THE POTENTIAL OF STRATEGIC LITIGATION IN DESEGREGATING THE HUNGARIAN EDUCATIONAL SYSTEM

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Until a year ago I never thought that the Roma issue would be my primary focus. Having met human rights activist fighting for the rights of the Roma through their dedication I understood and realized that if I really want to contribute something to my society, I should work for the advancement of the rights of the Roma. This is the reason why it was obvious to me that I would like to dedicate my thesis to learn more in depth about it. I have acquired enormous amount of knowledge from these people and I hope that complementing it with my experiences and skills I can really contribute with something.

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Executive Summary

The Roma issue constitutes the major human rights issue in Hungary in terms of human rights violation. Romani people face discrimination most of the time in most fields of society; it starts at their birth in hospital (Romani women hence children are often denied equal medical treatment) escalates throughout their (short) education (due to the consequences of segregation) that culminates in their unemployment, which eventually leads to their rejection and general exclusion of society. These discriminative practices are mostly driven by misconceptions, prejudices and racist attitudes towards the Roma. Eliminating the denial of equal opportunities in education can contribute a lot to ease this problem.

Strategic litigation is a powerful method that seeks to extend to usage of law by bringing test cases to courts and hence use legal tools to achieve social change. Since Roma, due to their marginalized status they lack representation from all sphere of public life; they are not represented in neither in the legislative nor in the executive branch. This is why using and challenging law can be their only hope to improve their situation, because through strategic litigation laws themselves are challenged or tested and the judiciary through its own means has to find justice.

Impact litigation can be a very powerful tool to achieve related social changes especially if there is a (1) clear litigation goal, (2) adequate laws exist, (3) the court decision can have a general impact and if (4) the issue involved concerns general public. All the above is either given or can be achieved in the near future in Hungary, therefore being aware of the different aspects of strategic litigation and using it in an effective way it has great potential within the Hungarian context to fight from also a legal perspective the segregate educational system of Hungary.

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THE POTENTIAL OF STRATEGIC LITIGATION IN DESEGREGATING THE HUNGARIAN EDUCATIONAL SYSTEM

"The Ostrava case "is a stunning legal victory, setting a strong legal precedent against the remaining obstacles that the Roma and other minorities often face in the realization of their right to education,"[1].

1. INTRODUCTION

The Roma constitute the biggest minority of Hungary, accounting for about 8-9% of the total population. This however is not the only major connotation to them. Due to their historical exclusion, marginalization and discrimination they are also the most deprived and vulnerable group not only in Hungary but in the whole of Europe.

1 Cynthia Morel, Legal Cases Officer, Miniority Rights Group: http://www.minorityrights.org/?lid=4233

The word “Roma” itself means “people” in Romani language with a connotation to “us” as opposed to the others to whom when talking among themselves they refer to as “gadje” meaning the “other”. This already reflects a high degree of us/them opposition, a notion that unfortunately has only been reinforced throughout history[2] contributing to their general rejection.

Trying to outline their history is impossible. All we know is that they, apparently coming from the lowest, Shudra cast, left India at a different time, from different territories and for different reasons[3]. Sadly though the only common history they share is that of general social exclusion, marginalization Roma Holocaust and racial discrimination. Several factors might have contributed to this: their late arrival to the continent; the high degree of cultural differences; visually different appearance: darker skin, different features, divergent, different from the majority etc. This however should not be among the only reasons for becoming and eternal target for common prejudices.

Their sociopolitical weakness has probably also allowed them to be much easier attacked. The fact that they never had a nation state also leaves them more vulnerable. Although they

[2] *Dimitrina Petrova, “The Roma between Myth and the Future”*

[3] *Ibid.*

are usually referred to as a “minority”, they do not have and never actually really had a “majority” from whom some protection, assistance or empowerment at all could be expected. There are also lots of misconceptions based on which Roma are generally regarded as parasites whose exclusion can be thus justified. Others think that the reason why Roma are excluded is because they do not event want to integrate; the reason why they are less educated is because Romani parents do not value education etc.

It is hard to define what the basis of ethnic Roma identity is. Historians failed to identify it and Roma cannot define it either. Interestingly though, it seems that society in general knows how to identify, because their ethnic identity and the misconceptions and stereotypes attached to them serve as mot of the time the only basis for their discrimination.

This profound rejection of the Roma is not only reflected in all spheres of the Hungarian and other societies, but in the most important socializing first stage as well. Roma children are being segregated within the Hungarian educational system. This segregation in the first important socializing stage is not merely physical, although there are many *ghetto schools*, where the percentage of Romani pupils among the student body can reach up to 100%, but it always implies an inferior quality of education. The practice of placing them in *separate classes* is usually justified by their need to catch up with the “others”- however there is nothing to what they should catch up, for they never started at the same level with those, with whom they should catch up. The *misplacement* of Romani children in special or remedial schools, that are designed for the mentally handicapped offer a substandard curriculum.

Children graduating from these, much inferior classes often not only have hardly any chance in continuing their sturdiest but also suffer from the stigma of being " stupid" or "retarded". Allowing Roma pupils to "become" "*private students*" is a Hungarian specialty how to keep Roma away from non- Romani students. Fulfilling the right to education is however the foundation of realizing other fundamental rights. The failure to exercise it obviously triggers the violation of other rights.

This notion, what is referred to as segregation, meaning the subjection of Romani children to substandard education is not only unacceptable because it violates human dignity and several legal provisions, but also because leaves the Roma community without any chance to break out of their socially imposed stereotype and fully integrate into society. However this is not the only reason why the Roma racial segregation problem should be shared by public concern. Denying equal quality education for Romani children also results in yearly 20 000 functionally illiterate[4]. It does not require high deduction skills to realize that this is not only bad for them, but for the society as a whole for their unemployment and failure to pay taxes also results in national economic damages that have to be paid by mostly by the non- Roma

[4] Újlaky András, one of the founders of Chance for Children Foundation

community. This is also the reason why desegregation should be supported by the general public as well.

Strategic litigation is a legal method that through test cases uses legal tools to achieve social change. If strategic litigation goal is clear, there are adequate legal instruments at disposal, court decisions can have general impact and when the issue concerns the general public impact litigation can be very powerful. In the case of the Hungarian segregated educational system the clear litigation goal is to end this practice. With the European Union's Race Equality Directive of 2000 and its transpose within the Hungarian domestic system through the Hungarian Equal Treatment Act of 2003 adequate legal instruments are given. The general impacts of court decisions cannot be yet assessed but seem promising with the favorable recent Ostrava II. decision and with the winning of the first Hungarian strategic case of Miskolc. The importance of the issue might be clearer for the Roma community but with active strategic litigation accompanied with other tools such as advocacy, campaigning and lobbying general public should also be brought to this realization.

Finally there are two more crucial reasons why the potential of strategic litigation within the Hungarian context has to be analyzed. First, the Roma community, due to their historical marginalization and vulnerability they lack effective political representation in both the legislation and in the local governments, neither are they present in the executive branch. For this reason the independent court is the only forum where they can vindicate their interests. Second, it is the specialty of the Hungarian educational system that the central government

has no responsibility to enforce the law or to control the execution because the educational autonomy is within the hands of local governments. The system is lacking the controlling-sanctioning mechanism and this is the gap strategic litigation in Hungary is aiming to fill.

1.1 Aim

Given the marginalized situation of the Roma community and the fact that racial segregation in their education significantly, if not absolutely hinders them from becoming equal members of their societies it is the *aim of my thesis to find out what potentials does the powerful method of strategic litigation have in order to achieve social change in this aspect.*

1.2 Relevance and importance of the topic

The topic of racial segregation of Romani children is very important because it constitutes one of the biggest concerns of the Hungarian human rights situation. Furthermore the protection of this right would not provide Romani children with equal opportunities, but it would be essential for the realization of other fundamental rights and eventually lead to theirh integration into society.

Examining the topic of the potential of strategic litigation in combating the Hungarian segregated education is also very relevant because of the historic Ostrava II. decision of the Grand Chamber of the European Court of Human Rights this November. Because of this

important decision at European level contributing to the clarification of Article 14 jurisdiction on discrimination and because even Hungary can strategic cases have recently been filed in Hungary.

1.3 Methodology

This paper mainly relies on primary and secondary sources, however personal experiences based on research are also included. Being a researcher of the ERRC conducting interviews with Romani women in order to prepare a shadow report to be submitted to UN CEDAW Commission in 2007 and accompanying one of the Chance For Children Foundation's activist to Miskolc allowed me to have a true insight in the complexity of the issue both from above and from the point of view of the non- Roma community.

1.4 Limitations of this research paper

Not having a legal background hence not being familiar with the legal environment of Hungary is the major limitation to properly analyze the potential of strategic litigation in Hungary.

Due to the prohibition of data protection based on ethnicity in Hungary, it is also difficult to back up the practice of racial segregation with statistical date. Although the numbers mentioned here might not be exactly precise, they do reflect very much the severity of the situation.

2. EDUCATIONAL SEGREGATION OF THE ROMA IN HUNGARY

Roma form the biggest minority in Hungary[5], their problems however go far beyond general minority issues. The Roma issue in Hungary constitutes the biggest concern not only from a human rights perspective but also of all other considerations. Romani people face discrimination most of the time in most fields of society; it starts at their birth in hospital (Romani women hence children are often denied equal medical treatment) escalates throughout their (short) education (due to the consequences of segregation) that culminates in their unemployment, which eventually leads to their rejection and general exclusion of society. These discriminative practices are mostly driven by misconceptions, prejudices and racist attitudes towards the Roma. It is its nature of a vicious circle that reflects the best the severity of the issue.

Roma children are the biggest victims of this social exclusion and institutional racism. Although whatever the "charges" against their ethnicity is, it is for sure not the children's fault, still it is them who have to start his essential socialization with a condemn imposed on

[5] Around 8% of the total population,

them by society. The result of this is that most of Romani children are racially segregated in education. Although sometimes this segregation is the result of residential segregation, sadly it does not end in their mere physical separation. When talking about educational segregation it has to be emphasized that it also implies an inferior quality of education that already burdens the child starting his life disadvantaged, a vicious circle breaking out of which is usually impossible.

2.1 Patterns of Segregation

There are four major patterns of segregation within the Hungarian educational system. Whether it is intentional or a result of unintentional conduct racial segregation of Romani children within the educational system constitutes a very severe form of discrimination violating their right to equal education, a right guaranteed by many international, regional and domestic human right treaties, laws.

Prohibition of Data collection based on ethnicity in Hungary hinders the collection of statistical evidence on the practice of racial segregation therefore it is hard to prove the pattern of segregation with numbers.

2.1.1 Ghetto Schools

We talk about ghetto schools when the overwhelming majority of the student body is of Romani origin. All- Romani schools can be the result of different factors such as residential segregation of the Roma, withdrawal of the non- Roma, demographic changes or of mere racial motivation.

Many Roma, especially in the North Eastern part of Hungary live in substandard settlements. Often these settlements have no basic facilities such as electricity or sewages. They are also usually to be found on the very outskirts of the city with no built roads leading to them. Children coming from such residential environment usually go to ghetto schools- if they can make it.

In some cases ghetto schools form part of mainstream schools where they have more than one building. In these cases, the one in worse condition is for the Roma. In the city of Miskolc for example after the administrational integration of two schools, while maintaining the catchment areas the result of which was that the Roma were kept in the very much more run down building of the Jozsef Attila primary school, where not only the facilities were substandard, but the level of education was much inferior. One could accept a justification for

having different student bodies, but the lack of handles and teachers cannot be explained legitimately.

Ghetto schools can also emerge as a result of the withdrawal of non- Romani student by their parents- the high number of Romani children that is associated with low level of education[6]. It can also happen though due to parents racist attitude and not willing to send their child together wit Roma to school because they assume that Roma are dirty, stinky, have a lice and steal.

Demographic trends are probably the least painful reasons for the formation of ghetto schools. With an increasing mobilization and economic migration of the people to bigger cities from villages, the poor and underprivileged Roma remained in villages increasing their proportion among the population. This increase in their proportion is also reflected in the composition of the student body.

There might be different reasons for the emergence of ghetto schools, they all share common characteristics however. The quality of education is generally lower. The schools have run

[6] "*Segregated Schooling of Roma in Central and Eastern Europe*"

down facilities (such as handles lacking from toilet doors, or no computers at all), they are inferior in material conditions. The teacher body is not always complete, sometimes lacking teachers of important subjects, such as mathematics or history. Even if it is teachers are not appropriately trained, or do not have the attitude of dedicating themselves to the "emancipation of the Roma children. Textbooks are out of date or sometimes even containing racist language regarding the Roma. They lack teaching aids or basic materials such as maps or overhead projectors.

There could be other, secondary aspects to thoroughly consider. The focus of this paper however does not allow the discussion of it in details therefore I just would like to mention some of these. When for example heavy rains fall on the roads of the settlements they become hard to cross for they are turned into mud- seas. If a child misses school for such a reason, it is not always accepted by the teacher and unjustified missing of school can thus accelerate the process of the child being treated less favorably.

2.1.2 Separate Classes within mainstream schools

Regular schools can maintain separate classes for children with developmental disabilities. The abuse of this option is the source and way of segregation within mainstream schools. The overwhelming majority of these classes are Romani students. Many are directly enrolled in them without parental consent.

The simplified curriculum followed by these classes provide for an inferior education, where the minimum standards are taught. Many times certain subjects are not taught seriously usually because of the general conviction of teachers regarding the mental capability of the Romani students. Many teachers think that they have lower capacities to fulfill academic requirements. In many cases there are no foreign language options.

The major source responsible for the segregation of Roma children is the pressure coming from non-Romani parents, who do not want their children to go with Roma students together. This racial prejudice is not only unfounded in many cases but is also humiliating for the Roma children. Even if school headmasters do not have racial prejudice themselves, most of the times they have to give way to the parental pressure, in order to prevent the school to become a ghetto school. Another reason why they have to obey this pressure is in order to maintain the same financial level. In Hungary schools receive money per head, therefore if school authorities, for the sake of non- Romani parents, segregate Romani children into separate classes non- Roma parents won't withdraw their children thus not decreasing the financial resources of the school.

The implementation of the Hungarian Decree No. 32/ 1997 of the Ministry of Education concerning the education of national minorities allows having separate programs for *inter alia* the Roma. In the disguise of separate curriculum in line with the minority education policy these separate classes result in unequal quality education of the Roma, without any

ethnic teaching at all. Different special programs that support the talented children also allow for creating a completely homogenous class under these programs.

Children are either directly enrolled in these substandard classes or are transferred to them. In theory they should be tested every half a year- in practice they remain within these classes from the moment they were enrolled in them. Although it is hard to prove objectively, in the case of having 3 classes in a year they are always placed in the last class (C.). When conducting personal interviews with Romani people it was also hinted, that they are placed in class C. because they are "Gypsies"[7].

Even if these separate classes function within mainstream schools and the physical conditions are similar to those of non- Romani students, the inferior level of education they receive still impedes them from equal future opportunities that in the case of the Roma are essential in order to integrate within major society.

[7] Gypsy in Hungarian is Cigány- this is why it's C.

2.1.3 Misplacement of Romani Children into Special Schools for the Mentally Handicapped

Council of Europe Commissioner for Human Rights had reported that Roma children were frequently placed in classes for children with special needs "without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin"[8].

Misplacement of Romani children into special schools for children with developmental disabilities is another common manifestation of denial of their right to equal education. These schools offer a much substandard curriculum therefore children, who once entered remedial schools have no real chance in entering higher education. The striking fact about the placement of Romani children into special schools is that their number in disproportionately higher. Despite the difficulties in exact data collection a research conducted in 1997 showed

[8] Final report By Mr Alvaro Gil-Robles, Commissioner for Human Rights, on the human rights situation of the Roma, Sinti and Travellers in Europe

that out of 309 special schools the proportion of the Roma was estimated to be over 40%, but some schools were also found where this percentage was over 90%[9].

Although misplacing children is a common practice, not only in Hungary but in the region as well, its unlawfulness was never stated up until two days ago[10] when in the Ostrava II. decision (a much awaited decision by Romani Rights activists), addressing the arbitrary misplacement of Romani children into remedial school the Grand Chamber of the European Court of Human Rights has established, by 13 votes to four that there was a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR) together with Article 2 of Protocol No. 1 (right to education) to the Convention on account of the applicants misplacement to special schools based on their racial origin i.e. segregation was recognized as a form of discrimination.

There are various ways how to misplace children into special schools. Hungarian legislation allows for direct placement of children to special schools with developmental disabilities. Children undergo a psychological test conducted by a Rehabilitation and Expert Committee aiming to assess the child's psychological capacity to enroll into school. These tests however

9 *"Equal Access to Quality Education in Hungary"*

10 This part of the thesis was written on 15th November.

are sometimes ignored meaning a quasi- automatic enrollment of the child of remedial schools.

When these tests are held, they often provide different conditions for Romani children. Where in case of failing such test non- Romani children can have more chances to retake them, Roma only have one. These tests are also often racially biased and do not take into account the linguistic and cultural differences. The results of the biased tests are not analyzed in the light of the particularities and special characteristics of the Roma children who sat them. Not all Romani children have Hungarian as their mother tongue they can therefore face difficulties in expressing themselves or talking about particular topics, which can lead to wrong assessment of their IQ level[11]. In borderline cases non- Romani are sent to remedial schools[12].

The Decree 14/1994 of the Hungarian Ministry of Education obliges the specialized diagnostic body to repeat test after the first year of the enrollment of the child into special

[11] To provide an example to see what this failure of linguistic and cultural adaptation of these tests imply: A Bulgarian girl was asked by the speech therapist to tell the name of the objects she saw in the picture, a hedgehog and a crab. She recognized them, but was not able to name them in Bulgarian. She was also told to put the pictures of a popular fairy tale in order, but she failed to do so for not knowing that tale (source "*Separate and Unequal*").

[12] "*Segregated Schooling of Roma"*

remedial school and then after every 2 years until the child is 12 years of age. However remedial schools have no intent to decrease the number of their students, and once a child is placed in a special school it is very less likely to be re-integrated into mainstream school.

The other major way Romani children become subjected to unequal quality education is by being transferred there from regular schools. There are two major abuses that result in such transfer: teachers' racist attitudes and parental consent.

Romani children, due to their differing linguo- cultural background have individual needs that are not met by the inappropriately trained teachers. By this Romani children may loose their motivation to study, which results in developing a responsive and defensive attitude towards this. Due to the racial harassment the child suffers in schools both from teachers and schoolmates start to behave even more defensively, which then is interpreted as behavioral problem, the solution to which is usually the suggestion to transfer the child to remedial schools. Romani parents want to protect their children and decide on the lesser evil based on their judgment. Law prescribes that such decisions should be free and based on adequate information. When making such decision the parent should be aware of the consequences of the decision, most of the time they are not however. School authorities take advantage of this opportunity and if they inform the parents, only mention the advantages of the school.

Another way to abuse parental consent is pushing parents to make such a choice. When school authorities want to get rid of their Roma students they start persuading the parents by saying that moving the child to a special school is for the own good of the child. Not only will s/he receive a more appropriate education tailored to the individual needs but will also be in a more familiar environment free of bullying and other racial harassment. In some cases however even if parents did not want to transfer their child, because of the pressure and more radicalized behavior of the teacher in order to protect the child had no other chance left than to transfer him and hope the best.

The major problem with special schools is that their much inferior curriculum (lacking language education *inter alia*) does not permit the child to proceed with higher studies, but unfortunately they only find it out when they are denied admission due to unsatisfactory knowledge. Parental consent should not be relied on- they themselves come from a disadvantaged group without education and without understanding and understanding the value of quality education. This form of segregation has a unique characteristic namely that apart from depriving the child from future equal access but is stigmatizing children making them feel ashamed all their life for something that was out of their control.

2.1.4 Private Student Status

The above mentioned three patterns of segregation are not only present in Hungary, but are common in the Region. There is one particular phenomenon that increases the options for

segregation of the Romani students that is also a common, although hidden practice in Hungary however: the status of private students.

The Hungarian Education Act allows students to suspend their regular school attendance while retaining their legal status and thus complying with their legal obligation of compulsory education. The compulsory age for school attendance is until the end of the school year in which they turn 16 years of age according to the Hungarian Public Education Act of 1993[13]. For children, who started school in or after 1998/1999 this age is raised to 18 (Section 6 (5).

„In case the individual endowments, handicap or particular situation of a student justify it, the school principal may, at the request of the student, exempt him or her from attending the compulsory classes partly or entirely" (Section 69 (2))… In case a student with a physical, mental, sensory, speech or other handicap, or a student with an adaptational, behavioral and learning disorder, shall pursue private tuition" (Section 120 (1)). Therefore if a student suffers from physical or developmental disabilities, experiences behavior problems or has learning difficulties can be granted the "private student status", but it can only happen on the

[13] Section 6 (3)

consent of the parent. The exemption from school attendance does not mean exemption from education however- or at least this is not what the law implies even though practice reveals the opposite.

Theoretically the school, with which the student maintains legal relation, should assist the child with after school classes and should maintain regular contact with him in order to support his education. Private students must give account about their knowledge at times defined by the school principal in the ways established by the teacher staff[14]. Notice that the law does not prescribe any specific arrangements to be made in order to supervise and enforce private tuition. Probably this is the key reason why private tutoring started to be abused and became yet another form to segregate.

The reality is that once a Romani student becomes a private student in every case it almost always means the end of his education. Based on a research involving 192 primary schools 3% of the Roma going to these schools were private students where as the percentage of non-Roma private students was only 0.1%[15]. Other research showed that the number of private

[14] Section 69 (2)

[15] Havas, Kemeny, p. 81 segregated schooling !!!

students where the proportion of the student body is 25% or more Roma it can reach up to 80%[16].

There are several reasons why a student becomes private student. Granting private status to students is a good opportunity for school officials to get rid of Roma students, and thus pleasing the non- Roma parents, who prefer to have a decreased number of Roma students in school with their children. Racial harassment of Roma students is also a reason why parents, willing to protect their children from such degrading practices "choose" private tuition for them. If a child has health problems, even if they are just temporary ones, the school often offers them the private tuition, but fails after the child is healthy again, fails to re-take them in regular education. In cases when young girls fall pregnant and give birth to a child at the age younger then the socially tolerated 18, for morality reasons school also use this option to keep the girl away from the regular students, in order not to expose them to negative practices[17].

Lastly there is another important matter to mention. Namely that although students can only be sent under private tuition with parental consent, that sometimes gives even more space to

16 Babusik, Ferenc. "*Survey of elementary schools educating Romani children*", Delphoi Consulting, Budapest, 2000, p.28, at: http://www.delphoi.hu/aktual.htm

17 Interview conducted with, Ibolya by Orsolya Jeney for the shadow report prepared by ERRC tobe submitted to the UN CEDAW Commission (April, 2007)

abuse. Due to the long practice of segregation, i.e. inferior quality of education usually the parents of Romani students themselves are either not aware of the value of regular, mainstream education, or again due to their poor education do not dare to or cannot be critical with what teachers say. Therefore when teachers tell the parents to "choose" private tuition for their children because it serves the best interest of the child, they often manage to persuade them making parents feel, that the decision was actually theirs. Neither the students, nor the parents are aware of the consequences of this decision however.

Once a student undergoes private tuition and is physically out of the school has no chance to receive equal education. School usually fail to maintain regular contact with the children, hence they are not only unequally educated, but are not even given the necessary assistance. Due to very poor housing and living conditions, and hence lack of electricity or appropriate furniture being outside the school in already difficult for some Roma to comply with homework or to study. Being away for the whole time to school makes it even more difficult to study and to maintain interest for education. The compensation for this and for the failure of the school to assist the private student, decreases to chances of an adequate formation of the child even more. What schools usually do is that they reduce the level of final examinations so that private students can formally pass. It these cases Romani students not only receive an inferior quality of education, but when willing to continue with their studies and undergoing admission exams have to realize that although they might have sufficient grades to pass them their knowledge fails way too short from the average. Thus private

tutoring does not only mean a much poorer education for the Roma but it also hinders them from equal opportunities in higher education or the labor market.

2.2 Effects of racial segregation

Racial segregation within the educational system it is thus not a mere physical separation of children, but the denial of quality education, the stigmatization attached to Romani children going to "catch up" classes or being enrolled in special schools for the mentally handicapped leaves a life- long effect and diminishes their motivation and beliefs in fundamental values. Not being socialized within a multicultural environment, they are denied already at an early stage the adaptation to different realities and thus it is unjust to expect from them, what non-Romani community does that they integrate within majority society.

In many cases parental consent justifies segregation. Parents say yes to is, but they are not aware of the consequences, or are mislead by wording that seems to serve the best interest of the child. Parents are often convinced, because they are not critical, they do not dare to be, and they love their children so much, and they want to have a different future for the children, as they themselves have. Thus, looking at it from this perspective, racial segregation also involves the infringement of the right of Romani parents to information.

3. STRATEGIC LITIGATION IN THEORY

There is neither official definition of public interest litigation nor there is a codified pubic interest law body. This might impede the understanding of the core of public interest law. For those however, who are dealing with strategic litigation there is no question about its meaning even if they themselves wouldn't be able to define it. It is hence not referring to a particular field of law (like family or discrimination law) but it hints *who* is being represented. It shifts the focus from "whom" they represented towards "what" they represent: public interest lawyers started representing the underrepresented.[18]

Strategic litigation, being concerned with social justice as much as with individual justice, is a legal tool that through the justice sector seeks to expand the usage of law to achieve social change through test cases[19]. It operates through court- ordered decrees that are intended to reform legal rules, enforce existing laws and articulate public norms[20].

3.1 Emergence of Strategic Litigation

[18] "*Pursuing the Public Interest"*

[19] "*Public Policy Advocacy: Strategic Litigation and International Advocacy"*

[20] Chayes, *T"he Role of the Judge in Public Law Litigation"*

It was first Louis Brandeis, US Supreme Court Justice 1916- 1939, to use the term in his speech addressed to the Harvard Ethical Society in 1905. He pointed out that "able lawyers have […] allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people". He further stated that "[t]he great opportunity of the American bar is […] to stand […] ready to protect also the interest of the people"[21]

Its practical emergence is strongly related to the landmark decision in 1954 of the US Supreme Court in *Brown v. Board of Education,* a case involving racial segregation in education.

Based on a previous decision on the same issue in *Plessy v. Fergusson* 1896 the Court upheld the constitutionality of racial segregation in public accommodation under the doctrine of "separate but equal", implying that state- imposed segregation of people of different race is not unconstitutional as long as equal facilities apply[22].

[21] Rekosh, "*Who defines public interest"*

[22] *Plessy v. Fergusson*

In *Brown*, where "minors of the Negro race through their legal representatives, [sought] aid of the courts in obtaining admissions to public schools of their community on a nonsegregated basis"[23] US Supreme Court overruled *Plessy*. It established that "…education is perhaps the most important function of state and local governments…it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment[…] To separate [students] from others of similar age and qualifications solely because of their race *generates feeling of inferiority as to their statues in community that may affect their hearts and minds in a was unlikely ever to be undone….segregation of the colored children* in public schools *has a detrimental effect* upon colored children. *Sense of inferiority affects the motivation of a child to learn*"[24][emphasis added].

Brown, apart from upholding racial segregation unconstitutional was a unique case because it went further from the classical adjudication only remedying an individual. It involved a public institution as a defendant and a self constituted group of claimants seeking to reform

[23] *Brown v. Board of Education*

[24] *Brown v. Board of Education*

future action by government agents. It therefore inspired a generation of lawyers who "saw law as a source of liberation as well as transformation for marginalized groups"[25].

The social turmoil of the 1960s and 1970s further accelerated the appearance of public interest (strategic) litigation. The Law and Development movement emerged as a response to the crisis of the self- estrangement of scholars regarding law. The crisis was majorly due to the changes in ideas about the role of law juxtaposing it with the dynamically developing concept of development of the Third World. Development was assumed to increase the rational capacity of men to control the world whereas law was attributed little or no effect on socio- economic conditions in the Third World[26]. Legal scholars therefore assumed that increasing the instrumental perspective of law would increase legal development. Therefore American lawyers started to attribute more impact to law- they wanted to have bigger impact on social issues. In achieving it lawyers started to define themselves as *public interest lawyers* who dealt with the representation of the poor and underrepresented social interests in order to balance the much better represented economically powerful interests.

[25] Helen Hershkoff

[26] Trubeck, Galanter

As magnificent as *Brown* was at that time, it revealed by the elapse of time without desegregation taking place that court decisions cannot have immediate effect and are not enough alone to achieve social change however. This latter realization was rather an evolution and hence an aspect of public interest litigation's later conclusion, when assessing the impact of *Brown.* Although *Brown* had to be completed with a second ruling, where Supreme Court ordered state compliance with *Brown I.* "with all deliberate speed" and still needed many years to have real effect nobody denies that *Brown* was a giant step forward for the civil rights movement.

3.2 Aims and objectives of SL

Strategic litigation is a rather new legal approach aiming to use law as a **(1) tool to achieve social change.** It is used to challenge the way the law is applied in a way that it affects more than just the client. Strategic litigation aims to use law to "*create long lasting effects beyond the individual case*"[27]. By using and challenging law it also seeks to (2) promote the rule of law and hence the advancement of the right of the underprivileged. It aims to go beyond the

[27] *"Strategic Litigation of Race discrimination in Europe: from principle to practice"*

immediate case and the individual client[28]. Public interest litigation can also help to (4) document legal injustices and help governments accountable. By aiming to have a far reaching effect to empower disadvantaged groups it also (5) raises public awareness about the issue of concern.

In theory public interest litigation is "an important activity that complements and supports electoral politics; for marginalized groups, litigation sometimes offers the only, or least expensive entry into political life"[29]. Having the nature of top down social engineering it makes use of local knowledge in designing effective remedies and implementation strategies. It also contributes to holding governments accountable for their promised public goods.

The first major use of PIL is through interpreting existing laws, constitutions and treaties in order to urge the better development of legal bodies by finding legal gaps so that they address more people's rights and needs either by redefining rights or identifying the underused or ignored laws that can be beneficial to people.

[28] *Ibid.* p. 81

[29] Helen Hershkoff, p. 14

The second major use of strategic litigation other than the intention of extending individual's rights, through testing and challenging existing law it also tries to pressure courts to properly and extensively use laws.

3.3 Advantages and Disadvantages of Strategic Litigation

Since strategic litigation seeks to use the law as a tool to achieve social change it operates through test cases. In a favorable outcome a small case can have a great effect. In the language of economics impact litigation could be described as a cost effective option where the marginal input (the case) is much less than the marginal output (the impact of the litigation). Impact litigation is also very powerful because it uses the judiciary itself to achieve justice. Test cases can serve as catalysts for reforming the judicial/ legislative system or relevant social policies. It can also pressurize government or state agencies to create better enforcement mechanisms. By establishing precedent, it can set blueprints for future cases. By highlighting issues of concern it can also motivate other social institutions to adapt their policies accordingly. Last, but not least it can empower disadvantaged group who due to their socio-political weakness might not have any other means to enforce their interests. It is a double disadvantage of marginalized groups that their rights are given by the majority this is why using the law itself can empower them truly.

It is not always granted that strategic litigation has a positive outcome. Even then, because of its strong lateral impacts it can have can still remain powerful.

Applying impact litigation can contribute to the stabilization and crystallization of the legal system's operation. It does not only support the rule of law but provides a firmer basis for further strategic litigation possibilities. Due to its "cutting-edge[30]" nature it fosters legal education by bringing both the judiciary and legal professionals to deeper levels of the language and philosophy of human rights. Even if it does not succeed during the hearing of the case it can help to reveal existing practices of injustices by officials or other government action. Exactly because it goes beyond the individual's case and seeks social change it puts more emphasis in scrutinizing government action therefore it can also promote government accountability by this pressure surely feared by governments. Since strategic litigation also aims to raise public awareness it can foster public understanding of the issue and empowerment of the underrepresented group.

Because strategic litigation can be a very powerful tool it is very important to be aware of its disadvantages as well in order to be able to better choose to use it.

[30] *"Strategic Litigation of Race discrimination in Europe: from principle to practice"*, p. 37

The chosen test case has to be well prepared to have the expected effect. To have a well-build case a lot of time is needed to investigate and because of this and because of the cost of the competent lawyers it is usually also very costly. Due to its high cost and lack of capacity to assess the impact of it, it is hard to justify its application. Even if time and money is given its desired outcome cannot be assured. In case of a failed case the results might reaffirm the rightness of the existing law. Although outside court settlements are generally more preferred it is not a real option for strategic litigation for it might only remedy the victims but not change or repair the law. It also strongly depends on finding the right client and the right case. This is not always easy however due to the victim's fear of victimization or harassment. If the given enforcement mechanisms are week, strategic litigation again might not have the desired impact. The case is similar when impact litigation lack public support because as it was emphasized above, strategic litigation alone cannot achieve social change; it needs to be complemented with other actions.

Being now aware of both advantages and disadvantages of impact litigation the next step is to know how to maximize the effect of its outcome. It is very important to clearly define the litigation goal. It is similarly important to choose the right applicant and defendant even if it is rather difficult especially when it is the state that is sought to be sued. In school segregation case for example it is crucial to decide who to hold accounted and therefore to whom should the court decision be addressed to then be obliged to take appropriate action: the Ministry of Education, the local government or the school headmaster?

Selecting the proper forum for litigation can also contribute to a better effect. Court might have the same jurisdiction but might have better reputation or might interpret the laws more favorably to the selected case. It is also important that the legal arguments are creatively used and that they rely on both constitutional and international principles of different jurisdictions. As we will see later Ostrava had very creative legal reasoning to outlaw racial segregation in educational system: 1. racial segregation and discrimination amount to inhuman and degrading treatment, 2. discrimination in the exercise of the right to education, 3. denial of the right to education and 4. denial of their right to a fair trial.

After outlining the concept of strategic litigation together with its advantages and disadvantages and knowing the requirements to maximize its positive impact, we can still conclude that it can be used as a very powerful tool to achieve social change. It has to been seen as a constructive but not sufficient mean. It definitely needs to be surrounded by other action as well, such as advocacy, campaigning, human rights education etc. just as much as it needs the support of the general public. Bringing the public to the realization that it serves their interests as well can decrease the dependency of strategic litigation on philanthropic actors and can remove a major obstacle from using it.

Another important consideration is that just because strategic litigation worked in the United States from where it originates, it does not mean that it will work similarly elsewhere. However it can serves as a good lesson and conclusions can be drawn for an improved usage of it.

4. STRATEGIC LITIGATION IN PRACTICE APPLIED TO EDUCATIONAL RACIAL SEGREGATION OF ROMANI CHILDREN

The problem of segregated education of Romani children in Hungary involves not only their violated right to education but this denial is the basis of their further exclusion and hence marginalization. It is thus obvious that it constitutes a grave violation and hence strategic litigation, given the clear litigation goal, appropriate legal instruments and cases with favorable outcomes points in the direction to be a potent method to combat racial segregation of Romani children within the Hungarian educational system.

4.1 Legal tools at our disposal that can be used to fight segregation

For many years sex and nationality was in the focus of the European legal combat of discrimination. With the adoption of the Treaty of Amsterdam in 1999 this fight has been assisted with Article 13 prohibiting discrimination on 7 grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. There is no doubt how much this opened the horizon of opportunities. The European community was hence better armed and started to adopt different Directives considering specific grounds for prohibition.

4.1.1 EU Race Directive

On 29th June the European Union (EU) adopted the Council Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial or ethnic origin (Race Directive). According to the EU system a directive has to be transposed within the national legislative system of a Member State, the date for which was set to be the 19th July 2004. It is far the highest legislative standard in the field of anti- discrimination legislation and it is hoped that it will not only protect EU nationals from discrimination on the grounds of racial or ethnic origin, but that it will affect other human rights instruments. The Race Directive might have been a European invention, human rights violations are international[31].

The purpose of the Race Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin with a view to putting into effect in the Member States the principle of equal treatment (Article 1). The requirement to comply with the equal treatment principle implies the prohibition of discrimination. This Directive is groundbreaking in even this perspective opening new prospects through the inclusion of not only direct but of *indirect* discrimination as well.

[31] "*Strategic Litigation of Race discrimination in Europe: from principle to practice"*

Direct discrimination, as defined by Article 2 a, occurs where one person is treated less favorably than another person in a comparable situation and this less favorable treatment is based on grounds of racial or ethnic origin. Indirect discrimination occurs, when an "apparently neutral provision, criterion, or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2 b). An important feature of the concept of indirect discrimination is that the motivation behind it does not have to be intentional or the perpetrator does not have to be aware of it. Within the concept of discrimination it also includes the prohibition of both harassment and instruction to discriminate. Under harassment it understands an unwanted conduct in relation with racial or ethnic origin with the purpose or effect of violating the dignity of another person or creating a intimidating, hostile, degrading, humiliating or offensive environment. Under instruction to discriminate we should understand situations when e.g. school headmaster instructs a teacher to fail a student because of his racial or ethnic origin.

The scope of the Directive (Article 3) is much more extensive than of any other anti-discrimination legal instrument and applies to all persons as regards to both the public and private sectors. It outlaws discrimination in employment related situations, in the field of social protection and social advantages, *education* and access and supply of goods and services that are available to the public, including housing. It is clear that the Directive is on the prohibition of unequal treatment in general and not on the obligation for equal treatment

in education, still education falling under States discretion sets a limit on the transposition of this scope.

Based on Article 7 State's obligation is to ensure that all persons who feel wronged have access to the available procedures even after the relationship in which the discrimination is alleged to have occurred ended. This provision further enhances the effectiveness of the implementation of the Directive by obliging States to allow the engagement of associations, organizations, or other legal entities in any provided judicial and/or administrative procedures.

The shifting of the burden of proof is another groundbreaking provision for it reaffirms the severity of the issue of the prohibition of discrimination to protect the individual from the abuse of power. Once the complainant has established the facts that allow for the presumption of discrimination it is the defendant that has to prove that there has been no breach of the principle of equal treatment. This however does not apply to criminal procedures.

Another way that the Race Directive is increasing the potential of this legislation is by obliging the State to take necessary measures to protect the individuals from a unfavorable effect of the proceedings or judgment (Article 9).

A designation of a body for the promotion of equal treatment of all persons is also set out in the Directive. The competences of these bodies should include providing independent assistance to victims of discrimination in pursuing their complaints, conducting independent surveys on discrimination, publishing independent report and issuing recommendations in relation to the issue.

It is clear that the Race Directive is not only an important tool to protect individuals from being discriminated against on grounds of ethnic or racial origin, but with some special provisions it is the highest legislative standard. The introduction of the concept of indirect discrimination is of particular reference in the case of segregation exactly because of its nature of being the result of an "apparently neutral provision, criterion or practice that puts persons of a racial or ethnic origin at a particular disadvantage compared with other persons". The shifting of the burden of the proof, once the fact from which discrimination can be presumed also increases the chances for discriminative practices to be established. The minimum requirement clause (Article 6) also assures that provisions set forth in the Race Directive will serve as the minimum for anti- discrimination protection, but it also encourages Member States to apply more favorable provisions.

4.1.2 Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities

It is the basic feature of a directive adopted by the European Community that it is binding upon Member States. In order to achieve this result directives have to be transposed within the national legislative system through an "act of transposition"[32]. It is left to the discretion of the Member States however the way they do it, however the minimum requirement clause (Article 6) encourages the adoption of more favorable provisions.

Hungary has interpreted this "minimum requirement" in a very constructive way and has thus adopted one of the most comprehensive anti- discrimination legislation in the world. With the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities Hungary has implemented *inter alia* the Race Directive.

The comprehensiveness of this anti- discrimination law is already reflected in the very extensive scope of the Equal Treatment Act (ETA) where the provisions applicable to both public and private sector (Article 4, 5). They are not compelling among private relations, such as family law relationships, relationships between relatives or relationship directly connected to religious life of the churches etc. however (Article 6).

[32] "*How Community Law Operates"*

As compared to the Race directive, it does not only embrace direct and indirect negative discrimination, harassment, but specifically mentions unlawful segregation. It also helps the usage of it for strategic litigation purposes by including retribution as a breach of the equal treatment principle protecting the victim to a bigger extent. Retribution is a conduct that causes infringement, or is aimed at infringement, or threatens infringement against a person making a complaint or initiating a procedure claiming breach of the principle of equal treatment (Article 9). If a behavior, measure, condition, omission, instruction or practice passes the reasonability explanation directly related to the relevant relationship it does not constitute discrimination (Article 7 (2)).

ETA enumerates 19 grounds specifically less favorable treatment based on which is prohibited and leaves the door even wider open to creative interpretation of the law with a 20th ground "other status, attribute or characteristic" (Article 8 t). The same grounds apply to indirect discrimination.

The inclusion of unlawful segregation is very important from the perspective of the Roma rights movement. Since there are no other segregated groups in Hungary the inclusion of it can be interpreted as an affirmation of the existence of both the problem and the will to guarantee protection against it.

Article 11 allows for positive discrimination as a tool to eliminate inequality of opportunities based on an objective assessment of an expressly identified social group without considering it discrimination, in line with the Race Directive's Positive Action provision (Article 5).

As it is required for the enforcement of the Act an administrative body is set up by Article 13 that can conduct ex officio investigation; initiate law suit, when rights to equal treatment have been violated; can review and comment on equal treatment related legal act drafts; can make proposal concerning government decisions; inform the public and the government about the situation concerning the enforcement of equal treatment. In the course of fulfilling its duties it and cooperate with organizations; inform those who would against violation of equal treatment; assist in governmental reports towards international organizations. It is important to note, that although it is a government body it has to be unbiased, and the government should have no power to influence its functioning. In summary the administrative body has basically monitoring, supervising and consultative function.

Article 19 (the transposed Article 8 of the Race Directive) is another very powerful provision of the Equal Treatment act concerning the burden of proof. It shares it in a way that the complainant only has to prove the facts from which violation of equal treatment can be presumed and that s/he possesses the characteristic(s) on grounds of which discrimination is prohibited. Once this happens, the burden of proof shifts on the defendant, who then has to prove either that it did not violate the principle of equal treatment or that it was not obliged to

observe it due to reasonability explanation. The Hungarian burden of proof provision does not apply to criminal procedures either.

Regarding the enforcement this anti- discrimination legislation contains specific provisions related to various situations *inter alia* education and training (Articles 27- 29). In Hungary local governments are responsible for education and since Article 4 b obliges local governments to observe the principle of equal treatment they are the major actors to whom this section applies. It enumerates specific aspects of education and training where the principle has to be applied such as defining and setting the requirements for education, performance evaluation, providing and using services related to education etc. These articles[33] also prohibit the unlawful segregation in an educational institution, or in a division, class or group. The fact that educational system that are substandard from an accepted professional requirement is also considered violation of the equal treatment principle clearly affirms the acceptance of the phenomena of segregation being more than mere physical separation. It also mentions the cases when discrimination does not occur e.g. separation based on sex or religious beliefs etc.

[33] Article 27 3b

In order not only to start as a truly comprehensive anti- discrimination legislation but also to end as such Chapter V orders the amendment of relevant legal acts ranging from as relevant as the civil code through cemetery and funeral acts, atomic energy to the supply of public libraries.

Content wise it is indeed a very comprehensive and seemingly dedicated act. It's effectiveness is however still to be assessed. Lawyers still have to familiarize themselves with the philosophy of the law and of international legal anti- discrimination principles. If they manage to digest appropriately especially the concept of indirect discrimination, from which many other practices can be deducted, a promising future for the fight against discrimination can start. This could not only be beneficial to Hungary from an internal perspective but by setting good example could also increase Hungary's reputation.

4.2 Case studies

In addition to segregation in education, Romani children face racially motivated violations of their rights. They are being denied access to health care, social benefits and political participation, to public places and housing. The unequal education hinders them from equal employment opportunities. "Attempts to tackle this level and complexity of marginalization cannot focus on one aspect alone, but at the heart of long-term ambitions for equality for Roma must be educational opportunities. It is for this reason that tackling the placement of

Romani children in special schools has been a priority for the Romani civil rights movement"[34].

4.2.1 Ostrava

In June 1999 12 Roma students with the assistance of Romani leaders and human rights organizations coordinated by the European Roma Rights center filed a complaint against 5 school headmasters, the Ostrava School Bureau and Czech Ministry of Education to the Czech constitutional court alleging that their, right to education due to systemic racial segregation has been violated. With demanding the de-segregation of the educational system in Ostrava within three years, they also sought remedy for the psychological and emotional harms they suffered.

All applicants were placed into special schools designed for children with mental disability. These schools offer educational program inferior to the normal system. Placing children to such schools is often justified by their failure of an IQ based psychological test. However many of these tests are biased, have racially disproportionate effects, they do not take into

[34] Morag Goodwin, "*D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe".*

account the different ethno- social background Romani children have therefore provide flawed results. Parental consent based on their adequate information- that in these cases is usually not adequate- is required to the approval of such results, and although they were given in each case they should not be accepted as justification for systemic racial segregation. In some cases parents are also intimidated by fear of racial hostility against their children in schools.

Placing them into special schools they were subjected to inferior education and were denied opportunity to ever return to regular schools. Due to relevant provisions of the Czech legislation prohibiting secondary education for special school graduates, they also became deprived of non- vocational secondary education and hence equal future employment opportunities. They have also been stigmatized 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"[35]. Being forced to study at special school they have also been denied the benefit of studying in a multicultural educational environment.

35 *Ibid.*

On October 20 1999 the constitutional court acknowledged the "persuasiveness of the applicants' arguments" but in the lack of proved existence of racial discrimination it dismissed the appeal stating that it had only competence to consider the particular circumstances of the applicants and not "competent to consider evidence (e. g. statistics) pertaining to the whole cultural and social context of race discrimination in Ostrava or the Czech Republic"[36]. It also considered that considering Plaintiff's request for a ban on future racial discrimination or compensatory schooling fall outside the courts jurisdiction. It suggested however that "the relevant authorities of the Czech Republic shall intensively and effectively deal with the Plaintiffs proposal"- which reading between the lines suggests that it did find merits in the claim but refused to consider them. Since the authorities did not follow the court's suggestion the applicants turned to the European Court of Human Rights in April 2000.

The core of the applicants' claim was that Article 14 (prohibition of discrimination in the enjoyment of the rights set forth) read in conjunction with Article 2 Protocol No.1 of the European Convention on Human Rights that secures the right to education has been violated. After the court declared the case partly admissible in March 2005 started to consider the

36 *Ibid.*

merits of it. On 7th February, 2006 a Chamber of the European Court of Human Rights by a vote six to one ruled that " there had been no violation of Article 14 of the Convention, read in conjunction with Article 2 of Protocol No. 1" because "the system of special schools was not introduced solely to cater for Roma children" [37]. The fact that it resulted in massive racial segregation did not amount to breach of Article 14.

The above reasoning as Goldston, a counsel for the plaintiffs suggests seems to overlook the relevant literature of the issue that show that systemic discriminatory practices are embedded in related decisions that do not aim to harm minorities, they just simply "overlook their best interest". Systemic discrimination also remains many times unspoken, because victims of the fear to admit them openly.

"This is a sad day for Roma and for the struggle against discrimination. The reality on the ground is unchanged"[38]- said Dimitrina Petrova, then Executive Director of ERRC after the decision. It is clear that a general disappointment followed not only from the perspective of Romani children and parents and for all dedicated legal advocates but also from the evolution

37 D.H. and Others v. the Czech Republic, Application no. 57325/00, Judgment 7 February 2006

38 *"European Court Fails to Find Czech Roma Children Victims of Racial Discrimination in Education"* http://www.errc.org/cikk.php?cikk=2378

of European anti- discrimination law. Although the European Union has adopted the Race directive with the legal mandate to remedy both direct and indirect discrimination, its enforcement is "a story yet to be told"[39]. With the final decision of the Grand Chamber however it seems that this story started to be composed.

Although Judge Costa concurred with the majority, suggested that "the Court's Grand Chamber might by better placed than a Chamber to revisit the case- law applicable in this area". On 5 May 2006 the applicants requested that the case be referred to the Grand Chamber under Article 43 2 (referral to the Grand Chamber) the re quest of which the panel of the Grand Chamber accepted on 3 July 2006.

"The Court held[40], by 13 votes to four, that there had been a violation of Article 14 (prohibition of discrimination) of the European convention on human rights read in conjunction with Article 2 of Protocol No. 1 (right to education) to the Convention on account of the fact that the applicants had been assigned to special schools as a result of their Roma origin. Under Article 41 (just satisfaction), the Court, by 13 votes to four, made awards

[39] James A. Goldston, "The role of European anti-discrimination law in combating school segregation: the path forward after Ostrava",

[40] *D.H. and Other v. The Czech Republic* no. 573225/00

of 4,000 euros (EUR) each in respect of non-pecuniary damage and EUR 10,000 jointly in respect of costs and expenses" [41].

Although in the light of the favorable decision of 13th November that occurred while writing this thesis it is now easier and more stable to outline the impacts Ostrava, in order to understand the lateral impact strategic litigation can have even in the case of a negative outcome it is important to include the evaluation of the case right after the 2006 decision.

In April, after the disappointing decision Goldston in order to "see the bright side of life" suggested[42] to recall the experiences in the United States where the racial issue was/is of similar importance and the problem is still not solved. Those experiences have shown that challenging and eliminating racial discrimination does not happen overnight and need a long time to achieve social change. He reminds us that although the systematic study of challenging school segregation was already attempted in 1930 it took many cases at all levels of the judiciary for the US Supreme Court to rule out racial segregation in *Brown*, 24 years later. And even *Brown* had to ripen for another 14 years in order to, with the help of

41 Grand Chamber Judgment D.H. and Others v. The Czech Republic, ECHR, press release issued by the Registrar 13 November 2007

42 James A. Goldston, "The role of European anti-discrimination law in combating school segregation: the path forward after Ostrava"

complementary legal campaigning eventually have an impact and Courts start demanding progress in implementing it.

Relevant international experiences in Canada, UK, India also show that it is essential to have intelligent and independent judges; a constitution guaranteeing rights on which a public interest case can be build and a popular culture that understands and reacts appropriately, but they are not sufficient. Without a potent civil society infrastructure, NGOs, activists that can take effective action strategic litigation can lead to dead end.

It is important that litigation is used jointly with political action as well. Ostrava reflects this same need and effect the powerful strategic litigation can induce. It can affect political debate and policy changes like it happened in the Czech Republic via increased number of reporting on school segregation and through the abolition of the prohibition against admission to secondary schools for remedial school graduates.

With the favorable Ostrava II decision the faith in impact litigation was eenforced. It thus now absolutely represents the center piece of the litigation strategy in advancing the rights of the Roma turning it into the "European Brown" case. The practical importance of *Ostrava* goes even beyond Brown's, where remedy was sought for the psychological harm. The case of the "European segregation" is much worse because it reaches beyond having a long term impact on the future development of the Romani children.

Ostrava II.'s theoretical importance lies in the development of Article 14 and hence the interpretation of the concept of prohibition of discrimination as a legal principle. It not only reaffirmed *Connors v. UK* that established that "the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs" (*Connors v. UK*, no. 66746/01 p. 84, 27 May 2004), but the Court further noted that "as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority (*D.H. and Other v. The Czech Republic* no. 573225/00, p.182, 13 November 2007).

James Goldston mentioned a couple of difficulties that emerged during strategic litigation. First the case, due to its expected future importance needed a through research. This research did not only consume a lot of money and almost a whole year of dedicated work but its effectiveness was further hindered by schools officials' hostile attitude towards them. Czech lawyers were also rather skeptic about the issue; many of them thought that it was natural that Roma are enrolled in special schools. Others believed that the problem was caused by the Roma themselves. Another difficulty arouse from the realization that data about segregated Roma did not exist officially. The situation is similar in Hungary- therefore litigators have to start from scratch.

The long and painstaking research finally managed to show shocking results. In the eight special schools of Ostrava Roma students constituted 56% of all students in the year of 1998/1999. Of all primary school- age students Roma constituted 5% in Ostrava, however in

the 70 regular schools the number of Romani students was just over 2%. This allowed a conclusion that Romani children in that region were 27 times more likely to end up in special schools in contrast to their non- Romani peers. Regarding the whole country, 75% of Romani children attended remedial schools and more than half of all the special school students were of Romani origin. "The degree of overrepresentation of Roma students in Ostrava special schools is unprecedented, and is itself prima facie evidence of racial segregation and discrimination"[43]

4.2.2 Miskolc

In June, 2005 Chance For Children Foundation (CFCF), aiming to ensure the educational success for disadvantaged children, focusing on Roma children, by facilitation of equal opportunities brought an actio popularis against the Local Municipality of Miskolc claiming that by "financially and administratively integrating" local schools while maintaining catchment areas it contributed to racial segregation of Romani children. The Miskolc Desegregation Case (Miskolc) case was dismissed on first instance and partially modified on

43 Dimitrina Petrova, "*The ERRC Legal Strategy To Challenge Racial Segregation And Discrimination In Czech Schools*"

appeal in June 2006 upholding the practice of racial segregation of Romani children in local schools of Miskolc.

The final judgment of this pioneering case is very important in the development of anti-discrimination litigation. It is the first decision where domestic court rules against state authorities (here the local government of Miskolc) for failing to address (unintentionally) racial segregation, a practice prohibited by domestic and international law and principles. Although the potential of this precedent setting case was at the time of the judgment was overshadowed by the failure of *Ostrava* before the European Court of Human Rights, now in the light of the positive Grand Chamber decision can have even more potential in future strategic litigation.

According to Hungarian Law local governments are responsible for education matters thus it is their task to define and publicize school districts. This has to be done in a way that it is in compliance with the equal treatment principle. In 2004 the Municipality of Miskolc decided to "administratively and financially" integrate local schools. This however has been done in such a manner that it failed to integrate the catchment areas of these schools.

The case involved seven local schools that were merged into three larger administrative and economic units but continuing to operate in separate buildings however. According to the law the enrollment into the schools of catchment areas is automatic. Due to residential segregation and failure of school authorities' effort to reorganize pupils' distribution based on

well- establish professional decision the reform resulted in predominantly non- Roma elite schools and Roma ghetto schools however. In the Roma- majority schools all conditions were much wore than in the non- Roma elite schools. Facilities are run down, in one of them having only one toilet on each floor without closeable doors and the state of the building is not acceptable for teaching. Teaching aids, materials are out of date just as the computers and internet. One also lacked dinning room, the students only being able to eat in a kitchen room. The number of students per teacher was also averagely higher and lacking any teacher being required to serve their special needs.

Based on the Hungarian Equal Treatment Act's provisions of prohibiting direct discrimination based on ethnic origin (Article 8 e) and social origin (Article 8 p); indirect discrimination (Article 9); unlawful segregation (Article 10 (2)) and the principle of equal treatment in relation to education (Article 27) claimed that *the Municipality of Miskolc by maintaining the school catchment areas contributed to the maintenance of segregation of Roma children resulting in the violation of their right to equal treatment.*

Based on the Hungarian Civil Code's provision for remedies the applicants demanded the court to: establish that Miskolc segregated the Roma and disadvantaged children; establish that defendant does not take appropriate measures to realize integration; compel the defendant to put an end to segregation; to express their regret through the Hungarian Press Agency and finally to impose an obligation on defendant to implement desegregation plan.

In the fist instance judgment[44] the Borsod-Abaúj-Zemplén County Court acknowledged the over- representation of Roma in the merged schools but dismissed that case on three grounds.

The major explanation for dismissal was that the applicant could not prove that discrimination was based on race or that it was a result of the local council intentional provisional action. The second ground was that the local council cannot be held responsible for the residential segregation and hence for the disadvantages resulting from it. Finally it also protected Miskolc Municipality from being held liable for the failure of individual schools to implement their pedagogical plan.

Following the decision the plaintiff appealed to the Debrecen Appeals Court claiming that first instance court has wrongly established the facts and therefore came to flawed conclusions. CFCF claimed that professional independence of schools should not justify municipalities' hands off approach to ensure the requirements of equal treatment therefore Miskolc Municipality has to be held responsible for the segregation of Roma students in some of the local schools. CFCF also asked the Appeals Court to revise the procedure of first instance court in not taking into consideration the concept of indirect discrimination and the

[44] 13. P.21. 660/2005/16

reversal of the burden of proof for it asked CFCF to prove casual link between segregation and the intent of the local council. The omission of the municipality leading to discrimination was also argued.

On 9th June the Debrecen Appeals Court[45] overruled the first instance decision, partially changing it. It established that the Municipality of Miskolc, by failing to integrate the catchment areas when "administratively and financially" integrating local schools upheld the segregation of Romani children thus has violated their right to equal treatment based on their ethnic origin. The court ordered the defendant to publicize the findings through the Hungarian Press Agency. The court also shared CFCF's opinion that the basis of discrimination is not an individual's conviction of belonging to a certain group but the perception of the others. The Appeal Court however could not order authorities to integrate Romani students into mainstream classes because that would mean interference with the enforcement of measures in public law. In the lack of a specific integration plan it cannot order any other decision.

[45] Pf. 20.683/3005/7

Although ECHR has a good reputation it has to be emphasized that the ruling of a domestic court accounts for a bigger importance. Cases get to Strasbourg when all domestic remedies were exhausted but still no appropriate remedies were achieved. One of the aims of the ECHR judgment is to put pressure on states to adopt relevant legislation. The EU Race directive however is transposed within the domestic legal system, therefore ruling a case on a domestic level based on the Race directive is more powerful, because the transposed directive already includes measures to be taken at national level and is much more adapted to the local legal and social context therefore can have broader effect and can also lead to policy change, institution reform etc.

It is also important because it underlined the shifting of the burden of proof. Once it was proved that the injured person has suffered disadvantage (Article 13) and possessed one of the characteristics defined in Article 8 the burden of proof is on the defendant to disprove discrimination.

4.2.3 Hajdúhadház, Nyíregyháza

There are two other strategic cases that were brought to court in Hungary. In order to effectively assess the potential of impact litigation within the Hungarian context it is worth going through them briefly.

Hajdúhadház, the second case of CFCF involves the suing of two ghetto schools that are places of "historical segregation"[46]. The clear segregation taking place in these two schools has long been identified due to voices of a very strong Roma representation but the different mediation approaches did not help, this is why strategic litigation had to be brought in the issue.

At the Court Hearing the Local Council argued against the charge of segregation by stating that they do not know who is of Romani origin and who is not. Still for some reason, mostly Romani children attend the substandard schools with rundown facilities whereas non- Roma attend the much better equipped schools. It can be a big contribution to the interpretation of the notion of segregation that the Judge hearing the case was very painstaking and invested lot of efforts. Since the Local Council was counter arguing that they do not know who is Romani, the Judge in order not to violated the prohibition of data collection based on ethnic origin ordered the Romani local representative to establish the ethnical composition of the schools. This reflect a very creative way of interpreting laws and is a good sign for an effective strategic litigation in Hungary. The Court finally condemned the Local Council and

[46] Újlaky András, one of the founders of CFCF

ordered the cessation of segregation by 1 September 2007, but the Local Coucil appealed. The case is now pending at the Debrecen Appeals Court.

One of the most recent cases[47], the third strategic case of the Chance for Children Foundation involves the Local Council of Nyíregyháza. Nyíregyháza, the 7th biggest city of Hungary maintained a very substandard ghetto school in one of the used-to be military bases of the city in order to keep very poor Romani children segregated. Soon after CFCF brought its claims to court, at the general assembly of the council decided to close down the ghetto school. It indeed remained closed at the school starting in September 2007 and in addition they also came up with a comprehensive desegregation plan: they considered each child individually and properly picked the most appropriate schools for them from the other five schools of the town also paying attention to putting siblings together. They also took into consideration other actors of this process: they prepared the Romani parents, the schools and the teaching staff.

[47] Spring, 2007

The Nyíregyháza case thus looks like a success and could be set as a good example to carry out desegregation. In order to increase the chance of this success it is now similarly important to properly document and evaluate the process.

4.2.4 Objections that arouse against segregation

So far the cases of CFCF in Hungary were aiming to establish segregation and requested the courts to order to end this practice. Although strategic litigation uses the court to achieve change, outside court occurrences also have to be considered.

Teachers of the ghetto school, when they hear about closing down the schools fear to lose their jobs, therefore usually try to win Romani parents' support not to close down the schools. If such initiative takes place it is not difficult to discourage Romani parents from supporting the case. School authorities can tell parents that enrolling their children in non- Romani schools or classes can expose their children to various difficulties such as higher academic expectations, or adapting to the new non- Roma majority environment. Another method is to tell parents that until now teachers supported them and their children, now it is their turn to support the teachers.

4.3 Conclusion of strategic litigation in practice in the case of racial segregation

Ostrava I. and II. along with the Miskolc segregation case was introduced in more details not only because they were the first cases at European and Hungarian level, but in order to leave the reader time to get in the context of the procedure of attempting to establish through courts the existence of segregation. In both of the major cases we can conclude that although neither of the cases were initially decided favorably this might actually attribute bigger importance to them if we believe that coming to a conclusion through first wrong judgment can eventually appraise the final decision.

Apart from the practical impacts, the legal principles concerning racial segregation were clarified at a European level and well interpreted at the Hungarian level in the Miskolc case. Miskolc along with Nyíregyháza can serve as not only an example to follow and to refer to, but can also be encouraging for future impact litigators. Although Hajdúhadház is still pending and the next hearing is scheduled for 13th December 2007 can still have constructive outcomes.

The cases also helped to reveal obstacles in the way of fighting segregation, not only from first level judiciary but also from stakeholders, like teachers or Romani parents' interest. It also highlights, that although strategic litigation can be a very powerful tool it still leaves the problem of changing the practice of segregation and of the attitude of the involved actors yet unsolved. As the complementation of impact litigation with a potent civic action, similarly to *Brown* that was complemented with the civil rights movement there is still a big potential in achieving social change in the reality of the Roma children however.

Until now I have presented the phenomenon of racial segregation of Roma children within the Hungarian educational system in order to show that it's not only a factual notion, but that it has very serious negative impacts not only on the level of education a Romani child receives, but due to racial harassment, bullying and the consideration of the Roma being inferior it leaves life- long negative effects. This is not only unfavorable for the child, but it also diminished the chances of implanting the basic social values in a child (both Romani and non- Romani), who when grows up could further promote the human rights culture. Since they face constant discrimination, exclusion etc. it is a normal reaction that they become defensive and sometimes this general rejection pushes them to act in a way that just further strengthens the stereotype constructed about them by non- Roma community. Let me give a very simple example in order to clarify what this really means in the practical reality.

Non- Roma blame Roma for being unemployed. This is not a misconception it is true that very high percentage of Roma are indeed unemployed. The misconception lies behind the reason for their unemployment however. Non- Romani say, that "Gypsies don't event want to work". The truth can be dated back to denial of education. A girl I've interviewed in May, 2007 in Miskolc when doing research for the Shadow Report prepared by ERRC to be submitted to CEDAW Commission told me her story. After graduating from Jozsef Attila primary school (the ghetto school merged with Selyemreti school, against which the lawsuit was brought by Chance for Children Foundation in the Miskolc Segregation Case) she wanted to become a confectioner and did the admission exams for that. She got admitted but

when went to the year- opening ceremony found her name to be in the roster of 3rd year gardeners, instead of being enrolled in first year confectioner faculty. After going to the headmaster to ask for justification, he told her, that confectioner 1st year has no more place for her. She had no other choice then enroll in the 3rd grade, where she was obviously behind the class, since she has missed the first two years of theory. After a semester she could not keep it up and dropped out. Not having thus a vocational training she cannot find a job ever since. She has become a multiple mother since then, which physically hinders her from getting training and thus being employed. It is common, that Roma, who are really committed to break out, rather sacrifice justice and obey to whatever they are told then to defend their justice.

It is very important that the issue of Roma segregation is perceived to be more than just right infringement, it is the core issue that hinders them from equal opportunities and dignity. In the light of this, I would now like to reveal other aspects of using strategic litigation as a mean to fight this.

Strategic litigation should be chosen to be the right tool, when the issue represents a general public importance. Although many racist non-Romani would not agree with this, our issue is still important for the whole community and not only for the Roma. If we jut look at its economic aspect: it is the non- Roma who through their taxes pay for the unemployment of the Roma, and also because since Roma are unemployed, their contribution to society is much lower that what they receive.

Strategic litigation is also encouraged, when a particularly grave violation of right occurs. After the above described it is no question that subjection to inferior education and unequal treatment constitutes a grave violation of human rights, especially when these rights are particularly guaranteed by a very comprehensive anti- discrimination law.

The impact a positive outcome a case could have also has to be assessed. Although both cases are rather recent decisions, they are already pointing in a direction of having great impact. If we consider that the fact that the Grand Chamber of the European court of Human Rights have accepted the Ostrava case for referral reflects the importance of the issue from a European level, and if we consider that the fact that, true, not on first instance but eventually even Miskolc was won suggests that from an impact view, strategic litigation in this field has great potentials.

Since the Hungarian Equal Treatment act contains provision concerning the publicizing of the findings of court cases, there is also great potential for media and public attention and raising awareness. If more cases were filed now, and were a bit similar to Miskolc case, courts could rule faster and public could be overwhelmed with all these decision and could become enlightened.

5. CONCLUSIONS

The Roma in Hungary, just as in all other countries due to their specific ethno-social features and constant exclusion, marginalization and discrimination they face find now themselves pushed in a vicious circle breaking out of which is very difficult. Their deprivation of education does not merely hinder them from this breakout, but marginalizes them further widening the cleavage between them and the majority society. Therefore when talking about racial segregation in education we have to bear in mind, that it is an issue involving not only the violation of couple of rights, but of that crucial right upon which the realization of most other rights and basic social needs rest. Leaving Romani people without quality education does not only imply individual denial of a right, but due to its systemic nature it becomes a social problem affecting the whole Roma community depriving them from hardly any chances to break down the socially constructed prejudices against them and hardly allows them to really integrate into society as it would be expected in the 21st century.

Impact litigation can be a very powerful tool to achieve related social changes especially if there is a (1) clear litigation goal, (2) adequate laws exist, (3) the court decision can have a general impact and if (4) the issue involved concerns general public.

In the Hungarian context the litigation goal is clear: (1) to stop the practice of racial segregation of Romani children. (2) A comprehensive law is also given. The appearance of anti- discrimination legislation on a European level reflects a "prevalence of a social and political climate where acts of discrimination are increasingly being punished"[48]. This is reflected in the adoption of the EU Race Directive, the content of which is quintessential in the development of effective human rights protection. Its greater importance however lies rather on its form than on its content. Being a directive it has to be transposed to all member states establishing a general ban on both direct and indirect discrimination practices regardless of the intentional or unintentional nature of it. It is exactly because of this provision *inter alia* that it serves a powerful tool for advancing the rights of the Roma because segregation is usually the result of facially neutral provision, criterion or practice that then have a disproportionate effect on the Roma. Its transpose does not only mean that the general level of anti- discrimination practices is expected to decrease but becoming part of the domestic legislation also attributes bigger power to domestic court decisions as opposed to the prestigious European Court of Human Rights. Tools to achieve social change through law are hence enriched at a European level.

[48] Larry Olomoofe, Human Rights Trainer, ERRC

Hungary was among the first Member States not only to transpose the EU Race Directive, but together with the transposition of other important EU legislations, with the enactment of the Equal Treatment Act of 2003 it created one of the most comprehensive anti- discrimination laws in the world. Comprehensive domestic legislation is already a big achievement in the development of a truly protective human rights system its effectiveness however is only assessable through practice. It does not only outlaw direct and indirect discrimination, also applying to local governments who are responsible for the respect for equal treatment *inter alia* in education but it specifically mentions the prohibition of unlawful segregation. This provision together with the favorable Miskolc decision saves time for impact litigators for instead of having to start to familiarize court with the unlawfulness of segregation they can focus on particular practices such as separate classes of the Roma or "private student status" that also constitute segregation.

(3) The general impacts strategic litigation can have can be approached from two perspectives. From a (a) theoretical point of view looking at the two cases mentioned in this paper it can be concluded that there is a prevalence of a starting recognition of the Roma specific racial segregation. This is first reflected in the fact that ECHR Grand Chamber accepted the appeal of the Ostrava decision and established a violation of Article 14 in conjunction with Article 2. of Protocol no. 1.

Another important aspect of the Grand Chamber decision is that in the assessment of the court it reaffirmed that the vulnerable position of the Roma requires special consideration to

their needs (*Connors v. UK*, no. 66746/01 p. 84, 27 May 2004) and that due to their turbulent history Roma have become a specific type of disadvantaged and vulnerable minority (*D.H. and Other v. The Czech Republic* no. 573225/00, p.182, 13 November 2007). These decisions along with the *Nachova II* (*Nachova and Others v. Bulgaria* nos. 43577/98 and 43579/98) decision, where applicant's burden of proving an Article 14 violation of some type has been eased, definielty indicate that the specific issue of discrimination against the Roma has definietly appeared on the map of European Court of Human Rights.

This historic decision definitely will help the Grand Chamber to clarify its approach towards Article 14 from both general and Roma specific perspective and establish to what extent facially neutral rules that have a disproportionate effect fall within the scope of the prohibition of discrimination with respect to the rights under the Convention. This has probably been recognized by the Grand Chamber based on the fact that it seldom accepts cases- requests have been turned down on average 39 times out of 40[49]. The positive outcome of Ostrava can encourage further cases to challenge the other aspects of school segregation. If the Hungarian cases do not achieve effective domestic remedy they might be more likely to turn to Strasbourg and have positive outcome. It can suggest that the Roma rights movement

[49] James A. Goldston, "*The role of European anti-discrimination law in combating school segregation: the path forward after Ostrava*"

bring more cases and contribute to the development of the European case law. In the case of Hungary this crystallization can serve as an alternative after exhausting domestic remedies.

The Miskolc Desegregation Case won at the Debrecen Appeal Court also indicates that Hungarian courts might be ready to interpret the Equal Treatment law in the right spirit hence strategic litigators can make good use of it. The fact that the Debrecen Appeals Court interpreted favorably the concept of indirect discrimination by recognizing that whether intentional or unintentional merging the schools with maintaining the catchment areas did in fact violate the principle of equal treatment can set a good example for other Hungarian courts to follow.

(b) From a practical perspective what we have to attribute to the success of strategic litigation is that although first Ostrava was dismissed, it still had an impact on the Czech educational system, because it generated the abolishing of the law prohibiting the admission of special school graduates in higher education. In Hungary Appeals court established racial segregation setting a blueprint for other similar cases, where any decision cannot now be less favorable, but can start a natural development towards totally eliminating racial segregation. In the Nyiregyhaza case we can observe how strategic litigation can have a pressurizing effect to achieve social change.

Looking at the indirect practical impact of such litigations we should consider the follows.

i. ECHR judgments are very detailed, which can also be used as an awareness raising tool for lawyers. When going through EU case law they can familiarize themselves with issues of concern. It can also serve as a great resource for legal advocates who might engage in strategic litigation to see what principles especially dissenting judges (or from opinions opposing to recognize racial segregation) apply and hence learn about different perspectives from their reasoning.

ii. It raises public awareness about the existence of the problem. It can put pressure on authorities.

iii. It can educate courts like in the case of Miskolc court.

(4) The importance of the issue is clear for the Romani community, but it might not be necessarily clear yet to the public in general. Since the major problem in the Hungarian case is not the lack of adequate laws, political will or civil society but the general prejudices of the people about the Roma. Some would argue with the previous statement that there is no lack of political will, because government policies are indeed sometimes flawed. It is all due to lack of public support and objection to break down prejudices about the Roma however. It is anyways difficult to find and execute the right policies for the inclusion of the Roma, but without the public support, which in the case of politicians is translated to votes government

actors cannot even "risk" to find such policies because due to public's general rejection of the Roma could mean less votes for the parties wanting to win elections. Wining the general public's opinion and achieving a change in their attitudes is therefore the key factor to win this case. The way strategic litigation can contribute to this is through raising public awareness and applying different tools such as advocacy, campaigning, or human rights training. Court decisions on such cases are therefore not only important because they become part of the legal process but because of the prestige of the court, the public might "listen better" to what courts say. Another important effect of court decision's upon the public is that courts can order the publication of the cases findings. This can be seen as an objective source for the public to be truly and objectively informed about the issue and might start breaking down prejudices and misconceptions about the Roma. Going back to the "unemployment" experience, where the young girl was unemployed because she was clearly denied education by enrolling her in the 3rd grade right away. If her case was brought to court by impact litigators, who are aware of existence of such problems and the court found that her unemployment is purely due to the denial of her right to education the publication of these finding could bring non- Romani to the realization that there might be different and more founded reasons for their unemployment other then their "laziness".

Given the above I would now like to conclude the followings:

Although in the case of Hungary the practice of impact litigation is still in a developing stage and the ETA is still a rather new, but powerful tool lawyers, judges have to still familiarize

themselves with its philosophy. There were not so many cases brought to court in order to accelerate this learning process the results achieved so far cannot be disregarded however. In the first ever test case (Miskolc) the Appeals Court established that the local council of Miskolc has violated the right to education of Romani children, when merged schools without merging their catchment areas, hence contributed to the maintenance of segregation. In the Nyiregyhaza case before final decision the local council started a desegregation plan.

There is a comprehensive legal tool to be used by litigators to fight segregation. Unlawful segregation is explicitly prohibited but with the provisions granting protection against harassment and retribution can encourage victims to report their cases and undertake being the applicant in a strategic case carried out by public interest organizations. There are dedicated lawyers in this field and it is not unimportant to mention these lawyers and legal activists are still relatively young. This does not only mean that through their years ahead of practices and experiences they can pass on the know how, but being a generation with a higher degree of multicultural exposure can account for more skills and competences needed for a litigation to indeed have an impact. Hungarian civil society, especially if well mobilized is willing to stand behind this cause. There are also different good practices from around the world that can be copied to teach both Roma and non- Roma community the benefits of intercultural learning and social inclusion. These both informal educative activities, practices can be a good complementary of strategic litigation. Thus with the existences of an active civil society impact litigation could fulfill its primary task to constantly challenge the law and contribute to more adequate practice of it while generating public awareness of the issue and

civil society actors could undertake the responsibility of achieving change in the mentality and behavior of people.

Strategic litigation in the future should aim at bringing cases involving the different practical aspects of the Hungarian segregation. By winning cases and setting blueprints in these different manifestations of segregation there would be more pressure on local governments to apply the principle of equal treatment and less pressure on teachers, headmasters to live up to non- Romani parents' expectations of educating their children separately from Romani children.

It is very important to bear in mind however, that just because strategic litigation can be used as important method in Hungary the whole strategy of desegregation cannot rely only on it can extend. It has to be complemented with other actions mainly aiming the change in behavior of non- Romani community. Therefore first civil actors should internalize this problem and adapt their mission and philosophy to it. Second this adaptation should be reflected in their activities concerning the general public in order to contribute to the breaking down of prejudices about the Roma and providing them equal opportunities so that they can prove that we are all born free and equal in our dignity and rights.

BIBLIOGRAPHY

PRIMARY SOURCES

14/1994. VI. 24 MKM rendelet a képzési kötelezettségrol és a pedagógiai szakszolgálatokról (Hungarian Ministry of Education Decree 14/1994 (VI.24).)

2003. évi CXXV. Törvény az egzenlobánásmódról és az esélyegyenloség elomozditásáról (CXXV Act of 2003 on Equal Treatment and the Furtherance of Equality of Opportunities.)

32/1997, (XI.5.) MKM rendélet a Nemzeti, etnikai kisebbség óvodai nevelésének irányelve és a nemzeti, etnikai kisebbség iskolai oktatásának irányelve kiadásáról. (Hungarian Ministry of Education Decree on the issuance of the guideline on the education of children of national and ethnic minorities in kindergarten and the guideline on the education of members of national and ethnic minorities in school).

A közoktatásról szóló 1993. évi LXXIX. Törvény (Act LXXIX of 1993 on Public Education)

Council Directive 2000/43/EC of 29th June 2000 implementing the principle o equal treatment between persons irrespective of racial or ethnic origin

Decree OM 57/ 2002 (XI 18) of the Minister of Education

The Constitution of the Republic of Hungary

The Framework Convention for the Protection of National Minorities

CASES

Brown v. Board of Education BROWN v. BOARD OF EDUCATION, 347 U.S. 483 (1954)

Connors v. The United Kingdom, Application no. 66746/01, Judgment 27 May, 2004,

D.H. and Others v. the Czech Republic, Application no. 57325/00, Judgment 7 February 2006

Debrecen Appeals Court Decision, 20.683/2005/7, from Chance for Choldren Foundation, http://www.cfcf.hu/?element_id=22&page=2

Miskolc Desegregation Case, 13. P.21. 660/2005/16, from Chance for Choldren Foundation, http://www.cfcf.hu/?element_id=22&page=2

Plessy v. Fergusson PLESSY v. FERGUSON, 163 U.S. 537 (1896)

SECONDARY SOURCES

"*A Miskolci próbaper*", Chance For Children Foundation, in: http://www.cfcf.hu/?nelement_id=4&article_id=12 retrieved 27th November, 2007

"*Az oktatási minisztérium hivatalból teszi fel a kezét*"- an interview with Újlaky András, one of the founders of CFCF. *Elet es Irodalom,* no. 46, 16 November 2007.

"*Barriers to the Education of Roma in Europe: A position paper by the European Roma Rights Center*". (May 2002)

"Combating Educational Deprivation of Roma Children". *A policy Discussion Paper submitted by: The Roma Education Initiative Working Group and Tom Alexander.* March 2003.

"European Court Fails to Find Czech Roma Children Victims of Racial Discrimination in Education" European Roma Rights Center, February 2006. http://www.errc.org/cikk.php?cikk=2378

"European Court of Human Rights Finds Bulgaria Liable for Failure to Investigate Racially Motivated Killings- *Nachova v. Bulgaria,* App. Nos. 43577/98 and 43579/98" *Harvard Law Review,* Vol. 119 No 6. (April 2006).

"*Knowing Your Rights and Fighting for Them",* a guide for Romani activists. European Roma Rights Center 2004.

Lilla, Farkas "*Segregation of Roma Children in Education, addressing structural discrimination through the Race Equality Directive"*European Comission, 2007.

"*Nyíregyháza: Per a roma gyerekek szegregációja ellen*". RomaPage, 21st March, 2007. in: http://www.romapage.hu/hirek/hircentrum-forummal/article/108764/164/ retrieved 28th November, 2007.

"The ERRC Legal Strategy to Challenge Racial Segregation and Discrimination in Czech Schools", *Roma Rights Quarterly of ERRC,* November 1, 2000.

"The Impact of Legislation and Policies on School Segregation of Romani Children". European Roma Rights Center, http://www.errc.org/cikk.php?cikk=2743 retrieved 16 October 2007

„D.H. and Others v. Czech Republic: A Major Set-Back for the Development of Non-Discrimination Norms in Europe". *German Law Journal* No. 4 (1 April 2006)

„*Appeal Leads to Victory for the Roma in Miskolc*", Chance For Children Foundation, in: http://www.cfcf.hu/?nelement_id=28&article_id=45 retrieved November, 2007

Babusik, Ferenc. "*Survey of elementary schools educating Romani children*", Delphoi Consulting, Budapest, 2000, p.28, at: http://www.delphoi.hu/aktual.htm

Béla Berkes, "*Diszkriminatív eljárások a pátkai iskolában– külön osztályok, műanyag tányér a roma gyerekeknek*". Roma Press Center, February 2003, in: http://www.romapage.hu/archivumbol/hirek/hircentrum-forummal/article/73012/437/page/9/starttime/1041375600/endtime/31535999/?tx_ttnews%5Bauthor%5D=RSK&cHash=fdc4658851 retrieved 18 October, 2007

Charles Thompson, "Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School". *Journal of Negro Education*, Vol. 4, No. 3, (1935).

Chayes, "The Role of the Judge in Public Law Litigation". *Harvard Law Review* 1281 (1976)

Commentary on Education under the Framework Convention for the Protection of National Minorities. Advisory Committee on the Framework Convention for the Protection of National Minorities, March 2006.

David Kaye. "Statistical Evidence of Discrimination", *Journal of American Statistical Asociation*, Vol. 77, No. 380 (December, 1982)

David M. Trubeck, Marc Galanter, "Scholars in Self-estrangement: some reflections on the Crisis in Law and Development Studies in the United States", *Wisconsin Law Review*, 1974, no. 4.

Description of the desegregation situation in Hungary. Prepared by Maxine Sleeer and Barbara Bedont for the Summer Seminar on Desegregation in Education in Budapest, Hungary 23-27 June 2003.

Dimitrina Petrova, "*The ERRC Legal Strategy To Challenge Racial Segregation And Discrimination In Czech Schools*", ECMI Panel in: http://www.tolerance.cz/english/sem2000/ecmi07.htm#1 retrieved November 19, 2007

Dimitrina, Petrova. "Implementing anti – discrimination law and the human rights movement". *Helsinki Monitor*, No. 1/2006.

Dimitrina, Petrova. "In Defense of Desegregation", *Roma Rights Quarterly of ERRC*, No. 3&4, 2002.

Dimitrina, Petrova. “Racial Discrimination and the Rights of Minority Cultures”. in: *Discrimination and Human Rights.* Ed. By Sandra fredman. Oxford University press, 2001.

Dimitrina, Petrova. “The Roma between Myth and the Future”, *Social Research,* Vol. 70 No1. (Spring 2003)

Dobrushi, A. *Testing the Enforcement of Anti- Discrimination Laws in Europe- selected ERRC cases.* June, 2007 http://fra.europa.eu/fra/material/pub/RAXEN/RAXEN_CT/TR/Dobrushi_Legal_cases.pdf
Duncan, Wilson. *“Minority Rights in Education. Lessons for the European Union from Estonia, Latvia, Romania and further former Yugoslav Republic of Macedonia”*. 2000.

ECRI general policy recommendation no. 7 on national legislation to combat racism and racial discrimination (adopted on 13 December 2002) European Commission against Racism and Intolerance (ECRI) Published: Strasbourg : COE, 17 Februar 2003 Doc.no. CRI(2003)8

Equal access to quality education for Roma in Hungary (2007), Open Society Institute EU Monitoring and Advocacy Program, Monitoring Report, 2007

Final report By Mr Alvaro Gil-Robles, Commissioner for Human Rights, on the human rights situation of the roma, sinti and travellers in Europe, Council of Europe, 2006 February.

„*Financial Times: „Időzített bomba a magyar roma gyerekek iskolai szegregációja*”, Chance For Children Foundation, in: www.cfcf.hu/?nelement_id=4&article_id=5, retrieved 29th November, 2007.

Grand Chamber Judgment D.H. and Others v. The Czech Republic, European Court Of Human Rights 781, Press release issued by the Registrar 13 November 2007

Helen Hershkoff, “*Public Interst Litigation: Selected Issues and Examples*”, a note written for the World Bank, 2001

How European Community law operates- directives and their Transposition. European Commission- Employment, Social Affairs and Equal Opportunities. In: http://ec.europa.eu/employment_social/fundamental_rights/legis/lgoperat_en.htm November, 2007.

I. Chopin, “*From Racism to Equality? Realizing the potential of European Anti-Discrimination Law”,* ENAR Policy Seminars, October 2006. http://www.enar-eu.org/en/events/directives/Isabelle_Chopin.ppt retrieved on 11th November, 2007.

Jack M. Balkin (ed) *What Brown v. Board of Education Should Have Said.* 2001

James A. Goldston, "*The role of European anti-discrimination law in combating school segregation: the path forward after Ostrava*", Brussels, 28 April 2006. in: http://www.enar-eu.org/en/events/roma/james_goldston.doc retrieved November 2007.

John, Tagliabue. "Bulgaria Opens School Doors for Gypsy Children". *New York Times, Foreign Desk*, June 12, 2001

Joseph Stewart, Jr.; James F. Sheffield, Jr. "Does Group Litigation Matter? The Case of Black Political Mobilization in Missisippi", *The Journal of Politics*, Vol. 49, (August, 1987)

Joseph, Stewart, Jr. "Does Interest Group Litigation Matter? The Case of Black People Mobilization in Mississippi", *The Journal of Politics*, Vol, 49, No. 3. (August, 1987)
Krisztián Kerepesy, "Mindenki egyenlő, de vannak még egyenlőbbek? – Jogvédelem az oktatási diszkriminációval szemben", *SZOCHÁLÓ*, October 2007, in: http://typo3.romapage.hu/aktualis/hircentrum/article/109919/766/

Lawrence, M. Friedman. "Litigation and Society". *Annual Review of Sociology*, Vol. 15. (1989)

Morag Goodwin,"D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe". *German Law Journal*, Vol 07, No. 4

"National Strategies for Minority Schooling: A comparative analysis". Report submitted on behalf of the European Monitoring Center on Racism and Xenophobia (EUMC), January 2005.

"*Public Policy Advocacy: Strategic Litigation and International Advocacy*", presentation by Edwin Rekosh

"Racism and Xenophobia in the EU Member States trends, developments and good practices". Annual Report 2005. European Monitoring Center on Racism and Xenophobia (EUMC).

Rekosh, Buchko, Terzieva, *Pursuing the Public Interest. A Handbook for Legal and Professionals and Activists*. Public Interest Law Initiative, 2001, New York.

Rekosh, E. "Who defines the Public Interest". *Sur lInternational Journal on Human Rights*. Year 2, Number 2 2005.

Rekosh, E., Sleeper, M. (ed.)*"Separate and Unequal: Combating Discrimination Against Roma in Education"* A sourcebook . Public Interest Law Initiative, 2004

Segregated Schooling of Roma in Central and Eastern Europe, European Roma Rights Center 2004

Strategic Litigation of Race discrimination in Europe: from principle to practice- a manual on the theory and practice of strategic litigation with particular relevance to the EC Race Directive. ERRC/INTERIGHTS/MPG, 2004.

W.E.B. Du Bois, "Does Negro Need Separate Schools? *Journal of Negro Education*, Vol. 4, No. 3, (1935).