Oñati Socio-Legal Series (ISSN: 2079-5971)
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Roma Customary Law and Gender Roles in the Practice of Portuguese Courts

OÑATI SOCIO-LEGAL SERIES VOLUME 15, ISSUE 6 (2025), 2126-2151: GENDER IN CUSTOMARY AND INDIGENOUS LAW AND PROCEEDINGS
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL.2384
RECEIVED 29 MAY 2025, ACCEPTED 24 SEPTEMBER 2025, FIRST-ONLINE PUBLISHED 21 OCTOBER 2025, VERSION OF RECORD PUBLISHED 1 DECEMBER 2025

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Abstract

While Roma law is not officially recognised as "proper law" and remains scarcely known, it is often relied on by Roma parties in litigation before Portuguese courts, most notably in cases involving child marriages and early school leaving by Roma girls. The Roma are Portugal's most visible ethnic minority and occupy a singular position in the "multicultural jurisprudence" of Portuguese courts, as theirs are the "culture defences" most often brought before the courts, and also those that the courts are most likely to address directly in their reasonings, either to dismiss or to acknowledge their relevance to the adjudication of the cases at bar. Based on findings from a socio-legal research project into the case law of Portuguese courts, conducted between 2018 and 2022, this article discusses how Roma law and its norms about gender roles are reflected and challenged in court practice, based on the reasonings of selected judgments, and on the opinions of judges and prosecutors interviewed for the project.

Key words

Roma law; gender roles; cultural diversity; courts; Portugal

Resumen

Si bien el derecho romaní no está reconocido oficialmente como "derecho propio" y sigue siendo poco conocido, las partes romaníes suelen invocarlo en los litigios ante los tribunales portugueses, sobre todo en los casos relacionados con los matrimonios infantiles y el abandono escolar precoz de las niñas romaníes. Los romaníes son la minoría étnica más visible de Portugal y ocupan una posición singular en la "jurisprudencia multicultural" de los tribunales portugueses, ya que son ellos quienes más a menudo invocan "defensas culturales" ante los tribunales, y también son los que

Research funded by the Portuguese Science Foundation (FCT) under grant PTDC/DIR-OUT/28229/2017.
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más probabilidades tienen de que los tribunales las aborden directamente en sus razonamientos, ya sea para desestimarlas o para reconocer su relevancia en la resolución de los casos que se juzgan. Basándonos en las conclusiones de un proyecto de investigación sociojurídica sobre la jurisprudencia de los tribunales portugueses llevado a cabo entre 2018 y 2022, en este artículo analizamos cómo el derecho romaní y sus normas sobre los roles de género se reflejan y se cuestionan en la práctica judicial. Para ello, nos sustentamos en los razonamientos de sentencias seleccionadas y en las opiniones de jueces y fiscales entrevistados para el proyecto.

Palabras clave

Derecho romaní; roles de género; diversidad cultural; tribunales; Portugal

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1. Introduction

It is widely acknowledged that Roma women and girls are still prevented from enjoying equal human rights in the fields of education, employment, health, participation in public and political life, etc., by the combined effects of institutional racism nurtured by historical discrimination and of sexism imbedded in "norms which are related to their ethnic origin" (Council of Europe 2024). While the concept of Roma law remains scarcely known by outsiders and is reportedly very diverse from one Roma community to the other (Corriggio 2007, 6-7, 30-33; Costa 2021), there appears to be little doubt about its transversal patriarchal tenets and the gender discrimination at the core of recurring early school leaving by Roma girls, and practices such as "child marriages."

Roma law is a form of customary law, even if not always recognised as such by state legal systems (Corriggio 2007, 4). In Portuguese court practice, for example, references to Roma law (*Lei Cigana*) by judges and prosecutors are generally accompanied by commas to make it clear that the use of the term "law" (*Lei*) is not technical but metaphorical, for the purpose of accommodating the terminology used by the Roma parties and ease intercultural communication. When given some consideration, Roma norms are not viewed by the courts in their legal significance but as mere expressions of Roma tradition or culture, at most as "custom" (*costumes*) or usages (*usos*), not customary law (*Direito consuetudinário*). The Roma themselves usually refer to "their law" or Roma law (*Lei Cigana*) without qualifying it as customary law. Nevertheless, Roma law meets the classical definition of customary law in Portuguese legal literature[1] and, as argued by Comparative Law scholar Jennifer Hu Corriggio (2007, 6), its legal significance should not so easily be dismissed by state law.

Like other customary laws, Roma law is flexible and fluid, consisting of mostly unwritten norms passed on orally by the elders of each community from one generation to the next and mutually understood as binding (Corriggio 2007, 23-24; Casa-Nova 2012, 128; Costa 2021). These norms retain considerable relevance in the governance of day-to-day matters, even among settled Roma communities, which are by now a large part of the Roma communities present in Portugal.[2] As a "minority legal order" (Malik 2012,

[1] As explained by Portuguese legal scholar João Baptista Machado (1997), customary law refers to norms arising spontaneously from the reiteration over time of a social practice within a given community, when that practice is perceived as mandatory by the members of said community. It may be secundum, praeter or contra legem, i.e., coincide with state law, go beyond state law, or contradict state law.

[2] The Roma (commonly referred to as *Ciganos*, by the Roma themselves and the Portuguese society at large) have been present in Portugal since the sixteenth century (Costa 2021) and are the most socially and politically visible ethnic minority in the country. According to the results of the Survey on Living Conditions, Origins and Trajectories of the Resident Population in Portugal, carried out in 2023, 47,500 people living in Portugal aged between 18 and 74 self-identified as Roma, in a pool of 7,585,000 people (Instituto Nacional de Estatística – INE – 2024). Despite continued discrimination and marginalisation, most Roma in Portugal are Portuguese nationals and speak Portuguese. Ethnographic work conducted with Portuguese Roma communities indicates that there are three main Roma groups: the so-called Portuguese Roma (*ciganos portugueses*); the Galician Roma (*ciganos galegos*), who originated from Galicia in Spain; and the *chabotos*, who are said to be a mix of Portuguese Roma and non-Roma based in the Northeast of the country (Costa 2021, 98-109). Foreign Roma originate mostly from Romania.

4-5), Roma customary law coexists with official state law without directly challenging its supremacy. Roma leaders do not even strongly advocate for an official recognition of Roma law within the framework of the state legal system (Corriggio 2007, 12), contrary to what we have seen in the past decades for Islamic minority legal orders in the United Kingdom, France, and Germany, for example (Cesari *et al.* 2004, 14-15, Fournier 2005, 73). As reported in the literature, the common understanding among the Roma is that, while Roma law ranks higher in their value system and disputes should be kept within the Roma internal legal system as much as possible, they must submit to the state jurisdiction when "the police are called" (Corriggio 2007, 40).

Roma's cognizance of their duty to obey state law does not mean that they will not invoke Roma law as "culture defence" before state courts, to explain (and attempt to justify) their behaviour or to claim exemptions from generally applicable laws (e.g., Kusters 2009, Kurczewski and Fuszara 2013, Ruggiu 2019, 13-16). In Portugal, Roma litigants stand out for their use of culture as a defence by comparison with other minority groups, which tend to shy away from making culture claims for fear of being seen as trying to abuse the system. The Roma are overrepresented in the pool of "multicultural" case law, i.e., cases involving some measure of cultural (ethnic, national, religious, and/or linguistic) diversity. The cases with Roma litigants are precisely those where Portuguese courts are most likely to be confronted with culture arguments (raised by the parties and/or brought in by social workers' reports) and to make remarks about diversity, culture, and equality, offering a clear illustration of the tension observed in Europe between the right to equality and the right to difference, and the weight gender power dynamics have in the equation.

Based on findings from the project "Equality and Cultural Difference in the Practice of Portuguese Courts: Challenges and Opportunities for an Inclusive Society" (InclusiveCourts),[3] this article takes stock and makes a critical assessment of how Roma law is being invoked by Roma litigants before Portuguese courts and perceived by judicial actors (judges and prosecutors, in particular). The approach is qualitative, top-down, and state centric, as the focus is put on what state officials have said in their rulings and during the interviews conducted for the project. The project's findings allow for a window into how Roma litigants portray Roma law without directly giving them "voice," since the project InclusiveCourts was focused on the courts' response to cultural diversity in general, and included only limited interactions with stakeholders besides judicial actors, as will be detailed in section 2. The background information on Roma law and gender roles provided in section 3 is therefore entirely drawn from secondary sources. As will be seen in section 4, Roma norms about gender roles occupy a prominent place in the practice of Portuguese courts – both the case law and the views of judges and prosecutors –, with instances of stereotype-reinforcing language and assumptions, but also of reasonable accommodation of culture claims, and of constructive engagement between judicial actors and Roma leaders for the betterment of the status enjoyed by Roma women and girls.

[3] Conducted between 2018 and 2022 with funding from the Portuguese Science Foundation (FCT), reference PTDC/DIR-OUT/28229/2017.

2. Research design

2.1. Object, objectives, and research questions

The project InclusiveCourts was designed to fill a gap in the "multicultural jurisprudence" literature (Renteln 1993, Torry 1999, Maier 2001, Foblets and Renteln 2009, Kymlicka *et al.* 2014) by focusing on the practice of Portuguese courts, which had been conspicuously absent from international comparative studies on the interplay between cultural diversity and legal practice, and not paid much attention in Portuguese academia either, particularly by legal scholars.[4] As with other research projects into the multicultural case law of domestic courts, the underlying motivator is the realization that domestic courts have become places of encounter and tension among different cultures and legal traditions (Renteln 1993, 437-505, Foblets and Dupret 1999), and that, while courts are arguably better suited than lawmakers to find reasonable accommodations of culture claims on a case-by-case basis (Saiz Arnaiz *et al.* 2013, 19), there are considerable risks involved in letting culture into the courtroom, due inter alia to judicial actors' lack of "cultural competences" (Demers 2011). Portuguese courts' cultural insensitivity, for example, has been called out by the European Court of Human Rights (ECtHR) on more than one occasion,[5] and the government has been repeatedly advised by international monitoring bodies to increase training for the judiciary as part of the effort to combat intolerance, stereotypes, prejudice and discrimination towards vulnerable and minority groups (such as the Roma), and to promote sensitivity and respect for cultural diversity (e.g., Human Rights Commissioner – HRC – 2020, 15; Committee on the Elimination of Racial Discrimination 2023, 8).

InclusiveCourts' main goal was to advance knowledge on how cultural factors come into play in judicial proceedings and how courts deal with these factors when applying the general law to individual disputes, i.e., how they respond to the "challenge of cultural diversity" (Ballard *et al.* 2009, 9). The driving research questions were (*i)* what types of cultural diversity-related cases appear before the Portuguese courts (litigants' profiles, cultural arguments used, and legal issue)?; (*ii*) how do courts reason in these cases (legal and extra-legal arguments, language, and balancing exercises)?; (*iii*) how do judicial actors perceive the challenges associated with these cases?; and (*iv*) how do other stakeholders perceive the courts' performance in dealing with diversity? The approach was both descriptive and normative, since the goal was not just to know how courts act in situations involving some measure of cultural diversity, but also to discuss what courts should be doing differently to be more inclusive, i.e., to ensure access to justice for minorities and foreigners, so that their access to justice and human rights is not hindered by cultural or linguistic barriers, unconscious bias, and systemic racism.

2.2. Methods

For the observation of court practice, we relied on a combination of methods – search in case law databases for the selection of relevant court judgments, legal analysis of the judgments selected, focus groups with key stakeholders (judges, prosecutors, attorneys,

[4] Notable exceptions are Pinto and Canotilho (2005), and Cunha and Jerónimo (2015).

[5] See, e.g., *Qing v Portugal*, ECtHR (first section), application No. 69861/11, 5 November 2015, § 91; *Soares de Melo v Portugal*, ECtHR (fourth section), application No. 72850/14, 16 February 2016, § 118.

civil society representatives, and court interpreters), online questionnaire applied to judges and prosecutors, and semi-structured interviews with judges and prosecutors.

The research into the case law was conducted throughout the duration of the project and relied mainly on keyword searches (using variations of terms such as culture, religion, Muslim, Roma, Church, ethnic, race, foreign, language, *talaq*, African, Brazilian, Cape Verdean, and Jehovah) in open access case law databases, the largest of which is provided by the Ministry of Justice IGFEJ Institute, which has judgments from all higher courts starting in the 1980s.[6] The resulting inventory of multicultural case law is far from exhaustive,[7] but exceeds eight hundred relevant judgments and allows for a good approximation to what has been the practice of the courts over the years.[8] The review of the case law followed a common template focusing inter alia on the way courts use concepts such as culture, ethnicity or identity, the way they interpret the principle of equality and balance it with respect for cultural difference, their openness to cultural arguments/evidence, and the weight that they accord such arguments/evidence in their rulings.[9]

The focus groups with stakeholders were held online in the months of October and November 2020. Each focus group had seven to eight participants, whom we invited through different channels, but with care to ensure, as much as possible, diversity of geographic location and gender. The participants were asked to share their experiences and opinions on a range of subjects, variable according to their respective profiles, but all ultimately coming down to what types of cases occur (again, by legal subject, groups, and cultural arguments), how the courts perform, and whether there are specific challenges associated with cultural diversity.

The online questionnaire was designed to ascertain the level of familiarity of Portuguese judges and prosecutors with cases involving cultural diversity, the weight they give to cultural information presented in court, the sources they rely on for cultural information, and their views on possible cultural barriers, and on the adequacy of the legal training currently available from law schools and the Centre for Judicial Studies (CEJ). It

[6] Supreme Court of Justice, Supreme Administrative Court, Courts of Appeals of Coimbra, Évora, Guimarães, Lisbon and Porto, Central Administrative Courts South and North. See http://www.dgsi.pt/ [01.05.2025].

[7] Reliance on the Ministry of Justice's database has considerable shortcomings, since it only covers higher courts judgments, only goes back to the early 1980s, has mostly summaries for the first years, and, although full text publication is now the norm, it is estimated that only a small fraction of the judgments rendered by the higher courts are made available on the database (Castelo 2020, 122-127). Furthermore, the use of key words is bound to leave relevant judgments undetected, whenever the court makes no reference to the parties' ethnicity, nationality, language or religion.

[8] "Relevant judgments" means those where ethnicity, religion, language, nationality and/or culture were part of the issue at stake and not merely mentioned in citations of legal provisions or in the title of a public body, e.g. references to Article 13 of the Portuguese Constitution (equality and non-discrimination) or to officials of the High Commission for Immigration and Ethnic Minorities. Also, from the judgments where the terms *culture* or *cultural* occur, we only selected those where the terms were used with the meaning of cultural identity (i.e., ways of living together, value systems, traditions and beliefs), and not when they were used with the meaning of cultural heritage or high culture (arts and literature). Relevant judgments were individuated by looking at the legal issue and the context in which the keywords appeared in the judgment.

[9] A few of the judgments selected were uploaded onto the project's dedicated website, along with annotations (in Portuguese and in English) by researchers on the team and guest contributors. See https://inclusivecourts.pt/en/jurisprudencia2/ [01.05.2025].

consisted of 23 questions, with a mix of multiple-choice and Likert scale answers, plus one open-ended question about satisfaction with training received and available. The questionnaire was circulated among judges and prosecutors with the collaboration of the High Council for the Judiciary, the Attorney General's Office, and CEJ. It was applied to 231 respondents, mostly judges (79,7%) and women (62,8%).

The semi-structured interviews with judges and prosecutors were designed as an opportunity to get a more in-depth look into their experiences with cases involving cultural diversity, and into their perception of what (if any) are the challenges associated with these cases. The interviews followed a basic script, covering most of the topics included in the questionnaire. Potential participants were initially identified on the basis of their direct involvement in judgments signalled as relevant during the research into the case law, but this proved unfeasible as many judges had moved or retired, so most participants ended up being invited through institutional or personal channels, and then snowballing. Similarly to what has been reported for other research projects involving interviews with legal elites (Gupta and Harvey 2022), it was not easy to find judges and prosecutors willing to be interviewed, mostly due to lack of time, but also with the argument that they had no experience with cultural diversity-related cases, which some equated with cases involving Roma litigants. Of the 55 interviews initially planned (33 judges, 22 prosecutors), we were able to conduct 40 interviews – 31 judges (17 men, 14 women) and 9 prosecutors (6 women, 3 men). The interviews were held online between May 2021 and September 2022.[10]

2.3. Place and purpose of this article in the overall research project

From the trove of data collected for the project, this article carves out the case law and stakeholders' opinions pertaining to the courts' handling of claims directly or indirectly based on Roma law, and the courts' interactions with Roma communities more broadly.

Roma cases are arguably the best laboratory to test the cultural competences of Portuguese judicial actors and the preparedness of Portuguese courts to respond to the challenges of cultural diversity. As noted earlier, Roma litigants stand out in the ensemble of multicultural case law of Portuguese courts, both in quantity (i.e. number of cases in which the Roma ethnicity of the parties is explicitly mentioned in the text of the judgment) and in "quality," meaning the direct consideration of cultural arguments by the courts, irrespective of whether to quash these arguments as irrelevant, to acknowledge them as having some weight, or to treat them as decisive in the adjudication of the case at bar. Noticeably, cases involving Roma litigants are the multicultural cases *par excellence* in the minds of many judicial actors in Portugal, to the point that some declined to be interviewed for the project with the argument that they had no experience with cases involving Roma parties. It is also noteworthy that, while

[10] Most interviews were conducted by anthropologist Ximene Rego, and by me, as co-interviewer or single interviewer. Other researchers conducting or co-conducting interviews were Manuela Ivone Cunha (who led the focus groups), Andreia Rodrigues, and Maria José Casa-Nova. The interviews were conducted in Portuguese. English translations of direct quotes from participants in the individual and group interviews included below will be referenced by the code attributed to each interview/participant (FGJ, FGP) – for focus groups with judges and with prosecutors, respectively; IJM, IJW, IPM, IPW – for individual interviews with male judges, female judges, male prosecutors and female prosecutors, respectively). Direct quotes were furthermore edited to streamline content and ease readability.

scholars insist on the diversity and general lack of understanding about Roma's legal systems (Corriggio 2007, 1), Portuguese judges and prosecutors seem quite confident as to their experience-based knowledge about the Roma, and judges hardly ever rely on academic studies or expert witnesses as sources for the (sometimes inaccurate and/or overbroad) remarks they make about Roma norms in their judgments. At the same time, the training modules on cultural diversity topics offered at CEJ in recent years have mostly focused on information about the Roma (Jerónimo 2016, 304-305), and there are reports of efforts by judges and prosecutors to engage with Roma leaders and intercultural mediators, as already mentioned and will be detailed below.

By looking into how Portuguese courts deal with Roma cases and how judicial actors articulate their views about these cases, we aim to make a contribution to ongoing socio-legal research on "multicultural jurisprudence" and legal pluralism, as we offer insights into the practice of a lesser-known domestic jurisdiction, which faces many of the challenges of other domestic jurisdictions in Europe (e.g., suspicion of cultural claims, unreliability of cultural information, state-centric views of the law), while having its specific blind spots (as to the courts' commonsense knowledge about the Roma, for example), and promising practices of constructive engagement with Roma communities. These insights are arguably valuable not only for socio-legal scholarship but also for legal practitioners and policy makers in Portugal and elsewhere in Europe, as a diagnosis of practices that should be encouraged and of aspects to correct or improve moving forward. The focus on cases involving gendered cultural norms allows furthermore a window into how state actors perceive the interplay between Roma customary law and state law, as it confirms that the assumption that Roma law is detrimental to gender equality is widely held among judicial actors, while revealing that many judicial actors trust in the adaptability of Roma norms regarding gender roles and that some are even actively invested in nudging Roma leaders into revising those norms (in line with state law) for the betterment of Roma women and girls.

3. Roma law and gender roles: a very short introduction

Considering the immense diversity of Roma communities and Roma legal systems , and the impossibility of conducting ethnographic research into Portuguese Roma communities in the timeframe allowed for this article, we relied on ethnographic studies conducted in Portugal, by Portuguese sociologists Maria José Casa-Nova (2012) and Sónia Isabel Teixeira Costa (2021), and in Spain, by North-American Comparative Law scholar Jennifer Hu Corriggio (2007),[11] to provide the background information on what can be viewed as "general traits" of Roma law in Portugal and its regulation of gender roles.

As noted earlier, Roma law is customary law. It consists of mostly unwritten norms passed on orally by the elders of each community/family from one generation to the next and mutually understood as binding (Corriggio 2007, 23-24, Casa-Nova 2012, 128, Costa 2021). The norms cover a wide range of subjects (most prominently family, territorial, and trade relations), mixing strictly legal with moral and social etiquette standards

[11] Corriggio's study on the gitanos of Andalucía is useful here given the purported similarities that exist among the Roma communities of Spain and Portugal, as voiced by Corriggio's own interviewees (Corriggio 2007, 39).

(Costa 2021). An important organising principle is that which divides behaviours into pure/right/honourable and impure/wrong/shameful (Costa 2021). It requires the avoidance of contact with polluting elements, such as those associated with persons of non-Roma ethnicity, which fosters isolation (Corriggio 2007, 37-38). Individual and family honour is directly tied with respect for Roma law (Costa 2021). Community cohesiveness is paramount, which results in a tight social control, and banishment is the ultimate penalty (Corriggio 2007, 38). Marriages tend to be endogamous, as a strategy for preserving the group's identity (Casa-Nova 2012, 128-131, Costa 2021). Dispute resolution mechanisms ("Roma tribunals") are participated by the whole community under the elders' leadership (Corriggio 2007, 31-34), and strive for consensus (Costa 2021).

The system is patriarchal. It is governed by the words of "respected men," who assert Roma law and act as mediators or judges in case of intra- and inter-community disputes among Roma (Costa 2021). Roma women are "expected to be absolutely loyal to both their men and their community, and shoulder the added burden of being guardians to their culture" (Corriggio 2007, 24). While their position within the community varies depending on their age, personal attributes, and stage in the life cycle (Corriggio 2007, 27-28), women are always in a subordinate position vis-à-vis men. The widows of "respected men" may "inherit" part of their husbands' authority and act as mediators in family disputes, but generally not with the same reach. The growing numbers of Portuguese Roma embracing the Evangelical Church of Philadelphia, while a factor of change for Roma law, is also said to contribute to reinforce gender inequalities by keeping women in passive and secondary roles within the community's religious practices (Costa 2021).

Gender differentials take on many forms. For example, it is said that patriarchs who govern over communities with more male members have more power (Corriggio 2007, 29). Nowadays, women are generally allowed to attend and speak at dispute resolution assemblies, but they are still required to wait until every man has spoken before they take their turn (Corriggio 2007, 32, 35). Women do not have a seat in the elders' council, but they may hold their own version of the council to address "women's issues" (Corriggio 2007, 36). It is theirs, *inter alia*, the role of administering the "virginity test" to young brides (Costa 2021).

Marriage rules follow the patriarchal norm, even though the bride (unlike the bridegroom) is entitled to break off the engagement without dishonouring herself or her family (Casa-Nova 2012, 129), and it is up to the wife to dissolve the marriage in case of adultery or domestic violence. Marriage proposals are addressed by the bridegroom's father to the bride's father and not the other way around. It is with the bridegroom's family (or nearby) that the newlyweds go live after the wedding,[12] and the bride is required to prove her honour by passing the "virginity test." Also, while marriages with non-Roma are always frowned upon as a source of shame, the marriage of Roma women with non-Roma men continues to be seen as more problematic and sometimes grounds for physical punishment or banishment. The children of a Roma father and a non-Roma mother are considered to be more truly Roma than those of a Roma mother and a non-

[12] Although the rule may be bent when the bride's family is wealthier (Casa-Nova 2012, 129-130).

Roma father (Casa-Nova 2012, 131-132). Physical punishment or banishment are also the penalties for adultery by a woman, which again is viewed as a much more serious offence than that of adultery by a man. When their male children or husbands die, Roma women are expected to do the mourning in the most rigorous (self-effacing) way, and, contrary to Roma widowers, are not supposed to remarry, particularly, if they have children, no matter how young they are. Similarly, divorced women are seen as dishonouring themselves and their families if they remarry, which impacts their "right" to keep the custody of their children (Costa 2021).

Existing research indicates that Roma law and social practices are changing, for reasons ranging from sedentarisation and residence in urban areas to closer interactions with state institutions (including the courts) and the non-Roma population. It is said that there is a growing convergence between Roma law and state law, with the former proving to be "adaptable" to context and social integration opportunities (Costa 2021). Significantly, women are credited for being "great catalysts for change in their communities" (Corriggio 2007, 36) as they are allowed to pursue their studies and obtain a university education. As will be seen next, Roma girls' schooling has been front and centre of the Portuguese courts' interactions with Roma communities, and the matter in which the courts have made a more deliberate effort at intercultural dialogue, with seemingly positive (if still limited) outcomes.

4. Roma law and gender roles in the practice of Portuguese courts

4.1. Views from the bench: Interview findings

4.1.1. Roma cases and the courts' familiarity with cultural diversity

The judges and prosecutors interviewed for the project were generally dismissive of the challenges posed by cultural diversity to court practice, noting that there has always been diversity and that ethnic or religious differences are not more challenging than regional differences in terms of e.g. habits and vocabulary between North and South or rural and urban areas, for example. The courts' long experience with Roma communities was singled out as evidence that they are well accustomed and prepared to deal with cultural diversity.

> The courts have always been in contact with different cultural, ethnic, and religious realities. Maybe the oldest reality is the Roma community, which in B. [city] is large, so, there were always many cases involving persons of Roma ethnicity. [FGJ6]

> We have the issues with the Roma community, which has a very particular way of being, usually they bring the whole family inside and outside the court. So, we always handled these questions, they always existed. [FGJ9]

The overall sentiment is that cultural diversity – even that which is brought by more recent immigration – is a non-issue for the courts, since the law is equal for all, and they trust their capacity to be neutral.

> Outside of possible language barriers, I do not see any other difficulties. We must assess the facts and apply the law, so I do not believe that these cases are more difficult than the others. [FGJ9]

> For the judge, there is no difference between the persons, they are all identical and what we have to do is apply the law. [IJM05]
>
> When I enter a case, I am neutral. It is as if I wear a black blindfold, that is what I learned, that is how I was formatted. I think we are all formatted in this way and so the issue is not even raised. [IJW03]

An uncritical belief in the neutrality of state law and in the judges' ability to be entirely neutral that is problematic, as it suggests aloofness to societal concerns about systemic racism and unconscious biases (Jerónimo 2022, 3-4).

Judges and prosecutors nevertheless acknowledge that they give at least some importance to the cultural information presented in court to understand the parties' sociocultural background, and may even give weight to cultural factors when adjudicating the cases, albeit without spelling it out in their judgments. That is most notably the case when deciding on the concrete penalty for criminal offences and when ruling on child protection measures.

> If we are talking about issues strictly related to the community and to customs, I think that the culture argument must be considered and have some weight. [IJM13]
>
> Well, I think that the use of the culture argument is only to determine the measure of the penalty or, in another perspective, by comparison with our culture, to explain the decision to the defendant, but only for the measure of the penalty, never as grounds for the decision. The decision is grounded in the law. [FGJ10]
>
> I think that we oftentimes value cultural factors, just do not know if we write it. [FGJ7]
>
> We may have more tolerance in child protection cases, but that oftentimes is not put in writing. [FGJ4]

4.1.2. Judicial actors' "cultural sensitivity" vis-à-vis the Roma

The examples of instances where the courts weighted cultural information often involve Roma litigants. They include e.g. the courts' attention to the fact that (a) trade in counterfeit goods is central to Roma communities' livelihoods; (b) individuals who appear as single in their identity documents may be married under Roma law; (c) getting a drivers' licence is impossible for Roma who do not know how to read or write; and (d) Roma men truly believe that they cannot go around without a firearm.

> I had some situations of trade in counterfeit goods by persons of the Roma community who sold those goods at markets. And an argument which was often used, besides the fact that they did not understand that they could not sell counterfeit goods, because it is something very rooted in that trade practice, was the fact that that was their livelihood, their sole and very normal way of living. [FGJ4]
>
> The court itself already internalised somehow these citizens' culture, because one of the questions asked, judges usually ask: 'Are you married?', 'Are you married under Roma law?' So, we know that under civil law they are not married. They are single, but there is always the care to ask: 'Are you married under Roma law?' They usually say yes, you understand, even young Roma, because they usually marry young. [FGP8]
>
> Maybe, if we look at the penalties for driving without a drivers' licence for non-Roma and for Roma, the latter commit the crime more times before they are arrested, because we consider that they do not know how to read or write, they learned to drive at age

> seven, movement is important, and public transportation must not be very nice for someone of Roma ethnicity. [IJW02]
>
> And I came to realise that it is a fact, they say 'It has to be', 'My father had one, my brothers have one, a Roma cannot be without a gun', 'It cannot be!' It can, of course it can, but well… [IJW04]

Other signs of cultural sensitivity are the judges' and prosecutors' awareness of the advantages of engaging Roma patriarchs (but also matriarchs) in finding solutions to problems that arise in disputes among the Roma or in the Roma's interactions with the courts and state law. For example, when a "peace agreement" between the patriarchs of two rival Roma families prohibiting the members of their respective families of entering the district controlled by the other family impacted the visitation rights of the father in a divorced Roma couple, the family court judge called in the patriarchs to assist the court in ensuring that the child would be able to visit her father on the weekends.

> The reason given by both parties for the lack of visits was that the patriarchs of both families had entered a peace agreement forbidding crossings over a given border. The patriarchs ended being summoned to a hearing to know if it was possible to overcome that situation. [FGJ4]

Also, to ensure order in the courtroom during a trial with several Roma defendants (and many family members in the audience), a judge looked for the leader of the group and, having individuated the matriarch, talked to her to set some ground rules for the proceedings.

> These cases of drug trafficking and theft, my main challenge was a matter of strategy to ensure order in the courtroom without exercising my authority too directly, which I think is often counterproductive, and so I try to understand what is the best way to keep some order in the courtroom. I remember that one time, the family patriarch had a disease, so it was not him who led the family in practice, it was his wife. And I remember that I called her to the side and said: 'Come on, madam, for this to go well, we have to set rules here'. So, identify who is in charge in the community, engage him or her, to ensure that things work out. [IJW31].[13]

Another example of strategic engagement was the decision by a Public Prosecutor to meet with Roma patriarchs and try to persuade them to put a stop to child marriages.

> In cases of child sexual abuse, my coordinator at some point had the care to meet with the patriarchs and explain them that the girls should not have sex with older men, because that is a crime; to explain that they should not allow marriages, but they do not

[13] Interestingly, one judge remarked that the patriarchs' authority over younger generations sometimes helps the courts in conveying a more effective message about the criminal nature of young Roma defendants' actions: "The patriarch, the grandfather or great-grandfather depending on the generations has a very strong influence over the children, grandchildren and great-grandchildren. I distinctly recall that on many occasions the family attended the trial and, as the facts were being described, the patriarch made an air of reproach which the defendant saw and which clearly impressed him more than any explanation given by the court. And that family mediation sort of echoing the reproach of the court and making it more effective was something that stayed with me, because I never found it in any other community, and considered it to be very effective" [IJM25].

> accept it well. It may have changed something, have some echo in their consciences, but it is difficult to change it. [IPW20][14]

The importance of keeping Roma girls in school after they reach the menarche (i.e., puberty) has also been impressed upon the patriarchs, with seemingly more promising outcomes.

> I have been lucky to be able to negotiate, be it with the parents, with the uncles, with the patriarch. I have been lucky to be able to negotiate, which is the proper term, a consensus solution for the girls to stay in school. [IJM07][15]

However, the use of cultural arguments by Roma litigants is sometimes decried as manipulative.

> Many times, cultural differences are invoked to manipulate, namely, not considering my difference is discriminatory against me, or is racism, whatever. For example, the placement of three Roma children into state care. Here the argument that was used was to say 'This is discrimination! Because we are Roma, because we live here, like this, we have no money and, therefore, they take them, if it was someone important they would not take the children'. [FGP9]

> Oftentimes the arguments and the manipulation of some cultural factors, to introduce elements or pseudo-elements of some discrimination, may contribute to a defence strategy and that also has to be weighted by the magistrate which reviews the facts on a case-by-case basis. [FGP11]

Not surprisingly, the take of some of the participants in the focus groups with attorneys and with representatives of civil society organisations was that the courts do discriminate against the Roma. Complaints against the courts' discriminatory treatment of the Roma are also common in the case law, namely that of the Constitutional Court, as will be detailed below. Although many judges and prosecutors made a point of stressing that they were not aware of there being any discrimination, some mentioned past discriminatory practices against Roma defendants, namely the default assumption of a risk of flight warranting their detention on remand.

> Now, luckily, we do not see many situations like these, but, in criminal cases, it was not rare to see rulings on preventive measures which incorrectly attributed, for example, to the Roma ethnicity a bigger residential instability as grounds to establish a risk of flight and of continuance of criminal activities. That is wrong and it is not even necessary to resort to those arguments. [IJM21]

[14] A more optimistic take was voiced by a judge who recalled having heard the testimony of a patriarch as a witness for the defence in an early marriage case to the effect that there was growing consensus among the patriarchs about the need to put an end to the practice. "I heard the testimony of a community leader and it was very useful. One of the defendants brought in a gentleman who presided over an association of Roma communities, an older person, who gave witness testimony and mentioned several Roma customs, but was critical of the fact that those situations still took place, because the patriarchs of the various communities had already started to reach agreement as to the need to put an end to it" [IJW04].

[15] On the topic of school absenteeism by Roma children, one of the judges praised the role of Roma mediators who helped him in ensuring that a Roma boy could return to school. "I already felt the need to call in Roma mediators. So, in child protection cases, I called in mediators, which is a very curious role, and they helped me a lot in bringing C. back to school" [IJM10].

4.1.3. Roma law and harmful customary practices v state law

Judges' and prosecutors' references to Roma law (both orally and in writing) are mostly made between commas, as noted at the outset of this article. There are occasional references to Roma law as customary law, but with the addition that it is not applicable as it is contrary to state law.

> The marriage, which, as you know, starts much earlier in the Roma ethnicity, raises the question when there are sexual relations with children under the age of 16, and naturally we must apply our laws, the laws of the country which are the only ones here, naturally, and if they collide with what the Roma call laws, the Roma law, which obviously is a customary law which has no application, obviously. [FGJ8]

More often, Roma law is treated as mere custom or tradition.

> When I am questioning a person who identified himself as 'I am Roma, I am single, but married according to Roma law', I respect that custom. When they answer, 'According to our law…', which is very often the case with persons of Roma ethnicity, then I have to ask, 'Explain to us what are those customs of yours…', I as a judge cannot say that it is the law, because they are customs. [IJW04]

> But, according to their customs, their tradition, their law, as they say, that is frequent. It is the Roma law, that is what they say. They use the argument that it is not a sexual abuse, it is our tradition. [IPW20]

School absenteeism or early school leaving and child marriages are the Roma practices where judges and prosecutors are more inclined to reject the relevance of cultural information. Even here, however, a few acknowledge that there is some "tolerance," and that the courts' approach is mostly "pedagogical" in trying to persuade Roma families of the need to abandon harmful practices.

> There are arguments that are acceptable and others which are not because they breach our law, namely that of school absenteeism. Of course, the attempt was more pedagogical on our part, to find a balance between what is culture worth preserving and what are proven harmful practices that must end. [FGJ6]

> I mean, we have, perhaps, more tolerance, I do not say that the law is not applied, but often we have more tolerance, a wider latitude in the way we see certain types of failures to comply, for example, in the question of school absenteeism, in families which are very distant from what is the standard of a family, with all respect for cultural diversity, but with the standard of a normal Portuguese family. [FGJ4]

> Lately the crimes of sexual abuse because of marriages between children, it is not my experience because it does not reach the judges, but I know that the public prosecutors often drop or suspend the criminal charges in those cases, considering the habits of the community and the fact that the Roma do not see it as reproachable. [FGJ7]

> It is clear that they have a lower degree of guilt living in that… considering those values and that culture, their own culture of accepting marriages of children. [IPW20]

The vulnerability of Roma girls under Roma law is omnipresent in discussions about early school leaving and child marriages, even if these are not always spelled out as instances of gender discrimination.

> In cases of school absenteeism, mainly after a certain age for Roma girls, less for the boys, so, besides the ethnic question also the gender question. [FGJ8]

> And being forced against their will to marry and have sexual relations since a very young age. The girls shut up when we get to trial, it is their parents and their husbands, and they can exercise their right to silence, and everything is silenced. It is hard to achieve something on that front, there is respect for the patriarch. [IPW20]

Some of the interviewees expressed confidence that there are signs of positive change in this regard.

> Even within Roma communities there are signs of some intolerance towards practices that were customary, like marrying ten-year-old girls, with all that that entails. [IJW04]

> Since I have been doing this for many years, I also notice that they are increasingly closer to what is the mainstream society in Portugal. This is a very slow process, and we must be patient. I ask the mother if she agrees that the boys know how to read and write and the daughters don't. And they look at me. That is, it depends on how you phrase it. Some understand it. [IJM07]

And there were also those who recalled episodes suggesting that Roma women are not as powerless as one would believe, either because they take on the authority of their husbands when they are ill, as exemplified earlier, or because it becomes apparent from the evidence produced in court that they are the ones in charge of running the family affairs.

> Roma men always say: 'I did everything, she only did it because I told her. In our law it is like this, the woman does what the man orders'. And the women say the same thing. But what I see, because we have evidence, is that they are not following their husbands' orders as much as they want us to believe. There may be still some subordination, but there are cases where the opposite is true, although in court the men always claim that the women are blameless. [IJW04]

> The police officers told me: 'You arrested the father, but you know that the one who runs the whole place is the mother, that is a slightly matriarchal society'. And I: 'Maybe I have my mental framework and thought the man controlled everything'. In fact, he owned up for everything, despite it all, he acted like a man, let's say. [IPM38]

Overall, Portuguese judges and prosecutors have extensive experience with the Roma and recognise their "customs," albeit always under the proviso that these customs do not breach state law. They acknowledge however that even those customs that breach the law (on mandatory schooling and minimum marriage age, most notably) may be given some weight when deciding the child protection measure to adopt and the penalty to impose. While dismissive of the challenges brought by cultural diversity in general, judges and prosecutors recognise that the differences between Roma customs and state law may at times prove difficult to reconcile and require that the courts engage in a "pedagogical" dialogue with the Roma communities to try to bring about changes to those customs that are harmful to the rights of Roma girls.

4.2. Judgments and reasonings

4.2.1. Roma cases in the pool of multicultural case law

Judgments in cases involving Roma litigants were easier to trace in our keyword database search than those involving other minority groups, as most Roma-related judgments explicitly mention the parties' ethnicity, at least in the description of the facts, usually by quoting from the background social reports prepared by social workers at the

courts' request. The phrasing tends to be boilerplate – "the defendant's socialisation process took place in a low-income family, in a context associated with the values of the Roma culture," "married according to Roma rituals" (often at age 14 or 15), and "did not attend school, as is common among the Roma."[16] References to Roma customs and traditions abound, sometimes with the explicit mention that these are "respectable traditions,"[17] while the expression "Roma law" is only used on rare occasions, usually a propos the parties' civil status.[18]

In many criminal cases (e.g., drug trafficking, theft, battery, murder, possession and/or traffic of firearms) the mentions to the defendants' ethnicity are not reprised by the courts in the legal reasoning part of the judgment,[19] which makes it impossible to ascertain the extent to which (if any) the defendants' ethnic background weighted in the courts' ruling. The text of the judgments is often opaque, since, as is typical of civil law systems, the courts tend to stick to a very dry presentation of the facts and applicable legal provisions, even though they sometimes go on tangents that show their bias and get them in trouble. Some of the "troubles" in cases involving Roma litigants come from the courts' overreliance on social reports, which they often quote verbatim creating the appearance that they endorse the reports' frequent use of stereotype-reinforcing language about e.g. the Roma's "welfare-dependency," "deviant behaviour," and "penchant for playing the victim."[20] On occasion, some such remarks are deleted from the "established facts" part of the judgment on appeal, on the grounds that they are immaterial for the adjudication of the case at bar, without going into the issue of whether the remarks were discriminatory.[21] There are also instances where the courts explicitly reject claims to the effect that Roma defendants are less prepared to act in compliance with the law, stating that it is common knowledge that the majority of the Roma population is law abiding.[22]

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[16] The social reports are not the only source of stereotype-reinforcing language, however, since defence attorneys sometimes draw on common anti-Roma stereotypes to "help" their clients as well. A recurring claim is that the courts should consider the "lack of preparation of Roma defendants to act in compliance with the law," made in drug-trafficking cases before the Supreme Court (judgment of 12 December 2002, No. 02P3115), and the Porto Court of Appeal (judgment of 16 November 2005, No. 0544635), for example.

[17] See e.g. Supreme Court judgments of 8 May 2003 (No. 03P982), and 5 June 2003 (No. 02P4635).

[18] That was e.g. the case with the Porto Court of Appeal judgments of 27 November 2013 (No. 322/04.1TAMLG.P1), 12 October 2016 (No. 223/14.5PCMTS.P1), and 8 June 2022 (No. 3926/17.9JAPRT.P1).

[19] See, e.g., Porto Court of Appeal judgment of 2 May 2012 (No. 8/11.0PASJM.P1); Évora Court of Appeal judgment of 7 May 2013 (No. 1165/11.1TAPTM.E1); Porto Court of Appeal judgment of 14 July 2020 (No. 169/18.8PDPRT.P1); Supreme Court judgment of 23 June 2022 (No. 11/20.0GACLD.C1.S1).

[20] That was notably the case with the Felgueiras Judicial Court (Second Chamber) judgment of 29 July 2008 (No. 21/06.0GAFLG), which led to the judge being accused of racial discrimination, and the defendants' attorney being convicted for slandering the judge, who claimed to have merely quoted from the social reports and witness testimonies.

[21] That was the case, for example, with the Porto Court of Appeal judgment of 5 November 2008 (No. 0814979), which deleted the sentence "The defendants of Roma ethnicity are connected by tight family ties and are associated with the practice of crimes in the area where they live" from the established facts, noting that it had been taken from the social reports.

[22] That was the case with the Supreme Court judgment of 12 December 2002 (No. 02P3115), mentioned earlier as an example of the use of anti-Roma stereotypes by the Roma defendants' defence attorneys. The Supreme Court rejected the claim holding that it "contradicted rules of common experience, because everyone knows that in the communities of Roma ethnicity, as in other communities, there is, fortunately, a majority of members who conduct their lives by rules of honesty and compliance with the law and the basic principles

There is, in any case, no shortage of appeals by Roma litigants to the Constitutional Court invoking racial discrimination by criminal courts, although these appeals tend to be summarily rejected as inadmissible, since the Constitutional Court's purview is limited to the constitutionality of legal provisions, and the appeals tend to question the actions of the courts instead of the validity of the provisions applied by the courts.[23] One of the very few instances in which the Constitutional Court ruled on the merits of claims of racial discrimination against the Roma was judgment No. 452/89, of 28 June 1989, in which it reviewed – at the Attorney-General's request – the constitutionality of several regulatory provisions about special police surveillance over groups and caravans of nomads. The Constitutional Court rejected the Attorney-General's claim that the use of the term "nomads" was a thinly veiled and discriminatory reference to the Roma and only found one provision to be in breach of the Constitution, for allowing searches of caravans without a court order and during the night. The Constitutional Court held that the special police surveillance was motivated by the dangers usually associated with a nomadic lifestyle and not by the "race"[24] of those under surveillance, which in the Court's view was evidenced by the fact that settled Roma communities (in growing numbers in the country) were not targeted (Jerónimo 2022, 16-18).

Considerations about the ethnic background of Roma litigants do appear in judgments[25] other than the ones regarding child marriages/child sexual abuse and school absenteeism/early school leaving by Roma girls but these two categories stand out as the instances where Portuguese courts are more prone to address culture arguments head-on and to reflect on the interplay of Roma customs and gender equality, which is why they are the focus of our analysis in this section.

4.2.2. Child marriage and child sexual abuse cases

For the first category, we identified four judgments – a 2010 Coimbra Court of Appeal judgment[26] about kidnapping and battery associated with a forced marriage, a 2010

of the surrounding society." To hold otherwise, the Supreme Court added, would be grounds to raise the penalty and not lower it as wished by the defendant.

[23] See, e.g., Constitutional Court judgments No. 169/2005, of 31 March 2005, No. 281/2012, of 30 May 2012, No. 209/2021, of 14 April 2021 (Jerónimo 2022: 15-16).

[24] The inadequacy of the term "race" (*raça*) is generally acknowledged in Portugal, but courts still use it on occasion, sometimes interchangeably with ethnicity. It must be noted, in any case, that the Roma themselves use the expression "Roma race" (*raça cigana*) in their interactions with the courts, as evidenced by quotes of defendants and witness testimonies in e.g. the Supreme Court judgment of 23 June 2010 (No. 252/09.0PBBGC.S1).

[25] For example, the Porto Court of Appeal judgment of 6 October 2004 (No. 0441909), in a case with multiple Roma defendants (men and women) and various counts of drug trafficking offences, rejected the claim made by one of the defendants according to which she had acted under pressure from her husband, of whom she was entirely dependent, as was common in Roma families. The Court held that it was far from demonstrated that, "in the Roma ethnicity, the woman is reduced to the status of «thing», or that in Roma families the wife is always in a position of absolute dependency vis-à-vis the husband." Also worth mentioning is the Guimarães Court of Appeal judgment of 12 June 2007 (No. 926/07-2), which confirmed the placement of a one-year-old Roma boy under state care with a view to adoption. The Court dismissed the parents' culture claims by reference to the rights of the child and the principle of equality but took the time to make extensive remarks about social identity and cultural attributes, "allegedly cultural conditionings," multiculturalism, and the traits and struggles of the Roma people, including some outdated references to its nomadic character.

[26] Coimbra Court of Appeal judgment of 29 September 2010 (No. 557/09.0JAPRT.C1).

Supreme Court judgment[27] and a 2012 Porto Court of Appeal judgment[28] about child sexual abuse, and a 2017 Supreme Court judgment[29] about slavery.

The case before the Coimbra Court of Appeal concerned the kidnapping of a 11-year-old Roma girl for the purpose of marrying her to one of the defendants, a 17-year-old Roma boy, and the battery resulting from her subjection to the "virginity test" at the hands of an unidentified Roma woman as part of the marriage ritual. The kidnapping had been reported to the police authorities by the girl's Roma legal guardians, and the girl had not yet engaged in sexual intercourse by the time the police rescued her. Four of the five defendants – the "bridegroom," his parents and one accomplice – had been given prison sentences (ranging from four years and six months to six years and six months imprisonment) but the bridegroom's and his mother's prison sentences had been suspended in their execution. The bridegroom's father had appealed his conviction arguing in essence that the facts had been wrongly assessed by the lower court, since there had been no forced marriage, but instead an elopement which was consistent with Roma tradition and had been planned by the girl and the boy. The Court of Appeal was not persuaded, finding this version of the facts to be simply outlandish, given its discrepancy with the sequence of events (e.g., the immediate hosting of a wedding party for 200 guests) and the girl's testimony.[30] The Court of Appeal held furthermore that the lower court had been duly sensitive to the Roma ethnicity's idiosyncrasies and cultural specificities, since it had considered as established fact that the appellant, as the other defendants, "showed an absence of critical awareness about the harmfulness of their actions, namely that of subjecting the girl to the virginity test, which they viewed as normal in the framework of their traditions and customs," and had found that, while this did not "decriminalise his actions, it contributed to attenuate his guilt."[31]

The two child sexual abuse cases decided by the Supreme Court in 2010 and by the Porto Court of Appeal in 2012 did not concern alleged Roma marriages or elopements, although the defendants brought up the traditionally low Roma "marriage age" to excuse their actions. In both cases, the courts explicitly rejected the defendants' culture defence and expressed doubts as to the defendants' compliance with Roma customs, as their behaviour had consisted of taking advantage of their victim's inexperience to satisfy their lust.

[27] Supreme Court of Justice judgment of 23 June 2010 (No. 252/09.0PBBGC.S1).
[28] Porto Court of Appeal judgment of 17 October 2012 (No. 297/11.0JAPRT.P1).
[29] Supreme Court judgment of 18 October 2017 (No. 355/15.2T9VFR.P1.S1).
[30] Elopement is a common practice among the Roma, sometimes used to circumvent parental objections to the match desired by the bride and the bridegroom, and others to avoid the expenses associated with the wedding party (Costa 2021). In this case, even without considering the girl's testimony, the fact that the bridegroom's parents were involved in subtracting the girl from her guardians' house, and had already organised a wedding party for 200 guests, is clearly inconsistent with the elopement narrative.
[31] The direct quote from the lower court judgment included in one of the appellate justices' concurring opinion allows a more detailed account of the lower court's reasoning when addressing the question of whether respect for Roma cultural idiosyncrasies could justify overlooking basic norms and principles of state law. One of the points stressed by the lower court when rejecting that possibility was the principle of equality and the resulting obligation not to disregard the physical integrity of a girl because of her Roma ethnicity. The quote in the concurring opinion also reveals the weight given by the lower court to the fact that it had been a Roma person who had warned the police about the girl's kidnapping as indication that the practice was not commonly accepted among the Roma.

The Supreme Court had been asked to reduce and suspend the six-year prison sentence set by the lower court for the crime of sexual abuse of a child under the age of 14. The defendant had been 21 years old and his victim 11 years old when they had engaged in sexual intercourse, following a few months of exchanges over the telephone. In his appeal, the defendant had argued that the lower court had failed to consider several aspects that should work in his favour, including, on the one hand, the fact that he did not keep ties with persons of Roma ethnicity, "whose lifestyle was different from his own," and, on the other hand, the fact that the Roma have different "values and customs" and start their sexual lives at a very young age (as had been the case with his own mother who had had him when she was 13). The Supreme Court noticed the defendant's contradictory claims and rejected the "values and customs" argument outright, holding that it was "deprived of any weight" since the law is equal for all, and that to allow a "differentiated treatment" would leave minority girls less protected than the girls belonging to the majority culture. The Court added furthermore that it was far from demonstrated that the Roma tolerate or excuse those who sexually abuse children, as that would be inconsistent with the compensation for damages filed by the victim's parents in the case at bar. It nevertheless lowered the prison sentence to five years, weighting inter alia the fact that it had been the victim who had taken the initiative of arranging a meeting with the defendant in the middle of the night.

The case before the Porto Court of Appeal was similar, but the defendant and his victim were older (31 and 14), the prison sentence was lower (three years), the defendant did not purport to be estranged from persons of Roma ethnicity, the victim had a mild mental impairment, and there was no claim of damages (the victim's grandmother had actually tried to withdraw the complaint, and the victim had claimed to not have been harmed). On appeal, the defendant had also argued that the lower court had failed to consider aspects that should work in his favour, in particular, the fact that both he and the victim were Roma, the Roma marry young (he himself had been married at age 15),[32] and it was possible that the defendant had been "tempted" by the victim, given her documented insistence for them to meet. According to the defendant, he had at most been negligent, since he had had no conscience of committing a criminal offence, "given the customs of the community where he had always lived." The Court of Appeal rejected these arguments and did not grant the appeal. It dismissed the "marriage age" argument as immaterial, noting that what was at stake was the exploitation by an adult of the inexperience and intellectual impairment of a 14-year-old child to have sex with her, "which is certainly not compliant with Roma customs," irrespective of whether the Roma marriage age "is in line with Justinian law or even Canon law." The Court further noted that the principle of equality could not be used to refuse the application of the general law "in favour of values and/or customs which in reality are not proven," and chastised the defendant for attempting to blame the victim.

The 2017 Supreme Court slavery judgment concerned two foreign Roma defendants (husband and wife) who had kept captive, beaten, and exploited a 13-year-old girl who had been "given" by her mother in Romania to the defendant husband. One of the defendants' allegations before the lower court had been that the victim was married to

[32] Because, he said, it was believed among the members of his community that "as soon as a woman can bear children, she is ready to marry."

their eldest son (also aged 13) according to Roma tradition, and that much of the treatment the victim had endured (household chores, beatings, etc.) was common under "Roma laws." The lower court had dismissed the argument reasoning that there was no justification to limit the protection of children and their right to sexual self-determination in the name of "cultural rights," and that the rights of the child had to prevail over any "cultural habits of the Roma race." The lower court had furthermore considered as an aspect weighting against the defendants the fact that they had dismissed the seriousness of their actions, excusing them with Roma traditions and laws, which "revealed distorted personalities warranting higher general prevention needs." While the defendants had not repeated their culture claims before the Supreme Court, and the Supreme Court agreed with the lower court that the Roma cultural habits were no excuse for the defendants' actions, the judgment stated nevertheless that the fact that the defendants belonged to a group of Roma ethnicity could not be ignored, the same way that it could not be ignored that it had been the girl's mother who had given her to strangers on two occasions, something which the Supreme Court found to be indicative of a moral degradation that led to some carelessness in the observance of the social, ethical and normative values in force. The appeals were therefore partially granted with a reduction of the prison sentences from nine years and six months to eight years.

4.2.3. School absenteeism and early school leaving cases

When it comes to school absenteeism and early school leaving by Roma girls,[33] the judgments run the gamut from (a) accepting Roma culture as a decisive factor, (b) considering it as relevant but not decisive, and (c) dismissing it as totally irrelevant. A common trait of these judgments is the explicit acceptance as fact that the Roma are organized according to their own deeply rooted cultural rules and principles, and that Roma values include the provision that girls must drop out of school after reaching the menarche in order to preserve their purity.

On the culture-deterministic side of the spectrum, we find the (in)famous 2017 Fronteira Judicial Court judgment,[34] which ruled on a child protection case involving a 15-year-old girl who had dropped out of school due to her parents' concern for her purity. The Fronteira Court dismissed the need to enforce any child protection measure, holding that the girl was not at risk, among other reasons, because, "in line with Roma tradition," she believed that she did not need to attend school, and because she already knew how to read, and had the basic academic skills required for her work and "social integration in her context of belonging." The Court remarked that there is no one single way of living a dignified life, and that there are "diverse and equally rewarding paths other than simply the attendance of compulsory education" for youths to develop their personalities. While the Court's openness to diversity of worldviews and life courses is arguably positive, its language is problematic (and was much criticised in the media) for

[33] Outside the scope of this article are judgments concerning school absenteeism by Roma boys, where we also find extensive remarks about the Roma's "cultural attributes." Notable examples are the Évora Court of Appeal judgment of 1 March 2012 (No. 290/09.3TMFAR.E1), the Lisbon Court of Appeal judgment of 11 September 2014 (No. 732/13.3TBVFX-A.L1-2), and the Évora Court of Appeal judgment of 9 September 2021 (No. 1674/18.1T8TMR.E1), reviewed in Jerónimo and Friedrich (2022: 35-53).

[34] Fronteira General Jurisdiction Court judgment of 5 January 2017 (No. 315/16.6T8FTR).

implying that "basic academic skills" are enough for Roma girls as their life courses are limited anyway by their ethnicity.

A good example of a middle-of-the-road approach is a 2009 Guimarães Judicial Court judgment[35] on a child protection case involving a 12-year-old girl who had dropped out of school after reaching puberty. The Court concluded that the girl was at risk, since her development and education were hindered, but also noted that it was evident that the traditions of the Roma community could not be disregarded, nor the negative consequences that would come to the girl and her family for departing from those traditions. The Court further remarked that, in multicultural societies, the goal of education is not to uniformise cultures or eliminate the identities of the different ethno-racial groups, and that the integration effort does not rest solely with the Roma communities but is a two-way street, which requires state measures to ensure the compatibility of compulsory education and Roma traditions. The Court stressed, however, that the traditions at stake were entirely at odds with the goal of providing a basic education to all Portuguese citizens and were detrimental to the Roma themselves, as they posed "a clear obstacle to their full integration into society." The Court expressed dissatisfaction with the child protection measures foreseen in the law, holding that the removal of the child from her family would be inadequate, and ordered a measure of support to the family to ensure that the child completed compulsory education.

An often-cited example of stark rejection of the culture argument is a 2012 Lisbon Court of Appeal judgment[36] on a child protection case involving a 14-year-old girl who had dropped out of school because, according to Roma culture, girls must leave school after reaching puberty to preserve their purity. The girl's parents had argued that she was not at risk, as she was a happy and autonomous girl, part of a close-knit family with deep respect for Roma traditions, and it was "unthinkable for her to go against the customs, as she was well aware of the high importance that community life has for her people, as well as respect for its traditions." The lower court had accepted the parents' reasons and found that the girl was not at risk. The Court of Appeal expressed some sympathy for the parents' concerns, but rejected the cultural argument outright, noting that social realities are not static and that it was unacceptable to invoke the preservation of the girl's purity as a reason for her not to attend compulsory education. The Court held that it was entirely possible and necessary to combine the girl's right to an education (on equal terms with every other youth) with her "cultural roots, which lead her (and her family) to believe that 'once the menarche is reached, the young woman must leave school to protect her purity'." The Court ordered therefore that the protection measure should consist of pedagogical work to be conducted by the social services with the girl's family, so that her parents understood how crucial it was for their daughter to complete compulsory education.

5. Concluding remarks

Roma norms about gender roles occupy a prominent place in the multicultural jurisprudence of Portuguese courts. The courts' strong stance on the prevalence of state law and on the principle of equality, which leads many judges and prosecutors to simply

[35] Guimarães Judicial Court Second Civil Chamber judgment of 28 September 2009 (No. TBGMR).
[36] Lisbon Court of Appeal judgment of 20 March 2002 (No. 783/11.2TBBRR.L1-1).

dismiss the challenges of cultural diversity as nothing new or significant, takes on a more nuanced tenor when it comes to cases involving the Roma. Without recognising Roma norms as "law," the courts acknowledge the fact that Roma values and practices are different, and that it is necessary to consider those differences when deciding Roma cases and interacting with the Roma more generally, although they also stress that those values and practices are not static and must be changed when they are harmful to children, Roma girls in particular. The courts' constructive engagement with Roma families and patriarchs in matters of compulsory education and child marriages is probably the most promising development to note, despite the condescending undertones of the courts' "pedagogy" and the mixed results attained so far.

Contrary to what has been reported in the literature for other domestic jurisdictions in Europe, Portuguese courts do not seem to be afraid of addressing culture arguments head-on, even though the courts' attention to cultural information about the Roma and their traditions does not necessarily work to the Roma's benefit or is always conducive to fair outcomes, since the line between cultural awareness and cultural racism is a fine one to thread, as seen in some early school leaving cases. While there are positive signs in the judges' openness to value the testimony of Roma patriarchs and to work with Roma intercultural mediators, their overconfidence in their experience-based knowledge about the Roma and overreliance on often stereotype-ridden social reports can (and has) prove(n) problematic.

Roma litigants for their part are known to play on the judges' and prosecutors' stereotypes about Roma women's submission to the men under Roma law to try to shield Roma women from criminal liability in drug trafficking offences involving various members of the same family. Something which the courts are generally aware of and sometimes even accept. The Roma early marriage age – taken as fact in many judgments where the defendants' marriage at age 14 or 15 is simply mentioned in passing – is sometimes invoked in opportunistic ways, as was the case in the child sexual abuse judgments reviewed in this article. The defendants' portrayal of Roma law was clearly distorted, as their focus on the lower "marriage age" glossed over other important rules governing marriage among the Roma, namely the importance of the bride's virginity, which meant that their actions were reproachable both under state law and Roma law, as hinted at by the courts. Understandably, the courts did not rely on the virginity argument to express their doubts about the defendants' compliance with Roma law, noting instead that the defendants had taken advantage of their victims' inexperience, which was likely impermissible among the Roma as well. Of note is the courts' attention to the voices from inside the Roma communities (parents, guardians and patriarchs denouncing or speaking against harmful practices) as indication that Roma customs are not uniformly interpreted and followed, and that equality-driven change is underway.

Despite the reluctance by Portuguese judicial actors in acknowledging cultural diversity's relevance to legal practice, Portuguese courts have clearly become places of encounter and tension among different cultures and legal traditions, much like their European neighbours. The information gathered in this article allows for a cautiously optimistic assessment of the courts' cultural competences, at least when it comes to intercultural communication with the Portuguese Roma communities, even though there is still much room for improvement, notably through training in intercultural

communication skills, unconscious biases, and legal pluralism. The positive strides made so far in engaging Roma leaders and intercultural mediators recommend that existing experiences be replicated in courts across the country and, where possible and desired by the Roma communities themselves, be given a formal and permanent basis. These collaborative experiences may also be of interest to other European jurisdictions where the courts' interactions with the Roma are known to be fraught with tension and cultural misunderstandings.

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