

The Opportunities and Challenges of Using Public Interest Litigation to Secure Access to
Justice for Roma Minorities in Central and Eastern Europe¹

James A. Goldston and Mirna Adjami*

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* The authors are the Executive Director and Legal Officer respectively with the Open Society Justice Initiative, an operational program of the Open Society Institute that pursues law reform activities grounded in the protection of human rights throughout the world. A major area of the Justice Initiative's work is the implementation of international legal prohibitions on racial and ethnic discrimination through international public interest litigation. Goldston, formerly Legal Director of the European Roma Rights Centre, now serves as a member of that organization's Board. The authors would like to thank Mirka Tvaruzkova for her contributions in the research and preparation of this article.

The Opportunities and Challenges of Using Public Interest Litigation to Secure Access to Justice for Roma Minorities in Central and Eastern Europe

The Roma in Central and Eastern Europe (CEE)² are the largest³ and arguably the most impoverished,⁴ disenfranchised, and marginalized ethnic minority group on the European continent. In some CEE countries, Roma are ten times poorer than the majority population.⁵ In Bulgaria and Romania, nearly 80% of Roma live on less than \$4 a day.⁶ The average lifespan for Roma in CEE is about 10 years less than for non-Roma; in the Czech Republic and Slovakia, infant mortality rates for Roma are double that of non-Roma.⁷ Unemployment rates for Roma in some CEE countries are multiples of five and ten that of non-Roma; in Bulgaria, between 60 and 80 percent of the community suffers permanent unemployment.⁸ Far fewer Roma complete primary and secondary education than non-Roma. Only one third of the Roma children in Kosovo go to school, and barely 2 percent are in a position to continue their education after primary school.⁹ These statistics are but snapshots of the systemic societal discrimination Roma suffer.

This article examines the use of litigation in national and regional European courts to secure equal rights for Roma in Central and Eastern Europe. The transformation of law, legal culture, and judicial systems wrought by the fall of communism opened the way for, and was in part fuelled by, public interest litigation. Over the past nearly two decades, independent-minded lawyers, advocacy-oriented nongovernmental organizations (NGOs), and concerned individuals in CEE countries have sought to use litigation to impact social change to address many problems. But nowhere has public interest litigation developed more quickly or gained greater traction than in the field of “Roma rights,” the pan-European movement aimed at reclaiming the universal human rights of Roma.¹⁰

At first blush, it may seem perverse to suggest that a tool as unproven and resource-intensive as public interest litigation could help address the myriad problems affecting Roma. As a general matter, public interest litigation in CEE countries faces huge obstacles,

² This article defines the region of Central and Eastern Europe as that which encompasses the following post-Communist successor states of the former Eastern Bloc: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Serbia and Montenegro, Slovak Republic, Slovenia, Former Yugoslav Republic of Macedonia, and Ukraine. All of these states belong to the Council of Europe, the European organization based in Strasbourg, France, which comprises 47 democratic countries of Europe whose goal is to promote democracy and the rule of law and protect human rights according to the principles of the European Convention on Human Rights. An overview of the Council of Europe can be accessed at <http://www.coe.int/>.

³ The Roma are Europe’s largest and most vulnerable minority. Approximately 70 percent of Roma in Europe live in the countries of Central and Eastern Europe and those of the former Soviet Union. See Dena Ringold, Mitchell Orenstein, Erika Wilkens, WORLD BANK: ROMA IN AN EXPANDING EUROPE: BREAKING THE POVERTY CYCLE, p. 3 (2005) (hereinafter “WORLD BANK ROMA POVERTY CYCLE REPORT”).

⁴ According to a survey by the United Nations Development Program, five times more Roma live below the poverty line than do the majority populations surveyed in Bulgaria and Serbia, and three times more than in Macedonia and Romania. See UNDP FACT SHEET: FACES OF POVERTY, FACES OF HOPE at 1 (2005) (hereinafter “UNDP FACT SHEET”).

⁵ See WORLD BANK ROMA POVERTY CYCLE REPORT, *supra* note 2 at xiv.

⁶ See *id* at xiv.

⁷ See *id* at 48.

⁸ See UNDP FACT SHEET at 11.

⁹ In a general survey of the region, fewer than 2 out of 10 Roma age 12 had completed primary education in all countries except the Czech Republic; the rates for secondary and tertiary education drop even further. See UNDP FACT SHEET at 2.

¹⁰ See Dimitrina Petrova, *The Roma: Between a Myth and the Future*, 1 ROMA RTS. Q. (2004).

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including cost, time, procedural barriers, limited legal counsel engaged in public interest law, and a deep-rooted popular skepticism concerning the possibility that law – and lawyers – may exist independently of politics. In no community are these challenges more daunting than among the Roma. Moreover, public interest litigation on behalf of Roma must overcome the broader reluctance of many Roma – borne of repeated frustration and humiliation at the hands of the state – to engage public institutions as such. The yawning gap which divides “the Roma” from “the law” is reflected, perhaps most starkly, in the paucity of Roma lawyers and judges throughout the CEE region today. Yet, notwithstanding public interest litigation’s admitted shortcomings to date, no other forms of advocacy offer markedly greater promise. If, as we believe, access to justice requires changing the gross disparities in life chances for Roma, public interest litigation remains for the foreseeable future one weapon of choice.

Addressing the plight of Roma in Central and Eastern Europe presents a compelling test for the value of public interest litigation because of the nature of the Roma as claimants on the one hand, and of the European political and legal order on the other. First, from the standpoint of the public interest litigator, Roma plaintiffs possess a number of positive attributes. Although Roma in CEE countries face discriminatory access to personal identification documents¹¹ they are usually citizens of the countries wherein they reside, entitled to the full panoply of legal protections provided in national constitutions and legislation. There can be no claim, however spurious, that denial of a particular benefit or interest is “justified” by their non-citizen status. Furthermore, the nature of the discrimination at issue in most Roma legal complaints – on the grounds of racial or ethnic origin – rests on a clear factual foundation, and invokes a clear remedy in law, as will be elaborated below.¹²

Second, political and legal developments in Central and Eastern Europe have created an ideal framework in which to pursue public interest litigation on behalf of marginalized groups like the Roma. Most post-communist successor states in the region joined the Council of Europe in the 1990s. More recently, some of the Central and Eastern European countries with the largest Roma populations have gained admission to the European Union (EU).¹³ As these and other regional institutions have placed the situation of Roma high on the agenda of European human rights policy, an increasing share of public attention and resources has been

¹¹ Due to their poverty and widespread social exclusion, Roma have lesser access to public services and institutions that formalize their identification and citizenship status. In light of the state succession process in the post-communist transition throughout Central and Eastern Europe, the lack of proper personal documents has exacerbated Roma social exclusion. At the extreme, the Roma have been particularly susceptible to becoming stateless.

¹² In addition to Roma, other prominent minorities in Western Europe include immigrants from Turkey or elsewhere from North Africa, the Middle East, or South Asia. Discrimination against other victims, who might be Sikhs, Kurds, or Muslims, is based on mixed religious/ethnic/national-origin motives; as a result, it is more difficult to substantiate legal claims for discrimination against victims from these social groups. By contrast, discrimination against Roma is clearly motivated by racial and ethnic grounds. Another reason why litigation to combat discrimination against Roma is comparatively favorable is that the Roma are rarely tarred by the brush of national security concerns; the “threats” they are said (however baselessly) to pose – to health, morals, or good taste – are of a qualitatively lesser order than the acts of terrorism which have been used to justify differential treatment among members of certain other communities since the 9/11 attacks.

¹³ In 2008, the European Union comprises 27 democratic European Member States. On May 1, 2004, 8 CEE countries listed above in Footnote 1 became Member States of the European Union: the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia, and Slovenia. On January 1, 2007 two additional CEE countries joined the EU: Bulgaria and Romania. An overview of the enlargement history of the EU can be accessed at http://europa.eu/abc/history/2000_today/index_en.htm.

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dedicated to addressing Roma disenfranchisement.¹⁴ The efforts of regional institutions have been complemented by a constellation of private donors, advocacy NGOs and grassroots activists working to forge community alliances, promote rights education, and intensify political engagement on behalf of Roma rights in a way unimaginable until recently.

The expansion of the Council of Europe and the EU to encompass CEE countries has also revolutionized the legal framework and rights protections available in these countries. Member States of the Council of Europe have incorporated the human rights protections enshrined in the European Convention on Human Rights, including the limited antidiscrimination norm in Article 14 and the free-standing norm in Protocol No. 12 as will be discussed further below.¹⁵ For their part, the countries that recently joined the European Union¹⁶ were required to undertake significant internal reform of their legislation and institutions to meet minimum EU standards, including the adoption of advanced measures to combat racial discrimination. As a result, all CEE courts operate under the official or unofficial guidance of at least one of two regional judicial systems – the European Court of Human Rights¹⁷ and the European Court of Justice¹⁸ – held in near-universal esteem.

Section I of this article assesses the feasibility and challenges of pursuing public interest litigation for Roma rights in CEE countries. It begins with a brief overview of the plight of the Roma in CEE and the barriers they face in accessing legal remedies. It defines the concept of public interest litigation as it pertains to the Roma of the CEE region and highlights the unique opportunities afforded by the regional European human rights and antidiscrimination legal framework. Despite the fertile legal framework available in CEE countries, many challenges to using public interest litigation for Roma rights remain. Section

¹⁴ “The treatment of Roma both in the European Union and beyond its current borders has become a litmus test of a humane society. The treatment of Roma is today among the most pressing political, social, and human rights issues facing Europe.” See European Commission, *THE SITUATION OF ROMA IN AN ENLARGED EUROPEAN UNION* at 10 (2004) (hereinafter “EUROPEAN COMMISSION ROMA REPORT”). “Ten years after the iron curtain fell, Europe is at risk of being divided by new walls. Front and center among those persons being left outside Europe’s new security and prosperity are the Roma. In many countries, Roma have been decreed illegal residents on their own property, banished beyond municipal boundaries, and left outside the community of common concern. These are not isolated incidents, but widespread practices – sometimes systematic and on occasion systemic. To redress the long and hard experience of Roma requires, therefore, considerable attention, careful analysis, development of specific policies and commitment of adequate resources.” Organization for Security and Co-operation in Europe High Commissioner on National Minorities, *REPORT ON THE SITUATION OF ROMA AND SINTI IN THE OSCE AREA* at 3 (2000).

¹⁵ As the European Court has repeatedly made clear, the right to non-discrimination set forth in Article 14 of the European Convention is accessory to other Convention rights, and is thus limited to the scope of the Convention itself. See, e.g. *Abdulaziz, Cabales & Balkandali v. the United Kingdom*, App. Nos. 9214/80, 9473/81, 9474/81 (ECtHR May 28, 1985); see also *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics Case)*, Series A, No. 6 (1979-80) (ECtHR Judgment July 23, 1968). To address this limitation, the Council of Europe has adopted Protocol No. 12 to the European Convention, which guarantees an independent right to be free from discrimination in its Article 1: “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Protocol No. 12 will be further discussed in text *infra* accompanying notes 52-55.

¹⁶ See *supra* note 12.

¹⁷ The European Court of Human Rights (ECtHR), based in Strasbourg is the judicial organ established by the European Convention on Human Rights whose role is to ensure that Member States of the Council of Europe observe and respect their human rights obligations under that Convention.

¹⁸ The Court of Justice of the European Communities, based in Luxembourg, interprets and ensures conformity and compliance with the treaties and laws of the European Union among the EU’s 27 member states.

I concludes by exploring the obstacles to the effective and systematic availability of public interest litigation as an operational tool for Roma.

Section II evaluates the impact of public interest litigation for Roma. In so doing, it offers a snapshot of the current legal framework and litigation landscape in the field of Roma rights in five countries: Bulgaria, the Czech Republic, Hungary, Slovakia, and the Russian Federation. It then presents case studies of the pursuit of public interest litigation on behalf of Roma rights in three thematic areas - racial violence, education and housing. We contend that the use of public interest litigation to defend and promote Roma rights has played a signal role in raising awareness of the human rights violations and systemic discrimination against Roma minorities in CEE. Despite these achievements, the impact of public interest litigation on the actual conditions of Roma remains inconclusive. Translating legal victories into systemic change is never easy. To this end, the article concludes with recommendations on how public interest litigation can be more effectively pursued and supported to secure access to justice on behalf of Roma minorities.

While this discussion draws upon the rich literature examining public interest litigation and social change more generally, the perspective of the authors is unabashedly one of practitioners. Taken together, the authors have been personally involved for more than a dozen years in some of the leading court cases on behalf of Roma in Europe. The views expressed in this article build upon the authors' prior reflections on Roma rights and the role of public interest litigation in defending and promoting Roma rights. The article also reflects the conventional wisdom of a number of leading Roma rights public interest lawyers in Central and Eastern Europe regarding the challenges and potential impact of the pursuit of Roma rights public interest litigation in the CEE region.¹⁹ The authors are grateful that the ABA World Justice Project has encouraged us to shift our lens and approach our analysis from a sharpened perspective of the Roma's access to justice concerns.

I. Public Interest Litigation for Roma Rights in Central and Eastern Europe: Opportunities and Challenges

I. 1. The Roma of Central and Europe and their Access to Justice Concerns

The Roma represent the quintessential pan-European ethnic minority, present in almost all Council of Europe Member States but lacking a territory or government of their own. Their numbers – the subject of much controversy – range from 7 to 9 million,²⁰ the vast majority of whom reside in Central and Eastern Europe. The Roma first arrived in Europe

¹⁹ The authors conducted interviews surveying a number of nongovernmental organizations and lawyers engaged in public interest litigation to defend and promote Roma rights in the following countries in Central and Eastern Europe: Bulgaria, the Czech Republic, Hungary, Romania, Slovakia, Serbia, and the Russian Federation for the purpose of this article.

²⁰ According to the World Bank, size estimates of the Roma population in Europe range from 7 to 9 million. However, the European Commission has estimated that the Roma population may be around 10 million people, or even higher at 12 million. *See* WORLD BANK ROMA POVERTY CYCLE REPORT, *supra* note 2 at 5; *see also* EUROPEAN COMMISSION ROMA REPORT at 9.

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from northwest India in the fourteenth century.²¹ Although they have lived in Europe for over 500 years, the Roma continue to be marked by a history – and often-continuing reality – of alienation, persecution, marginalization, and social exclusion.

The term “Roma” refers to a diversity of communities throughout Europe that share a common ethnic origin descendant of their eastern ancestors and speak variations of Romani, an Indo-European language. The term “Gypsies,” used by many non-Roma to refer to persons who consider themselves Roma, often carries a pejorative tint.²² A political awakening among the Roma minorities of CEE countries since the fall of communism has encouraged collective self-identification under the umbrella term “Roma,” which means “people” in the Romani language.²³ This article uses the term “Roma,” but acknowledges that distinct Roma communities self-identify according to other terms developed in various countries.²⁴

The Roma experience in Europe has been one of discrimination, subjugation, and oppression. Negative stereotypes which persist to this day have long deprecated nearly every aspect of Roma existence, from their lifestyle (as nomadic peoples) to their intelligence, hygiene, work ethic, and – the perhaps the most widely known canard – an alleged predisposition to crime.²⁵ European governments have deployed a wide range of repressive measures against the Roma, from enslavement in Romania (for close to half a millennium, ending only in the nineteenth century) to various degrees of banishment or forced assimilation and settlement in other countries. The extermination of an estimated half-million Roma under the Nazi regime represents the most horrendous and extreme manifestation of Roma persecution.²⁶

The particular hardships under communism to which the Roma of Central and Eastern Europe were subjected in the second half of the twentieth century have left a legacy of discriminatory policies and attitudes that disadvantage Roma today. Communist regimes in the region forced the Roma to cease their remnant itinerant lifestyle and settle in fixed communities. At the same time, communist governments discouraged Roma from expressing or acknowledging their unique ethnic, cultural, and linguistic identities in the name of class unity. But forced settlement of the Roma often resulted in the creation of isolated Roma communities; despite the rhetoric of state socialism, racism against Roma persisted.²⁷

²¹ For a thorough and concise overview of Roma origins and history in Europe, see Jean-Pierre Liégeois and Nicolae Gheorghe, ROMA/GYPSIES: A EUROPEAN MINORITY (Minority Rights Group International Report 95/4 1995) (hereinafter “MINORITY RIGHTS GROUP ROMA REPORT”).

²² While this term has been “used to denote ethnic groups formed by the dispersal of commercial, nomadic and other groups from within India . . . and their mixing with European and other groups during their diaspora,” see *id.* at 6, it evokes derogatory associations towards the Roma.

²³ See Dimitrina Petrova, *The Roma: Between a Myth and the Future*, 1 ROMA RTS. Q. (2004).

²⁴ See *id.* pp. 6-7; other terms used by Roma to self-identify include “Gitanos” in Spain, “Travellers” in England and Ireland, “Sinti” in Germany and Italy, and “Manouches” in France. See, e.g., EUROPEAN COMMISSION ROMA REPORT, *supra* note 13 at 5.

²⁵ See MINORITY RIGHTS GROUP ROMA REPORT, *supra* note 20 at 12.

²⁶ See *id.*

²⁷ While intensive efforts to assimilate Roma led to the inclusion of the first generation of Roma in state institutions and, assimilation policies were more marked by the persistence of racism and prejudice against Roma and an attempt to eradicate perceived ‘anti-social’ traits of the Roma, going so far as to adopt forced sterilization of Roma women. See EUROPEAN COMMISSION ROMA REPORT, *supra* note 13 at 8-9.

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The end of communism in Central and Eastern Europe led to the further deterioration of life conditions for many Roma.²⁸ In a number of countries where the early transitional period was scarred by political and social upheaval, the Roma were a convenient scapegoat for economic dislocation and a breakdown in public order. A surge in anti-Roma hate speech and violence in the early 1990s was capped by a series of pogroms in Romania which killed Roma and destroyed Roma property, and in some cases, entire Roma settlements.²⁹ Though some of the most overt forms of racially-motivated violence appear to have abated in recent years, throughout the region, Roma have continued to suffer disproportionately from the closure of state industrial enterprises, and their economic conditions have worsened, as racial discrimination impedes Roma access to education, employment, and social services.³⁰

A number of obstacles stand in the way of accurately documenting the extent of Roma social exclusion today. These include the varied nature of the Roma populations, the reluctance of many Roma to self-identify as such, and the absence of reliable ethnic data to describe social and economic patterns of development.³¹ It is only in the past few years that any concerted efforts have been made to fill the information gap.³²

And yet, notwithstanding the absence of precise data, the overall reality of Roma inequality remains strikingly clear. Anecdotal evidence collected by a variety of NGOs, media reports, research by a range of monitoring bodies, and surveys evidence all indicate that Roma continue to suffer high rates of racial violence and discrimination based on negative stereotyping.³³ Roma children suffer widespread discrimination in access to education, yielding attendance and graduation rates at primary, secondary and tertiary levels

²⁸ See MINORITY RIGHTS GROUP ROMA REPORT, *supra* note 20 at 10; EUROPEAN COMMISSION ROMA REPORT, *supra* note 13 at 9.

²⁹ One of the most egregious examples of mob violence against Roma occurred in the Romanian town of Hadareni in September 1993, which resulted in the deaths of three Roma villagers and the destruction of Roma houses in the village. See *Moldovan and Others v. Romania*, App. Nos. 41138/98, 64320/01 (ECtHR Settlement July 5, 2005). This case will be discussed in greater length *infra* accompanying notes 121-123. Over 30 such incidents of mob violence against Roma occurred in Roma during the period of 1990-1994. Cases seeking redress for racist violence from three other attacks in the villages of Plaesii de Sus, Casinul Nou, and Bolintin Deal have been filed with the European Court of Human Rights and remain pending. See Claude Cahn, *The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights*, 4 EURO. ANTIDISCRIM. L. REV. 14 (November 2006).

³⁰ See, e.g., WORLD BANK ROMA POVERTY CYCLE REPORT, *supra* note 2 at xiii.

³¹ In many countries in the CEE region, data protection laws are interpreted to bar the collection or maintenance of ethnically-coded data, even though European data protection norms make clear the permissibility of anonymous, non-traceable data gathered for public interest purposes – foremost among them, to document and remedy discriminatory practices. See, e.g., James A. Goldston, *Ethnic Data as a Tool to Fight Discrimination*, paper presented at a conference, *Data Collection to Promote Equality*, sponsored by the European Union and Finland from December 9-10, 2004 in Helsinki, Finland, available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/events/helsinki_jag.pdf

³² See, e.g., Patrick Simon, *ETHNIC STATISTICS AND DATA PROTECTION IN THE COUNCIL OF EUROPE COUNTRIES* (ECRI & Council of Europe eds., October 2007), available at http://www.coe.int/t/e/human_rights/ecri/1-ECRI/Ethnic%20statistics%20and%20data%20protection.pdf; see also Timo Makkonen, *MEASURING DISCRIMINATION: DATA COLLECTION AND EU EQUALITY LAW* (European Commission 2006), available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07measdis_en.pdf.

³³ In Bulgaria, nearly 80 percent of the population surveyed in 1999 said that they would not want to have Roma as neighbours, a figure higher than any other ethnic or social group. See WORLD BANK ROMA POVERTY CYCLE REPORT, *supra* note 2 at 13.

far below national averages.³⁴ In some countries, Roma children are still tracked into segregated schools or classrooms – some labeled “special schools” or “special classes” designed for the mentally disabled.³⁵ Roma are experiencing an unprecedented crisis in access to housing. An ironic cruelty of the post-communist transition is that many Roma are being evicted from the very land upon which they were once forcibly settled, as changing economic conditions make long-forgotten neighborhoods newly attractive to speculators and developers. The living conditions of those Roma who remain are rapidly deteriorating.³⁶ In addition, the Roma are suffering unparalleled rates of formal unemployment in these countries. The combined effect of heightened social exclusion has also created pressing health problems, including a lower than average life expectancy for Roma, higher than average infant mortality rates, and Third World levels of malnutrition and disease.³⁷

Racism and racial discrimination are surely only two of the reasons underlying this spiral of decline for Roma communities over the past two decades. But they are indisputably major factors. Though poverty, social exclusion, and unequal opportunities affect other population groups in Europe, including segments of each country’s respective ethnic majority, the scale, gravity and uniformity with which they afflict Roma are unparalleled.

The massive constriction of opportunities for Roma, amidst a general rise in prosperity for societies as a whole, has prompted a wide variety of responses from Roma communities, human rights organizations, and international and regional inter-governmental bodies, all of whom have employed a range of tools, including political advocacy, street protest and reasoned debate by suit-wearing men and women in large conference halls. Within this environment of economic and social crisis, pervasive rights violations, and new opportunities and allies, public interest litigation has emerged as a means of grounding claims in a legal framework, holding violators accountable, and assigning the courts a significant role in redressing one of the great human rights injustices in Europe today.

I. 2. Roma Rights Public Interest Litigation in Central and Eastern Europe.

The term “public interest litigation” refers to the use of litigation for the public good. It is described interchangeably as public law litigation, strategic litigation, test case litigation, impact litigation, social action litigation, social change litigation, civil rights litigation, or human rights litigation. Some commentators emphasize the role of litigation in obtaining court-ordered results that impact social change, social reform, or systemic policy change that looks for an impact beyond the individual plaintiffs or groups that initiated the litigation, in other words define public interest litigation by its potential impact.³⁸ Other commentators

³⁴ In Serbia, over 66 percent of the general population had completed primary education in 2002; by comparison, only 36.1 percent of Serbia’s Roma had done so. *See* Open Society Institute, MONITORING EDUCATION FOR ROMA (December 2006).

³⁵ *See* UNDP FACT SHEET, *supra* note 3 at 27.

³⁶ About 45 percent of the Romanian Roma lives in villages, the rest inhabits urban areas, often segregated. About 68 percent of Roma have no running water and sewerage in their houses. *See* UNDP FACT SHEET, *supra* note 3 at 51.

³⁷ *See* Kent A. Sepkowitz, *Health of the World’s Roma Population*, in THE LANCET, Vol 367 (May 2006).

³⁸ In prior writings, one of the authors defined public interest litigation in Central and Eastern Europe, including Roma rights litigation, as “law-based advocacy intended to secure court rulings to clarify, expand, or enforce rights for persons beyond the individuals named in the case at hand.” James A. Goldston, *Public Interest*

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underscore the critical role that public interest litigation can play in empowering otherwise marginalized and disenfranchised individuals and groups to vindicate equal rights they are entitled to under the law.³⁹ In some instances, observers define public interest litigation as espousing both of these goals: “By whatever name, [public interest litigation seeks] to use the courts to help produce systemic policy change in society on behalf of individuals who are members of groups that are underrepresented or disadvantaged – women, the poor, and ethnic and religious minorities.”⁴⁰ A foundational element of public interest litigation is its critical role in raising awareness and educating the public of the injustices that are being challenged through litigation as a means of changing public opinion and achieving greater social change.

Public interest litigation first emerged as an integral strategy of the African-American struggle for equality – what has become known as the “civil rights movement”- in the United States. Beginning in the 1930s and continuing into the 1950s, the National Association for the Advancement of Colored People (NAACP), and subsequently its sister organization, the NAACP Legal Defense and Educational Fund (LDF),⁴¹ spearheaded a multi-state legal challenge to racial segregation, which culminated with the landmark decision of the U.S. Supreme Court in *Brown v. Board of Education* outlawing segregation in public schools. The success of *Brown*⁴² spawned a burst of public interest litigation focusing on a range of issues, including sex discrimination, discrimination against gays and lesbians, children’s rights, prisoner’s rights, and the rights of the poor.⁴³ For all their differences, many of these legal campaigns shared a similar modus operandi: proactively select a goal – whether shaping legal doctrine or changing a systemic practice – then design a strategy of individual cases to achieve it through the crafting of legal argument, and the identification of appropriate fact situations and suitable plaintiffs.⁴⁴ Since this pioneering litigation approach took hold in the

Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges, 28 HUM. RTS. Q. 492, 296 (2006); see also, Peter Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1769 (1993); Helen Hershkoff, *Public Interest Litigation: Selected Issues and Examples*, available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf>; Aryeh Neier, ONLY JUDGMENT 226 (1982); Charles F. Sabel & William H. Simon, “Destabilization Rights: How Public Law Litigation Succeeds”, 117 Harv. L.Rev. 1015, 1017 (2004).

³⁹ PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS at 84 (Edwin Rekosh, Kyra A. Buchko & Vessela Terzieva eds. 2000).

⁴⁰ See, e.g., Helen Hershkoff & Aubrey McCutcheon, *Public Interest Litigation: An International Perspective*, in MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD at 54 (Mary McClymont & Stephen Golub eds. 2000).

⁴¹ In 1937, the NAACP Legal Defense and Educational Fund (known as the “Legal Defense Fund” for short) spun off from the NAACP as that organization’s legal arm to focus on pursuing civil rights litigation. See Richard Kluger, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1975) (hereinafter “SIMPLE JUSTICE”).

⁴² The contentious nature of the debate concerning *Brown* and its legacy, and the struggle to define, let alone implement its holding, are such that the very term “success” is controversial. For an extended discussion on the legacy of *Brown v. Board*, see, e.g., *Symposium: Brown at Fifty*, 117 Harv. L. Rev. 1302 (2004).

⁴³ Helen Hershkoff & David Hollander, *Rights into Action: Public Interest Litigation in the United States*, in MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD, 89 (Mary McClymont & Stephen Golub eds. 2000).

⁴⁴ See Scott L. Cummings, *The Politics of Bro Bono*, 52 UCLA L.REV. 1, 14 & n.66 (2004); see also SIMPLE JUSTICE *supra* note 40 at 133-37. A slightly nuanced methodological emphasis is encompassed in the notion of “public law litigation” that also emerged from the U.S. context, which sought to challenge practices and policies of large government institutions such as public schools, hospitals, welfare agencies, or prisons so that litigation would result in systemic remedies that would impact thousands of individuals. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV L.REV. 1281 (1976).

United States, variations have been pursued by activist lawyers and NGOs around the world, although mostly in countries with common law legal traditions such as the United Kingdom, India, South Africa, Israel or Nigeria.⁴⁵

In Central and Eastern Europe, public interest law was a new concept in the post-communist development of CEE legal systems. As a semantic matter, under communism, the term “public” was essentially synonymous with the “state,”⁴⁶ and dissidents espoused a particular understanding of “human rights” to fight for political freedom and against the repressive institutional arms of the authoritarian state. After the fall of communism, as former dissidents began to redefine their role through civil society activists, they reflected on how to embrace the notion of public interest law to reflect the broader canon of universal human rights. As such, a new understanding of “public interest law” emerged “to refer to the strategies and tactics used to protect human rights and to pursue other elements of a progressive agenda within the developing structures of governance.”⁴⁷ Indeed, foreign donors eager to support the democratic transition in Central and Eastern Europe embraced this pursuit of public interest law through civil society initiatives. To be sure, civil society actors in Central and Eastern Europe were inspired by civil rights and human rights struggles in the United States, South Africa, and other countries. But the leaders of the CEE public interest law movement maintain that their mission emerged as an original context-specific continuation of the civic engagement and human rights concerns of prior dissident movements under communism.⁴⁸

Not surprisingly, public interest litigation as a tool to promote social change developed its own characteristics within post-transition legal systems in Central and Eastern Europe. In communist times, the role of the courts was confined to the criminal sphere; the prosecutor’s office had primacy in driving the legal systems to focus exclusively on criminal law enforcement as per the state’s objectives. Civil litigation, particularly with respect to fundamental rights, was rare. But sweeping law reforms transformed the role of the procuracy, restructured the judiciary, drafted new constitutions, created constitutional courts to interpret them, and reorganized the legal profession.

As these legal reforms took place throughout the 1990s, the CEE countries joined the Council of Europe. In doing so, they signed and ratified the European Convention on Human Rights and acceded to the jurisdiction of the European Court of Human Rights. This supranational court has the authority effectively to overrule domestic court interpretations of the scope of fundamental human rights enshrined in the European Convention and to issue decisions binding on individual Member States. In order to engage the Court’s jurisdiction over a complaint alleging rights violations of the European Convention, individuals must first exhaust legal remedies in their national courts. As a result, the very structure of the Council

⁴⁵ Hershkoff, *supra* note 42 at 1.

⁴⁶ Dimitrina Petrova, *Political and Legal Limitations to the Development of Public Interest Law in Post-Communist Societies*, 3 PARKER SCH. J. OF E. EURO. L. 541 (1996).

⁴⁷ Edwin Rekosh, *Constructing Public Interest Law: Transnational Collaboration and Exchange in Central and Eastern Europe*, XX UCLA L. Rev. XX (forthcoming 2008); see also Edwin Rekosh, *Who Defines the Public Interest: Public Interest Law Strategies in Central and Eastern Europe*, 1 PILI PAPERS (2005), available at http://www.pili.org/en/dmdocuments/pilli_papers_july_2005.pdf.

⁴⁸ “Still, the exchange relationships among progressive activists, legal professionals and others from Central and Eastern Europe and elsewhere have been characterized, in many cases at last, more by a collaborative and pragmatic search for new solutions to local problems than by the export of foreign models.” Edwin Rekosh, *Constructing Public Interest Law*, *supra* note 46.

of Europe system and the particular role of the European Court of Human Rights set the procedural path for public interest litigation.⁴⁹

What did these changes in the legal framework of CEE countries mean for the Roma of Central and Eastern Europe? The post-communist transition in the 1990s led to both an opening of space for Roma to reclaim and express their ethnic identity and a resurgence of anti-Roma sentiment as manifested in part through a rise in racially-motivated violence and overt forms of discrimination. The European Convention system, and the culture and practice of public interest litigation it helped to foster among legal, human rights and advocacy communities in CEE countries, encouraged representatives of Roma communities to reframe and rearticulate the myriad social problems the Roma were suffering as violations of their fundamental human rights. Increasingly, patterns of violence and discrimination targeting Roma were understood as expressions of broad-based societal racism and prejudice.

The notion of “Roma rights” - encapsulating the recognition that Roma have articulable and justiciable legal claims to equality and nondiscrimination – was given institutional expression through the creation of the European Roma Rights Center (ERRC) in 1996. ERRC was created as a pan-European public interest law organization, based in Budapest, Hungary, whose mission was (and remains) to combat anti-Roma racism and defend and promote the human rights of Roma using a range of advocacy tools, including public interest litigation.⁵⁰ While the notion of Roma rights has been contested as creating special rights for Roma,⁵¹ its essential core is a commitment to fundamental human rights for Roma.⁵²

The growing understanding that many Roma problems stemmed from differential treatment on account of their ethnicity coincided with an expansion of legal protection against discrimination on grounds of racial or ethnic origin throughout Europe. As a result of these developments, public interest litigation to defend and promote Roma rights emerged as a European-specific articulation of race discrimination litigation, a particular subcategory of public interest litigation. When public interest organizations and lawyers began contemplating Roma rights litigation strategies in CEE countries, the field of race discrimination litigation was particularly undeveloped.⁵³ This was due in large part to the absence of national legislation in CEE countries that explicitly outlawed discrimination. Furthermore, the non-discrimination provision of the European Convention on Human Rights – Article 14 – is an accessory right. This means that there is no independent right to be free from discrimination under the European Convention. Rather, a victim of discrimination can only state a claim under the European Convention when the discrimination occurs as an

⁴⁹ “Local [CEE] activists, influenced by the recent dissident past, were already predisposed to taking their cues from the international human rights framework. As they became more conversant with the particulars of the public international law of human rights, they quickly grasped the instrumental advantages of the Council of Europe human rights system . . . but for most civil society advocacy organizations working in the field of human rights, it made little sense to talk about litigation outside the context of the European Convention on Human Rights.” Edwin Rekosh, *Constructing Public Interest Law*, *supra* note 46 at 26.

⁵⁰ See Dimitrina Petrova, *The Roma: Between a Myth and the Future*, 1 ROMA RTS. Q. (2004).

⁵¹ See, e.g., *Interview with Jenő Kaltenbach, Parliamentary Commissioner for the Rights of National and Ethnic Minorities in Hungary*, 1 ROMA RTS. Q. (2004).

⁵² The ERRC developed a position statement to counter critiques of the notion of Roma rights: “Roma rights, because human rights are universal, but human rights violations fall disproportionately (and in different ways) against certain groups.” Claude Cahn, *The Names*, 1 ROMA RTS. Q. (2004).

⁵³ James A. Goldston, *Race Discrimination Litigation in Europe: Problems and Prospects*, 1 ROMA RTS. Q. (1998).

element of violations of other substantive rights.⁵⁴ At the time the Roma rights movement emerged, the European Court of Human Rights had yet to issue a judgment in a case concerning racial discrimination as a violation of the European Convention.

But vast changes have occurred over the last decade that have given Europe some of the most robust legal protections against racial and ethnic discrimination in the world. For its part, the Council of Europe developed Protocol No. 12 to the European Convention, which creates a freestanding right to non-discrimination that will supplement the Article 14 nondiscrimination guarantee provided in the European Convention.⁵⁵ It was opened for signature and entered into force on April 1, 2005.⁵⁶

In 2000, on a separate, but parallel track, the Council of the European Union (EU) adopted the Race Equality Directive⁵⁷ and the Employment Equality Directive.⁵⁸ The Race Equality Directive prohibits discrimination on racial and ethnic grounds in a broad range of sectors, including employment, education, social protection, social advantages, and the provision of goods and services. For its part, the Employment Equality Directive prohibits discrimination on grounds of religion or belief, disability, age, and sexual orientation in employment. Both directives set progressive standards that facilitate the legal procedures to prove a legal claim of discrimination in court. For example, both directives define and prohibit direct and indirect discrimination and make clear that if claimants establish facts from which discrimination can be presumed, the burden of proof shifts to the respondent to establish that discrimination did not occur. Furthermore, the directives instruct EU Member States to create governmental bodies that promote equal treatment and enforce the antidiscrimination provisions of the directive.⁵⁹

By nature of the European Union's structure, EU members are required to transpose the legal protections of the directives into their national legislation. Of particular relevance to the potential for Roma Rights public interest litigation, several Central and Eastern European countries with sizeable Roma minority populations recently joined the European Union⁶⁰ and have therefore adopted progressive national antidiscrimination legislation in conformity with these directives.

In sum, the current legal frameworks of CEE countries, therefore, provide a fertile ground for testing the potential impact of Roma rights public interest litigation. As a result of normative developments in the Council of Europe and the European Union, these countries

⁵⁴ See *supra* note 14.

⁵⁵ See *discussion supra* note 14.

⁵⁶ As of May 2008, 16 Council of Europe Member States have ratified Protocol No. 12 to the European Convention on Human Rights and this Protocol is therefore binding in those countries. An additional 11 Council of Europe states have signed the Protocol only. Additional information regarding Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms can be accessed on the Council of Europe website at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=177&CM=8&DF=4/9/2008&CL=ENG>.

⁵⁷ European Union Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The full text of this Directive is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>.

⁵⁸ European Union Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The full text of this Directive is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>.

⁵⁹ See EU Race Equality Directive, *supra* note 56, Article 13.

⁶⁰ See *supra* note 12.

not only possess among the most comprehensive legal frameworks prohibiting racial and ethnic discrimination in the world, they have also ceded jurisdiction to judicial review by two highly respected regional judicial bodies that have binding legal authority over national legal systems, the European Court of Human Rights and the European Court of Justice. Additional regional pressure on states to respect European standards comes from the European Committee on Social Rights, which was created in 1998 with the power to hear collective complaints of violations of the European Social Charter and issue non-binding resolutions that may recommend that states adopt general measures.⁶¹

I. 3. Barriers to the Effective Pursuit of Roma Rights Public Interest Litigation in Central and Eastern Europe

While the current legal frameworks of countries in the CEE region present arguably the most favorable environment in which to pursue Roma rights public interest litigation, numerous practical barriers remain. These obstacles exist from the perspectives of the Roma population as well as public interest lawyers who are seeking to engage in public interest litigation to effectuate systemic change on behalf of Roma.⁶²

The first and perhaps the most serious obstacle to pursuing public interest litigation lies in the fact that Roma communities of Central and Eastern Europe lack awareness of their rights and harbor a deep distrust of public institutions, including the judiciary and the legal profession. Skepticism towards legal institutions is a distinct post-communist legacy that is slowly being overcome in CEE countries. Under communism, state and Party were synonymous, and the law and legal institutions were but an expression and extension of the state's power.⁶³ Post-communist institutional reforms created constitutional democracies and structures for independent judiciaries. For these institutions to become effective, shifts in legal culture – the way that law is understood and expressed⁶⁴ – are necessary to overcome “the disrespect, the distrust, the cynicism that citizens naturally felt about law and lawyers and courts and judges in the communist world, precisely because the law was seen to be an instrument of party policy.”⁶⁵ Changes in legal culture occur at different levels over different time periods. In general (and to simplify an obviously complicated process), whereas a small group of public-interest minded lawyers and civil society actors has emerged in CEE countries eager to test the new laws and judiciaries through public interest litigation, changes in perceptions of the legal system among the general population have been slower.

Continuing distrust in legal institutions and actors is perhaps most pervasive and deeply embedded among the Roma, who have suffered myriad indignations at the hands of the state. This is particularly significant when reflecting on the effectiveness and legitimacy of public interest litigation on behalf of Roma. Several public interest lawyers in CEE

⁶¹ A description of the European Committee on Social Rights can be accessed on the Council of Europe's website at http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/.

⁶² The observations and conclusions elaborated in this subsection derive from interviews of Roma rights public interest NGOs and lawyers for this article.

⁶³ *Symposium: Constitutional “Revolution” in the Ex-Communist World: The Rule of Law*, 12 AM. U.J. INT'L L. & POL'Y 45, 58 (1997).

⁶⁴ *See id.*

⁶⁵ *See id.* at 59.

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countries (most of whom are non-Roma) see this continuing distrust of the legal process as one of their greatest challenges in pursuing public interest litigation on behalf of Roma rights. To overcome widespread skepticism of legal institutions, lawyers and other advocates must take extra care to clearly explain legal procedures, address concerns about entering courtrooms and facing judges, avoid creating unrealistic expectations, and understand, and respond to, the specificity of circumstances prevailing in many Roma communities. Like other plaintiffs – but perhaps to an even greater extent – many Roma are primarily interested in the tangible results of any litigation in improving their own situation. Even as they support public interest litigation as a tool, many representatives of Roma communities underscore the need to engage Roma more meaningfully and consistently in discussions about litigation’s costs, benefits and tradeoffs.

The second major obstacle cited by lawyers engaged in Roma rights public interest litigation is the combined cost and length of legal proceedings. Effective public interest litigation requires skilled lawyers, and most Roma victims of discrimination lack funds to retain private counsel. In addition, preparing public interest litigation – particularly when challenging discriminatory practices – is expensive. Few countries in CEE have taken measures to mitigate such costs.

To the contrary, in most CEE countries, loser pay rules for cost allocations deter indigent plaintiffs from seeking to vindicate claims. Litigants may bear the burden not only of their own costs for research, legal representation, and victim services, but also, in the event their claims fail, those of their adversaries. In some countries, plaintiffs in civil actions are required to deposit a sum of money upfront at the time of filing the lawsuit in the event that their suit is unsuccessful.

In addition to prohibitive costs, public interest litigation involves lengthy court proceedings before obtaining a final legal judgment. As the cases discussed in Section II demonstrate, exhausting the trial and appellate levels of domestic legal review can require several years. Proceedings can be prolonged even further if remedies are sought at the European Court of Human Rights. The combined effect of high costs and excessively long delays in court proceedings to obtain final judgments potentially diminishes the impact of whatever positive results the litigation ultimately produces.

A third and related obstacle is the limited availability of legal aid to assist Roma in vindicating their rights. Despite structural legal reforms over the past decade and a half, governments in Central and Eastern Europe have failed to develop effective legal aid schemes to provide adequate legal representation for the indigent.⁶⁶ Most countries in the CEE region also lack a tradition of providing *pro bono publico*, or free legal services, through bar associations.⁶⁷ As a result, much public interest litigation on behalf of Roma has been undertaken with foreign donor support.

⁶⁶ “In many countries in Central and Eastern Europe, reform is needed to broaden the statutory eligibility criteria, to provide procedural guarantees for the right to legal aid outside mandatory defense, to ensure better application of the legal aid norms in practice, and to improve the management of the legal aid system.” Vessela Terzieva, *Comparative Report*, at 2, in ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE: COUNTRY REPORTS (Public Interest Law Initiative 2003).

⁶⁷ While some bar associations in CEE countries collaborate with courts to appoint lawyers *ex officio* in criminal cases for indigent defendants, *see id.* at 11, 26, such *pro bono* services are typically not available in civil cases, with the exception of the Czech Republic and Slovakia, whose Constitutions both guarantee “the right of everyone to legal aid in court proceedings and in proceedings before administrative authorities.” *Id.* at 18. Nevertheless, there is a serious gap in enforcing such aspirations to provide legal services and most potential

Fourth, even where public-minded lawyers can secure financial support for Roma rights work, they may be hampered by bar association rules that forbid the provision of legal advice outside the context of private law offices. As a result, even lawyers working at public interest law NGOs who can attract adequate financial means may have difficulty establishing the institutional foundation to litigate on behalf of Roma and other under-privileged communities.

Fifth, rules of law and procedure have hampered the effective pursuit of public interest litigation on behalf of Roma rights. Until recently, much national legislation in CEE did not explicitly outlaw discrimination on grounds such as racial or ethnic origin, or prohibit indirect discrimination based on the disproportionate application of facially-neutral rules or policies. Similarly, although empirical evidence – and in particular statistical data – is often central to a claim of discrimination, many courts in CEE have traditionally been reluctant to consider such evidence. In recent years, legislation has been changed, to conform with developments at EU level,⁶⁸ and the evolving jurisprudence of the Strasbourg court.⁶⁹ But it will take time for the new legal standards to be widely disseminated and applied.

Additional procedural obstacles to the effective pursuit of public interest litigation in CEE include limitations on allowing cases to be filed challenging systemic patterns of discrimination through *actio popularis* or class action law suits. These are two legal means of attacking institutional forms of discrimination that affect a group of persons rather than individuals. In class actions, numerous individuals join to bring one law suit challenging the same discriminatory practices and, often, seek a remedy that extends to other similarly situated persons who are not plaintiffs. In *actio popularis* proceedings, public interest organizations initiate legal action on behalf of the public as a whole, challenging laws or unlawful practices, without needing to prove harm in an individual case or having representative victim plaintiffs. In the CEE region, provisions allow for *actio popularis* lawsuits to be brought in Hungary and Bulgaria. Section II describes how this legal mechanism has been effectively used to challenge discrimination in education against Roma children.

Finally, a major challenge in successfully pursuing Roma rights public interest litigation in CEE countries is the stubborn persistence of negative attitudes, stereotypes, and bias against Roma by the agents of the legal system.⁷⁰ This not only reinforces Roma

indigent Roma legal claimants remain deterred from pursuing public interest litigation due to lack of effective access to legal aid.

⁶⁸ “Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion, or practice, would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons...” EU Race Equality Directive, *supra* note 56, Art. 2.2.(a). Operational paragraph 15 of the EU Race Equality Directive also instructs national courts to allow for the use of statistics to prove indirect discrimination: “The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.”

⁶⁹ *See, e.g., D.H. and Others v. Czech Republic*, App. No. 57325/00 (ECtHR Grand Chamber November 13, 2007). In that judgment, discussed in detail in text accompanying notes 158-184 below, the European Court accepted statistical evidence put forward by the applicants as sufficient to raise a presumption of indirect discrimination and ultimately a violation of the European Convention’s antidiscrimination norm. *See id.* at pp. 64-69, paras. 189-210.

⁷⁰ Commentators on the development of the rule of law in Central and Eastern Europe have defined access to justice in this region as “a very broad notion. The right to access to justice guarantees that every person has access to an independent and impartial court and the opportunity to receive a fair and just trial when the

victims' reluctance to seek legal remedies to vindicate their rights from these institutions; it may also affect the outcome of official investigations.⁷¹ In many CEE countries, judges and prosecutors work closely with the police and at all levels, civil servants harbor negative attitudes towards Roma victims and defendants. Public interest lawyers lament the difficulty, if not near impossibility in some instances, of obtaining a fair and unbiased trial in Roma rights public interest law suits.

I. 4. Conclusions

Section I has established how Roma rights litigation in Central and Eastern Europe today sets a unique stage to assess the potential impact of public interest litigation. Facing systemic discrimination in all sectors of life that perpetuates their extreme marginalization, the Roma of the CEE region have limited means to instigate systemic change. Yet Roma rights public interest litigation has emerged as one critical tool to effectuate change, despite the numerous and serious obstacles that exist. The regional European legal framework, in terms of the recent legislative changes in new EU Member States to conform with the Race and Employment Equality Directives as well as the human rights antidiscrimination framework of the European Convention on Human Rights, provides the most comprehensive and progressive legal standards to facilitate and promote the pursuit of antidiscrimination litigation for vulnerable groups such as the Roma. Furthermore, the political climate, in which institutions of both the European Union and the Council of Europe are prioritizing a comprehensive approach to combating discrimination against Roma in Europe, is also creating a unique and favorable environment for the pursuit of Roma rights public interest litigation. Section II now turns to an assessment of the impact of Roma rights public interest litigation to date.

II. Assessing the Impact of Roma Rights Public Interest Litigation in Central and Eastern Europe

Given that Roma rights public interest litigation emerged only recently as a tool to remedy systemic discrimination against Roma, it is both difficult and somewhat premature to attempt to assess the effectiveness of this enterprise thus far. What constitutes success in the

individual's liberty or property is at stake. Impediments to such access can be numerous, including high court costs, restrictive jurisdictional rules, overly complex regulations, ineffective enforcement mechanisms, and corruption. Access to justice is also linked to judicial independence and legal literacy. But few would contest the idea that basic availability of a competent lawyer's services is a crucial element of access to justice." Edwin Rekosh, Kyra A. Buchko, Daniel Manning and Vessela Terzieva, *Access to Justice: Legal Aid for the Underrepresented*, in SOURCE BOOK: ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE (PILI 2003) available at <http://www.pili.org/en/content/view/55/53/>.

⁷¹ Recent European Court jurisprudence imposes on States a positive duty to investigate racially-motivated crimes. This jurisprudence emerged from a case brought by a Roma victims of police abuse and is discussed in further detail in the text accompanying notes 110-130 below. See, e.g., *Nachova v. Bulgaria*, App. Nos. 43577/98, 43579/98 (Grand Chamber, June 7, 2005). In the case of the Hadareni pogrom in Romania, also discussed in text accompanying notes 119-123, the national courts were clearly biased against the Roma victims, resulting in meager punishment against the perpetrators of violence against Roma.

pursuit of public interest litigation is elusive to measure. This is because public interest litigation can achieve numerous outcomes. At one level, a legal victory should secure a positive remedy for a breach of a law in the circumstances of a particular case. These remedies can constitute a judicial declaration of rights violations, an order to pay compensation to a victim, and/or the prosecution of wrongdoers where crimes have been committed. At another level, positive judgments can set legal precedents that improve the state of the law. When this happens, a case has broader significance than remedying the case and facts at issue in a particular case because the victory sets an improved legal standard that can be applied in a broad range of future litigation. Public interest litigation has perhaps the most widespread impact, however, when a legal victory that validates and reinforces substantive equality and the nondiscrimination norm for Roma prompts public commentary and debate that increases momentum and pressure to change political and social attitudes, as well as institutional stances, that underlie systemic discrimination that the Roma continue to suffer. As such, public interest litigation truly emerges from the fluid forces between law and society and perhaps the ultimate measure of public interest litigation's success should be measured in tangible widespread social change.⁷²

Taking into account the difficulties in measuring the impact and success of pursuing Roma rights litigation, this Section nevertheless offers some observations and analysis based on a limited review of an illustrative and non-comprehensive portrait of the litigation landscape and particularities of the legal frameworks in a selection of five CEE states including Bulgaria, the Czech Republic, Hungary, Slovakia, and the Russian Federation. The Section then explores the impact of Roma rights public interest litigation in in-depth studies of three thematic areas, including racial violence, education and housing.

I. 1. A Select Overview of the Roma Rights Litigation Landscape in Central and Eastern Europe

Drawing on interviews with public interest lawyers in CEE countries and a survey of available reports on Roma rights public interest litigation in the CEE region, this section offers a overview of the litigation landscape in a selection of five CEE countries. A major obstacle to a comprehensive assessment of the scope and impact of Roma rights public interest litigation in Central and Eastern Europe is the lack of centralized data and statistics regarding court actions in the countries in this region. The available information, however, is improving due to a concerted effort on the part of the European Union through its Agency for Fundamental Rights (FRA),⁷³ the FRA's predecessor organization called the European Monitoring Centre on Racism and Xenophobia (EUMC),⁷⁴ and other initiatives such as the network of antidiscrimination legal experts established by the European Commission⁷⁵ to

⁷² "On the one hand, a pressing need for legal reform in the public interest stimulates strategic litigation. On the other hand, legal actions themselves prompt public reaction, inspiring public demands, protests, and support that ultimately can bring about social and legislative changes." PURSUING THE PUBLIC INTEREST, *supra* note 38 at 82.

⁷³ The scope of activities of the European Union Agency for Fundamental Rights can be accessed on the agency's website at <http://www.fra.europa.eu/fra/index.php>.

⁷⁴ *See id.*

⁷⁵ The scope of activities of the network of antidiscrimination legal experts established by the European Commission can be accessed at the following website: http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm.

monitor the implementation of the antidiscrimination legal principles established in the Race Equality Directive that have been transposed into national law. This section nevertheless seeks to provide brief but illustrative descriptions of the scope and range of Roma rights public interest litigation in three CEE countries that joined the EU in 2004 (the Czech Republic, Hungary, and Slovakia), one CEE country that joined the EU in 2007 (Bulgaria), and one CEE country that remains outside the scope of the EU but within the legal framework of the Council of Europe (the Russian Federation). Details on how regional legal norms have been implemented in the national legal systems, the prevalence of thematic areas in which Roma rights public interest litigation is being pursued, and the actors engaged in public interest litigation in these countries will be explored.

The special role of the European Roma Rights Center (ERRC)⁷⁶ in sparking Roma rights public interest litigation in the CEE region, however, must again be mentioned. As a pan-European public interest organization whose mission is to combat anti-Roma racism and defend and promote the human rights of Roma using a range of advocacy tools, including public interest litigation, the ERRC not only conceptualized the Roma struggle for equality as the pursuit of Roma rights,⁷⁷ it anchored this pursuit as it emerged in the 1990s in the unique human rights discourse of the Council of Europe system designed to permeate the national legal systems of the new post-communist Member States of this regional organization. The ERRC benefited from the strategic funding initiatives of donor organizations eager promote public interest litigation as a tool to develop the rule of law in the region.

The ERRC's strategic litigation program created partnerships with civil society actors and Roma community organizations in countries throughout the CEE region to identify and pursue Roma rights public interest litigation test cases. Since its inception, the ERRC is credited with creating a generation of Roma rights activists, increasing awareness of the systematic violation of Roma rights endemic in the region, obtaining an increasing number of significant legal victories in regional and national courts in Europe, thereby pursuing comprehensive efforts to advance the cause of Roma throughout the region.⁷⁸

Against the backdrop of the unique contribution ERRC has made to the pursuit of Roma rights public interest litigation in light of its advanced awareness of the regional European antidiscrimination legal framework, it is helpful to examine the Roma rights litigation landscape in the unique national contexts of five selected countries. This section will first look at the Czech Republic, Hungary, and Slovakia, all three countries having joined the EU on May 1, 2004, then turn to Bulgaria, which joined the EU on January 1, 2007, and conclude with a brief mention of the situation in the Russian Federation, which remains outside the EU but within the Council of Europe system.

Czech Republic. Although the Czech Republic joined the European Union on May 1, 2004, the Czech Parliament failed to adopt national legislation implementing the EU Race Equality Directive or create a specialized equality agency pursuant to the directive for several

⁷⁶ See *supra* note 49. An overview of the organization's history and activities can be accessed on its website at www.errc.org.

⁷⁷ See *supra* note 49.

⁷⁸ See *The 10th Anniversary of the European Roma Rights Centre: Remarks of Aryeh Neier*, 2-3 ROMA RTS. Q. (2006).

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years until the threat of sanctions from the EU forced its passage on April 23, 2008.⁷⁹ Whereas the Czech Charter of Fundamental Rights and Freedoms contains a general antidiscrimination provision, prior to the transposition of the Race Equality Directive, neither Czech law nor the Czech Constitution explicitly provided a legal prohibition against discrimination.⁸⁰ In the absence of a legal antidiscrimination prohibition, Roma rights lawyers in the Czech Republic have invoked a civil law provision protecting “personal rights.”

Czech legal procedures present barriers to the effective pursuit of Roma rights public interest litigation. For one, the Czech government does not provide legal aid outside of mandatory criminal defense cases and bar association rules do not allow lawyers to directly offer their services to clients.⁸¹ Roma victims of discrimination who have pursued litigation to complain of incidents of discrimination have typically contacted the few NGOs that address Roma rights concerns, such as the Czech League for Human Rights and the Council Center for Citizenship, Civil and Human Rights.⁸² In turn, these NGOs contact the small number of Czech public interest lawyers who are familiar with European antidiscrimination law and contract with them to represent victims in court.

While the number of Roma rights cases in the Czech Republic is not known, the volume is not estimated to be high. The cases that have been pursued have challenged discrimination in access to public places, housing, access to health, employment, segregation in schools, racial violence, and racial harassment. The first significant Roma rights litigation victory in the Czech national courts arose in a case in which a Roma woman was denied employment by an international drug store on the basis of ethnic discrimination. In this case, *Kotlarova v. Rossman International*, the NGO contacted by the victim sent a non-Roma tester to the same store, who was successfully hired based on the same credentials. The Czech courts accepted the evidence of differential treatment of the Roma victim established through the experience of the non-Roma tester and ruled in the victim’s favor, ordering the store to apologize to the victim and pay compensation.⁸³ The most ambitious and far-reaching Roma rights public interest litigation test case to arise from the Czech Republic is the case challenging segregation of Roma children in education in the Czech city of Ostrava that was recently decided by the European Court of Human Rights, *D.H. and Others v. Czech*

⁷⁹ The official notice of the passage of the antidiscrimination legislation can be found on the Czech Senate’s website, which is available at http://www.senat.cz/xqw/xervlet/pssenat/historie?ke_dni=24.04.2008&O=6&action=detail&value=2245; see also *Czech Senate Passes Antidiscrimination Law*, CESKE NOVINY ONLINE (April 23, 2008), available at http://www.ceskenoviny.cz/news/index_view.php?id=309086.

⁸⁰ See Pavla Bouckova, REPORT ON MEASURES TO COMBAT DISCRIMINATION: COUNTRY REPORT CZECH REPUBLIC (January 8, 2007), available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/csrep07_en.pdf.

⁸¹ David Strupek, *No system, no concept, insufficient mechanisms: legal aid and Roma in the Czech Republic*, ROMA RTS. Q. (2004), available at <http://www.errc.org/cikk.php?cikk=660>.

⁸² See Center for Citizenship, Civil and Human Rights website at <http://www.proadna-prava.cz>.

⁸³ See Radio Prague, *The Rossmann pharmacy chain has been ordered to pay 50,000 crowns in compensation for discriminating against a Czech Romany* (March 31, 2004), available at <http://www.radio.cz/en/news/52312>; see also ENAR, Shadow Report 2005: Racism in the Czech Republic, available at http://www.enar-eu.org/en/national/czechrep/Czech_Republic_2005.pdf; Barbora Bukovska, The Center for Citizenship, Civil and Human Rights Update – Progress in Anti-discrimination Jurisprudence, in JUSTICE INITIATIVE FELLOWS NEWSLETTER at 20-22 (2004), available at http://www.justiceinitiative.org/db/resource2/fs/?file_id=14746. Other employment discrimination victories on behalf of Roma victims have been won in Czech courts. See *id.*

Republic, App. No. 57325/00 (ECtHR Grand Chamber 13 November 2007), which will be discussed in greater detail below.

Slovak Republic. The Slovak Republic has a relatively well-developed antidiscrimination legal framework for the CEE region. Not only does the Slovak Constitution provide an independent guarantee on equal treatment in its Article 12, the Slovak Parliament also passed legislation transposing the provisions of the EU Race Equality Directive, the Act on Equal Treatment in Certain Areas and Protection against Discrimination (Equal Treatment Act), which entered into force on July 1, 2004.⁸⁴ This Act has properly transposed the standards set forth in the Race Equality Directive and has amended legal procedures to allow victims of discrimination to pursue class action law suits.⁸⁵ Furthermore, pursuant to the Equal Treatment Act, the Slovak government established the Slovak National Center for Human Rights in July 2004 an independent, non-judicial body subsidized by the state to oversee effective implementation of the discrimination prohibitions in the Equal Treatment Act. As of 2007, commentators criticized this body for not adequately fulfilling its role in awareness-raising and assisting victims pursue discrimination claims before the courts.⁸⁶

Antidiscrimination case law has been limited in Slovakia thus far, as elsewhere in the CEE. Few lawyers are familiar with antidiscrimination law and one main national NGO, the Center for Civil and Human Rights,⁸⁷ addresses issues of racial discrimination and assists in pursuing Roma rights cases. This NGO was selected to participate in a pioneering test project funded by the EU Community Action Programme to Combat Discrimination called the TRAILER, or *Traveller and Roma Action for the Implementation of Legal and Equality Rights*, project. From December 2004 – November 2006, the TRAILER project funded the Slovak Center for Civil and Human Rights to receive training in antidiscrimination law and underwrote the legal costs to file Roma rights litigation complaints.⁸⁸ As a result of this project, numerous Roma rights public interest litigation cases were filed in Slovak courts in the areas of access to goods and services (8 cases over 2 years), discrimination in employment (1 case), hate speech (1 case), health (1 case), and housing (1 case).⁸⁹ Interestingly, the experience of the TRAILER project confirms that public interest litigation is a long-term enterprise as in the 2-year time span of the project, more than half the cases remained pending or on appeal before national courts when the funding from the TRAILER project ceased.⁹⁰ Additional Roma rights national litigation has been brought independently of the TRAILER project, including several cases challenging Roma discrimination in housing

⁸⁴ Zuzana Dlugosova, REPORT ON MEASURES TO COMBAT DISCRIMINATION: COUNTRY REPORT SLOVAK REPUBLIC at 2 (January 8, 2007), available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/skrep07_en.pdf.

⁸⁵ See *id.* at 54.

⁸⁶ See *id.* at 56, 61.

⁸⁷ See Center for Civil and Human Rights website at <http://www.poradna-prava.sk>.

⁸⁸ See Final Report: the TRAILER Project 2004-2006, available at http://www.romadecade.org/portal/downloads/General%20Resources/TRAILER_report_web.pdf.

⁸⁹ See TRAILER Project Roma Case Law Database, Slovak Anti-Discrimination Cases, available at http://www.europeandialogue.org/ED_PAGES/Case_database/SK_cases.doc.

⁹⁰ See *id.*

that have been appealed to international jurisdictions as will be described in greater detail below.

Hungary. Hungary transposed the Race Equality Directive through the Equal Treatment Act of 2003, which in turn led to the creation of the Equal Treatment Authority, a government administrative body that has the power to review complaints of discrimination, and issue sanctions on persons or entities that violate the legal prohibition on discrimination.⁹¹ The Equal Treatment Act significantly altered Hungarian civil procedure to facilitate the pursuit of antidiscrimination litigation, including the explicit use of statistical evidence,⁹² evidence gathered through situational testing,⁹³ and the pursuit of *actio popularis* law suits.⁹⁴ The enactment of the Hungarian Equal Treatment has already contributed to an increased awareness of the prohibition on discrimination.⁹⁵ For its part, the Equal Treatment Authority is regarded as one of the most effective governmental equality bodies that has issued severe and/or frequent sanction or awards for violations of the prohibition on discrimination in 2005 and 2006.⁹⁶

Numerous Hungarian NGOs provide services to assist Roma victims of discrimination in pursuing legal remedies for discrimination including, but not limited to, the Hungarian Helsinki Committee, The Legal Defence Bureau for National and Ethnic Minorities (NEKI), the Roma Civil Rights Foundation, the Romani Civil Rights Community, and the Chance for Children Foundation (which focuses on challenging discrimination in education). The full scope and range of case law on Roma rights public interest litigation is difficult to assess. One cumulative report published in 2007 cites five positive rulings from the Hungarian Supreme Court finding discrimination against Roma in the fields of racial violence, segregation in education, discrimination in access to a discotheque in one case and a pub in another, and discrimination in access to employment.⁹⁷ Numerous other claims for discrimination on behalf of Roma victims have been taken to the national courts and now the

⁹¹ Andras Kadar, REPORT ON MEASURES TO COMBAT DISCRIMINATION: COUNTRY REPORT ON HUNGARY 72 (January 8, 2007) available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf.

⁹² See *id.* at 21.

⁹³ See *id.* at 16.

⁹⁴ See *id.* at 65. Under the ETA, “if the principle of equal treatment is violated or there is a direct danger thereof, a lawsuit for the infringement of inherent rights or a labor lawsuit may be brought by a) the Public Prosecutor; b) the [Equal Treatment] Authority; c) any social and interest representation organization, provided that the violation of the principle of equal treatment or the direct danger thereof was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately.” *Id.*

⁹⁵ “It can be said that the coming into force of the ETA and the first two years of the Authority’s operation have given an impetus to the fight against discrimination.” *Id.* at 81.

⁹⁶ In 2006, the Equal Treatment Authority received 592 complaints of discrimination on the basis of several grounds of which race and ethnicity were only a fraction; in that year the Authority found a breach of the prohibition on discrimination in 27 cases, of which 5 cases concerned discrimination on the grounds of ethnic origin. See European Union Agency for Fundamental Rights, REPORT ON RACISM AND XENOPHOBIA IN THE MEMBER STATES OF THE EU (2007), available at http://fra.europa.eu/fra/material/pub/racism/report_racism_0807_en.pdf (hereinafter “FRA RACISM REPORT”).

⁹⁷ See COUNTRY REPORT ON HUNGARY, *supra* note 90 at 3-5.

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Equal Treatment Authority,⁹⁸ challenging similar forms of discrimination. In addition, several Roma discrimination cases from Hungary have been taken to international tribunals,⁹⁹ such as several unsuccessful complaints of police brutality brought before the European Court of Human Rights¹⁰⁰ and a pending appeal of a groundbreaking national court decision finding discriminatory segregation of Roma in education that was the first *actio popularis* test case under the Hungarian Equal Treatment Act, which will be discussed in greater detail below.¹⁰¹

Bulgaria. Bulgaria transposed the EU Race Equality Directive before it joined the EU in 2007 with the passage of the Bulgarian Law on Protection from Discrimination, which entered into force on January 1, 2004. Bulgaria established the Commission for Protection from Discrimination as its governmental equality body pursuant to the directive in 2005. The Commission has the power to hear complaints, issue mandatory directions, administer penal sanctions, and represent victims of discrimination before the courts.¹⁰² Several Bulgarian NGOs address Roma rights complaints through litigation, including the Bulgarian Helsinki Committee, the Bulgarian Human Rights Project, the Romani Baht Foundation, and now the Equal Opportunities Initiative Association.

Of all the CEE countries in which Roma rights litigation has been pursued, public interest lawyers in Bulgaria initiated case law long before the transposition of the EU Race Equality Directive and cases from Bulgaria have perhaps made the most significant contributions to the advancement of regional standards on the prohibition of racial and ethnic discrimination.¹⁰³ Cases challenging racially-motivated police brutality in Bulgaria, as will be discussed in greater detail below, prompted not only the first positive Roma rights decision from the European Court of Human Rights,¹⁰⁴ but also the first explicit finding of

⁹⁸ See, e.g., NEKI won a case on behalf of a Roma who was discriminated in access to employment on account of his ethnicity before the Equal Treatment Authority, which was then upheld by the Court of Budapest. See FRA RACISM REPORT, *supra* note 95 at 60.

⁹⁹ The ERRC and Hungarian NGO NEKI initiated a successful complaint of discriminatory violation of a Hungarian Roma woman's reproductive rights as a result of forced sterilization before the United Nations Committee for the Elimination of Discrimination against Women, which issued concluding comments confirming discriminatory rights violations in the case of *Ms. A.S. v. Hungary*, see CEDAW Communication No. 4/3004 available at http://www.reproductiverights.org/pdf/www_CEDAW_Hungary_2006.pdf.

¹⁰⁰ Two cases brought by the Hungarian Helsinki Committee challenged instances of racially-motivated police brutality against Roma victims, but were declared inadmissible, namely the *Geza Farkas* case, App. No. 31561/96 and the *Bensedine* case, App. No. 37382/97, brought by the NGO NEKI. See Lilla Farkas, *Knocking at the Gate: The ECtHR and Hungarian Roma*, EUMAP Online Journal, available at <http://www.eumap.org/journal/features/2002/may02/echrandhunroma>.

¹⁰¹ See Miskolc Roma Segregation in Education Case, FRA RACISM REPORT, *supra* note 95 at 24.

¹⁰² See FRA RACISM REPORT, *supra* note 95 at 29. Prior to the enactment of the Law on Protection from Discrimination, Article 6 of the Bulgarian Constitution served as the legal provision insuring the principle of equality and prohibiting discrimination. See Svilen Ovcharov, ENAR SHADOW REPORT 2006: RACISM IN BULGARIA (ENAR 2006), available at http://cms.horus.be/files/99935/MediaArchive/national/Bulgaria_2006.pdf.

¹⁰³ As for case law under the Bulgarian Law on Protection from Discrimination, the Ministry of Justice started to collect information about court cases arising under this legislation in 2006, but the statistics do not distinguish whether cases complaint of discrimination on the basis of ethnic origin or some other ground. See FRA RACISM REPORT, *supra* note 95 at 30.

¹⁰⁴ See *Assenov v. Bulgaria*, App. No. 90/1997/874/1086 (October 28, 1998).

racial discrimination under Article 14 of the European Convention from that same court.¹⁰⁵ Today, Bulgarian public interest lawyers estimate there are 9 Roma rights cases pending before international tribunals emanating from Bulgaria, in the fields of police brutality, discrimination in education, access to public services, and housing. Bulgaria, like Slovakia, was included in the European Community Action Program to Combat Discrimination's TRAILER project.¹⁰⁶ In two years, this project resulted in the filing of 27 Roma antidiscrimination cases in the fields of access to goods and services (8 cases), education (7),¹⁰⁷ employment (6), racial violence (3), harassment (2), and health care (1).¹⁰⁸

Russian Federation. This section's brief examinations of the legal framework and landscape of Roma rights public interest litigation in CEE countries deserves to mention here the situation in one country outside the EU, namely the Russian Federation. Absent the imperative to adopt comprehensive antidiscrimination legislation, the Russian legal framework only provides piecemeal protection against discrimination through its Constitutional equality provision in Article 19 and various clauses prohibiting discrimination in the Labor Code and other civil legislation.¹⁰⁹ Elsewhere, Russian law criminalizes racial discrimination and outlaws racist hate crimes and extremism.¹¹⁰ Yet as a member of the Council of Europe, the European Convention on Human Rights antidiscrimination guarantee of Article 14 binds Russia.

Russian antidiscrimination activists do not focus their attention on the state of the antidiscrimination legal framework in their country, but rather deplore the lack of independence and rule of law endemic in the post-communist Russian judicial system. The legal culture and environment are not conducive to Roma rights public interest litigation. But the few lawyers who are versed in European antidiscrimination standards and Russian NGOs that address discrimination against Roma and other national minorities like the Memorial Human Rights Center, Moscow Helsinki Group, among a few others, acknowledge that the prospects of securing a favorable, binding judgment from the European Court of Human Rights remains one of the only tools to effectuate human rights change within Russia. In many respects, if Roma rights public interest litigation began elsewhere in the CEE region in the mid-1990s, this phenomenon is only beginning now to emerge in Russia. Roma rights cases are being brought before the national courts to challenge discriminatory denial of personal identification documents and access to public services and racial violence cases. But public interest organizations have acknowledged the need for strategizing on the use of public interest litigation to tackle endemic problems that the Roma suffer, such as the discriminatory evictions and housing rights violations, as will be discussed further below, and segregation of Roma children in education.

¹⁰⁵ See *Nachova v. Bulgaria*, App. No. 43577/98.

¹⁰⁶ See *supra* note 87.

¹⁰⁷ These cases challenging discrimination in education were initiated by the Bulgarian NGO Romani Baht in cooperation with ERRC under a companion project funded by the British Embassy in Sofia. See TRAILER Project Roma Case Law Database, Slovak Anti-Discrimination Cases, available at http://www.europeandialogue.org/ED_PAGES/Case_database/BG_cases.doc.

¹⁰⁸ See *id.*

¹⁰⁹ European Commission against Racism and Intolerance, THIRD REPORT ON THE RUSSIAN FEDERATION, at 12 (December 16, 2005), available at http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/russian_federation/Russian%20Federation%20third%20report%20-%20cri06-21.pdf.

¹¹⁰ See *id.* at 9.

II. 2. Assessing Impact of Roma Rights Public Interest Litigation in Three Thematic Areas

II. 2.1 Police Abuse and Racial Violence against the Roma

Roma rights public interest litigation in the field of combating racial violence made the first clear and significant contribution developing the regional antidiscrimination norm under the European Convention on Human Rights. The upsurge in racist violence and attacks against Roma in the post-communist transition in the CEE region created a pressing need to spotlight this widespread phenomenon and generate binding legal judgments finding racist acts a violation of regional, and therefore national, human rights standards in Council of Europe states. While racial violence against Roma has been perpetrated by private individuals and state agents alike, the first cases to challenge this conduct targeted racist violence by police or other state military agents in this period, highlighting the obligation of Council of Europe states to respect human rights norms in the European Convention. Over the past ten years, a body of increasingly favorable jurisprudence has emerged in this field, primarily from cases originating in the CEE region dealing with Roma victims of racial violence.

The pioneering case of *Assenov v. Bulgaria*¹¹¹ was the first ruling of the European Court of Human Rights ever that involved a Roma applicant from Central and Eastern Europe. Its significance as legal precedent is underscored by its symbolism challenging the type of ordinary racial violence that Roma face at the hands of police throughout the CEE region. The case originated in a 1992 incident in which Bulgarian police arrested Anton Assenov, a 14-year old Roma boy who was gambling in a town's market square, detained him, attacked him with truncheons, and pummeled his stomach during two hours of unlawful detention prior to releasing him. Assenov immediately obtained medical certificates ascertaining his mistreatment in detention. For two years, Assenov and his parents filed complaints with every available criminal investigative authority, up to and including the Chief General Prosecutor, to investigate and charge the police perpetrators for their racially-motivated abuse. These efforts were to no avail. Assenov's lawyers filed an appeal to the European Court of Human Rights in 1997. One year later, the Court issued its first positive judgment ever in a case brought by a Roma applicant. It held that the European Convention on Human Rights prohibition on torture and inhuman and degrading treatment in its Article 3 contains an affirmative procedural obligation to investigate credible allegations of mistreatment.

The Court's judgment in *Assenov*, however, did not address whether the police abuse at issue in the case was racially-motivated. To remedy this gap, additional lawsuits challenging violence against Roma were brought before national courts and appealed to the European Court. Some of these cases perished at the European Court, such as two cases spearheaded by Hungarian public interest organizations that were declared inadmissible for failing to state a viable claim.¹¹² The European Court examined other cases in more detail on

¹¹¹ See *Assenov v. Bulgaria*, App. No. 24760/94 (October 28, 1998).

¹¹² See mention of the *Geza Farkas* and *Bensedine* cases in note 99 above described in Lilla Farkas, *Knocking at the Gate: The ECtHR and Hungarian Roma*, EUMAP Online Journal, available at <http://www.eumap.org/journal/features/2002/may02/echrandhunroma>.

the merits. But in these cases too, evidence of discriminatory motive was not overwhelming, and the Court as yet gave no indication that it would apply any lesser standard of proof to claims of discrimination than to claims of other rights violations. Accordingly, these judgments followed *Assenov* in finding police mistreatment of Roma to breach substantive rights of the Convention – such as the right to life in Article 2 and the right to be free of torture and inhuman and degrading treatment under Article 3 – but not to amount to discrimination under Article 14.¹¹³

Persistence through public interest litigation can pay off, as demonstrated through the case of *Nachova v. Bulgaria*,¹¹⁴ the first case in which the European Court of Human Rights found a violation of Article 14 of the European Convention on grounds of racial discrimination. *Nachova* concerned the July 19, 1996 death of two Roma conscripts who were shot by military police soldiers. This case took two steps forward, by virtue of the first judgment issued by the European Court's First Section, a regularly constituted panel of seven judges, issued on February 26, 2004, then one step back in the final and binding judgment, issued on July 6, 2005 by the Grand Chamber of the European Court, a panel of 17 judges of the European Court that sits in extraordinary sessions with the power to review seven-judge panel decisions *de novo*.

The Grand Chamber's judgment in *Nachova* extended *Assenov*'s ruling that states have a positive obligation under the European Convention not only to investigate serious allegations of mistreatment but also to investigate *racial* motives behind perpetrated crimes when they are credibly alleged.¹¹⁵ This was a significant affirmation of the importance of rooting out any racial animus from infecting the integrity of criminal investigations and judicial proceedings. But in overturning the Court's seven-judge panel decision from 2004, the Grand Chamber first confirmed that, under certain circumstances, the burden of rebutting a presumption of discriminatory conduct shifted to the authorities, then found that, on the facts of the instant case, no such presumption arose, and thus there was no violation of Article 14.¹¹⁶

It was not until 2008 that the European Court ruled that an incident of police brutality against a Roma victim breached Article 14 of the European Convention because it was racially motivated. *Stoica v. Romania*¹¹⁷ involved a 14-year-old Roma boy who was beaten by police outside of a bar where he was standing with a group of other Roma individuals. As the police approached the bar to check the owner's license, they saw a group of Roma outside. Upon seeing the Roma individuals, the (non-Roma) Deputy Mayor of the village, wholly unprovoked and without any cognizable motive, instructed the police to "teach" the

¹¹³ See, e.g., *Velikova v. Bulgaria*, App. No. 41488/98 (May 19, 2000) (finding a violation of the right to life of a Roma man who died after being brutally beaten in police custody, but not finding that this beating was racially-motivated); *Anguelova v. Bulgaria*, App. Nos. 43577/98 and 43579 (June 13, 2002) (finding failure to conduct an effective investigation and unlawful violations of the right to life and right to be free from mistreatment in a case involving the death from beating of a 17-year old Roma boy); *Balogh v. Hungary*, App. No. 47940/99 (July 29, 2004) (finding unlawful mistreatment by the police during the interrogation of a Roma man).

¹¹⁴ See *Nachova v. Bulgaria*, App. Nos. 43577/98, 43579/98 (Grand Chamber, June 7, 2005).

¹¹⁵ See *id.* at para. 157. The Court reiterated its finding that the Convention contains a positive obligation on states to investigate possible racist motives underlying police brutality in *Bekos v. Greece*, App. Nos. 55762/00, 55974/00 (December 13, 2005) and *Cobzaru v. Romania*, App. No. 48254/99 (July 26, 2007).

¹¹⁶ The Grand Chamber set the burden of proof so high that evidence that a soldier shouted racial epithets at the Roma victims during the shooting incident was not considered sufficient to prove that the shootings were racially-motivated. See *id.* at para. 159.

¹¹⁷ See *Stoica v. Romania*, App. No. 42722/02 (March 4, 2008).

“Gyps[ies] ... a lesson,” which incited the police to beat several of the Roma bystanders, including the victim applicant.¹¹⁸ The European Court held that there was sufficient evidence presented as to the racially-charged context of the fight outside this bar to find a violation of Article 14 taken together with Article 3 (the substantive prohibition of torture, inhuman, or degrading treatment or punishment), in other words finding for the first time that police abuse against Roma was racially-motivated in violation of the Convention.¹¹⁹

The series of cases from *Asenov* to *Stoica* demonstrates perhaps slow but significant progressive normative developments to combat racial violence by the police. Parallel to these cases challenging racist police abuse of Roma, Roma rights public interest lawyers have sought to challenge acts of racial violence by private individuals before the European Court of Human Rights as well. One case involving an instance of egregious violence against Roma, known by the name of the village in Romania where the incident occurred – *Hadareni* – merits mention as it demonstrates mixed success at seeking redress for racist violence through litigation. In September 1993, a fight broke out at a bar in the Hadareni village between three Roma men and a non-Roma villager that resulted in the death of the latter’s son.¹²⁰ The three Roma men fled to a nearby house. But a large, angry mob, including several members of the local police, chased the Roma and set the house on fire. One of the Roma men burned to death inside the house; the two other Roma men escaped from the house but were then beaten to death shortly thereafter by villagers. The mob then raged through the village and set fire to the Roma-occupied houses, destroying 13 of them and severely damaging others. The Roma villagers of Hadareni lodged a criminal complaint with the Prosecutor’s office. Over the course of seven years, the Romanian Government prosecuted 11 defendants, of whom four were convicted of murder and the remaining seven of arson. In June 2000, two of those convicted of murder were granted a presidential pardon and set free.

The Hadareni pogrom was a notorious symbol of the most extreme anti-Roma racial violence. Since its creation, the ERRC was determined to use this case to demonstrate the power of law to redress even such a heinous crime.¹²¹ But it was not possible for the ERRC to intervene and alter the fact that there was limited criminal accountability for the villagers responsible for the three Roma deaths and the mass destruction of Roma houses through arson. Rather, the ERRC’s legal strategy was to sue for civil human rights violations related to the government’s discriminatory failure to remedy the abominable living conditions the Roma were forced into as a result of losing their houses through the attack. In 2000, the ERRC filed an application on behalf of 25 Roma victims from Hadareni to the European Court of Human Rights.¹²²

The filing of this application, coupled with continuing negative publicity about the killings, ultimately led the Romanian government to settle the case on relatively favorable terms for some of the victim applicants. Eighteen of the applicants in the lawsuit agreed to a settlement with the government that included damage payments that ranged from 11,000 –

¹¹⁸ *Id.* at para. 7.

¹¹⁹ *See id.* at paras. 118-133.

¹²⁰ The description of events here is taken from the ERRC’s announcement on this case, which is available on its website at <http://www.errc.org/cikk.php?cikk=245>.

¹²¹ *See* ERRC Statement on the Hadareni Case available on its website at <http://www.errc.org/cikk.php?cikk=245>.

¹²² *See Moldovan and Others v. Romania*, App. Nos. 41138/98, 64320/01 (Friendly Settlement, July 5, 2005). The application did not address the underlying racial violence, because those events preceded by one month Romania’s accession to the European Convention.

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28,000 Euros, an acknowledgement of the government's wrongdoing in the settlement agreement, and a pledge to undertake specific general measures to promote communitarian development and combat discrimination against the Roma in the Hadareni village.¹²³

For the seven Roma applicants to the case who refused the terms of the settlement, the European Court subsequently issued a judgment, finding the Romanian government in breach of the European Convention in that it failed to compensate the Roma victims for the destruction of their homes and property, leaving the Roma victims in living conditions of such squalor, they constituted inhuman and degrading treatment in violation of the Convention.¹²⁴

What can be said of the impact of this jurisprudence in the field of police abuse and racial violence? Unquestionably, it has contributed to the expansion of human rights protection under the European Convention. The progress from *Asenov* to *Nachova* has established a clear standard, binding in all Council of Europe states, that governments must carry out effective and thorough investigations of police abuse and racist crimes, capable of leading to the identification of perpetrators, and that any indicia of racist motivation merits particular attention. Over time, as the evidence of racist violence against Roma has accumulated in United Nations, Council of Europe, and NGO monitoring reports, the Court has progressively relaxed the standard of proof to establish discrimination under Article 14. The recent judgment in *Stoica v. Romania* gives hope that the Court will take a stronger stance in enforcing the prohibition on discrimination found in Article 14.

Perhaps unsurprisingly, the development of jurisprudence has not immediately altered public opinion attitudes towards Roma; it is likewise unclear that it has contributed to a reduction in the frequency of racially-motivated violence. With the accession of several CEE countries into the EU, greater efforts are being made to measure and track the prevalence of racial violence. Based on what is currently available, however, trends are somewhat contradictory. The EU Fundamental Rights Agency has concluded that from 2000-2006, there was a general upward trend in racist crime in Slovakia, whereas during the same period there was a general downward trend in racist crime in the Czech Republic.¹²⁵ Racial violence remains a cause of concern in other countries as well.¹²⁶

¹²³ These general measures include enhancing educational programs to combat discrimination against Roma, a public-education campaign to fight against negative Roma stereotypes, supporting community development projects to improve the socio-economic status of Roma, rehabilitating housing for Roma, among some other measures. See *Moldovan Settlement*, *supra* note 121.

¹²⁴ See *Moldovan and Others v. Romania*, App. Nos. 41138/98, 64320/01 (Judgment, July 12, 2005).

¹²⁵ FRA RACISM REPORT, *supra* note 95 at 124.

¹²⁶ For example, reports measured that racist attacks increased from 2004-2006 in Hungary, *see, e.g.*, European Network against Racism, SHADOW REPORT: HUNGARY (2006); that violent racial attacks against Roma remains one of the Czech Republic's greatest human rights challenges, *see, e.g.*, European Network against Racism, SHADOW REPORT: CZECH REPUBLIC (2006); and that a significant increase in racially-motivated crimes was recorded in Slovakia in 2006 as compared to 2005, *see, e.g.*, European Network against Racism, SHADOW REPORT: SLOVAKIA (2006). Keep in mind, however, that the absence of consistent data reporting cautions against drawing strong conclusions, as the European Fundamental Rights Agency has noted when reaching its own tentative findings regarding trends in racist violence in its reports. See FRA RACISM REPORT, *supra* note 95 at 123-24. Indeed, the European Network against Racism suggests that the upward trend in racist attacks measured in Slovakia could be due either to the Slovakian Government's stated goal of cracking down on neo-Nazi activities in the timeframe of 2005-2006 or to increased training of police on racially-motivated crimes resulting in an increase of crimes recorded as opposed to crimes that occurred. See ENAR, SHADOW REPORT: SLOVAKIA, at 20-21.

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After the *Assenov* judgment, the Bulgarian government took steps to address racial violence by the police. It created a special committee within the national police department to raise rights awareness among officers and launched several pilot projects fostering dialogue between police and minority ethnic communities. Yet, human rights reports contend that racial violence by the Bulgarian police against Roma remains a cause of concern.¹²⁷ One Bulgarian Roma rights lawyer admits that cases such as *Assenov* and *Nachova* have not contributed to altering negative, racist stereotypes of Roma in Bulgaria which fuels violence towards them, but commented that she would continue pursuing Roma rights public interest litigation as a means of improving the situation of the Roma of Bulgaria as part of ongoing multifaceted advocacy efforts striving to improve equality for Roma in Bulgaria and elsewhere in Central and Eastern Europe.

Events in Romania subsequent to the *Moldovan* litigation urge further caution in measuring the potential impact that Roma rights litigation can have in effectuating social change on the ground for Roma. The *Moldovan* litigation before the European Court was unable to change the reality that there was limited criminal liability for the villagers responsible for the murder of the three Roma men and the mob attacks on the rest of the Roma community in the village. As a result, the Roma villagers of Hadareni remain skeptical of the prospects of substantive change in attitudes of fellow villagers. According to one Roma victim of the Hadareni pogrom who benefited from the government settlement: “Romanians consider Gypsies like rats. They show more mercy to a dog. Now they are laughing at us. They say we can kill you and burn your houses and nothing will happen to us.”¹²⁸ The same Roma villager remains skeptical of the impact of the Romanian government’s community development plan.¹²⁹ Furthermore, human rights monitors reported an increase in racist speech towards Roma by the Romanian media and politicians in 2005-2006 in the context of the Romanian government’s compliance with implementing the settlement agreement pursuant to the *Moldovan* litigation.¹³⁰

It is clear that changing deeply embedded racist stereotypes that fuel violence takes time. Roma rights litigation in the field of racist police abuse of Roma has already made a significant contribution to the development of antidiscrimination norms in the human rights framework of the Council of Europe and the jurisprudence of the European Court of Human Rights. While the impact of this litigation on changing the prevalence of racist police abuse and violence towards Roma appears limited for the time being and has even resulted in a public verbal backlash against the Roma as in the case of the *Moldovan* litigation in Romania, the increasing awareness of Roma rights litigation as a tool for redress is slowly encouraging more Roma victims to employ this tool despite its limited reach.¹³¹

¹²⁷ See ECRI, THIRD COUNTRY REPORT: BULGARIA, at 19, paras. 76-79 (June 27, 2003).

¹²⁸ Doug Merlino, *Roma v. Romania: A judgment for the Gypsies gives them little satisfaction*, LEGAL AFFAIRS (March 2006), available at http://www.legalaffairs.org/issues/March-April-2006/scene_Merlino_marapr06.msp.

¹²⁹ For example, one Roma villager expressed concern that funds for the communitarian development project would in fact benefit the majority non-Roma population. *See id.*

¹³⁰ See European Network against Racism, SHADOW REPORT: ROMANIA, 19 (2006); *see also* Amnesty International, Romania Country Report 2007, available at <http://thereport.amnesty.org/eng/Regions/Europe-and-Central-Asia/Romania>.

¹³¹ *See, e.g.*, Merlino, *supra* note 127. The projection that awareness of ongoing Roma rights litigation is slowly empowering additional Roma victims to pursue litigation as a means of redress was echoed to the authors by Roma rights lawyers interviewed for this article.

II. 2.2 Housing

A significant test of the potential for public interest litigation to redress systemic discrimination arises in the field of housing. Communist regimes in Central and Eastern Europe subjected the Roma to forced sedentarization, often at the margins of majority society.¹³² As a result, the majority of Roma in CEE countries today live in substandard housing, often in slum ghettos or poorly developed communities¹³³ segregated from the majority populations on the margins of towns. Inadequate standards related to housing for the Roma include access to running water or sewage disposal,¹³⁴ electricity, exclusion from social services, and prevalent health concerns and disease.¹³⁵ The size of housing settlements in Central and Eastern Europe is alarming as well.¹³⁶ Yet, even though the conditions in these settlements are severe and deteriorating, the number of settlements in CEE is on the rise.¹³⁷ Without any security of title to property, the Roma have fallen victim to an increasing wave of violent forced evictions.¹³⁸

Litigation to combat discrimination in housing matters depends on a particularly complex legal framework. To the extent that few Roma have proof of legal title to their settlements, it can be difficult to state a claim to property rights. While the European Convention on Human Rights does not contain economic and social rights such as the right to adequate housing, forced evictions and substandard housing conditions can, however, be enforced through the Convention's protections against inhuman and degrading treatment in its Article 3 and the right to private and family life in its Article 8.¹³⁹ Nevertheless, the economic and social right to adequate housing is a foundational principle guaranteed by the European Social Charter. Racial and ethnic discrimination in access to economic and social rights is prohibited by binding United Nations treaties, such as the Convention on the Elimination of all Forms of Racial Discrimination (Race Convention). As for EU standards,

¹³² OSCE 2000 report, *supra* note 13 at 100.

¹³³ Findings from a government housing survey in Hungary indicate that 60,000 Roma – approximately 13 percent of Roma in the country – live in settlement-type environments that are isolated from the majority population. See WORLD BANK ROMA POVERTY CYCLE REPORT, *supra* note 2 at 34.

¹³⁴ In Romania, for example, about 68% of Roma have no running water and sewage in their houses, the highest in CEE. See UNDP FACT SHEET, *supra* note 3 at 51.

¹³⁵ Over half of Roma households in Bulgaria reported wet walls and leaky roofs, significantly more than in other countries. See *id* at 37, 51.

¹³⁶ The total living space in Roma households measured per household member in all countries except the Czech Republic is twice as low as the living space per household member for the majority populations surveyed. See UNDP FACT SHEET, *supra* note 3 at 2. According to a Yale dataset, Roma households are nearly twice the size of non-Roma households. See WORLD BANK ROMA POVERTY CYCLE REPORT, *supra* note 2 at 36.

¹³⁷ A survey of district officials estimated that there were 591 Roma settlements in Slovakia in 1998, in comparison to 278 in 1988. See *id* at 61.

¹³⁸ See Joint Statement by Council of Europe's Commissioner for Human Rights, Thomas Hammarberg and United Nations Special Rapporteur on the right to adequate housing, Miloon Kothari, *Governments Should Take Positive Steps to Protect Housing Rights of Roma in Europe*, (October 24, 2007), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/824CB02DF5A5C358C125737E00367C30?opendocument>; see also Thomas Hammarberg, *Forced Eviction of Roma Families Must Stop*, Viewpoint of the Council of Europe Commissioner for Human Rights (April 9, 2006).

¹³⁹ See Barbora Bukovska, *Difference and Indifference: Bringing Czech Roma Ghettos to Europe's Court*, EUMAP Journal, (May 2002), available at <http://www.eumap.org/journal/features/2002/may02/czechromaghettos>.

the Race Equality Directive forbids racial and ethnic discrimination in access to public goods and services and also instructs governments to undertake positive measures to remedy systemic discrimination. But the extent to which access to adequate public housing, or state-funded alternative housing in the event of evictions, to overcome Roma discrimination in this field is unknown as of yet.

That discrimination against Roma in housing matters is systemic throughout the CEE region makes this an important field in which to seek change through public interest litigation. The ERRC identified this need as such and brought the first two public interest litigation cases challenging instances of housing discrimination against Roma in the Slovak Republic in cooperation with a national Slovak legal defence NGO. Rather than raising claims under the European Convention on Human Rights, however, these first two cases were brought before Slovak national courts and then appealed to the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee). The impact of these cases is as follows.

The first of the Slovak CERD Committee cases, *Koptova v. Slovak Republic*,¹⁴⁰ challenged two municipal ordinances adopted in 1997, barring a local Roma community from, respectively, settling in a village in Medzilaborce County, or settling in shelters or simply entering a neighboring village in the same County. The local Roma community consisted of seven families who had permanent residence working at a communist agricultural cooperative since 1981, but had become unemployed and displaced after that agricultural cooperative closed in 1989. From 1989 to 1997, these families moved from temporary shelters from village to village in the region, until they settled in the spring of 1997 in this County, which prompted the neighboring municipalities to pass these two resolutions forbidding the Roma to settle in the villages and to enter or move freely in the villages. These prohibitions were accompanied by public hostility of the villagers towards the Roma, who burned the Roma community's temporary dwellings in the village. A national NGO, the Kosice Legal Defence Foundation, brought suit challenging the legality of the two municipal resolutions, but the Slovak Constitutional Court dismissed the petition on the grounds that the NGO did not have standing to sue. In response, a representative of the Roma community, Ms. Anna Koptova, filed a legal challenge in her name, which was also dismissed by the Slovak Constitutional Court.

The ERRC assisted in appealing Ms. Koptova's case to the CERD Committee, which found sufficient evidence of discrimination under the Race Convention. The CERD Committee's finding and declaration that the municipal resolutions violated international norms prohibiting racial and ethnic discrimination are a positive outcome of this public interest case. But another sign of the impact of public interest litigation came in the fact that the municipalities rescinded the two resolutions as a mere result of the pursuit of appealing the case before an international jurisdiction and the attention and condemnation that came with this. Even though the municipalities rescinded the ordinances during the course of the international proceedings, the CERD Committee nevertheless denounced the resolutions as unlawful under the Race Convention and recommended that the Slovak Republic take necessary measures to ensure that the Roma community's right to residence and freedom of movement be guaranteed on a non-discriminatory basis.¹⁴¹

¹⁴⁰ *Koptova v. Slovak Republic*, Communication No. 13/1998, CERD Committee, UN Doc CERD/C/57/D/13/1998 (Nov. 1, 2000).

¹⁴¹ CERD Committee Koptova Decision, paras. 10.1-10.3.

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The second of the Slovak housing discrimination cases brought to the CERD Committee, known as the *Dobsina* case after the town of the case's origin,¹⁴² challenged the discriminatory rescinding of a municipal resolution that planned to construct low-cost housing for the town's Roma inhabitants. The Roma community of Dobsina numbered approximately 1,800 people, most of who lived in appalling temporary shelters without access to water, sewage systems, or other social services. To improve the living standards of the Roma community, the municipality of Dobsina passed a resolution approving a plan to build low-cost housing in which to resettle the Roma community. The non-Roma inhabitants of Dobsina opposed this municipal measure, organized a petition drive fueled by racist speech against the town's Roma inhabitants, and thereby pressured the local government to rescind this resolution.

Several members of the Roma community filed suit before the Slovak courts, claiming that the cancellation of the municipal resolution to build low-cost housing for the Roma community was an act of racial discrimination. After exhausting domestic remedies without legal success, the plaintiffs brought the case to the CERD Committee, which indeed found that the cancellation of the municipal resolution was an unlawful act of racial discrimination.¹⁴³ The CERD Committee ordered the Slovak government to "provide the petitioners with an effective remedy. . . the State party should take measures to ensure that the petitioners are placed in the same position that they were in upon adoption of the first resolution by the municipal council."¹⁴⁴

Even though CERD Committee opinions are non-binding and do not have an enforcement mechanism, these two Slovak housing cases have had some tangible impact. As the *Koptova* case was the first CERD Committee case against the Slovak government on housing discrimination, there was media coverage that resulted in pressure on the municipal government to rescind the two resolutions that banned the Roma community from settling in the town and moving freely into the town while the case was still being considered by the CERD Committee.¹⁴⁵

Similarly in the *Dobsina* case, the local prosecutor in the relevant Slovak district wrote to the Dobsina municipality instructing it to reinstate the municipal resolution to undertake the construction of low-cost housing for the Roma community while the CERD Committee case was pending.¹⁴⁶ As a result, the Dobsina municipality indeed reinstated the resolution that adopted the plan to construct low-cost housing for the Roma community. By July 2006, however, the Dobsina municipality had failed to undertake any concrete measures to begin this construction plan. The local public interest organization following this case, the League of Human Rights Advocates, filed a complaint with the Slovak National Human Rights Center, the national agency tasked to oversee the implementation of the Slovak antidiscrimination law pursuant to the EU Race Equality Directive,¹⁴⁷ requesting its legal

¹⁴² See *L.R. et al. v. Slovak Republic*, Communication No. 31/2003, UN Doc. CERD/C/66/31/2003 (March 10, 2005).

¹⁴³ See *id.* paras. 10.8-10.9.

¹⁴⁴ *Id.* para. 12.

¹⁴⁵ Interview with ERRC lawyer.

¹⁴⁶ See *Request for Information Legal Opinion* submitted by Dr. Columbus of the Slovak League of Human Rights Advocates to the Slovak National Center for Human Rights, available at <http://www.cohre.org/store/attachments/Request%20for%20legal%20opinion%20on%20Dobsina%20implemen%20tation.doc>.

¹⁴⁷ See *supra* note 56.

opinion as to the organization's intention on filing a complaint that the failure to implement the low-cost housing construction plan violates the equality provisions of the new Slovak Equal Treatment Act that was passed to transpose the EU Race Equality Directive. As the Slovak National Human Rights Center responded that it did not view housing as an area covered by the Slovak Equal Treatment Act,¹⁴⁸ this case has been referred to the European Court of Justice¹⁴⁹ for clarification on this point.

Legal measures are being undertaken in other CEE countries to challenge discrimination in housing matters despite the complicated legal framework for bringing such actions. The Roma rights public interest organization ERRC and the international housing rights organization called the Centre for Housing Rights and Evictions (COHRE) have joined forces to place particular pressure to improve the housing situations in Bulgaria and Slovakia.¹⁵⁰ Currently, the ERRC and COHRE project has filed three cases in local courts in Bulgaria challenging living conditions of Roma who have been evicted from their homes, an eviction order, and lack of transportation services to a Roma community.¹⁵¹ All three cases cite violations of the Bulgarian antidiscrimination law and standards of the European Convention on Human Rights.

ERRC has secured one legal victory in a Roma housing discrimination case in Bulgaria by using the collective complaints procedure before the European Committee of Social Rights. A complaint filed in 2005 alleged "that Bulgaria discriminates against Roma in the field of housing with the result that Roma families are segregated in housing matters, lack legal security of tenure are subject to forced evictions, and live in substandard conditions in breach of Article 16 of the Revised European Social Charter (the Revised Charter) read alone or in conjunction with Article E."¹⁵² Article 16 of the Revised Charter encompasses the right of the family to social, legal, and economic protection, while Article E is the Revised Charter's nondiscrimination clause. The Committee interpreted the ERRC's general collective complaint to encompass arguments that the Roma of Bulgaria suffer as a result of discrimination from (i) inadequate housing standards and (ii) lack legal security of tenure and the forced eviction of Roma from dwellings occupied by them. Upon reviewing the general situation of housing conditions of Roma in Bulgaria, the Committee concluded that these two elements indeed constitute discriminatory violations of the Revised Charter's protections under Articles 16 and E. This is an important legal finding under this particular instrument of the Council of Europe. Despite the level of the Committee decision's generality and its non-binding nature, this decision can serve as a useful tool for advocacy purposes even if it is not one that has the sharp teeth to effectuate immediate change on the ground.

One final case challenging housing evictions of Roma deserves mention here as it represents the first Roma rights public interest case to be brought against the Russian Federation before the European Court of Human Rights. This case, *Bogdonavichus and*

¹⁴⁸ See *Response of the Slovak National Center for Human Rights* in the Dobsina Case, available at <http://www.cohre.org/store/attachments/Response%20of%20Slovak%20National%20Center%20for%20Human%20Rights.doc>.

¹⁴⁹ See *supra* note 17.

¹⁵⁰ The ERRC and COHRE's joint "Roma and Travellers' Project" also focuses on Ireland and Greece. A description of this project can be accessed at http://www.cohre.org/view_page.php?page_id=191.

¹⁵¹ For a description of the three COHRE and ERRC cases filed, see http://www.cohre.org/view_page.php?page_id=209.

¹⁵² *European Roma Rights Center v. Bulgaria*, Complaint No. 31/2005 (Decision of the European Committee of Social Rights, October 18, 2006).

Others v. Russia, Application No. 19841/06, was filed with the European Court in 2006 and challenges the discriminatory and violent evictions of the members of six Roma families who had lived for generations in dwellings in a sanctioned Roma settlement in the village of Dorozhnoe in the Kaliningrad region of the Russian Federation.¹⁵³ Although the European Court has not yet considered whether this case is admissible for evaluation on the merits at the time of the writing of this article, it is worth mentioning here because it represents an instance in which the Roma community of Dorozhnoe village was organized and mobilized to hire local lawyers and pursue legal remedies to enforce their right to housing. Furthermore, the Roma community leader and the local lawyer sought the help of Russian human rights organization, Memorial of St. Petersburg. Recognizing the precedent-setting potential of this case in light of the widespread threat of evictions of Roma throughout Russia, the Russian human rights organization in turn contacted an international human rights litigation organization for assistance in appealing the case to the European Court of Human Rights.¹⁵⁴ While it is too soon to project the potential impact of this case, it underscores that even in repressive countries such as the Russian Federation, international public interest litigation nevertheless serves as a tool to pressure for the respect for human rights.

In sum, public interest litigation can be deployed to bring attention to systemic human rights violations, even in a complex area such as discrimination in housing matters. As this subsection has shown, non-binding legal decisions, such as opinions emanating from the UN CERD Committee or the European Committee on Social Rights, can potentially serve as advocacy ammunition to effectuate concrete change. Nevertheless, overcoming systemic discrimination against Roma in housing matters in the CEE region will certainly require sustained pressure on multiple fronts, of which litigation can play a part.

II. 2.3 Education

Access to quality education is a paralyzing obstacle for most Roma minorities in Central and Eastern Europe, deprivation so dire it calls for corrective action.¹⁵⁵ In some countries, such as Romania, many Roma do not attend school at all, in part because they lack sufficient proof of identity; the portion of illiterate youth exceeds 32 percent by the time they enter the labor market.¹⁵⁶ In secondary and tertiary education the statistics drop even further.¹⁵⁷ In countries such as Hungary, Roma children are effectively segregated into Roma-only schools of variable but often lower quality, because educational placement simply

¹⁵³ A summary and copies of the application in this case can be found on the website of the Open Society Justice Initiative at http://www.justiceinitiative.org/db/resource2?res_id=103827.

¹⁵⁴ The authors, in their capacity with the Open Society Justice Initiative, are the legal representatives of the plaintiffs in this case. *See id.*

¹⁵⁵ In a general survey of the region, fewer than 2 out of 10 Roma age 12 had completed primary education (grades 1 – 5) in all countries except the Czech Republic. In Bulgaria, 10 percent of Roma age 12 had completed grade 5, as compared to 72 percent of non-Roma. *See* UNDP FACT SHEET, *supra* note 3.

¹⁵⁶ *See id.* at 51.

¹⁵⁷ It is estimated that less than 5 percent of Roma students finish at the secondary level in Albania, Czech Republic, Kosovo and Montenegro. *See* Open Society Institute, MEASURING EDUCATION FOR ROMA at 15 (2006).

reproduces pre-existing patterns of residential segregation.¹⁵⁸ Finally, in other countries, including the Czech Republic and Slovakia, a majority of Roma children are administered psychological tests, deemed unfit for “normal” education, and shunted into “special” remedial schools and classes for the “mentally disabled” or “mentally retarded.”¹⁵⁹ Though the particular means vary from place to place, throughout the CEE region, Roma children attend school less often than others, remain in school for shorter duration, and are provided education of sub-standard quality.

This section provides a detailed account of how discrimination against Roma children in education has been challenged as a focal effort of Roma rights public interest litigation at the initiative of the European Roma Rights Center (ERRC), whose role as a catalyst in this field has been described above. During the first two years after the ERRC was launched in 1996, the staff undertook an extended series of discussions with representatives of a broad range of Roma communities from several countries in Central and Eastern Europe. Among the goals was to ascertain, to the extent possible, what were their principal concerns. Time and again, education was at the top of the list. Not only was the state of education so deplorable for Roma children as highlighted above, but education is fundamental to the long-term goal of equalizing opportunities for Roma more generally. Absent quality education, there is no possibility for broad-based advancement in economic, social or political life. Virtually everyone conceded that Roma education was a major problem, but few looked to the law to solve it.¹⁶⁰

The ERRC decided to focus substantial resources on a test case aimed at securing a judicial finding that the state of Roma education in at least one country amounted to unlawful racial discrimination. Such a case – successful or not in the courtroom – would help galvanize the debate around Roma education by focusing attention on a particularly well-documented example, and by introducing both a new concept for understanding the source of the problem – discrimination – and a new tool to address it – litigation. Moreover, insofar as the discrimination at issue concerned the unequal application of facially neutral laws and regulations, education was emblematic of the kind of discrimination Roma suffered more broadly. Thus, a major education case could potentially expand legal protection against discrimination in all fields. Finally, education is about children, and there are few more sympathetic victims to serve as agents of public interest litigation.

The Czech Republic was chosen as a primary focal point for litigation, for several reasons. As one of the most enlightened and wealthiest of the CEE countries, it was a representative symbol for the region. A finding that even the much-praised Czech school

¹⁵⁸ In Hungary, there are approximately 700 schools in which Roma children are segregated into separate classes. See EUROPEAN COMMISSION ROMA REPORT, *supra* note 13 at 18.

¹⁵⁹ Under Czech Schools Law, Article 28(1), “specialized schools” at both elementary and secondary levels focus on education and teaching to pupils with mental, sensory or physical handicap, pupils with speech impediments, pupils with multiple impediments, pupils with behavioural difficulties and sick or weakened pupils placed in hospital care. See *D.H. and Others v. Czech Republic*, App. No. 57325/00 (Grand Chamber, April 18, 2000).

¹⁶⁰ The state of Roma education had long been a subject of lament, but for different reasons, depending on one’s point of view. For a substantial portion of the public, the disproportionate number of Roma children failing to succeed in normal schools, or assigned to special schools or classes, simply reflected the obvious fact that Roma children were innately less intelligent. For others, it was not Roma children, but their parents who were to blame – they were too lazy, selfish or uneducated themselves to ensure that their children attended class and studied hard. For still others, the school systems in CEE mirrored broader injustice in society as a whole; but the answer lay in enhanced political will on the part of government and educational officials, and this would take decades to marshal.

system breached the law would send a powerful signal that Roma education had to change. The pseudo-scientific basis for student assignments to Czech schools offered a target vulnerable to legal challenge. And finally, several local Roma and other NGO actors in the Czech Republic had already been discussing issues of Roma education for some time. Hence, any litigation effort would take place in a relatively fertile environment. The city of Ostrava, the third largest city in the country, was chosen as an area for research, in view of its large Roma population and the number of community organizations present.

The first problem was, in many ways, fundamental to any effort to challenge discriminatory practices: how to obtain data to document the claim.¹⁶¹ To address this concern, a process of dialogue was initiated with different Roma communities, a number of lawyers, and human rights NGOs. It became clear that data would have to be independently collected. Inquiries were made to obtain statistics from the government. But it was only when local Roma representatives contacted schools in the Ostrava region did administrators and teachers at dozens of schools produce precise lists of their students, categorized as Czech or Roma.

After several months of intensive effort, the research yielded comprehensive ethnic data that demonstrated an overwhelming practice of disproportionate assignment of Roma to special schools.¹⁶² Thus, although Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava, 56% of all pupils placed in special schools in Ostrava were Roma. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Roma pupils in Ostrava assigned to special schools was 50.3%. Overall, Roma children in Ostrava were more than 27 times as likely as non-Roma children to be sent to special school.¹⁶³ Having produced such powerful proof of discrimination, the ERRC team next considered how best to transform the data into a concrete legal case, which legal forum to approach, and how to frame the arguments.

The first step in transforming the data into a viable legal case required finding individual complainants¹⁶⁴ and so the search commenced for Roma children in Ostrava special schools whose individual cases might serve as representative of the broader group. The legal team met with hundreds of Roma children and their families. It was important that whoever went forward understood and fully accepted the unlikelihood of success, the possibility of retaliation, and the long time before a final result would be known. The legal team endeavored to ensure that claimants genuinely wanted – in a manner not inconsistent

¹⁶¹ Like most other European countries, the Czech Republic feigned ignorance of the number of Roma in special schools. Indeed, some officials contended that the mere act of counting Roma and non-Roma children would breach Czech data protection law. Given the historic abuses of personal data to which the Roma, and other groups, had been subjected at various points during the 20th century, many Czech Roma leaders were skeptical of statistics.

¹⁶² A complete description of the data collected is summarized in the text of the Application to the ECTHR in this case, available on the website of the Open Society Justice Initiative at http://www.justiceinitiative.org/db/resource2?res_id=102627.

¹⁶³ The findings seemed to confirm the conclusion of the United Nations Committee on the Elimination of Racial Discrimination, that Roma in the Czech Republic were subjected to “de facto racial segregation” in the field of education. See United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations: Czech Republic*, UN Doc. CERD/C/304/Add.47 (March 30, 1998).

¹⁶⁴ The approach was to identify compelling plaintiffs, then ask the court to use the Ostrava-wide data as a basis for inferring discrimination in their individual cases.

with their individual circumstances – to address the systemic problem.¹⁶⁵ In the end, the eighteen plaintiffs were all Roma students assigned to special schools whose initial test results – and/or subsequent academic performance – raised questions about the propriety of their placement.¹⁶⁶

Having identified Roma plaintiffs, the next step was to determine the legal forum in which to pursue the litigation. As discussed above, the Czech Republic had no law expressly prohibiting discrimination on grounds of racial or ethnic origin at this time.¹⁶⁷ In light of this clear legislative gap, the ERRC team considered filing an application directly with the European Court of Human Rights on the grounds that there existed no domestic remedy to exhaust. Ultimately, the team decided it was more prudent – particularly given the unprecedented nature of the substantive claims – to offer the Czech courts an opportunity to address the discrimination at issue. Two procedural routes through the Czech legal system were chosen and the plaintiffs were divided to maximize the possibility of securing a favorable ruling, to no avail.

After exhausting domestic remedies, all 18 plaintiffs filed an application with the European Court in Strasbourg in early 2000. The ECTHR application alleged violations of Articles 3 (prohibition against degrading treatment), 6 (fair trial), and Article 2 of Protocol No. 1 (right to education) taken together with Article 14 (non-discrimination). The submission contended that, as a result of their segregation in dead-end schools for the “mentally deficient,” the plaintiffs, like many other Roma children in Ostrava and throughout the Czech Republic, had suffered severe educational, psychological and emotional harm¹⁶⁸ Race-neutral factors failed adequately to explain the gross racial disparity evident in the statistics. There existed a virtual consensus among government officials and independent experts that many Roma assigned to special schools were not, in fact, mentally deficient.¹⁶⁹

¹⁶⁵ The legal team also explained that the government might try to forestall a negative judgment by offering the option to transfer from special to basic school. On June 29, 1999, two weeks after the lawsuits were filed, each applicant received a letter from the school authorities informing them of the possibilities available for transferring from special school to primary school. Four of the applicants were ultimately successful in aptitude tests and thereafter moved to ordinary schools.

¹⁶⁶ Finally, the team looked – somewhat naively – for Roma children whose placement in special school was so obviously erroneous as to preclude any explanation other than racial animus. As it turned out, the nefarious effects of even a year or two of special school in blunting the intelligence, curiosity and creativity of the most capable children were simply overwhelming. In practical terms, it was almost impossible to distinguish the impact of “innate intelligence” from “school environment” in producing a certain result on an intelligence test. A world-renowned expert in psychological assessment of children who conducted two days of tests on a group of Roma special school students was unable to conclude definitively that any one had been misassigned. He did, however, note that the racial disproportion revealed in the Ostrava school data was unprecedented and clearly indicative of discrimination.

¹⁶⁷ See *supra* note 78.

¹⁶⁸ The range of harm included the following: (i) they had been subjected to a curriculum far inferior to that in basic schools; (ii) they had been effectively denied the opportunity of ever returning to basic school; (iii) they had been prohibited by law and practice from entrance to non-vocational secondary educational institutions, with attendant damage to their opportunities to secure adequate employment; (iv) they had been stigmatised as „stupid” or „retarded” with effects that will brand them for life, including diminished self-esteem and feelings of humiliation, alienation and lack of self-worth; (v) they had been forced to study in racially segregated classrooms and hence denied the benefits of a multi-cultural educational environment.

¹⁶⁹ Many of the tests had been selected, and their results continued to be used, even though they had previously been shown to generate racially-disproportionate effects. Few, if any, Roma were consulted in the selection or design of the most commonly used tests. None of the tests had ever been validated for the purpose of assessing Romani children in the Czech Republic. In administering tests to these and other Romani children, insufficient

The evaluation mechanisms employed to assess intelligence were flawed and unreliable and in violation of government regulations, the Roma children plaintiffs assigned to special schools, like most other Roma children, had not been adequately monitored to ensure the continuing suitability of their placement. ;

Having demonstrated that the plaintiffs had suffered massive differential treatment, producing significant harm, without any objective justification, the submission asked the Court to declare the system of school placement discriminatory in practice and thus in breach of the Convention. And so it did.

In November 2007, the Grand Chamber of the Court issued a landmark judgment finding the Czech government in breach of its obligation not to discriminate on the basis of racial or ethnic origin in access to education.¹⁷⁰ The Court found that the data gathered by the applicants, supplemented by the reports of numerous monitoring bodies and by government admissions, established a “strong presumption of indirect discrimination.”¹⁷¹ The Court found no objective justification for the discriminatory treatment. As to the Government’s suggestion that “the applicants were placed in special schools on account of their specific educational needs, essentially as a result of their low intellectual capacity,”¹⁷² the Court “consider[ed] that, at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment.”¹⁷³ Nor was purported parental consent a justification. The Court was “not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent.”¹⁷⁴

In reaching these conclusions, the Court went out of its way to note that, though its decision is legally binding only on the Czech Republic, the problem it concerned is of Europe-wide scope.¹⁷⁵ It is thus all the more important that the ruling advanced jurisprudence under the European Convention on Human Rights concerning discrimination in several seminal ways. For example, the *D.H.* judgment clarifies for the first time that the Article 14 definition of discrimination encompasses indirect discrimination, that statistics can be used to establish discrimination, that the burden shifts to the government where applicants allege discrimination under the Convention, and that establishing a systemic disproportionately prejudicial effect on the Roma community can be sufficient to find discrimination in individual cases brought before the Court. In many respects, these normative developments bring the standard of finding discrimination under Article 14 of the European Convention in line with the standards of the EU Race Equality Directive as

care had been taken to account for and overcome predictable cultural, linguistic and/or other obstacles which often negatively influence the validity of „intelligence” assessments. No guidelines effectively circumscribed individual discretion in the administration of tests and the interpretation of results, leaving the assessment process vulnerable to influence by racial prejudice, cultural insensitivity and other irrelevant factors.

¹⁷⁰ See *D.H. and Others v. Czech Republic*, App. No. 57325/00 (ECtHR Grand Chamber, April 18, 2000).

¹⁷¹ See *id.* at para. 195.

¹⁷² See *id.* at para. 197.

¹⁷³ See *id.* at para. 201.

¹⁷⁴ See *id.* at para. 203.

¹⁷⁵ “[T]he Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children: other European States have had similar difficulties”(para. 205).

described above. Most symbolically, the Court affirmed the particular plight of Roma in striving towards equality in Europe in this decision. It held that “as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority” who “require special protection.”¹⁷⁶

The *D.H.* judgment constituted a major *legal* victory for advocates of Roma rights, equality and non-discrimination. But what of its impact on the ground? What was the impact on the 18 children who courageously agreed to bring this suit? Will this Court judgment contribute to improved educational opportunity for Roma children and/or others – in the Czech Republic, or elsewhere in Europe?

With respect to the fate of the 18 applicants, the sad reality is that, in view of the length of this litigation, only three children were in school at the time the Court was reaching its final judgment. Of the rest, nine children had not completed primary education and six had completed the special schools but were unemployed. Thus, the judgment had virtually no positive impact on the educational situation of the applicants who brought suit. The Court’s award of non-pecuniary damages to each applicant in the amount of 4,000 Euros¹⁷⁷ seems, by any standard, insufficient compensation. With respect to the impact, if any, on the situation of Roma education in the Czech Republic more broadly, the short answer is: it is too soon to tell. Less than a year has passed since the judgment was issued and desegregation experience from the United States demonstrates that the process of implementing legal decisions can take decades.¹⁷⁸

The mere act of bringing and pursuing the *D.H.* litigation has already forced changes in Czech educational law. At the time the initial lawsuit was brought, Czech legislation prohibited graduates of special schools from qualifying for normal secondary education. In 2000, the government abolished this rule.¹⁷⁹ In addition, in 2004, while the application was pending in Strasbourg, the Czech parliament enacted legislation which purported to abolish special schools and revamp the entire system of special education. Notwithstanding the shortcomings of the new law, it represented a clear acknowledgement that the practice of school assignment had to change and that “special schools” as previously constituted could not remain part of the system.

The Czech government nevertheless undertook these changes reluctantly and it maintained a disdainful attitude throughout the legal proceedings, as evidenced in its official public statement in response to the European Court’s 2007 ruling. The Czech Ministry of Education issued a press release in the wake of the judgment whose tone was clearly defensive, emphasizing that the Ministry has done everything in its power to support the integration of children into schools. It further maintained that the “special schools” as

¹⁷⁶ See *id.* at para. 182.

¹⁷⁷ See *id.* at para. 217.

¹⁷⁸ Although the landmark U.S. Supreme Court decision *Brown v. Board of Education* finding racial discrimination against Blacks in segregated education was decided in 1954, it was only when the U.S. Federal Government threatened to freeze federal funding for state education systems that school systems began to desegregate in earnest. See SIMPLE JUSTICE *supra* note 40 at 759. Follow-up litigation was brought to challenge ongoing segregation in the 1970s, see *id.* at 768, and the trend today in the United States is towards resegregation in education, see, e.g., UCLA Civil Rights Project, *Race in American Public Schools: Rapidly Resegregating School Districts*, available at http://www.civilrightsproject.ucla.edu/research/k12_ed.php.

¹⁷⁹ See Summary of Facts on Special Schools in *See D.H. and Others v. Czech Republic*, App. No. 57325/00, para. 17 (ECtHR Grand Chamber, April 18, 2000).

challenged in the litigation had been abolished under amendments to the Czech School Act. But specific reference to the plight of Roma children in education was not mentioned.¹⁸⁰

The coverage of the European court's *D.H.* in the Czech media was minimal,¹⁸¹ yet what was published was mixed. Some articles reported on the outcome of the European Court's judgment underscoring its unfavourable implication that the Czech Republic is responsible for systemic discrimination against the Roma.¹⁸² One magazine article did a feature highlighting how little has changed with respect to Roma children in education in Ostrava throughout the decade that the case was litigated; it highlighted the discriminatory conditions of how Roma are treated in schools, explained how the Roma are victims of harsh stigma, and elaborated on the greater ongoing problem of segregation of Roma in education throughout the Czech Republic.¹⁸³ But another article, for example, was critical of the European Court's decision in *D.H.* arguing that the rebuke of the Czech government's education policy was undeserved and criticized the role of international public interest lawyers in developing a case at a level that relied on statistics and the situation without providing details of the individual cases and the updated status on the ground.¹⁸⁴

The defensive reactions of the Czech government and some of the Czech media demonstrate that while the legal battle might have been won, much more will be required to secure that the legal victory of *D.H.* is translated into tangible improvements in the situation of Roma in education in the Czech Republic and elsewhere in Central and Eastern Europe. *D.H.* offers a solid foundation for future advocacy around issues of racial discrimination and educational reform. It will clearly take sustained effort in coming years to focus public attention and marshal public resources to carry out the long project of desegregation and improved educational reform. To a great extent, the impact of the November 2007 judgment henceforth depends on the actions of advocates in the Czech Republic, their civil society allies internationally, and the Committee of Ministers of the Council of Europe, which is responsible to supervise the government's adoption of general measures in fulfilment of the judgment. Outside the Czech Republic, *D.H.* offers an opportunity to other courts and legal advocates to apply its expansive principles to other groups beside the Roma and to fields of

¹⁸⁰ The Press Release made the following statements: 1. Special schools like the ones described no longer exist in the Czech Republic, per Ministry order in 2005; 2. It was never possible for children to be put into special schools without the consent of their parents. The approval of the parents was always a lawful contingent of the decision; 3. The Ministry tries to support the integration of children with learning disabilities into the school system and creates conditions for their successful integration; 4. In certain circumstances, however, it is not possible to successfully integrate the child. In that case the parents or social worker may (but do not have to) choose a classroom with alternative educational needs. See Ministry of Education, *Reaction to the 13. November Decision of the European Court of Human Rights in the Case D.H. and Others vs. Czech Republic*, (Prague November 14, 2007), <http://www.msmt.cz/pro-novinare/reakce-msmt-na-rozsudek-velkeho-senatu-evropskeho-soudu-pro-lidska-prava-ze-dne-13-listopadu-ve-veci-stiznosti-d-h-a-ostatni-proti-cr> (in Czech).

¹⁸¹ An internet search of the websites of the two leading Czech newspapers, "Dnes" and "Lidove Noviny" did not reveal any coverage of the *D.H.* decision.

¹⁸² In an article written by online newspaper Aktualne.cz, the author concludes that the Strasbourg decision has high implications for the Ministry of Education. "After all, this decision is a precedent, which now can be used by all Roma families, whose children were placed into special schools." See Ludvik Hradilek, *Stát zaplatí za posílání Romů do zvláštních škol* (in Czech), <http://aktualne.centrum.cz/domaci/soudy-a-pravo/clanek.phtml?id=513898>.

¹⁸³ See Jan Brabec, *Ach ta zvláštní česká škola* (in Czech) in RESPEKT, (January 7, 2008), <http://www.clouekvtisni.cz/index2.php?id=328&idArt=624>.

¹⁸⁴ See an editorial written for *Hospodarske Noviny*, Tomas Nemecek, *Štrasburská věž ze slonoviny*, in ECONOMIA ONLINE, (November 15, 2007), http://vyhledavani.ihned.cz/2-22421810-M00000_d-c0.

discrimination beyond education. How and whether this happens will depend, in part, on the receptivity of judges in other courts, the creativity and persistence of lawyers, and the ability of NGOs to raise awareness of the *D.H.* ruling in public fora among government officials and others.

As litigation in *D.H.* was ongoing, other Roma rights public interest lawyers and organizations in CEE countries outside the Czech Republic began pursuing legal challenges to discrimination in education against Roma and notable successes have been achieved in the national courts in Hungary and Bulgaria. Importantly, the more recent litigation challenging discrimination in education in these countries has been able to draw upon the new procedural legal provisions provided by national legislation implementing the EU Race Equality Directive.

In Bulgaria, the public interest organization, the Romani Baht Foundation, filed numerous legal suits in Bulgarian courts challenging discrimination in education with assistance from the TRAILER project¹⁸⁵ and with the collaboration of the ERRC. These cases followed on the heels of ongoing litigation of the *D.H.* case. One of the first suits, *Romani Baht Foundation & ERRC v. the 75th School Todor Kableshkov*, was filed in the Sofia District Court on behalf of 29 Roma children.¹⁸⁶ This suit alleged that the Roma children had been placed in segregated all-Roma schools in Roma settlements in Sofia and obtained there substandard education in comparison to educational standards available in integrated schools in Bulgaria. As this suit was brought prior to the transposition of the EU Race Equality Directive in Bulgaria, it alleged that this segregation constituted unlawful discrimination in access to education for these children in violation of the Bulgarian Law on Education, the Bulgarian Constitution, and international human rights treaties, including the European Convention on Human Rights.¹⁸⁷ Furthermore, the ERRC and the Romani Baht Foundation pursued extensive independent data gathering to create evidence for this case, similar to efforts made in *D.H.*¹⁸⁸ On November 11, 2004, the Sofia District Court ruled that the plaintiffs failed to establish that they suffered from unequal educational opportunities in this school district; the plaintiffs appealed the ruling, but the negative decision was upheld on appeal.¹⁸⁹

Shortly after the 2003 Bulgarian Act on Protection against Discrimination Antidiscrimination Act entered into force in January 2004, the Romani Baht Foundation and the ERRC filed another lawsuit in the Sofia District Court in October 2004, which resulted in the first European court decision finding unlawful discrimination in segregation of Roma children in education.¹⁹⁰ This suit was filed in the name of the two Roma rights public interest law organizations deploying the new *actio popularis* mechanism provided for in the new Bulgarian antidiscrimination legislation transposing the EU Race Equality Directive.

¹⁸⁵ See *supra* note 78.

¹⁸⁶ See TRAILER Database of Bulgarian Cases, available at http://www.europeandialogue.org/ED_PAGES/Case_database/BG_cases.doc#todor; see also ERRC Press Release, *ERRC Lawsuit Challenges Education Discrimination against Romani Children in Bulgarian Schools*, available at <http://www.errc.org/cikk.php?cikk=2055&archiv=1>.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See TRAILER Database of Bulgarian Cases, available at http://www.europeandialogue.org/ED_PAGES/Case_database/BG_cases.doc#todor

¹⁹⁰ See ERRC Press Release, *Desegregation Court Victory*, available at <http://www.errc.org/cikk.php?cikk=2411>.

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The suit, brought against the Bulgarian Ministry of Education, the Sofia Municipality, and School Number 103 of Sofia, alleged that School Number 103 was a segregated school consisting entirely of Roma pupils and that the conditions of education in this school were substandard compared to integrated, non-Roma schools in Bulgaria. The Sofia District Court accepted the evidence presented in this case, holding that the circumstances constituted unlawful segregation of Roma children and unequal treatment.¹⁹¹ The Bulgarian government's appeal of this ruling remained pending in 2008.¹⁹²

litigation challenging education discrimination against Roma children in Hungary marks another successful deployment of the *actio popularis* mechanism in a Roma rights public interest legal challenge in a national court in Central and Eastern Europe. The complexities of developing the *D.H.* case in the Czech Republic underscore how a legal tool such as *actio popularis* can facilitate a legal challenge to discrimination in education. As mentioned above, Hungary passed the Equal Treatment Act in 2003, expressly permitting *actio popularis* lawsuits to challenge discriminatory practices.¹⁹³ To take advantage of this new mechanism, a new Hungarian public interest law organization, the Chance for Children Foundation,¹⁹⁴ was created to litigate challenges to discrimination in education with the view of using the *actio popularis* mechanism established by the new Hungarian antidiscrimination legislation.

The first major suit brought by the Chance for Children Foundation challenged the segregation of Roma children as a result of failed integration efforts taken by the local council of Miskolc in April 2004. In this case, the local council attempted to integrate schools according to economic and administrative delineations in the region, but failed to account for the fact that the Roma community in this area were concentrated in a segregated community. As a result, the segregated Roma community continued to maintain segregated Roma schools that had substandard educational standards, thereby violating the principle of equal treatment under the Hungarian Equal Treatment Act. The first instance court rejected the suit based on a series of misinterpretations of the legal standards under the new Equal Treatment Act.¹⁹⁵

The Chance for Children Foundation appealed that decision and won a victory before the Debrecen Appeals Court on June 9, 2006.¹⁹⁶ That Appeals Court expressly found that the 2004 integration plan maintained the segregation of Roma children in violation of their right

¹⁹¹ See *id.*; see also Bulgarian Helsinki Committee, Human Rights in Bulgaria 2005, available at <http://www.bgelsinki.org/upload/resources/hr2005-en.doc>; and *ERRC v. 103 Sofia School, Sofia Municipality and the Ministry on Education*, TRAILER Database of Bulgarian Cases, available at http://www.europeandialogue.org/ED_PAGES/Case_database/BG_cases.doc#todor

¹⁹² This was confirmed in the authors' interview with Bulgarian lawyers involved in the case; see also FRA RACISM REPORT, *supra* note 95 at 101.

¹⁹³ See *supra* note 93.

¹⁹⁴ For an overview of the Chance for Children Foundation's activities, see its website, available at <http://www.ccf.hu/>.

¹⁹⁵ For example, the first instance court claimed that "discrimination requires active behaviour, so that an omission may not constitute a breach of equal treatment. In the court's opinion, the shifted burden of proof does not exempt the claimant from proving that there is a causal link between the protected ground (Roma origin) and the disadvantage the group with that particular protected characteristic suffers." See *First Instance Court Decision in Actio Popularis Claim Concerning Segregation of Roma Pupils*, in 3 EURO. ANTIDISCRIM. L. REV. 68-69 (2006).

¹⁹⁶ See *Successful Appeal of Court Decision on Actio Popularis Claim Concerning Segregation of Pupils*, in 4 EURO. ANTIDISCRIM. L. REV. 64 (2007).

to equal treatment based on their Roma ethnic origin. This decision is considered groundbreaking, as it upheld key principles of the antidiscrimination norms of the EU Race Equality Directive as transposed in the Hungarian Equal Treatment Act, such as the shifting of the burden of proof and the ability to find indirect discrimination.¹⁹⁷ The Court ordered the Miskolc authorities to publish the ruling in the Hungarian press but did not order any general measures to force the integration of Roma children into other mainstream schools in Miskolc. As of May 2008, the Hungarian government's appeal of this decision remains pending.

III. Conclusion: Evaluating the Impact of Roma Rights Public Interest Litigation to Date and Recommendations for Strengthening its Role in Improving Access to Justice for the Roma of Central and Eastern Europe in the Future

At one level, public interest litigation on behalf of Roma has had enormous success to date. The mere fact that a substantial number of individuals and organizations have invested the time and resources to bring so many formal complaints before national and international courts has raised awareness of the extent of Roma deprivation throughout the region. This article has described how public interest lawyers in Central and Eastern Europe first articulated the plight of Roma in the region as an assault on their human rights, thereby creating a Roma rights movement that uses litigation as a tool to seek redress for the discrimination Roma suffer in myriad fields ranging from police abuse to housing rights to education.

The legal standards in Europe prohibiting discrimination have been revolutionized over the past decade, in part due to the success of public interest litigation in putting access to justice for Roma on the political agenda. Moreover, Roma rights public interest litigation has resulted in major positive results at a jurisprudential level. In case after case, the European Court of Human Rights and other judicial bodies have improved protection against discrimination and racial violence and have increasingly found violations on the facts of the relevant provisions of the European Convention.

And yet, at the same time, it would be hard to conclude that the situation on the ground for most Roma has markedly improved – let alone, that public interest litigation can claim any credit. Given that Roma rights public interest litigation has been pursued for little more than a decade, it may simply be, as Chou en Lai notably said of the impact of the French Revolution, “it’s too early to tell.”

Nonetheless, the experience to date allows practitioners and supporters of public interest litigation on behalf of Roma to draw a number of conclusions about how to maximize the value of the enterprise:

For PIL advocates – lawyers, NGOs, community representatives:

1. Acknowledge that securing favorable court judgments is important, but only one step in a longer chain of events. Advocates must focus more on publicizing, and ensuring implementation of, positive court decisions.

¹⁹⁷ See FRA RACISM REPORT, *supra* note 95 at 24.

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2. Keep in mind that public interest litigation is only one of many tools to expand Roma access to justice. Generally, public interest litigation is most effective when carried out as part of a constellation of tools seeking social change, including legislative reform, lobbying of government officials, media outreach, and direct action. Public interest litigation often has more impact where it builds on and reinforces these other tools.
3. Representatives of Roma communities should be integrally involved in the design and execution of public interest litigation on behalf of Roma.
4. Be creative and flexible in making use of available legal resources on behalf of Roma. Even in a jurisdiction that does not treat court rulings as legally binding precedent, it may be possible to rely upon the persuasive force of a decision's reasoning in support of its application in other settings. If court rules do not provide for collective remedies through a "class action" or similar procedural mechanism, it may still be possible and desirable to join together in one legal action the complaints of several similarly situated Roma plaintiffs. In the event of protracted litigation, joinder may protect against the risk that one or more complainants do not pursue the matter. In actions challenging discrimination, it may also lay a foundation for presenting evidence of a pattern of harm affecting an entire class.

For governments of Central and Eastern Europe:

1. Narrow the gap between Roma (who are mostly not lawyers) and lawyers (who are mostly not Roma) – this may be accomplished by undertaking some of the following initiatives:
 - Educating Roma communities about their human rights, the legal system, its strengths and limitations
 - Providing affirmative efforts, including fellowships with financial assistance, enabling Roma to secure legal education and become members of the bar
 - Improving legal education more generally more clinical opportunities to work with Roma and other underprivileged communities
2. Combat continuing anti-Roma popular attitudes through education and awareness-raising – targeting law enforcement, teachers, and the general public about the history and continuing persistence of discrimination against Roma
3. Familiarize national level judges with recent sweeping changes in European legal landscape regarding anti-discrimination, with particular reference to numerous cases involving Roma applicants
4. Expand legal aid for indigent persons to encompass – and provide adequate compensation to enable the bringing of - civil claims seeking fundamental human rights protections, including on behalf of Roma
5. Modify loser pay rules for allocating costs in civil claims so as to exempt plaintiffs who can demonstrate indigency from burden of having to cover opponents' costs in case of loss