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Roma Law, National Minority Rights and Equality before the Law in Norwegian and Swedish Courts

Ida Nafstad¹

Abstract

This paper scrutinizes the role of equality before the law in the relations between the state legal systems, non-state law and national minority rights in Norway and Sweden, focusing on the national minority Roma and the practice of Roma law. It will be argued that courts must take the normative systems of Roma into account if it is to secure substantive equality before the law. Nevertheless, national minority rights or Roma law do not seem to impact judges' approaches to equality before the law. This is explained by lack of knowledge about national minority rights and Roma law, and by the juridical field not being suited to take such elements into account. The effect of this might enhance the general legitimacy of the criminal justice system, while decreasing the legitimacy of the system among Roma, and as a consequence contribute to further exclusion, alienation and discrimination.

Keywords: Equality before the law; Roma law; National minority rights; The European Framework Convention for the Protection of National Minorities

Introduction

The Roma are an ethno-cultural minority recognized as a national minority in Norway and Sweden under the European Framework Convention for the Protection of National Minorities (FCNM).² The signatories to the Framework Convention have a responsibility to both respect and create appropriate conditions enabling national minorities to express, preserve and develop their ethnic, cultural, linguistic and religious identity. The national minorities should further be guaranteed the right of equality before the law and of equal protection of the law. Roma law is an inherent part of the Roma culture and

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² The full text of the convention can be found at:
<http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm>

identity, and could thus be interpreted as protected under the Framework Convention.

The practice of Roma law can range from mediation and arbitration in tribunals to ostracism, ritual fights and blood feuds. The main forms of Roma law, though, are often portrayed as the tribunal system *Kris* and the private system of feuds. The most used form of Roma law practiced in Sweden and Norway is probably the tribunal system *Kris*. This is the system practiced by *Vlach-Roma*, the biggest known Roma group in Sweden and Norway (Nafstad, 2015).

A main topic of interest in regard to the practice of Roma law is how the nation-state relates to it. On one side, as a non-state legal system, it can be seen as threatening to the sovereignty of the state, and on the other, as a cultural practice of a national minority, it can be seen as entitled to protection and enablement of expression, preservation, and development. The aim of this paper is to grasp aspects of this topic by scrutinizing the relations between the state legal systems, the non-state Roma law and minority rights in Norway and Sweden, and the role of equality before the law in these relations. This aim is conceptualized through the following two questions: What relevance does the European Framework Convention for the Protection of National Minorities have for the right to practice Roma law? Do Roma national minority rights and legal culture play a role in judges' assessments of equality before the law, and on what basis are such assessments conducted? One important aspect to have in mind when looking into these questions is that the Scandinavian realist approach to law acknowledges a broad array of sources of law, like customs, public opinion and, more broadly, legal policy considerations (Eckhoff, 2001).

The last decade has seen some research on the relationship between Roma law and state law. This research has also tried to come up with suggestions on how to handle this, often contradictory, relationship, something that will be discussed below. Newer studies on Roma law discuss the role of international and human rights law and regulations for the right and possibility to practice Roma law within the framework of a nation state. What they do not discuss, however, are the encounters between two normative legal orders in the courtroom, and how the state legal system relates to this. Nor has the relationship between national minority rights and non-state law been given scholarly attention. Further, there is a gap in research about Roma law in Scandinavia. Close to nothing has been written on this topic (Nafstad, 2015). I cannot claim to have the data necessary to fill all these gaps, though I will go

into a discussion about these topics on the basis of available data, and also identify the specific issues on which further research is needed.

Discussions are based on data gathered in a literature review of Roma law in Europe and North America and of Roma in Scandinavia, in addition to a survey answered by ten Scandinavian judges. A questionnaire was sent to the criminal court of the first instance in one main city in each of the Scandinavian countries and distributed internally to the judges in the respective courts. The judges were asked about their experiences with, and knowledge about, traditional norm systems and conflict resolution mechanisms among Roma, the FCNM, use of expert witnesses and their opinions on the relevance of this for the court. This can be seen as an explorative study, which might provide some insights into juridical reasoning regarding the questions at hand, in addition to potential problems and contradictions. Additionally, using a Bourdieusian approach (Bourdieu, 1987) to analyze these data it can be said that the habitus of the judges, as actors in the juridical field, interpreted on the basis of their answers to the survey can provide some assumptions about the juridical field, and the interests, values, and forms of capital which are at stake in this particular field. In combination, the literature review and the answers from the judges is a first effort to get an overview of this area, and to point to further research of importance in order to advance the understanding of relations between the state legal systems, non-state law and national minority rights.

I will start by providing a short overview of Roma in Sweden and Norway, and the practice of Roma law in these countries. This will be followed by a discussion of the first research question outlined above, on whether the FCNM guarantees the right to practice Roma law. From there I will go on to examine the role of national minority rights and minority legal culture for formal and substantive equality before the law, and how this is assessed by judges answering the questionnaire, before I conclude with some general considerations about the relations between the state legal system, the non-state Roma law and national minority rights, and the role of equality before the law in this relation.

Normative Orders of Roma in Sweden and Norway

The history of Roma in Scandinavia spans more than 500 years (Fenger-Grøndahl and Fenger-Grøndahl, 2006). In regards to population, position in society, relations to the state, and minority rights, the Roma populations in the three Scandinavian countries differ. In Sweden and Norway Roma are

recognized as a national minority. Even if Denmark has ratified the FCNM, they do not recognize Roma as a national minority. The Danish government argues that the Roma population does not meet the criteria for a national minority described as a group with a historical and constant attachment to the state, and a clear cohesion as a group, beyond being an immigrant group or a diaspora. The Roma of Scandinavia does, however, share a main similarity; they have a long history of being discriminated against and alienated from mainstream society. Roma have been discriminated against in most areas of life; in regards to education, on the housing market, labor market and in penal law. In the criminal justice system, they have been subjected to negative stereotyping and hate crimes as well as experiencing discrimination on structural and institutional levels. They have experienced a historical and general social, economic and political exclusion and marginalization (Arbeids- og inkluderingsdepartementet, 2009; Brå, 2008; Engebrigtsen, 2011; Palosuo, 2008; Rosvoll and Bielenberg, 2012; SOU, 2010:55; Wigerfelt and Wigerfelt, 2015).

The Norwegian Roma recognized as a national minority are descendants of Romanian Roma immigrating to the country in the 1860s. They belong to the Kalderash and Lovara groups of the Vlach Roma, and consist of eight extended families estimated to be 500 and 800 persons (Arbeids- og inkluderingsdepartementet, 2009, Engebrigtsen and Lidén, 2010, Sigfridsson and Hasvoll, 2015). There are, however, also several other Roma groups in Norway – such as the Finnish Kaale, Czech Lovara, Polska Roma, Roma from Bosnia and Serbia, Turkish Roma, Romanian Roma and Hungarian Romungri. Many of them conceal their Roma origin, and there are no estimates on how many there are (Sigfridsson and Hasvoll, 2014). The national minority Roma are defined by the Norwegian Ministry of Labor and Inclusion as a Norwegian or foreign national registered as a citizen of Norway, and who defines him- or herself as Roma. This implies that the other Roma groups might also be acknowledged as a national minority if the rights are claimed (Arbeids- og inkluderingsdepartementet, 2009).

The Roma in Sweden consist of approximately 50,000 to 100,000 persons (Schiöler, 2015). The main groups are Kalderash, Finish Kaale, Travelers, non-Nordic Roma and newly arrived Roma (Palosuo, 2008). In Sweden all Roma citizens are regarded as part of the Roma national minority, also Travelers which are categorized as a separate national minority in Norway. The Roma population in Sweden is diverse, and language, religion and culture vary between different groups.

There is not much literature documenting the legal practices of Swedish and Norwegian Roma. There are, however, indicators on some of the groups' practices, which I will come back to after a brief overview of forms of Roma law.

Forms of Roma law vary, and are often divided into two main practices; a tribunal system, the Kris (law/judgement), and a private form that has blood feuds as a last resort. There are however several commonalities between different forms of Roma law. It can be seen as a more or less complete legal system, including lawmaking, control, and adjudicating mechanisms, and there are in general no distinctions between criminal, private and spiritual matters. The importance of Roma law can be said to relate to its demarcation of Roma culture and identity in opposition to mainstream society, and as a means of preserving Roma community, identity, and culture. Roma law is an inherent part of Roma life. The strength of Roma law has been explained as being due to over-control, alienation and discrimination of Roma, and the subsequent mistrust of mainstream society, resulting in the state legal system being distrusted and seldom used.

Kris, which is practiced by groups of Roma in Norway and Sweden, is used as a last resort and needed if negotiations between parties to a case (Divano) have not given results. A Kris is requested by the aggrieved party to a case, whereupon respectable men in the community are selected by each side to act as judges. A tribunal is set up, where all participants, including the audience, are allowed and expected to speak freely and at length. The final verdict is based on consensus reached by the assembly during the process, reasoning and traditions, not on settled laws. The sanctions mostly consist of a fine to be paid by the offender to the victim. Most cases handled in a Kris are economic conflicts, disputes related to family issues and moral and ethical disputes entailing social transgression (Marushiakova and Popov, 2007).

The feud system is mostly used by Roma groups who do not have natural authorities within the community to appeal to (Acton, Caffrey and Mundy, 1997). Feud belongs to a system based on private vengeance, and is in effect a justice of the stronger party. Feud is also a last resort, being enacted only if a system of avoidance is not adhered to. For communities who practice feuds, the first reaction will most often be that the offender avoids the victim and his or her family. This justice of avoidance can be more or less enforced upon the offender. If this is transgressed, blood feuds may occur.

Kris and feuds can be seen as two ideal types of Roma law, whereas in practice there are many and often overlapping forms of expression of Roma law, involving Kris, Divano, avoidance, but also organized ritual fights as well as

gossip and shaming that might result in ostracizing (Acton, Caffrey and Mundy, 1997; Foley, 2010).

Marushiakova and Popov (2007) claim that all communities that use tribunal systems speak Romanes and all Roma who speak the new dialects of Vlach practice tribunal systems. The main known Roma populations in Scandinavia are various groups of Vlach-Roma who speak the new dialects of Vlach (Bakker and Rooker, 2001; Lidén, 2005; Ruud, 2012). If Marushiakova and Popov are right in their claim, large groups of Scandinavian Roma practice tribunal systems. Even if contested, Acton, Caffrey and Mundy (1997) claim that those groups of Roma who practice Kris lead sedentary lives and practice arranged marriages. Most Roma in Norway and Sweden are sedentary, or semi-nomadic, and the practice of arranged marriage is widespread (Engebrigtsen, 2011; Engebrigtsen and Lidén, 2010; Ungdomsstyrelsen, 2009), which then also points to a system of Kris. The practice of Kris among Norwegian Roma is further confirmed in Engebrigtsen (2011) and Engebrigtsen and Lidén (2010), and among Swedish Roma in Englebretsson (2012). The legal practice of Roma is also visible in Swedish court rulings where the topic has been discussed as part of the case.

Possibilities to Practice Roma Law

Groups recognized as a national minority under the FCNM have distinctive rights to the practice and protection of religion, language, traditions and cultural heritage. The earlier politics of assimilation in Sweden and Norway is discarded and the new ideal is integration. National minority groups should be given the possibility to preserve, protect and strengthen their own group's characteristics at the same time as they are to be included as part of the mainstream society. Following from this the Norwegian and the Swedish states have special responsibilities to protect and to provide opportunities for the development of Roma culture, identity and language. According to the FCNM the states also have a responsibility to guarantee equality before the law:

The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited. (FCNM, Art. 4.1)

Roma culture and traditional ways of life can in some areas be difficult to reconcile with other national legislation and human rights law. Tensions between Roma rights as a national minority on one side and other legislation

and normative expectations on the other might arise. The practice of the non-state Roma law is one example of this. In addition, there could be tensions between minority rights as a group right and individual rights for persons belonging to the group. Women's and children's rights are examples of this.

The organization of various Roma communities are tightly connected to the norm- and moral systems and notions of social order, based on the sense of shame and honor (Engebrigtsen and Lidén, 2010:202-203), and to conflict resolution when norms are broken, based on consensus within the community (Marushiakova and Popov 2007). An important feature of Roma law, as an inherent part of Roma identity, is its differentiation from non-Roma (Weyrauch and Bell 1997). Roma law is a tool of distinction from mainstream society, and a tool of protection of a distinct culture and identity, thus an important aspect of Roma rights to protection under the FCNM.

Being recognized as a national minority implies rights, but it also implies duties. National minorities are protected against discrimination, and they have a duty not to discriminate (Engebrigtsen and Lidén 2010). As is stated in the FCNM (Art. 20):

In the exercise of the rights and freedoms flowing from the principles enshrined in the present framework Convention, any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities.

Furthermore, Article 21 of the convention (FCNM) states that:

Nothing in the present Framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.

The question at hand here is whether the practice of non-state law can be regarded as contrary to international law and the sovereignty of the state – its monopoly on violence. Following from this, any elements of Roma law that can be regarded as counter to human rights, international or national laws are not legitimized by, nor protected under, the Framework Convention. Consequently, one can reason that as long as the practice of Roma law is not contrary to human rights, international or national legislation, and is not discriminatory, Roma has a right to practice Roma law and its practice might be seen as protected under

the convention as part of Roma culture and identity. However, due to these limitations, it seems like the FCNM has little significance for the possibility to practice Roma law.

There is a seeming contradiction between the rights to the practice and protection of culture and identity and the feeble right to the practice of Roma law as an inherent part of that culture and identity. It seems difficult to secure parts of the national minority rights with such limitations. Engebrigtsen and Lidén (2010) are of the opinion that in order to secure minority rights, an ongoing negotiation between national legislation and minority rights has to take place. With the intention of ensuring such an ongoing negotiation, awareness and knowledge of Roma law and the Framework Convention in the state legal system must be in place. The questionnaire responded to by Swedish and Norwegian judges indicates that such knowledge might be weak at present, and additionally that not every judge thinks such knowledge is of importance or has significance for court cases. Four out of the ten judges who answered the survey did not have any knowledge about the Framework Convention, and only two judges had actively used the convention in their work. Five of the judges, however, felt that the Framework Convention does have significance for the court, but, as one judge explained, "Only as a general reminder." Several of the judges acknowledged the need for more competence in these areas; both in regards to the norm systems and internal conflict resolution systems of Roma as well as the Framework Convention itself. Other judges, meanwhile, rejected the thought that specific groups should get any special attention or be treated differently than other groups, and therefore were of the opinion that there is no need for knowledge about neither the Framework Convention nor Roma law as such. If the status as a national minority under the FCNM is to have any significance for the possibilities to practice Roma law, the knowledge of practitioners within the state legal system, and a coherent implementation of such knowledge, seems to be of importance.

Fear of Parallel Legal Systems

Responding to a question on whether conflict resolution mechanisms among Roma should carry significance for court cases where Roma are involved, one of the judges commented: “Probably not ... I am further uncertain whether Roma people are situated differently than others who have connections to several norm systems; whether they are religiously, geographically or ethnically grounded.” The judge states that the court cannot take non-state legal systems into regard. Another judge warns more explicitly about the possibility of emerging parallel legal systems if the court accepts non-state solutions: “If one opens up for such ‘private’/cultural conflict resolution models, I fear that we will get parallel processes.”

An important question here is whether this fear might impact on the right to equality before the law. Several authors have claimed that it is not only possible but also necessary to acknowledge the parallel legal system of Roma law, and to provide opportunities for its practice: Malik (2014) is of the opinion that there is a difference between law as custom and law as legislation, something that makes Roma law a minority legal system rather than a parallel legal system, and therefore not a threat to state law or the idea of one law for all. Roma law should be recognized under a private law system, according to Malik. Cahn (2010) also explores the possibilities of the state legal system to recognize Roma law, and further the possible dilemmas in regards to human rights that might arise from such recognition. Instead of applying ad hoc solutions that could endanger human rights, which is often the case in encounters between state and Roma law, one could foster compliance with human rights if that is a prerequisite for recognition. At present, according to Cahn (*ibid.*:115), minority rights law is one of the most powerful sources for formal recognition of Roma law.

Timmerman (2003/04), on the other hand, believes that state law should internalize Roma law, not with human rights as a prerequisite, but rather as a means to develop human rights standards in Roma law. Banach (2001/02), in turn, introduces the term *encapsulated communities within a larger constitutional regime*, which encompasses “a private, distinct group that has maintained its own traditions, its own laws, and exists as a distinct cultural and legal entity from the host society that geographically surrounds it” (*ibid.*, 356), such as many Roma communities. Banach argues that because of breaches of human rights, structural discrimination and alienation of encapsulated communities by the state, only international law can and should protect encapsulated communities’ interests. Because Roma communities constitute a

nation within other nations, they should be defended and regulated by international law (*ibid.*).

These authors' understanding of the relation between state and Roma law, and their suggestions on how to handle the relationship, varies. They all, however, agree that the state in one way or the other has to acknowledge Roma law and relate to it in consistent ways ensuring human rights, and that this does not entail any threat to state law. On this basis, how can we understand the fear of parallel legal systems?

Acton (2005) suggests, based on Weber, that the main goal of the state is to maintain the monopoly of legitimate violence through criminal law, and that Roma law is a threat to that monopoly. This is much in line with Bourdieu's (1987) theories of the role of the justice system, of the juridical field. Though, following Bourdieusian theory, Roma law is not only handled as a threat, it is made insignificant and deviant in the juridical field. The monopoly of state law is catered to by jurists by means of institutionalized language and forms, where elements deviating from such language and forms are made insignificant. The language of the professionals in court is characterized by universalization and neutralization, and the practitioners in the juridical field gain symbolic capital and legitimacy through the use of such techniques, according to Bourdieu (*ibid.*). The court masks its practice by using a language that can both refer to the existence of a normative consensus, a universal discourse of justice (universalization), and through a passive and non-personal language, where normative elements appear as neutral (neutralization). Differing understandings of reality, of norms, of conflict resolution are hence made deviant from the universal common fairness standard of society outlined by the court. Roma law, and other forms of non-state law, is challenging this universality represented by state law. Moreover, the juridical field is tied to other social fields, through the habitus of the jurists, formed by their involvement in additional fields, mostly positioned in dominating roles in dominant fields (*ibid.*). This leads to a situation where groups that are dominated in other social fields also become dominated in the juridical field. This might have the consequence of biases in the courtroom, with a continued subordination, and where the dominated group's version of reality is not acknowledged. The ignorance of other normative systems and legal cultures, universalization and neutralization as tools of legitimization makes the fear, or denial, of parallel legal systems more understandable. Even though one could say that the FCNM does have some significance for the possibilities to practice Roma law, despite the limitations

outlined above, it will, following Bourdieusian theory, be made insignificant in the juridical field.

The practice of universalization and neutralization techniques by professionals in court makes it particularly difficult and irrelevant to apply and understand other approaches to equality before the law than the formal one – the ‘like cases alike’ approach. Next I will go deeper into different approaches to equality before the law, and how the judges answering the survey relate to the concept.

Equality before the Law for Roma in State Courts

Before we engage with the question of how equality before the law is assessed in the relation between non-state law and the state criminal justice system, some clarification in regards to the often ambiguous concept of equality before the law is necessary. From there we will go into a discussion about the Scandinavian judges’ positioning in the landscape of formal and substantive equality before the law, and examine what consequences this might have for equality before the law for Roma in state courts.

The Ambiguous Concept of Equality before the Law

The right to equality before the law is not something only national minorities are entitled to; it is one of the general and central human rights. Article 7 of the Universal Declaration of Human Rights states “All are equal before the law and are entitled without any discrimination to equal protection of the law.” The principle is also enshrined in Article 14 of the International Covenant on Civil and Political Rights, and is contained in several other international conventions.³ As we can see, equality before the law is a firmly established human right. Still, an important question is what this right entails, what kind of equality we are talking about. Equality before the law is an ambiguous concept. McColgan (2014) points to the broad discussion regarding what this term encompasses that has been taking place (“equality of what”), and also in regards to the relation between equality before the law and minority rights. A distinction between two ways of interpreting the concept is, however, normally agreed upon; substantive equality before the law on one hand, and formal equality before the law on the other (*ibid*). Substantive equality before the law has equal

³ E.g. in the Convention on the Rights of the Child (Articles 12, 37 and 40), in the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (Articles 16, 18 and 83), and in the African Charter on Human and People’s Rights (Article 7).

outcome as the objective, which means that individual circumstances must be taken into consideration. Formal equality before the law implies that everyone is *treated* the same way, without regard to differing circumstances, a 'like cases alike' or 'one law for all' approach (McColgan, 2014; Von Doussa, 2005).

Formal equality before the law means that differences in background, such as ethnicity, class, gender, religion and cultural circumstance, are not taken into account. Formal equality before the law, the 'one law for all' concept, is, according to Von Doussa (2005), too ambiguous to be meaningful. One should therefore rather accept a notion of equality that goes beyond the formal approach (*ibid.*). Formal equality before the law has been criticized for its inability to address historical disadvantages and the negative outcome of this for discriminated persons (McColgan, 2014). This approach is also criticized for the likelihood of protecting the values and interests of majority citizens on behalf of minorities (Von Doussa, 2005). Renteln (2004) has shown that the same treatment regardless of cultural background might very well lead to results of inequality and unequal opportunities before the law. If social, economic, cultural and structural differences are not accounted for in court the result might be substantive inequality. Renteln (*ibid.*) argues that the court should take minority groups' norm systems into account in a structured manner in order to secure equality before the law – a substantive approach to equality before the law.

Whilst every human being is protected by international human rights, different groups, such as women, children and national minorities, are entitled to special rights beyond these general rights, according to human rights conventions aimed at these groups. Von Doussa (2005) suggests that this is done in order to reach substantive equality – some groups need specific rights in order to reach the same outcome as other groups. International law prioritizes substantive equality over formal equality before the law (*ibid.*). The FCNM can be interpreted the same way. The signatories to this convention need to take measures beyond general rights in order to protect an equal outcome and take anti-subordination measures for national minorities. Accordingly, when national minorities are entitled to equality before the law following the Framework Convention, this must imply substantive equality before the law. Hoekema (2013) concludes that in multicultural societies one has to leave the thought of formal equality of law, and accept different treatment of different groups, to remedy social vulnerability and to legitimize them as valuable partners in a common society.

'One Law for All'

With the Scandinavian judges' accounts of the relevance of Roma law in the criminal court as a starting point, I will further discuss how their approach to equality before the law can be interpreted.

Out of the ten judges answering the questionnaire, all had experiences of judging in cases where Roma were involved, and none were of the opinion that it made the cases different from other cases. As I will demonstrate, the judges use a language of universalization, of normative consensus. By using a language of universalization it becomes impossible to take a different norm system into account. If the fact that Roma are involved in a court case makes the case any different, it would have violated this principle of universalization, and hence the basis for the court's legitimacy.

The judges were asked about their knowledge about Roma norm systems and conflict resolution mechanisms, and the importance of such knowledge for the court. It appeared that half of the judges had some form of knowledge about Roma law, and six of them thought that such knowledge is of importance to a case, thus also one who was not familiar with Roma law. Only three judges, however, felt that such knowledge should have significance for the court when Roma are involved in a case, and four of the judges had used this knowledge actively as a judge. It shows that the knowledge about Roma law, opinions of its impact on a case, and willingness to take it into account varies. The judges are of different opinions about this matter, and the answers can seem a little confusing; on one hand all judges agreed that the involvement of Roma does not make the cases any different than other cases, but on the other hand knowledge about Roma law is of importance to many of the judges, and some have even actively used this kind of knowledge in cases. The reason for these seemingly contradictory answers can be found in their opinions about why such knowledge matters. When the judges were asked to specify why they thought such knowledge had or should have significance for the court, they mostly argued that knowledge about the background and context of a case, and the motive for acts and behavior, is of importance but cannot be used directly as a legal argument and has no bearing on the outcome of a case. As one judge explained: "At the fundamental level it does not have significance for the decision of a case (civil or criminal), because the material and procedural rules are the same for everyone. -But it can be useful in a larger context to have more knowledge." Another judge argued that "in criminal cases such knowledge is significant primarily in the evaluation of evidence." As Madsen (2013)

formulates it, based on Bourdieu, judges are interested in knowledge only to the extent that it can be used as a tool to solve practical problems.

The judges use knowledge of Roma law in order to get an overall understanding of the cases, but they still keep the principle of one law for all, the formal approach to equality of law, like this judge who answers a question about whether the norm system of Roma should carry significance in court: “Not in the way that Roma should be treated differently, but as mentioned above it can be good with an explanatory model corresponding to the way that it can be good to have some knowledge about shame/honor culture differences in various other ethnic groups.” In contrast to this judge who thinks knowledge could have significance in the ways described, one judge who did not have knowledge about Roma law, and who was of the opinion that Roma law did not have significance for the court, answered that it is:

[d]ifficult to estimate the possible significance of a factor which content one is not familiar with. The cases I have adjudicated have built on the Norwegian norm system. None of the parties have stated that Roma’s traditional norm system exists; what it implies or what significance it is claimed to possess, in any of the cases I have adjudicated. It then becomes difficult to ascribe any weight to an alleged alternative norm system in decisions based on the Norwegian legal and procedural system.

One can read the skepticism between the lines. The judge does not seem to believe that Roma law really exists, and rejects the importance of factors other than a Norwegian norm system. The language used is one of neutralization, in indicating that there only exists one Norwegian norm system, and that is the one being used in court. The norm system of Roma is made insignificant, it is not believed to exist, and if it does it is deviant from the normative consensus. The same judge further comments that he or she does not think Roma should be placed in a different position than any other group. The formal equality of law is important – other factors than state law should not infringe upon the courts.

Another judge argues along the same lines of the formal equality of law approach, and with a language of universalization and neutralization. The judge rejects the notion of treating any group differently; there is one law, and it should be practiced in the same way for all:

There are almost no limits to the prior knowledge regarding normative, social or anthropological circumstances that can likely be useful to judges when hearing cases (criminal or other) affecting Rom,

Samis, Pakistanis, Inuits, gay/lesbian/transpersons, left-handers, wheelchair users, inner city boys, school drop-outs, or pretty much any other self-defined “group”. I am very uncertain about the ways in which Romans [sic] differ from all other ‘groups’; including whether there is a difference between ‘Norwegian’ Roma and Eastern European Roma that to a large degree have arrived as street beggars over the last couple of years in that case, and if – and in that case why – there are any particular reasons to treat Roma differently than we treat all peculiar groups. Most of the pleading [sic] survey questions could be formulated about another group (‘woman’, ‘Jew’, ‘sailors’, etc), and I think my answers would have looked very similar.

This judge seems unaware of the fact that the Norwegian Roma are a national minority and hence entitled to special treatment in some areas, unlike some of the other groups mentioned, and uses a language of universalization. Neutralization is also used here, by putting both group and Norwegian in scare quotes, as if Roma is not a group (if it is it is self-defined) and not Norwegian, and by comparing Roma with all kinds of other groups which is understood to have particular claims, pointing to the impossibility and the folly of taking all these claims into account in the court. Roma law is made insignificant, also by this judge, both for the court and in comparison with the other groups mentioned.

Knowledge about Roma and about Roma law is of importance for several of the judges, but mostly as a basis for understanding the case and the involved persons better, as a tool to solve a problem. It does not imply that their cases should be treated in any other way than other cases. Among the judges, whether they had knowledge about Roma law or not, there is a strong emphasis and consensus on formal equality before the law.⁴ The important point here is that their answers show a firm ideal of a formal approach to equality before the law, on behalf of substantive equality before the law. In order to gain legitimacy for the court, by means of universalization and neutralization techniques, this is the only approach available.

Taking Substantive Equality before the Law into Account

⁴ The presented material does not tell anything about how Roma norm systems and conflict resolution are actually handled in court, and even though all the judges in the material are placed firmly on the formal approach to equality of law, it does not say anything about how other judges in Norway and Sweden relate to these questions. It might be that Roma law plays a bigger, or perhaps even a smaller, role than the judges of this survey represented. Their answers reflect their opinions, not necessarily the specific practice of different courts’ proceedings.

In the Framework Convention, national minorities are entitled to equality before the law and equal protection of the law (FCNM, Art. 4.1). As we have seen, this equality before the law is interpreted by Norwegian and Swedish judges answering a questionnaire as formal equality before the law. The judges claim that Roma should be treated the same way as any other group, and that this will secure equality before the law. At the same time one could sense a resistance from some of the judges to provide substantive equality before the law for Roma on trial or otherwise involved in a court case. In the quotes by the judges it becomes clear that the importance of Roma legal culture only has an impact on the judge's cultural knowledge of the group as a background for them to understand the behavior of the persons involved in the trial and for evaluating evidence, if it has an impact at all. The survey shows a lack of knowledge about the Framework Convention and whether it has any significance for trials involving Roma. The judges' accounts in regard to these topics might lead to a situation where national minorities and their particular situation, that might impact on equality before the law, are not recognized.

One can imagine several circumstances where an ignorance of substantive equality before the law may result in unjust outcomes. Biases and prejudices might lead to substantive unequal treatment. Roma are historically disadvantaged, due to alienation, discrimination and over-criminalization. Rosvoll and Bielenberg (2012) have shown how discriminating structures has led to criminalization of Roma as a group in Norway, and over-control of Roma in the state criminal justice system. The Swedish National Council for Crime Prevention finds that Roma are treated as a criminal group and discriminated against through the whole Swedish criminal justice system, from operative police work through crime investigation to the court process (Brå, 2008). Other social fields, fields where Roma are in a subordinated position and discriminated against, are transmitted into the juridical field and have an impact on how Roma are treated there as well. As discussed above, formal equality before the law does not have the capacity to take such historical disadvantages into account. This is a main reason why substantive equality before the law is an approach to anti-subordination, as McColgan (2014) explains. Personal characteristics, such as ethnicity or gender, should be taken into account to achieve this (*ibid.*). This is a conclusion that also the European Court of Human Rights has reached. In *Connors v. United Kingdom*, the court held that: "The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases" (in Cahn, 2010:114).

However, a substantive approach to equality before the law is not easily compatible with the juridical field's use of universalization and neutralization techniques which its legitimacy is based on.

Ignorance can lead to a further segmentation of exclusion and alienation, mistrust of mainstream society, a strengthening of the unacknowledged Roma law and be contrary to rights and duties protected and demanded by the Framework Convention. Sutherland (1997) argues that no groups should be exempted from state law, but an awareness of different legal cultures does have a greater capacity for justice. Acton (2005) also argues that knowledge about Roma law is a key issue for the state legal system, and not only for the sake of equality before the law. The state legal system has to take Roma law into account, and obtain knowledge about how Roma communities resolve conflicts among themselves, in order to successfully solve conflicts between Roma and mainstream society (*ibid.*). Accordingly, awareness of Roma law in the state legal system is also of interest to society at large.

Concluding Remarks

The Scandinavian legal models are historically and according to traditional jurisprudence characterized as monocentric and uniform, tightly connected to the nation-state. This legal identity is challenged by an increasingly diverse contemporary legal situation, with the development of a multicultural, globalized and pluralistic society (Gustafsson, 2002). Legal centralism is also challenged by a rising awareness of legal diversity (*ibid.*), resulting in a growing recognition that modern societies have to evaluate to what extent and how it should take different religious, cultural, and traditional norms and values into account (Twining, 2000). Northern Europe has become a transnational social space, with values, norms and laws that transgress the state boundaries, and with an emerging situation of transnational living law (Hellum et al., 2011:5). The state legal system does not easily adapt to changing societies. The court's response to a diverse legal situation has not been uniform, but can rather be characterized as arbitrary, and handled on a case to case basis (Lernestedt, 2006), something which might jeopardize the court's legitimacy.

The aim of this study has been to discuss the role of equality before the law in relations between the state legal system, the non-state Roma law and minority rights, particularly in Norway and Sweden. This has been done by analyzing the role of the FCNM in relation to the practice of Roma law, and, further, by discussing how, and on which background, equality before the law is

assessed by judges. This study cannot claim to give a thorough insight into questions of relations between the state legal system, Roma law and minority rights, due to its scope and the limited data available. It has, however, highlighted some important issues regarding Roma, Roma law and the question of, or quest for, equality before the law. In order to get a more complete picture of these relations further research is needed. If one is to secure full minority rights for Roma and ensure their equality before the law, there is a need for more knowledge about how Roma norm systems and conflict resolution mechanisms are actually handled in court. As part of this more knowledge about Roma law in Scandinavia is needed.

The Roma of Scandinavia have a long history of being discriminated against, criminalized, and situated on the outskirts of mainstream society. This has consequences for legal cultures and access to rights. The FCNM is an effort to compensate for historical wrongs, but the convention is unclear in regard to the impact of this for the state justice system and how these rights are to be practically granted to Roma and Roma communities. The Framework Convention does not seem to have any practical impact on the state criminal justice system, even though it can be argued that it should in order to grant Roma equality before the law. But, again, more knowledge is needed in order to get a complete picture of its possible impact.

It has been argued that even if state legal systems and the Framework Convention both set limitations to the practice of Roma law, the court must still take the normative system of Roma into account if it is to secure substantive equality before the law. One reason why the FCNM does not seem to have any impact might be the lack of knowledge about Roma law and the Framework Convention among judges. Another reason, following from a Bourdieusian analysis, is that the juridical field is not suited to take such elements into account. The practitioners in the juridical field might gain symbolic capital and legitimacy in doing the exact opposite, by using techniques of universalization and neutralization. Even if this may enhance the legitimacy of the system per se it can also decrease the legitimacy of the criminal justice system among Roma and other minority groups, and thus contribute to a continuation of exclusion, alienation and discrimination.

References

- Acton, T. (2005) 'Conflict Resolution and Criminal Justice – Sorting Out Trouble' in *The Journal of Legal Pluralism and Unofficial law* Volume 37 No. 51 pp 29-49
- Acton, T., Caffrey, S. and Mundy, G. (1997) 'Theorizing gypsy Law' pp 88-100 in Weyrauch, W.O. (ed) (1997) *Gypsy law: Romani legal traditions and culture* Berkeley: University of California Press
- Arbeids- og inkluderingsdepartementet (2009) *Handlingsplan for å bedre levekårene for Rom i Oslo* Oslo: Norwegian Government
- Bakker, P. and Rooker, M. (2001) *The political status of the Romani language in Europe* Working papers 3, Aarhus University: Department of Linguistics
- Banach, E. (2001/2002) 'The Roma and the Native Americans: Encapsulated communities within larger constitutional regimes' in *Florida Journal of International Law* Volume 14, Issue 3 pp 353-396
- Bourdieu, P. (1987) 'The Force of Law: Toward a Sociology of the Juridical Field' in *The Hastings Law Journal* Volume 38 pp 805-853
- Brå (2008) *Diskriminering i rettsprocessen: Om missgynnande av personer med utländsk bakgrund* Rapport 2008:4
- Cahn, C. (2010) 'Lawmaking in traditional Romani communities and international human rights law and norm: Case study of the real and potential role of the Romani Kris' in *European Yearbook of Minority Issues* Volume 7, Issue 1 (2007/8) pp 93-134
- Eckhoff, T. (2001) *Rettskildelære* Oslo: Universitetsforlaget
- Engbrigtsen, A. (2011) 'Within or outside? Perceptions of self and other among Rom groups in Romania and Norway' in *Romani Studies*, Fifth Series, Volume 21, No. 2 pp 123-144
- Engbrigtsen, A. and Lidén, H. (2010) 'Å finne sin plass som minoritet – Rombefolkningen i Norge i dag' pp 199-211 in Lund, A.B. and Moen, B.B. (eds) (2010) *Nasjonale minoriteter i det flerkulturelle Norge* Trondheim: Tapir Akademisk Forlag
- Engelbrektsson, L. (2012) 'Romernas "domstol" på väg att försvinna' in *Dagens Juridik* 10 April, <http://www.dagensjuridik.se/2012/04/romernas-domstol-pa-vag-att-forsvinna> (consulted 5 January 2018)
- Fenger-Grøndahl, C. and Fenger-Grøndahl, M. (2006) *Sigøjnere: 1000 år på kanten af Europa* Aarhus: Aarhus Universitetsforlag
- Foley, A. (2010) *Trailers and tribulations: Crime deviance and justice in Gypsy and Traveler Communities* PhD, University of Cardiff

- Gustafsson, H. (2002) *Rättens polyvalens: En rättsvetenskaplig studie av sociala rättigheter och rättsikkerhet* Lund Studies in Sociology of Law, 14
- Hellum, A., Sardar, S. and Griffiths, A. (eds) (2011) *From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads* Surrey: Ashgate
- Hoekema, A.J. (2005) 'European Legal Encounters between Minority and Majority Cultures: Cases of Interlegality' in *The Journal of Legal Pluralism and Unofficial Law* Volume 37, Issue 51 pp 1-28
- Lernestedt, C. (2006) "'Kulturella försvar", likhet och diskriminering' pp 283-316 in Sarnecki, J. (ed.): *Är rättvisan rättvis? Tio perspektiv på diskriminering av etniska och religiösa minoriteter inom rättssystemet*. SOU 2006: 30
- Lidén, H. (2005) *Barn og unge fra nasjonale minoriteter: En nordisk kunnskapsoversikt* Oslo: Institutt for samfunnsforskning
- Madsen, M.R. (2013) 'Bourdieu og nyere fransk rettsociologi' pp 367-385 in Hammerslev, O. and Madsen, M.R. (eds) (2013) *Rettsociologi – klassiske og moderne perspektiver* København: Hans Reitzels Forlag
- Malik, M. (2014) "Minorities and law: Past and present" in *Current legal problems* Volume 67, Issue 1 pp 67-98
- Marushiakova, E. and Popov, V. (2007) 'The Gypsy court in Eastern Europe' in *Romani studies* Fifth Series Volume 17 No. 1 pp 67-101
- McColgan, A. (2014) *Discrimination, equality and the Law* Oxford and Portland: Hart Publishing.
- Nafstad, I. (2015) 'Gypsy law – the Non-State Normative Orders of Roma: Scholarly Debates and the Scandinavian Knowledge Chasm' in *The Journal of Legal Pluralism and Unofficial Law* Volume 48 No. 1 pp 92-109
- Palosuo, L. (2008) *En inventering av forskningen om romer i Sverige* Uppsala: Uppsala Universitet
- Renteln, A.D. (2004) *The Cultural Defense* New York: Oxford University Press.
- Rosvoll, M. and Bielenberg, N. (2012) *Antisiganisme, stereotyper og diskriminering av rom* Oslo: HL-senterets temahefte nr. 14.
- Ruud, C.C. (2012) 'Ja, det er våres gavespråk'. *En undersøkelse av kodeveksling i samtaler mellom voksne romer i norskopplæring og holdninger til slik veksling* Masteroppgave i nordisk didaktikk, Oslo: Universitetet i Oslo
- Schiöler, I. (2015) 'Svenske erfaringer' in Sigfridsson, I. and Hasvoll, B.C. (eds) (2015), *Ute er det kaldt: Om romer i Norge* Oslo: Tiltaket for rom
- Sigfridsson, I. and Hasvoll, B.C. (eds) (2015) *Ute er det kaldt: Om romer i Norge* Oslo: Tiltaket for rom

- SOU (2010:55) *Betänkande av Delegationen för romska frågor. Romers rätt – en strategi för romer i Sverige* Stockholm: Statens offentliga utredningar
- Sutherland, A. (1997) 'Complexities of U.S. Law and Gypsy Identity' in *American Journal of Comparative Law* Volume 45, Issue 2 pp 393-406
- Timmerman, J. (2003/2004) 'When her feet touch the ground: Conflict between the Roma familistic custom of arranged juvenile marriage and enforcement of international human rights treaties' in *Journal of transnational law and policy* Volume 13 No. 2 pp 475-497
- Ungdomsstyrelsen (2009) *Unga romers situation – en intervjustudie* Stockholm: Rapport till Delegationen för romska frågor
- Von Doussa, J. (2005) 'One Law for All' in *Waikato Law Review* Volume 13 pp 12-21
- Weyrauch, W.O. and Bell, M.A. (1997) 'Autonomous lawmaking: The Case of the Gypsies' pp 11-87 in Weyrauch, W.O. (ed) (1997) *Gypsy law: Romani legal traditions and culture* Berkeley: University of California Press
- Wigerfelt, B. and Wigerfelt, A.S. (2015) 'Anti-Gypsyism in Sweden: Roma's and Travellers' experiences of bias-motivated crime' in *Internet Journal of Criminology* ISSN 2045 6743, https://docs.wixstatic.com/ugd/b93dd4_be0750143d6742188b5e09eaf4c8ca18.pdf (consulted 5 January 2018)