‘Governmental Xenophobia’ and Crimmigration: European States’ Policy and Practices towards ‘the Other’

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1. Introductory remarks

Migrants, refugees, asylum seekers – these are ‘the Others’ arriving in a new, often unknown and hostile destination. Even if the place of arrival (or residence) is an otherwise democratic, fully rights-protective European state, ‘the Other’ often encounters not merely social hostility but also another reaction, called by Jérôme Valluy ‘governmental xenophobia’. This xenophobia is defined as a combination of public discourse and actions aimed at stigmatising migrants, identifying them only as a source of threat or danger to the rest of the society, and then undertaking actions aimed at finding a solution to the problem so created (Valluy 2011). With the fearmongering escalating by the day, many European states has started to react to this problem created by themselves. The effect of ‘governmental xenophobia’ is multiplying restrictions in adhesion policy, expulsions rules and practices. To facilitate these processes, regulations stemming from criminal law are

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engaged. This criminalisation of migration policies and implementation of criminal law into migration legislation aimed at raising control over migrants, results in an emergence of a new phenomenon called 'crimmigration' (Stumpf 2006), which can be described as the manifestations, or rather as the result of 'governmental xenophobia'. In consequence, in some states immigrants are punished for committing crimes established and constructed specially for the sake of controlling them, while not applicable to the 'legitimate' citizens (Aliverti 2013). This approach is embedded in a desire to draw a strong distinction between 'Us' and 'Them', between the citizens and migrants, and – in the social perception – between the 'good' and the 'bad' (Kmak 2015; Franko Aas 2011; Holslag 2015).

Simultaneously, there exist another 'Other' in the European crimmigration sphere–'the Other' represented by the Roma community. Even though the link between the migrants and Roma may seem to be loose, in particular as most Roma are citizens of the EU (especially after the enlargement of the community in 2004 and 2007), the similarities in the crimmigration treatment of these groups are striking. Roma groups are, and always has been, migrants. Migration is embedded in their lifestyle, in their culture. And because of that Romani communities for ages has been presented as a 'race of criminals' who is genetically inclined for committing crimes, and their lifestyle has been perceived as a threat to public order and safety of European societies (Sigona & Trehan 2011, 119-120). At the same time, the methods of oppression towards Roma varied in the past between enslavement, enforced assimilation, expulsion, internment and mass killings, whilst today they consist mostly of various forms of discrimination, forced evictions and homelessness, lack of health and social care, no job opportunities, hate crimes, as well as crimmigration policy implemented against them. Roma are stopped and detained by the police more often than other citizens, while in custody they have much narrower access to legal aid, resulting in more severe judgments issued against them, not to mention the cases of criminalization of their traditional nomadic lifestyle.

This article identifies practices of numerous European states characterized as manifestations of 'governmental xenophobia' and 'crimmigration' as its special phenomenon, while at the same time demonstrating the ways these practices breach fundamental human rights, including prohibition of discrimination. Europe has been selected as a case-study for the purpose of this article as currently it is the area that reflects and cumulates, in an unprecedented way, all phenomenon the article relates to. It also proves that both the old, Western Europe's democracies and former Central and Eastern member states of the European community are not free from using the same practices towards 'the Other', relying very often on the same – universal xenophobic attitudes fed by the same fears and prejudice.

The article chooses to concentrate on two examples of victim groups: migrants and Roma, who are distinguished by their 'otherness' – the feature that transgresses the distinction between "others" coming from the outside world and those being, theoretically, the part of European inner-communities. It contemplates some dramatic social and legal effects of this type of state action, reflecting upon the current position of migrants and Roma – the position Michael Walzer analogised with the situation of resident aliens (*Metics*) in ancient Athens who lived in the realm of necessity (while the Citizens lived in the realm of choice), with their fate determined purely by the conditions of economic life. Such a distinction between both groups, as described by Walzer, was an effect of unequal distribution of their memberships, and consequently their power. Only one group had been granted the right to vote and consequently could influence the process of law-making. Consequently, members of the privileged group preserved the existing system from introducing any changes that could affect their supreme position (Walzer 1983). This paradigm had been copied throughout ages. Its today's reflection is a discriminatory distinction between citizens and immigrants and between citizens and Roma, manifested in the state laws and practices. The choice of Roma for the purpose of the analysis has been also dictated by the fact that the ages-long discriminatory, hostile and very often criminal behaviour of the state towards them can be perhaps perceived as a prototype or a model for the way of treatment of undocumented migrants and refugees today.

Lastly, the authors try to suggest possible answers to the remaining question whether there are chances for a transformation of social attitudes that will compel the changes of governmental policies, or if we should rather demand, by applying to international human rights law standards, a responsible and humane government policy leading to the cessation of othering in law and through law.

The search for the interconnections between different - but most fragile minority groups, as well as between phenomenon of crimmigration and governmental xenophobia forms an innovative, core research challenge of the article.

The article relies not only on the available literature in the subject, but also on different kinds of empirical materials, such as reports, statistical data or the case-law of the European Court of Human Rights. This approach aims at demonstrating also the practical implications of theoretical considerations concerning crimmigration and governmental xenophobia, being not only rhetorical or theoretical concepts but also dangerous tool of behaviour resulting in multiple human rights violations. This approach was thought as an innovative 'added value' to the existing literature and way of analysing the phenomenon debated here.

2. Governmental Xenophobia

The term 'governmental xenophobia' was coined by Jérôme Valluy to describe a conjunction of discourse and actions of public authorities, whose aim is to stigmatise foreigners in the eyes of society and to make citizens perceive them only as a source of threat or danger, only to later undertake an initiative of solving such a self-created problem, also with the tools of law (Valluy 2011, 116-117). This idea can be easily extended to any other ethnic group labelled as 'the Other' – Roma being the prime example here.

The first element of 'governmental xenophobia' is the creation of 'the Other'. In the process of selecting a group that would be labelled as such, an ethnic distinction (actual or perceived) between the labelled group and the majority of the society plays a crucial role. Importantly, the power of labelling lies in the hands of people in power – rich, males, usually white (Becker 1973, 204). This description happens to characterise most of the members of many of the current European governments. Such practices based on the will to "protect" the society by public authorities from others who enter or want to enter the state's territory were presented by Michel Foucault in his lectures at the College de France in 1976 as the beginnings of the idea of 'racial' purity (Foucault 2003, 80-84). However, the term 'race' is not used anymore – it has been replaced by the term 'culture'. What can be observed at present is described as the fight to preserve cultural homogeneity in the societies of the Global North. But as Maggie Ibrahim points out:

> The principle, or position, which link immigrants and the demise of the nation, is that cultural differences threaten the existing way of life. It is thus seen as rational to preserve one's culture through the exclusion of the other cultural group. This negative attitude toward migrants should be understood as racism. (Ibrahim 2005, 166.)

This is the face of 'new racism'. Once one group has been labelled as 'the Other', it is presented as the enemy – the source of threat and danger, the cause of a large part of day-to-day problems in the society. This forms the second element of the definition of 'governmental xenophobia': the enemy should be dehumanised in order to achieve further justification for its different treatment. As Jock Young stressed:

> This process of resentment and dehumanisation allows us to separate them off from the rest of humanity (us) but it also permits us to harden ourselves to deal with the special instance of a threat. We can act temporarily outside of our human instincts because we are dealing with those who are acting inhumanely. This technique of neutralisation permits the transgression of our general prohibitions against violence. (Young 2007, 35-36.)

In addition, a 'suitable' enemy is one that never dies – it can (and should) be attacked constantly, it can be undermined (authorities have to produce results), but it cannot be ultimately defeated. This fight can be carried on and used for political gain (Christie 1986). Thus, the immigrants fit this role perfectly. For many years they have been portrayed as the ones who threaten our (European) culture, lifestyle, economy, and are coming after benefits, which are and should only be ours. To prevent this threat the governments stepped up efforts in order to protect their citizens and launched a campaign aimed at fighting migrants.

This leads to the third element of the definition of 'governmental xenophobia' – the actions taken towards the problem, to challenge it, deal with it. In modern democratic and liberal states the only way for governments to act is to make their actions legal and legally legitimate. This approach can be unfold in two different type of actions. At the one hand, governments could refuse to take any legal steps, and as a result leave some groups out of legal protection. The very good example here could be undocumented migrants on whom themselves and on their exploitation we (as societies and governments on our behalf) turn a blind eye, denying them any rights (Noll 2010). On the other hand, special legal provisions for fighting migrants had to be created. They serve as a justification of actions undertaken by the governments who explain that the law requires them to act against 'the Other'. The practice of implementing the policy of 'governmental xenophobia' proves that most suitable legal instruments are stipulated in criminal law and could be easily adopted to migration law – broadened and changed when necessary (Zedner 2013). That's why criminalisation of 'the Other' is a necessary step on the path towards gaining better control and assuring the public opinion that the government is struggling with the enemy.

Undoubtedly, the highest incidence of cases which we have dubbed 'governmental/state xenophobia' can be observed in the Global North countries in the periods of election campaigns when exploiting the negative emotions and social fears of 'the Other' may bring the most tangible electoral dividends. That such strategies indeed produce real political benefits is well demonstrated by the election results, both at the level of nation-states and at the EU level.[1] This phenomenon is directly correlated with the fact that many mainstream political parties adopt the rhetoric of extremist forces; as a result, the European political populism is constantly growing, and manifests itself mainly in the general rejection of the principle of equality of treatment, and in the more and more overt hostility towards migrants and refugees (Gerard 2014; Goodman 2017; Klaus et al. 2018). At the same time, hitherto fringe parties have entered the political mainstream, only slightly changing

[1] See the analysis of the European Humanist Federation available on http://ec.europa.eu/justice/events/assises-justice2013/files/contributions/24.europeanhumanistfederationtheeuandthechallengeofextremismandpopulism_ehf_e.pdf.

their rhetoric and symbolism: they have, for instance, begun to apply modern methods of communication, and abandoned the most direct uses of racism, xenophobia and homophobia, also identifying some deeply felt social concerns, at the same time offering populist and radical solutions, especially to the problems concerning immigrants (Vysotsky & Madfis 2015).

Consecutive public opinion surveys in the European states demonstrate some very disquieting data concerning the attitudes towards minorities. The old, 'traditional' racism has become mixed with the new forms of xenophobia addressed mainly against immigrants and refugees. Equally disquieting, and not unrelated, are surveys which show a level of dissatisfaction with democracy and its institutions (Gottfried Report 2014). For example, the Eurobarometer polls of 2003-2011 prove that up to seventy-five percent of respondents in the EU states declare their lack of trust in the functioning and programmes of political parties. It is against this backdrop that both the political incumbents and those who aspire to rule, adopt programmes, slogans and actions which can only be termed 'governmental xenophobia'. Simultaneously, as noted in one of the reports, in 2010, 'almost 70 percent of citizens follow news about immigration and integration "closely" while almost half said their vote choice would be influenced by parties' policies on immigration' (Goodwin Report 2011, 14). As a result of such political facts, citizens come to perceive (or consolidate their perceptions) immigration as one of the gravest and most dangerous social problems, they believe that there are too many immigrants, and that immigrants 'steal' the benefits that only citizens deserve; there is also a stronger support for border controls (IPSOS Report 2011; Klaus et al. 2018).

3. Creating 'the Other'

The society (or, more precisely, those who rule on its behalf) needs to legitimate distinctions created between different social groups, resulting in labelling one of them as the non-belonging "Other" who deserves a different, usually violent, treatment. In other words, the use of violence against 'the Other' should be justified and presented as just and appropriate. Hence it presents various arguments to justify the exclusion of a marginalised group, including those of religious (being the chosen nation), ideological (stemming from nationalism), linguistic (using degrading, ridiculing expressions to describe 'the Other'), or ethnic kind. The language sphere is extremely important in creating 'the Other'. Using derogatory terms to describe certain groups arouses prejudice against them within society and dehumanises them. This is what Hitler did referring to Jews as "vermin", as well as Stalin, when he spoke of 'kulaks' (Galtung 1969; van Dijk 2006; Holslag 2015). The face of symbolic violence 'may be invisible, but it has to be taken into account if

one is to make sense of what otherwise seem to be 'irrational' explosions of subjective violence' (Žižek 2008, 2).

Symbolic arguments from the sphere of culture are most often used while creating 'the Other'. The group that holds power puts its achievements before the achievements of other groups and so displays (or justifies) its supremacy, excusing the fact that other groups have social rules forced upon them or are excluded from the society. As a result of demonstrating the superiority of a certain culture, structural violence[2] used by the stronger group starts to be perceived by its members as right, or at least as less wrong. Using such violence is thus fully justified. Therefore, there is a shift in the perception of the acts of violence (mostly symbolic or structural, but consequently often leading to physical acts of violence) through ignoring the use of unlawful force. Such symbolic power bears particular significance since it creates social reality and its image only by making certain claims, while people who are subjected to this power firmly believe its legitimacy, often without critical reflection (Bourdieu & Wacquant 1992, 147-148). As a result, 'with the violent structure institutionalized and the violent culture internalized, direct violence also tends to become institutionalized, repetitive, ritualistic, like a vendetta' (Galtung 1990, 302).

A modern example of such a creation of an enemy are immigrants, and among them particularly refugees and asylum seekers. The British media have been giving the subject of refugees negative coverage for a long time, alongside politicians who use many ethnic slurs towards forced migrants. As a result, the very words *refugee* and *asylum seeker* have started to be used as insults amongst young people in Britain (Cohen 2006, xxi). Playing the asylum seeker card has started to be very popular among politicians in a number of EU states to achieve their political goals, especially after 2015 refugee and migration crisis. It was used in arguing for Brexit (Goodman 2017) or as a tool to win the elections or strengthen the political position of a political party, as in the case of Poland or Hungary (Nagy 2016; Klaus et al. in print). It seems that nowadays we found ourselves fully in the position described a few years ago by Zygmunt Bauman:

> Refugees are very embodiment of 'human waste' [...], 'asylum seekers' have now replaced the evil-eyed witches and other unrepentant evildoers, the malignant spokes and hobgoblins of former urban

[2] Structural violence is a kind of social injustice, created mostly by the division of power within society. It leads to unequal life chances, which leave both physical and mental traces. While physical violence can be described as a single event, structural violence is a process whose effects have been deeply ingrained (and are still being ingrained) into social structure so deeply that at times even groups subjected to violence, as well as perpetrators, may be unaware of it, and perceive its instances not as violent but customary and regular demeanor. Structural violence leads to objective consequences in the form of social inequality, frequently without subjective intentions (e.g. racist or sexist motivation) of individuals who cause them (Galtung 1969, 196-178).

> legends. [...] Nothing is left [for them] but the walls, the barbed wire, the controlled gates, the armed guards. Between them they define the refugees identity – or rather put paid to their right to self-definition, let alone to self-assertion. (Bauman 2007, 41, 43.)

The current situation, hence, is not surprising at all. For many years foreigners in the Global North countries have been perceived as 'unwanted' and treated as pictured by Bauman. In 1990s migration started to be:

> [...] identified as being one of the main factors weakening national tradition and societal homogeneity. It is reified as an internal and external danger for the survival of the national community or western civilization. This discourse excludes migrants from the normal fabric of society, not just as aliens but as aliens who are dangerous to the reproduction of the social fabric. (Huysmans 2000, 758.)

To keep 'the Other' away, walls and fences were build and places of custody (called detention or guarded centres) to imprison immigrants (only because they were undocumented) were established.[3] This trend is continuing and expanding towards more countries (Karamanidou 2015; Klaus 2017).

The instruments of enforcing the strategy of 'governmental xenophobia', even though used mostly against foreigners – the migrants, are also implemented towards another category of minorities, who have been part of European societies for many centuries, living here legally and peacefully the Roma. The type of hostility and demonisation of that group is not significantly different from the treatment of migrants: the main difference may lie in the fact that, as far as the Roma are concerned, there are at the moment almost no special categories of crimes 'tailored' for them (although we could identify some of those practices in the past)[4]. And yet, statistics of detentions, arrests and

[3] And in some cases the process of making them undocumented is observed. It is again a state strategy targeting migrants that makes process of legalisation extremely difficult. And at the end of this process migrants are punished, although they are victims of the process of illegalisation (Bauder 2014).

[4] One should add though a particular example of bans on begging, which is not openly directed against Roma but in practice serve as a measure tailored for this minority group. As indicated in one of the reports on the issue: "Only four countries include an explicit begging ban in their national legislation: Greece, Hungary, Italy and Romania. And in some countries, bans on begging are unconstitutional: for example Germany and Italy. However, many countries punish begging under their Penal Codes, or as actions that 'breach the peace' and are therefore disrupting public order. In Germany, Italy, France, and Poland there are specific conditions under which begging is generally forbidden, for example, begging with children, and in some cases, what is deemed 'aggressive' begging, or begging with a 'dangerous' animal (France). In Italy for example, the 'enslavement of older people or minors for the use of begging is also forbidden, in order to protect potential victims of such schemes". If we look at the bans on begging as an attempt of the governments not to counteract forced begging and abuse of the weakest by criminal groups but as an effort undertaken to eliminate Roma from the public

punishments of Roma people clearly indicate that it is a group which is targeted by relevant authorities for special monitories and punitive treatment (ECRI General Policy Recommendation, 3-4). The Roma are 'the Other' of Europe, being subjected to 'governmental xenophobia' in almost the same way as the migrants and refugees entering Europe from African or Middle East countries are.

A shameful fact is that most of the estimated 10-12 million Roma in Europe face marginalization, prejudice, xenophobia and discrimination in their everyday lives (EU-MIDIS 2009).[5] The slow progress in remedying these human rights violations is often being attributed to the insufficient involvement in improving the situation of Roma children, who are unable to succeed because of the hereditary disadvantages. As a result, shocking cases of abuse, humiliation and discrimination of Roma children are reported, leading to international protests but at the same time remaining unsolved as structural problems. After the sadistic behaviour of Slovak police toward a group of Roma children became publicly known (arrested Roma children were forced to strip and slap one another violently in the face in the police station), the responsible police officers were suspended (Nicholson 2009). But alarming questions remained unanswered: was this an isolated event or had similar violations taken place before? Did the police officers even fear disciplinary repercussions? Is there a serious oversight in training or instructing the police and, therefore, the responsibility for these actions lies higher up? The truth is that the general hostile, humiliating and disrespectful attitude of European societies towards Roma people allows for shocking situations in which public hospitals in Slovakia do not hesitate to conduct forced sterilisation of Roma women with the aim of decreasing their fertility, on the basis of an alleged cultural tendency of the Roma to have too many children (ECRI Report 2009).

Also hate speech and hate crimes against Roma people, especially those coming from the Southeast Europe, have become disturbingly widespread in recent years. 'Gypsy pest', 'thieves', 'dirt' – these are common expressions directed at Roma by 'ordinary citizens' in much too many European states. Observing the rallies of masked hooligans 'cleansing' the neighbourhoods of Roma in Hungary (ECRI Report 2009), it is difficult not to think of the pre-war 'cleansing' of the Jewish population.

Roma people are also brutally exploited as victims of trafficking and forced into stealing, begging and prostitution in foreign countries – mostly old European democracies like Germany and France (EU-MIDIS 2009). This negative phenomenon remains to be one of the most alarming manifestations of violations of their rights. The traffickers

areas and "hide" their poverty and "otherness", than the bans can and should be perceived as one of the manifestations of the governmental xenophobia. FEANTSA Report (2015), p. 4.

[5] The number given by the European Commission. Data available on http://ec.europa.eu/justice/discrimination/roma/index_en.htm.

successfully cross the borders with Roma (mostly women and children), as they usually have easy access to legal documents, etc. The nature of the exclusion here is the lack of state protection offered to Roma victims of trafficking (including police and border control agencies), insufficient support for Roma families who are very often confronted with the criminal structures active within Roma communities, a small number of crisis intervention centres offering such counselling, weak cooperation on the international level on the issue of deportation of Roma detained because of criminal activities they were forced to take part in.

All examples provided above share a common denominator: the manifestations of discrimination, racism and xenophobia targeting Roma are the direct or indirect result of the governmental and law enforcement agencies actions, state policies and legal regulations disadvantaging Roma and making them even more vulnerable. Two most significant examples of 'governmental xenophobia' against Roma people are the conduct of the police forces and states' laws and policies concerning the education of Roma children.

Discriminatory and unlawful treatment of Roma by the police forces in many European states is a trend that has already been subject to a whole line of jurisprudence of the European Court of Human Rights (ECtHR).[6] The conclusions arriving from the analysis of the reported cases of such police behaviour indicate a very visible pattern, consisting of the belief of the police that they are simply allowed not to oblige the standards of treatment otherwise used towards majority-belonging members of the community (Śledzińska-Simon 2011, 28-29).

As noted in the 2014 Report of the European Commission on the discrimination of Roma children in education:

> Regardless of its shape or form, the segregation of Romani children amounts at least to indirect discrimination under the European Convention on human rights and fundamental freedoms. So far, no justification offered by States has been accepted by the European Court of Human Rights to justify it. There is no reason to doubt this structural discrimination would amount to discrimination under the Racial Equality Directive as well. (EC 2014 Report, 54.)

The attitude of the governments, lawmakers and law-enforcement powers that allow for discriminatory and brutal treatment of a particular minority, clearly amounts in the case of Roma to 'governmental xenophobia'. This attitude is rooted in perceiving Roma as the unwanted 'Other' who differs, alienates itself and does not belong to the ethnic majority, and in consequence – to the European society. This ethnic otherness allows police officers to act brutally while dealing with Roma and makes states segregate Roma children at schools exactly within the realm of 'governmental xenophobia'.

[6] This jurisprudence will be analysed in more detail in the subsequent part of this article.

4. Fighting 'the Other' with the tools of law

Once created, the enemy – 'the Other' should be fought and defeated. This is what the public expects and thus it becomes a task for the government willing to gain or keep the power. The latter has many instruments in its hand, the most powerful of which is the law. Making some group or its behaviour illegal, the government are obliged, as they claim, to deploy legal instruments and law enforcement agencies in fighting against those who violate the law. It is a founding idea behind criminalisation of migration and immigrants.

The very idea of criminalisation of members of certain groups mostly stems from the fact that they are perceived by a society as a source of crime. It is not a new phenomenon. Returning to historical comparisons, one may cite an example of authorities' fear of groups which were relatively free, because they had been deprived of social control, and were not so bound by limitations imposed by society. In other words, they lived according to their own norms, different from those generally accepted in a certain group. As such, they could threaten the authority of certain groups. Migrants have always been perceived as one of such groups. The same applies to Roma, with their nomadic lifestyle, a separate language and customs (Klaus 2015; Nail 2015; Sigona & Trehan 2011). Like vagabonds in 15th century who were persecuted and detained, and:

> the reasons for these proceedings lay not only in the offence committed, but in the simple fact of being without hearth or home. The vagabond was [perceived as] a criminal, on the one hand because he refused to work as God had ordained, and on the other, because vagabonds, as a group, committed crimes, since it was from their ranks and thieves, bandits and other villains were recruited. (Geremek 2006, 42.)

In the fight against 'the Other', created as the first act in the process of "governmental xenophobia", the state uses instruments of control that include familiar institutions previously tested as useful in implementing criminal law. To describe the results of 'governmental xenophobia' we can use the term 'crimmigration' coined by Juliet Stumpf. It is a perfect illustration of how two previously separate systems – immigration and criminal law – had become one. It was facilitated because both systems are based on a similar rule – the idea of inclusion and exclusion – which means separating certain people or groups from the majority of the society. As noted by Strumpf, 'both are designed to create distinct categories of people – innocent versus guilty, admitted versus excluded or, as some say, "legal" versus "illegal"' (Stumpf 2006, 380).

Crimmigration in practice manifests itself in three major areas. The first is the noticeable interference between criminal law, migration and

penalisation of migration laws as a new category of crimes (before the appearance of the phenomenon of crimmigration, civil or administrative penalties were mostly applied). One could find a new idea behind this process – the idea of prevention from a potential threat. Foreigners are detained just for breaking migration laws, not criminal ones. And it the process of detaining they are usually deprived of any procedural guaranties. Moreover, people are deported just because they are perceived by the law-enforcement or security services agencies as being able to commit a crime or as posing a threat to national security. And no proof of that (that complies with legal standard of proof) is requested (Zedner 2013). Secondly, crimmigration is visible in how organised immigration forces are becoming more similar to the law-enforcement forces (such as the police or the army), using the same or very similar means, for instance technical (e.g. guns, uniforms). Finally, the two systems come together in the case of actions taken against breaching immigration laws. In this regard, the most important element is keeping migrants in custody or under detailed surveillance (Stumpf 2006). Simultaneously, foreigners are often denied a number of rights and solutions guaranteed in the criminal law and available to citizens. It is particularly visible with undocumented migrants, who are often denied their basic human rights because of their unregulated status (Welch 2003; Dauvergne 2013).

As a result, foreigners are prosecuted for crimes which have been created solely in order to control them and which cannot be committed by citizens. Loïc Wacquant (1999), referring to the overrepresentation of African Americans in the American penitentiary system, calls migrants the 'blacks' of Europe, and notes that they are people who, in many Western European countries, are often and easily incarcerated. It does not result from a more criminal lifestyle of immigrants or a higher number of serious crimes they commit. It is the outcome of two factors. Firstly, the creation of a specific and new type of crimes which are migration crimes punishable by prison, and which can only be committed by migrants. Such crimes involve: irregular stay, illegal employment and the UK-specific example of 'no document offence' which means entering the UK without a passport or with a fake one (Aliverti 2013, 93-110). Secondly, as a result of mixing immigration laws with the criminal law, detention is used against non-citizens as a consequence of relatively petty crimes (e.g. fare evasion) only because they are committed by migrants. Consequently, what often happens is a practice of 'double sentencing'. First the immigrant is punished on the basis of criminal provisions for breaking the law and detained, and then administrative and legal means are used against them that usually result in their expulsion to the country of origin (see e.g. Gerard 2014; Klaus 2017). This way, people who deserve to be protected as refugees, are punished only because they entered a given state without possession of valid documents, which is considered to be illegal (Aliverti 2013, 144).

Moreover, the criminal law and the penitentiary system are used '[...] not only to curb crime but also to regulate the lower segments of the labour market and to hold at bay populations judged to be disreputable, derelict, and unwanted' (Wacquant 1999, 216). Such a process has been going on for centuries against representatives of various marginalized groups. What can be noted currently is the perpetuation of this phenomenon which continues to control certain excluded social groups and uses instruments of criminal law. They were designed, among others, to control workforce and, depending on economic conditions, 'introduce' them to, or 'remove' them from the market. An identical process happens in the US against undocumented migrants. During prosperity they remain unnoticed by public authorities – they become 'invisible'. They are allowed to live in the country because they are needed. This tactic changes drastically during periods of crisis. Migrants are then blamed for taking the Americans' jobs, and, in consequence, 'fished out', sentenced for even a trifling offence, which offers a ground and justification for their deportation (Welch 2003, 329-330).

One of the most severe manifestations of the policy of crimmigration is the idea of detention in dedicated 'detention centres'. This euphemism describes institutions which are de facto prisons; there are high walls with barbed wire, bars in windows, guards in uniforms. They are treated as prisons by the detained foreigners, who firmly object to having been placed there because they do not perceive themselves (and do not want to be perceived by others) as criminals. The time spent in detention is experienced by them as psychological torture, something truly humiliating (Bosworth 2014). The only grounds for such treatment is the lack of citizenship of the country 'the Other' arrived in:

> Non-citizenship emerges in this analysis as both a legal and an affective category. It is an identity through which the State governs individuals without recognizing them as subjects. [...] In practical terms, the only relevant legal status of a detainee is his or her lack of [...] citizenship. Citizenship, unlike a criminal sentence or conviction, is (meant to be) an absolute: you either have it and its attendant rights and obligations or you do not. There are no (legal) degrees of citizenship upon which decisions about where individuals could be detained or the length of their detention could be based. (Bosworth 2012, 134, 128.)

The grounds of such approach lie in the differentiation between 'us' and 'others', citizens and strangers. It is being explained by the membership theory, based on the idea of a contract between the authorities and people (sovereign) who are granted protection from the authorities. However, what is typical of the contract is the fact that it is binding only between the parties who accepted it. Thus, those who are not the parties of the agreement cannot demand rights equal to those of

citizens, and consequently are subject to mechanisms of crimmigration (Stumpf 2006; Walzer 1983, 52-63; see also Hammar 1990).

The consequences of widespread control of migrants are immensely negative. As noted by one of the authors:

> Social control aimed at illegal immigrants and criminal aliens we shall remain mindful of its various contradictions often reflecting on how self-defeating laws and policies perpetuate injustices against unpopular people who have few resources to defend themselves against ambitious enforcement campaigns, particularly those fuelled by moral panic, bigotry, and racism. (Welch 2003, 331.)

Such actions lead to multiple violations of basic human rights of migrants, detained in various closed institutions (prisons or detention centres), denied procedural rights which are evident for citizens in democratic countries (e.g. the right to legal representation). It is the result of particular discrimination, be it racial, ethnic, or national, which can be called 'institutional racism'. In states where such forms of racism function, the laws, customs and practices constantly contributing to inequality are passed, leading to the deprivation of certain privileges (Williams 1985; Anthias 1999). Such phenomenon can – and as we believe, should – be described as an expression and an effect of 'governmental xenophobia', to use Valluy's terminology.

At the same time, Roma people – despite theoretically belonging to the category of 'us' and being parties to the contract within the membership theory, also qualify as 'the Other' not only in the eyes of the societies, but also in the eyes, and actions, of the governments. In the case of Roma these consist mostly of multidimensional exclusion and deprivation of basic human rights, including the right to dignity, healthcare and education. There are no detention centres for Roma people, but as 'the Other', they face similar expulsion practices. When in 2010 the former President of France, Nicolas Sarkozy, decided to expel a few thousands of European Union citizens of Romani origin from the French territory (for a small financial compensation), the EU Commission itself intervened and most media did not hide their outrage.[7] The French public opinion, however, was divided – for some, the Roma with their nomadic lifestyle, darker complexion and a strange language, taking advantage of the state's aid, were perceived as unwanted strangers, as 'the Other', not adapted to the French social landscape. The measures used to expel them undoubtedly should be categorised as a manifestation of 'governmental xenophobia' and tools used in this situation demonstrate the implementation of the crimmigration scheme against Roma by the French government.

Moreover, what definitely allows for including Roma into the group of victims of xenophobic state actions, resulting in discriminatory

[7] See https://www.theguardian.com/world/2010/sep/14/roma-deportations-france-eu-disgrace.

treatment, is the exclusion of members of the Roma minority from a number of public services and essential social benefits as a consequence of their precarious administrative situation and often their statelessness, resulting in a lack of administrative documents attesting their legal status. As quoted by Olivier De Schutter, referring to the key findings of a 2003 Council of Europe report:

> Many Roma lack identity cards, birth certificates and other official documentation of their legal status. Such documents are often required to access public services. Statelessness, and the lack of status within the State of residence, as well as problems with documentation impede access to a range of rights including access to health care. These situations are created by a variety of factors, including information and financial barriers, eligibility criteria that have a disproportionate impact on Roma, and discrimination by local authorities. (De Shutter 2009, 21.)

The use of criminal law measures against Roma is also a noticeable issue within the discussion on the processes of othering of this minority in Europe. The measures used differ however from those applied in the case of migrants: no 'special' offences are being created with the aim of targeting Roma exclusively (with the exemption of bans on begging introduced in several European states), but the prejudice and myths of 'Gypsy criminality' as a distinguishing feature of the whole Roma population has led to different and discriminatory treatment by the police and judicial system when a Roma becomes a perpetrator of a crime or an offence. As pointed out by one of the authors commenting on this phenomenon in the case of Slovakia:

> There is a prevailing negative view by a part of the majority population, where mainly due to an increased crime relapse rate of the part of the Roma community the criminality problems are generalized and believed to regard all Roma. Unfortunately, these views can also be observed in the discriminatory practices of state officials. (Mlynek 2016, 7.)

It needs to be stressed that in fact the criminality rates in some Roma-inhabited areas are higher than in other parts of a given state or community. However, the crucial factor here is, as Dimitrina Petrova defines it, the understanding – understanding of the historical and social context: 'one cannot deny the existence of Roma crime, as righteous proponents of the "Romani cause" sometimes do. It is more important to understand its nature and to realize that Roma are also victims, not only of ordinary crime but of crimes with racial animus as well' (Petrova 2004).

5. 'Governmental xenophobia' and crimmigration as a violation of human rights

The problems discussed in this article have been identified by the organisations and institutions specialized in monitoring the protection of human rights by European states, as well as the judiciary element of the European human rights protection system, namely, the European Court of Human Rights. In the common opinion of all these bodies and institutions, practices that we qualify as manifestations of 'governmental xenophobia' (and sometimes additionally as crimmigration), constitute clear and unacceptable violations of human rights standards.

Analysing the human rights record of Italy, the ECRI stated (referring to the Lampedusa crisis) that it

> notes that the events in North Africa concern all European states and will undoubtedly necessitate some sharing of responsibilities. It nevertheless stresses that this situation does not relieve Italy of the obligation to ensure full respect for the rights of individuals coming under its jurisdiction. It notes with concern reports that – despite the Italian authorities' stated commitment to guaranteeing access to asylum procedures for any persons requiring it – dozens of people arriving from Egypt in mid-February were immediately returned to that country without having had the option of stating whether or not they wished to claim asylum. (ECRI 2012, 41.)

ECRI also recommended that Italy considers alterations to Identification and Expulsion Centres (CIEs) and the living conditions there; to ensure that all persons held in CIEs have access to medical care and investigate all allegations of ill-treatment in these centres and punish those responsible. In its report on the Netherlands, published in 2013, ECRI noticed with concern several legal provisions and examples of state policy that clearly indicate the willingness of the government to maximize the obstacles for immigrants and refugees. One of such examples were the provisions in the Civic Integration Act according to which a failure to pass the civic integration examination shall be a ground to impose a fine, or withdraw a temporary permit to stay. Another example given were the provisions of the Aliens Act providing that, in order for a refugee to obtain family reunification, the family must already have been formed at the time the refugee fled their country and the spouse of the refugee must have the same nationality as the refugee.

Another monitoring body – EU Fundamental Rights Agency has published an alarming report on criminalisation by the EU member states of migrants in an irregular situation and of persons engaging with them. FRA found that certain apprehension and reporting practices disproportionately interfere with fundamental rights of migrants in an irregular situation. The report indicated, among others, that

> national legislation may require public authorities and service providers to report the offence of irregular entry and/or stay to the law enforcement agencies. Because of a real or perceived danger of detection, migrants in an irregular situation often refrain from approaching medical facilities, sending their children to school, registering their children's births or attending religious services. (FRA 2014, 6.)

Both of the monitoring bodies mentioned above: ECRI and FRA, are also deeply concerned with the situation of Roma in Europe. In their reports they point out various examples of discrimination and hatred suffered by Roma and caused by the state actions, qualifying such actions as pure violations of human rights. Just as an illustration, two examples of deep concerns voiced by ECRI and FRA can be provided. In its fourth periodic report on Slovenia, ECRI noted with concern that:

> one of the most serious issues related to Roma housing in Slovenia is the lack of access to a safe water supply in or near some settlements. [...] According to one study, 17% of Roma obtain water from springs or neighbours, 2% from cisterns and 2% have no access to running water at all. Another report states that some communities are forced to walk considerable distances to collect water in jerry cans from petrol stations, cemeteries or polluted streams. [...] ECRI deplores this situation. Lack of access to safe drinking water has a direct negative impact on the health of the Roma communities concerned, as well as indirect repercussions on their everyday life in other areas, such as education and employment. It contributes significantly to perpetuating the cycle of poverty and marginalisation of the Roma population. (ECRI 2014, 28-29.)

The 2016 Second European Union Minorities and Discrimination Survey conducted by FRA revealed that:

> Some 80% of Roma surveyed live below their country's at-risk-of-poverty threshold; every third Roma lives in housing without tap water; every third Roma child lives in a household where someone went to bed hungry at least once in the previous month; and 50% of Roma between the ages of six and 24 do not attend school. This report underscores an unsettling but unavoidable reality: the European Union's largest ethnic minority continues to face intolerable discrimination and unequal access to vital services. (FRA 2016, 3.)

The 2018 FRA Report a 'persisting concern: anti-Gypsyism as a barrier to Roma inclusion', brings even more worrisome reflections on how the situation of Roma derogates, in particular when it comes to hateful, xenophobic attitudes against them. (FRA 2018, 10-14)

However, the most authoritative interpretation of the human rights violations caused by manifestations of 'governmental xenophobia' targeting both migrants and the Roma community, is to be found in the jurisprudence of the European Court of Human Rights.

In the so-called migration cases dealt with by the Strasbourg court, a number of state provisions and policies concerning detention of migrants have been challenged and found as violating the European Convention's standards. In *Mathloom v. Greece*[8], the applicant was an Iraqi national who had been kept in detention for over two years and three months with a view to his deportation, although an order had been made for his conditional release. The Court held that there had been a violation of Article 5 para. 1 (right to liberty and security) of the Convention. It found, in particular, that the Greek legislation governing the detention of persons whose expulsion had been ordered by the courts did not lay down a maximum period and therefore did not satisfy the foreseeability requirement under the Convention. In another case, that concerned a Syrian Kurd's detention by Cypriot authorities and his intended deportation to Syria after police operation on 11 June 2010 removing him and other Kurds from Syria from an encampment outside government buildings in Nicosia in protest against the Cypriot Government's asylum policy.[9] Overall, the Court concluded that there had been a violation of Article 5 para. 1 (right to liberty and security) of the Convention in respect of the applicant's entire period of detention. In particular, the Court stated that the only available recourse in the Cypriot domestic law that would have allowed the applicant to have had the lawfulness of his detention examined, was ineffective and thus contrary to the Convention: the Court held that the average length of available proceedings, eight months at the relevant time, was undoubtedly too long for the purposes of fulfilling the right to have lawfulness of detention decided speedily by a court.

When it comes to Roma, in tens of its judgments the Court has so far clearly indicated particular patterns of state-imposed discrimination against them, as well as of states' non-reaction towards violence against Roma (including acts of violence and hate crimes committed by police forces). Along with the practice of the facto forced and automatic segregation of Roma children at schools[10], the ECtHR found on

[8] *Mathloom v. Greece* (no. 48883/07).

[9] *M.A. v. Cyprus* (no. 41872/10).

[10] See among other cases where the ECtHR indicated the systemic problem of state-enforced segregation of Roma children, on the basis of state-sponsored laws that have a disproportionately prejudicial effect on Roma children: *D.H. and Others v. the Czech Republic* (no. 57325/00), *Horváth and Kiss v. Hungary* (no. 11146/11) , *Lavida and Others v. Greece* (no. 7973/10). In *Lavida* the applicants were restricted to attending a primary school in which the only pupils were other Roma children. The Court held that there had been a violation of Article 14 (prohibition of discrimination) of the Convention taken in conjunction with Article 2 (right to education) of Protocol No. 1, finding that the continuing nature of this situation and the state's refusal to take anti-segregation measures implied discrimination and a breach of the right to education.

numerous occasions the existence of a systemic problem with the treatment of Roma minorities in a number of European states (Śledzińska-Simon 2012, 26-33). One of the most significant examples of cases examined by the Court where it clearly referred to facts that we identify as manifestations of 'governmental xenophobia', was the case of *Stoica v. Romania.*[11] During a clash between officials and a group of Roma, the 14-year-old applicant, a Romanian national of Roma origin, was allegedly beaten by a police officer despite a warning that he had recently undergone a head surgery. The important part of the complaint concerned the allegation that the ill-treatment and rejection of the demand to prosecute the police officer who had beaten the applicant had been motivated by racial prejudice towards Roma people. The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention, both under its procedural and its substantive limb: on the one hand, it found that the Romanian authorities had failed to conduct a proper investigation into the applicant's allegations of ill-treatment; on the other hand, Romania had not satisfactorily established that the applicant's injuries had been caused otherwise than by the treatment inflicted on him by police officers. The Court further held that there had been a violation of Article 14 (prohibition of discrimination) of the Convention taken in conjunction with Article 3: neither the prosecutor in charge of the criminal investigation nor the Romanian Government have presented proof that the incident had been racially neutral; on the contrary, the evidence clearly indicated that the police officer's behaviour had been motivated by anti-Roma racism.[12]

What should be stressed in particular is the fact that the ECtHR has turned out to be the only effective judicial mechanism of stating the cases of pattern-like, systemic discrimination and violence targeting migrants and Roma, where the state is either not reacting in a way consistent with the human rights protection standards and its obligations, or where the state itself is implementing laws and policies contrary to such standards, and, according to our classification, belonging to the category of 'governmental xenophobia'.

6. Concluding remarks

One would be tempted to imagine that in the Western democracies which have been, for decades, the architects and participants of the international system of human rights protection, based as it is on the respect for human dignity, on prohibitions of discrimination, and on combating all forms of intolerance, the phenomenon of governmental or

[11] *Stoica v. Romania* (no. 42722/02).
[12] Other similar judgments of the ECtHR include: *Cobzaru v. Romania* (no. 48254/99), *Škorjanec v. Croatia* (no. 25536/14), *Nachowa and Others v. Bulgaria* (no. 43577/98 and 43579/98).

state xenophobia is simply impossible to exist. Even more so, when we take into consideration Europe's history in 1930s with numbers of similar behaviours and legislations preventing liberal states from inflows of Jews from Nazi Germany, such as borders closures, incarcerating refugees from the Third Reich, or compulsory expulsions to Germany (Caestecker & Moore 2010). But it appears that the temptation to manage and orchestrate social fears in order to use them against a group defined as the common enemy is, despite the echoes of history, often too hard to resist nowadays. The benefits of implementing these strategies, also by means of criminal law, seem to prevail over the very real dangers produced as a result, such as the consolidation of xenophobic and racist social attitudes, depicting 'the Other' as an enemy or violating basic standards of human rights protection.

The awareness of these dangers, and in particular of the mechanisms which trigger such phenomena, is the key to reflecting about the much-needed change. It is also – perhaps particularly – important for those societies which have only recently become, or which are yet to become, the destination for 'the Others': migrants, refugees, asylum seekers (Klaus 2017). They need to bear in mind lessons from the past, like the concept of moral panic introduced by Cohen in 1972. In his own words we could define a phenomenon as moral panic when:

> A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people (...). Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten (...) at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way the society conceives itself. (Cohen 2006 [1972], 1.)

This idea explains the mechanisms of creating panic in societies by inculcating anxiety in people's perception, and it was used to fuel the 'fear of crime' (Garland 2008). Now "regular criminals" have been replaced by the 'criminal Other' that serves the same purpose of spreading fear and exclusion, also with the instruments of law.

In his excellent piece on why human rights fail to protect undocumented migrants, Gregor Noll (2010) analysis a hypothetical example of Anna, a school-aged child of undocumented migrants, and whose parents are facing a dilemma or rather a fear of being reported to the authorities and possibly, deported from the territory of a host state, if they decided to enrol Anna to a local school. Keeping in mind all differences between the situation of Anna, an undocumented migrant, and another Anna – a girl from a Roma community who attends a local

school, as the only Roma child in the classroom, one can easily list all kinds of discrimination, prejudice and obstacles Roma children are facing while enrolled into public schools with the majority of non-Roma kids. All this results in various violations of human rights of minority groups.

As the governments of many European states are turning towards xenophobic and nationalistic attitudes and policies, the only real solution to the problems caused by the practices of 'governmental xenophobia', and crimmigration in particular, seems to be found today within the European (but also universal, UN-based) human rights protection systems. These practices result in multiple violations of human rights and should be considered as non-compliance with states' obligations arising from human rights protection treaties. Holding states accountable may eventually lead to ending the policy of othering in law and through law. Thus, all methods of enforcing this accountability should be involved. In particular, and as the example of Roma rights prove, strategic litigation in front of the European and universal human rights judicial bodies can serve as a helpful tool of establishing legal standards concerning practices and policies of states vis a vis individuals belonging to the most fragile minority groups, undocumented migrants and refugees being a prime example. Additionally, and on another level, more scholarly work and literature should engage in the phenomenon of crimmigration and governmental xenophobia, building the core analytical structure for counteracting human rights violating behaviour of those in power. The present article should be seen as just a modest attempt to achieve this goal.

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