MEDIATION IN MINORITY RIGHTS: EXPLORING POSSIBILITIES IN HUNGARY

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EXECUTIVE SUMMARY

This thesis aims to explain how minority rights related conflicts in Hungary could be most effectively resolved through mediation.

Mediation is a form of conflict resolution that offers an alternative to litigation. In relation to minority rights related conflicts, this conflict resolution instrument has the potential to reduce strategic and institutionalized discrimination, thereby aiding the process of minorities' reintegration into society. In more general terms, mediation contributes to the development and more effective implementation of human rights standards.

The Roma population, the largest minority group of Hungary, experiences serious institutionalized discrimination, which contributes to the intensification of social tensions and to the widening gap between Roma and non-Roma populations.

Based on the potential benefits this method of conflict resolution offers, I argue that mediation should be added to the applicable tools of the Hungarian Parliamentary Commissioner for National and Ethnic Minority Rights with the mandate to mediate certain minority rights related conflicts between state actors and individuals. I also maintain that within this Office, a Task Force on Minority Conflict Mediation should be established with the ability to mediate minority rights related conflicts between individuals. The office of the OSCE's High Commissioner on National Minorities should serve as a model for how this specific activity of the Ombudsman is to be carried out in practice.

After demonstrating that mediation is an adequate tool for resolving the most pressing Roma-related conflicts due to its potential to create social change by transforming public perception and eliminating the existing prejudices towards Roma communities, I analyze the

activities of the Office of the OSCE's HCNM, which I believe may serve as a model for mediation activities in Hungary. In the last chapter, I explain how mediation could be carried out in practice in Hungary in order to resolve minority rights related conflicts in a more effective way.

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INTRODUCTION

Mediation, conciliation, and arbitration are other types of legally permitted means of dispute resolution besides litigation, and are referred to as Alternative Dispute Resolution (ADR) mechanisms. Mediation, one of the most common forms of ADR, offers an alternative to adjudication and arbitration. The most fundamental differences between these mechanisms are the following: unlike adjudication and arbitration in which an authority or an authorized third party (for instance a judge) issues a legally binding judgment after a violation of laws or norms had already occurred, mediation can be employed at any stage of the conflict. Mediators do not have decision making authority, and the involved parties themselves determine the settlement. Furthermore, unlike legally binding decisions, mediated agreements do not function as a precedent, they do not establish an authoritative rule or pattern; instead, each agreement is unique to that particular dispute and may be entirely different in two similar cases.[1]

As of today, mediation is generally employed in a variety of countries and by various intergovernmental and/or international organizations. Canada, the United States of America, numerous African countries, and European states mostly employ mediation in civil harassment cases, divorce and child placement disputes, property quarrels, neighbor disputes, landlord-tenant conflicts, in customer-seller business disputes, employment and labor problems, and juvenile felonies.[2] Moreover, various international organizations utilize "good offices" (another term for mediation) with respect to human rights, i.e. the United Nations, the United Nations High Commissioner for Refugees (UNHCR), the International Labor Organization (ILO), the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and the International

[1] Menkel-Meadow, Carrie (ed.), *Mediation. Theory, Policy, and Practice*, Ashgate Pulbishing, (2001).

[2] Soceity of St. Vincent de Paul Institute for Conflict Management. *Basic Mediation Training Manual – Victim-Offender Reconciliation Program*, Council of Orange County, (2003).

Committee of the Red Cross (ICRC). With respect to mediation in minority rights disputes in particular, an intergovernmental organization, the Organization for Security and Cooperation in Europe (OSCE)'s High Commissioner on National Minorities (HCNM) has successfully resolved minority rights disputes in the past through mediation, and thus prevented ethnic tensions and conflicts from becoming intensified or violent.[3]

In Hungary, currently, the status of mediation is still in its preliminary stage. Although it is regulated by Parliamentary Acts and is employed in a variety of civil law cases, there is only a limited number of NGOs that seek to provide this service with respect to minority rights disputes.[4] Moreover, there is not a single national governmental organ which would provide mediation in minority rights abuses, as does the OSCE's HCNM Office at an international level. The two most important governmental institutions in connection to minority rights protection in Hungary, either of which has the potential to provide this service, are the Equal Treatment Authority and the Parliamentary Commissioner (in other words, the Ombudsman) for National and Ethnic Minority Rights. As will be discussed later, the Office of the Ombudsman would be more likely to fulfill this task in a more effective and successful way.

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[3] Kemp, Walter A., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities*, Kluwer Law International, The Hague, 2001.

[4] European Judicial Network in Civil and Commercial Matters, *Alternative Dispute Resolution Regulations – General Information, Hungary*, Available at: http://ec.europa.eu/civiljustice/adr/adr_hun_en.htm (Last accessed 5 November 2008).

At this point, it is important to call attention to the facts that the Roma[5] population is the largest minority group of Hungary, and that this group experiences serious and institutionalized discrimination which contributes to the intensification of social tensions. These disputes have a long history and to this day, they have not been effectively resolved. Moreover, compared to other minority groups in the region, such as ethnic Germans living in Hungary, Slovakia, Romania, or Poland, the Roma communities have a serious disadvantage in not having a kin-state. A kin-state would be willing to provide financial support or use its international political influence to pressure host-governments with Roma minorities to improve their status, such as accomplishing a higher level of compliance with minority human rights standards. Although the Roma population's status has improved in general, it is frequently noted that the government of Hungary could manage the situation in a more satisfactory way.

The Office of the Parliamentary Commissioner for National and Ethnic Minority Rights is one of the most important governmental organs dealing with minority rights abuses in Hungary. This Ombudsman is elected by the Parliament based on Act LXXVII of 1993 on National and Ethnic Minorities' Rights (also referred to as Minorities Act)[6] and is exclusively accountable to the Parliament. The task of this Ombudsman is to conduct an investigation of any violations which come to his attention concerning national and ethnic rights, and to initiate general or individual measures in order to remedy these issues. However, the Ombudsman lacks

[5] This essay adopts the European Commission's definition of the term "Roma" as referring to all people "describing themselves as Roma, Gypsies, Travellers, Manouches, Sinti, as well as other terms" (http://ec.europa.eu/employment_social/fundamental_rights/roma/rabout_en.htm). Although the great diversity of the numerous different Roma groups and related communities needs to be acknowledged, due to length limitations, this essay discusses the Roma population in general without focusing on a particular Roma subgroup and without intending to promote stereotypes as the heterogeneous nature of Roma populations usually remain unacknowledged or ignored.

[6] 1993. évi LXXVII. törvény a nemzeti és etnikai kisebbségek jogairól

an effective tool which could help to reduce the number of reoccurring violations of the same type. With some modifications, such as extending the mandate, internal restructuring, and employing mediation based on the example of the OSCE's HCNM, this already existing office could provide effective mediation in minority rights disputes on a domestic level, thereby improving the situation of Roma in Hungary as well as governmental compliance with international human rights standards.

In their overview of the relevant scholarly arguments dealing with the analysis of the mediation mechanism's limitations, Malony and Snell summarize and identify six primary arguments in support of mediation.[7] They state that mediation a) is generally less time-consuming and b) less expensive than conventional litigation; c) parties have more control over the outcome due to the fact that they actively participate and mutually formulate the terms and conditions of their agreement, which also d) increases the likelihood of successful implementation because parties are more prone to comply with the terms and obligations accepted in the settlement when it is not imposed on them; e) confidentiality ensures that sensitive information is not disclosed to the public; and f) it offers a wider variety of remedies compared to the limited remedies available in conventional litigation.

Summarizing the most significant arguments against mediation, the authors highlight the mediation mechanism's limitations. These disadvantages include: a) it may cause unnecessary delay and expenses if an agreement is not reached; b) unequal power-relations of the parties may be reflected in the negotiations and the mediator may be unable to compensate this inequality; c) if mediation is unsuccessful, it may function as a tool for one party to find out the other's trial strategies; and d) some parties may prefer the cathartic effect of a jury resolving their disputes by

[7] Maloney Sr, Pat and Snell, David Clay, *ATLA's Litigating Tort Cases*. § 11:3. Chapter 11. Alternative Dispute Resolution.

determining who is right and who is wrong, and mediation does not provide this effect. However, the authors conclude by saying that even if the parties are unable to reach a final settlement, mediation often narrows down the issues by identifying the true issues of controversy for trial. Thus, mediation may result in a more efficient litigation, with less time and energy spent on litigating irrelevant issues.

Standaert discusses mediation as applied to human rights abuses under the American Convention and analyzes it on a practical level.[8] Discussing the questions of imbalance of power, procedural shortcomings, and its overall effect on international human rights norms, the author uses successful examples in which these problems were effectively remedied. The author notes that in the U.S. for example, mediation is used increasingly in order to settle family disputes, such as divorce, child custody cases, and domestic violence.[9] In Argentina, friendly settlement was successfully used to resolve complaints originating from the arbitrary arrest and detention of the petitioners which then resulted in the question whether the Argentine government had failed to provide effective judicial remedies to victims of human rights violations.[10] Negotiations were successful, a friendly settlement was reached and as a result, a congressional bill was passed which provided for the monetary compensation of the petitioners.[11]

Although power imbalance is a serious problem, especially in cases with a history of violence, which is highly likely to create the feeling of fear, distrust, and subordination in the

[8] Standaert, Patricia E., *The Friendly Settlement of Human Rights Abuses in the Americas*, Duke Journal of Comparative and International Law. Volume 9. Pages 519-542.

[9] Id. See Page 529.

[10] Report No. 1/93, Report on the Friendly Settlement Procedure in Cases 10.288, 10.310, 10.436, 10.496, 10.631, and 10.771, Inter-Am. C.H.R. 35, OEA/ser. L/V/II.83, doc. 14 corr. 1 (1993) (Annual Report 1992-1993). Available at: http://www.cidh.org/annualrep/92eng/Argentina10.288.htm (Last accessed on 24 November 2008).

[11] Id. See sec. II, para. 2.

petitioner, the author argues that the presence of a highly trained human rights specialist may compensate for this imbalance allowing for equal exchange. However, this gap may be impossible to bridge in some cases. Thus, when applying mediation to minority human rights abuses, the problem of power imbalance must be carefully analyzed and alternative solutions should be taken into consideration in order to ensure the fairness of the process in which one party does not impose its will on the other.

Under the American Convention, the problem of power imbalance is compensated for by the Commission's dual role. This body not only acts as a mediator, but at the same time, it is also in the position to refer the case to the Court and publish its findings and recommendations allowing for the support of the weaker party. However, it is important to note that the dual rule of the Commission raises concerns about maintaining confidentiality, open and honest exchange of ideas, and neutrality all of which are very important characteristics and advantages of a mediator.

Addressing the effect of mediation on international human rights norms, the author concludes that mediation is successful when it ensures the right of the individual and of the society as a whole. This procedure gives a chance to the victim to raise his/her voice and the offending government is asked to take responsibility and come to terms with its moral obligations to comply with the principles of international human rights law which serves both parties' interests. Thus, mediation does not have a negative impact on international norms. It is wrong to think about this process as making deals with human rights violators. Rather, it serves as a tool which allows for a realistic compromise between a theoretical moral obligation of states and the fulfillment of this responsibility in practice. According to Standaert, it is better that governments admit their violations, take responsibility for them and make efforts to compensate

victims than to ignore this responsibility in practice and not comply with international human rights norms in practice at all.

A number of scholars discuss the role of mediation in minority rights disputes in both international[12] and domestic ethnic conflicts[13] with special focus on the crucial role of the OSCE's HCNM. Although the High Commissioner's significant role and influence in resolving minority disputes is not questioned,[14] scholars debate whether the HCNM's activities of promoting compliance with human rights norms and resolving ethnic conflicts can be considered mediation.[15] After critically analyzing the most common arguments, Touval concludes that the activities of the HCNM can in fact be considered mediation.

Taking all of these arguments into consideration, I approach mediation as one of the optional tools which parties to a conflict can employ because most disadvantages arise only if the parties do not reach a settlement, but even in that case, they still have the option of going to court. Moreover, mediation has the potential to contribute to the restoration and long-term development of the conflicting parties' personal relationships: a deeper understanding of the other party's reasons and circumstances enhances the possibility of reaching a mutually acceptable consensus that addresses both parties' needs.

Only a limited number of works focus on mediation in minority rights disputes, and even fewer discuss the role of mediation in Hungary and its potential of addressing and resolving Roma rights disputes. Based on the potential mediation has in restoring relationships while

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[12] Sisk, Timothy D, *Power sharing and international mediation in ethnic conflicts,* Washington, D.C. : United States Institute of Peace Press (1996).

[13] Ratner, Steven R, *Does International Law Matter in Preventing Ethnic Conflict?* International Law and Politics. Volume 32:59. pages 590- 698.

[14] Kemp, Walter A., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities*, Kluwer Law International, The Hague, 2001.

[15] Touval, Saadia, *Does the High Commissioner Mediate?* International Law and Politics. Vol. 32: 706-713.

resolving conflicts and on the success of the HCNM in mediating minority rights disputes, I will show how a Hungarian national human rights-protecting institution could effectively adopt and employ mediation in order to resolve certain Roma minority rights related disputes in Hungary. Moreover, I also address the role of NGOs in this process and discuss how, if at all, they could compensate for some of the procedural shortcomings of mediation.

I argue that mediation should be added to the applicable tools of the Hungarian Parliamentary Commissioner for National and Ethnic Minority Rights with the mandate to mediate certain minority rights related conflicts between state actors and individuals and that within this Office, the Task Force on Minority Mediation should be established enabling it to mediate minority rights related conflicts between individuals. The office of the OSCE's HCNM should serve as a model for how this specific activity of the Ombudsman is to be carried out in practice.

I will take a comparative approach exploring the current status of mediation in the legal framework of various national and international human rights instruments where mediation is successfully practiced in the field of minority rights. Analyzing and comparing the structures and operations of these institutions which may serve as examples will enable me to formulate the most effective recommendations for a Hungarian institution entrusted with similar tasks. In addition, I also conducted field research.[16]

The importance of this research is twofold: academic and practical. The status of mediation in Hungary is fairly new and the possibility of offering mediation as an option for resolving minority rights disputes in a structural, institutionalized manner has not been explored

[16] I was accepted to a 3-week internship position at the Office of the Hungarian Ombudsman for National and Ethnic Minority Rights for the month of March, 2008 which opportunity enabled me to familiarize myself with the structure and activities of this institution and by talking to several public servants about this topic, I gained a better understanding of the way in which mediation in minority rights disputes could be put into practice.

in detail. It is this aspect that I would like to explore in this thesis. The practical significance of this project lies in that this conflict resolution instrument has the potential to contribute to the development and more effective implementation of human rights standards as well as to reduce strategic and institutionalized discrimination of the Roma minority in Hungary, thereby aiding the process of their reintegration into society.

CHAPTER I Mediation as a Possible Solution for Roma-related Conflicts with Additional Benefits

This chapter explains in theory why and how mediation has the potential to resolve the most pressing Roma-related conflicts[17] and how it could create social change by transforming the public perception, through eliminating the existing prejudices towards Roma communities.

Mediation as a Possible Solution[18]

First of all, it is important to distinguish between the two spheres in which conflicts arise: those that occur a) between a governmental organ or a public service provider and a private individual, and b) between private individuals. Mediation takes place between individuals in both cases, but the difference lies in that the involved parties' official statuses are different.

In conflicts where a public entity is involved, one party is an official representative of the concerned party and the other one is a private individual. Most of the time the representative has limited negotiation powers: s/he is authorized to enter into an agreement that fulfills a set of already predetermined conditions. As a specific example, I observed a case in which an individual customer had problems with his phone service provider because he failed to pay the phone bill on time for a period of time; therefore, his phone service was suspended for an

[17] The four most severe problem areas of Roma minorities that require immediate attention are education, housing, employment, and health care. They are described in detail in Chapter III, under sections entitled "A Brief Overview of the Situation of Roma in the EU" and "A Brief Overview of the Situation of Roma in Hungary".

[18] The following section contains my own propositions about mediation which I formulated based on the mediator training course entitled "Mediation as an Alternative Dispute Resolution Technique", held by Carol McLaughlin at the Institute for Conflict Management St. Vincent de Paul Center for Community Reconciliation in Santa Ana, CA, USA between the time period of 15/01/2007 - 20/05/2007. Having finished this training, I became a volunteer mediator at Harbor Justice Center, Newport Beach, CA, USA under the supervision of Paul Shisbey, case manager for the our North & South County Regions. During this time I had the opportunity to gain practical experience by participating in mediation as an observer at first, later as a co-mediator, and finally as a mediator.

indefinite period of time. In this case, the representative of the phone company was not authorized to remit the debt; however, after hearing the customer's situation and reasons for the late payments, the parties reached a mutually acceptable agreement. They came up with a debt rescheduling scheme which was manageable for the customer and they also agreed on the specific date from when the provider will resume the phone service.

Similarly to this phone service provider case, the likelihood of reaching a positive outcome when other public service providers, such as gas or electricity companies, are involved is relatively high. Such a mutually constructed agreement is favorable for both parties because the company receives the payment and does not lose the customer, while the individual receives the service and a significantly more favorable and less burdensome payment plan.

Moreover, during mediation, the parties start to communicate with each other and most of the time they find themselves explaining their situations in detail. For example, in a case where an individual stole a minor article from a store, at the time when the theft took place, the offender probably did not feel the weight of his action. However, during mediation, he met with the representative of the store who explained to the offender that even such a minor theft costs so much time and extra work for the employees and that at the end of the day, the employees have to pay for the missing items from their own pockets.

Thus, this conflict becomes personalized. The offender becomes more aware of the consequences and understands that his action has a direct and negative effect on other people. This realization is usually enough for the offender to refrain from such actions in the future. At the same time, the representative of the company also becomes more aware of the offender's situation. In the same way as the offender starts to conceptualize the company as a group of individuals, the representative also starts to perceive the offender as a person who has feelings

and problems. In most cases, the offender also gives a specific reason explaining his action. For this reason, although such an action does not become acceptable, at least it may become understandable. Thus, in most cases, both parties who engage in mediation go through a perceptual transformation.

Such transformation is even more crucial in conflicts where a Roma individual is involved. In relation to Roma minorities in Hungary, conflicts in the public sphere most often occur in the fields of housing, employment, health care, and education. For example, there are several conflicts that emerge between the local government and Roma families who illegally occupy and continue living in buildings owned by the local government without paying any rent. One of the most severe incidents occurred in 2006, in Zugló.[19] During the process of selling local government property, a Roma individual with three children, along with six other families were evicted. The local government failed to accommodate the evicted families and in addition, threatened to temporarily remove the children. At the time of the eviction, Roma rights activists got involved and helped to find temporary accommodation for the families. The incident was also broadcasted on television.

At the same time, a complaint was filed with the Parliamentary Commissioner for National and Ethnic Minority Rights concerning the eviction procedure. The Commissioner found[20] that although Section 7 of the Child Protection Act stipulates that children may not be separated from their families on the sole ground that they are at risk due to financial reasons, the practical implementation of the rules of law regarding housing may constitute an infringement of the constitutional right of the children. As a result of the proceedings, the Commissioner

[19] Annual Report of the Parliamentary Commissioner for National and Ethnic Minority Rights 2006. Appendix 2. Available at: http://www.kisebbsegiombudsman.hu/word/04-29-2008_09_53_05/besz_2006.html

[20] Id.

proposed that the government, with the involvement of relevant ministries, review the rules relating to eviction and prepare amendments necessary to ensure that the rights of minors are fully respected in eviction procedures. However, these measures took effect only after the eviction already took place in a drastic manner.

This incident would have been an excellent case for mediation, as it is likely that the whole eviction procedure could have been prevented or at least performed in a different, less harsh manner. Based on mediation's potential to create a perceptional transformation, it is reasonable to presume that if the government officials were more aware of the situation of the individual Roma families, they would have been more flexible during the procedure and more willing to help.

More generally, mediation would also provide a solution to the problems that occur in the other most urgent problem areas as well, namely education (for example, unlawful segregation in schools), health care (for example, not receiving adequate medical care in hospitals), and employment (for example, discrimination by employers against Roma applicants during the interview process). Additionally, Roma families frequently cannot pay the cost of utilities or other services in general. However, through mediation, it is possible that a mutually acceptable agreement can be negotiated between the representative of the service provider and the customer, such as different debt rescheduling schemes that best fit the individual need of the person or families. Open dialogue would not only contribute to ensuring basic services that are essential to an average standard of living, but could also create emotional satisfaction in both parties and thereby abolish personal prejudices that parties may have towards each other. As an additional benefit of mediation, it is likely that in the long run, Roma individuals will begin to trust public officials and public services.

Similarly to conflicts that occur in the public sphere, mediation is highly likely to have the same beneficial effects on conflicts that arise between private individuals. In conflicts between private individuals, the emotional element is a more significant factor and the resolution is oftentimes as simple as a sincere apology. During mediation, the involved parties also go through a transformation: they start to focus on the problem instead of perceiving the other individual as an enemy. This is extremely crucial because once they focus on the problem, they become creative and more flexible in finding a mutually acceptable solution. At the same time, the relationship between the parties improves.

As an example, in the field of housing, neighbor disputes are very common. In some cases, the relationship can deteriorate to the extent that the neighbors completely stop communicating. In this case, the mediator can open a channel for communication and help the involved parties to explain their reasons for a specific behavior and find a solution. For example, a severe neighbor dispute emerged over an old lady's bush of roses when her neighbor had driven over the flowers several times. During mediation, it became clear that these roses had sentimental value for the old lady because her husband planted them shortly before he passed away. The neighbor was not aware of this sentimental value, but when the old lady explained, he apologized and promised to be more careful in the future. Thus, this successful mediation not only provided emotional satisfaction but also contributed to the immediate stop of the behavior which was the main source of the conflict.

In private conflicts where Roma and non-Roma individuals are involved, there is an added tension between the parties, and the process of mutual dialogue and experience-sharing can become a longer and more sensitive process. However, if the involved parties start communicating, they are likely to mutually understand each other and to perceive the other party

as an individual person rather than the enemy who belongs to a certain ethnic group and who possesses all the stereotypical characteristics of that group. Thus, mediation has the potential to gradually transform misconceptions and eliminate stereotypes. This change, of course, is a long process, but it can happen.

For the above-discussed reasons, mediation potentially offers a solution to the most severe social problems and has valuable benefits for society as a whole. This method of conflict resolution can facilitate social change by transforming negative public perception of Roma communities, and ultimately contribute to the elimination of stereotyping and prejudiced attitudes against them. A successful and permanent integration of Roma populations requires the society at all levels to understand, respect, and adequately adopt to the unique lifestyles and cultures of Roma communities. Moreover, this process should involve both the majority and minority populations: *mutual* respect and understanding should be built. Due to its ability to facilitate mutual and multicultural dialogue, mediation is an excellent means of attaining this goal.

Furthermore, mediation may also contribute to the process of trust-building towards the rule of law, as well as enhance the legitimacy of the public institutions and public officials (including increasing transparency and minimizing and gradually eliminating corruption), which would be beneficial for both the majority and minority populations and would be a great advancement in achieving social coherence and a stable society.

Thus, as a result of long-term mediation, a general, widespread change in the society's perception would occur gradually from top-to-bottom as well as from the bottom-up. As an example, prejudiced attitudes of various leaders oftentimes contribute to the public's stereotypical perception of Roma populations. However, if after such a statement or action,

public figures and various influential decision-makers would meet during the course of mediation with some Roma individuals who then would explain the negative effects they have experienced as a result of such action, it is reasonable to assume that these leaders would become more aware of their own actions and would become more sensitive to the potential damage they may cause to Roma minorities. As a result, in their statements and behaviors, public figures and politicians would refrain from manipulating certain facts, figures, or pieces of information that depict Roma communities in an unfavorable manner, as these leaders would also go through this process of perception-transformation and come to understand that Roma individuals do not fit stereotypical attributes.

As part of this social change facilitated by mediation, the media would provide unbiased and accurate information and news. Also, replacing prejudiced attitudes, high working morale and personal integrity will be promoted and valued among public figures, political leaders, public servants, and public service providers. A change in the attitudes of political and societal leaders would result in a change in the public's perception of Roma communities as well. To summarize, it can be concluded that mediation is one of the potential tools which could minimize and eventually eliminate discrimination and achieve permanent social integration, ultimately leading to a more fair, just and stable society.

CHAPTER II The Situation of Roma: Severe Problems in Urgent Need of Good Solutions

After providing a general overview of the situation of Roma communities within the EU and in Hungary specifically, this chapter highlights the most important steps taken by the EU and Hungary to respond to the urgent problems.

A Brief Overview of the Situation of Roma in the EU

The situation of Hungary's Roma population is very similar to those communities living in the other member states of the EU in the region. According to the World Bank, Roma is the largest and most rapidly growing minority in Europe. With the new member states joining, they represent roughly 2 percent of the 495 million people of the EU.[21] The total Roma population of Europe is estimated at 6[22] to 15 million.[23] The lack of accurate and exact population data is telling of the way the Roma have been perceived and treated in the European region both by their government and by the society in which they live.

Generally, official data is based mainly on censuses conducted by national governments, which tend to seriously underestimate the Roma population for a variety of social, economic, and political reasons. Clark[24] claims that government records and statistics generally "leave out the

[21] Ringold, Dena., **"**Roma in an Expanding Europe: Challenges for the Future". *Beyond Transition – The Newsletter about Reforming Economies.* Available at: The World Bank Group: http://www.worldbank.org/html/prddr/trans/julaugsep03/pgs25-27.htm. (last accessed 22 November 2008).

[22] Petrova, Dimitrina. "The Roma: Between a Myth and the Future". Available at: http://www.errc.org/cikk.php?cikk=1844. (Last accessed on 25 October 2008).

[23] Nicolae, Valeriu., "Reasons and Solutions for the Inclusion of Roma within European Institutions". Available at: http://www.ergonetwork.org/exclusion.htm (Last accessed on 7 October 2008).

Roma altogether" or sometimes "classify them under 'other'" for financial reasons: "if the figures do not show the Roma to 'exist,'" then the government does not need to fund specific social policies supporting them.[25] At the same time, the Roma, due to their deepening social problems, increasingly rely on state resources and financial aid, which may also contribute to the growing social tensions between the Roma and the majority of population in the relevant member states.

Moreover, some Roma communities have a lifestyle quite different from the majority of EU citizens because they are frequently moving from one region to the other; therefore, their fluctuation may be a reason for the lack of accurate official numbers. National governments may take advantage of this phenomenon and claim fluctuation as an excuse for not having precise data and not providing financial assistance to these communities.

In some countries, Roma hesitate or choose not to reveal their ethnic identities during census.[26] This may also be a factor which makes it difficult to give a proper estimation of their exact numbers. This trend also signals existing social tensions, as in some cases, a Roma individual may choose not to identify him/herself as a member of this minority group due to the fear of discrimination. For example, according to a case study, educated Roma were especially likely to deny their ethnic identity, and many of them tried to marry non-Roma and hide their identity from their children. Research conducted in the Czech Republic found that people who identify themselves as Roma tend to be of either very low social status, who hope for increased

[24] Clark, Colin., "Counting Backwards: the Roma 'Numbers Game' in Central and Eastern Europe". Available at: http://www.radstats.org.uk/no069/article4.htm. (http://www.ergonetwork.org/exclusion.htm) (Last accessed on 8 September 2008).

[25] Barany, Zoltan. D., "Ethnic Mobilization without Prerequisites: The East European Gypsies" (2002). *World Politics, Volume 54*, 277-307.

[26] Petrova, supra note 25

social benefits, or those of the highest social status, who want to gain political power by representing the Roma population.[27]

The study "The Situation of Roma in an Enlarged European Union"[28] conducted in 11 countries of the enlarged EU by the Directorate General for Employment and Social Affairs in the Community Action Programme to Combat Social Exclusion 2002-2006 framework provides more specific examples of how governments treat their Roma minorities in an unfavorable and discriminatory way. The study's aim was to gain a better understanding of the conditions and challenges the largest ethnic minority of Europe faces, focusing on the fields of education, employment, housing, and healthcare. According to this study, the segregation of Roma children in schools results in very low levels of their educational achievements. Moreover, governments do not pay sufficient attention to the poor quality of their education. Regarding the field of employment, it was found that only a few member states identify the Roma as targeted groups within the National Action Plans on employment, although the overall Roma unemployment rate is as high as 80%.

The study furthermore points out that housing is one of the most important problem areas, as the Roma populations live in sub-standard housing conditions characterized by ghettoisation and constant threat of eviction. Regarding health care, Roma's status may be characterized as having high levels of transmittable disease and low levels of access to

[27] Barany, supra note 28

[28] The study consisted of both desk research and field visits to a limited number of countries and projects addressing the Roma issues. During the visits, researchers interviewed government and NGO representatives. The European Roma Information Office ensured interviews with Roma organizations' activists and Roma individuals themselves. European Commission Directorate-General for Employment and Social Affairs Unit D3. "The Situation of Roma in an Enlarged European Union" Manuscript completed in 2004. Available at: http://ec.europa.eu/employment_social/publications/2005/ke6204389_en.html

healthcare, especially among women. The study concluded that access to healthcare systems should be guaranteed and improved.

A Brief Overview of the Situation of Roma in Hungary

According to official statistics published in 2007, Hungary's largest minority group is the Roma, constituting 1.9 percent of the country's total population of 10 million.[29] Despite the fact that at the time of the enlargement, the EU accession process seemed to have improved the situation of Roma populations in general,[30] serious problems remained unresolved in Hungary as well as in other countries in the region wanting to become members of the EU. This fact is also supported by the statement of the Central and Eastern European preparatory meeting for the World Conference against Racism in 2000, according to which despite some improvements, the Roma "remained the least integrated and most persecuted people in Europe."[31]

Prior to Hungary joining the EU in 2004, the country's EU accession was conditional upon fulfilling the Copenhagen political criteria. These included the so-called "minority conditionality," which, among other things, addressed the status of Roma minorities by requesting the improvement of their social and economic standing as well as their integration into their respective societies. [32] However, similarly to the situation in the majority of member

[29] Hungary in Numbers, 2007 Hungarian Central Statistical Office. Available at: http://portal.ksh.hu/pls/ksh/docs/hun/xftp/idoszaki/pdf/magyarorszag_szamokban.pdf

[30] Spirova, Maria and Budd, Darlene. "The EU Accession Process and the Roma Minorities in New and Soon-to-be Member States" (2008). *Comparative European Politics* 6, 81–101. doi:10.1057/palgrave.cep.6110123. Available from http://www.palgrave-journals.com/cep/journal/v6/n1/full/6110123a.html. (Last accessed on 9 April 2008).

[31] Xanthaki, Alexandra. "The Proposal for an EU Directive on Integration". http://www.errc.org/cikk.php?cikk=2211. (Last accessed on 24 June 2008).

[32] Mirga, Andrzej. "Making the EU's anti-discrimination policy instruments work for Romani communities in the enlarged European Union" Available at: http://www.per-usa.org/Reports/Andrzej%20Mirga%20_2.PDF. (Last accessed on 8 April 2008).

states, the Hungarian Roma communities still face systematic, institutionalized discrimination as well as social marginalization based on stigmatization and stereotyping, which results in segregated systems in housing, education, healthcare and social welfare. These factors perpetuate the vicious cycle of discrimination, thereby intensifying segregation, exclusion, separation and social tensions.

The EU's Efforts

The EU has a variety of policies and programs to address the challenges of discrimination ranging from the legal framework for equal treatment and prohibition of discrimination to forums for policy and financial cooperation aiming to promote social inclusion. Within the European Commission, for example, an Inter-Service Group including 14 different departments chaired by the Employment, Social Affairs and Equal Opportunities DG coordinates the different policies and programs tackling Roma issues.[33]

In addition to policy development, a number of EU programs provide support for projects combating discrimination against Roma. The European Commission differentiates its programs dealing with Roma issues into five major fields: (1) anti-discrimination, (2) employment and social inclusion, (3) regional policy, (4) education, training, youth and research, and (5) enlargement and external relations. Within these, some programs (such as those under the label "regional policy") are more general and provide funding which aims to improve the situation of disadvantaged groups or regions (including, but not exclusively, Roma groups and areas where they live), and some projects are specifically designed to target Roma communities, such as

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[33] "The EU and Roma". Available from: European Commission's DG Employment, Social Affairs & Equal Opportunities Action against discrimination. http://ec.europa.eu/employment_social/fundamental_rights/roma/rabout_en.htm. (Last accessed on 28 June 2008).

those providing scholarships and internships available only to Roma students. The EU's policy dealing with enlargement and external relations focuses on providing advice and assistance to candidates in order to successfully fulfill one of the alleged fundamental criterions of EU membership: achieving "substantial improvement in the Gypsies' situation."[34]

On a more regional level, a promising major development is the establishment of the project called The Decade of Roma Inclusion 2005–2015, which is an unprecedented political commitment by nine governments in Central and Southeastern Europe to improve the socio-economic status and social inclusion of Roma.[35] The Decade brings together governments, intergovernmental and nongovernmental organizations as well as Romani civil society that are working together on the priority areas of education, employment, health, and housing, and are also addressing the core issues of poverty, discrimination, and gender mainstreaming.

Although a series of EU directives aim at combating racism and discrimination, some scholars, civil society activists, and policy makers argue that the legally binding directives are not efficient enough to respond to the increasingly pressing problems many Roma living in the EU face. They argue, moreover, that these legal instruments along with the current system of social protection provided by EU member states with Roma populations failed to end the institutionalized, strategic, and widespread discrimination against Europe's largest minority group, affecting every aspect of their personal as well as public lives.

The three most important directives expanding the scope of anti-discrimination legislation include: a.) Directive 2000/43/EC implementing the principle of equal treatment

[34] Due to space limitations, this essay cannot discuss all of these programs in detail; more information can be found at the Employment, Social Affairs and Equal Opportunities Directorate-General's website.

[35] The Decade of Roma Inclusion 2005–2015 Official website. Available from: http://www.romadecade.org . (Last accessed on 24 June 2008).

between persons irrespective of racial or ethnic origin[36] also referred to as Race Equality Directive; b.) Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[37] also called the Employment Directive; and c.) Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.[38]

The Race Equality Directive – Directive 2000/43/EC

The Race Equality Directive, a key piece of EU legislation implementing the principle of equal treatment irrespective of racial or ethnic origin and giving protection against discrimination in employment and training, education, social protection and access to goods and services plays a particularly significant role within the framework of the EU's policy on Roma as it covers many of the areas in which racial discrimination (both direct and indirect) manifests itself.[39]

The Racial Equality Directive is the product of a ten-year campaign by the Starting Line Group, a broad network of non-governmental organizations coordinated by the Migration Policy Group, preventing people in the European Union from being discriminated against based on race and ethnic origin.[40] The Directive's most significant features include the following:[41] first, the

[36] OJ L 180, 19.7.2000, p. 22–26.

[37] OJ L 303, 2.12.2000, p. 16–22.

[38] OJ L 269, 5.10.2002, p. 15-20.

[39] European Roma Rights Center., "EU Roma Integration Directive – Filling the Gap in the Equality Legal Regime" (2005). *Roma Rights Quarterly* Number 1, pp. 27-30, 2005. Available at: http://www.ceeol.com/aspx/getdocument.aspx?logid=5&id=AA318BF1-433B-44D4-9692-C162ACF9B790 (Last accessed on 24 June 2008).

[40] Id..

[41] "Implementing European Anti-Discrimination Law". *Roma Rights*, Newsletter of the ERRC, Number 1, 2001, Access to Justice, p. 68. Available at: http://www.errc.org/cikk.php?cikk=679.

scope of protection explicitly covers both direct and indirect discrimination. The difference between these two types of discrimination is that direct discrimination occurs when a group or a person is treated less favorably compared to the others in the same situation, whereas indirect discrimination occurs when a provision seemingly complies with the principle of equal treatment but would place a person or a group in a considerably disadvantageous situation compared to others in the same condition. The directive also prohibits harassment, instruction/incitement, and victimization. Thus, this Directive covers a broad range of discriminatory practices and provides a wide scope of protection.

Second, the Directive applies to both the public and private sectors. For this reason, by eliminating the "state action" requirement which is usually a common standard, for example in the European Convention on Human Rights, anti-discrimination law is strengthened, as it is now enforceable among private parties.

Third, the Directive grants the option for states to adopt positive action measures in order to prevent or compensate for disadvantages based on racial or ethnic origin.[42] Although it is prohibited to guarantee "absolute and unconditional priority"[43] for certain groups, the European Court of Justice has approved an affirmative action policy providing that in situations in which two applicants are equally qualified, the historically underrepresented applicants should be given preference, unless reasons tilting the balance in the other applicant's favor arise. This principle developed from the ECJ's interpretation of analogous provisions contained in the gender discrimination directives according to which states are permitted but not required to adopt positive action measures where they are a) limited in time to the period necessary to overcome

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[42] Article 5

[43] *Kalanke v. Freie Hansestadt Bremen* [Case C-450/93 (1995)]

the disadvantage being targeted and b) sufficiently flexible to allow exceptions in particular cases.[44]

Fourth, the Directive makes it easier for victims to prove that they have suffered discrimination in two ways: a) the Directive shifts the burden of proof in civil cases by requiring that once a prima facie case of discrimination has been established, "it shall be for the respondent to prove that there has been no breach of the principle of equal treatment"; and b) the Directive provides that indirect discrimination may be "established by any means, including on the basis of statistical evidence," which, from a practical point of view, often the most sufficient or the only way to prove indirect discrimination.[45]

The Directive contains the indirect discrimination test according to which it should be possible for states to adopt measures that give preference to members of minority groups which have historically been victims of discrimination, if a) such measures have the legitimate aim of reducing *de facto* inequalities which result from past discriminatory practices, and b) the nature and extent of the present inequalities make the preferential measure proportionate.[46]

Fifth, the Directive requires states to establish enforcement bodies that are capable of "providing independent assistance to victims of discrimination in pursuing their complaints."[47] Moreover, the Directive stipulates that effective, proportionate, and dissuasive sanctions must be imposed for violation of national anti-discrimination norms. Thus, with the establishment of specialized bodies capable of taking legal action to secure equal treatment, the Directive provides

[44] *Marschall v. Land Nordrhein-Westfalen* (Case C-409/95 (1997) All ER (EC) 865)

[45] Id.

[46] Goldston, James A. The European Union Race Directive. Available at: http://www.justiceinitiative.org/activities/ec/ec_russia/moscow_workshop/goldston_moscow (Last accessed on 17 September 2008).

[47] Id.

for an effective enforcement mechanism in the field of non-discrimination, which is crucial to the realization of the Directive's principles.

Due to the binding nature of the directive, which sets a particular goal but still allows some leeway in regards to how national governments go about achieving this result, each member state's national government was under the legal obligation to implement the Racial Equality Directive's principles by 2003. At the same time, the Directive became part of the *Acquis communautaire*, the body of EU law, which all states wishing to join the EU must adopt. Therefore, not just member states, but EU candidate countries were also supposed to enact legislation and educate judges, prosecutors and other public officials about the new legal standards.[48]

Hungary's Efforts

In order to fulfill this legal obligation, Hungary, a state with a considerable Roma population and a country which at the time enjoyed the candidate status, decided to enact a new piece of legislation, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities and set up a new institution supervising compliance with EU requirements of equal treatment. On the basis of this Act, the Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure was passed and thereby a new public administration agency came into existence.[49] The Equal Treatment Authority started its work on February 1, 2005. Since then, the institution receives and deals with individual and

[48] "The Race Equality Directive". Available at: www.tolerance.cz/courses/monnet/winter2004/lectures/Unit6_**directive**.doc. (Last accessed on 7 April 2008).

[49] Official website of the Equal Treatment Authority of Hungary. Available at: http://www.egyenlobanasmod.hu/index.php?g=english.htm. (Last visited on 18 November 2008).

public complaints about unequal treatment.[50] Understanding the Authority's mandate inspired by the Race Equality Directive and its relation to the other main national minority protecting institution, the Ombudsman for National and Ethnic Minority Rights, is essential when discussing the possible national instrument that is most likely to employ mediation effectively and successfully.

The Authority is an independent institution and its primary task is to ensure the implementation of the principles of equality and non-discrimination.[51] Although the Authority works under the direction of the Minister for Social Affairs and Labor, neither the government nor the Ministry may instruct the Authority when it performs its tasks under the Equal Treatment Act. This provision is intended to guarantee the Authority's independence from the Government. The structure of the Authority is the following: it is led by a president who is appointed by the Prime Minister. It has an Advisory Body, consisting of six independent experts, with outstanding experience and reputation, to assist the Authority in issues of strategic importance. The Prime Minister appoints the board members subsequent to an extensive consultation process during which NGOs nominate 24 candidates. The Board has co-decision powers with the Authority on the fields of reporting, adopting proposals for Government decisions, and drafting legislation relating to equal treatment.[52]

Every natural or legal person has the right to lodge a complaint to the Equal Treatment Authority about the violation of equal rights. The main task of the Authority is to review complaints it receives and determine if the principle of equal treatment has been violated on any

[50] Id.

[51] Id.

[52] Id.

of the covered grounds.[53] The Authority deals with cases involving harassment, unlawful segregation, sexual harassment, and retribution in addition to direct and indirect discrimination.

After having established that the principles of equal treatment have been violated, the Authority has the mandate to sanction the offenders. It may order that the situation constituting the violation of law shall be eliminated, may prohibit the continuation of the violation of law, may publish its decision establishing the violation of law, or may impose a fine ranging from fifty thousand to six million HUF (approximately 280-28000 Euros).[54]

Statistical data demonstrate the importance of the Authority regarding Roma populations: in 2006, the Equal Treatment Authority received more than 800 complaints, the majority of which dealt with the issue of ethnic discrimination. The principle of equal treatment was most frequently infringed upon in the field of employment. The Authority has established the violation of equal treatment in 27 cases, in 10 of which a fine was imposed on the violating party. In 13 cases, the parties reached an agreement or friendly settlement with the help of the Authority.[55] In more than 200 cases, either no discrimination was established or the Authority dissolved the proceedings, partly due to the fact that the clients withdrew the complaints, partly because simultaneously with the Authority's procedure the case was at court on the same grounds. In the rest of the cases, the Authority gave written advice to the parties involved.[56]

[53] These include: "sex, racial origin, color, nationality, national or ethnic origin, mother tongue, disability, state of health, religious or ideological conviction, political or other opinion, family status, motherhood (pregnancy) or fatherhood, sexual orientation, sexual identity, age, social origin, financial status, the part- time nature or definite term of the employment relationship or other relationship related to employment, the membership of an organization representing employees interests, or any other status, attribute or characteristic". Available from "About us - What are the tasks of the Authority?" at: http://www.egyenlobanasmod.hu/index.php?g=ebh_aboutEN.htm. (Last visited on 5 April 2008).

[54] Id.

[55] Please note that the Equal Treatment Authority encourages and supports parties to settle their conflicts through friendly means. This process will be later explained in more detail in Chapter V.

[56] Id.

The Office of the Ombudsman was established almost sixteen years ago with the mandate to provide protection for Hungary's thirteen officially recognized minorities. As of today, there are four Ombudsmen in Hungary: the Parliamentary Commissioner for Civil Rights, one for Data Protection and Freedom of Information, one for National and Ethnic Minority Rights, and one for Future Generations (which position has been recently established). The Ombudsmen are nominated by the President of Hungary and are elected by the Parliament. These individuals are intellectuals who are well-respected experts in their respective fields. Once elected, they are exclusively accountable to the Parliament. The tasks of the Ombudsmen are to investigate or to have investigated any violations which come to their attention and to initiate general or individual measures in order to remedy these. Any natural or legal person can lodge a complaint either for oneself or on somebody else's behalf, but the Ombudsmen have the mandate to address only those issues in which a public authority or a public service provider is involved; hence, they cannot address issues between private individuals. Compared to the mandate of the Authority, the Ombudsman's recommendations and findings do not have a binding effect, his tools are more limited, and the institution mostly employs its soft-power to resolve cases. However, this weakness can also be considered as its strength because its mandate allows for more flexibility, creativity, and innovation.

The Authority was established only 2 years ago, its mandate is broader, and its decisions are legally binding. Although it is supposed to be a completely independent institution, the Authority is obliged to take court rulings into consideration. Additionally, the courts can overrule the Authorities' decisions.

At the time when Hungary's policy makers were deciding how to implement the EU's Race Equality Directive, there were two major alternatives. One option was the amendment of

already existing legislation to extend the mandate of the Ombudsman, including granting it the authority to issue more severe sanctions and to initiate proceedings in private matters in addition to the already existing mandate of conducting investigations against governmental and public service provider authorities. The other option was the establishment of a completely new institution, which was then implemented.

Following the establishment of the Authority, no clear division existed between these two instructions regarding which of them should deal with which specific complaints.[57] However, by now, efforts have been made by both institutions to cooperate. According to one of the Authority's staff members[58] concerning the level of protection the Authority provides for Roma, the Authority provides adequate protection and there is no need for improvement in this field. Because the Race Equality Directive covers a large scope of protected grounds and because ethnic origin is oftentimes not the only ground based on which discrimination is carried out, the likelihood of finding complaints by Roma individuals valid is very high.

According to a staff member of the Ombudsman,[59] the fundamental reason for the insufficient scope of reach of the existing Directives, including the Race Equality Directive, is the fact that the Directives are based on individual non-discrimination, while Roma communities are in need of legal protection as a group. Furthermore, she stated that there is a need for specific, flexible measures addressing the specific needs and challenges Roma communities face

[57] Being an intern at the Office of the Hungarian Parliamentary Commissioner for National and Ethnic Minorities' Rights during the month of March, 2008, I had the opportunity to visit the Equal Treatment Authority's Office and had a discussion with one of its staff members. These two institutions are the most significant governmental human rights protection mechanisms of Hungary and it was very interesting to observe that there is a certain level of competition or even rivalry between them.

[58] I visited the Equal Treatment Authority (85 Margit krt., 1024 Budapest) on March 11, 2008 and conducted an informal interview with Dr. Annamária Gombos.

[59] Informal interview with Dr. Katalin Szajbély conduted at the Office of the Ombudsman for National and Ethnic Minorities' Rights, in March, 2008.

in the EU. The best solution would be the expansion of the Ombudsman's mandate by amending already existing laws. Hence, whether or not to extend the mandate of the Ombudsmen is currently an important question in the governmental sphere dealing with human rights issues and is likely to become even more significant in the near future.

Although there has been some progress and the government of Hungary is making an effort to improve the situation of the Roma communities, these issues need urgent and adequate redress as leaving the problems unattended only intensifies the conflict and makes it increasingly difficult to resolve as time passes by.

Clearly, as the existing measures are not adequate to redress the problems, a new approach is necessary in order to properly address these pressing issues. These measures are only reactions to the problems, which are unable to prevent recurrent infringements. However, as explained in the previous chapter, mediation has the potential not only to redress already existing conflicts, but also to prevent their reoccurrence in the future once they have already taken place, or prevent them entirely from happening. If employed correctly, mediation has the potential to produce social change on all levels of society. Therefore, it could serve as a tool which would facilitate not only the social inclusion of Roma communities but also their re-integration into society.

CHAPTER III A Working Model for Mediation in Minority Rights Conflicts: The OSCE's High Commissioner on National Minorities

This chapter explains and analyzes the activities of the Office of the OSCE's HCNM[60] in detail, as it is an effective instrument of minority rights related conflict prevention and resolution, which may serve as a model for mediation activities in Hungary on a national level.

The Organization for Security and Cooperation in Europe (OSCE)

During the Cold War period, the most significant political meeting between the NATO and Warsaw Pact countries was the Helsinki consultations, a diplomatic conference which concluded with 35 nations' heads of state or government accepting and signing the Helsinki Final Act (HFA) on 1 August 1975. The HFA established the intergovernmental organization called the Conference on Security and Cooperation in Europe (CSCE), which on 1 January 1995 became the Organization for Security and Cooperation in Europe (OSCE). Today, the OSCE has 56 participating states, making it the world's largest regional security organization. The OSCE offers a forum for political negotiations and decision-making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation, and "puts the political will of the participating states into practice through its unique network of field missions."[61] Moreover, the OSCE plays an important role in setting an international human rights standard that all participating states should implement.

[60] Max van der Stoel was the first diplomat to fill the position of the High Commissioner on National Minorities.. His personality and actions were significant determining factors in the development of the Office and his legacy left a deep impact on the operation of the Office to this day. Part One in Kemp, Walter A, *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities*, Kluwer Law International, The Hague, 2001.
For this reason, when discussing the activities of the HCNM, this chapter focuses on the activities of Max van der Stoel specifically.

[61] OSCE official website. Available at: http://www.osce.org/about/ (Last accessed on 19 November 2008.)

Membership in the OSCE does not entail a legal obligation to implement decisions.[62] Neither the Helsinki Final Act nor any of the subsequent documents adopted by the OSCE are legally binding, with the exceptions of the Treaties on Conventional Armed Forces in Europe and on Open Skies, and the Convention on Arbitration and Conciliation. These three treaties are legally binding only on those states that become parties to them. All other OSCE documents are only politically binding, although an increasing number of experts[63] argue that the Helsinki Final Act has become customary international law (thus, legally binding), and some states have also decided to ratify some of the agreements or signed bilateral, legally binding treaties.

The OSCE is co-operative, which means that all 56 States enjoy equal status. This principle is reflected in the Rules of Procedure, which state that all States participating in the Conference do so as sovereign and independent States and in conditions of full equality. Accordingly, the decision-making process is one of consensus – meaning that every participating state has an equal voice in decisions.[64]

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[62] The terminology used to refer to the parties of the OSCE also reflects the non-binding nature of the organization: the countries of the OSCE are not members but "Participating States"; and the codified agreements are called "commitments", demonstrating that OSCE terminology distinguishes between political commitments and legal obligations.

[63] Especially those who support the right of self-determination because the Final Act contains a Declaration on the Principles Concerning Mutual Relations of the participating States and its Principle VIII explicitly refers to internal and external self- determination. For example, in the official final report prepared by Dajena Kumbaro entitled "The Kosovo Crisis in an International Law Perspective; Self-Determination, Territorial Integrity and the NATO Intervention", submitted by the Office of Information and Press for the NATO, dated on 16 June, 2001, the Helsinki Final Act is listed among the International Conventions relevant to the right of self-determination. Available from: http://www.nato.int/acad/fellow/99-01/kumbaro.pdf (page 20.) (Last accessed on 19 November 2008).
Another document, a White paper concerning the status of the territory called Nagorno Karabagh, prepared by the The Armenian Center for National and International Studies, Yerevan, Armenia and published on the official website of the Ministry of Foreign Affairs of the Republic of Armenia, also refers to the Helsinki Final Act in support of the right of self-determination. Available at: http://www.armeniaforeignministry.com/fr/nk/white_paper.html (Last accessed on 28 November, 2008).

[64] The only exception to the consensus rule, agreed at the 1992 Prague Council of Ministers, stipulates that "in cases of clear, gross and uncorrected violations of relevant CSCE commitments" the Council can take appropriate action, "if necessary in the absence of the State concerned". "The Culture of Dialogue" The OSCE Acquis 30 Years after Helsinki. Available at: http://www.osce.org/documents/osce/2005/07/15787_en.pdf (Last accessed on 19 February 2008).

Thus, the OSCE can be characterized as an organization which operates on a primarily voluntary basis. Moreover, the work of Max van der Stoel, the first diplomat to fill the position of the High Commissioner on National Minorities, demonstrated that the fact that OSCE's decisions are not legally binding oftentimes enhanced the success of conflict prevention and conciliation. That is, the HCNM took advantage of this situation and could intervene in a conflict via more flexible and creative means. Moreover, the HCNM operates on an international level, so a national entity entrusted with the task of mediation would have the advantage of already possessing the knowledge of the local circumstances and possibilities.

This advantage has promising implications for employing mediation in resolving minority rights conflicts in Hungary. Once a national institution that is most adequate to perform mediation in order to resolve minority rights conflicts is identified and developed, it will have already existing knowledge and familiarity with the general situation. Moreover, with this expertise, and provided that parties will participate in the voluntary process of mediation, the likelihood that the involved parties will succeed in formulating a mutually acceptable agreement, which they will voluntarily uphold, is relatively high.

The Office of the OSCE's High Commissioner on National Minorities

Structure and Mandate

The OSCE created the post of High Commissioner on National Minorities (HCNM) in 1992. The Office of the HCNM is located in The Hague, Netherlands. Max van der Stoel, the first OSCE employee with executive powers, had considerable success in the field of ethnic

conflict prevention as well as resolution during his service of 10 years due to his practice of preventive, quiet diplomacy, including mediation.[65]

Preventive diplomacy is an innovative, multi-dimensional diplomatic approach employed, inter alia, in the field of ethnic conflict management. The UN defined preventive diplomacy as an "action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the matter".[66] For the HCNM, the concept of preventive diplomacy also entails "attempts to foster democratic institutions and establish the rule of law, reasoning that these issues are often the cause of instability and violence".[67] In addition, for the OSCE and the HCNM, preventive diplomacy also includes the alleviation of social, political, and economic problems such as poverty, human rights violations, unequal power relations, and deficient economic development.[68]

These ideas are reflected in van der Stoel's statement, which identifies the general causes of ethnic tensions: "[i]f people are unemployed, if they have little or no possibilities for education, if no decent housing is available" then "nationalism becomes the panacea for all problems".[69] In van der Stoel's view, it is the task of OSCE to "identify the root causes of conflict and to help to combat these, in order to ultimately prove that nationalism, xenophobia,

[65] Swimelar, Safia. "Approaches to Ethnic Conflict and the Protection of Human Rights in Post-Communist Europe: The Need for Prevention Diplomacy." *Nationalism & Ethnic Politics* 7.3 (2001): 98.

[66] Id.

[67] Id.

[68] Swimelar offers a more comprehensive and accurate definition of preventive diplomacy: "an outside peaceful, diplomatic action to encourage cooperation and dialogue between disputing parties, and to assist in democratic institution-building and human and minority rights protection in order to prevent threat or use of force or limit the escalation or spread of conflict". Furthermore, Swimelar states that preventive diplomacy "must incorporate underlying sources of conflict where they [conflicts] clearly have the potential to result in the use of force". Swimelar, Safia. "Approaches to Ethnic Conflict and the Protection of Human Rights in Post-Communist Europe: The Need for Prevention Diplomacy." *Nationalism & Ethnic Politics* 7.3 (2001): 98.

[69] Swimelar, supra note 68

racism, and the portrayal of 'others' as the enemy are certainly not the answers, but indeed part of the problem."[70]

Accordingly, in theory, the HCNM's general goals are to "promote dialogue, confidence, and cooperation" among parties involved; in practice, he acts as an "adviser-facilitator" and a "neutral inside third party."[71] The mandate and the HCNM's status within the OSCE allow him to act independently. The HCNM works under the OSCE Senior Council and reports to the Chairman-in-Office, but has independent authority to visit participating states, make diverse recommendations, and intervene where and when he feels the necessity. Confidentiality and impartiality are crucial to encouraging cooperation among dissenting state leaders and gaining both sides' trust.

Under the HCNM's mandate, which describes him as "an instrument of conflict prevention at the earliest possible stage," he is independent in that the HCNM is authorized to initiate state visits without consent from either the government or the OSCE, although he needs to notify the government prior to his visit.[72] Moreover, the HCNM can discuss and remind governments not only of OSCE commitments, but can also base his recommendations on the whole body of international law dealing with human and minority rights. This is important in that unlike commitments, human rights law is legally binding. Although the HCNM cannot take action regarding an individual complaint, he receives information from a variety of sources.

[70] Id.
[71] Id.
[72] Homan, Cees. "Interview with Max van der Stoal, former High Commissioner on National Minorities." *Helsinki Monitor* No 1. (2002): 3-10.

Techniques and Activities

The HCNM's information acquisition techniques employ track-two diplomacy, which differs from track-one diplomacy in that instead of "formal contacts among diplomatic officials at the international level," track-two diplomacy involves "informal contacts among private citizens at the transnational level".[73] These track-two contacts most often consist of professionals, academics, policymakers, and activists interested in promoting a particular agenda on a national as well as on an international level. The importance of track-two diplomacy lies in that the process of information exchange improves the participants' positions in domestic policy debates. As an example, the Pugwash Conferences during the Cold War succeeded in bringing Western and Soviet scientists and policymakers together in a private capacity when formal correspondence between these two blocks was extremely limited. Thus, track-two diplomacy helps to keep civil relationships alive, even during times when parties in their official status are reluctant to cooperate.

The HCNM employed track-two diplomacy as to a large extent the Office's activities were based on personal research and information collection. The HCNM acquired information from a wide variety of sources: in addition to formal contacts such as national governments, political parties, and the media, civil contacts such as NGOs, individuals, representatives of national minorities, cultural organizations, academic institutions, and the whole array of civil society were also utilized.[74] All of these reliable resources contributed to the collection and dissemination of accurate information, which created transparency and contributed to the elimination of misperceptions and falsehoods.

[73] Chetan, Kumar. "India and Track-Two Diplomacy." Available at: http://www.acdis.uiuc.edu/Research/S&Ps/1993-Sp/S&P_VII-3/diplomacy.html. (Last accessed on 5 February 2008).

[74] Swimelar, supra note 68

The track-two diplomatic approach gives the HCNM the flexibility to "proceed inductively," which means "working from the ground up" to formulate a response that "meets the particular circumstances of each conflict situation".[75] The combination of personal visits and track-two diplomacy allows the HCNM to establish direct contacts and personal relationships with conflicting parties. This combination enables the HCNM to gaining a very deep, comprehensive understanding of the given problem and to provide very specific recommendations to best fit the situation.

Moreover, flexibility also allows the HCNM to act in a timely manner and respond to tensions quickly as he is not obligated to follow time-consuming bureaucratic and legal procedures. For example, the HCNM does not have to formally define "national minority," a term which is subject to ongoing political debate within the international community. This flexibility is due to the proclaimed goal of preventing conflict as soon as possible instead of determining the legal rights and obligations of the involved parties. Consequently, the HCNM adopted a flexible view and did not limit activities to a strictly defined group of people.

As a specific example, the HCNM recognized the importance of the potential conflict that the question of citizenship posed due to the definition debate. The HCNM dealt with questions regarding citizenship in the Baltic region, where many members of the Russian minority are considered to be linguistic or ethnic, but not national minorities. This flexible view also allowed the HCNM to work with minority groups such as the Roma and the Kurds whose national minority status is also debated because they do not possess a kin-state.

The HCNM practiced the method of confidentiality because public embarrassment could hinder the process of negotiation and reconciliation between the conflicting parties. Therefore, the HCNM maintained a low profile. Van der Stoel's experiences supported the practice of

[75] Id.

discretion because he found that conflicting parties were more willing to find creative ways of cooperation when they did not have to worry about their reputation. Furthermore, dialogue proved to be more sincere because the parties were "unable to exploit international attention to their advantage," a tactic employed by the Hungarian government to pressure the Slovak government to improve the status of ethnic Hungarians living in the country.[76] This type of low profile diplomatic confidentiality is also referred to as quiet diplomacy.

In addition to confidentiality, the HCNM also had to maintain impartiality. In an interview given to the *Helsinki Monitor*, van der Stoel clarified that the HCNM is not a protector of minorities. Even the title clearly articulated that van der Stoel was the High Commissioner **on** national minorities instead of **for** national minorities. Although the HCNM recognized that in the majority of cases, it was the national minorities who suffered from human rights violations by the state, he had to maintain neutrality and total impartiality to win the trust of both sides and persuade both of them that the improvement of the situation and the implementation of the changes served both of their interests.[77]

In addition, the fact that the HCNM is an independent mediator instead of a representative of a certain country or government contributes to both sides' recognition of the HCNM as a trustworthy, impartial third party. For this reason, they are more likely to accept his suggestions. For example, van der Stoel recommended to the Baltic governments that they create fair and transparent rules, such as policies regarding citizenship. Furthermore, these governments "must provide adequate facilities and resources," such as language centers, enabling Russian and other minorities to achieve citizenship.[78] The HCNM argued that Russians who become Estonian or Latvian citizens "will be more loyal, educated, and satisfied," thus "less inclined to challenge

[76] Id.
[77] Homan, supra note 75
[78] Swimelar, supra note 68

the government or foment inter-ethnic conflict".[79] Van der Stoel further stated that if a minority feels that the state "takes their interests into account, they will develop a more positive attitude towards it. Feelings of loyalty will prevail over any tendency toward separatism".[80] Thus, the HCNM's recommendations served both parties' interests, which demonstrated his impartiality.

The work of van der Stoel also demonstrated several techniques associated with four major academic approaches and methodologies to negotiation, illustrating the phenomenon that diplomatic tactics and academic research are oftentimes intertwined. These were theories developed by Herbert Kelman, Roger Fischer and William Ury, John Paul Lederach, and Harold Saunders. Harvard professor Kelman's problem-solving workshop aimed to bring together influential, albeit not official, conflicting individuals to increase understanding of each party's position and circumstances and to identify acceptable solutions to the conflict. Upon return to their own communities, participants took their new insights and suggestions and used them in the political process.[81]

Another method developed by Fischer and Ury in the framework of the Harvard Negotiation Project (HNP) is based on the theory of "principled negotiation," as presented in the book, *Getting to YES*.[82] Their theory explains how negotiators need to "separate relationship issues from substance" in order to accomplish a mutual "win-win situation." This can be attained

[79] Id.

[80] Id.

[81] Sharp, Paul, et al. "Academics, Practitioners, and Diplomacy: An ISP Symposium on the Theory and Practice of Diplomacy." *International Studies Perspectives* 3.2 (2002): 139.

[82] Project on Negotiation (PON). "Harvard Negotiation Project (HNP)". Available at: http://www.pon.harvard.edu/research/projects/hnp.php3. (Last accessed on 5 November 2008).

by "focusing on interests, not positions; inventing options for mutual gain; and using independent standards of fairness to avoid a bitter contest of will."[83]

Lederach developed a different theory focusing on the "transformation of the conflictual relationship into a nonconflictual or reconciled one" by fostering the society's sense of trust and common goals.[84] Saunders' approach to deeply-rooted conflicts is a "multi-level peace process," which aims to develop participants' capability to analyze the sources of conflict and negotiate solutions, and to nurture their sense of responsibilities for creating their own peace process and future.[85]

All of these academic approaches share common characteristics that may serve as guidelines for mediators. First, they are based on the idea that changing ways of looking at problems significantly improves the chances of the parties involved to reach an agreement or reconciliation. This change of perspectives can be achieved by separating the interests from the positions, taking on a long-term transformative view of the conflict, or establishing personal relationships with the other side's views. Second, all of them represent models for developing relationships between and among the parties rather than on maintaining adversarial positions.

In order to evaluate van der Stoel's achievements and compare his political approach to the legal approach, one must understand the difference between these approaches. The legal approach to human rights promotion and conflict prevention in particular is for example, applied by the Council of Europe (CoE). The three fundamental elements include: (a) treaties and other legally binding instruments used to enforce compliance with human rights standards; (b) adjudication of human rights violators through the European Court of Human Rights (ECHR); and (c) monitoring mechanisms of implementation through state reports. Thus, interference and

[83] Id.
[84] Sharp, supra note 84
[85] Id.

direct involvement in dispute situations happen primarily in response to the requests of the authorities concerned. In contrast, the HCNM's political approach includes: (a) fact-finding missions in areas that are anticipated sources of future ethnic conflicts; (b) early-warning mechanisms to alert and inform actors such as states, regional and international organizations to security threats; (c) on-going, long-term missions and short-term personal visits to build mutual trust and promote dialogue and cooperation between conflicting parties; and (d) "extra-judicial means" and strategies such as stage-two or preventive diplomacy to encourage states to comply with human rights standards to reduce the probability of conflict.[86]

Even though it is expected that legally binding obligations would have greater force than politically binding commitments, taking into consideration the complex nature of ethnic and minority conflicts, the HCNM's achievements demonstrated that states do fulfill their political commitments. This can be attributed to the fact that OSCE decisions are made based on a consensus rule in which all states equally participate; thus, they are more likely to feel obligated to fulfill these commitments by virtue of agreeing to them.

Moreover, although compared to legally binding CoE documents, the degree of precision of OSCE texts is less and they do not contain as precise of definitions (such as of "national minority"), these characteristics can also be viewed as an advantage, which leaves more room to individual states for interpretation, negotiation and flexibility. This also improves the chances of reaching an agreement which results in cooperation, and also allows the HCNM to get involved in the conflict, such as the issue of minority Russians in the Baltic States.

Furthermore, unlike legally binding obligations, states, as part of their political commitments, allow ongoing, long-term monitoring missions within their boundaries, which also favorably impact human rights tensions. The fact that the HCNM's recommendations are not

[86] Swimelar, supra note 68

legally binding gives them their strengths. The HCNM explained that in the negotiation process, an element of moral pressure was also present. By building personal relationships with the conflicting parties and by aiding them in the generation of mutually developed rather than externally imposed solutions and recommendations, the risk of losing individual credibility if they break the agreement is significantly increased.[87]

It is also important to note that the CoE also made significant contributions to the improvement of human rights standards by enforcing government implementation. However, CoE's human rights enforcing mechanisms are most effective only after human rights violations took place or once domestic violence occurred.

On the other hand, the OSCE and the HCNM also have limitations. For example, the HCNM does not have the capacity, capability, and authority to resolve a conflict when serious human rights violations or violence have already occurred, such as the extreme example of genocide. Also, HCNM operations cannot be implemented if the parties involved refuse to reach agreement and cooperation.

Although the HCNM is mediating on an international level, based on the HCNM's model, there are three most important factors that need to be taken into consideration when developing the most effective national model for Hungary. These are: a) flexible mandate; b) ensuring constant development of expertise; and c) developing a wide network of support.

First of all, similarly to the HCNM's mandate, the national actor should be an independent, impartial entity whose mandate should be flexible allowing for a wide variety of tools and activities. In relation to minority rights related conflict mediation in Hungary, it is important to highlight the fact that the HCNM's mandate does not allow for an individual complaint procedure. Therefore, based on the example of HCNM's mandate, the national actor

[87] Id.

that will be entrusted with the task of mediating minority rights related conflicts should have the authorization to receive and follow up on individual complaints.

Second, as demonstrated by the example of the HCNM's activities, the lifelong learning approach and cooperation with academic experts and intellectuals are crucial to being able to constantly improve the skills, the knowledge, and the level of expertise of a mediator.

Third, co-operation and partnerships with relevant experts and actors in the field of minority rights is extremely important. Such a network would be beneficial for all actors and could serve as a national support system for mediators as well as parties involved in the conflict.

Keeping these factors in mind, we now turn to exploring the possible options for an effective national minority rights related conflict mediation system in Hungary. Currently, there are two existing institutions that could carry out mediation in minority rights related conflicts: the Equal Treatment Authority and the Ombudsman for National and Ethnic Minority Rights.

The Ombudsman for National and Ethnic Minority Rights should be the institution entrusted with this task to perform mediation in minority rights related conflicts that occur between individuals and governmental or public service providers for two reasons: first, because the Ombudsman's mandate would require only minor modifications and expansion (based on the example of the HCNM's mandate), which would take the least amount of time; and second, because this institution, in addition to its deep familiarity and comprehensive knowledge and expertise in the field of Roma minority related conflicts, already has an excellent reputation amongst both Roma and non-Roma communities. Moreover, within the Office of the Ombudsman, a Task Force on Minority Conflict Mediation, entrusted with the responsibility to mediate conflicts that occur between private individuals, should be established. Similarly to the activities of the HCNM, which include cooperation with other relevant actors, the Task Force

could be the primary driving force behind establishing and coordinating the activities of the support network for the specialized mediators.

CHAPTER IV Mediating Minority Rights Related Conflicts in Hungary: Suggestions and Recommendations

The aim of the following chapter is to explain how mediation could be carried out in practice in Hungary in order to resolve minority rights related conflicts in a more effective way.

Legality of Mediation: A Developing Legal Framework

After having established the theoretical reasons why parties should employ the tool of mediation in human rights conflicts, we now turn to the legal framework in which this method of conflict resolution operates.

Mediation falls under the category of "friendly settlement" mechanisms and has a legal basis in various international and regional human rights instruments. Traditionally, the mechanism of mediation has also been referred to as "good offices." Article 41(1)(e) of the International Covenant on Civil and Political Rights provides for the opportunity of its parties to utilize its "good offices." Moreover, Articles 38[88]-39[89] of the European Convention on Human Rights and Fundamental Freedoms call for the "friendly settlement" of complaints.

The EU has also recognized mediation as a valuable dispute resolution method and has taken action in order to develop legal regulations governing it. The EU Commission developed a

[88] Article 38 of the European Convention on Human Rights and Fundamental Freedoms reads: "Article 38. Examination of the case and friendly settlement proceedings 1. If the Court declares the application admissible, a) it shall a pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities; b) place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto. 2 Proceedings conducted under paragraph 1.b shall be confidential."

[89] Article 39 of the European Convention on Human Rights and Fundamental Freedoms reads: "Article 39. Finding of a friendly settlement If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached."

mediator code of conduct, which was finalized in July 2004.[90] The Commission has also published a draft directive on mediation in October 2004.[91] This Directive (Directive 2008/52/EC) was adopted on 21 May 2008.[92] Moreover, on May 26, 2004 the EU Network of Independent Experts in Fundamental Rights published the "Report on the Situation of Fundamental Rights in the European Union for 2003", which calls on the European Union to develop a "Directive specifically aimed at encouraging the integration of Roma".[93] Furthermore, in one of its earlier recommendations discussing the EC Race Directive (2000/43/EC), the Employment Directive (2000/78/EC) and the revised Equal Treatment Directive (2002/73/EC), the European Roma Rights Center (ERRC) emphasize the importance of the promotion of settlements by ADR, including mediation.[94] Thus, the prospect for the status of mediation in the developing EU legal framework is promising.[95]

The Hungarian legal system also provides for two types of alternative dispute resolution which are optional: arbitration and mediation.[96] Mainly Parliamentary Acts govern alternative dispute resolution. Act LV of 2002 on Mediation allows the parties (natural persons, legal persons, business entities without legal personality, other organizations) to a civil dispute to use a

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[90] European Code of Conduct for Mediators. http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

[91] *Advice Services Alliance (ASA) Comments on the Proposed EU Directive on Certain Aspects of Mediation in Civil and Commercial matters*, http://www.asauk.org.uk/fileLibrary/pdf/euadrdirective.pdf. Published in Brussels 22 October 2004.

[92] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:NOT

[93] Supra note 93

[94] Hepple, Bob. *A Unified Approach to Equality Law*, Roma Rights Quarterly. Notebook. Available at: http://www.errc.org/cikk.php?cikk=1452#1

[95] Farkas, Lilla, *Will the Groom Adopt the Bride's Unwanted Child? The Race Equality Directive, Hungary and its Roma*, http://www.errc.org/cikk.php?cikk=1386&archiv=1 (last accessed on 5 December 2007).

[96] European Judicial Network in Civil and Commercial Matters. "Alternative Dispute Resolutions – Hungary". Available at: http://ec.europa.eu/civiljustice/adr/adr_hun_en.htm

mediation procedure provided the law does not limit their right of disposition. The Act specifies the range of civil legal actions in which mediation is not possible and "where its provisions cannot apply to mediation and conciliation proceedings governed by other acts or to mediation in arbitration proceedings."[97] Act CXVI of 2000 on Mediation in Healthcare provides for the optional out-of-court resolution of legal disputes concerning service provision by healthcare providers to patients. Under the 2003 amendment to Decree No. 149/1997 (IX. 10.) Korm. mediation in child protection matters was introduced on 1 January 2005. The Labor Mediation and Arbitration Service was established by Act XXII of 1992 on the Labor Code in order to resolve collective labor-related disputes. This body's mediation services can also be used to resolve private labor disputes. Act CLV of 1997 on Consumer Protection established conciliation bodies attached to the regional economic chambers. These bodies deal primarily with consumer disputes relating to the application of rules on the quality and safety of goods and services and product liability, in addition to disputes over the conclusion and implementation of contracts.

Based on the above, it is reasonable to conclude that the current legal framework already recognizes mediation as a lawful means of dispute resolution. Thus, with minor modifications and/or with new pieces of legislation, mediation could be legally added to the applicable tools of the Ombudsman for National and Ethnic Minority Rights, for example, by extending his mandate. Thus, once the political will exists, this unit could be established in a relatively short period of time.

[97] Singer, J (Mackie, K, Hardy, T and Massie, G - editors), The EU Mediation Atlas: Practice and Regulation (2004). Chapter 16 entitled "Mediation in the New Member States".

Mediation in Practice Connected to Roma Issues in Hungary Today: Space for Improvement

As of today, there are five main entities relevant to mediation regarding Roma-related minority conflicts in Hungary. These are the a) Oktatásügyi Közvetítői Szolgálat (OKSZ)[98] [the Mediation Service in Educational Affairs]; b) the Országos Mediációs Egyesület (OME)[99] [National Association of Mediators]; c) Partners Hungary;[100] d) Konszenzus Alapítvány[101] [Consensus Foundation]; and e) Kisebbségi Mediációs (korábbi nevén Bar Kochba) Oktatási, Kutatási, Kulturális Tanácsadó Intézet[102] [Institution of Minority Mediation (formerly called Bar Kochba) Education, Research, Culture and Counseling]. Although the Equal Treatment Authority itself does not provide mediation, this institution is also a significant and relevant actor, as it allows for parties to settle their differences in a friendly way if both parties voluntarily wish to engage in mediation.

The following observation, made while conducting my research on mediation connected to minority rights conflicts in Hungary, is essential to understanding my suggestions about how this specific type of mediation's effectiveness may be improved and its beneficial impacts maximized. By talking to various experts in the field of mediation, I reached the conclusion that this community is very small and is highly interconnected which, at times, is a disadvantage;

[98] Official website of Oktatásügyi Közvetítői Szolgálat.. Available at: http://www.oksz.ph.hu/ (Last accessed on 25 November 2008).

[99] Official website of Országos Mediációs Egyesület. Available at: http://www.mediacio.hu/ (Last accessed on 25 November 2008).

[100] Official website of Partners Hungary. Available at: http://www.partnershungary.hu/ (Last accessed on 25 November 2008).

[101] Official website of Konszenzus Alapítvány. Available at: http://www.konszenzus.org/ (Last accessed on 25 November 2008).

[102] Official website of Kisebbségi Mediációs (korábbi nevén Bar Kochba) Oktatási, Kutatási, Kulturális Tanácsadó Intézet. Available at: http://www.mediare.hu (Last accessed on 25 November 2008).

however, one can also take advantage of these characteristics and use them to improve the quality of Roma-related conflicts' mediation provided in Hungary. In the following section, I discuss each of the relevant actor's strengths and weaknesses, and at the same time, I explain my ideas and suggestions in detail.

Oktatásügyi Közvetítői Szolgálat / Mediation Service in Educational Affairs[103]

This independent and impartial organization was established and is being funded by the Educational and Cultural Ministry of the Government of Hungary and accordingly, it is being supervised by the Minister of Educational and Cultural Affairs. This entity started to provide its services on January 1, 2004 with the aim to provide a cutting-edge, low-cost dispute resolution option for people involved in education. This organization provides mediation services free of charge during the first twelve days, the proceedings are confidential and if an agreement is not reached the parties have the option to resolve their conflicts through litigation.

According to the director of the organization, the most significant challenge that they need to face is that courts have the authority to require mediators to serve as witnesses in certain cases, specifically when an agreement was not reached and the parties turn to court. On his view, this is alarming since in the long run, this would be extremely detrimental for mediators: prospective and potential clients may become reluctant to participate in mediation due to a lack of trust and a fear that confidential information may be released if mediation does not resolve the conflict. For this reason, it is urgent to develop more effective regulations that specifically address this problem by granting a mediator immunity from being required to serve as a witness in court in the specific case s/he mediated. This indeed is a very significant problem and it would serve to the benefit of mediation in general in Hungary, if this problem was solved immediately.

[103] I visited the Mediation Service in Educational Affairs, one of the most important organizations providing mediation in Hungary and conducted an informal interview with its director, Dr. András Krémer on March 18, 2008.

The director of the Service expressed satisfaction with the results they have achieved so far and demonstrated the need for mediation by pointing out that so far, there were approximately 1.3 million court cases in Hungary, 400 000 civil lawsuits and only 6000 judges. Thus, mediation could significantly ease the workload of Hungarian courts.

Overall, in my opinion, the most important advantage of this institution is that it is recognized and is supported by the government; therefore, it can be considered as one of the strongest, most respected and hence socially accepted organizations, which provides mediation services in Hungary today.

This is also demonstrated by the fact that the Mediation Service in Educational Affairs works in close cooperation with the Equal Treatment Authority. During the course of the Authority's proceedings, the involved parties are offered the option of resolving their differences via friendly settlement. If all involved actors voluntarily agree, the proceeding is suspended for a period of 30 days and the parties start the mediation process conducted by the Mediation Service in Educational Affairs. If the mediation is successful, then the case is resolved; if not, the proceeding recommences.[104]

According to the latest data published by the Equal Treatment Authority in the annual report[105] summarizing the institution's activities, there was a radical decrease in the number of mediated cases during 2007. Compared to 2006, during which 13 cases were mediated and the mutually formulated agreements were approved by the Authority, only 3 cases were mediated in 2007.

[104] Government Decree 362/2004 (XII 26) on the Equal Treatment Authority and the Detailed Rules of its Procedure. Article 7/B entitled "Official mediators".

[105] Available at: http://www.egyenlobanasmod.hu/index.php?g=kozadat.htm (Last accessed on 24 November 2008).

Unfortunately, the report does not offer any explanation as to the possible reasons for this extreme decrease. However, below I shall formulate some possible explanations. First of all, unfortunately, the report does not state the total number of cases that were referred for mediation. Therefore, it can only be assumed, that given the expertise of the Mediation Service in Educational Affairs and assuming that there was not much difference in their average success-rate, it is reasonable to presume that the number of involved parties willing to try mediation dropped. I suppose that the fact that mediation is still new and is yet unknown to so many people in society may be one of the reasons explaining this extreme decrease. Also, the fact that mediators may be required to serve as witnesses in court can also be responsible for this downward tendency.

The other, more complex postulate is that due to the fact that mostly those people turn to the Authority who themselves experienced discrimination, they are already in a disturbed state of mind and are more hesitant to share and thereby re-live this experience with another outsider, or the mediator in this case. This would be especially true for complainants of Roma origin because they oftentimes already have the feeling of unequal power-relationships within society in which they are weaker than the other party and they would need very personalized care and attention that would address their specific needs. However, in order to be able to provide this for them, a mediator would first need to gain their trust and respect; otherwise, the mediator would be perceived as another outsider who is not only not objective but even prejudiced against them. Thus, when offered the option of mediation by the Authority who should be addressing their putative or actual grievances, they may feel that they are just being passed on to another

organization, which would be a waste of time and efforts and would rather proceed with the case.[106]

For the above-mentioned reasons, in my opinion, the mediation services offered by the joint cooperation between the Equal Treatment Authority and the Mediation Service in Educational Affairs cannot provide adequately sufficient mediation services for people of Roma origin. Furthermore, compared to the Ombudsman for National and Ethnic Minority Rights that specializes in minorities exclusively, the Authority serves the needs of a much wider target group.

Indubitably, a new model should be tried and if it works, adopted. More specifically, the Ombudsman for National and Ethnic Minority Rights and his officials are excellent, well-educated experts who, in addition to specialized and comprehensive knowledge about Roma communities, also possess the necessary qualities such as social sensitivity and compassion which are indispensable to a mediator in order to win the trust and acceptance of a person of a Roma origin.

Consequently, one of the options could be that the Equal Treatment Authority builds a close co-operation with the Office of this Ombudsman and refers cases in which ethnic origin is the likely basis of discrimination to the Ombudsman. Although this option of referral would not solve the potential problem of causing the above-explained feeling of "being passed along," given that this Ombudsman already has an excellent reputation, that his expertise is not only acknowledged but also valued, and that his objectivity is accepted by the Hungarian Roma

[106] I base this hypothesis on my previous studies at Central European University where I took a course called Roma Rights with Professor Dimitrina Petrova, former director of the European Roma Rights Center and an internationally recognized expert in the field of Human Rights of Roma Minorities. During the course, she explained how important it is to give special attention to people of Roma origin, who need extra care and attention by highly sensitive, well-educated experts who are not only familiar with but also open to and accepting Roma culture and traditions.

communities in general, makes it reasonable to expect that complainants would be more willing to try mediation, if this service was provided by the Ombudsman and his Office.

Országos Mediációs Egyesület / National Association of Mediators[107]

The National Association of Mediators, another relevant actor related to mediation in Hungary, is a nationwide network of mediators committed to improving the general quality of mediation in the country. Its members engage in various activities such as organizing conferences, sharing best practices, promoting mediation, organizing training sessions, and lobbying in governmental spheres. However, in practice, many of its members are inactive and/or are not really qualified mediators or are not willing to improve their skills or to keep up-to-date with the most recent developments in this field.

In my opinion, the most significant advantage of this association is that it gathers intellectuals from various fields, including lawyers, teachers, or social scientists. These individuals have specialized knowledge in their respective fields, which they can utilize while conducting mediation. Thus, the pool of available and educated mediators already exists, but their professional skills need to be improved. Mediators should be cross-trained and take a multidisciplinary approach. Moreover, mediators should go through cultural trainings so that they would become more socially aware and more familiar with different minority groups' (especially of the Roma minority) needs.

For these reasons, I propose the idea that the necessary and optional trainings be provided by the Office of Ombudsman for National and Ethnic Minorities Rights. The Association and the Office could mutually benefit from this co-operation by sharing their knowledge and expertise

[107] , Dr. András Krémer, director of the Mediation Service in Educational Affairs, also serves as the president of the National Association of Mediators. The following description is based on the informal interview that took place on March 18, 2008.

because they would improve their skills and in the process, their chances as mediators to successfully mediate a minority-related conflict would significantly improve.

As a second step, in order to address conflicts between private individuals, a Task Force on Minority Conflict Mediation could be established within the Ombudsman's Office from the members of the Association who have already completed their training. This would enable those members of the Association who are committed and want to engage in this specific type of mediation to get involved and put their expertise into practice. Thus, with a minimal investment of resources, a team of dedicated experts could be trained.

Furthermore, within the Task Force, another crucial element which has to be taken into consideration is that both Roma and non-Roma individuals should be trained as mediators. Once they become well-trained experts, they could form pairs and conduct co-mediation, which would preserve impartiality. More importantly, this cooperation would send a very important message to the society as a whole: the existing problem is mutually shared, and only by working together as a team can these problems be resolved.

Partners Hungary and Konszenzus Alapítvány / Consensus Foundation[108]

There is a very close connection between these two organizations as Consensus Foundation grew out of Partners Hungary. Partners Hungary is a foundation which is part of an international network of NGOs, established by two American individuals, Raymond Shonholtz and Jim Isenberg, who are the leaders of the American NGO Partners for Democratic Change. Partners Hungary was established with the specific aim of easing the transition to democracy by

[108] I had the chance to personally meet with Sándor Geskó (also a member of the National Association of Mediators) who is one of the four founding fathers of Partners Hungary; however, over the years, he has founded a new NGO called Consensus Foundation. He provided me with the following pieces of information during an informal interview that took place on 15 March, 2008.

preventing and remedying social conflicts. The foundation wanted to promote ADR methods, especially mediation and its original focus was on resolving Roma-non-Roma conflicts. The original goal of Partners Hungary was to socially transform the prejudice and negative perception of Roma individuals and to constructively resolve conflicts. Over the years, Partners Hungary has grown and shifted its activities' focus, broadened the organization's target group and by now has become part of the Partners for Democratic Change International network of NGOs. At the time when Partners Hungary started to change its focus, one of its founding members seceded from this organization and established a new one, called Consensus Foundation.

Consensus Foundation specializes only in mediating conflicts in which Roma individuals are involved. According to the director and founding member of the Foundation,[109] Roma-related conflicts are a lot more emotionally intense, and there is already a preexisting social tension, which serves as a basis for conflicts thereby exaggerating them. For these reasons, in these cases, mediation is a lot more complex and difficult; however, if it is successful, the benefit gained from it is substantially more significant. At the same time, an unsuccessful mediation can cause a lot more damage and have negative psychological effects, as a negative experience reinforces the status-quo.

The organization managed to mediate a conflict in which an entire Roma community was involved. The director of the Foundation[110] conducted group-mediation which requires extra special skills and knowledge in addition to special resources (such as an adequate place where

[109] Mr. Geskó has a deep insight into Roma culture and traditions and although a non-Roma himself, he seems to have been accepted as an objective, independent, and neutral actor by the Roma communities.

[110] Mr. Geskó is a dedicated and knowledgeable mediator whose impartiality is accepted by the Roma communities as he has been working with them for over 10 years now. Moreover, from the tone of our conversation, it was clear that Mr. Geskó has a good relationship with the Office of the Ombudsman for National and Ethnic Minorities' Rights.

mediation can take place). The conflict emerged over a water well and the situation was so intense that there was a threat of eruption of violence. The process of mediation took a very long time with multiple sessions and the mediator had to employ a combination of techniques, including breaking the groups into smaller units, working individually with them, then reuniting the smaller units, and finally bringing the groups together again. In such complicated cases, it is extremely difficult to mediate because the conflict is very complex and needs to be broken down into its elements. Furthermore, in such cases, it is extremely difficult to preserve impartiality. However, the mediation ended with an agreement and to this day, the organization considers this case to be its greatest achievement.

According to the director, the Foundation hopes that in the future, mediation will catalyze social change by transforming people's negative perception towards Roma populations one-by-one; when the critical mass is reached, the entire Hungarian society's perception will also change.

Consensus Foundation could be one of the driving forces and one of the leaders of the Task Force on Minority Conflict Mediation. Moreover, there is an existing link on the leadership level between Consensus Foundation and the National Association of Mediators.[111] This would not only ease but also speed up the process of establishing a close working cooperation between these organizations and integrate them, including with their existing networks, into the Task Force.

[111] By talking to both Mr. Geskó and Dr. Krémer, it learned that they have already worked together in the past on some mediation cases.

Kisebbségi Mediációs (korábbi nevén Bar Kochba) Oktatási, Kutatási, Kulturális Tanácsadó Intézet / Institution of Minority Mediation (formerly called Bar Kochba) Education, Research, Culture and Counseling[112]

This NGO was established in 1993 by five private individuals with the aim to improve the quality of mediation via research, education, and various trainings. The Institution provides mediation services in minority rights related conflicts in the following areas: public education, higher education, governmental and civil sector, and trade and commerce. According to the organization, mediation does not and should not substitute or replace legal sanctions; instead, these two should be complementary. Furthermore, one of the additional and most important benefits of mediation besides its potential to transform prejudiced public perception is that mediation may also contribute to the prevention of abuses by lowering the likelihood of their reoccurrence.

According to the director of the organization, the current political leadership lacks the will to support mediation in minority rights related conflicts and virtually no lobbying activity is being done in this field. Moreover, mediators specializing in minority conflicts do not get professional recognition at all, or only on a very minimal level. Further, compared to mediation in the field of trade and commerce which is very profitable, minority-related mediation does not provide nearly as much financial profit. This also implies that the social benefits this service would provide are not being recognized on a wide-enough political level. For these reasons, it is clear that the current political leadership lacks the will to provide support (both moral and

[112] The organization is under the leadership of Dr. habil Magdolna Barcy, one of the founding mothers of the organization, whom I had the pleasure to meet and interview informally in April, 2008. The following section contains information which I learned from her during this session. Moreover, Dr. Barcy also teaches and simultaneously serves as the Director of the Sociology Department's Institution for Social Studies at Eötvös Loránd Tudományegyetem (ELTE), which is the most prestigious university of Hungary.

financial) for this specific type of mediation. The leaders are reluctant to invest resources into the development and improvement the quality of this service, nor do they provide support for the NGOs and other actors that would willingly provide it. Consequently, the Institution on Minority Mediation is currently also struggling with funding; for this reason, their activities and success-rate are quite limited. Thus, unfortunately, overall, the institution is not really active at the moment. In my opinion, this situation is an extreme waste of talent, knowledge, and expertise.

Moreover, the leadership of this Institution also has a high level of commitment and dedication towards mediation in this specific area and believes that mediation would be beneficial and would contribute to the establishment of a more fair, just and stable society. It is thus extremely crucial that when establishing the Task Force, the input of the Institution's leadership be taken into serious consideration and be consulted about joining the Task Force, including exploring the possibilities of a close-cooperation with it.

From the above, the conclusion can be drawn that currently, in Hungary, with proper planning and coordination, minority rights related conflict mediation could be put into practice in a relatively short period of time. Available resources already exist; therefore, the political leadership would need to invest only a minimal amount of resources. The potential benefits that can be gained through mediation would not only remedy the situation but also ensure an enduring change. Thus, it is very worthwhile and beneficial to invest in minority rights related conflict mediation.

CONCLUSION

Although officially recognized as a lawful means of dispute resolution, mediation in general is still in its preliminary stages in Hungary. Compared to other types of mediation, such as mediation that takes place in the field of trade and commerce, minority rights related conflict mediation lacks governmental support and, consequently, is significantly underdeveloped. However, there is a pressing need for this type of mediation to be developed and employed immediately.

Overall, there has been some progress and the government of Hungary is making an effort to improve the situation of the Roma communities; however, the measures employed are reacting to the problems but are not adequate enough to function as enduring solutions or to prevent re-emerging infringements and conflicts from happening. Therefore, to most effectively redress the most severe minority issues, current governmental efforts aiming to improve the situation of the Roma minorities should be complemented by mediation.

According to the model I propose, mediation should be added to the applicable tools of the Ombudsman for National and Ethnic Minority Rights with the mandate to mediate certain minority rights related conflicts between governmental actors or public service providers and individuals, and that the Task Force on Minority Conflict Mediation should be established within the Ombudsman's Office enabling it to mediate minority rights related conflicts between individuals in a structural, institutional manner. This process, I believe, would be the most effective way in which minority rights mediation could be employed in Hungary.

Moreover, there are already existing resources; therefore, with careful planning and coordination, this model could be put into practice within a very short period of time. Therefore, I urge governmental leaders to take action and invest the necessary resources to enable this

model to be put into practice. Based on the various benefits of mediation and the potential social gain, investing time, energy and resources into minority rights related conflict mediation is very sensible.

If Hungary would succeed in institutionalizing minority rights related conflict mediation, it could serve as a model for other countries in the region. This type of minority conflict resolution instrument not only would contribute to the reduction of strategic and institutionalized discrimination of the Roma minority in Hungary, thereby aiding the process of their reintegration into society but, at the same time, it would also enable the government to implement human rights standards in a more effective manner.

Furthermore, the application of minority rights related conflict mediation has very important implications for human rights in general. With regards to collective rights, mediation could compensate for some of the limitations of litigation. Litigation cannot adequately address disputes where large numbers of groups are involved because litigation operates on very specific facts and on a case-by-case basis after the violations have already taken place. However, mediation, for example in the form of group-mediation, could complement litigation and these two types of dispute settlement mechanisms could mutually contribute to the realization of collective rights in practice.

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Lecutres

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