 48.9 per cent of migrants from Western Europe, 81.7 per cent of migrants from the former colonies, 64.7 per cent migrants from Turkey and Morocco and 27.6 per cent of CEE migrants had been living in the country for more than 20 years. As time passes, this amount of time will increase for all migrants who remain in the Netherlands. However, looking at the specific times that these migrant groups first came to the Netherlands in large numbers, we claim that CEE migrants are the newest arrivals as a distinct group.

As mentioned earlier, research has often focused on the settling intentions of different migrant groups. From an analysis of studies published so far about migrants from the East European region, a complex picture begins to form regarding the settling intentions and trends of this migrant group, with more between-group similarities based on level of education than in-group similarities. In the data of Karpinska, Fokkema, Conkova and Dykstra (2016), 60.8 per cent of Polish migrant respondents claimed that they intended to remain in the Netherlands. Other studies show that CEE settlers tend to be young(er) and highly educated (Engbersen et al., 2013; Snel et al., 2011). This trend could also be explained by selectivity, in the sense

[3] It must be noted that the results presented here are based on aggregated data and mirror answers that emerged at certain time points. The grammatical present tense is used in the text to mirror a data set aggregated over great period of time. This specific aspect of the present research is also discussed in the conclusion.

that 'those who really want to live in the country of destination will probably get citizenship faster, might marry a native, speak the national language more often and ignore or not encounter in-group discrimination' (Andre and Dronkers, 2017: 124). This selectivity issue also applies to the pre-departure moment, as previous research about Romanian migrants (Sandu, 2017) showed that highly educated Romanian migrants tend to migrate to the North and West of Europe, while less educated ones migrate to Southern Europe.

These studies indicate that the level of education can have an influence on settlement intention, but this relation, as we will see in the following section, is not that straightforward.

### *3.2 Education levels and employment status*

From the group under analysis, the largest share of respondents with a higher-level education (some form of BA, MA or higher) were from Western Europe. Comparison of level of education between the migrant groups, expressed as the number of years of completed full-time education, shows that there are statistically significant differences ($p<0.05$) between migrants from Turkey and Morocco and the other three groups, with a difference of -2.9/-2.8 years when compared with migrants from Central Eastern and Western Europe, respectively.

The answer to the first research question – *What is the employment status of CEE migrants in the Netherlands?* – is indicated by the data presented in Table 1. Half of the CEE migrants had a paying job at the time of questioning, and out of the four migrant groups they had the largest share of unemployed-but-actively-looking-for-work respondents (Table 1). The group with the largest share of respondents involved in paid work was that from Western Europe, confirming earlier studies that have also shown that immigrants from Western Europe are less likely to be unemployed (Fleischmann and Dronkers, 2010). Regarding the employment rates of immigrants in different destination countries, researchers found that immigrants from wealthy, more politically free and stable countries, and immigrants from neighboring countries have lower unemployment rates than immigrants from poorer countries or from prevalently Islamic countries (Fleischmann and Dronkers, 2010). The data in Table 1 is in line with these results, as migrants from Western Europe and the Former Colonies were found to have lower unemployment rates than migrants from Eastern Europe, Turkey and Morocco.

Table 1: Main activity, last seven days. All respondents. Post coded * Region Crosstabulation

| | Western Europe | Former Colonies | Eastern Europe | Turkey and Morocco |
|---|---|---|---|---|
| Paid work | 55.8% | 44.3% | 50.0% | 47.0% |
| Education | 3.9% | 0.0% | 2.3% | 3.0% |
| Unemployed, looking for job | 3.9% | 4.2% | 11.5% | 4.8% |
| Unemployed, not looking for job | 2.2% | 2.1% | 2.3% | 4.8% |
| Permanently sick or disabled | 4.4% | 5.8% | 4.6% | 13.1% |
| Retired | 12.7% | 22.0% | 4.6% | 4.2% |
| Housework, looking after children, others | 15.5% | 19.9% | 20.7% | 22.6% |
| Other | 1.7% | 2.1% | 3.4% | 0.6% |
| Total | 100.00% | 100.00% | 100.00% | 100.00% |

Data Source: ESS. Aggregated file for the Netherlands. Waves 1–7

The unemployment rate has been seen as an indicator of economic competition, as reported by Savelkoul et al. (2011). The unemployment rate in the Netherlands in 2018 was 3.7 per cent (OECD, 2018). Following this line of reasoning, the higher unemployment rate observed in Table 1 in the case of CEE migrants (13.7 per cent) could be explained by the fact that they entered a labor market in which labor competition from other groups was strong. Questions remain about with whom they compete, and in which occupational segment. More data with a focus on the occupational segment is needed in this respect. Based on other data from 2009, of all the four large non-Western groups in the Netherlands, those of Moroccan origin were most often unemployed (Gijsberts and Dagevos, 2010). This finding is not supported by the data in Table 1, but there is an observable difference in the proportion of migrant groups engaged in the fifth category of main activity, which could be linked to this difference between this and more recent data.

Researchers who previously looked at the employment and job status of migrants in Europe talk about the 'deviant selectivity' of 'guest workers' in the case of migrants from Morocco, Algeria and Turkey:

> The selection of these 'guest workers' deviated from that of other immigrants from different countries of origin: they came from the poorest and most underdeveloped regions of these countries and were specifically selected [due to their] low [level of] skills in order to avoid competition [with] native skilled

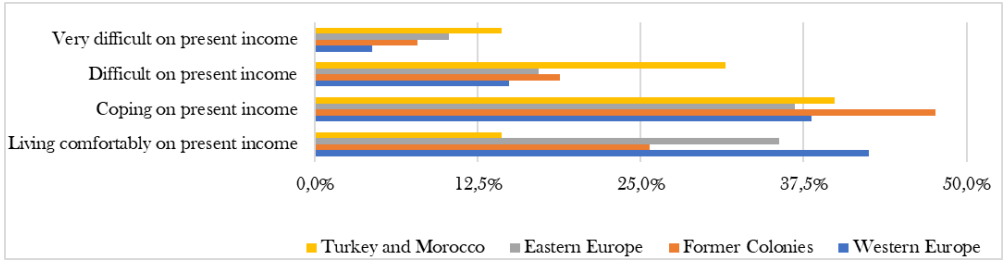
> workers in a number of European countries (Belgium, France, Germany, the Netherlands, Sweden). (Dronkers and Fleischmann, 2010: 200–201)

The researchers also suggest that the higher unemployment rate of migrants who come from a Muslim majority country could also partially be explained by direct or indirect discrimination against Muslims on labor markets (Fleischmann and Dronkers, 2010). Returning to Table 1, a large share (22 per cent) of migrants from the former colonies were retired at the time of questioning, in accordance with the higher age average of this group. The proportions of Central East European and Turkish and Moroccan migrants who had household work or looking after children as main activity were similar.

CEE migrants were the group with the largest share of respondents (37.7 per cent) working according to temporary contracts (often through temporary employment agencies – *uitzendingbureaus*) at the time of questioning, or without a contract (9.8 per cent), while migrants from the former colonies had the largest share of respondents (83.4 per cent) working with a permanent contract (n=446). This observation is in line with findings from other studies: from the 654 East European migrants investigated by Engbersen et al. (2013), 41 per cent of Bulgarians had a verbal contract while 35 per cent of Romanians and 65 per cent of Bulgarians were residing in the Netherlands without a work permit. Having a temporary work contract can be seen as very stressful for migrants from the two East European countries, as the former come from a culture which is highly risk adverse and rather values safety, as Hofstede (2001) shows. In the Netherlands, more and more employment contracts are of a temporary nature (*bepalde tijd*) for both native and migrant groups, and the same is true in the UK (Mcdowell et al, 2009) but this situation might not be seen as being that stressful by natives who come from a culture more in favor of taking risks (Hofstede, 2001), while the latter also have other advantages on the job market compared with migrants, such as their native language and acknowledgment of their education in the Netherlands. However, we must consider the fact that the decision to migrate suggests taking on a certain level of uncertainty and therefore may be associated with less risk-adverse people.

The main activity of respondents (Table 1) is often reflected in the income level of their household. Figure 2 presents the perceptions of respondents about their household income at the time of questioning compared between the four migrant groups.

Figure. 2: Feeling about managing on household income nowadays * Region Crosstabulation



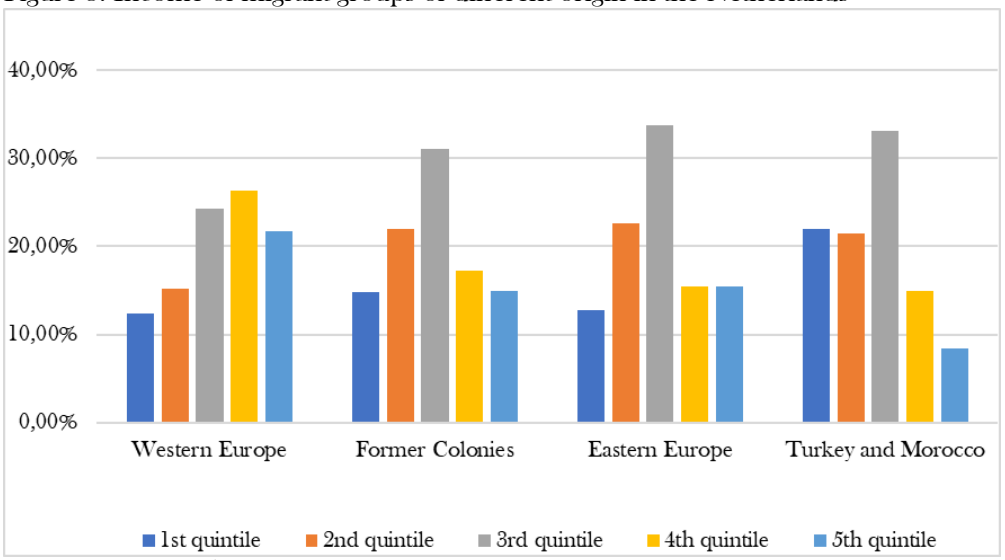

Data Source: ESS. Aggregated file for the Netherlands. Waves 1–7

Migrants from Western Europe were most satisfied with the income of their household at the time of questioning, and migrants from Turkey and Morocco were least satisfied with their present net income, saying that it was very difficult or difficult for them to live on their present income.

Regarding the second research question *How likely is it that CEE migrants will be satisfied with their income in the Netherlands?* we first need to know the general satisfaction level. Based on data from Figure 2, CEE migrants were rather satisfied with their income, with three-quarters of respondents from the CEE group saying they were living comfortably or coping on their present income. The fact that some migrants were living in a family with a Dutch partner could have influenced the net income of the household. The language most often spoken at home can be used as proxy for this: 74.7 per cent of respondents from Western Europe, 90.6 per cent from the former colonies, 59.8 per cent of CEE migrants and 48.2 per cent of migrants from Turkey and Morocco mentioned that Dutch is the language most often spoken at home at the time of questioning.

Looking at respondents' household income level of the four migrant groups shown in Figure 3, we can see again that migrants from Western Europe had the highest share (as a group) of the top two quintiles of income category, meaning that they contained the largest share of members with the highest income. In accordance with the level of dissatisfaction with their income, migrants from Turkey and Morocco were the group with the smallest share of members in the two top quintiles of income. Of the four migrant groups, the one from Western Europe on average had the highest share of high-income members, while the group of migrants from Turkish and Morocco had the highest share of low-income members.

Figure 3: Income of migrant groups of different origin in the Netherlands




N=547 valid cases[4]
Data Source: ESS. Aggregated file for the Netherlands. Waves 1–7

[4] The smaller number of responses is due to the fact that many respondents refuse to answer questions regarding income.

Migrants from Central Eastern Europe had a similar income level to migrants from the former colonies (Figure 3), but they were slightly more satisfied with this income than the latter (Figure 2) at the time of questioning. This situation may be related to the expectation levels of the two migrant groups in relation to the time spent by the two categories in the Netherlands. Migrants belonging to more established (older) migrant groups presumably expect a smaller gap between the incomes of natives and their own. This conclusion is also in line with the results of Lubbers and Gijsberts (2016) that confirms the satisfaction of CEE migrants in the Netherlands with their present income level, despite possible job-status downgrading (which it is not possible to investigate here). However, as CEE migrants will become an established migrant group in the Netherlands, their expectations about a comfortable living style could change.

The third research question *Does the region of origin influence the likelihood of having a comfortable income in the Netherlands?* is addressed by a regression model that was run to predict income satisfaction for the four migrant groups, taking the time spent in the country and the education level into account. In Table 2 we see that both education and region of origin had a significant impact on the probability of living comfortably on the present income: respondents with a higher-level education were more likely to be satisfied with their income, with respondents from Western Europe most liable to declare that they were living comfortably on their present income (Table 2). The length of stay in the Netherlands had no significant impact on the chance of being satisfied with income.

Table 2: Factors influencing chances of living comfortably on present income

| **Parameter Estimates** | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Feeling about household incomes | | B | Std. Error | Wald | df | Sig. | Exp(B) | 95% Confidence Interval for Exp(B) | |
| | | | | | | | | Lower Bound | Upper Bound |
| Coping on present income | Intercept | 0.11 | 0.304 | 0.132 | 1 | 0.717 | | | |
| | [Came to country = Last 5 years] | 0.444 | 0.359 | 1.526 | 1 | 0.217 | 1.559 | 0.771 | 3.151 |
| | [Came to country = Between 6-10 years ago] | 0.009 | 0.352 | 0.001 | 1 | 0.98 | 1.009 | 0.506 | 2.013 |
| | [Came to country = Between 11 and 20 years ago] | 0.195 | 0.275 | 0.503 | 1 | 0.478 | 1.215 | 0.709 | 2.082 |

**Parameter Estimates**

| Feeling about household incomes | | B | Std. Error | Wald | df | Sig. | Exp(B) | 95% Confidence Interval for Exp(B) | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | Lower Bound | Upper Bound |
| | [Came to country = More than 20 years ago] | 0[b] | . | . | 0 | . | . | . | . |
| | [Region = Western Europe] | -0.92 | 0.305 | 9.028 | 1 | 0.003 | 0.4 | 0.22 | 0.727 |
| | [Region = Former colonies] | -0.28 | 0.309 | 0.845 | 1 | 0.358 | 0.753 | 0.411 | 1.379 |
| | [Region = Central Eastern Europe] | -0.86 | 0.367 | 5.538 | 1 | 0.019 | 0.422 | 0.205 | 0.866 |
| | [Region=Turkey and Morocco] | 0[b] | . | . | 0 | . | . | . | . |
| | [Education=ISCED 0-1] | 1.739 | 0.457 | 14.48 | 1 | 0 | 5.694 | 2.324 | 13.95 |
| | [Education = ISCED 2] | 1.185 | 0.276 | 18.4 | 1 | 0 | 3.271 | 1.903 | 5.622 |
| | [Education = ISCED 3] | 0.865 | 0.256 | 11.44 | 1 | 0.001 | 2.375 | 1.439 | 3.92 |
| | [Education = ISCED 4] | 0.769 | 0.521 | 2.176 | 1 | 0.14 | 2.157 | 0.777 | 5.987 |
| | [Education = ISCED 5-6] | 0[b] | . | . | 0 | . | . | . | . |
| Difficult or very difficult on present income | Intercept | -0.59 | 0.359 | 2.663 | 1 | 0.103 | | | |
| | [Came to country = Last 5 years] | 0.344 | 0.433 | 0.632 | 1 | 0.427 | 1.411 | 0.604 | 3.294 |
| | [Came to country = Between 6-10 years ago] | -0.08 | 0.407 | 0.042 | 1 | 0.838 | 0.92 | 0.414 | 2.045 |
| | [Came to country = | 0.167 | 0.31 | 0.289 | 1 | 0.591 | 1.182 | 0.643 | 2.171 |

| Parameter Estimates | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Feeling about household incomes | | B | Std. Error | Wald | df | Sig. | Exp(B) | 95% Confidence Interval for Exp(B) | |
| | | | | | | | | Lower Bound | Upper Bound |
| | Between 11 and 20 years ago] | | | | | | | | |
| | [Came to country = More than 20 years ago] | 0[b] | . | . | 0 | . | . | . | . |
| | [Region = Western Europe] | -1.46 | 0.337 | 18.63 | 1 | 0 | 0.233 | 0.121 | 0.452 |
| | [Region = Former colonies] | -0.91 | 0.331 | 7.454 | 1 | 0.006 | 0.405 | 0.211 | 0.775 |
| | [Region = Central Eastern Europe] | -1.03 | 0.398 | 6.745 | 1 | 0.009 | 0.356 | 0.163 | 0.776 |
| | [Region=Turkey and Morocco] | 0[b] | . | . | 0 | . | . | . | . |
| | [Education=ISCED 0-1] | 3.135 | 0.485 | 41.71 | 1 | 0 | 22.993 | 8.879 | 59.54 |
| | [Education = ISCED 2] | 2.045 | 0.34 | 36.19 | 1 | 0 | 7.727 | 3.969 | 15.04 |
| | [Education = ISCED 3] | 1.431 | 0.331 | 18.67 | 1 | 0 | 4.183 | 2.186 | 8.006 |
| | [Education = ISCED 4] | 1.021 | 0.65 | 2.464 | 1 | 0.116 | 2.776 | 0.776 | 9.932 |
| | [Education = ISCED 5-6] | 0[b] | . | . | 0 | . | . | . | . |

a. The reference category is: Living comfortably on present income.

b. This parameter is set to zero because it is redundant.

Confirming circular migration patterns, 35.1 per cent of Central East Europeans in the sample claimed to have had paid work in another country for more than six months in the previous ten years, making them the group with the largest share of respondents

having given a positive answer to this question. Even if Central East Europeans were newcomers on the Dutch job market, they had other international work experience, being part of transnational migration flows (Mcdowell et al., 2009) in constant search of better job opportunities. However, in a survey conducted by Karpinska et al. (2016), only 24.2 per cent of Polish respondents stated that they had ever lived in another country before moving to the Netherlands, while Snel et al. (2019) report that CEE migrants who started as circular migrants eventually settled there. Again, this indicates that Central East European migrants should not be investigated as a homogenous group (an observation also made by Engbersen et al. 2013 and Snel et al. 2019) and that, given the necessary data, comparison of the situation according to different countries of origin would prove valuable.

Related to job opportunities for East European migrants in the Netherlands, a previous study showed that Romanian work migrants had found their jobs in the Netherlands via the internet or via 'an explicit work-campaign conducted in Romania by Dutch companies' (Snel et al., 2011: 22). The Romanian community in the Netherlands also has both offline and online opportunities for interaction such as the forum 'Romanians.nl' which also serves as a contact/information point for potential newcomers. Dutch job websites periodically advertise job openings for Romanian- and/or Polish-speaking recruiters or HR specialists who wish to work in technical, construction, or agricultural businesses in the Netherlands. Candidates are required to be able to speak Dutch and English and another language such as Romanian, Polish or Hungarian. The job advertisements are in Dutch, thus indirectly selecting from the get-go those candidates who are able to understand the job advertisements and deterring candidates who do not possess at least a conversational level of Dutch. These jobs include the task of selecting and recruiting Polish- or Romanian-speaking personnel and the administrative and legal work of facilitating the hiring of such personnel by contractors. Many of these advertisements explicitly refer to work migrants (*arbeidsmigranten*). Despite statistics showing that East European migrants are mostly concentrated in the Randstad area (Amsterdam, The Hague, Rotterdam, and Utrecht), the jobs that are advertised are in companies located outside this area, either in the north or the south of the country. What these advertisements show is the dynamic and liquid/circular migration (Snel et al., 2015; Engbersen et al., 2010) of East European migrants.

### *3.3 Overall levels of satisfaction*

When compared to Western migrants, those from the former colonies and from Turkey and Morocco were less satisfied with the state of the economy in the country at the time of questioning, while Central East Europeans were more satisfied than migrants from Turkey and Morocco when compared with them (one-way ANOVA, $p<0.05$). Regarding satisfaction with life as a whole, there was a statistically significant difference (one-way ANOVA, $p <0.05$) of 0.615 between migrants from Western Europe and migrants from Turkey and Morocco. Another factor that should be considered here is that satisfaction is also influenced by subjective factors, and scholars classify countries as happy or unhappy, or as cultures of dissatisfaction (Bartram, 2013; Polgreen and Simpson, 2011). Satisfaction can be the result of comparison with the first reference group from the host country, but in time this can change because

the reference group changes, and satisfaction may also be influenced by a culture of satisfaction or dissatisfaction.

Asked whether they feel part of a group that is discriminated against in the country in which they are living, migrants from Turkey and Morocco more often gave a positive answer (40 per cent) than did migrants from the former colonies of Central Eastern Europe (about 20 per cent each). This trend was also noted by Gijsberts and Dagevos: 'relatively few [people of Turkish or Moroccan origin] think that the Netherlands is a hospitable country for migrants and a country in which people are given every opportunity' (Gijsberts and Dagevos, 2010: 16). Andre and Dronkers (2017) also found that immigrants from poorer countries perceive in-group discrimination more often than immigrants from wealthier countries.

The findings presented above have limitations that should also be considered in connection with the characteristics of the data. As the analysis is based on aggregated data from seven waves of ESS, it means that some respondents interviewed more than 10 years apart were brought together in the sample. Different historical moments could have had different impacts on respondents' answers regarding satisfaction, income levels, etc. Also, the length of time spent by respondents in a certain country at the time of the interview could also have influenced the results. There is also the question of delimiting natives from non-natives, seeing that Dutch nationality law is based on *jus sanguinis,* not on *jus soli*, a discussion I have elaborated upon elsewhere (Popa, 2019). This detail is of particular importance in the case of respondents from the group of former colonies described in this article.

## *4. Conclusions*

This article looked at previous studies about CEE migrants in the Netherlands and at data about this same group found in the ESS. As studies and first-hand targeted data still remain scarce, conclusions are still contradictory. Further research about specific Central East European migrant groups in less studied destinations, as in the case of the Netherlands, would be of substantial value to the field of migration studies.

Based on data from the ESS, (registered) CEE migrants were younger than migrants from other groups. Slightly more women than men had migrated from Central Eastern Europe to the Netherlands. Migrants from East Europe did not feel as discriminated against as migrants from Turkey and Morocco at the time of questioning.

CEE migrants were on average better educated than the guest migrants from the 1960s and 1970s although they still made up the largest share of respondents who were unemployed and looking for a job. Many CEE migrants were working according to limited contracts or were used to working without a contract. They were relatively satisfied with their income level.

Many CEE migrants have so far been a part of the circular migration phenomenon, having worked in other host countries before arriving in the Netherlands (the Polish group may be an exception, as previous studies have shown). However, because it was very likely that they had an income on which they could live comfortably, as the analysis above has shown, it is also probable that they were likely to settle in the Netherlands. Another reason why settling is likely is that the reasons for the migration of Central East Europeans are beginning to change. While in the early

days of the emigration phenomenon being a migrant was often a means of obtaining higher social status back home (due to higher living standards when returning to the origin country after time working abroad and saving money), people have now started to emigrate for reasons other than financial ones, often related to social values and political and economic predictability. As a previous study (Popa, 2018) has shown, for East European migrants satisfaction with how democracy works in the host country has a significant positive impact on declared subjective wellbeing.

Satisfaction with income could also change over time for this new migrant group in the Netherlands, as their perspective about what represents a comfortable lifestyle could change. While in the first stages of migration migrants compare their new situation with the one back home, in time the reference comparison will become other migrant groups or the native population, thus expectations will change.

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# Authors' Biographies

**Lídia Balogh** holds a PhD from Eötvös Loránd University, Budapest, and MA degrees in Nationalism Studies, Communication Studies, Hungarian Language and Literature. She is a Research Fellow at the Hungarian Academy of Sciences, Centre for Social Sciences. As a freelance researcher, she participated in various projects of the EU Agency for Fundamental Rights. Currently. she serves as gender expert within the framework of the project 'European network of legal experts in gender equality and non-discrimination' (co-ordinated by the Human European Consultancy B.V., Utrceht) and the project 'Civil Society Monitoring of National Roma Integration Strategies' (co-ordinated by Central European University, Budapest). She is involved as gender expert in the activities of the European Roma Rights Centre relating to Roma women's reproductive rights. She has been active in Hungarian civil society (focusing on gender equality, social inclusion and human rights issues) since the early 2000s. As an expert on minority women's issues, she contributes to the advocacy initiatives of the Hungarian Women's Lobby (the national platform of the European Women's Lobby).

**Lilla Farkas** has been a member of the Budapest Bar Association since 1998, serving as president of the Hungarian Equal Treatment Authority's Advisory Board between 2005 and 2011. She is the race (Roma) ground coordinator of the European network of legal experts on gender equality and non-discrimination (since 2005). Lilla is finalising doctoral research at the European University Institute on The transnationalization of the civil rights movement: donors, lawyers and Roma rights in Europe.

**Eszter Kováts** is a PhD student at the Institute for Political Science at the Faculty of Law of Eötvös Loránd University, Budapest. She works in the Hungarian Office of the German political foundation Friedrich-Ebert-Stiftung (FES), and is responsible for gender issues in East-Central Europe.

**Zsolt Körtvélyesi** is researcher and lecturer based in Budapest, at the Institute for Legal Studies of the Hungarian Academy of Sciences, Centre for Social Sciences, and at the Department of Human Rights and Politics of Eötvös Loránd University, Faculty of Social Sciences. He holds a law degree (University of Szeged, 2006) with specialization in French Law (University of Paris Nanterre, 2005), a Nationalism Studies MA (Central European University, 2009), an LL.M. (Harvard Law School, 2014, on Fulbright Scholarship), and an S.J.D. (Central European University, 2016). He has research experience in questions of human rights, citizenship, nationalism, minorities and comparative constitutional law.

**Bálint Madlovics** holds an MA in Political Science (2018) from Central European University in Budapest. He is a research fellow of Financial Research Institute in Budapest (2018-2019). He is also the research partner of Bálint Magyar, contributing a chapter to one of his volumes on the post-communist mafia state and co-authoring past and upcoming publications since 2015.

# Authors' Biographies

**Bálint Magyar** holds MA degrees in History and Sociology (1977) and a University Doctoral degree in Political Economy (1980) from Eötvös Loránd University, Budapest. He was Member of the Hungarian Parliament (1990-2010), and served as Minister of Education (1996-1998, 2002-2006). Recently, he has been a researcher of post-communist regimes as Open Society Fellow (2015-2016), Hans Speier Visiting Professor at New School (2017), and senior fellow at CEU Institute for Advanced Study (2018-2019). He is a senior fellow of Financial Research Institute in Budapest.

**Alexander Osipov**, PhD, is a Board member of the International Centre for Ethnic and Linguistic Diversity Studies, a think-tank incorporated in the Czech Republic, and a Visiting Researcher at the Centre for the Study of Ethnic Conflict, Queen's University Belfast. Currently his research interests include ethnic and racial discrimination, autonomy arrangements, diaspora issues and ethno-cultural diversity policies.

**András László Pap** is Research Chair and Head of Department for the Study of Constitutionalism and the Rule of Law at the Hungarian Academy of Sciences Institute Centre for Social Sciences Institute for Legal Studies, he is also Professor of Law at the Law Enforcement Faculty of the National University of Public Service, Budapest, and Adjunct (Recurrent Visiting) Professor in the Nationalism Studies Program at the Central European University in Budapest-Vienna, and Professor of Law at Eötvös Loránd University Institute of Business Economics, in Hungary. Throughout 2016-2018 he was SASPRO-Marie Skłodowska-Curie Fellow at the Institute of Sociology of the Slovak Academy of Sciences in Bratislava. In 2018 he founded the International Association of Constitutional Law (IACL) Research Group on identity, race and ethnicity in constitutional law.

**Diana Mariana Popa**, PhD, is Lecturer at University Politehnica of Bucharest, in the Department of Training for the Teaching Career, Social Sciences and Humanities. A social scientist by training, she has an interest in migration patterns of Central East European migrants and has written several articles about social, economic or cultural aspects connecting Eastern Europe and The Netherlands.