



CENTRAL COUNCIL of German Sinti & Roma



State of the Art Report

Transitional Justice for Roma in Europe

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CHACHIPEN

Remembrance, Recognition,
Justice and Trust-Building



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About the project

CEPS, together with the Central Council of German Sinti and Roma, the European Roma Grassroots Organisations (ERGO) Network, the Federación de Asociaciones Gitanas de Cataluña (FAGIC) and the Asociația Fast Forward (AFF) from Romania, have launched a project funded by the EU Rights, Equality and Citizenship Programme and the German Ministry of Foreign Affairs, called 'Paving the way for Truth and Reconciliation Process to address antigypsyism in Europe: Remembrance, Recognition, Justice and Trust-Building', abbreviated as 'CHACHIPEN', meaning 'truth' in the Romani language.

This project aims to lay the foundations for transitional justice via tools like truth and reconciliation processes as a way to address historically rooted antigypsyism in Europe. Using the experiences of the Swedish and German Independent Commissions, the project will draw lessons on what has (not) worked. We elaborate on what processes could be of relevance to Romania and Spain and at EU level to combat antigypsyism, aiming to build a common narrative on Roma equality.

In this context, the project has produced this State of the Art Report, along with four country reports providing the evidence and baseline for calls for a larger debate on transitional justice with Roma communities, civil society, external scholars and national and EU policy makers, as well as with regional and international human rights bodies.

More about the project: <http://antigypsyism.eu/chachipen/>



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Abbreviations

Abbreviation	Full name
CAT	United Nations Committee Against Torture
CEDAW	Committee on the Elimination of Discrimination against Women
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
ERRC	European Roma Rights Centre
EU	European Union
EUCFR	European Union Charter on Fundamental Rights
GDPR	EU General Data Protection Regulation
GYEM	Hungarian Working Group Against Hate Crimes
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IHRA	International Holocaust Remembrance Alliance
NRIS	National Roma Integration Strategy
OAS	Organization of American States
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights
TRP	Truth and Reconciliation Process
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States



Introduction

In this State of the Art Report, we provide a historical perspective of antigypsyism and the ways in which it continues to impact the delivery of equality, non-discrimination and justice for Roma in Europe. We explore standards applicable to Truth and Reconciliation Processes (TRPs) and other transitional justice-like tools. We further question to what extent and under what conditions various transitional justice tools addressing historical antigypsyism are capable of delivering justice, equality and inclusion of Roma in European societies.

In this paper, we first explore the concepts that are used by academics, civil society and international institutions when advocating for the use of non-judicial means to address the grave human rights violations of the past. How and under what conditions can such tools promote a transition into a European society that is based on the equality and inclusion of Roma?

Second, we map existing literature on antigypsyism – what have been the gravest manifestations of antigypsyism in Europe? We further focus on the four countries of the project – Germany, Romania, Spain and Sweden.

Third, we explore the right to know, the right to the truth and the right to justice as the moral foundations for addressing structural injustice. We assess the extent to which transitional justice tools can be fit for purpose.

Finally, we open more questions to be explored, considering how transitional justice tools have been used in Europe and elsewhere. What lessons have been learned? And how can these tools be used by Roma and pro-Roma rights activists as a way to address the historically rooted antigypsyism in Europe?



Antigypsyism in Europe

Antigypsyism is defined as a specific form of historically rooted racism towards a group of people who are stigmatised as 'Gypsy', whether they be Roma, Sinti or any other group who, due to their lifestyle, are associated with 'Gypsies'. Some of the definitions given to antigypsyism fail to acknowledge that it is more than mere 'discrimination', 'prejudice', 'stereotyping' or a 'phobia'. Antigypsyism as a specific form of racism has been used throughout history to dehumanise and oppress those stigmatised as 'gypsy'. They have not only been portrayed as 'other', 'exotic' or 'backwards', but also as 'inferior' and 'undeserving'. In this report we use the following definition:

Antigypsyism is a special form of racism directed towards Roma and those stigmatised in the public imaginary as 'Gypsies' that has at its core the assumption that Roma are inferior and deviant, which justifies their oppression and marginalisation (Rostas, 2020, p. 11).

This definition gives a concise yet holistic overview of all the dimensions of this notion. This report reflects and borrows additional nuance from various other definitions. Roma and pro-Roma organisations and academia under the Alliance against Antigypsyism (2016) also propose a working definition. It refers to antigypsyism as:

a historically constructed, persistent complex of customary racism against social groups identified under the stigma 'Gypsy' or other related terms, and incorporates: 1) a homogenising and essentialising perception and description of these groups; 2) the attribution of specific characteristics to them; and 3) discriminating social structures and violent practices that emerge against that background, which have a degrading and ostracising effect and which reproduce structural disadvantages (Alliance against Antigypsyism, 2016).

We also build on the definition of antigypsyism in General Recommendation No 13 proposed by the European Commission against Racism and Intolerance (ECRI) of the Council of Europe in 2011 and revised in 2020. We further build on developments within the UN and the European Union, such as the EU anti-racism plan and new EU strategic framework for the equality, inclusion and participation of Roma in EU countries (European Commission 2020 a and b). We also reflect on intergovernmental initiatives such as working definition adopted by the International Holocaust Remembrance Alliance (IHRA) (2020).

Ismael Cortes and Markus End (2019) note the long history of the term itself:



First used by Romani activists in the 1920s and 1930s in the early Soviet Union, the term 'antigypsyism' was rediscovered in European scholarly and activist discourse in the 1980s. Since then, its use has broadened among activists and scholars, even though it remains a controversial term ... In recent years, the notion of 'antigypsyism' has gained increasing attention Europe-wide both in political and scholarly fields.

Due to the different definitions of antigypsyism circulating in the public sphere, there are two important clarifications to be made. The first is the use of the term 'racism' over the term 'discrimination' within the definition given in this report. Whilst the terms are conceptually related, they are different in the scale of the two notions and the consequences of the implementation of behaviours based on them.

The definition of the word 'racism' from the Encyclopedia Britannica is as follows:

Racism, also called racialism, is the belief that humans may be divided into separate and exclusive biological entities called 'races'; that there is a causal link between inherited physical traits and traits of personality, intellect, morality, and other cultural and behavioural features; and that some races are innately superior to others¹.

Meanwhile, the definition of 'discrimination' given by the Cambridge Dictionary is:

Treating a person or particular group of people differently, especially in a worse way from the way in which you treat other people, because of their skin colour, sex, sexuality, etc.²

The ECRI General Recommendation No 7 defines 'racism' as a 'belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons' (ECRI, 2002). ECRI further operationalised 'direct racial discrimination' as 'differential treatment' that has no objective and reasonable justification, while 'indirect racial discrimination' results in differential outcomes caused to racialise minorities by apparently neutral provision. ECRI (2007) further specifies 'racial profiling' by the police or when fighting terrorism as a specific

¹ Encyclopedia Britannica, 'Racism: Definition, History, Laws and Facts', accessed 17 August 2021, <https://www.britannica.com/topic/racism>.

² Cambridge Dictionary, 'Discrimination', accessed 17 August 2021. <https://dictionary.cambridge.org/dictionary/english/discrimination>.



manifestation that does not happen with other types of discrimination, i.e. sex or sexual orientation.

Within the EU's legal framework, Article 21 of the European Union Charter on Fundamental Rights (EUCFR) for instance defines 'non-discrimination', where race and colour are mentioned among the other prohibited grounds. The Racial Equality Directive 2000/43/EC (Article 2) also refers to 'direct and indirect discrimination based on racial or ethnic origin' as 'less favourable treatment' within various areas of life – from employment, education and healthcare to access to various public services. However, the EU does not have its own definition of racism and rather falls back on the notion proposed by ECRI (2002).

The European Commission has just embarked on a deeper reflection on the specificities of racism as a historically rooted and structural phenomenon as opposed to other forms of discrimination within the new EU anti-racism action plan for 2020-2025:

Racism is often deeply embedded in our societies' history, intertwined with its cultural roots and norms. It can be reflected in the way society functions, how power is distributed and how citizens interact with the state and public services (European Commission, 2020a).

This plan attempts to distinguish individual and structural racism, but issues such as racist attacks and violence, or the non-investigation of racist crimes, show the interplay between the two layers that are enabling each other. In addition, the new plan calls for an acknowledgement of the historical roots of racism:

Colonialism, slavery and the Holocaust are embedded in our history and have profound consequences for society today. Ensuring remembrance is an important part of encouraging inclusion and understanding (European Commission, 2020a).

The action plan calls to acknowledge Roma history, and also mentions antigypsyism as a specific form of racism. In the new EU strategic framework for the equality, inclusion and participation of Roma in EU countries (European Commission, 2020b), antigypsyism is described as 'a form of racism against Roma' and used as a distinct phenomenon from discrimination and socioeconomic exclusion (p. 1). In the footnotes of the framework, the Commission further describes it in the following way:

Antigypsyism (a form of racism against Roma) is a historically rooted structural phenomenon that appears at institutional, social and interpersonal levels. It has its origins in how the majority view and treat those considered 'Gypsies'.



It is rooted in a process of 'othering' that builds on negative as well as positive, exoticising stereotypes (European Commission, 2020b).

As illustrated above, notions of racism (as a belief system) and discrimination (as a treatment) have been operationalised and used interchangeably within the international, regional and EU mechanisms. This, for instance, has been one of the main criticisms towards the IHRA (2020) working definition of antigypsyism, which equates the phenomenon with 'anti-Roma discrimination'.

We argue that racism is qualitatively different from discrimination as it implies the clear notion of superiority of one group vis-a-vis the inferiority and even 'dehumanisation' of the other, besides mere 'differential' or 'less favourable' treatment. In the EU, laws and policies continue to evolve, and the EU's anti-racism action plan illustrates the ongoing global reflection prompted by the Black Lives Matter campaign (European Commission, 2020). Similarly, in the area of recognising and fighting antigypsyism a European Advocacy by Roma and pro-Roma organisations played a major role in shifting the paradigm. Isabela Mihalache and Jonathan Mack (2019) concludes that:

The major achievement in the fight against antigypsyism lies in the shift from victimisation of Roma towards states' acknowledgement of their role in reinforcing racism against Roma and their obligation not only to protect Roma but also to achieve substantive equality for all.

Therefore, we regard the term 'racism' is more appropriate than 'discrimination' to define 'antigypsyism'. Racism implies a power difference between those labelled 'Gypsies' and those who are not. This translates into a racial superiority of majority society or 'gadje' and treatment of Roma and other groups seen as 'Gypsies' as inferior and deviant.

The second important clarification to be made is over the use of the term 'Gypsy' and its connection to the Roma nowadays. For this purpose, the definition uses the public imaginary as the locus where these terms come together. The 'public imaginary', otherwise known as 'social imaginary', was coined by Charles Taylor in 2004 in the book *Modern Social Imaginaries*.

To paraphrase Charles Taylor, he defines this term as the way in which people 'imagine' their social existence, their place in the broader social context, the expectations they have of themselves and of others, and the notions and images that underlie those expectations, as well as the 'imagined' image of a person's social surroundings. All of these aspects are carried, according to Charles Taylor, through



narrative tools (images, stories and legends), are shared by large swathes of people, if not the whole of a society, and are the 'common understanding that makes possible common practices and a widely shared sense of legitimacy' (C. Taylor, 2002, p. 106).

In this sense, antigypsyism has been continually propagated and maintained by creating and manipulating visuals and narratives of the stereotypical 'Gypsy' and not of the Roma. Hence, the use of the term antigypsyism fits to describe the situation in the EU. While there is emerging consensus about the understanding of antigypsyism at European and international level, in many countries there has been – or should be – a debate about the term best suiting the national context.

1.1. The dark side of history: antigypsyism until the Enlightenment

The history of antigypsyism in Europe begins with the arrival of the Roma in Europe. The Roma originated in India and migrated to the European continent around 1000 AD. The confusion with a Christian heretic sect – athinganoi – is the source of their identification by outsiders as 'tzigane, țigani, cigan, zingari or Zigeuner' (Fraser, 1992). Becky Taylor points out that further confusion is at the origin of another label attached to the Roma – the belief that they come from Egypt and should therefore be called Gypsy (B. Taylor, 2014). By the 15th century, Roma communities had settled across Europe. During this time, as Margaret Brearley notes, 'the initial response to these dark-skinned and exotic nomads was often antagonistic but sometimes warm, both among local populations and church and secular authorities' (Brearley, 2001, pp. 588-589). However, already in the 15th century persecutions and marginalisation of those identified as 'Gypsies' were widespread across the whole continent. As shown by Donald Kenrick, between the years 1400 and 1450, approximately 62 historical chronicles and town council records on the subject of Roma could be identified. These early writers, mostly notaries of the cities, through imitation and exaggeration, constructed a negative image of 'Gypsies' that was transmitted further through visual arts, literary works and folklore (Kenrick, 2004).

Whilst this hardening of position towards those identified as 'Gypsies' happened in all European territories, the way Roma were oppressed by non-Roma Europeans varied from region to region. In some countries, being a 'Gypsy' was a reason for capital punishment. For instance, in 16th century England, the law foresaw punishment for Roma: 'If caught, a Rom could be tortured, flogged, branded, and banished. If caught a second time, the penalty was death for men and women' (Brearley, 2001, p. 589). Already at the end of the 15th century, Roma were expelled from the Holy German Empire and Spain, being accused of spying for Ottomans or



Arabs and denied entry under the threat of severe punishment, including death (Kenrick, 2004).

The Roma communities were enslaved by the various kingdoms forming what is now Romania, starting in the 14th century. In 1385, Roma enslavement in the Romanian principalities of Walachia and Moldova is mentioned for the first time in a donation of Dan I, the king of Walachia, to the Tismana monastery, which included among other goods 40 families of Roma slaves (Petcut, 2016). The origins of Roma slavery remain unknown. There are four theories, but these are not supported by clear evidence or archival documents: slavery as a result of Tatar invasion; slavery as Byzantium/Ottoman domination; slavery as economic exploitation; or slavery as a result of the historical practice of taking prisoners of war.

There were three categories of Roma slaves: those belonging to the state; those belonging to private landlords or boyars; and those belonging to the Orthodox Church and monasteries. The conditions of the slaves varied but, in general, those belonging to the state had more freedom to sell their goods. Unlike other forms of slavery that existed in the Middle Ages, Roma slavery was hereditary and lasted approximately 500 years. Slaves could be sold, beaten and abused, and for a long period the owners had the right of life and death over their slaves. Slaves could not testify before a court of law, and they could be punished without a decision of a court. Even the Orthodox Church treated them as subhuman, objects with no soul and no right to attend religious services.

The enslavement of Roma lasted until the mid-19th century. Between 1843 and 1856, Roma were liberated from slavery through a series of laws adopted in both Walachia and Moldova. 20 February – the date of adoption of the last law in Walachia – became the day of commemoration of Roma slavery, recognised as such by a law adopted by the Romanian Parliament (Law 28/2011). Through the liberation laws, those who were compensated were the slave owners, and no measures were taken to ensure the equality of Roma with other members of society. On the contrary, the 1864 land reform excluded Roma from being beneficiaries as they were legally considered 'free people'. Freedom meant almost nothing to former slaves, as they had to renegotiate with their owners the possibility to live on their property and work for them.

These harsh conditions led to the second wave of Roma migration in Europe: former slaves looking for better life conditions in other countries, including in America. The word 'țigăni' referring to the Roma also means 'slave' in Romanian and a person with lower social status. Thus, one should not be surprised about the strong pejorative connotation of this word and, consequently, the opposition of Roma activists to its use in public, especially by state institutions.



In other countries, such as the Netherlands, Brearley describes how 'organised Gypsy hunts became fashionable. Male Gypsies could be sent to the royal galleys, chained as oarsmen for decades or even for life'. Such episodes of torture and inhuman and degrading treatment speak about how dehumanised the Roma were, and how racism towards 'Gypsies' (as the public imaginary of Roma as 'inferior and undeserving') was a means to assert the white supremacy of non-Roma, and to legitimise and justify otherwise prohibited horrendous crimes. Finally, the very Roma identity was threatened by the methods that aimed to assimilate them. 'In Hungary, Germany, Spain and England, Gypsy children as young as two or four were taken by force and given to non-Gypsies to raise. These measures were justified with various allegations and claims of Roma being foreign spies, carriers of the plague, and traitors to Christendom' (Hancock, 1991, p. 395).

Racism towards and persecution of the Roma during that time were inconsistent. Some academics note that there were periods of at least formal legal tolerance towards the settlement of Roma communities in certain territories, such as the Ottoman Empire. Jim MacLaughlin, in his article 'Gypsies and the Historical Geography of Loathing', states that 'unlike in western Europe, Gypsies in the Ottoman Empire experienced far less state interference in their internal affairs ... The Ottoman authorities appear to have respected the customs and institutions of subject people, including Gypsies' (MacLaughlin, 1999, pp. 34-35). However, these periods of relative tolerance were short lived, as every time the empire in question retired or lost the territories that it had in Europe, the Roma in that territory reverted back legally and socially to their position as the marginalised and racially oppressed group. Whilst there is no concrete evidence as to why these reversals happened, it can be assumed that it was due to the rooted racism towards the Roma in the affected regions.

This pattern of structural and institutional racism followed through the centuries of Enlightenment, with only the methods changing. For example, in the 18th century, the aim was no longer to expel the Roma but to forcibly assimilate them into the majority population and to eradicate any Romani identity, including the Romani language. In the 19th century there was a reduction in state persecution of the Roma due to the notions of equality from the Enlightenment period. Furthermore, an increased interest in Romani culture was quickly offset by the rise in social Darwinism, which justified the belief that Roma were 'racially inferior' (Brearley, 2001, p. 589). For instance, on such basis in the newly formed Germany and Italy, Roma were excluded from society (Illuzzi, 2019, pp. 67-69).



1.2. Modern history: nation-states and antigypsyism

Antigypsyism eventually led to increasingly extreme measures in the 20th century. Ethnocentric nation-state building left Roma in a no-man's-land, treated as 'temporary guests' at best or as a 'problem' for the ethnic homogeneity at worst. Ethnic and national conflicts caused the Second World War, which culminated in the Holocaust. During the Holocaust, along with the millions of Jews, hundreds of thousands of Roma were killed in the Nazi death camps³. Under the influence of eugenic and racial sciences promoted systematically by Nazis and their allies, several countries adopted eugenic programmes of sterilising those seen as undesirable, among them people with disabilities and Roma people. Interesting to note is that some of these programmes adopted during the interwar period (1929-1936) lasted until the late 1970s in Sweden, Denmark and Norway.

Roma were framed by Nazi scientists as an inferior racial group and lived under the threat of total extermination. Their assumed inferiority was translated into their incapacity to respect the social norms in society, thus constituting a danger for the public order. Roma were deported to concentration camps, where many of them were exterminated in gas chambers. Romani children were targeted by Nazi health officials for horrific medical experiments.

In Romania, under the Antonescu regime and in the context of Nazi Germany declaring the Roma as 'enemies of the state', mass deportations of Roma to Transnistria started in 1942, where many of them died due to the poor conditions. Despite the authorities' attempt to present the deportations as a measure to protect public order, so only those Roma with a criminal record or those who were nomadic were reportedly being deported, it has to be said that this was a racial measure against the Roma and part of the plan to exterminate them, similarly to Jews, in an attempt to 'clean' the nation (Solonari, 2013). Recently published documents reveal that even families of soldiers fighting the war against the Soviet Union were deported by Antonescu's regime (Furtuna et al., 2020).

In the case of the Roma in Europe, the Holocaust lasted longer than for the other victims of the Nazi regime and its allies. For the Roma, the end of the Second World War did not mean the end of the Holocaust, camps and restrictive policies. In France, they continued to be kept in internment camps until July 1946, more than a year

³ There are no concrete data about the Roma victims of the Holocaust. The estimates are from several hundred thousand to 1.5 million Roma killed by the Nazis and their allies (see Hancock, cited above). The Council of Europe estimates the number of Roma victims of the Holocaust to be 500 000.

after the end of the war in Europe and without legal explanation of the situation (Foisneau, 2022).

The number of Romani victims of the Holocaust is estimated to be between 500 000 and 1.5 million. The debates on the number of victims might be misleading in certain circumstances. Not all Roma who died were recorded as Roma victims of the Holocaust. As Karola Fings points out, there are no accurate recordings to allow a comparison of the number of Roma before and after the war in each country, and there is no political will to support research on the Roma during the Holocaust (Fings, RomArchive). What really matters are the mechanisms of repression and the fact that Roma were targeted for extermination solely for their ethnicity.

After its foundation in 1949, the Federal Republic of Germany recognised the Holocaust, but did not recognise that Roma were victims of the Holocaust. Police files included statistics, fingerprints and detailed personal information, even tattooed concentration camp numbers. A registry of Roma in Germany was used well after the war by the police in Western Germany. The vagrancy ordinance in Bavaria was maintained until 1970. Those involved in implementing extermination measures against Roma were not held accountable, as even the Federal Court of Justice supported their claim that they had implemented 'crime-prevention policies' (Gress, RomArchive).

The end of the Holocaust, and even its condemnation, did not lead to the emancipation of Roma in the post-Second World War world. Since the end of the Second World War, life for Roma has been increasingly difficult due to the following factors: various oppressive laws that restrict their lives; poor housing; limited access to healthcare and/or education; harsh and brutal attitudes of law enforcement towards them; and, finally, the fact that Roma have been the victims of a significant number of harassment, racism and hate crimes in Western Europe since the 1990s, especially in Germany, Spain and Italy (Brearley, 2001, p. 590).

In Central and Eastern Europe, however, the situation was different, as the Roma in those countries were the victims of assimilationist policies. One such measure that happened all across the region was the drive to forcibly sedentarise nomadic 'Gypsies', with the argument that:

Once the nomadic lifestyle has arisen as a result of the injustice of the surrounding peoples and their respective institutions, its discontinuation must accordingly be conducted by the Soviet institution, who took over the historical responsibility to care for the creation of a rightful society (Marushiakova and Popov, 2020, p. 270).

Other oppressive measures intended to erase the Roma identity included: a ban on the Romani language; a ban on political organisation; the prohibition in the 1950s of nomadism; forcible renaming and re-identification in order to 'become' a non-Roma; a ban on self-employment and of traditional Roma jobs; forcible settlement in shanty towns or factory-owned flats; and, in some extreme cases (such as in Czechoslovakia) the forced sterilisation of Roma women and separation of Roma children from their parents to put them in state-run orphanages.

Under the Communist regime, Roma did enjoy a level of protection and access to public services like never before in their history. But the protection and benefits were dependent on sacrificing their own identity as Roma, Communist Party affiliation, adoption of the 'Marxism-Leninism' ideology and socialist way of life. All protections for the Roma who followed this route disappeared with the fall of Communism and the re-emergence of nation-states, which were oppressed by the Soviet or Yugoslav regimes. Finding themselves once again in the ethnocentric state, Roma became a highly marginalised and persecuted group in Central Eastern Europe, as they did not fit into the new definition of 'nation'.

Given the centuries-long history of antigypsyism described above, this specific form of racism persists despite the legislative push within the EU to improve the socioeconomic situation of Roma via soft-law instruments. CEPS study on institutionalised forms of antigypsyism in Europe notes that EU National Roma Integration Strategies have taken the shape of 'fixing the Roma', while overlooking the aspects that need to be fixed within the majority society, such as 'fixing white superiority' and uprooting antigypsyism (Carrera, Rostas and Vosyliūtė, 2017). Some of the possible solutions to address institutional forms of antigypsyism would require a hard-law approach, such as going to court to address various violations.

Unfortunately, currently the EU lacks the 'biting' rule of law mechanism. Academics have proposed to the European Parliament to call for an independent rule of law mechanism, equipped with a special commission of distinguished lawyers and academics to evaluate EU Member States' application of the law in line with EU values including equality, non-discrimination and human dignity (Bard et al., 2016). Current annual rule of law reports (European Commission, 2021) constitute the soft law – or naming and shaming – strategy of exposing various systemic violations and instances of structural injustice towards Roma communities.

The EU has developed hard law on non-discrimination, in particular within its Racial Equality Directive 2000/43/EC, which aims to capture direct and indirect forms of discrimination and harassment as well as the instruction to discriminate. For instance,



the European Commission has started several infringement proceedings on Roma segregation in the school system in Czechia (2014), Slovakia (2015) and Hungary (2016) being incompatible with the EU's Racial Equality Directive. These infringement proceedings are still ongoing (Commissioner Dali, 2021).

The Free Movement Directive 2004/38/EC is another legal instrument that has been used to protect the rights of Roma who are EU citizens residing in another EU Member State. Nevertheless, Eurodiaconia's 2020 statement shows how Roma have been precluded from accessing their rights under this directive, as a disproportionate number of registration procedures for Roma mobile EU citizens have resulted in rejection, among numerous other obstacles to access their rights. Such biased application of EU law is in itself an institutional manifestation of antigypsyism.

The report on *Scaling up Roma Inclusion Strategies* further elaborates on the importance of going back into history and coming to terms with historically rooted antigypsyism (Carrera et al., 2019). The feasibility of truth and reconciliation commissions and transitional justice-like tools have been carefully considered to address various forms of past and ongoing discrimination. As this section illustrates, Roma and other groups stigmatised as 'Gypsies' have been attributed many different negative stereotypes over the centuries, aimed at dehumanising them by portraying them as inferior and deviant. These stereotypes were instrumentalised to justify the dominance and oppression of the Roma across Europe fuelled by racism and hatred.

The moral foundations of the Roma's claim for social justice regarding their historical experiences of oppression in Europe are based on a nexus of three rights: the right to know; the right to the truth; and the right to justice. The sections below will explore how these rights could be used in the context of their claim for social justice.

2. Exploring approaches and tools to address historical injustice

The project partners strongly agree on the concept of antigypsyism as a structural and historically rooted form of racism that has been institutionalised and reproduced to oppress and marginalise Roma communities across Europe. The CHACHIPEN project aims to explore how various tools have been used to address grave human rights violations in the past. There are various concepts and tools embedded in transitional justice and other concepts of historical justice, retributive justice and others, nuancing the different aspects or approaches to the issue. Hence, this section



will explore the terms used and assess the differences between competing terms that have been adopted by academia, international and regional institutions as well as civil society.

During the launch conference of the CHACHIPEN project the following terms were used by partners and invited speakers, who referred to retributive justice, distributive justice, corrective justice, historical justice, restorative justice and transitional justice. While it is impossible to define these terms without oversimplification, we provide below the very nuance or focus that each term calls for.

For instance, *retributive justice* is concerned with the proportionate punishment of the perpetrator, while *distributive justice* stresses a fair distribution of resources. *Corrective justice* seems to focus on a reversal of wrongs or the undoing of transactions. *Historical justice* is seen as an umbrella term by some, but for others it suggests emphasis on addressing events as remaining in the past by acknowledging and redressing historical wrongs such as slavery, apartheid, genocide, colonialism and the systemic oppression of racial, ethnic and religious minorities. *Restorative justice* provides a nuance on repairing the harm inflicted on individuals or communities, in which the offenders take responsibility for their actions with the aim of understanding the harm they produced, giving them an opportunity to redeem themselves. *Transitional justice* focuses on how the past defines the present, and is 'ultimately concerned with the just pursuit of societal transformation' (Murphy, 2017, p. 7). This is what differentiates transitional justice from other forms of justice. Transitional justice is also relational, acknowledging how different interpretations of past events and human rights violations change relations among citizens and between citizens and state institutions.

In this context, *truth and reconciliation processes (TRPs)* can be seen as a tool rather than an approach. TRPs consist of the institutional setting and work of truth and reconciliation – or truth and justice – commissions, which seek justice for victims and aim to reconcile relations between the victims of human rights violations and their families on the one side and the perpetrators on the other, with the aim of the democratisation of society and peaceful coexistence. TRPs include individual and public hearings, community reconciliation, perpetrators' apologies and victims' forgiveness, writing, publishing and presenting reports on human rights abuses, proposed memorialisation and compensation for the victims and their families. As such, TRPs are tools of transitional justice, and can also address historical justice or attempt at retribution.

The different ways of framing the understanding of justice in different contexts is determined by the following issues: what acts might be incriminated and be part of transitional justice processes? Who are those that are claiming justice? And what



purpose does this justice serve? These are questions that need to be clarified not only for the purpose of the CHACHIPEN project but, as Sharp puts it, they 'are profoundly political, ideological, ethical, philosophical, religious, and, yes, legal questions' (Sharp, 2018, p. vii).

To succeed in their claims of justice for Roma for their historical sufferings, Roma rights advocates and supporters must attempt to answer the questions above. The section below, consisting of a literature review of scholarly publications related to antigypsyism in Europe, provides a deeper understanding of the issues at stake, as well as the challenges of using transitional justice-like tools for justice for Roma in Europe.

2.1. A deep-dive into the transitional justice approach

Tracing the history of the term, Paige Arthur places transitional justice at the end of the 1980s, linked to the third wave of democratisation as human rights activists, political scientists, legal scholars, journalists and policymakers were concerned with the transition to democracy. She defines the field of transitional justice as 'an international web of individuals and institutions whose internal coherence is held together by common concepts, practical aims, and distinctive claims for legitimacy' (Arthur, 2009, p. 324).

As a concept, transitional justice could be defined narrowly, mostly in legal terms, or more broadly, as processes. Ruti Teitel defines transitional justice in a narrow sense as 'the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes' (Teitel, 2003, p. 69). A broad definition of transitional justice is offered by 'a set of moral, legal, and political dilemmas involving how best to respond to mass atrocities and other forms of profound injustice in the wake of periods of conflict and repression ... defined in part by reference to a set of practices now associated with responses to widespread human rights violations' (Sharp, 2018, p. 1).

The United Nations (UN) Secretary-General has defined transitional justice as:

compris[ing] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof (UN, 2004, p. 4).

Scholars have linked transitional justice to the attempts of repressive systems to democratise. Empirical research shows that societies that have made steps towards democracy have achieved better results in dealing with past wrongdoings. However, the fundamental issue at stake is about the principles when assessing whether certain responses were just or not, or, as Colleen Murphy puts it, ‘what are the appropriate standards of justice to use when evaluating various legal responses to wrong-doing in transitional contexts?’ (Murphy, 2017, p. 5).

2.1.1. Practical considerations on transitional justice

Transitional justice is appropriate where there might be difficulties in legally identifying the offenders, the number of cases might overwhelm the criminal justice system, or where there is a lack of trust in state institutions, including the justice system, corruption and insufficiently trained investigators. Transitional justice conceives justice as a gradual concept and not a binary one. It means that justice is not a matter of black and white and that in particular circumstances one should aim for the greatest possible justice to be achieved.

Context is another element that differentiates restorative and transitional justice. In the case of restorative justice, claims are seen as context insensitive, while in the case of transitional justice, context is fundamental. For transitional justice advocates, justice depends on the circumstances of prior injustices. Justice in this case is instrumental, as the response to past wrongdoings will transform the community or society into a more inclusive community or society governed by liberal democratic order.

Forgiveness as a core element of restorative justice places the burden on the victim. Our belief is that the burden should be shared by other actors, such is the state and society at large, and not be placed disproportionately on those who have already suffered.

Colleen Murphy identifies four circumstances of transitional justice to be considered: ‘pervasive structural inequality, normalised collective and political wrongdoing, serious existential uncertainty, and fundamental uncertainty about authority’ (Murphy, 2017, p. 33). The EU and its transformation of Roma status through its EU Roma Framework should tackle structural inequalities, recognise the wrongdoings against Roma and hold perpetrators accountable, strengthen the rule of law and access to justice for all its citizens including Roma, and establish more inclusive institutions in the pursuit of social justice, human rights and equality.



Individuals and communities react to injustices and the failure of justice systems. The murder of George Floyd in the United States led to major demonstrations in support of the Black Lives Matter movement and social justice aims across the world. Now, in the era of virtual communication, mobilisation has become easier across large geographies.

As Colleen Murphy shows in her book, 'a process of transitional justice directly contributes to transformation by strengthening the rule of law, increasing trust among citizens and officials and among citizens, and/or enhancing the relational capabilities and capability to avoid poverty of citizens' (Murphy, 2017, p. 140). These are exactly the democratic processes that Member States and the EU have tried for the past decades to strengthen or overcome: rule of law, mistrust in public institutions, poverty alleviation and social cohesion.

2.1.2. Transitional justice around the globe

Transitional justice appeared as a field at the international level, comparing country efforts and as a specific human rights activity to answer moral and political dilemmas and justice claims by different actors (Arthur, 2009, p. 325). However, the circumstances differ and the concept could also be applied to other political contexts to tackle social inequalities and provide justice in countries and contexts that are not transitioning to democracy.

Transition was a term used during the late 1970s and early 1980s in reference to emerging democracies in Southern Europe and Latin America. The term used previously for such transformations was modernisation. Human rights movements had a significant impact on the framing of justice claims of local groups in these countries. Human rights principles should be treated as absolute values, trumping political aims. The measures taken during the transition to deal with human rights violations of repressive states were regarded as legitimate within the UN international legal framework (Joinet Principles), although, as Paige Arthur notes, these measures were subsequently applied to other political and practical dilemmas (Arthur, 2009, p. 355).

The historical discussion on transitional justice as a response to human rights abuses in the past had two objectives: providing justice to the victims and achieving a more just, democratic order (Arthur, 2009, p. 357). Transition was understood as legal-institutional reforms to establish a new political order. Transitional justice is distinctive from other forms of justice by its second normative aim: to establish a more democratic order.



Transitional justice is based on two broad sets of beliefs: 'normative ideas that specify criteria for distinguishing right from wrong and just from unjust' and 'beliefs about cause-effect relationships which derive authority from the shared consensus of recognised elites, whether they be village elders or scientists at elite institutions'. The challenge for transitional justice is 'to systematise knowledge about the cause-and-effect relationships between justice measures and transitions' (Arthur, 2009, p. 358). Until 2010, Priscilla Hayner counted 40 truth commissions, starting with the Sabato Commission in Argentina. According to Sharp, the Office of the High Commissioner for Human Rights (OHCHR) supported transitional justice programmes in more than 20 countries (Sharp, 2018, p. 7).

Transitional justice programmes have been implemented in Central and Eastern Europe since the collapse of Communism. Lavinia Stan and Nadya Nedelsky edited a volume on transitional justice in post-Communist Europe, focusing on dealing with the past regarding Communist crimes, but also the Holocaust (Stan and Nedelsky, 2015). Their focus is on the factors that shaped the transitional justice programmes in Central and Eastern Europe over 25 years of post-Communism. Among the factors identified by Lavinia Stan and Nadya Nedelsky in the conclusion of the book are: 1) the economic and material consideration of transitional justice; 2) the consideration of public opinion, which resulted in the politicisation of transitional justice; 3) the positioning of the political elites and the demand for political renewal, or national victimisation as a strategy for acquiring political legitimacy; 4) the focus on 'hard' tools of transitional justice (lustration, restitution and truth commissions) and to a lesser extent on 'soft' aspects such as memorialisation; 5) the narrow vision of seeking justice without reconciliation, which led to divisions and exclusions in society; 6) 'the overzealous pursuit of truth and the potential re-victimisation of certain individuals'; and 7) the weak and non-independent judiciary (Stan and Nedelsky, 2015, pp. 296-299).

There are different views on justice and its relationship with moral and pragmatic considerations. Retributive, distributive, corrective, historical and restorative justice are all terms used in providing justice to individuals and communities, and there are considerable distinctions to be made between them. In order to understand the differences in these terms and how they operate one has to consider the context, as different theories of justice might have different applicability. Thus, context is a significant factor in making claims for justice. Without pressing for one term over the other, these approaches share common ground on the right to know and the right to the truth, although they might differ on the right to justice. Thus, these rights are explored in detail.



3. Rights underpinning approaches to address historically rooted injustices

3.1. Exploring the right to know

Within international human rights law there is not the explicit right to know. However, such a right could be a derivative of other rights and freedoms. The right to know was used in the context of journalistic investigations especially in scrutinising governmental actions after the Second World War.

Louis Henkin, one of the leading human rights scholars, when analysing one of the landmark cases on the people's right to know – the Pentagon Papers – conceived the right to know in connection with the government's right to withhold information. He points out ways in which the state has protected its right to withhold information from becoming public knowledge. His proposal to balance the potential abuse of power by the state is the contentious notion of public interest: 'In principle as in practice, then, the "right of the people to know" what Government does has always been reduced by the "right – or duty, or responsibility – of the Government to withhold" in the public interest' (Henkin, 1971, p. 275).

As a legal construct, the public's right to know is based on the right of citizens to self-determination and to claim increased control over government activities and transparency. The right to know is part of the whole system of freedom of expression. Thomas Emerson underlines the importance of the right to know and its functions in a democratic society (Emerson, 1976). He argues that the right to know serves similar functions to the right to communicate: 'It is essential to personal self-fulfilment. It is a significant method for seeking the truth ... It is necessary for collective decision-making in a democratic society. And it is vital for effectuating social change without resort to violence or undue coercion' (Emerson, 1976, p. 2).

In a complex analysis combining philosophical arguments with legal arguments from US Supreme Court jurisprudence, Emerson shows **how the right to know could be used**. He identifies three major instances: first, as a defence against potential government interference with the system of freedom of expression; second, within the government formulation, affirmative controls designated to regulate or expand the system of freedom of expression; or third, using the right to know in accessing information from government or private sources (Emerson, 1976).

3.1.1. Is there a limit to the right to know?

In Henkin's view, the limitations to the right to know are determined by the public interest to withhold information. Emerson believes that the limitations to the right to know should be in place when this right conflicts with other interests that deserve protection. He sees two such confrontations: the first with the right to privacy, and the second with the right not to know, which could be seen as protecting 'the individual against communications forced upon him against his will' (Emerson, 1976, pp. 20-22). Emerson concludes that there is a need for a new doctrine on the right to know, going beyond the negative use of the freedom of interference of the government into the freedom of expression, but also on the affirmative aspect of protecting or expanding the system of freedom of expression.

More recently, Dorota Mokrosinska analyses the right to know and state secrecy in the light of new developments in the understanding of the relationship between citizens and the state (Mokrosinska, 2018). She points out that the people's right to know became encapsulated within the term of freedom of information, which belonged to each individual. Mokrosinska makes the point that the people's right to know is proportional to state secrecy. In making her arguments, she considers the right to know both as a human right and as a right belonging to citizens. Thus, she points out the moral sources of the people's right to know: the very humanity of every person and the relation between citizens and the state, as the state exercises authority and citizens have the power to hold their representatives accountable.

So, do Roma have a right to know their history? And what exactly do they have the right to know about their past?

As an ethnic group, it is fundamental for Roma identity to know their past, traditions, culture and language. International human rights law and minority rights order the protection of the right of national minorities to maintain their identity and to express it in the public sphere. Why do Roma speak the Romani language in such limited proportions in certain countries? What is the status of the Romani language throughout Europe? How can the language and traditions of this national and ethnic minority be better protected? Even more important, how can the existence of this minority be ensured?

Corrine Lennox shows that following the Second World War, the preoccupation of the international community was to ensure the existence of national minorities through the Genocide Convention, followed by non-discrimination in accessing rights, and later by provisions protecting the identity of these minority groups. Only



later did participation become the fourth pillar on which minority rights operate (Lennox, 2018).

Roma's history, culture and traditions are clearly not classified government information. In this respect, governments cannot claim that they are protecting public interest by withholding such information to be taught within the educational system. It is also important to mention that in Europe, education is a monopoly of the state. By 'divulging' such information to the public through the education system, it cannot be argued that the state is not violating the right to privacy of individuals. Data regarding the ethnic and racial affiliation of individuals are protected in Europe under the EU General Data Protection Regulation (GDPR) and subsequent national legislation. Moreover, ethnic or racial affiliation is based on voluntary self-declaration.

The question becomes whether 'divulging' such information so that it becomes public knowledge will infringe certain people's right not to know.

Theoretically, one could argue that certain populations might object to teaching Roma history, as it will expose the students to violence and violent language in describing the historical oppression of Roma. Thus, students, their parents and their legal guardians, even third parties, might invoke their right not to know, to not be exposed to such information against their will, as they might feel traumatised by such information. This argumentation leads to a moot point, as other groups could similarly invoke their right not to know about the majority's history. Hence, the state must decide what information should become public knowledge.

Historically, nation-states have favoured the language and history of the ethnically and racially majority population. In the past century, as democracy became widespread, combined with globalisation and political transformations in Europe towards an integrated supra-state, the majoritarian tendencies decreased. The neutrality of the state increased due to the emerging human rights and national minorities' rights order, and the promotion of diversity as a legitimate public policy aim. Thus, the guiding principle of the state decision on what is to be taught within the educational system became the public interest, and less the interests of the ethnic or racial majority. To conclude, the right not to know is also limited by public interest, and the state must decide what information should be 'disclosed' to the public through its education system.

As citizens, Roma have the right to question the government and to inquire about their position and social status. Thus, it is legitimate for Roma to ask why so many of them are among the poorest citizens of their countries. What exactly has put them in such a marginal position? The legitimacy of such inquiries resides in their freedom

of expression as citizens. Any answers to such questions need to go back to the Roma's history since their arrival in Europe.

In dealing with Roma-related issues, governments have disproportionately focused their actions on the socioeconomic status of Roma and much less on the causes of the current situation, or on measures protecting the identity of the Roma and their specificity (Rostas, 2019). It is time for governments and international organisations to look into the root causes of the Roma's current marginal position in society, and the EU Roma strategic framework for equality, inclusion and participation takes the right approach in placing antigypsyism as a priority.

While international human rights law, especially concerning national minority protection, provides the basis of the right of Roma to know their history, culture and traditions, and to express them freely in the public sphere, one might ask if the rest of society has a right to know of this past. Once again, the answer resides in the public character of such information, whether disclosing such information serves the public interest.

3.1.2. What type of knowledge and how much of it should be provided by the power holders to those concerned?

An interesting debate is generated around the right to know the truth. Some scholars argue that in certain contexts 'too much knowledge can inhibit rather than enable thought', or that 'some information can be harmful'. They argue for a more balanced approach to the supremacy of the right to know (Herring and Foster, 2012, p. 20). The right not to know and the debates around it appeared within the medical field related to genetic research and the rights of patients. Currently, it is recognised and included in some international documents such as the UNESCO Universal Declaration on the Human Genome and Human Rights⁴ and the European Convention on Human Rights and Biomedicine⁵, and it is echoed in the national legislation of Belgium, France, Hungary and the Netherlands (Herring and Foster, 2012, p. 21). The right not to know is based in the principles of autonomy and respect for privacy.

⁴ Article 5(c) of the UNESCO Universal Declaration on the Human Genome and Human Rights states that 'the right of every individual to decide whether or not to be informed of the results of genetic examination and the resulting consequences should be respected'.

⁵ Article 10.2 of the European Convention on Human Rights and Biomedicine stipulates that 'everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed'.



Bartha Maria Knoppers provides a brief outline of the transition from the right to know to the right not to know in the medical field (Knoppers, 2014). She shows that although recognised within the medical field, even there the right not to know has some limitations suggested by the World Medical Organization and the European Society of Human Genetics, related to the need to protect the life of others. Thus, when discussing the right to know, it is imperative to consider the needs and interests of others as factors that might temper the right not to know or, as Knoppers put it, 'one could maintain that the only exception (to the right not to know) is where our ignorance is likely to cause serious harm to others' (Knoppers, 2014, p. 9).

To conclude, while exploring the right to know, it is important to look into potential counterarguments brought by those who might disagree with the right to know. One of the most important such counterarguments is the right not to know. Hence, to the possible invocation of the right not to know the past and the atrocities suffered by Roma in Europe during the past centuries, the answer could be found in the limits of this right. In this sensitive debate, ignorance could not be an argument, and the needs and interests of others – especially those of the victims and their relatives – could easily override the right not to know.

Moreover, the right not to know found its expression in the medical field, and even there it is not an absolute right. Knowing the past, acknowledging past atrocities and mass human rights violations, and fighting impunity could become a legitimate public interest, especially in those regimes that are trying to consolidate their democratic institutions and strengthen public accountability of their leadership. In such conditions, the right to know might overcome other rights and interests in a society.

3.2. Exploring the right to the truth

Members of a society might have a right to know. Once agreed upon this point, there are two important questions to be answered: what exactly to know and how much of it. In an era where individuals are bombarded with all kinds of information, one cannot assume that all information is worth knowing, or that all information has the same worth. The general assumption is that knowledge is about truth. The development of new communication technologies and social media shows that not all information is true. On the contrary, some information could be used to cover the truth and to manipulate people. In practice, the impunity enjoyed by those committing serious human rights violations on a mass scale were covered up by authoritarian regimes by limiting access to certain knowledge and by covering and manipulating facts. Hence, the importance of the right to the truth as the right to know depends on what exactly to know and how much of it.

3.2.1. How the right to the truth emerged?

The UN Special Rapporteur on the study on the impunity of perpetrators of human rights violations, Louis Joinet, presented his report in August 1997 after six years of investigations. He organised the report around a set of 50 principles and their relevance to victims' rights. Hence, the report was organised based on: 1) the victims' right to know; 2) the victims' right to justice; and 3) the victims' right to reparations. In his interpretation, the right to know is assumed to include the right to the truth: 'This is not simply the right of any individual victim or his nearest and dearest to know what happened, a right to the truth' (Joinet, 1997, para. 17).

Joinet saw the right to know as a collective right and not as an individual right of the victims or their relatives. Not surprisingly, the first section and the very first principle is the inalienable right to the truth:

Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future' (Joinet, 1997, para. 16).

Thus, the right to know and the right to the truth come together as an inalienable right, whose corollary is the state 'duty to remember'. Over the years, this interpretation has become the canon in interpreting the right to the truth in international law.

In a 2004 study that led to the updated set of principles in 2005 for the protection and promotion of human rights through action to combat impunity, Diane Orentlicher offers a detailed view on the duty of the state to preserve memory. Reaffirming the initial principle that 'a people's knowledge of the history of its oppression is part of its heritage' (Orentlicher, 2004), the duty of the state is further clarified as the duty to preserve archives and other evidence and the duty to facilitate knowledge of past human rights violations as a way to preserve the collective memory of the group and to oppose revisionist and negationist arguments.

3.2.2. The right to the truth: from restitution and compensation to memorialisation and re-building trust

More recently, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Savioli (2020) emphasised the

importance of the 'duty to carry out memory processes' as a complement to the four pillars of transitional justice. For Roma in Europe, this duty of the state is of major importance, since they were subjected to centuries of assimilationist policies reflected in the decreasing number of Romani-language speakers, and for affirming their identity in the public sphere. The Rapporteur highlights that the duty to carry out memory processes as well as to preserve and open relevant archives 'is an obligation and not an option for states in which violations of human rights and international humanitarian law have been committed' (Savioli, 2020).

Theo van Boven provides a detailed account of developments in the interpretation of international human rights law and the recognition of the right to the truth within the UN context (van Boven, 2010). Concerns about protecting the victims of gross violations of human rights and fundamental freedoms during the 1980s prompted the UN to start working on studies regarding the right to restitution, compensation and rehabilitation for these victims. It was at a time when transitional justice mechanisms had just been created in some countries, and the UN studies were intended to assist with fighting impunity and providing reparations to the victims. It took 15 years for the UN to negotiate and agree on the set of principles and guidelines discussed below.

In 2005, the UN General Assembly adopted by consensus the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which were updated by the Human Rights Council in 2006 (van Boven, 2010, p. 1). Van Boven also presents a list of important issues that were negotiated: state responsibility towards individuals; human rights law and international humanitarian law applicability to reparation cases; the notion of victim; the types of human rights violations that should fall under these principles; and the responsibility of non-state actors. The most relevant point in van Boven's presentation is the historic evolution of human rights since the Second World War, which became part of international law and thus 'the right to an effective remedy for violations of human rights and a fortiori of gross human rights violations, may be regarded as forming part of customary international law' (van Boven, 2010, p. 2).

On 8 February 2006, the Office of the UN High Commissioner for Human Rights presented to the UN Commission on Human Rights' 62nd session a comprehensive study on the right to the truth (OHCHR, 2006). The report identifies the roots of the right to the truth within the international humanitarian law concerning forced disappearance (1949 Geneva Convention and its Additional Protocol 1). The right to the truth is recognised as an inalienable right to know the truth about past events vis-à-vis gross human rights violations and serious crimes under international law.

This right is autonomous in international law, imprescriptible and belongs to the victims, their families or legal representatives, and might have a collective dimension. It has become a norm of customary international law applicable to both international and domestic armed conflicts. It is recognised by international regional organisations such as the Council of Europe Parliamentary Assembly, the European Parliament, the General Assembly of the Organization of American States (OAS), and by the national courts at highest level in Colombia, Peru, Argentina, and Bosnia and Herzegovina. In addition to the forced disappearance of persons, the right to the truth appears in connection with the state duty to conduct effective investigations into serious human rights violations and the right to an effective judicial remedy, the right to family under the International Covenant on Civil and Political Rights (ICCPR) and the right of the child to identity under the Convention on the Rights of the Child.

In different national legislative frameworks, there are a number of rights that facilitate the use of the right to the truth, although they are not recognised as such. The right to seek and impart information, the right to access to justice, the right to a remedy and reparations, legislation on access to information and habeas data ensure the right to the truth. As the UN OHCHR report states, 'the right to the truth is closely linked to the right to an effective remedy; the right to legal and judicial protection; the right to family life; the right to an effective investigation; the right to a hearing by a competent, independent and impartial tribunal; and the right to obtain reparation', and is also linked to 'the freedom of expression, which includes the right to seek and impart information' (OHCHR, 2006, 12). In addition, the right to the truth is linked to the principles of good governance, transparency and rule of law.

The report mentions the contribution of truth commissions in 'promoting justice, uncovering truth, proposing reparations, and recommending reforms of abusive institutions', but also the shortfall that 'these commissions are often subjected to several constraints often due to and restrictions in the mandate regarding time periods under investigation, material scope the lifespan of the commission' (OHCHR, 2006, 14). A crucial point in establishing these truth commissions or similar mechanisms is that the legal foundations are grounded in 'the need of the victims, their relatives and the general society to know the truth about what has taken place; to facilitate the reconciliation process; to contribute to the fight against impunity; and to reinstall or to strengthen democracy and the rule of law' (OHCHR, 2006, 6).

3.2.3. 'The right to the truth' in European human rights case law

The European Court of Human Rights (ECtHR) recognises the right to the truth in relation to Articles 2 (right to life), 5 (right to liberty and security), 8 (right to respect



for private and family life) and 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR) in several cases concerning alleged terrorist acts. In *El-Masri v The Former Yugoslav Republic of Macedonia*, No 39630/09, 13 December 2012, the ECtHR emphasised the importance of the right to the truth for other victims of similar crimes and the general public, who had the right to know what had happened. The collective aspect of the right to the truth meant that once this right belonged to society, then any individual with a legitimate interest in the truth was entitled to invoke that right. The same principle was reaffirmed by the ECtHR in *Husayn (Abu Zubaydah) v Poland*, No 7511/13, 24 July 2014 and in *Al Nashiri v Poland*, No 28761/11, 24 July 2014, the so-called 'rendition cases'.

Of particular importance for the CHACHIPEN project is the interpretation of the right to the truth by the four judges in the Joint Concurring Opinion in the *El-Masri* case⁶. The right to the truth was seen as the right to 'an accurate account of the suffering endured and the role of those responsible for that ordeal' (para. 1), as the right to ascertain and establish the **true facts**, and not a philosophical or metaphysical truth. Moreover, in the sixth paragraph, the four judges expose the importance of the right to the truth in a democratic society:

In practice, the search for the truth is the objective purpose of the obligation to carry out an investigation and the raison d'être of the related quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny). For society in general, the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law. For those concerned – the victims' families and close friends – establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so. Ultimately, the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery (Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller).

To sum up, the right to the truth is recognised as part of international law as an inalienable and autonomous right, which imposes a duty on the state to protect and guarantee human rights. The right to the truth is interlinked with the right to justice, covering the impartial institutions that conduct effective investigations and guarantee an effective remedy and reparation to the victims of gross human rights

⁶ *El-Masri v The Former Yugoslav Republic of Macedonia*, No 39630/09, 13 December 2012, Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller.

violations. The right to the truth belongs to the victims, their family or their legal representatives but also to society as a whole. The right to the truth is linked to other rights and to the principles of good governance, transparency and rule of law. It should be considered as a non-derogable right not subject to limitations.

3.3. Exploring the right to access to justice

The right to know and the right to the truth are closely interlinked and interdependent with the right to access to justice. On the one hand, it is hard to access justice without knowing the truth of what happened and who the perpetrators were. Victims need to know who to submit claims against to the relevant judicial authorities in order to get an effective remedy and/or compensation. On the other hand, when victims of crimes and various human rights violations seek justice in domestic or international forums, they are also calling for the right to know and the right to the truth, which can be uncovered during the conduct of effective investigations by independent and impartial competent authorities.

This very access to justice can further frame the narrative on what wrong or damage perpetrators did to victims in the past and how it is important to prevent this behaviour in the future. In this sense, access to justice is essential not only for the protection of the human rights of the individuals who are seeking it, but also to other individuals who are in a similar situation. However, what precisely does the right to access to justice entail? Is it only individual or also collective? And what is the key difference for access to justice for victims of crime and victims of gross human rights violations when official institutions have been involved? How far into the past can the victim's right to access to justice be effective? And finally, how can access to justice be ensured within the transitional justice approach and what are the main weaknesses?

3.3.1. What does access to justice entail?

Francesco Francioni (2007) argues that the right to access to justice entails not only the mere possibility for an individual to submit claims in courts, but also that such case would be 'heard and adjudicated in accordance with substantive standards of fairness and justice'. This right thus provides a standard by which to assess whether justice has been administered with independence and impartiality and has provided for an effective remedy. Thus, it is both a procedural guarantee, for instance in a criminal court, and a human right that can be invoked in the domestic and international courts.

The individual's right to access to justice in international law was needed as foreigners tried to access local courts and had to be covered by the diplomatic protection of their country of origin. Thus, it was framed first as the international standard of treatment of aliens (Francioni, 2007). The atrocities of the First and Second World Wars in the 20th century led to the development of various international war tribunals and war commissions to deal with war crimes, as well as with other gross violations of human rights. These international institutions framed access to justice as an individual rather than a collective right, although some outcomes of individual cases had broader societal impact and meaning of remedying the harm towards communities affected by the same atrocities or violations.

Various international complaint mechanisms and courts have ensured the exercise of this right and provided a review of domestic courts and competent authorities. For instance, the ECtHR provides for direct access to justice for individuals. However, the Strasbourg Court admits cases only after the complainants have exhausted their domestic remedies, otherwise they need to prove that there has been a denial of justice and that no effective remedy is available to them, and thus the ECtHR would fill this vacuum. Article 13 ECHR is one such example, as it ensures the right to an effective remedy 'before a national authority for the rights and freedoms as set forth in this Convention'. Moreover, Article 41 ECHR provides for 'just satisfaction'. So, the person not only needs to appear before the relevant tribunal, but can ask for compensation for the material or moral damage incurred.

3.3.2. Does transitional justice provide for the right to effective remedy and due process standards?

Article 47 EUCFR reiterates the 'right to an effective remedy and a fair trial' before an 'independent and impartial tribunal previously established by law'. The EUCFR lays out the conditions for the delivery of justice, entailing a 'fair and public hearing within a reasonable time', where 'everyone shall have the possibility of being advised, defended and represented' and where legal aid is provided to those lacking resources. However, this EUCFR standard is applicable only to violations falling under the EU's competence.

UN-level standards on access to justice are also established in the Universal Declaration of Human Rights (UDHR) and the ICCPR. Article 8 UDHR refers to effective remedies for 'acts violating fundamental rights granted him by constitution and by law', while Article 2 (3) ICCPR states that an effective remedy should also extend to 'the rights and freedoms recognised herein'. Interesting that not all human rights qualify for an effective remedy (Francioni, 2007). The UN Economic and Social

Council (ECOSOC) Committee's Comment No 3 notes that economic, social and cultural rights also require an effective remedy, since even some socioeconomic rights depend on 'progressive state implementation' and resources. Some of the issues, such as discrimination based on ethnicity, gender or other prohibited grounds in accessing healthcare, housing and social assistance, require an effective remedy.

The international right to access to justice relies on domestic institutions. Not only courts of law but also other competent authorities can ensure various remedies, but to what extent they are 'effective'?

Francesco Francioni (2007) stresses that 'what counts, for the purpose of access to justice is that such remedies are effective and that they provide fair and impartial justice in a way that is equivalent to that provided by the remedies that are *stricto sensu* judicial'. For instance, among numerous competent authorities, it is also possible that even private actors may undertake the settlement of various disputes, for instance various mediation services are used in labour law. However, for EU law purposes and Article 47 EUCFR, non-judicial remedies cannot qualify as effective remedies. For instance, while they tend to be cheaper and faster, they may lack credibility and be biased or accused of replacing traditional justice.

Lavinia Stan and Nadya Nedelsky (2013) provide a broader overview of transitional justice tools as going above and beyond truth and reconciliation commissions. They highlight that assuring the due process standards remains a challenge, and 'in some cases they [truth and reconciliation commissions or lustration commissions] have borrowed from criminal law or international legal practice to design *ad hoc* due process standards' (p. 170).

Francioni (2007) similarly invokes their review standard 'whether it is designed and monitored in such a way as to guarantee equal access, proper expertise of the professionals involved, sustainable costs, and most important, a timely and high-quality justice as to satisfy accessibility and effectivity in accordance with the principle of equal protection of law'. If this criterion is met, it adds credibility and likelihood of compliance, for instance in paying compensation.

This kind of review standard could also be applicable to various transitional or historical justice tools, such as truth and reconciliation commissions. However, what sort of acts could they investigate, how far back could they go, and how about the recent ones? Could such 'alternative' tools or commissions guarantee effective remedy and reparation to the victims? Should they entail international human rights or international criminal law remedies?



Starting from the last question, Francioni argues that the distinction between human rights law and criminal law tools is not that clear, as it is often assumed. He writes that:

The emerging practice at the state and the international level supports the progressive development of a view that holds that the state's obligation to respect and protect human rights also entails an obligation to investigate, prosecute and punish their violations, or at least the most egregious violations that amount to international crimes (Francioni, 2007).

Stan and Nedelsky also argue that 'as transitional justice settles as an international practice, we may expect due process to become standardised and codified in each of its different mechanisms' (Stan and Nedelsky, 2013, p. 170). In the meantime, some ECtHR cases may already provide relevant arguments for the European due process and effective remedy standards.

3.3.3. How transitional justice balances the duty to punish past abuses and democratic transition? Case of forced disappearances in Argentina

Access to justice was also invoked in a transitional justice context in the case of forced disappearances in Argentina. There was a thought-provoking debate regarding the granting of amnesty to those military actors who acted in due obedience.

Carlos Santiago Nino (1991) puts 'the duty to punish past abuses of human rights' in the Argentinian case in this context and raises some very pertinent and difficult questions. For instance, should justice score above the preservation of the democratic regime? While some argued for punishing all army members involved in gross human rights violations despite their rank or level of obedience, others called for at least the capturing of some of the highest political level perpetrators. Argentina's new regime, when making its decision, took many risks and did not avoid trade-offs. The risk of a coup by the military was highly likely if all military ranks were prosecuted. However, if only the highest-ranking generals were persecuted unfairness would be felt among the victims and their families, as some individuals would go unpunished.

The ambitious aim to capture everyone within the military despite their rank risked ending up with empty court rooms, since limited police and prosecutorial authorities lacked the necessary force and time. This could have undermined the very legitimacy of government and further prospects of democratisation in Argentina. Nino saw partial amnesties as an unavoidable evil for the very success of the wider criminal justice process at the national level. Compliance with the court orders in Argentina, which was backed only by the moral authority and popular support, was



already seen as a mere miracle. Nino proposes that at that time the only other legitimate alternative would have been for an international tribunal to prosecute a wider number of military agents involved in atrocious acts.

It seems that history took its course and provided another alternative: to wait until the time was ripe. The Supreme Court of Argentina, only 20 years later in the *Simon* (2005) case, 'held that amnesty laws adopted in 1986 and 1987, to foreclose prosecution of the atrocities committed during the military dictatorship were unconstitutional and void' (Francioni, 2007). Francioni (2007) further commends that the *Simon* case 'provide[d] a forceful and innovative step towards the recognition of a customary law standard in criminal justice that may prevail even over the express will of the legislature'. However, if Nino's (1991) calculations are correct in the Argentinian case, the initial amnesty held back the process for true retributive criminal justice process.

Retributive and transitional justice can be hard to reconcile, or at least have quite different objectives – to punish all perpetrators as a way to discourage future violations or to ensure peaceful coexistence as a way to maintain the conditions in which such violations do not happen. And maybe the question is not so much either/or, but when one or the other approach should be. For instance, could it be seen as fair to reconcile over crimes in the distant past by the state investing in memorials, remembrance in the curricula and compensation for the families?

But when is it time to call for retributive justice over recent human rights violations and even crimes perpetrated by the state? Under what conditions does this create a sense of trust and reconciliation and when does it merely reflect impunity and unfairness? Or is it unfair to grant amnesty and then revoke it? Also, to what extent can you punish for wrongdoings of the past, if at the time the people involved could not foresee the consequences? In other words, can crimes be construed retrospectively in order to prevent future wrongdoings?

3.3.4. State versus individual responsibility: Case of forced sterilisation of Romani women in Europe

Building on experiences from Argentina, let us take the example of state responsibility for the forced sterilisation of Romani women. A 2016 report by the European Roma Rights Centre (ERRC) on coercive and cruel practices of forced sterilisation of Romani women in the Czech Republic contains accounts of events over the last 50 years. The report elaborates how in Czechoslovakia under the Communist regime, the Decree on Sterilisation came into force in 1971 and lasted until 1993. The ERRC report describes how 'the practice of sterilising Romani women and women with



disabilities against their will continued throughout the 1990s and 2000s, with the last known cases documented in 2007, when the Czech Republic was already a Member State of the European Union'.

The Committee on the Elimination of Discrimination against Women (CEDAW) framed the sterilisation of Romani women merely as a form of coercion, which 'violates women's rights to informed consent and dignity' (CEDAW General Recommendation 24). The Committee Against Torture (CAT), in its concluding observations on the Czech Republic and Slovakia, took a tougher approach requiring states to ensure access to justice:

The UN CAT recommended that states take urgent measures to investigate promptly, impartially, thoroughly and effectively all allegations of involuntary sterilisation of women, prosecute and punish the perpetrators, and provide the victims with fair and adequate compensation (UN CAT, 2009, in ERRC report, 2016).

However, without understanding deeply rooted antigypsyism, UN bodies and even Roma rights advocates shy away from or have difficulty in linking the sterilisation of Romani women with international criminal law approaches as established in the Rome Statute of the International Criminal Court (ICC).

The ICC defines that 'imposing measures intended to prevent births within the group' with intent to destroy, in whole or in part, ethnical, racial or religious groups is one of the modalities of genocide as defined in Article 6 (Rome Statute of the ICC, Article 6, para. D). 'Enforced sterilisation ... when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack' is explicitly mentioned among the modalities of the Crimes against Humanity (Rome Statute of the ICC, Article 7, para. g).

The systemic and widespread sterilisation of Romani women with the intent of controlling the Romani population would seem to meet the criteria of both a gross international human rights violation and an international criminal law violation. These avenues entail not only different narratives of gravity as to what has happened, but also different lengths in litigation and evidentiary requirements.

For instance, in the Czech Republic, Romani women came together to demand compensation for their rights having been violated. In March 2021, Czech lawmakers approved the bill that would give EUR 12 000 in compensation to every forcibly sterilised woman (Palata, 2021). Elena Gorolova, one of the survivors of forced sterilisation, welcomed this law as an appropriate, symbolic measure that



acknowledges the suffering of Romani women (CHACHIPEN Kick-off Conference, 2021). However, in neighbouring Slovakia, Romani women are not yet recognised as victims of a gross human rights violation. The ERRC report highlights how in Slovakia this has been covered by the same Communist law:

The civil courts refused to consider sterilisation without full and informed consent to be a violation of human rights. The affected women have thus been seeking justice through civil courts with limited success.

Access to justice even in this case has many nuances. For instance, should some politicians or also social workers and doctors be called on to take personal responsibility for such policy? Or should those who acted prior to 1993 be exempted as acting in due obedience? How about those who continued their practices after 1993, after entering the EU and accepting various non-discrimination and race directives – could they foresee that their activities were illegitimate?

How about survivors and victims of the same crime – would they consider it fair that some of them are receiving symbolic compensation while others are getting individual injury compensation from criminal courts? Or would it be fair to treat survivors of forced sterilisation before 1993 as victims of human rights violations and those afterwards as victims of crime?

How about state responsibility – to what extent can the current Czechia and Slovakia be held accountable for the legacy of the Communist regime? With their sovereignty and independence, what of their responsibility under customary law to protect Romani women from grave human rights violations and crimes against humanity? Why does the forced sterilisation of Romani women not take racial bias into account? Should it be equated with crimes of intentional bodily harm with a racial bias?

Can the very negligence of and non-investigation by the state into the recent past give rise to claims of the right to justice? The *Krastanov v Bulgaria* case answers 'yes' to this last question (see sub-section 3.3.5.) .

3.3.5. Recognition of ongoing antigypsyism by the European Court of Human Rights: due process and effective remedy standards in criminal matters

When discussing access to justice for Roma people, the question arises whether the very antigypsyist attitudes held by or seen as permissible in the courtrooms would qualify as 'denial of justice'? And more importantly, how to capture and remedy this denial of



justice within domestic or international arenas? Antigypsyism should be considered as qualifying for hate crime or as an aggravating circumstance for other crime.

In Hungary, a Working Group Against Hate Crimes (GYEM) study shows that antigypsyism and racial 'bias motivation' have often been downplayed when investigating, prosecuting and sentencing crimes. 'In Hungary, perpetrators of hate crimes are held accountable only in a small number of cases, and even in those cases they are punished with a less severe sanction than they would deserve'. The Hungarian equality body representative (in Carrera et al., 2019, p. 74) also calls out that 'lack of recognition of motivation is hindering access to justice' for Roma.

Amnesty International (2017) elaborates how shared 'racial bias' judicial systems would shield extreme right-wing movements from investigation in Hungary instead of protecting marginalised Roma communities from racially motivated attacks. One such case ended up at the ECtHR, since hate crimes 'remained without legal consequences'. *Király and Dömötör v Hungary* (Application No 10851/13) found a violation of private and family life, and questioned the future legitimisation or tolerance of such abuse. Interestingly, however, the right to effective remedy in this case was not disputed⁷. The Concurring Opinion of Judge Bošnjak questioned the effectiveness of the criminal investigation itself:

While there is no absolute right to obtain the prosecution or conviction of any particular person, a violation of the above-mentioned positive obligation may be found where there were culpable failures in seeking to hold perpetrators accountable (see the case-law cited in the judgment, paragraph 61). This should be the test in any given case: in finding the violation, the Court's judgment should clearly and convincingly identify the failure of the authorities of the respondent State and provide an explanation as to why that failure may be qualified as culpable.

One of the dissenting opinions used the 'failure to exhaust domestic remedies', namely to resort to the Hungarian Constitutional Court, as grounds for the very case being inadmissible. It is quite interesting that this argument has been made in the context of openly antigypsyism rhetoric by the government and increasing judicial control in Hungary. For instance, Fekete (2016) highlights how the administration of justice would be captured and serve Orbán's 'Christian-national idea': 'with its anti-Semitic undertones, Christianity is hitched to the nativist cause, rallying popular views

⁷ Amnesty International (2017), *A Drop of Hope in the Sea of Fear: Tackling Hate Crimes against Roma in Hungary*, <https://www.amnesty.org/en/latest/news/2017/01/a-drop-of-hope-in-the-sea-of-fear-tackling-hate-crimes-against-roma-in-hungary/>.



against refugees, the Roma and the “indolent” poor’. While the dissenting judge makes very sound arguments of law, it seems that the majority of the ECtHR accepted the claim considering the very likely unfairness towards Romani applicants in de facto getting an effective remedy.

The ECtHR’s *Krastanov v Bulgaria* case is another example. The Bulgarian national Svetoslav Dimitrov Krastanov was by chance in a café when a special antiterrorist squad carried out an operation. He was taken by the officers and beaten badly. The officers later realised they had mistaken him for another suspect and apologised. However, Mr Krastanov spent 12 days in hospital and his recovery took even longer, and he also received state disability. Svetoslav Dimitrov Krastanov started proceedings in the Sofia City Court in order to be awarded compensation and to punish the perpetrators. The State Responsibility for Damage Act only foresees damage compensation, but not criminal investigation. The applicant simply could not access the criminal court, for instance he had no names of the officers, as these were considered by the authorities to be secret information. He thus invoked Article 3 on torture and inhuman or degrading treatment, Article 6 on fair trial and Article 41 providing for just satisfaction.

The ECtHR held that reducing such ‘intentional police ill-treatment’ to mere payment of compensation in civil proceedings risked creating the situation of impunity for Article 3 violations, thus could not be regarded as an effective remedy. In other words, torture and inhuman and degrading treatment when committed by state police authorities should be afforded with criminal punishment. The court further argued that:

If the authorities could confine their reaction to incidents of intentional police ill-treatment to the mere payment of compensation, while remaining passive in the prosecution of those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity and the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice (para. 60).

Thus, the court found a violation of Article 3 not only on substance, but also due to the lack of an effective investigation. This is especially pertinent in cases of institutional historical racism and antigypsyism among police forces that can be witnessed today as well as in the recent past, for instance in the case *Király and Dömötör v Hungary* (Application No 10851/13), where police non-investigation of a crime with racial bias was confirmed as a violation of Article 8 (privacy and family life) but not of Article 13 (right to effective remedy). Transitional justice also entails the duty to prosecute past abuses.



4. Lessons learned and questions for future research

Nanci Adler talks about an early transitional justice model and a more mature stage of transitional justice. What she calls 'earlier models' are characterised by the belief that transitional justice will deliver justice to be correlated with achieving reconciliation. She is of the opinion that 'repressive societies often blur the boundary between perpetrators and victims, so the increased opportunity to tell stories also gave rise to competing narratives of who was a victim' (Adler, 2018, p. 3). Moreover, victims of repression could fall victim, yet again, to new forms of oppression: 'continued disagreement on facts and causes can marginalise victim groups, intensify rivalry, and facilitate the recycling of old repressions into new ones' (Adler, 2018, p. 3). Adler points out several milestones of the transitional justice tools employed: the belief that all parties involved will have the same understanding of justice; the fact that getting rid of the repressive regime does not lead to reconciliation as there is a cultural construct – a repressive culture – that has to be replaced; the tensions between truth and justice; and the competing narratives of different parties.

Adler lists the following assumptions that were not properly reflected upon, which led to the failure to meet expectations regarding justice and reconciliation:

The belief that a post repressive government is synonymous with a post repressive culture; a conflation of truth, justice, and fairness (even by some judges, lawyers, and commissioners) that offends the common sense judgment of victims and survivors; the belief that the 'truths' produced by court testimony can be at all immune to the social context of the courtroom; and the belief that the repressors' acknowledgment of a crime is more important to the aim of reconciliation than our acknowledgment of the preceding xenophobia and dehumanisation of the 'other' embedded in the crime (Adler, 2018, p. 7).

The milestones and assumptions behind the justice and reconciliation processes mentioned by Adler should be considered during the CHACHIPEN project. Managing the expectations of allies and the public, especially the Roma, is one of the milestones of the project. It is evident that social justice will not be achieved by using transitional justice-like tools to address antigypsyism in Europe. However, these tools constitute additional avenues to claim justice, besides the traditional courts of law. They present several advantages in comparison to claiming justice in front of a court of law: 1) the claim for justice is collective; 2) the redresses are collective and do not exclude individual compensation for victims of human rights violations; 3) recognition of past sufferings becomes contingent on archives, testimonies and



historical documents, rather than on legal technicalities; and 4) there are several ways to compensate unidentified victims: recognition, memorialisation, remembrance, commemoration, public education and affirmative action being the most common tools used.

Transitional justice tools have been used to address various human rights violations and atrocities from the past, including ethnic and racial injustice. Some of these tools are better known, and took shape in various truth and reconciliation commissions set up in Australia, Canada and South Africa to address the long-lasting racial and ethnic oppression and conflicts, to transition towards democratic societies.

Some other transitional justice tools, such as lustration commissions to address crimes of the Communist regime, or processes to redress the victims of neo-Nazism and fascism, were tested in Europe, including Central and Eastern Europe. Some of these transitional justice processes have bits and pieces that might be relevant to Roma, but we also have to consider the backlash. Special antigypsyism commissions have been set up in Germany and Sweden, comprising some of the features and even insights into the potential of transitional justice tools (these will be discussed in the forthcoming CHACHIPEN Swedish and German country reports produced by Jan Selling and Anja Reuss respectively).

Nevertheless, many questions still remain in this project. How far to go back? We propose going back as far as the first manifestations of antigypsyism in Europe. However, transitional justice tools have mostly been used to deal with the recent past. How can we identify the perpetrators of medieval times? What kind of remedy can be proposed? How should it differ to the remedy for victims of recent regimes, where the perpetrators are still alive? What are the risks associated with confusing transitional justice processes with criminal justice processes for crimes that are happening now?

The focus of our initiative is this: should we focus predominantly on education instead of having justice served? This question is linked to our intention to consider a longer time span for our approach. Since we would be considering the history of Roma since their arrival in Europe without being able to identify the perpetrators of wrongdoings, we must communicate that the aim is to educate the whole of society. However, transitional justice should deliver justice to the victims of crimes perpetrated in the recent past. Nevertheless, ongoing crimes do not require a human rights approach, but a clear-cut criminal law approach. Balancing the educational purpose with that of achieving justice would be a significant challenge.

So far, transitional justice tools have been used in the national context. Could there be a common European approach or EU-led process? How deep could it go? What should remain a national responsibility? And how can we ensure that different approaches in different countries do not lead to a dilution of the pro-Roma message at EU level?

One of the most frequently quoted transitional justice tools is the work of truth and reconciliation commissions. For instance, the European Commission (2020) has committed itself with the new EU Roma Strategic Framework 2030 to 'raise awareness on Roma history and culture and promote truth and reconciliation'. Also, the Independent Antigypsyism Commission in Germany (2021) has referred to the possibility of setting up such processes to address crimes against Roma that were perpetrated after the fall of the Nazi regime. However, are national institutions mature enough? Do we have motivation among Romani activists to lead such processes in different countries? What should the key conditions be so that the transitional justice tools and TRPs are not misused to normalise racism or 'window dress' state negligence over its responsibility to protect its own and other EU citizens who are Roma, or non-EU citizens who may also be seeking international protection?

Building alliances with and among local Romani communities, European antigypsyism and anti-racism alliances led by civil society, as well as EU, regional and international human rights institutions is key to changing the narrative on Roma in European societies. Hence, there is a need to involve opinion makers and academics and use their authority to spread the message about racial injustices suffered by Roma, and to educate the public about these injustices.

Transitional justice tools alone are not enough to achieve this aim. They are merely means. So, who should use them to reach the actual transition towards more democratic, non-racist societies based on equality – and how? How can justice be assured? How can trust between Roma and non-Roma be rebuilt? These are among the questions that the CHACHIPEN project aims to explore further.



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CHACHIPEN
Remembrance, Recognition,
Justice and Trust-Building



CENTRAL COUNCIL of German Sinti & Roma



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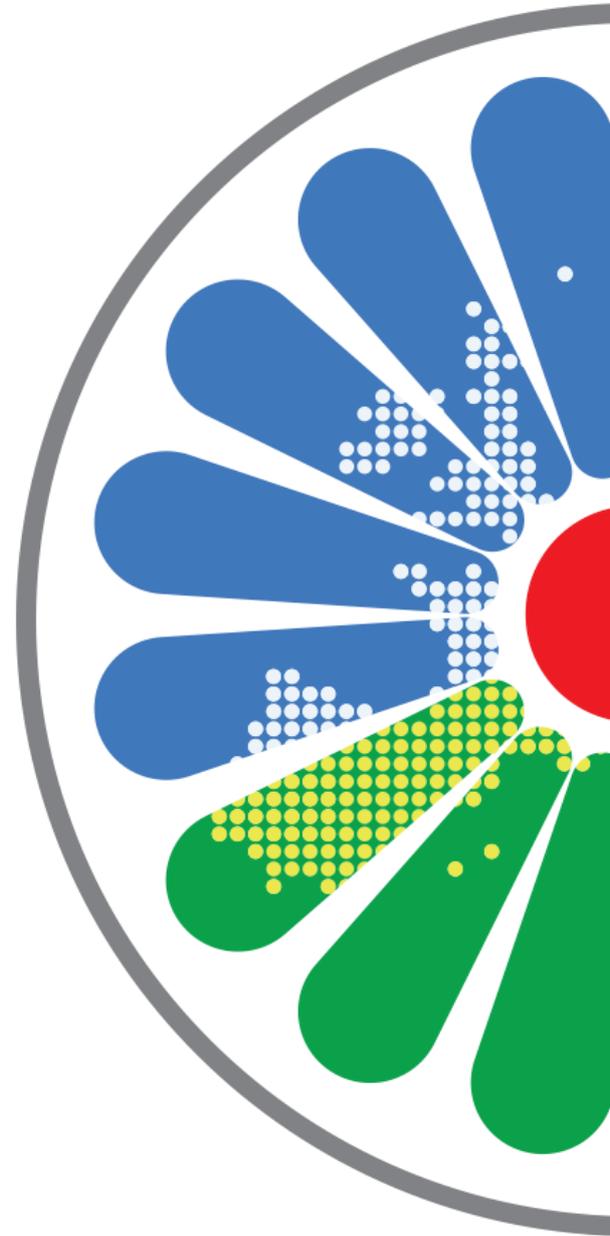
About the project

CEPS, together with the Central Council of German Sinti and Roma, the European Roma Grassroots Organisations (ERGO) Network, the Federación de Asociaciones Gitanas de Cataluña (FAGIC), the Asociatia Fast Forward (AFF) from Romania, has launched an EU Rights, Equality and Citizenship programme & German Ministry of Foreign Affairs funded project called 'Paving the way for Truth and Reconciliation Process to address antigypsyism in Europe: Remembrance, Recognition, Justice and Trust-Building', abbreviated as 'CHACHIPEN' for 'truth' in the Romani language.

This project aims to lay the foundations for the transitional justice, via tools like Truth and Reconciliation processes as a way to address historically rooted antigypsyism in Europe. Using the experiences from Swedish and German Independent commissions, the project will draw the lessons on what has (not) worked. We elaborate what processes could be of relevance for Romania and Spain and at the EU level to combat antigypsyism, aiming to build a common narrative on Roma equality.

More about the project:

<http://antigypsyism.eu/chachipen/>



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The content of the project's outputs represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.



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