



**STRATEGIC LITIGATION AND SEGREGATION IN THE EDUCATION SYSTEM:
THE UNITED STATES AND CENTRAL AND EASTERN EUROPE**

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ABSTRACT

Strategic litigation is a part of public interest law that uses legal strategies with the aim of bringing about social change. It is a novelty in the legal systems of Central and Eastern Europe, but is becoming a relevant factor in the struggle for change in the social landscape, especially with respect to the Roma minority's struggle against widespread prejudices and human rights violations. In this context, the thesis focuses on the U.S. Supreme Court case *Brown v. Board of Education of Topeka* - a landmark case that ended the racial segregation in public schools and to which the emergence of public interest law is usually dated; and the European Court of Human Rights case *D.H. and Others v. the Czech Republic* - an important achievement in public interest lawyers' struggle to bring about social change for members of the Roma community. This thesis aims to point out how the lessons from the U.S. strategic litigation experience in the *Brown* case can be useful as an instructive example for further development of strategic litigation in the countries of Central and Eastern Europe.

INTRODUCTION

Strategic litigation is one type of human rights action, within public interest law, used as a very powerful instrument for social change and promotion of human rights¹. Its development is connected with the expansion of the international instruments for the protection of human rights after World War II and subsequently with the rise and influence of the social movements in the United States in the late 1950's.

Strategic litigation is defined as a legal action that seeks to bring about a change in social reality through the use of the courts beyond the individual case². Another important aspect of strategic litigation is that it raises awareness of issues of public concern among the general public³. In this context, strategic litigation is very interesting from the aspect of the interaction and influence between society and law – on the one hand, strategic litigation is stimulated by the need for social change in different aspects of life, while at the same time, strategic litigation itself, most significantly its defined aims and achievements, helps to bring to the attention of the general public issues of public interest that, until that, have been concerns of only a small group of a people (minority)⁴.

This correlation is especially accentuated in societies with a strong and well-developed 'civil society'. In contrast, societies in which this sphere is not developed or, as is the case in many post-Communist countries in Central and Eastern Europe (hereinafter: CEE), is in initial stages of progress, it is often difficult to articulate the concerns of people that do not represent the

¹ KNOWING YOUR RIGHTS AND FIGHTING FOR THEM: A GUIDE FOR ROMANI ACTIVISTS 165 (European Roma Rights Center 2004)

² *Id.* at 166

³ PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS 82 (Edwin Rekosh, Kyra A. Buchko & Vessela Terezieva eds., Public Interest Law Initiative 2001)

⁴ *Id.*

majority. As Goldston quite rightly notes, during Communism the public interest was considered to be represented by the state and the idea of “nongovernmental vision of public interest through law was impossible.”⁵ Thus, prior to 1990 strategic litigation was almost unknown in the CEE countries⁶.

Its origins are connected with the social movements in the 1950s, primarily those of African Americans and their struggle for equality in the United States. One early example of strategic litigation is the benchmark case *Brown v. Board of Education of Topeka, Kansas*⁷ (hereinafter: *Brown case*), in which the U.S. Supreme Court ended racial segregation in public schools. The emergence of public interest law is usually connected with this case.⁸

Although a relatively new phenomenon in the legal practice in the CEE region, strategic litigation, nonetheless, has growing importance, mostly due to the expansion of non-governmental, public interest organizations, as well as the awaking of public opinion to the present social problems. Because of its rapidly increasing usage and significance in the CEE region in addressing many issues of social importance⁹, strategic litigation presents an interesting issue for analysis. The Roma minority’s struggle in combating segregation in public schools presents one significant filed in which strategic litigation is used in the CEE countries in the post-Communist era. The leading case in this field is *D.H. and Others v. the Czech Republic*¹⁰ (hereinafter: *D.H. case*) decided by the European Court of Human Rights (hereinafter: ECtHR)

⁵ James A. Goldston, *Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges*, 28 HUM. RTS. Q. 492, 493 (2006)

⁶ *Id.* at 492

⁷ *Brown v. Board of Education of Topeka, Kansas* 347 U.S. 483 (1954) (hereinafter: *Brown case*)

⁸ Helen Hershkoff, *Public Interest Litigation: Selected Issues and Examples*, at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf> (last visited March 24, 2009)

⁹ GOLDSTON, *supra* note 5, at 495

¹⁰ *D.H. and Others v. The Czech Republic*, App. No. 57325/00, judgment of 13 November 2007 (hereinafter: *D.H. case*), available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009)

in 2007. Because the challenges that the public interest lawyers are facing now in the CEE region are similar to those that existed in the time when the *Brown* case was decided¹¹, it will be instructive to see how the experience from the early development of strategic litigation in the United States can contribute to the development of strategic litigation in the CEE countries, especially in the Roma minority struggle for equality.

The analysis will focus on the *Brown* case, because being a benchmark case in this field it has marked a new era in litigation and has established certain criteria for successful litigation. It will examine what strategic litigation criteria were established by the *Brown* case and how they can be applied in the CEE context to tackle the problem of segregation of Romani children in public schools, using the example of the *D.H.* case. The analysis will, moreover, look at the similarities and differences in the U.S. and CEE approach to public interest law issues.

There are a number of studies dealing with different aspects of the *Brown* case¹² – its factual and historical context, the legal strategies employed before the courts, its impact and implementation, public reactions to it, as well as its contribution to the enactment of the antidiscrimination laws in the 1960's in the United States. For instance, Jack Greenberg explains how the *Brown* case was prepared, fought and won, from the perspective of a lawyer engaged on the case.¹³ Another interesting source is a collection of essays on the National Association for the Advancement of

¹¹ See PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 82

¹² See e.g. DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (Oxford University Press 2004); RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION (Austin Sarat ed., Oxford University Press 1997); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (Vintage Books 2004); JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (Oxford University Press 2002)

¹³ JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT (Twelve Tables Press 2004)

Colored People's campaign for racial justice in the United States, edited by Peter F. Lau.¹⁴ These essays provide a useful insight about the historical context and the legal background of the case as well as about its impact.

Studies about strategic litigation in Europe are comparatively smaller given its relatively recent development. However, useful and detailed information can be found in the manuals for legal (human rights) activists published by non-governmental, public interest organizations.¹⁵ Another good source are articles¹⁶ written on the impact of the *D.H.* case which provide a good insight into the strategic litigation employed to fight discrimination against the Roma minority. Although references are made to the U.S. strategic litigation experience, and especially to the *Brown* case, the analysis is mostly focused on the current state of strategic litigation in the CEE countries in the context of Roma minority struggle against discrimination.

This thesis will look at the two cases - the *Brown* and the *D.H.* – from a more comprehensive perspective and will undertake a more direct comparison. The criteria for successful litigation established in the *Brown* case will be analyzed using the knowledge established in this field and assessment of their applicability to the CEE context will be made.

¹⁴ FROM THE GRASSROOTS TO THE SUPREME COURT: BROWN V. BOARD OF EDUCATION AND AMERICAN DEMOCRACY (Peter F. Lau ed., Duke University Press Durham 2004)

¹⁵ See KNOWING YOUR RIGHTS AND FIGHTING FOR THEM: A GUIDE FOR ROMANI ACTIVISTS, *supra* note 1; PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS *supra* note 3; STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE: FROM PRINCIPLE TO PRACTICE: A MANUAL ON THEORY AND PRACTICE OF STRATEGIC LITIGATION WITH PARTICULAR REFERENCE TO THE EC RACE DIRECTIVE (European Roma Rights Center, The International Centre for the Legal Protection of Human Rights & Migration Policy Group 2004)(hereinafter: STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE); SEPARATE AND UNEQUAL: COMBATING DISCRIMINATION AGAINST ROMA IN EDUCATION (Edwin Rekosh & Maxine Sleeper eds., Public Interest Law Initiative 2004)

¹⁶ GOLDSTON *supra* note 5; James A. Goldston, *Ending Racial Segregation in Schools: The Promise of DH*, 1 ROMA RTS. J. OF THE EUR. ROMA RTS. CENTER 1 (2008); Edwin Rekosh, *Who defines the public interest? Public interest law strategies in Central and Eastern Europe*, 1 PILI PAPERS (2005); Lilla Farkas, *The Scene After Battle: What is the Victory in D.H. Worth and Where to Go From Here?*, 1 ROMA RTS J. OF THE EUR. ROMA RTS. CENTER 52 (2008); Gemma Hobcraft, *Roma Children and Education in the Czech Republic: DH v Czech Republic: Opening the Door to Indirect Discrimination Findings in Strasbourg?*, 2 EUR. HUM. RTS. L. REV. 247 (2008)

This topic will be approached from the analytical and comparative perspective. The first chapter expands briefly on the definition and interpretation of strategic litigation in the relevant literature and provides a general overview of its origins and development in the United States and in the CEE region. In the next section of the first chapter methods, characteristics and effects of strategic litigation are described. In the last section of the first chapter public interest law organizations will be presented, with a special focus on the two leading organizations in the United States and the CEE region in combating the inequality and discriminations of minorities (the African Americans in the United States and the Roma minority in the CEE region). The second chapter gives an assessment of strategic litigation in the United States using the example of the Brown case and identifies certain criteria established by strategic litigation experience in this case. The second section of this chapter analyses the CEE strategic litigation experience based on the example of *D.H. and Others v. the Czech Republic* case.

1 STRATEGIC LITIGATION

This part of the thesis explains meaning and interpretation of strategic litigation and provides a general overview of its origins and development in the United States and the CEE region. Furthermore, it gives a brief account on the methods, characteristics and effects of strategic litigation, with the aim of highlighting its basic procedural steps and requirements for successful development and presentation of the case before the courts.

1.1 STRATEGIC LITIGATION: DEFINITION, MEANING AND ORIGINS

Strategic litigation is a tactic of public interest law organizations designed to “bring about a change in social reality through the use of the law courts.”¹⁷ It is typically a human rights action within the sphere of public interest law¹⁸, which can be employed in a battle against various social injustices. This can be in a variety of fields, such as education, employment, housing, health care, and political participation. Public interest law is a broader term, encompassing other types of public interest activities, such as human rights monitoring, campaigning for the public interest, clinical legal education, public education programs, and legal aid for indigenous peoples.¹⁹

¹⁷ KNOWING YOUR RIGHTS AND FIGHTING FOR THEM: A GUIDE FOR ROMANI ACTIVISTS, *supra* note 1, at 166

¹⁸ “Public interest law is a term that became widely adopted in the United States during and after the social turmoil of the 1960s. It built on a tradition exemplified by Louis Brandeis, who, before becoming a U.S. Supreme Court justice, incorporated advocacy for the interest of the general public into his legal practice. In a celebrated 1905 speech, Brandeis decried the legal profession, complaining that ‘able lawyers have to a large extent allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people.’” *See* PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at. 1

¹⁹ *Id.* at 10

It is impossible to analyze strategic litigation without reference to the emergence and development of public interest law. “The term ‘public interest law’ originally comes from the United States” and was created to describe public interest lawyers’ endeavors to correct “the influence of powerful economic interests in the legal system.”²⁰ While public interest does not represent a specific legal field, it does symbolize legal action taken in “fighting for the little guy.”²¹ The notion comes from determining “whom the public interest lawyers were representing, rather than what matters they would work on.”²²

Public interest law, and strategic litigation as an aspect of it, is a relatively new phenomenon in the CEE region that started to develop after the demise of Communism in those countries.²³ The idea is that the articulation and defense of public interest are connected with a developed public sphere:

In the post-socialist countries, there is another aspect of ‘public interest law’ that is critical to understanding how the term has come to be used in that region. The notion of public interest law assumes the existence of a ‘public sphere’, as understood by thinkers such as Jürgen Habermas, or – to use the term popularized by Vaclav Havel – ‘civil society’. The essence of this idea is that society includes a variety of formal and informal, interlinked, self-organized associations that somehow connect the private and public spheres. The idea that private organizations should take active part in public discourse and processes sounds unremarkable to Western ears, but it stands in marked contrast to the socialist legal order, in which the public sphere was coextensive with the state.²⁴

It should be noted, however, that public interest as such was not completely absent from the socialist societies – it was the duty of the public prosecutor to defend the public interest.²⁵

Regarding this difference of understanding public interest in Western and post-Communist

²⁰ REKOSH, *supra* note 16, at 3, 5

²¹ *Id.*

²² PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 1

²³ GOLDSTONE, *supra* note 5, at 492-493

²⁴ PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 2

²⁵ REKOSH, *supra* note 16, at 10; “But, to the extent that general public interests were taken into account, they were determined at the top in a non-democratic process, implemented and enforced in the courts by the all-powerful procuracy” *Id.*

societies, Rekosh argues that the key difference lies in the way public interest law is developed and carried out. For the U.S. public interest lawyers, he explains, the main concern has been “rectifying imbalance in how the work of lawyers favored the powerful economic interest in society.” He goes on to note that, in contrast, the main issue for the public interest activists in CEE countries is the creation and development of the public sphere as a key element of democracy.²⁶

Despite its recent appearance, the notion of public interest law – and more precisely strategic litigation – is becoming more and more important in the CEE region with the increased development of non-governmental, public interest law organizations.²⁷ Goldston claims, further, that one of the challenges that lawyers in this region have to overcome is the Communist legacy of widespread mistrust and disbelief in lawyers and the judicial system in general. Furthermore, “victims of human rights violations are often hesitant to register formal complaints, press charges, or seek redress.”²⁸ Assessing the achievement of public interest law so far, Goldston points out that the most visible impact has been realized in the field of racial discrimination, especially in relation to the Roma minority in this region.²⁹

Therefore, it could be concluded that the public interest law, and, thus strategic litigation as an aspect of it, is rapidly becoming one of the important aspects of the legal systems in the CEE region. Given its recent appearance it is all the more relevant to underline its basic elements so as to see what makes it successful.

²⁶ *Id.* at 8

²⁷ GOLDSTON, *supra* note 5, at 497

²⁸ *Id.* at 497

²⁹ *Id.* at 503

1.2 METHODS, CHARACTERISTICS AND EFFECTS OF STRATEGIC LITIGATION

Public interest lawyers typically use a three-step method in deciding whether to use strategic litigation to address a particular issue through the courts:³⁰ defining the litigation goal, choosing the right defendant,³¹ and, if there is a choice of forum, selection of the most appropriate one.³² A clearly defined goal and a well thought-out list of possible outcomes will make it easier to determine what kind of strategy should be used in a particular case. For a strategic case to be successful, regardless of the aim, the defendant, or the selected forum, it is important for lawyers to use concrete examples from domestic and international case-law, to creatively make legal arguments, to work closely with non-governmental agencies, and to use outside expertise and analysis.³³ In some strategic cases, it is also necessary to educate the court, in cases where judges might not have relevant or sufficient knowledge on the relevant international law or might be unwilling to take the case because of novelty or lack of precedent.³⁴ It should be emphasized, however, that “the question of resources is the fundamental one, an issue that underlines every case, campaign, and the overall mission of a public interest organization.”³⁵

One of the main characteristics of strategic litigation is that, in contrast to civil law cases where a lawyer represents only his client’s interests, strategic cases focus on achieving broader social impact. In other words, their aim is “to end a degrading or humiliating practice for a group of

³⁰ PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 87-88

³¹ “Selecting the proper defendant in a public interest lawsuit is not always easy. This is especially true in cases that try to hold the state liable for a wrong committed by state officials. For example, who should be sued for wrongful behavior of the police in the particular case: the Ministry of interior, a subdivision of it, a local police precinct, or individual officials?” *Id.* at 88

³² In some cases it could be possible to choose the forum before which to bring the test case: “For instance, where are similar cases in different geographical locations, one particular district or municipality may offer a better chance of success”. *Id.* at 89

³³ *Id.* at 92-100

³⁴ *Id.* at 94

³⁵ *Id.* at 86

people, move a government to adopt or amend human rights-based policies, or otherwise reshape the social and legal landscape.”³⁶

Strategic litigation aims at bringing social change in different ways. The means used varies, depending on the test cases used and the particular violation or discriminatory practice it seeks to eradicate. Sometimes it seeks to compel the authorities to enforce existing laws that are being ignored and thus to fulfill their duties to the citizens.³⁷ “For example, Green Action, an environmental organization in Croatia”, has successfully brought a case before the courts to compel the relevant authorities to “stop issuing mining permits to companies whose quarries are destroying property.”³⁸

In other situations, strategic litigation can be aimed at changing existing law.³⁹ For example, in the ECtHR case *Norris v. Ireland*, the applicant successfully challenged the prohibition of homosexual conduct in the Irish criminal law.⁴⁰ Furthermore, its objective can be to prompt legislative or judicial reform⁴¹ by pointing out the problems in existing legislation. One example comes, again, from the European Court of Human Rights case-law - in the case of *Assenov v. Bulgaria*, the Court found that the Bulgarian authorities had violated the prohibition of torture, inhuman or degrading treatment or punishment from Article 3 of the European Convention on Human Rights⁴² (hereinafter: ECHR). The said judgment prompted changes in the Bulgarian

³⁶ KNOWING YOUR RIGHTS AND FIGHTING FOR THEM: A GUIDE FOR ROMANI ACTIVISTS, *supra* note 1, at 166

³⁷ PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 107

³⁸ *Id.*

³⁹ STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE, *supra* note 15, at 36

⁴⁰ *Id.*

⁴¹ PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 106-109

⁴² Article 3 of the Eur. Conv. on H.R. reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

law: “Criminal Procedure Code was amended to limit the discretion of prosecutors” and “to establish a maximum time of pretrial detention.”⁴³

Apart from these particular effects, every strategic case has the important effect of raising public awareness on social issues, changing public attitudes and empowering vulnerable groups, supporting the rule of law, documenting injustice and promoting government accountability.⁴⁴

Thus, even if the outcome of a strategic case is unsuccessful in the particular case, this does not necessarily mean that litigation has failed; “pressure on the system resulting from public education may be sufficient to achieve the necessary . . . changes.”⁴⁵

An unfavorable result may have different impacts depending on the context of the case. For instance, the Bulgarian Helsinki Committee brought an action against the owner of a private café in the town of Plovdiv for refusing to serve a Roma customer, as well as against the municipality for not sanctioning such a discriminatory practice. While the case was still pending, the public interest aim was achieved, because the café in question started serving members of the Roma community.⁴⁶ Another example comes from Slovakia, where the WOLF Forest Protection Movement’s claim to be granted standing in the administrative proceedings about the forest management plans in Slovakia was rejected by the Supreme Court. Nonetheless, the case achieved an important goal as it helped establish “an expansive interpretation of the criteria for obtaining status as a party in administrative proceedings in Slovakia”.⁴⁷

⁴³ PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 97-98

⁴⁴ STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE, *supra* note 15, at 37

⁴⁵ PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 109

⁴⁶ *Id.* at 109

⁴⁷ *Id.* at 108-109

As strategic litigation is usually an expensive, slow, and complex process⁴⁸ there are different views on whether it is the best tactic for achieving social change. Some commentators argue that it is the critical element for reshaping the social landscape and is often the only solution available if real progress is to be realized. They argue that although “achieving the desired goal can be elusive, taking the case to the court may be the best or only tactic available.”⁴⁹ In contrast, other authors contend that strategic litigation is a last resort: “slow, expensive and uncertain it is a recourse generally worth pursuing only as a complement to – not a substitute for – more explicitly political actions.”⁵⁰ Nonetheless, these opposing views share a common understanding that litigation cannot be used alone; it is only one part of the more comprehensive and complex process and that it needs to be accompanied by other activities.⁵¹

Therefore, the chosen strategy is the core aspect of litigation, but it in itself is not the guarantee for success. As was aforementioned, strategic litigation needs to be followed by range of different activities that raise public awareness of the specific issue and help implementation of the court’s ruling. In this sense, special importance needs to be attached to the support of local community. This will be shown in the second chapter based on the example of the two cases that dealt with the segregation in public schools in the United States and the CEE region.

⁴⁸ *Id.* at 110

⁴⁹ *Id.*

⁵⁰ James A. Goldston & Ivan Ivanov, *Combating Segregation in Education through Litigation: Reflection on the Experience to Date*, in SEPARATE AND UNEQUAL: COMBATING DISCRIMINATION AGAINST ROMA IN EUROPE, *supra* note 13, at 145, 164; they argue in favor of ‘direct action’: “An example comes from Bulgaria, where over the past few years a number of Romani advocates groups, working with the Open Society Institute, have achieved integration of previously segregated schools, not by filing lawsuits, but by hiring additional teachers, renting buses, and organizing previously excluded parents and children to attend classes in newly mixed schools.” *Id.*

⁵¹ Such as, for example, grassroots campaigns, lobbying, monitoring, public education, or a combination of those activities, *see* PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 110

1.3 PUBLIC INTEREST ORGANIZATIONS IN THE UNITED STATES AND THE CEE REGION

Public interest law organizations are often key actors in using strategic litigation to bring about social change and help indigenous, disadvantaged, and marginalized people otherwise unable to bring their cases before the court.⁵² In other words, public interest law organizations use strategic litigation “as an instrument to promote the rights and advancement of disadvantaged populations and to further social justice.”⁵³ These organizations are a relatively new phenomenon in legal systems – their appearance is connected with the rise of civil rights movements, especially with the African Americans struggle for equality in the early parts of the twentieth century in the United States.

The following section provides a short overview of the two public interest organizations from the United States and the CEE region that are using strategic litigation as a tool for empowering marginalized groups of people: the National Association for the Advancement of Colored People and the European Roma Rights Center. Both organizations seek to advance full equality for minorities in political, economic, social and cultural aspects of life. The National Association for the Advancement of Colored People is specifically concerned with the African Americans struggle for equality in the United States, while the European Roma Rights Center aims at fighting anti-Roma racism and promoting the advancement of Roma minorities in their respective communities within the CEE countries. Special attention is given to these two organizations because of their achievement in the struggle against segregation in the education

⁵² Because of the general distrust in legal system, costs of legal services and courts proceedings, *see* GOLDSTON, *supra* note 5, at 497

⁵³ STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE, *supra* note 15, at 35

system in the United States and in the CEE region. The specific cases, and their similarities and differences will be presented in the second chapter.

National Association for the Advancement of Colored People

African Americans' struggle against segregation and discrimination started to have more precise and definite objectives and contours at the beginning of the twentieth century through the activities of the National Association for the Advancement of Colored People (hereinafter: NAACP), one of the first and most important public interest organizations in the United States. It was created in 1909 with the object of seeking "equal rights and opportunities for all," as a reaction to a lynching in Springfield, Illinois.⁵⁴ The NAACP organized people who were willing to take a risk and voice their claims openly against the discriminatory practices in their communities.⁵⁵ It was at the forefront of the U.S. civil rights movement,⁵⁶ leading the struggle to obtain the full civil rights for African Americans. The Legal Defense and Educational Fund Inc. (LDF) was created in 1940⁵⁷ and handled legal aspects of the NAACP.

The LDF led one of the first public interest litigation campaigns against the discrimination and segregation prevalent in public schools. Initially its activities were mostly oriented around combating segregation in higher education.⁵⁸ At the same time, though, it did not limit its

⁵⁴ GREENBERG, *supra* note 11, at 13

⁵⁵ *Id.*

⁵⁶ *See* PURSUING THE PUBLIC INTEREST, A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 84

⁵⁷ The first director of the LDF was Thurgood Marshall, later to become a Justice of the U.S. Supreme Court, *see* GREENBERG, *supra* note 11, at 17

⁵⁸ E.g. *Pearson v. Murray*, 169 Md. 478 (1936): requiring the state of Maryland to admit the plaintiff, African American, to the white law school because there was no law school for African Americans. Thus, the precedent was established that "when there was no comparable black institution, blacks have to be admitted to the white school", *see* GREENBERG, *supra* note 11, at 63

activities only to issues regarding education, but also tackled issues of “teachers’ salaries, voting, housing, transportation, criminal cases, and other subjects.”⁵⁹

One of the LDF’s biggest achievements was the landmark case *Brown*, in which the U.S. Supreme Court declared that racial segregation in education was unconstitutional.⁶⁰ The factual and legal background of the case, as well as the strategies employed by the LDF lawyers will be dealt with in the second chapter of this thesis. LDF is still active and nowadays deals with issues of education, voter protection, economic and criminal justice.⁶¹

European Roma Rights Center

The European Roma Rights Center (hereinafter: ERRC) is an international public interest law organization established in 1996 and based in Budapest. Through different types of activities, such as “strategic litigation, international advocacy, research and policy development and human rights training”, it aims at fighting anti-Roma racism, widespread prejudices and discrimination of Romani people and at raising awareness of the human rights problems of Romani communities in Europe.⁶²

One of the most important activities of the ERRC is strategic litigation, which the organization has employed in various cases of human rights abuse: “equal access to government, education, employment, health care, housing and public services”.⁶³ Its Legal Defense Program provides resources for local lawyers or national public interest law organizations to assist victims of

⁵⁹ GREENBERG, *supra* note 11, at 62

⁶⁰ PURSUING THE PUBLIC INTEREST, A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 85

⁶¹ For more information on LDF activities *see* <http://www.naacpldf.org/content.aspx?article=1133> (last visited March 25, 2009)

⁶² *See* http://www.errc.org/About_index.php (last visited March 25, 2009)

⁶³ *Id.*

human rights abuse before the domestic courts.⁶⁴ Moreover, the ERRC also takes cases before international tribunals where necessary, mostly before the ECtHR or appropriate UN treaty bodies⁶⁵. When determining when and how to use strategic litigation, the ERRC tries to assess whether the case involves “an issue of general public importance with respect to the protection of Roma” and concerns especially grave violation; quality of legal representation and possibility of proposed litigation; and whether the case could have broader impact and serve an educational purpose.⁶⁶

Some of the most common problems encountered by the ERRC in its work on eradicating discrimination and human rights violation against Romani people are the difficulties in obtaining proof of discrimination. This is especially problematic in cases of indirect discrimination, as well as the possibility that the plaintiffs might decide to withdraw from the case due to the victimization and constant threats from the community in which they live.⁶⁷

One of the ERRC’s biggest achievements, so far, is the *D.H.* case, in which the ECtHR established that the Romani children in the Czech Republic had been indirectly discriminated against by placement in the special schools designed for children with learning disabilities. The factual and legal background of the case, the strategies employed by the EERC lawyers, as well as its similarities with the *Brown case*, will be dealt with in the second chapter.

⁶⁴ See STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE, *supra* note 15, at 79

⁶⁵ *Id.*; e.g. judgments of Eur. Ct. H.R. in cases concerning violation of human rights of Roma people: *Moldovan and Others v. Romania*, App. Nos. 41138/98 and 64320/01, judgment of 12 July 2005; *Nachova and Others v. Bulgaria*, App. Nos. 43577/98 and 43579/98, judgment of 6 July 2005; *Balogh v. Hungary*, App. No. 47940/99, judgment of 20 July 2004; *Connors v. the United Kingdom*, App. No. 66746/01, judgment of 27 May 2004; *Assenov v. Bulgaria*, App. No. 24760/94, judgment of 28 October 1998 available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009); for more information see http://www.errc.org/Judgements_index.php (last visited March 25, 2009)

⁶⁶ See STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE, *supra* note 15, at 79

⁶⁷ *Id.* at 79-81

2 STRATEGIC LITIGATION EXPERIENCE IN THE CONTEXT OF SEGREGATION IN EDUCATION IN THE UNITED STATES AND IN THE CEE REGION

2.1 THE U.S. EXPERIENCE

This part of the thesis analyses strategic litigation experience from the African Americans' struggle for integration in public schools in the United States. It will take as an example the *Brown* case, decided on 17 May 1954, in which the U.S. Supreme Court declared that racial segregation in public schools was unconstitutional. It is one of the most important cases in the African Americans' long quest for equality in the United States.

Brown's importance does not lie solely in the substantive or merits issue that was decided. It is also significant because the emergence of public interest law is often dated to this case⁶⁸ and it is one of the first examples of the use of strategic litigation to achieve profound social change. As such, it will be an instructive example for identifying the criteria for successful litigation in the issue of desegregation in the education system. However, before this analysis, it is necessary to provide a brief account of the historical context and factual background of the case, as well as a brief description of the U.S. Supreme Court holding.

Historical and factual background

Racial segregation in public schools was widespread practice in the United States prior to the *Brown* case:

⁶⁸HERSHKOFF, *supra* note 7

In 1951, seventeen southern and boarder states required the racial segregation of public schools, and four others – Arizona, Kansas, New Mexico, and Wyoming – permitted local districts to impose it. Segregated schools have prevailed in the District of Columbia since the Civil War. Americans who grew up prior to the 1950's had assumed that such practices were all but immutable.⁶⁹

Schools for African American children were far inferior in respect to both physical facility condition and curriculum.⁷⁰ J.T. Patterson argues that the *de facto* segregation that existed in northern states, like in Kansas where the *Brown* case would eventually spring up, was “publicly sanctioned and as intentional” as *de jure* segregation in the south.⁷¹ He further explains the reason for *de facto* segregation: the U.S. public educational system depended primarily on the support of tax payers. This had the result that the separate schools reflected the economic and social conditions of the respective white and African Americans families. White families who were better off would often move to wealthier cities and regions that provided better education to avoid sending their children in the schools for low-income families (which were attended primarily by African American children). Other factors that exacerbated *de facto* segregation included zoning and district demarcation, school locations, and school bus routes.⁷²

The *Brown* Decision

The so-called school Segregation Cases, which would become known as *Brown*, were comprised of several cases⁷³ coming from the States of Kansas, South Carolina, Virginia and Delaware. The cases were brought by LDF lawyers challenging the prevailing ‘separate but equal’⁷⁴ doctrine.

⁶⁹ PATTERSON, *supra* note 10, at xiv–xvi

⁷⁰ “In 1940, public spending per pupil in southern black schools had been only 45 percent of that in white schools. In South Carolina, Georgia, and Alabama it was only 33 percent; in Mississippi, it was 15 percent.” *id.* at xvi–xvii

⁷¹ *Id.* at xx

⁷² *Id.*

⁷³ Oliver Brown, et al. v. Board of Education of Topeka, Shawnee County, Kansas, et al.; Harry Briggs, Jr., et al. v. R.W. Elliot, et al. (South Carolina case); Dorothy E. Davis, et al. v. County School Board of Prince Edward County, Virginia et al.; and Francis B. Gebhart, et al. v. Ethel Louise Belton, et al. (Delaware case). *See more* GREENBERG, *supra* note 11, at 123

⁷⁴ This doctrine was established in the U.S. Supreme Court decision Plessy v. Ferguson, 163 U.S. 537 (1896)

Under this doctrine, equality is achieved when the races are provided with substantially equal, but separate public facilities (such as public toilets, water fountains, transportation, schools). In *Brown*, LDF lawyers decided to tackle one of these facilities, asking the Court to stop the race-based segregation in public schools. The facts and the local circumstances of those cases were quite different, but they all presented the same legal question: is it constitutional that public schools operate on a racially segregated basis?⁷⁵ In the Kansas, South Carolina and Virginia cases a federal district court denied the plaintiffs' claim on the basis of separate but equal doctrine. In the fourth case, the Delaware Supreme Court stuck to that doctrine as well, but "ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools."⁷⁶

The U.S. Supreme Court in this case had to answer the question "does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"⁷⁷ The answer was affirmative: "in the field of public education, the doctrine of 'separate and equal' has no place. Separate educational facilities are inherently unequal."⁷⁸ The Court stressed that the consideration should not be given merely to the equality of tangible factors, but to the effect of segregation on public education.⁷⁹ The Court concluded that "the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of

⁷⁵ BELL, *supra* note 10, at 16

⁷⁶ Brown case, *supra* note 7

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”⁸⁰

The Court did not decide on the remedy for the unconstitutional practice of the racial segregation in public schools in the 1954 case because of the “wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases present problems of considerable complexity.”⁸¹ Instead, it made this decision one year later in the second decision in the *Brown* series (*Brown II*),⁸² when it decided to return the cases to the district courts for enforcement.⁸³ The implementation of the case was a slow, complex, and difficult process, due largely to the long history of segregation and negative attitude of many towards the integration⁸⁴ – in some commentators’ views, these are on-going topics for debate even now.⁸⁵ For instance, in Prince Edward County, Virginia between 1959 and 1964, all public schools were closed by the county to avoid compliance with the *Brown*.⁸⁶ Nevertheless, the *Brown* was “a social, political, and cultural event that presented – as it still does today – a

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 349 U.S. 294 (1955)

⁸³ BELL, *supra* note 10, at 18

⁸⁴ PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 85; “...the South succeeded for then years in largely evading and defying the Supreme Court’s directive to end racial segregation in public schools...A decade after *Brown*, not even one in fifty African American pupils was attending classes with whites in the eleven states with the largest proportion of black residents. Meanwhile, the rest of the nation looked on not overly concerned, preferring to see the South’s stalling tactics as a regional problem and turning a blind eye to the depth and virulence of their own uncoded racism and the *de facto* segregation in their urban ghettos”, *see* KLUGER, *supra* note 10, at 755-756

⁸⁵ “At best, the *Brown* precedent did no more that cast a half-light on that resistance, enough to encourage its supporters but not bright enough to reveal just how long and difficult the road to equal educational opportunity would prove to be.” *see* BELL, *supra* note 10, at 19

⁸⁶ Kara M. Turner, *Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and, “Brown”*, 90 Va. L. Rev. 1667, 1668 (2004)

powerful symbol of the possibilities and limitations of American democracy and a reference point for ongoing battles over questions of segregation, schools and equality”.⁸⁷

Strategy employed in the Brown case

In the beginning of forming a strategy for those cases, lawyers had to decide whether to base cases on separate-but-equal or anti-segregation theory; at first, the emphasis was on equality - providing equal conditions for segregated public schools, but later on the aim was firmly set on eradication of segregation and full integration of the two races in public schools⁸⁸. At the same time within the anti-segregation theory dilemma arose whether to challenge segregation *per se*, as established in the Plessy v. Ferguson case or to tackle this issue from the point of apparent inequality in conditions and equipment of segregated public schools.⁸⁹

The strategic innovation was that, apart from the pure legal arguments, the cases were supported by scientific studies on detrimental effect that segregated schools had on children: segregation *per se* implied a belief that children assigned to separate schools are not fit to attend the regular schools.⁹⁰ Studies presented showed that segregation “impaired the self-esteem of black children

⁸⁷ FROM THE GRASSROOTS TO THE SUPREME COURT: BROWN V. BOARD OF EDUCATION AND AMERICAN DEMOCRACY, *supra* note 12, at 1

⁸⁸ Greenberg provides an explanation why at the outset of forming the school segregation cases, aiming at the equality was seen as a better strategy: the fear that the African Americans teachers would loose their jobs, as they would not be accepted to work in integrated schools, to teach white children; another reason was that they hoped that the states would eventually realize that bringing equality in all aspects of education in segregated schools is too expensive and would rather opt for the integration, *see* GREENBERG, *supra* note 11, at 63-64, 87-88; Moreover, many of African Americans (living in the South) were interested more in obtaining the equality, rather than desegregation. Patterson argues that some of them feared that the segregation would force them to “assimilate into white culture”. Being “deeply suspicious of whites, they believed that efforts for racial integration – wherein people of different colors would come together in an increasingly respectful manner – were utopian”, *see* PATTERSON, *supra* note 10, at xxvi

⁸⁹ GREENBERG, *supra* note 11, at 88

⁹⁰ *Id.* at 145

and their sense of identity”⁹¹ and “instilled in black children a sense of inferiority, impeded their development, and subjected them to further discrimination.”⁹²

Additionally, it was important to frame and substantiate the claims effectively. The main issue in the cases was whether the Fourteenth Amendment⁹³ to the Constitution of the United States of America prohibits racial segregation in public schools. Yet, even after finding a Constitutional hook on which to hang the claim, LDF lawyers had a second important tactical issue to solve: whose claim to voice.⁹⁴

In cases preceding *Brown*, which concerned the operation of the public education system, parents’ rights were raised and children’s rights were not even mentioned.⁹⁵ One option in *Brown* was, thus, to frame the claim along those lines: “[Are] African American parents, citizens and taxpayers entitled to full benefit of systems established for the education of children within their communities.”⁹⁶ But, *Brown* was not a case of the rights of citizen-taxpayers; it was a case of the children being harmed by segregation.⁹⁷ Davis explains the reason for this strategic choice: “the

⁹¹ *Id.*

⁹² See PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS, *supra* note 3, at 85

⁹³ Fourteenth Amendment, Section 1, as far as relevant, reads: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

⁹⁴ “There will often be casting alternatives even with respect to the identity and characterization of the claimants. The story of segregated public schooling that was told in *Brown* could be a story of children stigmatized and hurt by separation, a story of parents denied the appropriate benefits of citizenship, or a story of community subordinated by caste legislation. The choice will often have implications for the stances of the litigants and lawyers.” Peggy C. Davis, *Performing Interpretation: A Legacy of Civil Rights Lawyering in Brown v. Board of Education*, in RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION, *supra* note 10, at 23, 26

⁹⁵ The only case in which the spotlight was not on the parents was the case *Cumming v. Richmond County Board of Education*, 175 U.S. 528, 544 (1899) involving African Americans parents, see DAVIS, *supra* note 93, at 29

⁹⁶ DAVIS, *supra* note 93, at 29

⁹⁷ *Id.* at 30

image of children harmed was credible and compelling, while the image of African American citizens claiming entitlement resisted cultural expectations.”⁹⁸

Looking at the *Brown* strategy in the context of the prevailing views on political community in the United States, it is hard to imagine “a multicultural political community.”⁹⁹ Thus, the strategy used by the lawyers arguing for the plaintiffs in *Brown* was constructed upon the idea of “the United States as a white polity.”¹⁰⁰ It was this very idea that the case sought to undermine.¹⁰¹

Lessons learned from the Brown case

The importance of *Brown* to the subsequent development of strategic litigation lies in establishment of the procedural elements that have come to be considered to be the constituent elements of test cases:

The defendant was a public institution; the claimants comprised a self-constituted group with membership that changed over time; relief was prospective, seeking to reform future action by government agents; and the judge played a leadership role, complemented by the parties’ efforts at negotiation.¹⁰²

Another important consideration is the fact that *Brown* was just one piece in the larger African American struggle for equality in the United States.¹⁰³ The important and complex strategic goal of this case could not have been achieved solely on the basis of actions in the legal arena. Its success did not rely only on the ability of lawyers to formulate legal issue and convince or persuade the court in the merits of their clients’ claims. It was a product of legal actions and greater social movement in the community – local support, working together. In this way, a

⁹⁸ *Id.*

⁹⁹ *Id.* at 24

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² HERSHKOFF, *supra* note 7

¹⁰³ Peter F. Lau, *From the Periphery to the Center: Clarendon County, South Carolina, Brown, and the Struggle for Democracy and Equality in America*, in FROM THE GRASSROOTS TO THE SUPREME COURT: BROWN V. BOARD OF EDUCATION AND AMERICAN DEMOCRACY, *supra* note 12, at 105

strategic case can have an impact even if unsuccessful in the courts. At the same time, even if the case is successful it might take a long time before it is accepted by a community or the public at large, or before it is fully implemented. Such was the case in the *Brown*. This is an important consideration for any other community seeking to achieve equality. Especially in the context of the Roma minority's effort in the CEE region to have an equal access to public education, because, like in the *Brown* case, they are challenging the widespread practice of discrimination in this area.

It is not a simple task to speak out publicly against discriminatory practices or any other type of human rights violation. This is particularly true in a community where the violation stems from deeply-rooted prejudices. People might fear retaliation, in most of the cases reasonably. This is exactly why it is important that the strategic case, whose aim is to challenge a long and prevailing practice, be accompanied by the greater movement in the community and by the strong support of the local community. For instance, it was the support of parents and local community that enabled the students from Moton High School, (a segregated high school for African Americans in Prince Edward County and one of the classes of cases encompassed in the *Brown* case) successfully to plan and carry out their protest against the severely overcrowded and unequal conditions at their school:

They imparted to their children the consciousness that they were worthy of, and had a right to, equality...Finally, institutions and individuals gave the students the courage to execute their daring plan, by assuring them that if they did their community will be holding a net.¹⁰⁴

Brown not only challenged the decades-long practice of racial segregation in public schools; it also gave an example just how significant it is for a strategic aim to be supported by the local

¹⁰⁴ Kara M. Turner, *Liberating Lifescrpts: Prince Edward County, Virginia, and the Roots of Brown v. Board of Education in FROM THE GRASSROOTS TO THE SUPREME COURT: BROWN V. BOARD OF EDUCATION AND AMERICAN DEMOCRACY*, *supra* note 12, at 88, 90

community. That awareness and readiness of people affected with the discriminatory practice is one of the most fundamental and crucial elements for any social change. This is the case whether through the use of strategic litigation or through the use of others tools of public interest law.

Some authors argue that the experience in strategic litigation in the United States can not be understood as a model that can be transplanted into any given country.¹⁰⁵ Despite this, the *Brown* experience provides “informative lessons of how situations have played out in one complex judicial system under specific and often nonreplicable conditions.”¹⁰⁶ Even if it is true that the U.S. model cannot necessarily be exported, the early development of strategic litigation in both the United States and the CEE region is nonetheless connected with segregation in education. Thus it will be useful to see how the experience from *Brown* could be useful in the context of Roma struggle for equality in access to public education.

2.2 THE CEE EXPERIENCE: D.H. CASE

Racial segregation in education in the CEE is only recently being legally challenged, even though it has been present in this region for several decades¹⁰⁷. As such, it is too early to give an assessment or definite conclusions on its development, progress or success.¹⁰⁸ Nevertheless, keeping in mind the importance of education for the economic and social progression of Romani families, it is important to examine the early experience of strategic litigation.¹⁰⁹

¹⁰⁵ HERSHKOFF, *supra* note 7

¹⁰⁶ *Id.*

¹⁰⁷ GOLDSTON & IVANOV, *supra* note 48, at 163

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

The ECtHR judgment in *D.H.* case is so far the biggest achievement in combating the racial segregation in education in the CEE region. The case saw eighteen applicants – Romani children and their parents – challenge a widespread practice involving placing the Romani children in the special schools in Ostrava, Czech Republic.

Before analyzing the specific strategies employed in this case, it is necessary to give a short overview of the factual background of the case, as well as a brief account of the ECtHR judgment.

Factual background

The Roma minority, the largest ethnic minority in Europe, is currently facing different economic, political, social and cultural problems in the CEE countries' transition from Communism.¹¹⁰

From the beginning of its work in 1996, the ERRC was primarily concerned with the two most important issues for the Romani communities in the CEE region: discrimination in education and violence.¹¹¹ In this respect, education is of a special relevance – it is one of the fundamental elements for the economic and political progress and development of any community.¹¹²

In 1998, the ERRC lawyers started working on a test case to tackle this issue in the city of Ostrava in the Czech Republic.¹¹³ The legal complaint asserted that Romani children have been

¹¹⁰ István Pogány, *Legal, Social and Economic Challenges Facing the Roma of Central and Eastern Europe*, 2 Queen's Papers on Europeanization, 1 (2004)

¹¹¹ GOLDSTON, *supra* note 14, at 1

¹¹² *Id.*

¹¹³ *Id.*; Goldston explains why the Czech Republic was chosen for litigation: "As one of the most enlightened and wealthiest of the Central and Eastern European countries, it was a representative symbol for the post-Communist region. A finding that even the much praised Czech school system breached the law would send a powerful signal that Roma education had to change. The pseudo-scientific basis for student assignments to Czech schools offered a target vulnerable to legal challenge. And finally, several local Romani and other NGO actors in the Czech Republic had already been discussing issues related to Roma education for some time. Hence, any litigation effort would take place in a relatively fertile environment. The city of Ostrava, the third largest, was attractive in view of its large Romani population and the number of community organizations present." *See id.* at 2

assigned in the special school because of their race and ethnic origin, and that “the result of such segregation has been a denial of equal educational opportunity for most Romani children.”¹¹⁴

A system of special schools for children with learning disabilities not capable of attending the ordinary schools and following the ordinary curriculum was established in the Czech Republic and many others CEE countries during the Communist regime.¹¹⁵ Placement in these schools was based on the results of tests carried out by an educational psychologist and designed to measure children’s intellectual capacity.¹¹⁶ Even though the tests appeared race-neutral, they were prepared without taking into consideration the cultural, linguistic and other specificities of the Roma.¹¹⁷ Furthermore, no procedure was established to prevent arbitrariness, racial prejudice, and cultural insensitivity in administering and interpreting the results of testing.¹¹⁸

By law, the decision for placement in special schools was made by the head teacher of the school and required the consent of the parents or legal guardians of the child.¹¹⁹ Placement of all the eighteen *D.H.* applicants was made based on this procedure. On its face, the legislation establishing the procedure for the assignment of children in special schools was not discriminatory. Moreover, these procedures had been fully complied with in the applicants’ cases.¹²⁰ However, statistical data collected by the ERRC from every school in Ostrava showed that the psychological testing and subsequent placement in special schools frequently discriminated on the basis of race:¹²¹

¹¹⁴ KNOWING YOUR RIGHTS AND FIGHTING FOR THEM: A GUIDE FOR ROMANI ACTIVISTS, *supra* note 1, at 167

¹¹⁵ FARKAS, *supra* note 14, at 52

¹¹⁶ HOBcraft, *supra* note 14, at 247

¹¹⁷ GOLDSTON, *supra* note 14, at 3

¹¹⁸ *Id.*

¹¹⁹ HOBcraft, *supra* note 14, at 247

¹²⁰ *Id.*

¹²¹ FARKAS, *supra* note 14, at 53

Although Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava, 56% of all pupils placed in the special schools in Ostrava were Romani. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Romani pupils in Ostrava assigned to special schools was 50.3%. Overall, Romani children in Ostrava were more than 27 times as likely as non-Romani children to be sent to special school.¹²²

Consequently, the placement of Romani children in the special schools on the basis of the results of testing that did not take into account their cultural specificities and without sufficient safeguards against the racial prejudice presented a major disadvantage for their education. To understand both this problem and the gravity of the obstacle it presented for the educational opportunities of the Romani children, it is important to note that special schools followed a curriculum far inferior to that used in regular schools.¹²³ This caused children difficulties in continuing their education at the secondary level. Moreover, after completing elementary education in special schools, the children could enter only the vocational schools.¹²⁴ Thus, children were limited in their future education potential simply because of the results of a test; they were raised in a system that provided poor education and knowledge mainly because of ethnic prejudices.

The ECtHR judgment

After the applicants' request, submitted to the Ostrava Education Authority, for reconsideration of administrative decisions to place them in the special schools had been rejected, they lodged a constitutional appeal to the Czech Constitutional Court.¹²⁵ In the appeal they argued that the placement in the special schools had resulted "in *de facto* racial segregation and discrimination that were reflected in the existence of two separately organised educational systems for members of different racial groups, namely special schools for the Roma and "ordinary" primary schools

¹²² GOLDSTON, *supra* note 14, at 1

¹²³ HOBcraft, *supra* note 14, at 246

¹²⁴ GOLDSTON, *supra* note 14, at 3

¹²⁵ D.H. case, *supra* note 10, § 23-25

for the majority of the population.”¹²⁶ Because this difference in treatment did not have any objective or reasonable justification, the applicants asked the Constitutional Court "to quash the decisions to place them in special schools, to order the respondents ... to refrain from any further violation of their rights and to restore the *status quo ante* by offering them compensatory lessons.”¹²⁷

After the appeal had been dismissed by the Constitutional Court, partly as being manifestly ill-founded and partly because the court did not have a jurisdiction to hear it¹²⁸, the applicants brought the case before the ECtHR. In their ECtHR application, the *D.H.* applicants argued that placement in the special schools denied Romani children their right to education guaranteed by Article 2 of Protocol No. 1 to the ECHR, taken in conjunction with the prohibition of discrimination from Article 14 of the ECHR.¹²⁹

On February 7, 2006, the ECtHR held that there had been no violation of Article 14 of the ECHR, taken together with Article 2 of Protocol No. 1 of the ECHR.¹³⁰ The Court held that the system of special schools in the Czech Republic had not been established for Romani children solely, and that non-Romani children had been placed there as well. Thus, the Court stated:

In that connection, it observed that the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children...While acknowledging that the statistical evidence disclosed worrying figures and that the general situation in the Czech Republic concerning the education of Roma children was by no means perfect, it considered that the

¹²⁶ *Id.* § 25

¹²⁷ *Id.*

¹²⁸ *Id.* § 28

¹²⁹ See KNOWING YOUR RIGHTS AND FIGHTING FOR THEM: A GUIDE FOR ROMANI ACTIVISTS, *supra* note 1, at 171; Article 2 of Protocol No. 1 to the Eur. Conv. on H.R., as far as relevant, reads: “No person shall be denied the right to education.”; Article 14 of the ECHR reads: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

¹³⁰ *D.H.* case, *supra* note 10

concrete evidence before it did not enable it to conclude that the applicants' placement or, in some instances, continued placement, in special schools was the result of racial prejudice.¹³¹

On November 13, 2007, the ECtHR Grand Chamber (to which the case was referred¹³²) issued a judgment in which it held that the Czech government had violated its obligations not to discriminate on the basis of racial and ethnic origin in access to education.¹³³ The Court stressed that the relevant legislation in force in the Czech Republic had a “disproportionately prejudicial effect” on the Roma community and on the applicants as members of that community.¹³⁴ Furthermore, it held that the difference in treatment between Roma children and non-Roma children had not been objectively and reasonably justified; there did not exist a reasonable relationship of proportionality between the means used and the aim pursued.¹³⁵

Strategy employed in challenging the school segregation in *D.H.* case and its similarities with the strategy from *Brown*

The ERRC has identified the main concerns that need to be taken into account when devising a strategy with respect to discrimination in education: identifying issues, choice of plaintiffs, possible victimization of plaintiffs, collecting the evidence to support the claim, international jurisprudence, available domestic remedies and possibilities of choosing a forum.¹³⁶

As in *Brown*, the *D.H.* claim was formulated as a claim of the children harmed by discrimination.

The applicants claimed that they “had been discriminated against in that because of their race or

¹³¹ *D.H.* case, *supra* note 10, §125-127

¹³² The case was referred to the Grand Chamber in accordance with Article 43(1) of the Eur. Conv. on H.R. which reads: “Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.”

¹³³ *D.H.* case, *supra* note 10, § 208-209

¹³⁴ *Id.* § 208.

¹³⁵ *Id.*

¹³⁶ STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE, *supra* note 15, at 82-86

ethnic origin they had been treated less favourably than other children in a comparable situation without any objective and reasonable justification.”¹³⁷

The main issue in the case was “whether it was the result of indirect discrimination that the applicants, all of whom were Roma children, were sent to special schools.”¹³⁸ Thus, in contrast to *Brown, D.H.* concerned indirect discrimination – the application of the facially-neutral evaluation mechanism that produced racially disproportionate effects.¹³⁹ The lawyers argued that it was not necessary to prove that the Czech authorities had intention to discriminate – the question was not whether the special schools were designed with the aim to facilitate racial segregation of children, because that was the effect they produced in practice.¹⁴⁰ They introduced statistical evidence in order to prove this discriminatory practice, holding that this evidence should be accepted as a means of establishing a *prima facie* case of discrimination.¹⁴¹

The Chamber Judgment of February 7, 2006 discounted the statistical evidence as a proof of indirect discrimination. However, the Grand Chamber took a different approach: “reiterated the main principles in relations to statistics and their role in establishing discriminatory practice.”¹⁴²

As in *Brown*, the legal claim in *D.H.* was accompanied by contention that by placement in special schools was detrimental for Romani children’s emotional, educational and psychological development:

¹³⁷ *D.H. case, supra* note 10, § 124

¹³⁸ HOBcraft, *supra* note 14, at 246

¹³⁹ Goldston, *supra* note 14, at 3

¹⁴⁰ *D.H. case, supra* note 10, §129 ; “The reality was that well-intentioned actors often engaged in discriminatory practices through ignorance, neglect or inertia.” *Id.*

¹⁴¹ HOBcraft, *supra* note 14, at 250

¹⁴² *Id.* at 255

The range of harm included the following: they had been subjected to curriculum far inferior to that in basic schools; they had been effectively denied the opportunity of ever returning to basic school; they had been prohibited by law and practice from entrance to non-vocational secondary educational institutions, with attendant damage to their opportunities to secure adequate employment; they had been stigmatized as “stupid” or “retarded” with effects that will brand them for life, including diminished self-esteem and feelings of humiliation, alienation and lack of self-worth; they had been forced to study in racially segregated classrooms and hence denied the benefits of a multicultural educational environment.¹⁴³

Other than challenging the same legal issue and the use of evidence on detrimental effect on children of segregated educational system, both cases relied on the support of the local community in their strategies. Before choosing plaintiffs for the case, the ERRC lawyers visited many Romani families in the city of Ostrava and tried to get their support for the case.¹⁴⁴ Members of the local Roma community were also involved in gathering the evidence on discrimination.¹⁴⁵ Therefore, both cases show the importance of the involvement of local community in the case, especially in the context of possible victimization of plaintiffs.¹⁴⁶

***D.H.* achievement**

The *D.H.* decision is relatively recent, and it is therefore not yet possible to assess its full impact. However, it is reasonable to suppose that its impact will go beyond the educational system in the Czech Republic and will influence those in other Council of Europe member states that have a Roma minority¹⁴⁷. Even while the case was still pending before the ECtHR the Czech authorities

¹⁴³ GOLDSTON, *supra* note 14, at 3

¹⁴⁴ “It was important that whoever went forward understood and fully accepted the unlikelihood of success, the possibility of retaliation and the long time before a final result would be known. The team endeavored to ensure that claimants genuinely wanted – in a manner not inconsistent with their individual circumstances – to address the systemic problem.” *Id.* at 2

¹⁴⁵ *Id.*

¹⁴⁶ “The litigation in the Czech Republic [in *D.H.* case] generated a series of hostile reaction on the part of local authorities, including a bomb threat and the suggestion that the failure to withdraw the complaint would result in referral of the matter to so-called skinheads”, GOLDSTON & IVANOV, *supra* note 48, at 166

¹⁴⁷ The case tackling the issue of separate Roma-only classes in Croatia, *Orsus and Others v. Croatia*, App. No. 15766/03, is currently pending before the Grand Chamber of Eur. Ct. H.R. after the Chamber in a judgment of 17 July 2008 found no violation of Article 2 of Protocol No. 1 to the Eur. Conv. on H.R. taken alone or violation of Article 14 of the Eur. Conv. on H.R. in conjunction with Article 2 of Protocol No. 1 to the Eur. Conv. on H.R.

introduced some changes in the existing system of special schools: the rule that graduates from the special schools can attend only vocational secondary education was revoked.¹⁴⁸

The key achievement of the case is that the Court found a violation of prohibition of discrimination in relation to widespread practice of racial discrimination in the sphere of public education. In doing so, the ECtHR recognized, for the first time, that the “Convention addresses not only specific acts of discrimination, but also systemic practices that deny the enjoyment of rights to racial and ethnic groups.”¹⁴⁹ Another great achievement is extension of the ECtHR approach to admissibility of statistical evidence and shift of burden of proof to the respondent Government. The Court has interpreted more extensively the notion of what constitutes *prima facie* evidence of difference of treatment capable of shifting the burden of proof on to the respondent Government.¹⁵⁰ The *D.H.* case presents the beginning of the larger and more comprehensive struggle for equal access to education of the Roma minority.

It is important to emphasize the significance of the fact that *D.H.* case was decided by the ECtHR keeping in mind its role in the system of human rights protection established in Europe under the ECHR and binding nature of its judgments to the Council of Europe member states.

The success of the *D.H.* case shows that strategic litigation in this part of Europe is becoming more and more important tool in achieving social change in respect of marginalized and indigenous people. This case should be seen as an indicator of the future path for the public interest lawyers’ struggle towards social justice.

¹⁴⁸ GOLDSTON, *supra* note 14, at 4

¹⁴⁹ *Id.*

¹⁵⁰ *D.H.* case, *supra* note 10, §178

CONCLUSION

Strategic litigation, as a specific aspect of public interest law, is an important tool in achieving social change through the use of the courts. The CEE region is witnessing profound changes in its social landscape after the demise of Communism. Strategic litigation is becoming more and more important in the legal systems of the CEE countries through the emergence of human rights activists ready to address the issue of human rights violation and discrimination against certain groups of people.

The difference between the CEE and the United States in this field is that in Europe, lawyers and judges are not being trained in anti-discrimination law litigation.¹⁵¹ It is therefore unreasonable to accept a big and sudden success in litigation in this field. Besides, the whole concept of litigation, as was mentioned before, is a relatively new phenomenon in this part of Europe. Being in the initial phases of development it nevertheless provides an interesting topic for analysis. This is especially so in the context of Europe's biggest minority – the Roma minority, and its struggle against widespread prejudices and human rights violations that its members are facing in every day life. *D.H.* case, being the first one to challenge the widespread practice of racial segregation and exclusion of Romani children, is a good example of the path to be followed in the future struggle for equality.

It should be noted, however, that regardless of how essential strategic litigation is, it can never be the only tool used to achieve profound changes, especially in relation to widespread practices of discrimination and human rights violation. Foremost, it should be accompanied with the rise of

¹⁵¹ GOLDSTON & IVANOV, *supra* note 48, at 164

awareness of a particular community that the time has come for change. The importance of local community support from the *Brown* case is a valuable lesson for human rights activists that work with the Roma community. Strategic litigation is in itself not enough to bring about the change – people need to be aware that they are entitled to live in better conditions and that they are entitled to the full enjoyment of all rights and freedoms within their community like the rest of the citizens of a particular country.

Both the *Brown* and the *D.H.* case reflect the importance of local community support. A comprehensive approach in securing the right to equal opportunities in education and equal quality of education is one of the most important lessons to be learned from the *Brown* case.

Bibliography

Assenov v. Bulgaria, App. No. 24760/94, ECtHR judgment of 28 October 1998 available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009)

Balogh v. Hungary, App. No. 47940/99, ECtHR judgment of 20 July 2004, available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009);

Bell, Derrick. *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*. Oxford: Oxford University Press, 2004.

Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954), available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0347_0483_ZS.html (last accessed on March 25, 2009)

Connors v. the United Kingdom, App. No. 66746/01, ECtHR judgment of 27 May 2004; available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009), available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009);

Cumming v. Richmond County Board of Education, 175 U.S. 528, 544 (1899) available at <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=175&invol=528> (last visited March 25, 2009)

Davis, Peggy C. "Performing Interpretation: A Legacy of Civil Rights Lawyering in Brown v. Board of Education". In *Race, Law, and Culture: Reflections on Brown v. Board of Education*, edited by A. Sarat, 23-48. New York: Oxford University Press, 1997.

D.H. and Others v. The Czech Republic, App. No. 57325/00, ECtHR judgment of 13 November 2007, available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009)

European Convention on Human Rights, <http://www.echr.coe.int/echr/> (last visited March 24, 2009)

European Roma Rights Center, at http://www.errc.org/About_index.php (last visited March 25, 2009)

Farkas, Lilla. "The Scene After Battle: What is the Victory in D.H. Worth and Where to Go From Here?" *Roma Rights Journal of the European Roma Rights Center* 1 (2008): 51-65

Goldston, James A. "Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges". *Human Rights Quarterly* 28 (2006): 492- 527

—, "Ending Racial Segregation in Schools: The Promise of D.H.". *Roma Rights Journal of the European Roma Rights Center* 1 (2008): 1-5

Goldstone, James A., and Ivan Ivanov. "Combating Segregation in Education through Litigation" Reflection on the Experience to Date". In *Separate and Unequal: Combating Discrimination Against Roma in Europe*, edited by E. Rekosh and M. Sleeper, 145-171. Budapest: Public Interest Law Initiative, 2004

Greenberg, Jack. *Crusaders in the Courts: Legal Battles of the Civil Rights Movement*. New York: Twelve Tables Press, 2004.

Hershkoff, Helen. “Public Interest Litigation: Selected Issues and Examples”
<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf> (last visited March 24, 2009)

Hobcraft, Gemma. “Roma Children and Education in the Czech Republic: DH v. Czech Republic: Opening the Door to Indirect Discrimination Findings in Strasbourg?” *European Human Rights Law Review* 2 (2008): 245-260

Kluger, Richard. *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality*. New York: Vintage Books, 2004.

Knowing Your Rights and Fighting for Them: A Guide for Romani Activists. Budapest: European Roma Rights Center, 2004.

Lau, Peter F. ed. *From the Grassroots to the Supreme Court: Brown v. Board of Education and American Democracy*. Durham: Duke University Press, 2004.

—, “From the Periphery to the Center: Clarendon County, South Carolina, Brown, and the Struggle for Democracy and Equality in America”. In *From the Grassroots to the Supreme Court: Brown v. Board of Education and American Democracy*, edited by P.F. Lau, 105-126. Durham: Duke University Press, 2004.

Legal Defense and Educational Fund Inc. at <http://www.naacpldf.org/content.aspx?article=1133>
(last visited March 25, 2009)

Moldovan and Others v. Romania, App. Nos. 41138/98 and 64320/01, ECtHR judgment of 12 July 2005, available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009)

Nachova and Others v. Bulgaria, App. Nos. 43577/98 and 43579/98, ECtHR judgment of 6 July 2005, available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009)

Orsus and Others v. Croatia, App. No. 15766/03, ECtHR judgment of 17 July 2008, available at <http://www.echr.coe.int/echr/> (last visited March 25, 2009)

Patterson, James T. *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*. New York: Oxford University Press, 2002.

Pearson v. Murray, 169 Md. 478 (1936), available at <http://www.brownat50.org/brownCases/PreBrownCases/PearsonvMurrayMd1936.htm> (last visited March 24, 2009)

Plessy v. Ferguson, 163 U.S. 537 (1896), available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0163_0537_ZS.html (last visited March 25, 2009)

Pogány, István. “Legal, Social and Economic Challenges Facing the Roma of Central and Eastern Europe”, *Queen’s Papers on Europeanization* 2 (2004): 1-20

Rekosh, Edwin. “Who defines the public interest? Public interest law strategies in Central and Eastern Europe.” *PILI Papers* 1 (2005): 3-16

Rekosh, Edwin, Kyra A. Buchko and Vessela Terezieva, eds. *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists*. New York: Public Interest Law Initiative, 2001.

Rekosh, Edwin, and Maxine Sleeper, eds. *Separate and Unequal: Combating Discrimination Against Roma in Education*. Budapest: Public Interest Law Initiative, 2004.

Sarat, Austin, ed. *Race, Law, and Culture: Reflections on Brown v. Board of Education*. New York: Oxford University Press, 1997.

Strategic litigation of race discrimination in Europe: from principles to practice: A manual on the theory and practice of strategic litigation with particular reference to the EC Race Directive. Budapest, London and Brussels: European Roma Rights Center, The International Center for the Legal Protection of Human Rights and Migration Policy Group, 2004.

Turner, Kara M. "Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and "Brown". *Virginia Law Review* 90 (2004): 1667-1691

—, "Liberating Lifescritps: Prince Edward County, Virginia, and the Roots of Brown v. Board of Education". In *From the Grassroots to the Supreme Court: Brown v. Board of Education and American Democracy*, edited by P.F. Lau, 88-104. Durham: Duke University Press, 2004.