Mobilising for racial equality in Europe

Roma rights and transnational justice

Lilla Farkas

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 28 February 2020

European University Institute
Department of Law

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I Lilla Farkas certify that I am the author of the work Mobilising for racial equality in Europe: Roma rights and transnational justicee> I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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Summary

The thesis provides a transnational account of Roma rights activism over the last thirty years with a focus on five Central and Eastern European countries, where the majority of the European Union's Roma live. It contributes to scholarly debate by (i) mapping ethnic/racial justice related *legal opportunities*; (ii) taking stock of *legally focused* non-governmental organisations; (iii) charting *legal mobilisation* in courts and enforcement agencies; (iv) presenting an alternative account of the transplantation of public interest litigation, and (v) 'mapping the middle' between dominant and critical narratives about the Open Society Foundations and *white* Europeans in the Roma rights field. Finding that international advocacy and litigation alone have been insufficient to generate social change, the thesis highlights the salience of indigenous practices. It points to the shortcomings of the elitist conception of legal mobilisation characterised by top-down, planned legal action and a focus of international NGOs. The thesis proposes to shift the limelight to the financial resources of strategic litigation, to a broad conception of collective legal action, and the necessity of investigating the role private individuals, NGOs, as well as public agencies play in promoting racial equality in general and Roma rights in particular in a transnational field. By scrutinising the ethno-political critique of Roma rights activism and pointing to its conflation with the critique of litigation - that resonates on both sides of the Atlantic - the thesis navigates between liberal internationalism and ethno-nationalism by acknowledging and celebrating organic cross-border cooperation, in other words "good transnationalism."

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Thanks are due to Michael Sinclair Stewart, a cultural anthropologist based at University College London, who authored a groundbreaking study of a Hungarian Roma community in the 1980s and who was kind enough to advise me to apply to the European University Institute with a fuzzy idea for doctoral research. Here, at the Institute, professors Claire Kilpatrick, Bruno de Witte and Loic Azoulai steered me towards a law and society approach, catapulting me into the unknown and causing many sleepless nights, but also tremendous happiness once the project started shaping up.

My gratitude is also due to professor Elise Muir, Head of the Institute for European Law of the KU Leuven, to Zsolt Körtvélyesi and Balázs Majtényi of the Lóránd Eötvös University for reading early drafts of the thesis and offering valuable advice about its analytical chapters. I would also like to warmly thank Sophie Latraverse for emphasizing the functional differences 'precedent' plays in common law and civil law jurisdictions, and Theodoros Alexandridis for his incredible research 'assistance' and for being the most wonderful sounding board during my difficult months. I am forever indebted to professor Scott L. Cummings of the University of California Los Angeles, who took me under his wings during my time as a Fulbright fellow and pushed me to my limits in order to tease out conclusions that may be of interest not just in Central and Eastern Europe or Europe in general, but also across the Atlantic.

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Dramatis personea

Key social entrepreneurs and organisations, dates and places of birth, activity in the Transnational Roma Rights Network

Name	Date of birth	Place of birth	Activity
Alexandridis, Theodoros		Kalamata, Greece	human rights lawyer
Bíró, András	1925	Sofia	journalist, progressive activist, development specialist
Bodrogi, Bea	1972	Nagykáta, Hungary	human rights lawyer
Bukovska (Kvocekova), Barbara	1973	Slovakia	human rights lawyer
Bulgarian Helsinki Committee	14 July 1992	Sofia, Bulgaria	Bulgarian NGO dedicated to human rights defence
Cahn, Claude		USA	historian, Roma/human rights activist, ERRC's Programmes Director (until 2009)
Chance for Children Foundation	2003	Budapest, Hungary	Hungary's emblematic desegregation NGO
Clements, Luke		UK	solicitor (since 1981) and academic
Croatian Helsinki Committee	31 March 1993	Zagreb, Croatia	Croatian NGO advocating for civil and political rights
Czech Helsinki Committee	1990	Prague, Czech Republic	Czech NGO advocating for civil and political rights
Durbakova, Vanda		Kosice, Slovakia	human rights lawyer
European Roma and Travellers Forum	2004	Strasbourg, France	INGO ensuring Roma political representation in the Council of Europe
European Roma Information Office	2003	Brussels, Belgium	a joint initiative of the EU, OSF and the Netherlands advocating on behalf of the Roma
European Roma Institute for Arts and Culture	8 June 2017	Berlin, Germany	a joint cultural initiative by the Council of Europe and OSF

Name	Date of birth	Place of birth	Activity
European Roma Rights Center	1996	Budapest, Hungary	OSF's flagship INGO dedicated to Roma rights advocacy and legal defence
Equal Opportunities Initiative Association	2001	Sofia, Bulgaria	Bulgarian Roma rights and community development NGO in Sofia's Fakulteta district
Furmann, Imre	1951-2010	Nyékládháza, Hungary	prosecutor, NEKI's executive director (1993-2005) and deputy director of the Hungarian Equal Treatment Authority
Gergely, Dezideriu		Romania	Roma/human rights lawyer first at Romani Criss, then councillor at the Romanian Council Combatting Discrimination, ERRC executive director (2011-2014)
Gheorghe, Nicolae	1946-2013	Romania	social scientist and Roma activist, founder of Romani Criss
Goldston, James A.		New York, USA	lawyer, ERRC legal director, OSI deputy director and OSJI executive (since 2003)
Greek Helsinki Monitor	1993	Athens, Greece	Greece's litigating human rights NGO
Grozev, Yonko	1965	Sofia, Bulgaria	human rights lawyer, BHC legal director (until 2007) and ECtHR judge (since 2015)
Haller, István		Tirgu Mures, Romania	geologist, journalist, lawyer, minority rights activist and councillor of the Romanian National Council Combating Discrimination (since 2003)
Harding, Deborah		USA	linguist and development specialist with the Peace Corps and OSF deputy executive (1996-2004)

Name	Date of birth	Place of birth	Activity
Havas, Gábor	1944	London, UK	Hungarian social scientist and teacher
Helsinki Watch	1978	New York, USA	US NGO monitoring the implementation of the Helsinki Final Accords
Horváth, Aladár	1964	Miskolc, Hungary	Roma activist, liberal MP (1990-1994), politician
Human Rights Project	1992-2004	Sofia, Bulgaria	Bulgaria's first Roma rights project
Human Rights Watch	1988	New York, USA	US NGO advocating for human rights globally
Hungarian Helsinki Committee	1989	Budapest, Hungary	Hungarian human rights NGO
Ilieva, Margarita		Sofia, Bulgaria	human rights lawyer, BHC's legal director (until 2017)
INTERIGHTS	1982-2015	London, UK	international human rights NGO
International Helsinki Federation for Human Rights	1982-2007	Vienna, Austria	international human rights NGO
Ivanov, Ivan		Bulgaria	physician, lawyer and Roma rights activist at HRP and ERRC, ERIO director
Jovanovic, Zeljko		Valjevo, Yugoslavia	lawyer, executive director of RIO (since 2006)
Kanev, Krassimir		Bulgaria	social scientist, president of the BHC
Kawczynski, Rudko	1954	Krakow, Poland	German Roma activist, executive director of RPP (1996-1999) and president of ERTF (2004-2014)

Name	Date of birth	Place of birth	Activity
Kóczé, Angéla	1970	Kispalád, Hungary	Roma activist and academic, worked at OSCE, ERRC, ERIO and now leads the CEU Romani Studies Department
Kusan, Lovorka		Zagreb, Croatia	lawyer, constitutional judge (since 2016)
Kushen, Robert		USA	human rights advocate, OSF Roma 'plenipotentiary, ERRC executive director (2008-2011)
Lester, Anthony	1935	UK	barrister, former member of the House of Lords and INTERIGHTS chair
Matache, Margareta (Magda)		Romania	Roma activist and academic, executive director of Romani Criss (2005-2012) and instructor at Harvard FXB Center
Mihaylova, Daniela		Sofia, Bulgaria	Bulgaria's leading Roma rights lawyer
Mohácsi, Viktória	1975	Berettyóújfalu, Hungary	journalist, Roma rights activist, ministerial commissioner (2002-2004) and MEP (2005-2010)
Neier, Aryeh	1937	Berlin, Germany	human rights activist, ACLU executive director, HRW deputy director and OSI president (until 2012)
NEKI (Legal Defence Bureau for National and Ethnic Minorities	1993	Budapest, Hungary	Hungary's emblematic Roma rights NGO
Open Society Foundations	2010		George Soros' foundation
Open Society Institute	April 1993	New York, USA	George Soros' foundation
Open Society Justice Initiative	2003	New York, USA	OSF's global public interest litigation program
OSCE Contact Point for Sinti and Roma	1998	Warsaw, Poland	the OSCE's Roma-specific unit

Name	Date of birth	Place of birth	Activity
Petrova, Dimitrina		Bulgaria	philosopher, human rights activist, academic, founder of HRP and ERRC executive director 1996-2007
Plese, Branimir		Belgrade, Yugoslavia	ERRC legal directior 2002-2004
Poradna Pro Občanství Občanská A Lidská Práva	1997	Prague, Czech Republic	the Czech Republic's first NGO undertaking predominantly Roma rights and development work
Poradňa pre Občianske a Ľudské Práva (Slovak Centre for Civil and Human Rights)	2002	Slovakia	Slovakia's emblematic Roma rights NGO
Roma Education Fund	2005 2006	Switzerland Budapest, Hungary	INGO established by George Soros to promote the education of European Roma
Roma Civil Rights Foundation	1995	Budapest, Hungary	Hungarian Roma rights NGO spearheaded by Aladár Horváth
Roma Initiatives Office	2006	Budapest, Hungary	OSF program dedicated to Roma political participation and mainstreaming Roma rights issues within OSF
Romani Baht Foundation	1996	Sofia, Bulgaria	Roma-led development NGO in Sofia's Fakulteta district
Romani Criss	1993	Bucharest, Romania	Romania's emblematic Roma rights and development NGO
Roma Participation Program	1996-2006	Budapest, Hungary	OSI program dedicated to Roma political participation
Romanian Helsinki Committee	1991	Bucharest, Romania	human rights organisation
Rostas, Iulius			Roma rights activist at ERRC and RIO, academic at CEU Romani Studies Program
Russinov, Rumyan		Dunavtsi, Bulgaria	Roma rights activist at HRP, RPP and REF

Name	Date of birth	Place of birth	Activity
Roussinova-Danova, Savelina		Bulgaria	Roma rights activist at HRP, ERRC and OSF
Soros, George	1930	Budapest, Hungary	billionaire philanthropist, businessman and economist
Strupek, David		Prague, Czech Republic	lawyer
Zoon, Ina		Bucharest, Romania	human rights activist and consultant (OSCE, EU and Council of Europe), presently working for OSJI in Mexico

Chapter I

Introduction

The thesis provides a transnational account of Roma rights activism from 1989 until the present day with a focus on five Central and Eastern European countries, where the majority of the European Union's Roma live. It seeks to contribute to scholarly debate on mobilising for racial equality in the Europe by: (i) mapping *legal opportunities*; (ii) taking stock of *legally focused* non-governmental organisations; (iii) charting *legal mobilisation* in courts and enforcement agencies; (iv) putting forth an alternative account of the transplantation of public interest litigation and (v) dispelling misconceptions about the Open Society Foundations and *white* Europeans in the Roma rights field. The thesis argues against ethno-nationalism whose destructive thrust the author most profoundly disagrees with, but it also argues against top-down liberal internationalism by showcasing organic cross-border cooperation – labelled in the text as "good" transnationalism - and the interethnic traits of Roma rights activism.

1.1. Structure and content

Following an introduction to the Introduction in Part 1, the next section provides the context for those unfamiliar with the protagonists, Europe's 'pariah' community, whose fight for justice has inspired the project. It sketches basic facts about the Roma and the questions that occupy social scientists who study this social group and design policies to improve its deplorable situation. Part 3 describes the research question and the methodology that has steered the author's auto-biographical study. Part 4 offers a glimpse into the civil rights movement in the United States of America and the flagship legal battle that served as a basis of a mythology that has in turn profoundly impacted on the discourse about Roma rights mobilization in Central and Eastern Europe. Following this trans-Atlantic comparison, Part 5 sets out the meaning of transnationalism in the thesis. Part 6 summarises what is meant by a "law and social movements" reading, while part 7 sketches the structure of the thesis.

The Introduction is followed by three descriptive and two analytical chapters, offering conclusions that provide food for thought for further research, rather than a definitive closure of the author's project, which aims at breaking down the walls of the subject matter's provincialism ad in turn situating Roma rights activism of the last three decades in mainstream

academic debates. Hard choices had to be made about the direction of the analysis and this also means that the descriptive chapters are rather dense, not leaving room for detailed description. It is with regret that Chapter II on legal opportunities relevant in the Roma rights context could not be extended to a more detailed description of Roma-relevant social rights and the dynamics between social rights and equal treatment norms. Similarly, even though Chapter IV on legal strategies has attempted to amalgamate factual knowledge about cases brought before both domestic and international tribunals, its failure to do justice to the breadth of litigation in all relevant fields must be recognised. Filling these gaps is the task of future research, for the present, it is hoped that the material presented in the thesis sufficiently supports the main argument, which, of course, could also have taken a different path. The choice that ultimately led to a thesis about legitimacy and representation in the Roma rights context is informed by concurrent debates in which the voice of Roma activists who use the law, and more particularly, of domestic Roma rights lawyers is shamefully underrepresented. While this choice has resulted in a thesis that could do with more law and legal analysis, it has also enabled the author to present a piece of work firmly rooted in the law and society tradition, which is not only novel in the Roma rights context, but will – it is hoped – anchor the ever so often provincialized topic in mainstream academic debate and provide ammunition for scholars who seek to understand the role US actors have played in transnationalising and/or globalizing public interest litigation.

The topic thus chosen is particularly relevant at present, when resources for legal mobilisation are shrinking in a region gripped by populism. Given that not only social justice, but also minimum welfare and status equality are rendered increasingly unattainable, identifying synergies between legal and political tools, tactics and strategies seems more important than ever—yet mustering synergy is as distant an aspiration as ever before. Populists intentionally defy the rule of law, fundamentally question the authority of courts and constrain grassroots initiatives, hampering the utility and effectiveness of both legal and political mobilisation for social change. The progressive Roma elite is advocating for a renewed focus on grassroots organisation, while the communities are increasingly seeking the protection of their most basic needs in specialized agencies and courts. These trends call for a research agenda with a broader empirical basis and new analytical frames.

At the community level, the need for basic amenities seems to come before the enduring quest for ethnic identity, so that the study of legal strategies addressing access to housing, electricity, food and water is highly topical. There are lessons to be learned from the local and national level, and the thesis highlights the strengths of indigenous practices relative to a narrow and elitist conception of (international) legal action. It points to the shortcomings of entrusting

the enforcement of legal norms to private individuals and non-governmental organisations (the private enforcement model) that *strategic litigation*, a concept and practice transplanted from the United States has come to represent. The necessary condition of top-down, planned legal action is collective standing, which has been in the focus of debate inspired by the activities of (international) legally focused NGOs. Drawing on a broad definition of collective action and collective actors, the thesis proposes to shift the limelight to the financial resources of litigation, asking questions about the allocation of public funds and the ways in which the Roma themselves use the law to promote their rights with the assistance of public enforcement agencies and legal service providers.

The thesis explores the topic from the perspective of local versus transnational advocacy arenas, identity-based versus interethnic conceptions of Roma rights, legal versus political tools of social change, and courts versus public enforcement bodies as venues of legal and policy reform. The conclusions following each chapter and concluding the thesis itself try to tease out answers to these binaries, acknowledging that further analytical work needs to be undertaken to understand the nuances the rich field of Roma rights offers.

1.2. Context

The term Roma depicts a minority group that numbers over ten million worldwide and seven million within the European Union, two-thirds of whom live in Bulgaria, Romania, Hungary, Slovakia and the Czech Republic, the countries referred to as "Roma-dense" throughout the text.[1] These numbers do not reflect population censuses,[2] but estimates used widely at the international level. The Roma represent more or less ten percent of the total population in Bulgaria (800.000), Romania (2 million) and Slovakia (500.000), 6% in Hungary (600.000) and 3% in the Czech Republic (250.000). Their proportion is much higher in the school age population, given the rapidly decreasing population growth, so that in Hungary, for instance, Roma make up 15% of children aged 5-16.[3]

The term "Roma" unites various subgroups identified chiefly but not only on the basis of minority language, descent and/or traditions. A distinction is made between the Eastern Roma who are overwhelmingly sedentary and the Western Travellers, for whom the "travelling

[1] The term is borrowed from Kertesi Gábor - Kézdi Gábor, A cigány népesség Magyarországon, Socio-typo, Budapest, 1998.
[2] Census data yields surprising results contingent on how the ethnicity question is asked and how safe the Roma feel about exposing their minority ethnicity in general and to the interviewer in particular.
[3] István Kemény, Béla Janky and Gabriella Lengyel, A magyarországi cigányság, 1971-2003, Gondolat, 2004.

way of life" represents a cornerstone of ethnic identity.[4] This distinction generally denotes minority attitudes *vis-a-vis* majority populations and states: the former seeks to blend in, while the latter to stand apart.[5]

Describing the minority is not a straightforward task, because of its heterogeneity and the discrepancies between Roma self-identifications and external Romaphobic stereotypes. The debate over "who is a Roma" and the ensuing dilemmas of Roma policymaking predate the political transition,[6] addressing the relevance and the nexus of ethnicity and socio-economic status (class) in group labelling, linked to the methodology of data collection, namely whether it should be based on self-identification, hetero-self-identification (collecting data about one's self-perception based on reactions from the external world) or third party identification (by external observers).

The main lines of academic debate address the following puzzles. Are the Roma a nation (without a land)?[7] Are they an ethnic, national, cultural or linguistic minority and at what stage of identity formation are they?[8] How different or similar are the Roma from other minorities?[9]

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[4] For a list of groups and their politically correct denomination see the Council of Europe Descriptive Glossary of terms relating to Roma issues version dated 18 May 2012. As the Glossary notes, the terminology has evolved since 1969 and the most important changes were effected when the denomination from nomadic turned to Travellers and from Gypsy to the Roma. These changes took place after the political transition, clearly showing the impact of the accession of Roma-dense CEE countries on discourse and expert construction. For the numbers see, Jean-Pierre Liegeois, *Roma, Gypsies, Travellers*, Strasbourg, Council of Europe, 1994. p. 34. These estimates have served as a basis for later publications by the EU and the World Bank. An estimated 200.000 Roma live in the Czech Republic, 500.000 in Slovakia, 600.000 in Hungary, two million in Romania and 700.000 in Bulgaria. Roma diasporas can also be found in the United States, Brasil and India.

[5] Elena Marushiakova, Vesselin Popov: The Roma – a Nation without a State? Historical Background and Contemporary Tendencies.in Bernhard Streck (Hg.): Segmentation und Komplementarität. Organisatorische, ökonomische und kulturelle Aspekte der Interaktion von Nomaden und Sesshaften. Beiträge der Kolloquia am 25.10.2002 und 27.06.2003. Halle 2004 (Orientwissenschaftliche Hefte 14; Mitteilungen des SFB „Differenz und Integration" 6) S. 71–100.. Importantly, there are no great differences between Roma on the territories of the former Habsburg and Ottoman empires from this perspective.

[6] See the debate on "Who is a Roma": János Ladányi – Iván Szelényi: Ki a cigány? Kritika, 1997 december; Gábor Havas – István Kemény – Gábor Kertesi: A relatív cigány a klasszifikációs küzdőtéren. Kritika, 1998 március; Gábor Kertesi: Az empirikus cigánykutatás lehetőségéről. Replika, 1998 március; János Ladányi – Iván Szelényi: Van-e értelme az underclass kategória használatának? Beszélő, 2011/11: 94–98. Also see, György Csepeli and Dávid Simon, Construction of Roma identity in Eastern and Central Europe: perception and self-identification, Journal of Ethnic and Migration Studies, 2004, Vol 30 Issue 1, pp. 129-150, Andrea Krizsán (ed.) Ethnic Monitoring and Data Protection: The European Context, 2001, Central University Press - INDOK. I have addressed the law's capacity to address both self-identification and racialisation in Lilla Farkas, The meaning of racial or ethnic origin under EU law: between identity and stereotypes, European Commission, January 2017 and Lilla Farkas, Data Collection in the Field of Ethnicity: Analysis and Comparative Review of Equality Data Collection Practices in the European Union, European Union, 2017

[7] Morag Goodwin, The Romani claim to non-territorial nationhood: taking legitimacy-based claims seriously in international law, European University Institute Department of Law, April 2006.

[8] Nicolae Gheorghe, Roma-Gypsy Ethnicity in Eastern Europe, Social Research, Vol. 58, No. 4, (Winter 1991), pp. 829-844. Gheorghe observes that the Roma are in a formative stage as a minority group, a process he labels "ethnogenesis".

[9] Gabriel Sheffer, Diaspora Politics At Home Abroad, Cambridge University press, 2003, pp. 139-141.

Does heterogeneity[10] or hybridity[11] capture more adequately in-group diversity? Are the Roma a racialised group in that they are compressed into a single, "constructed" entity by majorities on the basis of stereotypes, assumptions and other race making mechanisms?[12] Is Roma a politicised identity?[13] How to tackle the "expert construction" of Roma identity - a particularly salient question for Travellers (concentrated in the United Kingdom, Ireland and France) and groups at different stages of linguistic and cultural assimilation?[14] Are "civilised" nations, Eurocrats, experts and more broadly Western liberal democracies liable for mis-recognising[15] and mis-categorising the Roma?[16]

The thesis does not study Roma identity as a central theme. In order to bridge the gap between the group's categorical refusal of the racial label, and their endemic racialisation (discrimination based on assumed racial origin), it negotiates a way between the two poles of "Roma" as a "category of practice" - in other words between self and third-party identifications.[17] It deploys "Roma" as a collective label that more or less adequately reflects self-identification in the five Roma-dense countries, referring to identity puzzles whenever they become significant for the analysis.[18]

'Roma rights' in contrast is a widely used term that ignites little controversy and the thesis adopts a broad definition of the concept, conceiving it as encompassing not only claims as a minority, but also as a racialised, poverty stricken, excluded and subordinated "pariah" group.[19] Racial equality activism is used in reference to issues and events arising from

[10] Jean-Pierre Liégeois, Gypsies: An illustrated history. London: Al Saqi books, 1986. He talks about "a mosaic of small diverse groups" at pp. 49–50.

[11] Annabel Tremlett, Bringing hybridity to heterogeneity in Romani Studies in Romani Studies, Volume 19, Number 2, December, 2009, pp. 147-168.

[12] Enikő Vincze, The racialization of Roma in the 'new' Europe and the political potential of Romani women, European Journal of Women's Studies, 2014, Vol. 21(4) 443-449.

[13] Adrian Marsh and Elin Strand (eds.), Gypsies and the Problem of Identities: Contextual, Constructed and Contested, Swedish Research Institute in Istanbul, Transactions Vol 17, 2006.

[14] Katrin Simhandl, 'Western Gypsies and Travellers'–'Eastern Roma': the creation of political objects by the institutions of the European Union, Nations and nationalism, 2006, Mihai Surdu and Martin Kovats, Roma Identity as an Expert-Political Construction, Social Inclusion 2015, 3 (5) pp. 5-18.

[15] Andria D. Timmer, Educating the Hungarian Roma: Non-governmental organisations and minority rights, Lexington Books, Lanham, Boulder, New York and London, 2017. Timmer's analysis relies on Fraser's work, Nancy Fraser, Rethinking Recognition in Cultural Studies: From Theory to Action, edited by Pepi Leistyna. Maiden: Blackwell Publishing, 2005.

[16] Ian Law and Martin Kovats, Rethinking Roma: Identities, Politicisation and New Agendas, Palgrave McMillan, 2018.

[17] Mara Loveman, Is "Race" Essential?, American Sociological Review, Vol. 64, No. 6 (Dec., 1999), pp. 891-898.

[18] The law can reconcile the two poles of Roma as a "category of practice" by permitting challenges against discrimination based on both self-identification and presumptions. See, Lilla Farkas, The meaning of racial or ethnic origin under EU law, European Commission, 2017.

[19] István Pogány, Pariah peoples: Roma and the multiple failures of law in Central and Eastern Europe, Social & Legal Studies, 2012.

Romaphobic racial bias, rather than in reference to a racial frame voluntarily adopted by the Roma themselves. Romaphobia, a term emerging from ethno-political mobilisation and the academic studies of the Roma is used to denote anti-Roma, anti-Gypsy stereotypes.

The geographic reach of the thesis is not strictly limited to the Roma-dense Czech Republic, Slovakia, Hungary, Romania and Bulgaria, but the bulk of the material and the essence of the arguments are based on events that took place or came as a response to concerns emerging in these countries. Events that occurred elsewhere are incorporated when they shed light on the developments of Roma rights activism in the region, especially when litigation elsewhere in Europe greatly impacts on strategic choices in the CEE Five or on judicial interpretation at the European level that, in turn, reverberates in the CEE region.

An important characteristic of Roma communities in the CEE is not only their size, but also the negligible Roma middle classes and institutions as the quintessential preconditions of empowerment.[20] The group's economic situation is characterised by (often extreme) social deprivation and exclusion.[21] The most relevant indicator is unemployment ranging between 50-70%, which denotes the lack of official employment, while indicating the inability to break out of the substandard, overwhelmingly illegal labour conditions in which the majority of Roma labourers find themselves. Life expectancy, infant mortality and health indicators for the Roma stay shockingly low in national and regional comparison. Housing and schooling conditions are dire, particularly because the *de facto* toleration of Roma dwellings on state owned land was not regulated after the political transition, which continues to cause existential problems for those living in segregated settlements. Access to schools is generally not a problem, but drop-out and absenteeism are. Despite common prejudices concerning teenage pregnancies and birth rates, demographic trends among the Roma are approximating majority figures. While on paper the Roma enjoy equal voting rights, their residence status may be unresolved and impede not only participation in public life, but also access to social services.

Similar to other racialised minorities in continental Europe, the Roma do not self-identify as a racial minority. While being the most sizeable racialised minority in the CEE, they are marginal in Western Europe, where European Muslims and Afro-Europeans occupy central place in policies designed for populations "of immigrant background," a proxy category of race.

[20] Csepeli György – Örkény Antal: Az emancipáció kihívása a mai magyar társadalomban a romák és nem romák viszonyában, *Szociológiai Szemle*, 2015, 83-102.
[21] Dena Ringold, Mitchell A Orenstein and Erika Wilkens, Roma in an expanding Europe: Breaking the poverty cycle, World Bank, Washington D.C., 2004

In the CEE, where national origin is the key proxy, the Roma are not a dominant minority group.

Roma slavery prevalent in the Romanian Principalities for over three hundred years was abolished in 1856, approximately a century after the end of general serfdom. In the Habsburg Empire, the Roma were subjected to forceful assimilation, while being excluded from cities and land ownership. Their fate shows similarities with various indigenous communities and African-Americans in the United States, but this is a false comparison against which authors on both sides of the Atlantic caution.[22] The European "silence on race,"[23] - prevents Roma from becoming the "archetypical" racial minority in the CEE.[24]

The thesis is set in a period of profound transformation, with transitional democracies emerging from decades of social engineering and embracing Euro-Atlantic integration, a strongly desired counterbalance to the military and economic power of the Soviet Union/Russia. Systemic political, legal, and social reforms supported by elites were implemented in spaces that a century ago belonged to the Austro-Hungarian Empire on the one hand and the Ottoman Empire on the other. Their similarities, but also important differences had implications not only for ethnic identity formation, the organising culture and relations with dominant minority groups in a truly multiethnic region, but also for the use of legal tools. [25]

Considerations of regional security and stability threatened by the dissolution of federal states drew attention to the plight of the Roma as a matter of international concern, which in turn increased the salience of efforts addressing their recognition as an ethnic minority and/or

[22] Dimitrina Petrova, Political and Legal Obstacles to the Development of Public Interest Law, 5 E. Eur. Const. Rev. 62 (1996). See, also, Jack Greenberg, Report on Roma Education Today: From Slavery to Segregation and Beyond, 110 COLUM. L. REV. 919 (2010).

[23] Lentin A., Europe and the Silence about Race, European Journal of Social theory, 2008/11, p. 496. See also, Etienne Balibar and Immanuel Wallerstein, Race, Nation, Class: Ambiguous Identities, Verso, London - New York, 1988. They argue that social class - and within that, race and gender - define socio-economic disadvantage in Europe.

[24] Others argue that anti-Semitism is the dominant prism through which Europeans conceive of racial bias, which overshadows other types of racism. See, Rubio-Marín, R. and Möschel, M., 'Anti-discrimination exceptionalism: Racist violence before the ECtHR and the Holocaust prism', The European Journal of International Law Vol. 26 no. 4, 2015.

[25] The bureaucratic state is much stronger in the former, while familial ties provide the most important basis of social organisation in the latter. This difference has been noted by various social scientists. See, István Kemény, Beszámoló a magyarországi cigányok helyzetével foglalkozó, 1971-ben végzett kutatásról, Budapest, 1976. See, also, János Ladányi and Iván Szelényi, Patterns of exclusion: Constructing Gypsy ethnicity and the making of an underclass in transitional societies of Europe, East European Monographs, Columbia University Press, New York, 2006. A concise summary of social organisation specific to the Bulgarian Roma is provided in Ilona Tomova, The Roma in Bulgaria: Employment and Education, Südosteuropa Mitteilungen 02:66-86.

a subject of racial bias and social deprivation.[26] The threat of ethnic violence and statelessness activated local NGOs, and as soon as the physical threats dissipated and Roma-dense countries were admitted to NATO, EU accession advanced at an unprecedented pace.

The EU imposed its own policy frames on candidate countries, without much consideration for their past experiences.[27] Following accession - 2004 for the Czech Republic, Slovakia and Hungary and 2007 for Bulgaria and Romania - it left implementation to the member states and domestic civil society, despite predictions that norm compliance would decrease unless robust oversight was put in place.[28] According to predictions, pro-Western, liberal governments were more likely to adopt minority rights and anti-discrimination laws than nationalist ones,[29] but as the thesis shows, political preferences influenced norm-compliance following accession as well.

The global economic crisis only a year after the second batch of Eastern accessions triggered a new wave of Romaphobic violence reinforced by hate speech campaigns spearheaded by the political class. The crisis exacerbated the Roma's already precarious economic conditions, while rendering Romaphobic attitudes and narratives cocooned in welfare chauvinism widely acceptable.[30] Populists who initially racialised the Roma as mentally inferior and innately criminal at this point instrumentalised the group's dire socio-economic conditions to racialise poverty and delegitimise social inclusion policies.[31]

While some public institutions play an important role across the CEE,[32] public administrations in general do not promote Roma rights or worse, are part of the problem by

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[26] Indeed, the most widely cited study of the Roma's social deprivation in the CEE was published by the World Bank. See, Dena Ringold, Roma and the Transition in Central and Eastern Europe: Trends and Challenges, The World Bank Washington, D.C., 2000.

[27] Elena Marushiakova and Veselin Popov, European Policies for Social Inclusion of Roma: Catch 22?, Social Inclusion 2015, Volume 3, Issue 5, pp. 19-31. For an analysis of socio-economic conditions, see, Ringold et al, 2004, supra.

[28] Mileda Anna Vachudova, Europe undivided: democracy, leverage, and integration after communism, Oxford University Press, 2005. Antje Wiener and Guido Schwellnus, Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights, The Constitutionalism Web-Papers p0009, 2004. Ugo Sedelmeier, After conditionality: post-accession compliance with EU law in East Central Europe, Journal of European Public Policy, 2008, 15, 6: 806-825. Dimitrova, A. L., The new member states in the EU in the aftermath of accession. Empty shells?, Journal of European Public Policy, 2010, 17, 1: 137-148.

[29] Milana Anna Vachudova, The leverage of international institutions on democratizing states: Eastern Europe and the European Union, EUI Working Papers, 2001/33, Robert Schuman Center. Ruling elites fall into the categories of liberal and nationalist. Vachudova distinguishes between passive and active leverage, i.e. an abstract promise of accession and explicit accession criteria.

[30] Aidan McGarry, Romaphobia: the last acceptable form of racism, Zed Books Ltd, London, 2017.

[31] Law and Kovats, 2018, supra.

[32] Andrea Krizsán, Ombudsmen and similar institutions for protection against racial and ethnic discrimination, 4 Eur. YB Minority Issues, 62 (2004), and Balázs Majtényi, What Has Happened to Our Model Child: The Creation and Evolution of the Hungarian Minority Act 5 Eur. Y.B. Minority Issues 397 (2005-2006).

systematically undermining implementation and violating Roma rights.[33] They had frustrated the implementation of not only pro-minority but also anti-poverty policies, leaving the representation of the minority's collective interests to progressive ethno-political formations that resist cooptation by mainstream politics and to NGOs working for, with and on behalf of the Roma, still largely failing to empower the minority group itself.[34] In contrast with the general criticism of these actors, the thesis concerns itself with the recognition of the positive role of public institutions and the civil sector, to which there is simply no alternative in the present political climate. Nonetheless, given the breadth of the material and the focus on NGOs, the deeds of public institutions do not always come to the forefront of the analysis. This is a conscious choice that can be remedies by future research.

1.3. Methodology

The thesis asks why and how do the Roma use the law and what is the role of the law, lawyers and Roma rights activists? What do Roma rights mean and where do the Roma and activists place the emphasis? Do legal opportunities facilitate or hamper access to Roma rights and how do they impact on the structure, agenda and frames of Roma rights activism? What are its practices and how are they narrated? Is legal mobilisation a necessary component of the Roma movement?

The thesis interprets the past thirty years on the basis of archival materials, reports, judgments and decisions, as well as interviews with key activists and lawyers. It is notable that domestic activists were more likely to agree to interviews than persons working with international organisations, with the exception of Romania's best known Roma rights NGO, Romani Criss.[35] The interviewees were chosen to reflect the focus of the thesis, which is mapping the middle between international and local advocacy spaces. Most interviewees are go-betweens in the sense that they help translate frames and information up from the local to the national or the national to the international level, simultaneously bringing back useful morsels from the table of decision makers at higher levels. Important actors whose interviews are already on public

[33] Csepeli and Örkény, *supra*, p. 90.

[34] See, Maja Miskovic (ed.), Roma Education in Europe: Practices, policies and politics, Routledge, London and New York, 2013. On a more structural critique of the civil sector, see, Amanda Lashaw, Christian Vannier, Steven Sampson, Victoria Bernal, Erica Bornstein and Inderpal Grewa, Cultures of Doing Good: Anthropologists and NGOs, Tuscaloosa: The University of Alabama Press, 2017.

[35] Harvey, W (2011) Strategies for conducting elite interviews, Qualitative Research, 11(4): 431-441. Joan Font, Donatella della Porta and Yves Sintomer (eds.), Participatory democracy in Southern Europe: causes, characteristics and consequences, London-Lanham, Maryland: Rowman & Littlefield International, 2014.

record and who have had considerably better access to the public and academic research have not been interviewed by the author for this project, which does not mean, however that the author is unfamiliar with these personalities or their opinions. Some activists have been interviewed on numerous occasions, and the ones with whom the author has cultivated long term professional friendships have become involved in shaping the narrative perhaps more than otherwise desirable, but this is a risk accompanying any participatory account.

Archival materials comprise documents available to the public in print, on the internet or in the Open Society Archives that holds materials from the Roma Participation Program, the Constitutional and Legal Policy Institute and the Chance for Children Foundation. The periodical Roma Rights published by the European Roma Rights Center (ERRC), the publications of the European Network of Legal Experts in gender equality and non-discrimination (Legalnet) and domestic NGOs form the backbone of the research and email correspondence on record with the author another. Materials have also been retrieved from Hungarian court archives that hold the founding documents of the ERRC and domestic NGOs.

Because the author has been a participant in the Hungarian Roma rights scene and in transnational projects, her participatory observation over the last 25 years augments the sources. The narrative is biased by her positionality, namely that she is Legalnet's race (Roma) ground coordinator, that she served as president of the Hungarian Equal Treatment Authority's Advisory Board (2005-2011) and spent the most tumultuous period within the Roma rights movement - 1998-2006 - working as a staff lawyer at the Hungarian Helsinki Committee. She hails from a multiethnic background, identifies as a central European, a feminist and a successor of political dissidents.

As the foregoing suggests, the thesis employs a mixed method approach, probing and balancing subjective personal accounts with other similar narratives, but also with hard facts on public record. First, qualitative methods, such as interviews and participatory observations are augmented by quantitative ones, i.e. the collection and study of judgments from domestic courts and international tribunals, but also, of key advocacy materials. The way in which domestic judgments and decisions can be collected is far more difficult than locating and reading the rulings of international tribunals, especially in the context of a comparative analysis comprising at least five countries. Often, only short descriptions are available about domestic judgments that prevent researchers from analyzing case law in depth. Given that the thesis is – to the author's knowledge – the first attempt to systematize Roma rights jurisprudence in so many diverse fields, it is necessarily incomplete. Moreover, the fact that the author's point of

departure was practice, rather than theory, interpretation took a somewhat longer, and more winding path than generally expected.

Rather than discussing leading cases and doctrinal changes or focusing on courts and judges as the prime agents of social change the thesis foregrounds the activities of lawyers and activists. It tracks the careers, probes the biographies and credos of individual actors, who breathe life into these legal mechanisms and pays particular attention to legal strategies in education, housing and hate speech before public agencies enforcing anti-discrimination law (equality bodies) and courts at the domestic and supranational level. These fields are covered by all three inter/supranational legal orders - the treaties of the United Nations and the Council of Europe, as well as EU law - that prohibit racial discrimination in the five Roma-dense CEE countries and/or otherwise pertain to Roma rights broadly understood.

The literature dealing with the impact of Europeanisation[36] shows that norm diffusion triggered by the accession process was beneficial for the Roma's formal legal status, enhanced the advocacy potential of Roma NGOs and triggered policy change.[37] Voices critical of the actual handling of EU accession conditionalities emphasise that civil and political rights, minority rights and anti-discrimination laws alone were not sufficient to address the most pressing concern: the rapidly deteriorating socio-economic conditions and increasing social exclusion of the vast majority of the Roma.[38]

The thesis sheds light on the severe shortcomings of the social rights regime as a function of a limited EU *acquis* and the significance of member state competence in this field, that magnified the refusal of CEE governments to ensure adequate access to social entitlements.[39] It also addresses the gap between studies on compliance with laws on the books and in action

[36] Europeanisation is a contested concept that brings together complementary processes of change ranging from changes in external boundaries, developing institutions at the European level, central penetration of national systems of governance and exporting forms of political organization to a political unification project. It represents an institutional turn in political science research that focuses on standard operating rules and organisations of government. See, Johan P. Olsen, The Many Faces of Europeanization, JCMS 2002 Volume 40. Number 5, pp. 921–52. Maarten Vink, What is Europeanisation? and other question on a new research agenda, European Political Sciences, Autumn 2003.

[37] Melanie H. Ram, Roma advocacy and EU conditionality: Not one without the other?, Comparative European Politics, March 2011, Volume 9, Issue 2, pp. 217–241.

[38] Critical analysis investigated EU conditionalities separately, never in combination. István Pogány, Minority rights and the Roma of Central and Eastern Europe, Human Rights Law Review 6(1): 1–25. Peter Vermeersch, Minority policy in Central Europe: exploring the impact of the EU's enlargement strategy, The Global Review of Ethnopolitics 3 (2), 3-19. and Aron Buzogany: Swimming against the tide: contested norms and antidiscrimination advocacy in Central and Eastern Europe in Emanuela Lombardo and Maxime Forest (eds.),The Europeanisation of Gender Equality Policies. A Discursive-sociological Approach, Palgrave MacMillan, 2011, 145-167.

[39] Such as, for instance, Birgit Weyss and Alexander Lubich, Minority Protection and Anti-discrimination Policies: Synergies and Challenges at the EU Level, 4 Eur. Y.B. Minority Issues 297 (2004-2005), pp. 297-320.

by directing attention to legal mobilisation, i.e. using the law to generate social change for the benefit of the Roma.

The thesis canvasses non-governmental organisations that provide the organisational basis of Roma rights activism by studying how they came into being, their governance, activities, strategies and resources.[40] It draws on four different NGO classifications that, when combined, provide a full panorama of the organisational structure. The most basic distinction is made between domestic and international NGOs that are distinguishable in relation to their geographic scope and the desire to promote social change with reference to a state or the international community. This distinction, as will be shown does not automatically mean that domestic NGO focus is confined to domestic institutions or the other way around, but it does in most cases signify direct engagement with domestic Roma communities, domestic law and domestic courts and agencies, or contrariwise, a predominant focus on international organisations and tribunals. The thesis also distinguishes between organic (membership based), donor and (quasi)-government-organised NGOs.[41] The categories denote the source of initiative and funding. Donor-organised NGOs (DONGOs) are regularly mentioned in relation to the Open Society Foundations, a meta-NGO, a term that refers to an entity whose primary purpose is to provide support to other NGOs but that can also come to "govern" the NGOs it funds.[42] The thesis investigates legally focused or mixed profile NGOs.[43] The number of purely legally focused NGOs in the Roma rights field is limited, while hybrid NGOs pursuing both political and legal strategies are more common. In order to qualify as a legally focused entity, the NGO's agenda must be predominantly legal, meaning that it must employ lawyers and use the law in legal proceedings, based on a legal strategy or as a matter of legal service provision.

The analysis is conducted from the perspective of legal opportunities, organisational structure and legal strategy (framing and channeling). Variables taken from theories explaining the emergence of social movements, such as resources,[44] political opportunities[45] and relational

[40] John D. McCarthy and Mayer N. Zald, Resource Mobilization and Social Movements: A Partial Theory, American Journal of Sociology, Vol. 82, No. 6 (May, 1977), pp. 1212-1241; The Enduring Vitality of the Resource Mobilization Theory of Social Movements in Handbook of Sociological Theory, Jonathan H Turner (ed.), pp 533-565.

[41] Thomas George Weiss and Leon Gordenker (eds.), NGOs, the UN, and global governance, 1996, Lynne Rienner.

[42] Paul Stubbs, Stretching concepts too far? Multi-level governance, policy transfer and the politics of scale in South East Europe, Southeast European Politics, 2005, Vol 6, no 2: 66–87 at p. 81.

[43] The term is taken from Loveday Hodson, NGOs and the Struggle for Human Rights in Europe. Oxford and Portland, Oregon: Hart Publishing, 2011.

[44] McCarthy and Zald, *supra*, 1977.

[45] Doug McAdams, Revisiting the U.S. Civil Rights Movement: Toward a More Synthetic Understanding of the Origins of Contention, Center for Research on Social Organization Working Paper Series. 1999, No 588.

capital[46] provide the context and guide the analysis. Resources include not only money, but also "expertise, legal representation, status, political connections, and media access."[47] The narrative is organised in a chronological order that is also adequate for the description of how legal strategies evolve, change and revert back to previously abandoned approaches, responsive – albeit with some delay – to changing legal and political opportunities.

The analytical framework borrows from studies on (transnational) social movements.[48] Social movements are distinguishable from interest groups and coalitions. They are "defined as networks of informal interactions between a plurality of individuals, groups and/or organizations, engaged in political or cultural conflicts, on the basis of shared collective identities."[49] Given the focus of transnational social movement literature on collective action in the political sphere, the thesis also draws on transnational justice theory[50] in order to tease out the specificities of legal mobilisation for Roma rights: Roma-relevant legal opportunities, institutions, legally focused NGOs, as well as legal strategies. Given their centrality to the thesis, these theories are further detailed below.

The narrative draws on the "pathways of transnational influence" model[51] that studies transnational activism on the basis of the following premises: 1. developments in different institutional arenas are interlinked; 2. events must be analysed longitudinally; and 3. interactions between international organisations, transnational civil society, and the states targeted by mobilisation must be taken into account. This "longitudinal, multidimensional and dynamic approach" can adequately demonstrate that mobilisation for Roma rights occurs "in the context of fluid, multi-layered and interactive governance arrangements and is simultaneously influenced by the responses of the target" countries.[52] The pathways of transnational influence model is congruent with the overall aim of portraying interactions, synergies and combined outcomes between the national and international levels, the law and politics.

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[46] Mario Diani and Doug McAdam (eds.), Social Movement and Networks: Relational Approaches to Collective Action, 2003, OUP.

[47] An overview of legal mobilisation is provided in Michael McCann, Litigation and legal mobilization in Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (eds.), The Oxford Handbook of law and politics, 2008, p. 525.

[48] Jackie Smith, Charles Chatfield, and Ron Pagnucco (eds.), Transnational Social Movements and Global Politics: Solidarity Beyond the State, Syracuse, NY: Syracuse University Press, 1997.

[49] Mario Diani, The Concept of Social Movement, The Sociological Review, 1982, Vol 40, Issue 1: 1-25.

[50] Yves Dezalay and Bryant G Garth (eds.), Lawyers and the Construction of Transnational Justice, Routledge, 2012.

[51] Sabrina Zajak, Rethinking Pathways of Transnational Activism, Global Society, 2017, Vol. 31, No. 1, pp. 125–143.

[52] Ibid, p. 126.

The narrative is divided into three periods. In the *early years* between 1989 and 1995, UN treaties and domestic constitutions provided the benchmark of Roma rights activism before the CEE Five acceded to the Council of Europe, ratifying the European Convention on human rights and fundamental freedoms (ECHR) and the Framework Convention for the Rights of National Minorities (FCNM). Roma rights organisations began to emerge at the domestic level, while representation in the international advocacy realm was in the hands of the International Romani Union. Resources came primarily from the EU and the US (philanthropies) that set the frame for the coproduction of knowledge on the rule of law in general and Roma rights in particular.[53] Roma rights lawyering focused on advocacy and legal service provision in the field of criminal justice.

In the early years, the legal field was fragmented across nation states, while international legal opportunities were either inaccessible or underutilised both in terms of individual complaints and alternative reports complementing the monitoring mechanisms of various treaty bodies. Europeanisation changed the normative landscape and judicial interpretation as national (constitutional) courts embraced international treaties and jurisprudence, while international tribunals were striving to ensure coherence and consistency across supranational norms. While the European Court of Human Rights developed principles and measures requiring states to comply with its case law, EU law directly links the national to the supranational by requiring national courts to interpret and enforce its provisions in compliance with the Court of Justice of the EU's (CJEU) jurisprudence.[54]

In what the thesis terms the *golden age* between 1996 and 2006, the countries approximated their national legislation to EU law, joining NATO and the EU in quick succession. The US-based Open Society Foundations intervened in the organic development of the movement by establishing the ERRC, the crown jewel in what the thesis terms the *OSF Roma structure*. Jurisprudence emerged on Romaphobic violence and discrimination, particularly after the overtransposition of the EU's Racial Equality Directive. The ERRC became a key interlocutor in transplanting public interest litigation with reference to *Brown*,[55] the iconic US Supreme Court judgment declaring segregation unconstitutional.[56]

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[53] Ole Hammerslev, The European Union and the United States in Eastern Europe: two ways of exporting law, expertise and state power in Dezalay and Garth, 2012, supra.

[54] Paul Craig and Grainne de Búrca, EU Law: Text, Cases, and Materials, Oxford University Press, 2011, pp. 180-217.

[55] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[56] Andrew Moravcsik, Federalism in the European Union: Rhetoric and Reality, in The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union, Robert Howse and Kalypso

Europeanisation created new remedial routes, whose accessibility can, however, be hampered by admissibility requirements, such as the exhaustion of effective remedies (in fora other than the CJEU)[57] or the refusal of national courts to grant access (by failing to refer to the CJEU). That collective standing is often limited before international tribunals can also impede justiciability, because Roma rights claims tend to deal with structural discrimination.[58] Importantly, due to over-transposition, four CEE countries go beyond the "EU collective actor legislative requirements".[59]

The period of organic transnationalism following 2007 marked the OSF Roma structure's shift to policy advocacy befitting the European Social Model that spurred compliance by coordination in the framework of multi-level governance.[60] EU accession transformed OSF's role and post-accession backsliding placed an emphasis on developments at the national level, giving rise to mutual cross-border cooperation termed organic transnationalism in the thesis. This type of collaboration is distinguishable from the centralized, donor-imposed variety predominant in the "golden age." From financially destabilised Roma rights NGOs litigation defaulted to mainstream human rights organisations, while Roma communities mobilised national equality bodies. From financially destabilised Roma rights NGOs litigation defaulted to mainstream human rights organisations, while Roma communities mobilised national equality bodies. The European Commission sparingly used its enforcement power against recalcitrant member states as concerns non-compliance with the Racial Equality Directive.[61] More importantly, however, the EU failed to respond to the negative implications of the global economic crisis and populist backsliding with legislation reinforcing (racial) equality and financial incentives promoting the enforcement of existing norms.

Nicolaïdis (eds.), Oxford University Press, 2001, pp. 151-190. See, also, Daniel R Kelemen, Built to last? The durability of EU federalism in Making History: European Integration and Institutional Change at Fifty, Sophie Meunier and Kathleen R McNamara (eds.), OUP, 2007, pp. 51-66.

[57] Albertina Albors-Llorens, Judicial protection before the Court of Justice of the European Union, European Union Law, 2014, pp. 255–299.

[58] Impediments can be overcome by bundling claims or organising groups into NGOs that have standing in matters directly concerning their members.

[59] Elise Muir, Anti-discrimination Law as a Laboratory for EU Governance of Fundamental Rights at the Domestic Level: Collective Actors as Bridging Devices in Kilpatrick, de Witte, Muir and Miller, 2017.

[60] Beryl Philine, Ter Haar and Paul Copeland, What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy, European Law Journal, 2010 Vol 16, Issue 3, pp. 273-291.In their view, the European Social Model is "a mixture of hard law, soft law and underlying norms and values," while the increasing integration capacity of equal opportunities policies emerges despite the Commission's neoliberal preferences. Börzel argues that there is no way of knowing the level of compliance, however. See, Tanja A. Börzel (2001) Non-compliance in the European Union: pathology or statistical artefact?, Journal of European Public Policy, 8:5, 803-824. The capacities of the EU and accession states, as well as local social contexts play a part in compliance, according to Beate Sissenich, Building States without Society: European Union Enlargement and the Transfer of EU Social Policy to Poland and Hungary, 2007, Lexington Books.

[61] None of the infringement cases decided under the RED concern Roma rights.

1.4. Trans-Atlantic comparisons

The thesis tells the story of the ways in which Central and Eastern Europe's most sizeable ethnic minority has used the law in search of a better life, and while doing so, it cannot escape comparisons with the US civil rights movement, which is used by academics as well as the general public as the benchmark of racial justice activism across the globe. The civil rights movement has a vast literature and its definitive legal history was first written in the 1960s, then re-written by the so-called revisionists in the early 1990s, to serve as a touchstone for renewed critical insights in more recent times. In the center of this literature one finds the *Brown v Board of Education of Topeka* judgment of the US Supreme Court, a historic verdict in which the doctrine of 'separate but equal' was overturned in the context of primary education.[62]

While the thesis cherry-picks from this vast literature to support new arguments that may perhaps seem risky in Europe and the Roma rights context, it does not fully engage with US-centered theories and explanatory frames. It hopes to take the first step to the type of synthesis that the work of renowned constitutional scholar Mark Tushnet's definitive legal analysis about the legal strategies of the civil rights movement's flagship organization, the National Association for the Advancement of Colored People represents in the pre-*Brown* era, i.e. between 1925 and 1954.[63]

For his analysis, Tushnet could not only rely on the full, archived correspondence of NAACPs staff and leaders – such as Thurgood Marshall, the leading advocate and later Supreme Court judge for whom Tushnet himself clerked – but also the case files that signposted the NAACP's journey to the landmark ruling in *Brown*. These types of materials are scarcely available today, when correspondence is maintained via email and archived materials of key organisations are not yet open to the public. Nonetheless, the thesis uses Tushnet's analysis as a compass when it steps into a field yet unexplored.

While references to the civil rights movement contextualise the analysis, it is important to note at the outset the significant differences between the US under Jim Crow and the transitional CEE. Unlike in the US, segregation was outlawed in the CEE, because the Soviet

[62] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[63] Mark V Tushnet, The NAACP's legal strategy against segregated education, 1925-1950, 2nd ed, The University of North Carolina Press, 1994.

constitutions prohibited discrimination, but also because states in the soviet bloc supported anti-racist and anti-colonial struggles worldwide, being the first to ratify the relevant international treaties. Simultaneously, however, Roma children whose schooling began in earnest as late as the 1950s were taught by non-Roma teachers in substandard schools that became increasingly segregated, lacking positive role models, also because the children of affluent Roma families were admitted to integrated schools.[64]

The communities' own resources greatly differ in terms of employment levels, financial stability, expertise and ethnic solidarity. Black churches provided the backbone of the civil rights movement in the US as sites of identity formation, healing and community organising, but the connection between the struggle for recognition and spiritualism has been largely missing in the CEE, where historical churches partake in the Roma's oppression, while small Christian churches popular in segregated Roma districts have not supported the struggle for Roma rights in the public discourse.[65] The involvement of Black clergymen in political mobilisation could draw on majority religious support in the US, but one finds no parallel development in the CEE.[66] The social distance between whites and Blacks has been less accentuated than between the Roma and the *gaje* (non-Roma or *whites* in Romanes, the minority language), while the Roma - as Europeans in general - are not likely to make rights claims in court.[67]

Inspired by critical comparative methods, the thesis demonstrates the clout of indigenous norms and practices and the importance of understanding the context, rather than taking analogies and parallels for granted.[68] It situates accounts of the transnationalisation of anti-

[64] After 1989, non-Roma children were transferred from schools where the proportion of the Roma exceeded 10-15% and the quality of teaching and student competence in segregated schools plummeted. Physical conditions improved mainly from EU funds, but teachers resisted institutional reform necessitated by demographic trends - the rapidly decreasing school age population. Even though these trends provided an opportunity to close down Roma only schools, this has not been done, and segregated schools continue operating in the vicinity of integrated ones.

[65] This has been noted both by Michael Simmons, a civil rights activist who transferred to the CEE in the mid-1980s. See, John Feffer, Roma and the Civil Rights Movement, interview with Michael Simmons, 20 September 2013.

[66] Some Roma leaders have played an important role in minority religious life. See, for instance, Lászó Fosztó and Marian Viorel Anăstăsoaie, Romania: representations, public policies and political projects in Between Past and Future: The Roma of Central and Eastern Europe, Will Guy (ed.), University of Hertfordshire Press, 2001

[67] Interview with Simmons, 2013.

[68] Legrand calls attention to the ability of comparative law to enrich our understanding of ourselves, but also of those from whom we borrow. In his view, "unless the comparatist can learn to think of law as a culturally-situated phenomenon and accept that the law lives in a profound way within a culture-specific - and therefore contingent - discourse, comparison rapidly becomes a pointless venture." See, Pierre Legrand, The Impossibility of Legal Transplants, 4 Maastricht J. Eur. & Comp. L. 111 (1997), p. 124. Kahn-Freund suspects potential abuse, if comparative legal analysis "is informed by a legalistic spirit which ignores [the] context of the law'. See, Otto Kahn-Freund, On Uses and Misuses of Comparative Law, 37 Modem Law Review (1974), p. 27.

discrimination law[69] and public interest litigation[70] in the context of the CEE rights revolutions following 1989.[71] The true significance of the iconic Roma rights case, *D.H. and Others v the Czech Republic* (the "European *Brown*"[72]), the place of Roma rights among rival causes,[73] the significance of litigation as a social change tool and the Strasbourg Court as a supranational forum are explored in the thesis as they facilitate and constrain strategic litigation.[74]

D.H. takes prominent place in the analysis, which carries a moderate critique of its carefully constructed myth in the European anti-racist Parthenon. A complaint filed by 18 Roma children from the Czech city of Ostrava first in the Czech Constitutional Court (1999), and subsequently before the European Court of Human Rights (2000), the 'European *Brown'* challenged the wrongful placement of mentally sound students in so-called special schools on the basis of racial/ethnic origin. Unlike *Brown* in the US, *D.H.* did not result from the action of individual parents, but from the carefully planned legal strategy of the European Roma Rights Center that solicited clients for this litigation. In this sense, the origins of the case are very different from the scores of Roma rights cases discussed in the thesis. The Strasbourg Court's chamber delivered a negative judgment in the case in 2005, which was overturned by the Grand Chamber in 2007. The final ruling established indirect ethnic/racial discrimination in education for the first time under the auspices of the Council of Europe.

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[69] Andrew Geddes (2004) Britain, France, and EU Anti-Discrimination Policy: The Emergence of an EU Policy Paradigm, West European Politics, 27:2, 334-353; Mark Bell, Racism and Equality in the European Union, Oxford University Press, 2008; Erica Howard, The EU Race Directive: Developing the Protection against Racial Discrimination within the EU, Routledge, 2009; Rhonda Evans Case and Terri E Givens, Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive**,** JCMS 2010 Volume 48. Number 2. pp. 221–241; Stefano Fella and Carlo Ruzza (eds.), Anti-racist movements in the EU: between Europeanisation and national trajectories, Palgrave McMillan, 2013; and Iyiola Solanke, Making Anti-Racial Discrimination Law: A Comparative History of Social Action and Anti-Racial Discrimination Law, Routledge, 2012.

[70] Scott L Cummings and Louise Trubek, Globalizing public interest law, UCLA J. Int'l L. & Foreign Aff., Vol 13, 2009. See, however, Richard E. Posner, The Cost of Rights: Implications For Central And Eastern Europe - and for the United States, TULSA Law Review, Vol. 32 Issue 1., Fall 1996, pp. 1-19 and Richard L. Abel, The Globalization of Public Interest Law, 13 UCLA J. Int'l L. & Foreign Aff. 295 (2008).

[71] Jiři Přibáň and Wojciech Sadurski, The Role of Political Rights in the Democratization of Central and Eastern Europe in Wojcieck Sadurski (ed.), Political Rights under Stress in 21st Century Europe, Oxford, Oxford University Press, 2006, pp. 196-238.

[72] Morag Goodwin, Taking on racial segregation: the European Court of Human Rights at a Brown v. Board of Education moment?, Rechtsgeleerd magazijn Themis, 2009-3; Martha Minow, Brown v. Board in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge, 50 San Diego L. Rev. 1 (2013) and Antonia Eliason, With No Deliberate Speed: The Segregation of Roma Children in Europe, 27 Duke J. Comp. & Int'l L. 191 (2017).

[73] Dia Anagnostou (ed.), Rights and Courts in Pursuit of Social Change Legal Mobilisation in the Multi-Level European System, Hart Publishing, 2014

[74] The term is widely used but undefined. See, Evangelia (Lilian) Tsourdi, Enforcing Refugee Rights Under EU Procedural Law: The Role of Collective Actors and UNHCR in Claire Kilpatrick, Bruno de Witte, Elise Muir and Jeffrey Miller (eds.), How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum (EUI Working Paper LAW 2017/17, pp. 99-112.

1.5. Transnationalism

Interested in the movement of ideas, practices and institutions across national borders the thesis tells a transnational history of Roma rights activism from the perspective of lawyers and domestic legally focused NGOs who coproduced a transnational legal field concerned with Roma rights.[75] The transnational order is situated between the "horizontal language of statism and hegemony, and the vertical language of supranationalism."[76] Transnationalism is used to steer attention away from the states[77] but the thesis also relies on it to shift attention away from international (non-governmental) organisations and supranational adjudication.

Transnational captures three distinct vectors of transfer: the US-CEE, the EU-CEE and the CEE-CEE, alongside which legal transplants come to the fore.[78] Racial equality norms were embellished by EU legislation, which was in turn indirectly inspired by US law, while strategic litigation was transplanted to the CEE directly from the US.[79] The involvement of US rule of law crusaders can explain why other models were not drawn upon, such as EU gender equality legislation,[80] and legal mobilisation by Kurds and the LGBTQI community.

Ethnographic approaches direct attention to translators across diverse local practices in transnational networks[81] by pointing out that knowledge, ideas and practices must be vernacularised to be effective, in other words "they need to be translated into local terms and situated

[75] The term transnational history was coined in David Thelen, NI Painter, RW Fox, R Rosenzweig, A round table: Synthesis in American history, Journal of American History, 1987.

[76] Richard A. Falk, Human Rights and State Sovereignty, New York: Holmes and Meier Publishers, 1985, p. 49.

[77] H. Patrick Glenn, A Transnational, Concept of Law in The Oxford Handbook of Legal Studies, Mark Tushnet and Peter Cane (eds.), 2005.

[78] Alan Watson, Legal Transplants, 2nd ed., University of Georgia Press, 1993. According to Watson the concept denotes 'the moving of a rule [...] from one country to another, or from one people to another', p 21.

[79] James A Goldston, Race Discrimination Litigation in Europe: Problems and Prospects, Roma Rights 1998/2.

[80] Catherine Hoskyns Integrating Gender: Women, Law and Politics in the European Union, 1996, Verso, London-New York. In the United Kingdom, the statutory equality body, the Equal Opportunities Commission was the driving force behind legal mobilisation. See, Catherine Barnard, A European litigation strategy: the case of the Equal Opportunities Commission, 1990, Florence, European University Institute, 1990, EUI LLM theses; Department of Law. Elsewhere, lawyers and trade unions played a pivotal role in mobilising for equal pay. See, Claire Kilpatrick, Gender Equality: A Fundamental Dialogue in Labour law in Courts, in Silvana Sciarra (ed.), Labour law in Courts, Hart Publishing, 2001.

[81] Sally Engle Merry, Transnational Human Rights and Local Activism: Mapping the Middle, American Anthropologist, Vol 108, Issue 1, , March 2006, pp. 38-51.

within local contexts of power and meaning."[82] Individuals who inhabit the transnational echelons of the Network and engage in *translation* are depicted as brokers or social entrepreneurs.[83]

Transnationalism also helps distinguish between voluntary mutual and reciprocal practices of collaboration from unilateral efforts that seek to enforce a hierarchy between philanthropies and NGOs, as much as between international and domestic actors. The thesis conceives of the first form as "good" or organic transnationalism, contrasting it with "bad" or artificially generated transnationalism. It draws on the transnational account of the Helsinki movement to show its significant interlinkages with Roma rights activism and partly to highlight the different versions of transnationalism that predominate collaboration within the Helsinki movement on the one hand and the Roma rights movement on the other.[84] While transnationalism in the former seemed to be based more on an equal footing, in the latter context transnationalism has been wrought with severe tensions. Agents involved in both movements employed different types of transnational collaboration in one and the other.

The Roma minority itself is described in transnational terms[85] and Roma rights are likewise vindicated in a transnational practice field.[86] Cross-border cooperation in the EU is a model of transnationalism and Europeanisation has greatly contributed to the transnationalisation of Roma rights. It has not only provided a framework for norm diffusion, but also left a mark on legal practices. The general trends of Europeanisation of norms is well documented by

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[82] Sally Engle Merry, Human Rights & Gender Violence: Translating International Law into Local Justice, University of Chicago Press, 2006, p.1.

[83] Ana María Peredo and Murdith McLean, Social entrepreneurship: A critical review of the concept, Journal of World Business 41 (2006) 56–65. Peredo and McLean propose a broad definition of social entrepreneurs based on five elements: a person or group who (1) aims at creating social value; (2) shows a capacity to recognise and utilises opportunities to create that value (""envision""); (3) innovates in creating and/or distributing social value; (4) is willing to accept a high degree of risk in the process; and (5) is unusually resourceful in being relatively undaunted by scarce assets. In general, however, social entrepreneurship is an "untidy" concept. There is much debate on what is social and what is entrepreneurial in the "business of doing good." The concept may be new but the practice of combining a "social mission with an image of business-like discipline, innovation and determination" is not.

[84] The linkages between the Helsinki movement and the Roma rights field are noted in Aryeh Neier, The International Human Rights Movement: A history, Princeton University Press, Princeton and Oxford, 2012, pp. 156-158. The thesis diverges from his views on other points, notably on the "legalism" of the democratic opposition, embracing the Roma issue and the characterisation of the lawyers connected to the Helsinki committees. For a transnational perspective of the Helsinki movement see also, Sarah B. Snyder, Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network, Cambridge University Press, 2011.

[85] Aidan McGarry, Who speaks for Roma?: Political representation of a transnational minority community, Ethnopolitics, Vol 12, 2013, Issue 220.

[86] The term transnational law was first used by a judge of the International Court of Justice. See, Philip C. Jessup, The Concept of Transnational Law: An Introduction, 3 Colum. J. Transnat'l L. 1, 2, 1963.

social scientists,[87] but the thesis offers a rare account of the details of transposition and legal institutions facilitating compliance.[88]

Transnational law that eloquently captures Roma rights practice from the perspective of progressive domestic Roma rights lawyer has "its own normative sphere," in other words, it is "*neither* national nor international nor public not private at the same time as being *both* national and international, as well as public and private."[89] The *corpus iuris* relevant for Roma rights is inter-ordinal,[90] meaning that it derives norms and interpretations from EU law and distinct international treaties, as well as diverse adjudicative processes that partially overlap and diverge, each claiming authority to interpret the actual instrument whose oversight it is entrusted with.[91]

The thesis also describes developments situated in the national legal field, in international organisations and supranational judicial fora. The adoption of national and international norms, the establishment of institutions and the role of domestic and international NGOs provide material for chapters II and II, while Chapter IV offers a new take on adjudication by looking at legal, policy and political processes preceding and following celebrated supranational rulings, cutting across national borders.

Following these descriptive parts, Chapters V and VI become more analytical, shedding light on exchanges, collaboration and conflicts within the Roma rights movement - in place by 1989 when the story begins - and the Transnational Roma Rights Network that emerged in the second half of the 1990s, when the growth of resources, the organisational structure, legal (and political) opportunities and relations accelerated. These factors can also explain the emergence of social movements, yet, the Network is not synonymous with the Roma movement, because the latter focuses on political mobilisation and grassroots organising, while the Network concerns itself with legal and policy changes. Yet, given the overlaps between political and legal advocacy, the Network is intimately connected to the movement.

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[87] This is the case for analyses by Pogany, Vermeersch and McGarry cited above.

[88] For an exception to the general approach see, Buzogany, 2011.

[89] Craig Scott. "Transnational Law" as Proto-Concept: Three Conceptions, German Law Journal 10.6/7 (2009): 859-876 at p. 873. Transnational human/Roma rights lawyering is analogous to the *flow* described in The Flow experience and its significance for human psychology in Mihály Csíkszentmihályi and Isabella Selega Csíkszentmihályi (eds.), Optimal experience: Psychological studies of flow in consciousness, CUP, 1988.

[90] Luis I. Gordillo, Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law, Oxford: Hart Publishing, 2012.

[91] M. Claes and Š. Imamovic, Caught in the Middle or Leading the Way? National Courts in the New European Fundamental Rights Landscape, European Journal of Human Rights, 2013/4, p. 628.

The thesis draws on transnational advocacy network (TAN) theory[92] that is not only widely used by the Roma related literature,[93] but incidentally also applies to the study of the Helsinki movement that plays a significant role in Roma rights activism.[94] TAN theory investigates the emergence of transnational norms produced by a network of experts and activists that forms around the consensual idea of human rights. TANs arise around international treaties at transnational conferences, particularly in the human rights field.[95] They include NGOs, public officials and journalists, both at the national and international level. Linkages between national and international organisations enable network members to promote legal and policy change *vis-a-vis* their governments through the so-called boomerang effect, whereby a domestic NGO initiative gains leverage on domestic policy via international advocacy.

Roma rights activism unfolds in the framework of the Transnational Roma Rights Network, whose backbone is the Open Society Foundations' Roma structure that acts as an interlocutor/interloper between domestic Roma NGOs, bureaucracies and international organisations. The expansion of (inter)national bureaucracies relevant for Roma rights impacted on the formation of the Network that ebbs and flows depending on the salience of the Roma issue in European and national politics.

The Network supports the Roma movement, at times overlapping with it, without either actually controlling the other. Movement members often belong to the Network too, but the contrary seldom occurs. While the movement is defined by ethnicity and leaders directly link to the grassroots, the Network is overwhelmingly non-Roma, defined by expertise and information exchange to promote the collective interest of the Roma.

The Network is not an officially established or registered entity. While being virtual, it nonetheless provides a structure for action, collaboration, mutual learning, but also domination among Network constituents: national and international, European and US activists, lawyers, journalists, philanthropies and bureaucrats. There is widespread consensus about the existence

[92] Margaret E. Keck, and Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics, Ithaca: Cornell University Press, 1998.

[93] Peter Vermeersch, Advocacy networks and Romani politics in Central and Eastern Europe. *JEMIE - Journal on ethnopolitics and minority issues in Europe*, 1, 2001, pp. 1-21; Melanie H. Ram, Studies in Comparative International Development, 2003, Summer 2003, Vol. 38, No. 2, pp. 28-56; and Aidan McGarry, Ethnic group identity and the Roma social movement: Transnational organizing structures of representation, The Journal of Nationalism and Ethnicity, Volume 36, Issue 3, 2008, pp. 449-470.

[94] Snyder, supra, supra, 2011, p. 8.

[95] Keck, and Sikkink, 1998.

of a Roma (rights) movement, as well as a Roma (rights) TAN,[96] but their relevance in law has not yet been explored.

Relying on the transnational justice model the thesis tracks the role of lawyers, activists and other agents as they construct the Roma rights field. Transnational justice provides an explanation for norm adoption and diffusion[97] and the thesis draws on its insights that convincingly bridge the shortcomings of competing explanatory frames, such as TAN[98] and radical international political economy.[99] These diametrically opposed frames focus on consensus and collaboration v hegemonic and imperial attitudes in international normative practices.

The transnational justice model perceives these approaches as "too one-dimensional" in that they underestimate either idealism and collaboration or conflict, competition and professional hierarchy.[100] Both collaboration and competition have been important driving forces in the Roma rights field as the story unfolding on the following pages undoubtedly shows. Agents often legitimate themselves by competing and "turf battles" have been central to the Roma rights field with reference to areas of expertise, legal traditions, language and ethnicity.[101] The law, the common law tradition and fluency in English could be transferred into "symbolic goods" to enable lawyers to prevail in conflicts,[102] while transforming them into un-"neutral translators".[103]

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[96] See, for instance, Ilona Klímová-Alexander The Romani voice in world politics: The United Nations and non-state actors, 2005, Routledge, London; Peter Vermeersch, The Romani movement: Minority politics and ethnic mobilization in contemporary Central Europe, 2006, Berghahn Books, New York, London. On the Roma TAN see, Vermeersch 2001, Ram 2003, and McGarry 2008, *supra*.

[97] Garth and Dezalay explain their lack of attention to neo-institutionalism by pointing to this model's different approach to how consensus is engendered. In the neo-institutionalist explanation consensus that plays a central role in the two opposing theories is replaced "by a simple assumption of an emerging rationality," Dezalay and Garth, 2012, supra, p. 5. John W. Meyer, John Boli, George M. Thomas and Francisco O. Ramirez, World Society and the Nation-State in American Journal of Sociology, Vol. 103, No. 1 (July 1997), pp. 144-181.

[98] Similarities between TANs and epistemic communities are suggested in Steven Meili, Latin American Cause-Lawyering Networks in Austin Sarat and Stuart Scheingold, Cause Lawyering and the State in a Global Era, OUP, 2001. An epistemic community is "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area." Epistemic communities have a common policy enterprise and a shred criteria of validity, however, what fundamentally distinguishes them from scientific networks is that "members of an epistemic community in addition share principled (normative) and causal beliefs." See, Peter M Haas, Introduction: Epistemic Communities and International Policy Coordination in International Organization, Vol. 46, No. 1, (Winter, 1992), pp. 1-35, p. 35.

[99] Hardt, M and A Negri, Empire, Cambridge: Harvard University Press, 2000; Van der Pijl, K, Global Rivalries: From the Cold War to Iraq, London: Pluto Press, 2006; and Van der Pijl, K., Imperialism and Class Formation in the North Atlantic Area, Amsterdam: VS Verlag, 1983. The last volume introduces the concepts of an "Atlantic ruling class."

[100] Dezalay and Garth, 2012, p. 5.

[101] Dezalay and Garth take this concept from Abbott, A, The System of Professions, Chicago: University of Chicago Press, 1988.

[102] Dezalay and Garth, 2012, p. 5.

[103] Ibid.

Roma rights lawyers and activists had to be adaptable to keep up with the pace of Europeanisation.[104] The thesis foregrounds the legal, political, academic, linguistic and ethnic capital invested in the field by tracking the agents' career paths. It studies their strategies, delving into the hierarchy between the dominant international and the second class national (CEE local) elites[105] with reference to control over transfer and coordination as "an important dimension of power."[106]

Existing accounts focus on INGOs, overshadowing the role of domestic agents,[107] their broad understanding of social change tools, and connections between domestic and supranational activism and litigation.[108] They understand movement activism as analogous to "sustained challenges, by individuals or groups with common purposes, to alter existing arrangements of power and distribution," while conceding that (supranational) litigation can not only clarify the law and practice but also create further opportunities for action.[109]

The thesis demonstrates the complexity of transnational Roma rights practice, the importance of "forum-shopping" and judicial borrowing - or non-borrowing, as the case may be. Interpretation by the European Court of Human Rights (ECtHR, Strasbourg Court) dominates the analysis,[110] but the transposition and interpretation of EU anti-discrimination law is also assessed. Less attention is paid to UN treaty bodies on account of their marginal impact in the region.

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[104] Dezalay and Garth, supra, 2012, p. 6.

[105] Yves Dezalay and Bryant Garth, From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights, Annu. Rev. Law Soc. Sci. 2006. 2:231–55.

[106] Haas, supra, 1992, p. 2.

[107] Dilek Kurban, Stiftung Wissenschaft und Politik - SWP - Deutsches Institut für Internationale Politik und Sichenheit (Ed.), Europe as an agent of change: the role of the European Court of Human Rights and the EU in Turkey's Kurdish policies, working paper, Berlin, 2014, pp. 9-10. Kurban reminds the reader that although a visit of British human rights lawyers to Diyarbakir in 1992 launched a fruitful cooperation with Kurdish lawyers before the Strasbourg Court, a Kurdish human rights activist, Kerim Yildiz, founder of the Kurdish Human Rights Project in London was the "translator" and Kurdish lawyers became the pioneers of supranational litigation to complement political mobilisation.

[108] Rachel A. Cichowski, The European court and civil society: litigation, mobilization and governance, Cambridge, UK; New York: Cambridge University Press, 2007 and Lisa Vanhala, Anti-discrimination policy actors and their use of litigation strategies: the influence of identity politics', Journal of European Public Policy, 2009, 16, 5: pp. 738-754. A multi-level research agenda on why the law is mobilised and by whom is proposed in Lisa Conant, Andreas Hofmann, Dagmar Soennecken and Lisa Vanhala, Mobilizing European law, Journal of European Public Policy, 2018, 25:9, pp. 1376-1389.

[109] Martin Shapiro, Courts: A Comparative and Political Analysis, Chicago: University of Chicago Press, 1981; A. Stone Sweet, On Law, Politics and Judicialization, Oxford: Oxford University Press, 2000. On Roma rights, see, Sophie Jacquot and Tommaso Vitale, Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level, Journal of European Public Policy, 2014, 21:4, 587-604.

[110] According to the ECtHR's Factsheet on Roma and Travellers, as of January 2018, the European Court of Human Rights delivered 76 Roma related judgments and nine inadmissibility decisions, while 15 applications are pending before it.

Transnationalism takes different forms and the thesis navigates among them with reference to "good" and desirable v "bad" and undesirable transnationalisms, while assessing the strengths and weaknesses of each, including the leverage provided by multilevel systems, such as the EU, cross-border collaboration among NGOs, the mixed outcomes of supranational adjudication that often fails to gain traction in national advocacy spaces, and the harm that top-down internationalism dominating the planning and funding practices of meta-NGOs/philanthropies can cause.

1.6. A "law and social movements" approach

To explain Roma rights activism from the perspective of social change the analysis relies on the concept of legal mobilisation that developed from the sociological study of civil rights organisations in the US.[111] The term was introduced to depict the political uses of the law,[112] while the concept can accommodate a wider range of actors, given that: "The law is ... mobilized when a desire or a want is translated into a demand as an assertion of rights"[113] The thesis adopts this broad understanding, because it facilitates a bottom-up inquiry conscious of the agency of Roma individuals.

Legal mobilisation scholarship understands litigation "as just one potential dimension or phase of a larger, complex, dynamic, multistage process of disputing among various parties."[114] Scholars conceive of litigation strategies and impacts "as typically complex, indeterminate, and contingent."[115] They share the premise that individuals possess grossly unequal capacities to mobilise the law,[116] thus the law itself can sustain existing "privileges of unequal power."[117] The law can "contain, channel, divert, and absorb citizen challenges" while it also has the capacity to empower marginalised groups.[118]

Public interest litigation plays a central role in the understanding of how racial equality is claimed in the United States. The concept is debated, but there is a consensus on its origins

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[111] Joel F Handler, Social movements and the legal system: A theory of law reform and social change, 1978, University of Wisconsin, Madison.
[112] Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change, 1974, New Haven, Conn.: Yale University Press.
[113] Frances Kahn Zemans, Legal mobilization: The neglected role of the law in the political system, American Political Science Review, Volume 77, Issue 3, September 1983 , pp. 690-703 at p. 700.
[114] McCann 2008, supra, p. 524.
[115] Ibid.
[116] McCann 2008, supra, p. 525.
[117] Ibid.
[118] Ibid.

in litigation for racial equality and the emergence of civil rights organisations.[119] The thesis takes a broad view of public interest litigation as "integral to a holistic social change strategy that may also include community mobilization, leadership and economic development, media outreach, policy analysis, and empirical research"[120] to promote access to justice of underrepresented groups. Public interest litigation opened the way to challenges reforming public policy in the US, a phenomenon termed public law litigation.[121] Given the specific role public interest law organisations[122] play in US governance and political processes,[123] public interest *litigation* as a mechanism of social change can be distinguished from public interest *law* as a political institution that requires professional structures and stable resources.[124]

Interdisciplinarity is necessary to bridge the gap between the study of the law and social movements,[125] to ask questions about both the law and politics[126] and analyse institutions,[127] comparing the effectiveness of tools employed by "politics as well as law."[128] Interdisciplinary approaches can fill the gaps of existing critical accounts that focus on the "prototype"[129] of legal mobilisation, the *Brown* litigation.[130] Regrettably, they rely on a counterfactual, the assumption that political mobilization would have been more effective than legal mobilization or that in the least the former would have been a "more effective and accountable challenger of power" than litigation.[131] Synergistic accounts also address the rift that characterised the legal and political

[119] Handler, 1978, supra.

[120] Helen Hershkoff and David Hollander, Rights into Action: Public Interest Litigation in the United States in Many roads to justice: the law-related work of Ford Foundation grantees around the world, McClymont, Mary, ed.; Golub, Stephen (eds.), 2000, p. 90.

[121] Abram Chayes, The role of the judge in public law litigation, Harvard law review 1976, pp. 1281–1316. Public law litigation targets public bodies and entities that provide public services.

[122] Catherine R Albiston and Laura Beth Nielsen, Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change, Law & Social Inquiry, 2014, Vol 39, Issue 1, pp. 62-95

[123] Helen Hershkoff, Public Interest Litigation: Selected Issues and Examples, The World Bank, Washington DC, 2005.

[124] *Ibid*.

[125] Michael McCann, Law and Social Movements, Routledge, London, 2006, p. xi.

[126] Scott L. Cummings, Rethinking the Foundational Critiques of Lawyers in Social Movements, 85 Fordham L. Rev. 1987 (2017).

[127] Neil K. Komesar, In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative, Michigan Law Review, 1981, 1350-1392, and Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, Chicago, University of Chicago Press, 1994.

[128] Cummings, 2017, p. 1988.

[129] David S. Meyer and Steven A. Boutcher, Signals and Spillover: Brown v. Board of Education and Other Social Movements, Perspectives on Politics, 5, 1: 81-93, 2007.

[130] Gerald N Rosenberg, The hollow hope: Can courts bring about social change?, 1991, University of Chicago Press and Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 8 (1993).

[131] Cummings, supra, 2017, p. 1990.

wings of the civil rights movement.[132] Understanding the trajectory not only of legal mobilisation, but also of its critique can shed light on the agenda of US agents in the Roma rights movement and help answer questions plaguing the Roma movement as well, particularly about the role of grassroots activists on the sidelines of masculine turf battles.[133]

The thesis builds on accounts of Roma rights activism that inquire into a given country, field or organisation[134] and the development of the political movement,[135] studying the organisational structure ("informal and formal organizations as sites of mobilization"), political opportunities ("the opportunities for a challenger to engage in successful collective action") and framing processes ("collective processes of interpretation, attribution and social construction that mediate between opportunity and action").[136] In these accounts the political field subsumes legally focused NGOs.

The thesis reviews assumptions that treat the law as a black box and legally focused organisations as irrelevant or worse still, as competitors for the political movement. The focus on political processes neglects the explanatory force of the law and casts legal agents into supporting roles.[137] Roma rights NGOs become the protagonists here as compared with political science accounts that customarily begin with the International Romani Union (IRU) and track political formations,[138] viewing legally focused NGOs – first and foremost the ERRC - with suspicion, while neglecting domestic Roma rights NGOs.[139]

The thesis seeks to "factor in" the law, telling the story with reference to frames explaining the emergence of social movements. The analysis relies on resource mobilisation theory that highlights expert, financial and other resources, whose availability facilitates the

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[132] Christopher Coleman, Laurence D. Nee and Leonard S. Rubinowitz, Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest, Law & Social Inquiry, Vol. 30, No. 4 (Autumn, 2005), pp. 663-736. Lani Guinier, From Racial Liberalism to Racial Literacy: *Brown v. Board of Education* and the Interest-Divergence Dilemma, The Journal of American History, June 2004, pp. 92-118.

[133] Tomiko Brown-Nagin, The transformation of a social movement into law? The SCLC and NAACP's campaigns for civil rights reconsidered in light of the educational activism of Septima Clark, Women's History Review, 1999, 8:1, 81-137 at p. 81.

[134] Helen O'Nions, Minority rights protection in international law: The Roma of Europe, Routledge, London, 2007 and Claude Cahn, Human Rights, State Sovereignty and Medical Ethics: Examining Struggles Around Coercive Sterilisation of Romani Women, 2014, Martinus Nijhoff Publishers.

[135] Vermeersch, supra, 2007, p. 213.

[136] McAdam, supra, 1999, p. 3.

[137] Zoltán D. Bárány, The East European gypsies: regime change, marginality, and ethnopolitics, Cambridge University Press, 2002.

[138] On pre-IRU developments see, Hancock, 2002, pp. 113-124. See, also, Ilona Klimova-Alexander and Sevasti Trubeta, Roma as Homines Educandi: A collective subject between educational provision, social control and humanism in Roma Education in Europe: Practices, Policies and Politics, edited by Maja Miskovic, Routledge, London and New York, 2013, pp. 15-28.

[139] See, Jacquot and Vitale, supra, 2014, pp. 596-597. They mention the ERRC as part of an OSF influenced TAN, mainly to undergird activist Rudko Kawczynski's pivotal role in the establishment of various Roma NGOs.

participation of self-interested persons in movements.[140] Progressive philanthropies, civil rights organisations and lawyers play a key role in narratives about the civil rights movement in the US. Philanthropies, the EU, Roma rights NGOs and lawyers play an equally significant role in the thesis that sheds light on the importance of EU/US donors and the Helsinki movement as resource providers in the CEE, and the controversial, yet altogether positivel role of the OSF Roma structure in transnationalising the struggle for Roma rights.

The thesis draws more substantially on legal opportunities, an analytical framework addressing gaps in the model of political opportunity structures[141] that inaccurately explains movement activity, because of its failure to reckon with the law as a separate field.[142] Political scientists treat the law as a set of policies, even though separating out legal opportunity may explain movement strategies better, because "a lack of [political opportunity] may *influence* the adoption of litigation as a strategy in place of lobbying" while the choice of protest "may be *influenced* by poor political and legal opportunities."[143] Legal opportunities foreground the importance of legislative and jurisprudential changes that benefit minorities, laying the ground for analysis accounting for the "significant role laws, courts and cause lawyers play in triggering social change."[144] The impact of legal opportunity structures guides the analysis throughout the thesis, in the way they influence the organisational basis, channel resources and legal strategies, and interfere with knowledge transfers.

The emergence of advantageous legal opportunities had a profound impact on Roma rights activism by facilitating the framing of claims under specific (treaty) mechanisms. The expansion of (international) norms lay the ground for channeling, a conversation between social movements, courts and counter-movements.[145] The choices made about presenting goals in human rights terms impacted on the Roma movement, as much as on the inevitable counter-mobilisation.[146] Channeling, i.e. the law's "pulling effect", its influence on the "rhetoric, strategies, and norms of social movements" and inversely, the movements' influence on the law[147] has

[140] McCarthy and Zald, 1977.
[141] Charles Tilly, Social Movements and National Politics in C. Bright and S. Harding (eds.), State- making and Social Movements: Essays in History and Theory, Ann Arbor: University of Michigan Press, 1984, pp. 297–317.
[142] Chris Hilson New social movements: the role of legal opportunity, Journal of European Public Policy, 2002, 9:2, pp. 238-255.
[143] Hilson, supra, 2002, p. 239.
[144] Ellen Ann Andersen, Out of the Closets & into the Courts: Legal Opportunity Structure and Gay Rights Litigation, University of Michigan, 2005.
[145] William N. Eskridge, Jr., Channeling: Identity-Based Social Movements and Public Law, University of Pennsylvania Law Review, Vol. 150, No. 1 (Nov., 2001), pp. 419-525, at p. 423.
[146] Ibid.
[147] Ibid.

been particular in the Roma rights context, because by summoning Roma-dense CEE states before international tribunals, the movement had influence over supranational adjudication and European law broadly understood,[148] but it also engendered governmental counter-mobilisation against Roma rights.

1.7. Structure

The thesis begins with an Introduction that constitutes a chapter of its own. It is followed by three descriptive and two analytical chapters that are brought together in the Conclusion. Chapter II charts the development of the legal opportunity structure with particular emphasis on the underutilisation of minority rights, the refusal of the Roma-dense CEE countries to effectively protect social rights, and in turn, the Racial Equality Directive's over-transposition benefitting the Roma by putting in place enforcement regimes combining broad agency powers with collective standing—with the exception of the Czech Republic. Legal opportunities lay the ground for analysis in Chapter IV and support the critical assessment of the so-called critical Roma narrative in Chapters V and VI.

Chapter III sheds light on the ways in which the organisational structure and transnational collaboration were shaped by resources, legal, and political opportunities. Chapter IV charts the legal strategies of NGOs, communities and public enforcement agencies as they shape, use and/or ignore legal and political opportunities. It draws attention to the ways in which domestic agents seized international tribunals to leverage both their legal and political agendas at home. Being directly accountable to grassroots, they responded to community needs more adequately than INGOs. In the CEE Four, public enforcement and representative action played a significant role, with civil rights and anti-discrimination frames used to vindicate social rights, while the Czech Republic where strategic legal action was pioneered remained an exception.

Chapter V studies the impact of inter-ordinal complexity – particularly the expanding substantive provisions and the ever-evolving "the rules of engagement" - on the transplantation and internationalisation of public interest litigation by zooming in on turf battles between the

[148] Armin von Bogdandy, The Idea of European Public Law Today - Introducing the Max Planck Handbooks on Public Law in Europe, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2017-04.

dominant international and the secondary CEE elites.[149] From a moderate perspective, the chapter argues that rather than engaging in "myth-busting" at home, the US legal elite seized the opportunity to transfer its own, "presentist" reading of *Brown* to then re-import it bathed in the glory of international human rights.[150] In the CEE, legal as well as policy reform was driven by advocacy and community action, in turn buttressed by litigation, with lawyers and international litigation playing an important role, but not in the way suggested thus far.[151]

Chapter VI builds on the analysis of legal opportunities and legal strategies to partially dispel both the dominant narrative and its critique advanced by the progressive Roma elite based on ethnicity and the primacy of political mobilisation. Using desegregation as a case study, it reviews the dogma of Roma participation, concluding that interethnic collaboration and transnationalism adequately facilitate representation in the CEE context, because the Roma lack the resources necessary to achieve racial justice alone, while European corporativism necessitates dialogue prior, during and after legal disputes.

Chapter VII concludes by highlighting the indispensability of legally focused NGOs that garner interracial coalitions and bring *gaje* resources to the Roma movement. It argues that CEE agents ought to have a say in the narrative, otherwise there is a real risk that US debates about the primacy of legal or political mobilisation will be transnationalised, undermining the legitimacy of Roma rights NGOs at a time, when all hands must be on deck. While recognising the importance of strategic litigation, it proposes to shift the limelight to public enforcement, collaboration with equality bodies and public funding for (representative) action. The thesis advocates for deeper engagement with bar associations and legal aid services that can offer resources and select test cases that reflect the needs of the communities, rather than the aspirations of legal and political vanguards. The key take-away is that organic and voluntary cross-border cooperation is the form that transnationalism should aspire to in order to most effectively fight the evils of racism. In other words, the *modus operandi* of the Roma rights movement should be more closely aligned with that of the international human rights movement, which

[149] Scott L. Cummings, The Internationalization of Public Interest Law, Duke Law Journal, 2007, Vol 57, pp. 891-1036.

[150] Susan D. Carle, How Myth-Busting about the Historical Goals of Civil Rights Activism Can Illuminate Future Paths, 7 Stan. J. C.R. & C.L. 167 (2011).

[151] James A Goldston, Public interest litigation in Central and Eastern Europe: Roots, prospects, and challenges, Human Rights Quarterly, 2006, Vol. 28, No. 2 (May, 2006), pp. 492-527; The Struggle for Roma Rights: Arguments that Have Worked, 32 Hum. Rts. Q. 311 (2010), pp. 311-325 and most recently, The Unfulfilled Promise of Educational Opportunities in the United States and Europe: From Brown to D.H. and Beyond in Jacqueline Bhabha, Andrzej Mirga, Margareta Matache (eds.), Realizing Roma Rights, 2017, University of Pennsylvania Press, pp. 163-186.

would necessitate that these movements' key donor, the Open Society Foundations pursue analogous strategies both in terms of funding and collaboration.

Chapter 1I

Legal opportunities

Chapter I1 charts the development of norms that can be used to further the cause and defend Roma individuals, as well as those that hamper legal mobilisation. It sets the tone of the thesis as a legally oriented piece that, however, considers social change equally important. The scope of this chapter sets the thesis apart from other works on Roma rights, because it goes much further in describing Roma-relevant norms than customary, particularly as concerns social rights and the procedural aspects of Roma rights practice. Moreover, rather than listing the relevant norms separately, the chapter seeks to highlight the linkages among the legal regimes that populate the Roma rights field. Chapter II also sets the scene for the analysis of legal strategies in Chapter IV, indicating when certain legal opportunities become accessible so that strategic choices can be understood in their temporality. Finally, it provides the background against which both the dominant and critical narratives about Roma rights mobilization can be realistically assessed, particularly in Chapter VI.

Roma-relevant norms have been summarised in every major work on the topic that often retrospectively discuss *formal compliance*, i.e. when rules on the books comply with the international canon. In order to ground the analysis at the level, where legal action customarily begins, showcase the role of a multitude of institutions and build a transnational narrative, Chapter II presents domestic and international legal opportunities as a continuum. It inquires into often overlooked procedural aspects to tease out the ways in which the law can be invoked to ensure *substantive compliance*, i.e. compliance with the rules in practice.

The chapter considers four relevant baskets of issues for each period: 1. the substantive content of discrimination law; 2. specific provisions addressing segregation, especially in education; 3. relevant social rights protection beyond a discrimination framework; and 4. provisions on enforcement and remedies. Social rights can ensure access to rights per se that anti-discrimination law cannot, such as the right to education, housing, public services (health) and employment. Given that anti-discrimination law is limited to instances when, for instance access to such rights is not equal, social justice claims can be framed in this way in a rather limited fashion. The level of compliance with international standards, and more particularly with the criteria on which EU accession was conditioned (accession conditionalities) is assessed at the end of each section. This approach allows for effective comparisons across sources and periods,

while mapping the context in which legal mobilisation occurred. To understand legal strategies and (the lack of) legal action later on, the chapter analyses the existence, accessibility and adequacy of rights.

The early year's focus on minority rights aligned with the agenda of Roma leaders, who made ethnicity a central tenet of political mobilisation, in response to communist assimilationist policies characterizing communist regimes until the mid-1980s. Regrettably, minority rights could not adequately respond to Romaphobic violence and the rapid deterioration of socio-economic conditions following the political transition. Moreover, the rights catalogues in domestic constitutions were not yet accessible in practice and even though individual complaints could be launched under the European Convention for human rights and fundamental freedoms[152] and the International Covenant on Civil and Political Rights,[153] what domestic remedies to exhaust - a precondition of access - was not straightforward in the swiftly changing legal orders of the early 1990s.

The "golden age" preceding EU accession was dominated by the approximation of domestic laws to the EU *acquis*, including the EU anti-discrimination directives adopted in 2000. EU law created unparalleled legal opportunities in domestic law for the enforcement of the right to equal treatment. The Czech Republic was an outlier due partly to an early backlash to legal mobilisation, but more importantly, to the influence of Eurosceptic conservative politics. With the exception of this country, however, the right to equal treatment became accessible more broadly than mandated by EU law. The focus on the Czech storyline and anti-discrimination law in general has shunned another important development, namely the failure to effectively protect social rights in domestic legislation and the countries' decision to block access to international tribunals. Due to these shortcomings, this period therefore sealed a neoliberal *status quo* in the region, whereby social rights overwhelmingly outside the EU *acquis* were not adequately protected and directly accessible.

Attention focused on the anti-discrimination *acquis* also, because of the key role NGOs played in its transposition. While norm adoption in the Conference on Security and Cooperation in Europe - renamed in 1995 as the Organization of Security and Cooperation in Europe - and the Council of Europe was driven by powerful states, the Racial Equality Directive[154] was

[152] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.005, adopted in Rome on 4 November 1950 and in force since 3 September 1953.
[153] International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 and in force since 23 March 1976.
[154] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19/7/2000, pp. 0022-0026.

adopted as a result of a transnational NGO campaign within the "old EU". The local human rights elites and minority parties played a crucial role in the directive's over-transposition, which gave rise to a hybrid enforcement regime combining broad agency powers and collective standing specific to Roma-dense CEE countries - with the exception of the Czech Republic.

The period of organic transnationalism following EU accession brought mixed developments, including backsliding in countries with the most advanced legal protection (Bulgaria and Hungary) and window-dressing to conceal the lack of actual progress elsewhere. Political efforts sidelined and/or destabilised existing institutions, and policies conflicting with EU measures were pursued unabashed. NGO advocacy on complementing the RED with Roma-specific EU norms was unsuccessful, but policy initiatives influenced governance, without, however, gaining traction in national practices.[155] Anti-discrimination law and the European Convention provided some access to housing rights.

2.1. The early years: 1989-1995

An abundance of legal norms relevant for the Roma was adopted after 1989, but many provisions pre-existed the political transition without being directly accessible either in the national or the international context. Roma-dense CEE states were forced into the soviet block after World War II, with separate structures for military and economic cooperation - the Warsaw Pact and the Council for Mutual Economic Aid - but mechanisms for the approximation of legal orders was not established.

In contrast, integration through law became significant after 1989. The path to European integration - military, political and economic - began as soon as democratic transition commenced.[156] The former soviet bloc countries sought military alliance with the North Atlantic Treaty Organisation (NATO) to shield themselves from the threats of instability in the former Yugoslavia and the Soviet Union. The desire to stabilise economies plummeting after the dissolution of the Cold War world order prompted responses from the European Communities[157]

[155] On this point, see, most recently, Law and Kovats 2018, supra, and Iulius Rostas, A Task for Sisyphus? Why European Roma Policies Fail, CEU Press, Plymouth, forthcoming.
[156] Geoffrey Pridham, Designing Democracy: EU Enlargement and Regime Change in Post-Communist Europe, Palgrave MacMillan, 2005, New York.
[157] See, for instance, the Poland and Hungary Action for the Reconstruction of the Economy Programme (PHARE) launched in 1989. PHARE provided resources for Roma rights NGOs as well, as detailed in Chapter 2.

and made entry conditions salient even before formal membership requests and accession negotiations began.[158]

The European Union established by the members of the European Communities in the 1993 Maastricht Treaty[159] sets economic and political conditions[160] for states wishing to join. Candidate and accession countries are required to comply with the criteria of stable democratic government that respects the rule of law, and its corresponding freedoms and institutions.[161] Technically outside these criteria, states must also approximate their legal orders with that of the EU, meaning that they must enact legislation, gradually bringing their national laws into line with the European *corpus iuris* (*acquis communautaire*).

Given the nature of constitutionalisation within the EU, the bulk of common standards pertaining to democratic governance and the rule of law were at the time contained in international treaties external to EU law proper.[162] The European Convention served as the basis for interpreting fundamental rights within the EU, where minority rights were not ensured *per se*, but instruments of external relations applied to some of the thorny issues in a "somewhat hypocritical" fashion,[163] because the fulfilment of the minority conditionality was not explicitly required from member states.

The Conference on Security and Cooperation in Europe (later Organisation of Security and Cooperation in Europe, OSCE), established by the Helsinki Final Accord in 1975 and the Council of Europe played equally significant roles in this period. Before the transition, however, they were functionally different, because soviet bloc countries were members of the CSCE, but not the Council of Europe, where membership was conditioned on the ratification of the ECHR.[164] Being an ideological instrument of the Cold War, the European Convention -

[158] For instance, Hungary submitted a request for membership in March 1994 and formal negotiations began in 1998. Seen as accession from the East and integration from the West, the process has been studied in separate silos, according to Lendvai, who also posits that the approximation of social policies began rather belatedly. Noémi Lendvai, The Weakest Link? EU Accession and Enlargement: Dialoguing EU and Post-Communist Social Policy, Journal of European Social Policy, Volume: 14 issue: 3, 1 August 2004, pp. 319-333.

[159] Treaty on European Union (TEU) signed on 7 February 1992, in force since 1 November 1993.

[160] The Copenhagen criteria adopted at the Copenhagen Summit held in June 1993.

[161] The failure to fulfill the political criteria during the Meciar government threatened the Slovakian accession, for instance, see Pridham 2005.

[162] The Worlds of European Constitutionalism edited by Gráinne de Búrca, J. H. H. Weiler, Cambridge University Press, New York, 2012. See, more particularly, Neil Walker, Constitutionalising Enlargement, Enlarging Constitutionalism, European Law Journal, Volume 9, Issue 3, July 2003, pp. 365-385.

[163] Bruno de Witte, Politics versus law in the EU's approach to ethnic minorities, EUI Working Papers, Robert Schuman Centre for Advanced Studies, RSC No. 2000/4.

[164] D. J. Harris, Michael O'Boyle, Ed P. Bates, Carla M. Buckley, Law of the European Convention on Human Rights (OUP, 2014), 3; Bernadette Rainey, Elizabeth Wicks, Clare Ovey, Jacobs, White, and Ovey – The European Convention on Human Rights (OUP, 2017), 3-4.

unlike UN treaties - provided a right to individual complaint that threatened to expose the illusory nature of civil and political rights in the East.[165] The former soviet countries gradually acceded to the Council of Europe in the 1990s, when the ECHR became a vehicle for rule of law reform.

During the Cold War, communist countries supported social movements for racial equality and decolonisation as part of the ideological warfare against the West, and by so doing, contributed to the successes of the civil rights movement in the United States and decolonisation movements elsewhere.[166] The West fought back by criticising the state of civil and political rights in the East, in response to which came a challenge of globally safeguarding social rights. Roma-dense CEE countries ratified all the major UN human rights treaties that did not, however, provide for individual complaints against states parties at the time. Following 1989, the West put a victorious end to the ideological rivalry by reforming the former soviet countries' legal orders, for which the already existing UN treaties provided an initial benchmark.

Standard setting occurred in silos demarcated by existing organisations at the international level, where intergovernmental negotiations witnessed the growing participation of (international) non-governmental organisations. The adoption of new norms was issue specific and limited by the international organisations' (IO) mandate, therefore Roma rights were broken down into the familiar civil and political, and social, economic and cultural rights frames, with minority-specific measures containing overwhelmingly civil and political entitlements.

Preserving culture and achieving recognition as an ethnic minority was a major political ambition of the Roma elite towards the end of the communist era, and became a key to ethnopolitical mobilisation after 1989.[167] The political transition threw up two new crisis issues: the necessity to stem Romaphobic violence and alleviate the deterioration of socio-economic conditions. The three questions required different approaches, namely (i) special rights for the Roma as a national or ethnic minority; (ii) (equal) access to civil and political rights as a

[165] Mikael Rask Madsen, From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics,, Law & Social Inquiry, Vol. 32, No. 1 (Winter, 2007), pp. 137-159.

[166] See, for instance, John David Skrentny, The effect of the Cold War on African-American civil rights: America and the world audience, 1945–1968, Theory and Society, April 1988, Volume 27, Issue 2,, pp 237–285. Mary L. Dudziak, Cold war civil rights: Race and the image of American democracy, Princeton University Press, Princeton and Oxford, 2011 and Dayo F. Gore, Radicalism at the Crossroads: African American Women Activists in the Cold War, New York University Press, New York and London, 2012.The Cold War and soviet diplomatic engagements had a profound effect even on the seminal Brown v Board of Education judgment in 1954., in which the Department of Justice submitted a friend of court brief in support of the plaintiffs, because racial segregation in particular caused embarrassment in foreign relations. See, Mary L. Dudziak, Brown as a Cold War Case, The Journal of American History, June 2004. pp. 32-42.

[167] Will Guy (ed.), Between Past and Future: The Roma of Central and Eastern Europe, University of Hertfordshire Press, 2001

community targeted by racism, and (iii) social rights protection, including positive action measures based on race and/or socio-economic conditions.

Against the backdrop of increasing ethnic animosities, the Roma demand for recognition coincided with that of powerful national minorities - such as Turks on the Balkans and Hungarians in neighbouring states. Given the limited geographic scope of Roma rights, Europe-specific IOs became the primary venues of norm adoption, trying to stem an impending westward exodus, whose security implications alarmed powerful Western states.

The minority rights frame coming to the forefront between 1989 and 1996 was clearly inadequate in and of itself to deal with the threefold problems faced by the Roma. The baseline for minority rights was Article 26 of the International Covenant on Civil and Political Rights (ICCPR) prohibiting discrimination and requiring special rights for national, linguistic and religious minorities.[168] Minority related soft law measures were also adopted within the CSCE/OSCE,[169] while in 1995 the Framework Convention for the Rights of National Minorities[170] was adopted under the auspices of the Council of Europe.

Other regional norms relevant for the Roma were not drafted in this period, while legislating on social rights was hugely problematic at the national level, given the financial and economic constraints of fulfilling social entitlements. A 1995 review of constitutional reforms provides a concise summary of the complex realities law makers in the CEE grappled with in the early years:

> "The problem with rights and freedoms under the Socialist systems did not lie with the constitutions -- many provisions seemed liberal -- but with the lack of a political and legal system to enforce them. These provisions could therefore have been retained in many cases …

[168] Article 27 ICCPR ensures the protection of minorities as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

[169] The 1975 CSCE Helsinki Final Act, Principles I–X; the 1990 Charter of Paris for a New Europe; the 1990 CSCE Document of the Copenhagen Meeting on the Human Dimension (hereinafter: "Copenhagen Document"), paragraph 37 and recommendations/guidelines issued by the High Commissioner on National Minorities, such as The Hague Recommendations Regarding the Education Rights of National Minorities 1996, The Oslo Recommendations Regarding the Linguistic Rights of National Minorities 1998, The Lund Recommendations on the Effective Participation of National Minorities in Public Life 1999, Guidelines on the use of Minority Languages in the Broadcast Media 2003, Recommendations on Policing in Multi-Ethnic Societies 2006, The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations 2008, and The Ljubljana Guidelines on Integration of Diverse Societies 2012.

[170] Framework Convention for the Protection of National Minorities, ETS No.157 adopted in Strasbourg on 1 February 1995, in force since 1 February 1998.

> International models were available to assist in drafting the constitutions, namely three sets of documents, adopted at three different stages in history and in three different contexts. These were the documents of the United Nations, Council of Europe and the CSCE and were drawn on to a very large extent.
>
> Particularly in the area of political rights and freedoms, the new constitutions have enshrined the full range of fundamental rights …
>
> Economic and social rights were more of a problem as they had been given prominence in the Socialist constitutions, even though they mainly existed in name only. Was the best approach to take a realistic stance and only enshrine economic and social rights that could actually be achieved within a reasonable timeframe -- which risked being interpreted as a social policy climb-down -- or was it to continue to affirm rights as the philosophical starting point from which to inspire state policy? The second option was chosen in most cases. As a consequence, the economic and social rights are often very different in nature to the political rights".[171]

The Roma-dense CEE states were members of the CSCE already when transition began and the Roma issue was discussed within the human dimension mechanism,[172] which sets forth respect for human rights and fundamental freedoms with reference to the Universal Declaration of Human Rights.[173] Roma rights were first brought to the table at the CSCE civil society conference held in Copenhagen in 1990 and the OSCE became a testing field for advocacy afterwards.[174]

Roma-relevant standard setting in Europe followed a pattern whereby soft low measures adopted in the CSCE/OSCE were emulated in the Council of Europe and to a more limited extent, in the European Union. The OSCE was the first IO to establish a Roma-specific structure, but while others now also have similar institutional units,[175] those are not lead or staffed by Roma themselves, like the Contact Point for Sinti and Roma Issues initiated in 1995 and established in 1998.

The United Nations played a far less significant role, even though several of its treaties ratified by CEE countries prior to 1989 pertained to Roma rights. The UN was also the first IO, where the Roma obtained formal representative status: the International Romani Union became an observer in the Economic and Social Council in 1979.[176]

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[171] Constitutions of Central and Eastern European Countries and the Baltic States, Organisation for Economic Co-Operation and Development, OCDE/GD(95)132, Paris 1995, p. 19.

[172] Based on the human dimension of the Helsinki Final Act and comprises Principle VII of the security pillar.

[173] Daniel C. Thomas, The Helsinki Accords and Political Change in Eastern Europe in The Power of Human Rights: International Norms and Domestic Change, Thomas Risse, Stephen C. Ropp, Kathryn Sikkink eds., Cambridge University Press, 1999. It "makes more sense to treat the inclusion of human rights in the Helsinki Final Act as a prior, inter-state bargain which the East Bloc leadership accepted in hopes of gaining economic resources and political legitimacy." p. 208.

[174] Erika Schlager, Policy and Practice: A Case Study of US Foreign Policy Regarding the Situation of Roma in Europe, in Bhabha et al, 2017, p. 63.

[175] The Council of Europe established the Co-ordinator for Specialists on Roma, Gypsies and Travellers in 2002.

[176] Klimová-Alexander, 2005.

Even though IOs regularly reviewed compliance with their converging standards, they did not establish a permanent structure for collaborative, a goal identified as crucial by the OSCE High Commissioner for National Minorities.[177] Oversight remains separate and collaboration is sporadic, while none of the IOs penetrated national bureaucracies as successfully as the EU that relies on domestic agents (courts and administrative agencies) to safeguard compliance with its norms.

2.1.1. The substantive content of discrimination law

The Roma-dense CEE countries were among the first to ratify UN treaties dealing specifically with racial discrimination, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[178] and the UNESCO Convention Against Discrimination in Education (CADE).[179] CADE was adopted first (1960), following a report of the Special Rapporteur appointed in 1954 by the Economic and Social Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities.[180] The General Assembly adopted ICERD in 1966 with a Preamble making reference to CADE. Bulgaria ratified the CADE on 4 December 1962, Hungary on 16 January 1964, Romania on 9 July the same year, while the Czech Republic succeeded to the Convention on 26 March 1993 and Slovakia on 31 March the same year.[181] Bulgaria ratified the ICERD on 6 August 1966, Hungary on the 4th of May 1967, Romania on 15 September 1970, while the Czech Republic succeeded to the Convention on 22 February 1993 and Slovakia on 28 May the same year.[182]

They also ratified the two covenants that prohibited discrimination in relation to civil and political rights on the one hand, and economic, social and cultural rights on the other. ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[183] both contain provisions requiring states parties to ensure the principle of equal treatment in

[177] Report on the situation of Roma and Sinti in the OSCE Area, Organization for Security and Co-operation in Europe High Commissioner on National Minorities, 20 March 2000.
[178] International Convention on the Elimination of All Forms of Racial Discrimination adopted by General Assembly resolution 2106 (XX) of 21 December 1965 and in force since 4 January 1969.
[179] United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education adopted by the General Conference at its eleventh session, Paris, 14 December 1960.
[180] Rights to Education, Commentary, Convention against Discrimination in Education, Yves Daudet and Pierre Michel Eisemann, UNESCO, Paris, 2005, pp. 1-7.
[181] Croatia succeeded to the Convention on 6 July 1992. Greece has not ratified it.
[182] Croatia succeeded to the Convention on 12 October 1992. Greece ratified it on 18 June 1970.
[183] International Covenant on Economic, Social and Cultural Rights adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, in force since 3 January 1976.

relation to the rights safeguarded in the treaties[184]. Bulgaria ratified the ICCPR on 21 September 1970, Hungary on 17 January 1977, Romania on 9 December 1974, while the Czech Republic succeeded to the Covenant on 22 February 1993 and Slovakia on 28 May the same year.[185] Bulgaria ratified the ICESCR on 21 September 1970, Hungary on 17 Jan 1974, Romania on 9 December the same year, while the Czech Republic succeeded to the ICESCR on 22 February 1993 and Slovakia on 28 May the same year.[186]

As part of European integration, the Roma-dense CEE countries ratified the European Convention in the early years. The ECHR prohibits discrimination based on, among others, race, colour, national origin and membership in a national minority (Article 14) in conjunction with "Convention rights", i.e. rights enshrined in the Convention and its Protocols that contain overwhelmingly civil and political rights, but also guarantee the right to education (Article Protocol 1). This formulation means that discrimination under the ECHR can only be established if there is an arguable claim about the violation of a substantive Convention right. Furthermore, Article 14 does not guarantee the *right* to equal treatment, which has important consequences for case law as will be shown in Chapter IV. Signing and ratifying the ECHR was a prerequisite of membership in the Council of Europe. Bulgaria ratified the Convention on 7 September 1992, Hungary on 5 November 1992, Romania on 20 June 1994 while Czechoslovakia on 18 March 1992.[187]

Notwithstanding the abundance of international treaty provisions, equal treatment was approached from the perspective of special rights pertaining to recognised national/ethnic minorities in the early years. Prior to 1994 when the European Commission against Racism and Intolerance (ECRI) was established, the Council of Europe lacked norms and institutions dedicated to the rights of ethnic groups,[188] but afterwards, adjustments were made to reflect the Council's eastward expansion.

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[184] Article 26 ICCPR ensures equality before the law to all persons without any discrimination. "In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 2.2. ICESCR stipulates that "2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[185] Croatia succeeded to the Convention on 12 October 1992, while Greece ratified it on 05 May 1997.

[186] Croatia succeeded to the Convention on 12 Oct 1992, while Greece ratified it on 16 May 1985.

[187] Croatia ratified the Convention on 5 Nov 1997, while Greece ratified it on 28 November 1974.

[188] More precisely, the Division servicing the Committee on Migration, Refugees and Demography dealt with racial discrimination against persons "of migrant origin", which was geared to the Western political context.

The 1993 Verspaget report sought to bring the Roma under the western paradigm by placing an emphasis on migration and stating that "[Roma] are a true European minority, but one that does not fit in the definitions of national or linguistic minorities."[189] However, the Parliamentary Assembly's Recommendation 1203 'on Gypsies in Europe' deviated from this approach, proposing a Protocol to the European Convention to safeguard minority rights. Bringing the Eastern Roma and the Western Travellers together and marrying their fate to other minorities and persons of "migrant origin" has guided European standard setting since. By becoming recognised at both the European and national level, the Roma also came under the purview of European anti-racist norms that pertain to ethnic origin.

Rather than a Protocol with access to individual complaints under the Convention, the Framework Convention on the Rights of National Minorities (FCNM) was adopted in 1995, entering into force four years later. It has a weak enforcement mechanism - reporting by the Advisory Committee - because proposals to supplement it with an additional protocol setting out "clearly defined rights which individuals may invoke before independent judicial organs" failed.[190] The European Charter for Regional or Minority Languages safeguards minority language rights,[191] but Romanes is among the languages that receive a lower level of protection, which diminishes this instrument's salience. The Council of Europe's eastward expansion led to an important paradigm shift for the Travellers, Gypsies and Roma, because the minority marginal in terms of numbers and issues beforehand[192] became significant both in terms of its size and problem areas.

The CEE Five ratified the FCNM as part of the minority conditionality whose fulfilment was a compulsory step towards NATO and EU membership. Dominant minority groups merited attention as a matter of regional security, while the Roma became an issue because of the internal security of states taking the brunt of their westward migration.

The transitional constitutions, sector and field specific laws also prohibited discrimination in line with UN treaties, but the justiciability of these clauses was less than straightforward

[189] Josephine Verspaget, The Situation of Gypsies (Roma and Sinti) in Europe, report adopted by the CDMG (Council of Europe), 5 May 1995, note 13, 20-22., para. 2.
[190] Geoff Gilbert, 'The Council of Europe and Minority Rights', *Human Rights Quarterly*, Vol. 18. No. 1, 1996, p. 162.
[191] Three weaknesses are identified in relation to the Language Charter. The first is its tendency to limit language rights to national minorities, while leaving unclear what is a national minority. The second is a weak enforcement model. The third can be pinned down to different levels of protection dependent on the language spoken. De Varennes, F., 'Language rights as an integral part of human rights', International Journal on Multicultural Societies 3.1 (2001): 15-25.
[192] Council of Europe Descriptive Glossary of terms relating to Roma issues, version dated 18 May 2012.

and seldom tested.[193] Minority rights received attention after 1989. In Bulgaria, the use of mother tongue and cultural autonomy is regulated in the Constitution. The Romanian and Slovakian constitutions provide protection for national and ethnic minorities. Minority rights are partly regulated through an act on minority languages in Slovakia, where the Roma languages are recognised.[194] In Romania, minority rights are anchored in participation in public life and language rights are enshrined in the public education act,[195] while the "Gypsies" are a national minority.[196] In the Czech Republic, the rights of national minorities are enshrined in the Charter and the Roma are recognised.[197] In Hungary, the Roma, recognised as a national (ethnic) minority, have a right to cultural self-governance.[198]

2.1.2. Specific provisions addressing segregation, especially in education

The majority of Roma in the CEE live and study in segregated conditions, which is not voluntary, but arises either spontaneously as a result of societal trends or in a manner whereby authorities surrender to majoritarian demands - explicit, but most often, implicit - to spatially separate the minority group. Thus, the explicit prohibition of segregation and its detailed regulation is of primary importance for the Eastern Roma. The situation may be different in the West, where Travellers and Gypsies often choose segregated housing in order to preserve their traditions and group cohesion.

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[193] Racial, ethnic and religious discrimination a comparative analysis of national and European law, Migration Policy Group, Brussels, 2002 ECRI was among the first to report about anti-discrimination provisions, such as for instance in relation to Romania: "The new Constitution of 21 November 1991 … contains many provisions explicitly dealing with issues of discrimination … (such as the general equality clauses, e.g. Article 4, para 2 and Article 16 para 1) are proving difficult to fully implement, especially as concerns the Roma/Gypsies and certain other minority groups." First report on Romania (adopted on 19 June 1998 / published on 13 March 1999), p. 6. "Article 33 of the Constitution prohibits discrimination against national minorities and ethnic groups in general ("Belonging to a national minority or ethnic group shall not be disadvantageous to anybody"), while Article 34 sets out the basic provisions governing the rights of minority groups." First report on Slovakia (adopted on 19 September 1997 / published on 15 June 1998), ECRI, p. 6.

[194] Slovakia, Section 1(2) of the Act No 184/1999 Coll. on the use of languages of national minorities.

[195] Romania, Law 35/2008 for the election of the Chamber of Deputies and of the Senate and for the amendment of Law 67/2004 on the election of local public administration authorities, of Law 215/2001 on local public administration and of Law 393/2004 on the Statute of officials elected in local elections, 13 March 2008, Art. 2 (29).

[196] Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, First Opinion on Romania, ACFC/INF/OP/I(2002)001 adopted on 6 April 2001.

[197] Czech Republic, Law no. 273/2001 Coll., on the rights of members of national minorities, of 10 July 2001.

[198] Hungary, Act CLXXIX of 2011 on the Rights of Nationalities, 20 December 2011, previously Act LXXVII of 1993, on the Rights of National and Ethnic Minorities. See, also, Vermeersch, 'EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland', (2003) 1 Journal on Ethnopolitics and Minority Issues in Europe 1.

CADE and ICERD are the only international treaties that specifically prohibit racial segregation, thus being of primary importance for Roma rights. CADE distinguishes between discrimination and segregation, prohibiting the latter with exceptions, meaning that it permits physical separation as long as stringent conditions are met, and sets forth a clear test for situations in which racial or ethnic separation in schools may be deemed lawful. CADE Article 2(b) stipulates that the "establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level." Pursuant to Article 2(c) segregation in private schools is also prohibited, i.e. in situations when education is not funded by the state.

ICERD prohibits segregation in Article 3 in all walks of life. Under article 3, States parties undertake to prevent, prohibit and eradicate all practices of racial segregation, which shall include "partial segregation [that] may also arise as an unintended by-product of the actions of private persons," such as residential patterns reflecting group differences in income, race, colour, descent and national or ethnic origin.[199] States must take into account that "racial segregation can also arise without any initiative or direct involvement by the public authorities."[200] The CERD Committee issued a general recommendation on ICERD Article 3 in 1995, interpreting this provision as prohibiting spontaneous segregation as well.[201] Segregation is not explicitly outlawed in any other international or EU norm discussed in this chapter.

Given that the Roma-dense CEE countries ratified both these treaties already before 1989, segregation was formally prohibited on their territories. However, domestic provisions explicitly on segregation did not exist and the UN treaties were not in fact directly applied by national courts, partly owing to the fact that while the provision prohibiting segregation in CADE is clear and precise enough to serve as a basis of judicial interpretation, the prohibition in ICERD is not.

2.1.3. Relevant social rights protection beyond a discrimination framework

[199] Racial segregation and apartheid (Art. 3), 8/08/95., CERD, General recommendation XIX, 1995, point (3).
[200] Ibid, (4).
[201] Ibid.

An early analysis showed that civil and political rights and the emerging rule of law paradigm did not only fail to deliver actual protection to the Roma, but that it offered far less than the general social rights regimes during communism.[202] The shortcomings were partly attributable to the fact that the International Covenant on Economic Social and Cultural Rights (ICESCR) and the 1961 European Social Charter[203] did not become justiciable until after the end of the first decade following the political transition. The Roma-dense CEE countries did not ratify the 1961 ESC in this period, while the revised European Social Charter was adopted only in 1999. At the national level, social rights were only partially guaranteed in the constitutions, which were, again, not directly justiciable. This was a conscious decision, because decision makers believed national budgets could simply not support social entitlements.

2.1.4. Enforcement and remedies

A declaration to ICERD and Optional Protocol 1 to the International Covenant on Civil and Political Rights (ICCPR) provided individuals with a right to complain. Individual complaints could be filed under ICERD from all the Roma-dense countries, because Hungary made the necessary declaration under Article 14 ICERD already on 13 September 1989, Bulgaria on 12 May 1993 and Slovakia on 17 March 1995.[204] The ICERD complaint mechanism was blocked in the Czech Republic and Romania until the 2000s due to the lack of declarations.

Complaints could also be filed with the Human Rights Committee, the treaty body overseeing the implementation of the ICCPR already in the first half of the 1990s, because Hungary ratified the Optional Protocol in 1988, Bulgaria in 1992, while the Czech Republic, Slovakia and Romania in 1993.[205] Individual complaints concerning civil and political rights could be launched under the European Convention that Czechoslovakia ratified on 18 March 1992, Bulgaria on 7 September 1992, Hungary on 5 November 1992 and Romania on 20 June 1994.[206]

Even though the ECHR is the most significant Roma-relevant norm at the international level, it is important to bear in mind that it did not become accessible until the very end of the early years. Individuals and NGOs (in matters concerning their members or the organisation

[202] István Pogány, (2004) Refashioning rights in Central and Eastern Europe: some implications for the region's Roma, European Public Law, 10(1), pp. 85–106.
[203] European Social Charter, ETS No.035, adopted in Turin on 18 October 1961, in force since 26 February 1965.
[204] Interestingly, neither Croatia, nor Greece have made declarations under Article 14 ICERD, therefore individual complaints cannot be made from these countries.
[205] Croatia succeeded to the ICCPR OP on 12 October 1995 and Greece ratified it later than the transitional democracies, i.e. on 5 May 1997.
[206] Croatia ratified the ECHR on 5 November 1997 and Greece on 28 November 1974.

itself) can lodge a complaint with the European Court of Human Rights (ECtHR), subject to various admissibility requirements, the key condition being the exhaustion of effective domestic remedies. Case law has clarified over two decades which domestic remedies must be exhausted, but every time a new remedy is provided under national law, it must be tested, before the lack of effectiveness can be argued.

Given the academic focus on the Strasbourg Court's "inadequate remedial approach" concerning the Roma education cases, it must be noted at the outset that the Court has two powers: to find violation of a right protected under the Convention (Convention right) and provide just satisfaction in the form of monetary compensation.[207] Chapter IV discusses the ECtHR's efforts to strengthen its remedial powers by imposing individual and/or general measures, but it must be emphasised that these powers are not explicitly stipulated in the Convention itself and developed over time, following the establishment of the single court in 1998.

Strasbourg complaints had a pulling effect given denser knowledge transfer and the commitment to "return to Europe", so local NGOs sidelined UN treaty remedies,[208] which seemed reasonable also, because treaty bodies could only recognise violations, but could not impose remedies.[209] Moreover, the Strasbourg Court has the right to order states parties to pay the applicant's legal costs[210] and/or provide legal aid[211] once an application is declared admissible.

Domestic institutions safeguarding civil and minority rights were also established in the early years. Minority issues were generally subjected to political oversight in most countries,

[207] According to Practice Directions, "The award of just satisfaction is not an automatic consequence of a finding by the European Court of Human Rights that there has been a violation of a right guaranteed by the European Convention on Human Rights or its Protocols. The wording of Article 41, which provides that the Court shall award just satisfaction only if domestic law does not allow complete reparation to be made, and even then only "if necessary" (*s"il y a lieu* in the French text), makes this clear." Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007, I/1, p. 63.

[208] For instance, Roma complaints have not been filed with the ICERD and the ICCPR from Hungary. The first Roma complaint with the CEDAW, A. Sz. v Hungary was filed in 2004. In fact, Roma complaints were filed with the ICERD from Slovakia only, under the European Roma Rights Center's guidance in the early 2000s as chronicled in Chapter 3. The ICCPR mechanism has been utilised by Bulgarian NGOs in tandem with INGOs in the early 2010s in relation to forced evictions, which is also discussed in Chapter 3.

[209] Early warning and interim measures became available later on.

[210] Claims for the payment of costs and expenses must be submitted as part of a just satisfaction claim, but the Court may decide to order only partial payment of the costs, particularly if they occur out of the applicant's own fault or seem excessive. Ibid. IV/3, p. 65.

[211] According to Rule 105.1. (former Rule 100), "The President of the Chamber may, either at the request of an applicant having lodged an application under Article 34 of the Convention or of his or her own motion, grant free legal aid to the applicant in connection with the presentation of the case from the moment when observations in writing on the admissibility of that application are received from the respondent Contracting Party in accordance with Rule 54 § 2 b, or where the time-limit for their submission has expired." Legal aid automatically continues before the Grand Chamber. Rules of Court, 3 June 2019, Registry of the Court, Strasbourg.

except in Hungary that is an exception with sizeable ethnic Hungarian populations in neighbouring states. Minority institutions satisfied the requirement of participation in public affairs.[212] In Romania, minority parties have representatives in the Senate and the right to delegate members to the Council for National Minorities, a consultative government organ.[213] Rather than the Council, the Department for Interethnic Relations played a key role in norm diffusion, particularly in relation to equal treatment as detailed below. In the Czech Republic the Council for National Minorities, a consultative body for the government was established in 1994 and issued its first report on the situation of the Roma in 1997. In Slovakia, the Government Plenipotentiary for Solving the Problems of Citizens in Need of Special Care was established in 1995, in the wake of a Romaphobic murder.[214]

Shaped at the minority roundtable, the Hungarian constitution ensured collective minority rights accompanied with individual enforcement. In the case of the Roma, the leverage of dominant minorities (Germans) balanced out the lack of kin state support, while in a corollary fashion Hungarian speaking Roma communities in neighbouring countries benefitted from provisions earmarked for the ethnic Hungarian diaspora.[215] Hungary established minority self-governments and the Parliamentary Commissioner for the Rights of National and Ethnic Minorities (Minorities Ombuds/Commissioner). The former elected bodies deal with Roma culture and education.[216] While most advocate for better quality education and social rights, only a handful mobilise against segregation as discussed in subsequent chapters.

First elected in 1995, the Minorities Ombuds had the power to investigate complaints and issue recommendations, propose legislative amendments[217] and launch *ex officio* investigations. From its inception, the office was flooded by complaints from Roma, consequently, it

[212] FCNM Article 15. For details, see, Political Participation of Minorities: A Commentary on International Standards and Practice, edited by Marc Weller, Katherine Nobbs, Oxford University Press, Oxford - New York, 2010, p. 737.

[213] Romanian government decree no. 137 of 1993.

[214] See, Eben Friedman, The Slovak Government Plenipotentiary for Romani Communities: From Form to Substance?, EUMAP features, August 2005.

[215] Lilla Farkas, Roma under Hungary's "Status Law," Roma Rights 2/2002.

[216] For a discussion on the right to vote, ethno-business and recommendations for institutional reform, see, András László Pap, András Pap, Recognition, representation and reproach: New institutional arrangements in the Hungarian multiculturalist model in Balázs Vizi, Norbert Tóth, Edgár Dobos (eds), Beyond International Conditionality: Local Variations of Minority Representation in Central and South-Eastern Europe, Auflage 2017,pp. 101-136.

[217] The "Hungarian experience supports the case for 'soft' and flexible institutions" that can facilitate debates on "inevitably contentious issues." Andrea Krizsán, The Hungarian Minority Protection System: A flexible approach to the adjudication of ethnic claims, Journal or Ethnic and Migration Studies, Vol 26, 2000, issue 2.

prioritised Roma rights and collaborated with NGOs.[218] Ombuds institutions were established across the CEE Five, but their engagement with the Roma has not been meaningful, except recently in Slovakia and the Czech Republic. The existence of the Minorities Ombuds in Hungary meant that Roma rights received special attention, bringing to the fore difference in the *de facto* situation of the Roma as compared to other minorities.

The justiciability of constitutional rights was uncharted territory, in which the judiciary and lawyers were equally untrained and inexperienced. The reform of domestic justice systems and the emergence of progressive jurisprudence were eagerly awaited. Attitudes needed to change and a "rights revolution",[219] a steep rise in constitutional litigation needed to take root. In retrospect, it took surprisingly little time before ordinary courts began to refer to the constitution and Strasbourg judgments, but this could not be predicted in the period immediately following transition. The direct applicability of constitutional provisions in civil law disputes and the power of civil courts to impose injunctions on public authorities may be debated, but judicial review is well-embedded in the justice system.[220]

2.1.5. Compliance level in 1996

The West expected norm compliance in terms of minority rights, civil and political rights and formal equality, giving a *carte blanche* to the transitional democracies as concerns social rights provisions. This had negative implications on the poor and the Roma over-represented among the most destitute in CEE societies. The ethnic identity focus of Roma political mobilisation played along this general trend, but it is doubtful whether the development of legal opportunities would have taken a different course if Roma leaders had prioritised social rights alone.

CEE countries complied with the EU's minority conditionality by 1996, even before the FCNM came into force and accession negotiations started with the Czech Republic and Hungary - and sometime later, with Slovakia. This political criterion was not matched by minority

[218] In 1998, my first collective lawsuit was based on a case remitted to NEKI by the Minorities Ombuds. See, K. town, White Booklet 1998. The minorities ombuds' colleagues were open to consultation and permitted access to their case files, but I had to raise funds for two local Roma leaders' and my fee from the ERRC. Since the adoption of the illiberal constitution in 2011, minority issues have been dealt with by a deputy of the Commissioner for Fundamental Rights, a status change that has not changed legal strategies.

[219] Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective, University of Chicago Press, 1999. See, Chayes, supra.

[220] A personal anecdote can illustrate this point. In 2013 I was indicted for defamation, a criminal offence by a television station on account of comments made in a documentary released by the Hungarian Civil Liberties Union in response to a report about a case in which I represented the Chance for Children Foundation against Gyöngyöspata, a village led by a radical mayor. The case was summarily dismissed by the court with reference to Strasbourg case law. Pesti Központi Kerületi Bíróság, 1.B.31.144/2013/7, decision of 16 April 2013.

protection within the EU itself, so much so that the treaty benchmark - the FCNM - was external to the EU. Likewise, racial or ethnic discrimination was not yet prohibited by specific EU legislation, although member states outlawed it in their national legal orders and ratified international treaties.

Political scientists predicted that pro-Western, liberal governments would be more likely to comply with minority rights and anti-discrimination norms than nationalist ones and distinguished between passive and active attitudes towards norm compliance.[221] Indeed, this section shows substantive, rather than formal compliance with the minority conditionality with regard to Hungary alone. This finding is in line with the argument that viewing minority rights as a legal transplant from the West is "misleading", chiefly because CEE legislation reflected the strategic interests of accession countries, dictated by geopolitical considerations and security concerns.[222]

Indeed, minority rights were not so much a transplant than an invention imposed on the East by the West, following on an earlier effort under the auspices of the League of Nations' minority rights treaties after World War I.[223] A key review found minority rights in the case of the Roma "irrelevant", "a luxury", "artificial", and "inapplicable",[224] underlining gaping discrepancies across treaties adopted under the *aegis* of different international organisation, the lack of justiciability and the failure to address the real issue, that of economic disadvantages. According to this assessment, the extent of assimilation among the Roma renders minority rights particularly artificial, because entitlements concerning linguistic and religious practice are in effect futile, and also because "it is doubtful whether significant numbers of Roma in the CEE region regard the preservation or expression of their "cultural identity" as matters of overriding concern."[225]

[221] Vachudova, 2001.

[222] Peter Vermeersch, EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland, Journal on ethnopolitics and minority issues in Europe, Issue 1/2003, pp. 23-26 . Schwelnuss claims that "Hungary can hardly be viewed as an instance of Western norm transfer in any meaningful sense" due to its strategic ambition to enhance the protection of the Hungarian diasporas by setting an example at home. See, G Schwellnus, The adoption of nondiscrimination and minority protection rules in Romania, Hungary and Poland in The Europeanisation of Central and Eastern Europe, 2005, p. 59.

[223] Patrick Thornberry, International law and the rights of minorities, Oxford University Press, 1991. See, more particularly, Pejic, J., Minority rights in international law, Human Rights Quarterly, Vol. 19. No. 3, 1997, pp. 666-685.

[224] István Pogány, Minority rights and the Roma of Central and Eastern Europe, Human Rights Law Review, Vol 6, No 1, pp. 1-25, 2006.

[225] Pogány, 2004, supra, p. 9.

In retrospect, much of the skepticism proved well-founded, but certain provisions inspired positive developments,[226] such as intercultural and minority language education. By becoming a European security concern, the Roma benefitted more from this political criterion than some other minorities.[227] More importantly, minority rights provided an institutional structure for mobilisation, channeling complaints from the Roma *vis-a-vis* political processes or specialised bodies that made incursions into the realm of social rights and equal treatment. As a matter of happy coincidence, the Roma benefitted from the leverage of politically more influential minorities as well.

In the early years, the substantive content of discrimination law was situated within the minority rights regime, while both constitutions and treaty law prohibited discrimination based on racial or ethnic origin. Segregation was *de iure* outlawed by UN treaties not justiciable at the time. Provisions on enforcement were partly missing, with the ICCPR, the ECHR and ICERD – except in Romania and the Czech Republic - becoming accessible to individual applicants by the mid-1990s. The economic crisis engulfing transitional democracies curtailed social legislation, given the alleged lack of resources to satisfy entitlements. Roma-dense CEE countries did not ratify the 1961 European Social Charter, while the justiciability of the ICESCR was yet to be resolved within the UN itself.

2.2. The "golden age": 1996-2006

The decade preceding EU accession is not explicitly called "the golden age" in the literature or among the activists, but the overwhelming majority describes it as exceptional in terms of both political and legal opportunities opened up by the accession process that also unlocked considerable financial resources. Strasbourg litigation on Romaphobic violence yielded important

[226] Less pessimistic views were also available, but over time they have proved wrong. See, for instance, Gabriel N. Toggenburg, "Minority Protection in a Supranational Context: Limits and Opportunities," in Gabriel N. Toggenburg (ed.), Minority Protection and the Enlarged European Union: The Way Forward, OSI, Budapest, 2004, 1-37, 8.

[227] Dimitry Kochenov, EU's Numerous Contradictory Approaches to Minority Protection: Internal-External Paradox and Mutually Exclusive Pre-Accession Standards (September 2006). Taking the Russian speaking minorities as a point of departure, Kochenov claims that "The EU is "mostly powerless to move beyond a pure non-discrimination vision of minority protection." In Dimitry Kochenov, European Union's Troublesome Minority Protection: A Bird's-Eye View in W. Kymlicka and J. Boulden (eds.), International Approaches to Governing Ethnic Diversity, OUP, 2014.

case law in this decade and national (constitutional) courts began to develop jurisprudence on equal treatment with a particular emphasis on Roma rights.

The necessity to advocate for a justiciable right to equal treatment became obvious as soon as Roma rights lawyering began in 1992-1993, but initially, neither domestic advocacy, nor (constitutional) litigation was successful in this regard. EU accession was indispensable for the adoption of anti-discrimination laws in the CEE, where domestic agents used the momentum to over-transpose the Racial Equality Directive's provisions on enforcement, fortifying this emerging field of practice.

Another important trend was the failure to drive social legislation in the region that would have more directly benefitted the Roma than any other frame. The non-ratification of relevant international treaties and protocols (providing access to treaty mechanisms) and the inadequate regulation of housing and social provisions in domestic legal regimes is, nonetheless, as important a feature of the relevant legal context as the RED's over-transposition. Social rights remained inadequate and inaccessible, while the minority rights frame was abandoned in favour of anti-discrimination law that came to occupy central place between 1996 and 2006, fundamentally shaping legal strategies chronicled in Chapter IV.

2.2.1. The substantive content of discrimination law

This section addresses the adoption, transposition and over-transposition - i.e. systematically going beyond the minimum requirements - of EU anti-discrimination law. In 1992, in the "old EU" the Starting Line Group was formed to advocate against *racial and religious* discrimination. SLG initially campaigned for a "starting point", which led to the adoption of a treaty provision that gave the EU specific powers to combat discrimination on the grounds of *racial or ethnic origin,* among others.[228] The original draft included the terms "racial, ethnic or social origin,"[229] but the latter was removed from the final text. The SLG draft aspired to mobilise public resources for and carve out an important function for NGOs and trade unions in

[228] Article 13 of the Treaty on the European Communities, now Article 19 of the Treaty on the Functioning of the European Union. Consolidated version of the Treaty on the Functioning of the European Union Official Journal 115 , 09/05/2008 P. 0056 - 0056: 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
[229] Conference of the Representatives of the Governments of the Member States, European Union today and tomorrow. Adapting the European Union for the benefit of its peoples and preparing it for the future. A general outline for a draft revision of the treaties, CONF 2500/96, 5 December 1996, p.16.

enforcement.[230] The SLG draft was driven by Western European concerns, which does not diminish its impact on Roma and other ethnic groups in the East.

The Racial Equality Directive adopted four years before the first wave of accessions (July 2000) prohibits direct and indirect discrimination, harassment and victimisation in the fields of employment, education, housing, health and services available to the public, regardless of whether it occurs in the private or public sphere.[231] The RED's material scope is broader than other EU anti-discrimination directives', but narrower than ICERD that prohibits racial discrimination in all walks of life as concerns both civil and political, and social, economic and cultural rights. The directive's key concepts are more detailed and precise in defining different forms of unequal treatment, but fail to expressly prohibit racial segregation. Importantly, ICERD Article 1 defines racial discrimination in a manner that provides a more useful guidance as to the characteristics that may trigger protection than does the RED.[232]

The RED requires member states to establish bodies for the promotion of equal treatment based on racial or ethnic origin (Article 13), entitle NGOs and trade unions to act on behalf or in support of complainants (Article 7) in judicial proceedings in which discrimination can be established, damages and possibly other remedies (Article 15) ordered in proceedings in which complainants benefit from the reversal of the burden of proof (Article 8). In comparison, individual complaints can be brought under ICERD, but like other international treaty mechanisms, this does not provide an arsenal of enforcement tools either. It is important to note that the RED's main enforcement route is private individual enforcement, which sets the highest threshold for accessing justice, imposing both the financial and emotional burden on individuals to litigate. Member states have reporting obligations under both instruments, but while the addressee of these reports under ICERD – the CERD Committee - can issue observations, the European Commission overseeing compliance with the RED has the right to take legal action in case of non-compliance. Both bodies can publish recommendations as concerns interpretation and implementation.

The Charter of Fundamental Rights of the EU[233] prohibits discrimination on the grounds of race, colour, ethnic or social origin, language and membership of a national minority,[234]

[230] The drafts do not fully support the claim that "innovations concerning access to justice to the courts and institutional support for [strategic] litigation" were the intended enforcement models. Case and Givens, 2010, p. 222.
[231] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
[232] See, further, Farkas, 2017.
[233] Charter of Fundamental Rights of the European Union, 2000/C 364/01.
[234] Article 21.1 and Article 22 CFREU.

binding EU institutions and Member States. The Charter was solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission, but its legal force was uncertain until the entry into force of the Treaty of Lisbon[235] on 1 December 2009, i.e. after Eastern accessions.

The RED Preamble references various human rights treaties,[236] which is relevant, because "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."[237] According to the Charter, the ECHR and Strasbourg jurisprudence constitute the minimum level of protection.[238]

The RED was adopted before the accession of the CEE Five and although it streamlined anti-racist norms, it did not engender a unified anti-racist agenda in the EU, therefore the integration of the Roma and migrants remain separate policy areas.[239] Within the EU Agency for Fundamental Rights (FRA) the Roma constitute a specific theme. The Equality and Citizens' Rights Department researches and advises on racism, discrimination on all EU grounds, Roma and migrant integration, etc. The Department is composed of five Sectors, including Sector Equality and Sector Roma and Migrant Integration. The former deals with equality on the grounds of racial or ethnic origin, while the latter focuses on social inclusion and social rights. The EU lacks institutional units led by or exclusively dealing with the Roma. Coordination with Roma NGOs and leaders takes place at the European Roma Summit and the FRA's NGO Platform.

The pace of accession and race equality legislation were both unexpectedly fast,[240] which left limited opportunities for Roma rights advocacy. This explains why advocacy from the East was somewhat belated, such as the reports of the Open Society Foundations' EU Monitoring and Advocacy Program[241] and the European Roma Rights Center's initiatives[242] addressing Directorate General Enlargement and the EU Network of Independent Experts on

[235] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed on 13 December 2007.
[236] RED preambular indent (3).
[237] Case C-4/73, J. Nold, Kohlen- Und Baustoffgrosshandlung v Commission of the European Communities, para. 13. With regard to the ECHR, see Article 52(3) of the Charter.
[238] Article 52-53. CFREU.
[239] Fella and Ruzza, 2013, supra.
[240] EU membership still seemed a distant possibility.
[241] See, for instance, Monitoring the EU Accession Process: Minority Protection, November 2002.
[242] Focus Consultancy Ltd., European Roma Rights Center, European Roma Information Office, *The situation of Roma in an enlarged European Union*, European Commission Directorate-General for Employment and Social Affairs, 2004.

Fundamental Rights.[243] In 2004, the ERRC supported a recommendation for the adoption of a Roma-specific directive explicitly prohibiting segregation and imposing a duty on Member States to take positive action measures to remedy structural discrimination.[244] Race equality legislation was sealed by then, however, so that Roma advocacy refocused on EU institutions and the Council of Europe monitoring bodies.

Advocacy did not yield visible results in relation to Protocol 12 ECHR[245] negotiated simultaneously with the RED and adopted in November 2000, which is not entirely surprising, given the vast - and possibly unavailable - resources advocacy in the quickly proliferating venues would have required. Despite prohibiting discrimination in all walks of life based on an open list of grounds, Protocol 12 plays a marginal role in the dominant Roma rights narrative. The fact that the Protocol does not focus specifically on racial or ethnic origin or add to the level of protection provided by the RED - other than perhaps its material scope, which is, however, identical to ICERD's - may further explain its marginality. Only Romania ratified Protocol 12 in the CEE Five.[246]

Domestic anti-discrimination laws were adopted to comply with the EU accession conditionality and were drafted by pro-European forces within government and assisted by NGOs externally. Human rights activists played a pivotal role in the process, but in Romania and Slovakia dominant ethnic minority parties held the key to the legislative process. In the Czech Republic, conservatives in the upper chamber and president Klaus, an outspoken critic of equality norms blocked legislation until after accession.

Political scientists underline the importance of collaboration between the EU and Roma NGOs during the transposition of anti-discrimination legislation. While it is generally believed that one could not have succeeded without the other,[247] data suggests that political parties were also an important driving force in the process.[248] The suggestion that the ERRC played a key part in norm diffusion seems to overvalue its role. All in all, legal advocacy on anti-

[243] This Network was set up in 2002 by the European Commission upon the request of the European Parliament, in order to monitor compliance with the Charter of Fundamental Rights. The ERRC opposed the nationality exception in Article 4 of the RED. Olivier de Schutter and Annalies Verstichel, The Role of the Union in Integrating the Roma: Present and Possible Future, European Diversity and Autonomy Papers EDAP 2/2005, p. 421.

[244] De Schutter and Verstichel, supra. See also, Alexandra Xanthaki, The Proposal for an EU Directive on Integration, Roma Rights 2005/1 and Hope Dies Last: An EU Directive on Roma Integration, 11 Eur. Pub. L. 515 (2005). The proposal was based on Article 21 of the EU Charter.

[245] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.177 adopted in Rome, on 4 November 2000, in force since 1 April 2005.

[246] Romania ratified it in July 2006. Bulgaria neither signed, nor ratified Protocol 12, the Czech Republic, Hungary and Slovakia signed it on 4 November 2000, but have not subsequently ratified it.

[247] Melanie H. Ram, 2011.

[248] See, particularly Buzogany 2011.

discrimination law constitutes an important overlap between domestic legal strategies and legal opportunities.

The collaboration of mainstream human rights NGOs, dominant minorities and pro-European political forces shaped the legislative process. The ERRC itself lacked the capacity to meaningfully contribute to transposition. Conversely, prominent academics on the ERRC board urged the organisation to critically engage with the transposition of the EU anti-discrimination *acquis*.[249] While the ERRC did engage in knowledge transfer[250] as a project coordinator, even where it partially financed legal advocacy, such as in Bulgaria, the drafting itself came down to local lawyers.

Mainstream human rights lawyers spearheaded the drafting process on the NGO side, developing progressive proposals in their countries, independently from each other, even though all pursued the same agenda: buttressing enforcement. Borrowing occurred exceptionally, such as in relation to the status of the Hungarian equality body[251] and representative standing in Slovakia.[252] Had the ERRC meaningfully promoted cross-border exchanges, both the substantive and procedural features of national anti-discrimination laws could have been improved.

Romania was the first to transpose the RED through emergency decree in August 2000.[253] This may seem a bit hasty in retrospect, given that the RED was adopted a month before, and also that the country acceded seven years later, but dominant minority interests and political opportunities dictated immediate action. The adoption of anti-discrimination legislation formed part of the program of the Democratic Union of Hungarians in Romania (RMDSZ), which held key positions in government.[254] Minister without portfolio Péter Eckstein-Kovács, head of the Department of Inter-ethnic Relations was alerted to the SLG draft[255] and his team engaged in a contemporaneous drafting process in collaboration with an NGO coalition led by Renate Weber, director of the Romanian Soros Foundation and previously the Romanian

[249] See, for instance, Bob Hepple QC, A Unified Approach to Equality Law, Roma Rights, 10 May 2003

[250] In the framework of an EU funded project aimed at training judges and lawyers in the new Member States. I acted as a trainer in Hungary, the Czech Republic and Latvia.

[251] Csaba Tordai working at the time for the Ministry of Justice consulted with Péter Eckstein-Kovács. Tordai interview.

[252] The 2009 amendment was based on information Poradna collected from Ilieva and Romanian NGOs and relayed to the person in charge at the Ministry of Justice, a judge with experience in consumer law seconded to the Ministry. Durbakova interview.

[253] Government Ordinance no. 137/2000 (endorsed by law no. 48/2002) regarding the prevention and sanction of all discrimination forms. The equality body was also established by government ordinance: no. 1194/2001 regarding the creation, organization and operation of the National Council for the Fight against Discrimination (CNCD).

[254] Asztalos interview.

[255] Eckstein-Kovács interview.

Helsinki Committee, an NGO committed to good inter-ethnic relations as the cornerstone of peace and democracy.[256]

Aware of the impossibility to advance legislation on minority rights - which would have best served the interests of the Hungarian minority - RMDSZ settled for protection through special measures in education and local governance compounded with anti-discrimination norms. The draft was scheduled for the summer recess on the initiative of the parliamentary human rights commission headed by an ethnic German MP. It was adopted in the Senate surpassing debate in the Chamber, whose majority was vehemently opposed to equal treatment based on national origin and sexual orientation.[257] The emergency decree "epitomised the wish list of a good Samaritan" and went far beyond the RED's scope.[258]

In Bulgaria, the Protection against Discrimination Act (PADA) adopted in 2003 was drafted by the government, with significant input from the Bulgarian Helsinki Committee and its staff lawyer, Margarita Ilieva.[259] Her proposals on representative action, etc. were taken on board by the pro-European government lawyers[260] aided by an EU expert participating in a cross-border project.[261]

In Slovakia, public debate on discrimination was facilitated by the press and NGOs. The first and second drafts of the Anti-discrimination Act (ADA), introduced in 2002 and 2003 by the Deputy Prime Minister for Human Rights, Minorities and Regional Development delegated by an ethnic Hungarian party were severely contested.[262] Parliament rejected both drafts, but gave a green light to the third, which was adopted in May 2004 the month Slovakia acceded to the EU.[263] The law also charged the Slovak National Centre for Human Rights with the duties

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[256] Andreescu interview.

[257] Gabriel Andreescu, President of Association for Protecting Human Rights - Helsinki Committee, Why did the Helsinki Committee involve in the national minorities doctrine?, p. 94. "If the law- project for the fight against discrimination had been passed on to the Parliament, it would have had no chance to be passed. Who would imagine he would have been voted exactly by the political persons that used the chauvinist language."

[258] Iordache interview. Iordache is the Romanian expert for Legalnet, consultant for the CNCD and former RHC lawyer.

[259] Margarita Ilieva, The Bulgarian Draft Anti-Discrimination Law: An Opportunity to Make Good on the Constitutional Promise of Equality in a Post-Communist Society, 10 May 2003, Roma Rights 2003/1.

[260] Ibid.

[261] The former legal director of the Commission for Racial Equality for Northern Ireland, one of the few such entities pre-existing the RED advised the Bulgarian government. Scullion, G., New Legal Director Highlights Opportunities Under Anti Discrimination Law to Challenge Racism against Roma, 21 November 2007, Roma Rights, 2007/4.

[262] Executive Summary, Slovakia Country report on measures to combat discrimination, Zuzana Dlugosova, 2007, Legalnet.

[263] Act No. 365/2004 Coll. of 20 May 2004 on Equal Treatment in Certain Areas and Protection against Discrimination, and on amending and supplementing certain other laws as amended.

of the national equality body.[264] Subsequently, only positive action on the ground of racial and ethnic origin - enshrined in the ADA - provoked debate. The Minister of Justice lodged a constitutional complaint against this provision, which was annulled for lack of legal clarity, but following the 2006 elections, the new Deputy Prime Minister made plans to reintroduce it in order to improve the situation of the Roma. The legal battle did not put an end to positive action measures in practice.

In Hungary, the Ministry of Education and the administrative state secretariat within the Ministry of Justice - two liberal strongholds - were influential in the transposition process. The Ministry of Justice started preparations during the tenure of the conservative government (1998-2002), commissioning professor of labour law Tamás Gyulavári, expert for the liberal party and Botond Bitskey, an official of the Constitutional Court's Office to draft a concept and a bill on the prohibition of discrimination and the promotion of equal opportunities (Equal Treatment Act, ETA). NGOs, academics and trade unions were involved in the public consultation.[265] The Hungarian Helsinki Committee combining expertise on gender, race, ethnicity and sexual orientation was the most influential.[266] HHC also provided input on the Equal Treatment Authority, which proved highly influential for secondary legislation.[267] The Authority's advisory board, established in June 2005, included many drafters. During its six years of operation, the Board issued guidelines that have been widely cited by the Authority and courts.[268] The legislative process sidestepped the Minorities Ombuds who prepared a draft anti-discrimination law in 2000 that failed to garner sufficient support in Parliament.[269] The Minorities Ombuds also issued a legal opinion, requesting the equality body mandate,[270] but with the adoption of the ETA, his previous significance decreased, a development he sought to counterbalance with thematic work.

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[264] PC.DEL/840/04, 13 September 2004, Statement of the Minister of Foreign Affaires of the Slovak Republic Eduard Kukan at the OSCE Conference on Tolerance and Fight against Racism, Xenophobia and Discrimination, Brussels.

[265] Észrevételek az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló törvény koncepciójához, 2003 január, Nem nyilvános, on file with the author.

[266] Lilla Farkas, András Kádár and József Kárpáti, Néhány megjegyzés az egyenlő bánásmódról szóló törvény koncepciójához (Comments on the Concept Paper of the Equal Treatment Bill), Fundamentum 2003/2

[267] Lilla Farkas and József Kárpáti, Gyerekjáték összerakni? A magyar anti-diszkriminációs testület modellje, (A Child's Plaything? A Model of the Hungarian Equal Treatment Body), EU Tanulmányok II. kötet (EU Studies, Volume II), Nemzeti Fejlesztési Hivatal (Office of National Development), Budapest, 2004

[268] Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat, Összefoglaló vélemény, no date provided.

[269] Minorities Ombuds Jenő Kaltenbach actively participated in the standard setting work of ECRI and through that body connected to the broader European movement. Later on, he also served on the ERRC's board.

[270] The Ombuds institution was strongly linked to the dissident aspirations to counterbalance state power, so much so that mixed competences were not considered proper at the time.

Romania and Bulgaria transposed the RED years before accession, when the domestic political climate was favourable. In Hungary and Slovakia, the law was passed right before accession with the support of recently elected pro-European governments. The Czech Republic was the last to transpose the RED in the whole EU and the country is an exception to the CEE trend. The Czechs transposed after accession, under the threat of an infringement action. It is quite probable that international litigation, namely the *D.H.* case was in fact counter-productive not only for the Roma, but the overall equality cause in that country.[271] The Czech enforcement regime is the weakest in the region, due in part to standing rules, short deadlines, high fees and costs.[272]

Conversely, anti-discrimination legislation in the CEE Four (Romania, Bulgaria, Hungary and Slovakia) provides ideal conditions for enforcement. For domestic law-makers, over-transposition offered the technical advantage of reconciling the discrepancies across the relevant legal orders. It was also perceived as a *low-cost investment* with a high political pay-off - except in the Czech Republic, where blocking legislation paid off in the electoral booths.[273]

2.2.2. Specific provisions addressing segregation, especially in education

The issue of segregation was taken up by the Council of as soon as ECRI and the FCNM Advisory Committee began reporting about Roma-dense CEE countries. ECRI issued various recommendations relevant or specific to the Roma, defining segregation as *de facto* discrimination that can amount to direct or indirect discrimination.[274] This is, unfortunately, not in line with ICERD, according to which segregation is a stand-alone form of discrimination, nor with CADE that permits segregation only when it is based on free choice and serves the purposes of maintaining a minority's identity - such as for instance minority language education. While ECRI's conception blurs distinctions between direct and indirect, intentional and "spontaneous" segregation, it prevents the potentially negative consequences of borrowing from the US, where *de facto* segregation is not prohibited.[275]

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[271] Koldinská interview.

[272] Chopin, I. and Germaine, C., A comparative analysis of non-discrimination law in Europe 2018: A comparative analysis of the implementation of EU non-discrimination law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey, European network of legal experts in gender equality and non-discrimination, January 2019.

[273] Iordache interview.

[274] ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial intolerance adopted on 13 December 2002 and revised on 7 December 2017.

[275] Kristi Bowman and Jiri Nantl, 2013, supra.

All in all, the CEE Four are unique in the EU as regards the explicit prohibition of segregation, but not as a result of transnational collaboration.[276] Curiously, domestic dispositions follow different logics. Even though European law does not specifically prohibit segregation, the RED's transposition and the leverage provided by the EU equality conditionality created momentum for national norm adoption. The Bulgarian and Hungarian anti-discrimination acts contain relevant provisions, but only the Hungarian provision is modelled on international norms, while the Bulgarian is contrary to both CADE and ICERD, requiring proof of *compulsory* separation.[277] The Slovakian School Act prohibits all forms of discrimination, particularly segregation.[278] In Romania, ministerial circulars have regulated segregation since 2004.[279]

In Hungary, segregation was prohibited in the 1993 Public Education Act by a 2002 amendment, but desegregation was set out in ministerial decrees that did not necessitate the approval of mayors overrepresented in the Parliament and weary of political consequences.[280] Based on socio-economic status that could sufficiently capture Roma children most in need of protection, legislation concerned: (i) integrated education programming and financing; (ii) zoning and admission; (iii) downsizing special schools and integrating special education needs (SEN) children in mainstream education; (iv) free and mandatory schooling for impoverished children age 3 and up, and (v) the conditionality of EU funds on equality planning, a governance tool modelled on the statutory duty to promote equal treatment that requires planning on the basis of equality goals and timetables, with the involvement of minority representatives.

Originally, the definition of segregation in the Hungarian ETA's general provisions provided for a more lenient justification than the specific provisions in the chapter on education.[281]

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[276] Bulgaria, Hungary and Romania also went beyond the minimum requirements concerning the fields and grounds covered by anti-discrimination law. See, Chopin I. and Germaine-Sahl, C., A Comparative Analysis of Non-Discrimination Law in Europe, The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared, European Commission, October 2016, pp. 88-94 and 114-119. and Ilieva, M. Legal Standing for Civil Society Legal Entities to Litigate Against Discrimination in the Member States of The European Union and Candidate Countries, 2014, unpublished, pp. 33-42.

[277] Article 3 ICERD categorically prohibits segregation. The CERD Committee clarified Article 3 in General Recommendation No. 19: Racial segregation and apartheid (Art. 3): 08/18/1995. Gen.Rec.No.19. (General Comments). PADA Additional Provision § 1.(6) "Racial segregation" shall mean issuing an act, performing an action or omission to act, which leads to compulsory separation, differentiation or dissociation of persons based on their race, ethnicity or skin colour.

[278] Article (3) b, Zákon c 245/2008. z. z. o. vychove a vzdelávani. Article 2(2) of this Act defines school integration as the education of children with special education needs in classes and schools designed for children without special educational needs.

[279] Including Notification No 28463/2010 of the Ministry of Education.

[280] The Desegregation Sub-commission of the Parliament's Human Rights Committee provided an important forum for discussion. Mohácsi interview.

[281] Until 2006, Article 10(2) ETA prohibited unlawful as "a conduct that separates individuals or groups of individuals from others on the basis of [a protected ground] without an objective and reasonable justification."

Both were drafted by experts associated with the liberal party, but the former was authored in the Ministry of Justice, while the latter in the office of the Ministry of Education's Ministerial Commissioner for the integration of Roma and disadvantaged children.[282] Once a representative lawsuit shed light on the discrepancy, the Ministry of Justice proposed amendments, following which segregation was categorically prohibited, "unless specifically permitted by law."[283]

The Ministerial Commissioner was established in 2003, followed the establishment of background institutions servicing the fledgling integration program with substantial funds from EU sources.[284] Viktória Mohácsi, the first in this office was a Roma activist[285] who collaborated with educationalists and social scientists, but depended on the state secretary as concerns legal expertise.[286] The liberal dedication to decentralised governance dismantled central school inspection and the oversight of segregation suffered collateral damage.[287] Mohácsi found a way around these structural constraints by inspiring the establishment of the Chance for Children Foundation (CFCF) with the sole purpose of implementing the ETA's prohibition of segregation in education as discussed in Chapter IV.

2.2.3. Relevant social rights protection beyond a discrimination framework.

The development of legal opportunities concerning social rights was hampered by the CEE states at home, as much as by their denial of access to treaty mechanisms at the international level. Slovakia ratified the 1961 European Social Charter on 22 June 1998, Hungary on 8 July

[282] ETA Article 27(3)a, stipulated that the "principle of equal treatment is especially violated if a person or group is unlawfully segregated in an educational institution, or in a division, class or group within such an educational institution. Pursuant to Article 28 (2) The principle of equal treatment is not violated if, a) in elementary and higher education, at the initiation and by the voluntary choice of the parents, b) at college or university by the students" voluntary participation, education based on religious or other ideological conviction, **or** education for ethnic or other minorities is organised whose objective or programme justifies the creation of segregated classes or groups; provided that this does not result in any disadvantage for those participating in such an education, and the education complies with the requirements approved, laid down and subsidised by the State.

[283] Since 2005, segregation in Article 10(2) ETA is defined as "any conduct [or omission] that separates individuals or groups from other individuals or groups in a comparable situation on the basis of [race, ethnic origin, etc.], without a law expressly permitting such segregation."

[284] Such as OOIH, the National Educational Integration Network led by Judit Szőke, Szőke interview.

[285] Raised in Bedő, a small village with an equal share of ethnic Romanians, Hungarians and Roma, she attended a school that taught an ethnic Romanian curriculum and was truly inter-ethnic, so much so that it lacked an ethnic majority. Once in Budapest, she joined her aunt, Ágnes Daróczi at the public television's Roma program, then worked for the ERRC and RPP. She is an unrelenting force of nature, fighting for Roma inclusion tooth and nail.

[286] Szőke interview.

[287] Centralised oversight is only a necessary precondition, not a remedy itself as shown by the paradigm shift in 2011, when the conservative government re-centralised public education - with religious exceptions benefitting the middle classes - but deepened segregation. The previous Act's discrimination specific remedies were neither known, nor used, See Article 77 of Act No LXXVII of 1993 on public education - since repealed.

1999 and the Czech Republic on 3 November 1999.[288] Adopted in 1999, the Revised European Social Charter safeguards social rights and prohibits discrimination, but its material scope is contingent upon ratification, meaning that states parties can pick and choose which rights they undertake to protect. It provides for collective complaints, but due to the lack of binding decisions and sanctions the enforcement mechanism that also includes monitoring is considered rather weak.[289]

Romania ratified the revised Charter[290] on 7 May 1999, Bulgaria on 7 June 2000, permitting collective complaints as well. Hungary and Slovakia ratified in April 2009, while the Czech Republic signed the Charter in November 2000, but has not yet ratified it. In April 2012, it did, however, ratify the old Charter and its additional protocol permitting collective complaints.[291] More importantly, however, only Bulgaria and the Czech Republic - since April 2012 - allow for collective complaints.[292]

Following entry into force (2004), the Committee overseeing compliance with the Charter started issuing Roma-related decisions in 2007 concerning Bulgaria, Greece, Belgium and France. The Charter mechanism remains dormant in the Czech Republic, even though this country has the weakest domestic legal opportunities, which should render the collective complaint mechanism exceedingly valuable.

Accessibility shortcomings and the lack of sanctioning powers diminish the Charter's salience, even though the Committee's monitoring function and its progressive jurisprudence could in theory promote a social rights agenda. These mixed characteristics shaped legal strategies on housing, forcing litigation into the civil rights and equal treatment frames as discussed in Chapter IV.

2.2.4. Enforcement and remedies

Given that only Romania ratified Protocol 12 and only after 2006, individual complaints were not filed from the Roma-dense CEE countries under this mechanism during the decade

[288] Greece ratified the 1961 ESC on 6 June 1984 and Croatia on 26 Feb 2003.

[289] Olivier de Schutter, The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights, European Union, 2016, pp. 5-6 and 24-32.

[290] European Social Charter (revised), ETS No. 163, opened for signature on 03 May 1996, entered into force on 01 July 1999.

[291] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, ETS No.158 open for signature by the member States signatories to Treaty ETS 35 on 9 November 1995. Greece.has not ratified the revised Charter, while Croatia ratified the revised ESC on 18 March 2016.

[292] Greece has permitted collective complaints since 18 June 1998 and Croatia since 26 February 2003.

preceding EU accession, and due to the low ratification rate, Protocol 12 was generally sidelined in legal practice. Still, the leading case under Protocol 12 is a Roma judgment rendered after 2006.[293] As concerns other Convention rights, *p*ro-Roma jurisprudence began to emerge from an increasingly activist Strasbourg Court and Chapter IV highlights *Nachova and Others v Bulgaria*,[294] that set the precedent on the investigation of racially motivated crimes and *D.H. and Others v Czech Republic*[295] in which the Chamber verdict did not find racial or ethnic discrimination in education in 2005, but the Grand Chamber did in 2007.

Collective complaints under the European Social Charter could be launched form Bulgaria and this route was used as quickly as practicable. Otherwise, the ESC left no tangible impact through monitoring, despite the regularity of this process. More emphasis was laid on UN reporting mechanisms, with NGOs submitting shadow/alternative reports - often in coalitions - and attending the meetings of monitoring bodies.

The mark left by the Roma in ICERD litigation is surprisingly small, which may be partially due to the fact that the Czech Republic made the necessary declaration under ICERD on 11 October 2000 and Romania as late as 18 March 2003, meaning that individual complaints in these countries became available surprisingly late. By then, not only had legal strategies settled, but the time came to transpose EU anti-discrimination law in the run-up to accession, which opened new enforcement routes at home and took the limelight away from ICERD as a viable forum. Still, in Bulgaria and Hungary, no plausible explanation can be found, other than the Strasbourg Court's pulling effect on domestic lawyers. ICERD was used by the ERRC on behalf of Slovakian litigants to circumvent lack of access to justice and jumpstart cases at the international level as explored in Chapter IV.

The NGO coalition advocating for the adoption of the Racial Equality Directive sought "innovations concerning access to justice and institutional support for [strategic] litigation," envisaging representative standing for associations.[296] Few groups in the European Parliament were in favour of making class action available, which explains the directive's modest

[293] Sejdić and Finci v Bosnia and Herzegovina, Applications Nos. 27996/06 and 34836/06, Grand Chamber judgment of 22 December 2009. The case concerns the right to vote, whose discriminatory nature was coded in the Dayton agreement sealing peace in this country.

[294] Nachova and Others v Bulgaria, Applications Nos. 43577/98 and 43579/98, judgment of 26 February 2004.

[295] D.H. and Others v The Czech Republic, Application No. 57325/00, Chamber judgment of 7 February 2006, Second Section.

[296] Case and Givens, 2010, p. 222. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

minimum requirements in this regard,[297] but not in other respects, such as public enforcement. Minimum requirements are crucial, because the effectiveness of enforcement is in the hands of member states.

The effectiveness of enforcement varies across the EU and the CEE Four stand out in respect of both public enforcement and collective private enforcement.[298] Identical approaches derived from domestic experiences. An important precursor of representative lawsuits was the mandate of public prosecutors in socialist law, but representative action was also available in the already Europeanised environmental and consumer protection fields. The most significant input originated from the experiences of a specific set of drafters: NGO and government lawyers with an affinity for the rights of marginalised groups.

Considering domestic resistance to norm adoption, it is somewhat surprising that the RED's minimum requirements were not used by opponents to undercut the drafts' enforcement potential. The RED requires that NGOs and trade unions be given a role in legal proceedings, either by acting on behalf or in support of actual victims of discrimination.[299] This can be ensured by granting them the right to represent individuals in administrative or judicial proceedings, to intervene and/or to act as friends of the court (*amicus curiae*). The directive mandates the establishment of a promotional body endowed with the power of providing independent assistance to victims, issuing independent reports and undertaking independent surveys. The RED does not foresee a role for equality bodies in legal proceedings, nor does it require member states to mandate collective action, let alone representative standing.

Representative standing in civil proceedings and the quasi-judicial powers of equality bodies are significant points of divergence in enforcement regimes across the EU. The former empowers NGOs, trade unions, and selected public bodies to initiate civil action in their own name, if the plaintiffs cannot be identified, because they are too numerous or if discrimination is impending. Even though acting in the public interest is part and parcel of representative action, generally only procedural conditions are examined by courts, the actual public interest at hand is not.[300]

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[297] Adam Tyson, 'The negotiation of the EC directive on Racial Discrimination', in The Development of Legal Instruments to Combat Racism in a Diverse Europe, Isabelle Chopin and Jan Niessen (eds), Martinus Nijhoff Publishing, 2004, p. 123.

[298] Alvaro Oliveira, What Difference Does EU Law Make? The Added Value of EU Equality Directives on Access to Justice for Collective Actors in Kilpatrick, de Witte, Muir and Miller 2017.

[299] Article 7(2) RED

[300] Margarita Ilieva, The role of NGOs under EU anti-discrimination law, 2013, unpublished, on file with the author.

The Romanian emergency decree empowers NGOs to initiate representative action, particularly before the equality body and the Bulgarian PADA also ensures representative standing to NGOs.[301] Proceedings before the Bulgarian equality body can be initiated even without a specified victim (signalisation).[302] In civil courts, standing is dependent on registration as a public interest entity. Class action under civil procedure law is also permitted, but it is not utilised in the field of discrimination,[303] even though it would open the way to compensation.[304] The Hungarian ETA provides representative standing to various entities, including NGOs.[305]

Whether compensation is available through representative action is not straightforward. In Bulgaria, the sanctions are limited to declaratory finding and repressive injunctions. In Romania, taking representative action in civil courts is contingent on damage claims, but it is unclear whether those can be made by representative plaintiffs.[306] In Hungary, a recent judgment ordered the payment of punitive damages (public interest fine) in a representative suit,[307] suggesting that compensation can also be claimed as according to jurisprudence under the old Civil Code applicable in the case, punitive damages can only be imposed if compensation is granted. The issue is not settled under the new Civil Code.

The Romanian, Bulgarian and Hungarian equality bodies have *quasi*-judicial functions.[308] The Hungarian body was the product of a compromise, because entrusting the

[301] According to Article 71(3) In cases of discrimination where the rights of many people have been violated, the NGOs engaged in public interest activity may bring an action on their own. The persons whose rights have been violated may join the legal action as an assisting party as per Article 174 of the Code of Civil Procedure.

[302] PADA Article 50(3). The Supreme Administrative Court has imposed a restrictive interpretation since 2014, in essence requiring an individual victim as a prerequisite of finding a sanctionable breachSupreme Administrative Court, Decision No. 5645 in case No. 15991/2013; Decision No. 15637 in case No. 1925/2014.

[303] Civil Procedure Code, Article 379.

[304] Ibid.

[305] Representative standing was championed by Gyulavári, who had been involved in test case litigation and witnessed first hand the difficulty of challenging discriminatory job advertisements. ETA Article 18 (2) stipulates that "In a public administrative procedure initiated because of the violation of the principle of equal treatment, the social and interest representation organisation is entitled to the rights of the client. Article 20(1) A lawsuit under personal or labour law because of a violation of the principle of equal treatment before the court can be initiated by a) the Public Prosecutor, b) the Authority, or c) the social and interest representation organisation, if the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and the violation of law affects a larger group of persons that cannot be determined accurately. (2) The compensation and fines of public interest imposed in the lawsuit initiated by the application of Paragraph (1) are due to the central budget."

[306] Even though all the agents I interviewed in Romania are aware of the significant impediment this causes, none could specify why the issue has not been clarified in practice.

[307] 18 April 2018 judgment No. 40.P.23.675/2015/84 of the Metropolitan Court in CFCF v Ministry of National Resources. Upheld by the Budapest Appeals Court in *CFCF* v. *Ministry of National Resources*, Pf.21.145/2018/6/I, 14 February 2018.

[308] According to Article 22(1) of the Romanian ordinance, human rights NGOs "can appear in court as parties in cases involving discriminations pertaining to their field of activity and which that prejudice a community or a group of persons." Subsection (2) grants them the right to "also appear in court as parties in cases involving discrimination that prejudice a natural entity, if the latter delegates the organisation to that effect."

Minorities Ombuds with enforcement would have required 2/3 of the votes that was unattainable, while his limited mandate would have led to non-compliance. In contrast, the Slovak equality body lacks quasi-judicial powers, but it can initiate representative action. It rarely does, however, least of all in Roma cases.

Equality bodies play a central role in enforcing racial equality norms.[309] Thus, their mandate, budget, independence and strategy are of paramount importance. The Bulgarian Protection against Discrimination Commission (KZD) was established in 2005. It is an independent body led by nine commissioners. Its budget is approved by Parliament, to which it reports annually.[310] Even though the KZD has legal standing to litigate on behalf of victims or bring representative action, and also to intervene, it has not yet initiated lawsuits and rarely intervened.[311] It does not have a litigation strategy, nor does it prioritise the Roma,[312] nonetheless, it has played a significant role in access to electricity litigation until the Court of Justice of the EU deactivated its strategy, an issue analysed in Chapter 3.[313]

Established in 2001, the CNCD was restructured by its ethnic Hungarian president at the helm since 2003. Following an equal pay campaign by judges and prosecutors who diverted the body's resources and the courts' attention for most of the 2000s,[314] the CNCD developed a strategic vein for Roma rights. Under the pressure of an NGO coalition, it also reformed its sanctioning policy.[315] The initial practice of the Hungarian Equal Treatment Authority (EBH) was also criticised for lenient sanctions in practice, which, however, have improved over time.

Following accession, discrimination against the Roma was handled by the Anti-discrimination Unit within Directorate General Employment that initiated over a dozen infringement proceedings to ensure formal compliance with the RED. The EU legal order is a supranational, multi-layered system. EU law can be enforced in a "centralised system", before the CJEU, but more frequently, it is enforced in a decentralised manner before national courts.[316] According

[309] Farkas, 2017, supra and Lilla Farkas, Throwing the babies out with the bathwater: the CJEU, xenophobia and equality bodies after Jyske Finans, European Anti-discrimination Law Review, 1/2018.
[310] PADA Article 40.
[311] PADA Article 47(5).
[312] It covers several protected grounds. PADA Article 4(1).
[313] Lilla Farkas, NGO and Equality Body enforcement of EU anti-discrimination law: Bulgarian Roma and the electricity sector, in Kilpatrick, de Witte, Muir and Miller, 2017.
[314] Culminating in a CJEU judgment and several Constitutional Court decisions attempting to put an end to the litigation saga that threatened the operation of the anti-corruption prosecution and courts in Romania, established to comply with a pre-accession requirement. Case C-310/10, Ştefan Agafiţei and Others, ECLI:EU:C:2011:467.
[315] Romanița Iordache and Iustina Ionescu, Discrimination and its Sanctions – Symbolic vs. Effective Remedies in European Anti-discrimination Law, European Anti-discrimination Law Review, Issue 19, November 2014, pp. 11-24.
[316] Albors-Llorens, 2014, supra.

to jurisprudence setting out the supremacy and direct effect of EU law, courts are expected to interpret national provisions in compliance with EU law, while in case of dispute or uncertainty,[317] interpretation can be sought from the CJEU.[318] Preliminary referrals enable locals to come before the CJEU,[319] augmented by "EU collective actor legislative requirements", i.e. innovations concerning the role of NGOs and equality bodies in assisting victims.[320]

Member states bear the duty to transpose directives with the caveat that they can choose measures best suited to do so, and in case of non-compliance the European Commission can initiate infringement procedures before the CJEU to bring national legislation (and interpretation) in line with EU law.[321] Direct actions[322] are not pursued in the Roma rights context, because the goal is not to challenge existing legislation and the actions or omissions of EU institutions that are often key allies vis-a-vis recalcitrant member states. The European Commission launched infringements to ensure the transposition of the directive itself, and while its choices seem imbalanced in the context of discrimination trends,[323] i*n lieu* of a specialised European agency, it remains the sole EU institution with competence to take legal action for compliance.

Preliminary referrals are the main form of judicial protection and incidentally, of European integration.[324] Referrals are embedded in the domestic judicial process, in which the CJEU rules on the interpretation or validity of national provisions to ensure uniform application. Preliminary questions can be formulated by parties to the legal dispute, but national judges are in charge, any of whom can make referrals, whereas courts of final instance - against whose rulings no remedy can be - are under the obligation to refer. There are few exceptions to the duty

[317] Christiaan Timmermans, The European Union's judicial system, Vol 41 Issue 2 CMLR, 2004 pp. 393-405.

[318] Juan A. Mayoral, In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe, CMLR Vol 55, Issue 3, May 2017, pp. 551-568.

[319] Information on cases is gleaned from two databases. The first was compiled at Maastricht University by Egelyn Braun and Marie Gérardy under the supervision of Elise Muir in the context of a research project leading to the publication, 'How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum'. The other data set was generated by Jeffrey Miller at the European University Institute for the Anti-Discrimination Working Group sponsored by professor Claire Kilpatrick.

[320] A term coined in Kilpatrick, de Witte, Muir and Miller, 2017, p. 4.

[321] Tanja A Börzel, Guarding the treaty: the compliance strategies of the European Commission in The state of the European Union: Law, Politics, and Society edited by Tanja A. Börzel and Rachel A. Cichovski, 2003, Oxford University Press. Sibylle Grohs: Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases in Compliance and the Enforcement of EU Law, Volume 20, Book 2 edited by Marise Cremona, 2012, Oxford University Press.

[322] Such as for the annulment of EU legislation, for failure to act, pleas of illegality and actions for damages under Articles 264, 265, 268, 277 and 340(2) TFEU.

[323] Special Eurobarometer 437 Discrimination in the EU in 2015, European Commission, October 2015. and EU-MIDIS II: European Union minorities and discrimination survey, December 2017.

[324] Alex Stone Sweet, The Judicial Construction of Europe, 2004; Joseph H.H. Weiler, The Transformation of Europe, 100 YALE L. REV. 2403–83, 1991.

to refer.[325] Domestic proceedings continue once the CJEU judgment is delivered and domestic courts have exclusive competence to establish the facts.

Both judicial activism and judicial resistance to refer are documented.[326] Judges in certain member states are more likely to make references, than in others. A popular theory claims that preliminary references are the most likely to arise when lower courts' interpretation diverges from that of higher courts,[327] which has been the case in *CHEZ*.[328] On the other hand, in many other cases the judiciary refused to refer altogether, as explored in Chapter IV.

Member states and the European Commission have the right to intervene in cases referred to the CJEU. The involvement of equality bodies may steer member states towards representing minority interests before the CJEU.[329] The Commission safeguards the implementation of EU law and specific administrative interests,[330] while advocate generals act to ensure the consistent application of EU law.[331]

Procedural requirements anchored in domestic law prevail before the CJEU.[332] The general trend throws into doubt initial academic forecast on ways in which the individual justice model underpinning EU anti-discrimination law may become a hindrance.[333] The "vigilance model" draws attention to public enforcement - including by the European Commission[334] - and

[325] Such as (i) when EU law questions are not relevant to the decision in the main proceedings, (ii) in a situation before a national court is "materially identical with a question which has already been subject of a preliminary ruling in a similar case" ("acte éclairé"), or (iii) when the proper interpretation of EU law is "so obvious as to leave no scope for any reasonable doubt" ("acte clair"). See, Limante, Agne. Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a more Flexible Approach, Journal of Common Market Studies, 2016.

[326] For judicial activism see Barnard 1990 and Kilpatrick. 2001. For an account of judicial resistance, see Chapter 3.

[327] Karen J Alter and Jeannette Vargas, Explaining variation in the use of European litigation strategies: European community law and British gender equality policy, Comparative Political Studies, Vol 33 No 4, pp. 452–482, 2000.

[328] Case C-83/14 CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (Nikolova), ECLI:EU:C:2015:480. See, Farkas in Kilpatrick, de Witte, Muir and Miller, 2017.

[329] For instance, in the Belov case, Bulgaria concurred with Advocate General Kokott and the KZD concerning the latter's compliance with the requirements of national tribunals entitled to refer.

[330] In infringements, it acts "in the general interest", because "Article 258 `is not intended to protect that institution's own rights. Case C-394/02 Commission v Greece [20051 ECRI-4713, [15]—[161. See further, Paul Ctaig and Grainne de Búrca, EU Law: Text, Cases and Materials, 2015, p. 438.

[331] On the ground of racial or ethnic origin, religion, sexual orientation and disability advocate generals have issued opinions in the overwhelming majority of cases.

[332] Mark Dawson, Elise Muir, and Monica Claes, 'Enforcing the EU's rights revolution: the case of equality', European Human Rights Law Review 3, 2012.

[333] Christopher McCrudden, 'National Legal Remedies for Racial Inequality' in Fredman, S. and Alston, P. (eds) Discrimination and Human Rights: The Case of Racism. Oxford University Press, 2001, pp. 253-259.

[334] Mark Dawson and Elise Muir, 'Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma', Common Market Law Review 48.3, 2011. Dawson., Muir and Claes, 2012.

collective standing is generally held to be significant.[335] Still, class or representative standing is not necessary to effect structural change, as test case litigation with one claimant can set a precedent for others,[336] and "aggregated" individual actions can also drive legal and policy reform.[337]

Minority rights and anti-discrimination enforcement blended in with the enforcement of constitutional rights under the ambit of national human rights institutions. The Romanian Ombudsman was elected in 1997[338] and initially, the office included a department for national minorities,[339] but Roma rights were not prioritised and the number of complaints from Roma remained very low.[340] In the Czech Republic the first Public Defender of Rights took office in 2000[341] and dealt with forced sterilisation and desegregation. The mandate is filled by former dissidents, who play a pivotal role in the desegregation campaign. The first Slovak Public Defender of Rights was elected in 2001.[342] The first Bulgarian Ombudsman was elected in 2005, but it does not specifically deal with Roma rights. All in all, however, the realisation that socio-economic disadvantages could not be remedied within the minority rights regime[343] inspired

[335] Mónika Ambrus, Enforcement mechanisms of the racial equality directive and minority protection. Eleven International Publishing, 2011.

[336] Stefan Wrbka, Steven van Uytsel and Mathias Siems, 'Access to justice and collective actions: 'Florence' and beyond', in Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?, Stefan Wrbka, Steven van Uytsel and Mathias Siems (eds), Cambridge University Press 2012. They call attention to action "by a single claimant, who can be a private individual, a private legal entity or a public authority, as well as by a group of people" whose claims may be "aggregated into one total amount or just bound together via a single procedure." p. 11.

[337] Frances Kahn Zemans, Legal mobilization: The neglected role of the law in the political system, American Political Science Review, Vol 77 No 3, 1983, pp. 690-703. Zemans underlines that "an aggregation of individual citizens acting largely in their own interests strongly influences the form and extent of the implementation of public policy and thereby the allocation of power and authority."

[338] Romanian Government Department for Interethnic Relations, Dr Cristian Jura state secretary, Complementary system of human rights protection in general, and of the national minorities of Romania, in particular in Complementary System of Protection of the Human Rights and Fight Against Discrimination in Romania, 2004, Transylvania University Brasov, Romania, p. 24.

[339] Attila Markó, Romanian Government Interethnic Relations Department State Sub-Secretary, Evolution of the interethnic relations promotion system since the foundation of the National Minorities Council in 1993, p. 46.

[340] Ombudsman Institution, Anton Petrisor Parlagi Manager, pp. 59-60. For instance, in 2003, the Ombudsman received 1361 petitions on the right to property, 1096 on the right for a decent living, 93 complaints from "handicapped persons" and only 30 on equality.

[341] Law 349/1999 Coll. of 8th December 1999 on the Public Defender of Rights.

[342] Slovak Act No. 564/2001 Col. of Laws, on the Public Defender of Rights.

[343] The Roma as a social group are stratified. There is a Roma middle class and a small economic and intellectual elite. 30-40 % are officially employed in the five CEE countries, while a significant segment lives in extreme poverty, with minimal subsistence from public work programs or unofficial jobs, often in horrendous conditions. See, The Situation of the Roma Minority in Selected New Member States of the European Union, Edited by Will Guy and Ivan Gabal July-August 2012, published by the European Liberal Forum asbl.

Ombuds institutions to advocate for anti-discrimination norms both at the national and European levels.[344]

In Slovakia, the Government Plenipotentiary for Solving the Problems of Citizens in Need of Special Care - established in 1995 - was abolished in 1998, when a pro-European government set up the Plenipotentiary for Solving the Problems of Citizens Belonging to the Romani Minority under the supervision of the Deputy Prime Minister for Human Rights, Minorities and Regional Development, a post held by an ethnic Hungarian. Overseen by the Prime Minister since 2002 the Plenipotentiary's office has been held by Roma activists.

2.2.5. Compliance level in 2006

Rule of law reform in the decade preceding EU accession was shaped by political and legal criteria set by the EU, which overshadowed compliance pressure *vis-a-vis* other international organisations. After the adoption of the Racial Equality Directive, the key accession conditionality focused on equality and non-discrimination, complemented with social inclusion right before the first wave of accession (2004), bringing the Czech Republic, Slovakia and Hungary into the EU. While the directive provides the most extensive enforcement regime, its material scope does not extend to civil and political rights. Moreover, it cannot compensate for the lack of social legislation that remained an important feature of Roma-relevant legislation, despite positive developments within the Council of Europe. All in all, significant progress notwithstanding, access to rights particularly relevant for the Roma remained curtailed.

Except for the Czech Republic, an outlier in respect of anti-discrimination legislation, the Roma-dense CEE countries complied with the EU's anti-discrimination conditionality by 2004. Accession had a pulling effect on domestic legislation characterised by over-transposition as concerns enforcement, particularly public enforcement by equality bodies and collective action (representative suits) available in civil courts. Local agents also used the momentum to specifically prohibit and define segregation in the field of education

The directive's key concepts must be regarded as legal transplants from the West, but other progressive features were inspired by local Roma rights litigation, which in turn drew on antecedents in the United States as discussed in Chapter V. The status of equality bodies and

[344] Giancarlo Cardinale, 'The preparation of ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination', Chopin, I. and Niessen, J. (eds), *The development of legal instruments to combat racism in a diverse Europe*, Martinus Nijhoff Publishing, 2004. Kristin Henrard, Ever-Increasing Synergy towards a Stronger Level of Minority Protection between Minority-Specific and Non-Minority-Specific Instruments, European Yearbook of Minority Issues, Volume 3, Issue 1, pp. 15-41.

the form of collective action follow on local traditions peppered with a shared heritage of communist legalism. Considering identical local solutions, the level of transnational exchange within the CEE was surprisingly low. Local rule of law reformers would not or did not wish to go beyond the anti-discrimination frame and build a strong social rights framework that would have benefitted the Roma more profoundly.

In retrospect, much of the optimism concerning the anti-discrimination frame proved well-founded, especially because anti-discrimination laws in the CEE cover civil and political life as well, available against hate speech as discussed in Chapter V. Still, this frame cannot properly address immediate needs, such as access to housing. Anti-discrimination law complemented national human rights institutions and field specific agencies, successfully channeling complaints from the Roma and legally focused NGOs.

Discrimination law became a specific field, although overlapping with minority rights as far as , for instance, education is concerned. With the exception of the Czech Republic, segregation was *de iure* outlawed and became justiciable at home, as well as before international tribunals. New routes opened up for access to justice under ICERD, Protocol 12 ECHR and - to some extent - the European Social Charter whose significance was overpowered by the pull of EU law that created favourable legal opportunities at the national level as well.

Initially discussing the strengths and weaknesses of national human rights institutions in hopeful terms, optimism began to waiver as research gradually uncovered the limitations of enforcement powers and the increasing unwillingness of public administrations to comply with recommendations.[345] Research points to the inconsistencies of legal strategies and legitimacy shortcomings,[346] but in retrospect the most striking hiatus is the lack of systemic collaboration between the public bodies and Roma rights NGOs.

2.3. Organic transnationalism: 2007-2019

When Romania and Bulgaria joined the EU in 2007, the expansion of favourable legal opportunities for the Roma in general came to an end, with variations across the Roma-dense CEE countries. In the Czech Republic, an outlier during the “golden age," the post-accession period

[345] Roma related work focused on discrimination from 1997 onwards. Employment related complaints sparked recommendations to expand the mandate to cover equality and non-discrimination in general. Krizsán, 2004, supra pp. 172. and 182. See, also Philip Giddings, The Ombudsman as Advocate, 4 Eur. Y.B. Minority Issues 207 2004-2005, pp. 215-218.

[346] Majtényi Balázs szerk.: Lejtős pálya. Antidiszkrimináció és esélyegyenlőség (Föld-rész Könyvek), Budapest: L’Harmattan Kiadó, 2009,

finally saw the adoption of domestic anti-discrimination law (2009), which, however, is limited to the RED's minimum requirements. Still, the introduction of key concepts in Czech law and the designation of the Public Defender of Rights as an equality body improved the situation to a certain extent, even if the reform of the education law following the 2007 Grand Chamber judgment in *D.H.* seemed more like window-dressing, rather than systemic policy change. Given the lack of enforcement, the same must be said about the seemingly progressive Romanian regulations on desegregation. In Bulgaria and Hungary, where legal and institutional reform went the farthest before accession, backsliding was the most extensive once full membership was obtained, particularly during the reign of populist governments. In Slovakia, where legal reform was not institutionally embedded, progress as well as backsliding was more moderate.

The literature approaches the post-accession period with reference to the securitisation of the Eastern Roma in the West, a characteristic closely linked to a fundamental freedom (free movement of workers), but also to the significance of cross-border movement within the EU. The European Roma Rights Center's internal crisis and increasing, spontaneous cross-border exchanges chronicled in the following chapters suggest that a key characteristic of the post-accession period is a shift from a centrally imposed cross-border exchange to more genuine, organic transnational collaboration, therefore the most recent period is named after this concept.

Compliance backlash was predicted for the post-accession period,[347] due to the legitimacy deficit of top-down policy changes that seemed as insufficient for engendering "sustained policy learning."[348] In practice, the adoption of anti-discrimination legislation was less straightforward than theorists suggest with equally unpredictable outcomes after 2004-2007, given that pro-European governments sustained compliance on the books and as much as they could, in action as well. EU law's leverage has prevented or stalled backsliding but could not force compliance from decidedly unwilling populist political forces that have refused to yield to political pressure even from the European Parliament. Political backsliding notwithstanding, jurisprudence has been largely compliant with the RED, but of little relevance from the perspective of dismantling structural discrimination.

2.3.1. The substantive content of discrimination law

[347] Dimitrova, A. L. (2010) 'The new member states in the EU in the aftermath of accession. Empty shells?' Journal of European Public Policy, 17, 1: 137-148.
[348] Rachel A. Epstein & Ulrich Sedelmeier (2008) Beyond conditionality: international institutions in postcommunist Europe after enlargement, Journal of European Public Policy, 15:6, 795-805.

The bulk of Roma rights case law in the Strasbourg Court emerged in this period. The Grand Chamber judgment in *D.H. and Others v Czech Republic* delivered in November 2007 is the leading case on racial discrimination under the European Convention and constitutes the basis of a campaign for social inclusion in general, and desegregation in particular. The verdict is also a prime example of NGO-triggered judicial dialogue between EU law and the Convention system.[349]

The European Committee of Social Rights also rendered the overwhelming majority of its Roma-related conclusions after 2007. Importantly, however, complaints against forced eviction were more satisfactorily resolved under the European Convention in *Yordanova and Others v Bulgaria*[350] and *Winterstein et autres c France*.[351] The Court of Justice of the EU declined to examine a preliminary referral by the Bulgarian equality body, the KZD in *Belov*[352] on a stigmatising practice of an electricity company. Subsequently, in the 2015 *CHEZ* case it delivered an outstandingly progressive judgment on the same issue involving an ethnically non-Roma applicant who suffered discrimination 'together with the Roma.' Chapter IV discusses these developments in detail.

As an exception to regional trends, the Czech Republic transposed EU anti-discrimination law five years after accession and has not chipped away from standards since, primarily because it kept compliance to the minimum. The country adopted anti-discrimination legislation in June 2009, becoming the last EU member state to transpose the RED.[353] The draft law repeatedly suffered defeat by a "narrow and formalized perception" of the rule of law and justice.[354] The Czech Senate questioned the necessity of transposition in a single act. Substantive equality provisions were bitterly attacked on the basis of the "civic principle," the ideal that citizens enjoy equal protection under the constitution, rendering further legislation obsolete.[355] The Czech legislature rejected drafts seeking to introduce representative standing and to

[349] D. H. and Others v Czech Republic, Application No. 57325/00, Grand Chamber judgment of 13 November 2007.

[350] Yordanova and Others v Bulgaria, Application No. 25446/06, judgment of 24 April 2012.

[351] Winterstein et autres v France, Application No. 27013/07, judgment of 17 October 2013.

[352] Case C-394/11 Valeri Hariev Belov v CHEZ Elektro Balgaria AD and others, ECLI:EU:C:2013:48.

[353] 198/2009 Coll. Act of 23 April 2008 on equal treatment and on the legal means of protection against discrimination and on amendment to some laws (the Anti-Discrimination Act). See, Czech Republic becomes last EU state to adopt anti-discrimination law, Equal Rights Trust press release Czech Republic, June 25, 2009.

[354] Executive Summary, Czech Republic country report on measures to combat discrimination by Pavla Boucková, 2007, Legalnet.

[355] Positive action is tolerated on the ground of disability only, while measures targeting the Roma are generally perceived as "unjustified advantages". Ibid.

provide the Public Defender standing in court with a mandate to initiate the abstract constitutional review of primary legislation.[356]

In the other four countries, EU law's compliance pull (the threat of infringement actions) repelled or minimised legislative backsliding, but could not prevent attacks against institutions as political counter-mobilisation sought to undermine the legitimacy and resources of equality bodies, rather successfully muzzling them in public debates. Non-discrimination was not singled out, however, as fundamental rights and their institutional basis in general came under attack.[357] Despite criticism from extremist political parties, the appointment of the Bulgarian KZD's councillors was never as scandalous as those of the Romanian CNCD. The Hungarian EBH is subordinated to the government, not the Parliament and although the quality of its decisions is adequate, it has retreated from the public eye since the populist government appointed a new EBH president in 2010 and terminated the NGO-dominated advisory board in the following year.

Anti-discrimination laws were subjected to minor, but incessant amendments. Appointments to the Romanian equality body's steering board and the politicisation of its decision making caused grave concerns.[358] In Hungary, the efforts of corporate lobbyists to water down the Equal Treatment Authority's sanctioning powers were staved off before the level of vigilance diminished with the elimination of the advisory board and the Authority withdrew from the public discourse.

Following the CJEU verdict in *CHEZ,* the Bulgarian PADA's provision on indirect discrimination and less favourable treatment were amended by Parliament.[359] In Romania, legislation extended the equality body's sanctioning powers in the wake of the *ACCEPT* judgment that formed part of an NGO-coalition's legal campaign.[360]

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[356] Legalnet report: Czech Republic - Anna Šabatová elected by Czech Senate as new Ombudswoman, 14 February 2014. "The post of Minister for human rights was first established in the government of Vladimír Špidla (2002 - 2004), but has since then only existed shortly between 2007 and 2010. The new government´s programme suggests that the human rights and equal opportunities will become priority issues again."

[357] For instance, the Slovak government severely limited the institutional basis of human rights and discrimination-related issues in 2012. Legalnet report: Slovakia - Slovak Government Limiting the Scope of Institutional Coverage of Human Rights and Discrimination-Related Issues on National Level, 18 January 2013.

[358] Legalnet report: Romania - Head of national equality body declares that he is shamed by decision taken by body, 1 November 2013.

[359] Legalnet report: Bulgaria - ADL amendments of definitions of "indirect discrimination" and "unfavourable treatment", 18 January 2017.

[360] The ACCEPT litigation formed part of the Romanian Anti-discrimination NGO Coalition's campaign to improve the CNCD's sanctioning practices. Other cases were also taken. Iordache and Ionescu, 2014, supra.

The RED's broad scope is interpreted as creating a "hierarchy of grounds" in EU anti-discrimination law that allegedly favours racial or ethnic origin.[361] The EU gender lobby is the most vocal about this perceived hierarchy, using the critique to mobilise for the mainstreaming of gender in equality policies addressing other grounds.[362] The debate focuses on the 2000 directives, which leaves nationality and the bulk of gender legislation to the side. When looking beyond the scope of hard law instruments, the "hierarchy" seems less straightforward.[363] For instance, reasonable accommodation in employment is provided on the basis of gender (pregnancy and parental leave) and disability,[364] while on the ground of race, reasonable accommodation or measures of substantive equality are lacking in EU hard law.[365]

2.3.2. Specific provisions addressing segregation, especially in education

The RED does not specifically outlaw segregation, but it prohibits direct or indirect discrimination that can apply to cases involving segregation. The first Roma-themed report of the European Network of legal experts on gender equality and non-discrimination argued for an interpretation of segregation as direct discrimination,[366] given that segregation is inescapably obvious in the case of visible minorities, such as the Roma. As segregation is the most severe form of discrimination in ICERD, it should be at least as difficult to justify as it is to justify direct race discrimination, but this argument has been widely debated.[367] The difference is significant

[361] Mark Bell and Lisa Waddington, More equal than others: distinguishing European Union equality directives, Common Market L. Rev., Vol 38, 2001.

[362] Dagmar Schiek and Victoria Chege (eds), European Union non-discrimination law: Comparative perspectives on multidimensional equality law, 2009, and Dagmar Schiek and Anna Lawson (eds.), European Union non-discrimination law and intersectionality: investigating the triangle of racial, gender and disability discrimination, Ashgate Publishing Ltd, 2013.

[363] Sara Benedi Lahuerta, Taking EU Equality Law to the Next Level: in Search of Coherence, *European Labour Law Journal* 3, 2016. and Dr Ania Zbyszewska and Dr Sara Benedi Lahuerta, Rethinking EU Equality Law – Towards a More Coherent and Sustainable Regime, Exploring the Alternatives, Southampton/Warwick Working Policy Paper on EU Equality Law, 2017. They note at p. 2. that "the EU equality law framework articulates, at times uneasily and incompletely, with other EU legal and policy fields that do not necessarily fall within equality law "proper"."

[364] Pregnancy Directive 92/85/EEC, Parental Leave Directive 2010/18/EU.

[365] Lisa Waddington and Mark Bell, Exploring the boundaries of positive action under EU law: A search for conceptual clarity, Common Market L. Rev., Vol 48, 2011.

[366] Lilla Farkas, Segregation of Roma Children in Education: Addressing structural discrimination through the Race Equality Directive, July 2007.

[367] Goodwin, 2009; Jennifer Devroye, The Case of D.H. and Others v. the Czech Republic, 7 Nw. J. Int'l Hum. Rts. 81 (2009); R. Medda-Windischer, 'Dismantling Segregating Education and the European Court of Human Rights. D.H. and Others vs. Czech Republic: Towards an Inclusive Education?', European Yearbook of Minority Issues, Vol. 7, 2007/8; Helen O'Nions, Divide and Teach: educational inequality and the Roma, The International Journal of Human Rights, Vol 14, issue 3, 2010, pp. 464-489; Sina van den Bogaert, Roma Segregation in

in theory, because the Strasbourg Court approaches segregation from the *principle* of equal treatment (Article 14) and applies the same justification test to both direct and indirect discrimination (reasonability and proportionality). Under the directive[368] the difference between direct and indirect discrimination becomes significant, because reasonable justification is permitted in the case of indirect discrimination, but direct racial discrimination is only justifiable by positive action measures. In practice, however, the Strasbourg Court holds segregation *de facto* unjustifiable as discussed in Chapter IV. This is significant, because pursuant to the EU Charter, Strasbourg interpretation should be taken to constitute a minimum level of protection.[369] A duty to desegregate could resolve this conundrum, but no such duty is spelt out in EU law, although policy guidance to this effect has been issued.[370]

Following nominal amendments during the *D.H*. proceedings in Strasbourg, the Czech government introduced desegregation provisions in 2009, which were, however, short-lived and once their sponsor, the Green Party left the coalition government, reform initiatives were also abandoned. They picked up again once the European Commission opened a pilot infringement procedure against the country.[371] Rather than diagnostic protocols, the 2014 amendment changed the approach to special education needs (SEN), made preparatory classes available in primary schools for all and conditioned extra funding on individual needs.[372] Due to *D.H*'s focus on special education, other forms of segregation remain unaddressed, despite their increasing prevalence following the 2014 amendments.[373]

Segregation was defined in the Romanian Education Act 2009 which was, however, declared unconstitutional.[374] In 2016, the Ministry of Education adopted new desegregation

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Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters, 2011, Max-Planck-Institut für auslandisches öffentlisches Recht und Völkerrecht, pp. 719-754; Kalina Arabadijeva, Challenging the school segregation of Roma children in Central and Eastern Europe, The International Journal of Human Rights, Volume 20, 2016, Issue 1; and Rosa Drown, Equal Access to Quality Education' for Roma: how indirect and unintentional discrimination obstructs progress, Race Equality Teaching, Volume 31, Number 2, Spring, 2013, pp. 32-36.

[368] Case C-188/15, Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole SA, Opinion Of Advocate General Sharpston, ECLI:EU:C:2016:553.

[369] Article 52-53 ECFR.

[370] EGESIF_15-0024-01 11/11/2015, European Commission, European Structural and Investment Funds, Guidance for Member States on the use of European Structural and Investment Funds in tackling educational and spatial segregation.

[371] Legalnet report: Bulgaria - Anti-discrimination law amendments. Shift of the burden of proof and definition of 'sex', 28 May 2015.

[372] Legalnet report: Czech Republic - Amendment to the School Law, 28 May 2015: Amendment to the School Law Promotes the Right to Equal Access to Education for Roma Children. School Law, no. 561/2014.

[373] Summary Report on Protection against Discrimination, Public Defender of Rights, 2018, Brno, Omega Design s.r.o.

[374] Under the draft Education Act 2009 mother tongue education could justify race or ethnicity based segregation. Article 8(6) Education Act 2009.

measures[375] that remain unenforced, similar to the 2004, 2007 and 2010 guidance issued by the Ministry of Education.[376] Framework order no. 6134/2016 defines ethnic segregation on the basis of numerical indicators, while the exception clause follows the logic of relevant international human rights law, permitting self-separation for the purposes of ethnic identity preservation.[377] The order envisages the establishment of a National Commission for Desegregation and Educational Inclusion, but the body is not yet operational and the order does not foresee sanctions for non-compliance.

The 2011 National Education Act (NEA) in Hungary became the vehicle of legislative regression. The Hungarian ETA's prohibition of segregation complies with CADE on the books, but has been problematic in practice since the Supreme Court's 2015 judgment in *Chance for Children Foundation v the Greek Catholic Church et al*.[378] The legislative basis of the Hungarian government's resegregation policies was created in the 2011 NEA, although minor changes were also made to the ETA. The latter's major overhaul was prevented by NGOs that mobilised the European Commission. Failing in its attempt to amend the ETA provision on positive action measures that would have opened a direct route to segregation, the government capitalised on the ETA Article 28 safeguard's failure to properly delineate exceptions between religious and ethnic minorities and conflated these two grounds when permitting segregated education explicitly in the NEA and implicitly in ETA.

The legal bases of re-segregation were gradually constructed in response to a representative action that subjected government policy to judicial review. The NEA was amended in 2014 so that its "Special provisions on the operation of faith and private schools and on religious and moral education organized in the state education system" now govern ethnic minority and catch-up education as well. Roma minority education can be organized for purposes other than

[375] Article 4 of the Framework order no. 6134 of 2016 defines ethnic segregation as "physical separation of [students] belonging to an ethnic group in the educational unit …, so that the percentage of the [students] belonging to the ethnic group from the total of the pupils in the educational unit … is disproportionate when compared to the percentage of the children belonging to that ethnic group in the total population of that specific age in the educational cycle in that specific administrative-territorial unit." As an exception it allows for groups, classes, educational units (schools) enrolling "mostly or only kindergarten children, pre-schoolers or pupils belonging to an ethnic group, with the purpose of teaching in the mother tongue of that group or in a bilingual system."

[376] Legalnet report: Romania - Romanian Ministry of Education issued a Framework order on prohibiting school segregation in primary and secondary education and a ministerial order for the action plan on school desegregation, 24 January 2017.

[377] Ethnic segregation is defined in Article 4 as "physical separation of kindergarten children, pre-schoolers or pupils (in primary and secondary education) belonging to an ethnic group in the educational unit / group / classroom/ building / last two rows / other facilities, so that the percentage of the students belonging to the ethnic group from the total number in the educational unit is disproportionate when compared to the percentage of the children belonging to that ethnic group in the total population of that specific age in the educational cycle in that specific administrative-territorial unit." An exception is permitted for mother tongue education in kindergartens.

[378] Hungary, Curia, Pfv.IV.20.241/2015/4, judgment of 22 April 2015.

the preservation of minority identity, while the same exception does not apply to other ethnic groups,[379] which constitutes *de iure* discrimination.[380]

In 2015, the Slovak Schools Act was amended ostensibly to facilitate Roma desegregation in education, but the content suggested otherwise.[381]

2.3.3. Relevant social rights protection beyond a discrimination framework.

Little changed in terms of social rights legislation, despite the Strasbourg Court's ruling in *Yordanova and Others v Bulgaria*[382] mandating national legislation in order to protect vulnerable communities threatened by forced evictions, an issue discussed in Chapter IV. Neither did monitoring and complaints under the European Social Charter yield legal or policy reform.

Complaints under the International Covenant on Economic, Social and Cultural Rights became theoretically available in 2013, when Optional Protocol 1 was adopted, but in practice, only Slovakia ratified this treaty on 7 March 2012. Consequently, individual complaints cannot be filed from Bulgaria, the Czech Republic, Hungary and Romania under the ICESCR. Domestic anti-discrimination laws, the ICCPR and the ECHR individual complaint mechanisms (procedural safeguards and the right to private and family life) are used instead to access housing rights.

2.3.4. Enforcement and remedies

In Romania and Hungary, the equality bodies' interpretation of domestic anti-discrimination law is generally upheld by administrative courts. The guidelines issued by the Hungarian Equal Treatment Authority's Advisory Board have been applied by the Authority and courts, particularly on the reversal of the burden of proof and the definition of "any other ground". In

[379] For a period in the late 1990s and early 2000s, the Minorities Act permitted Roma minority education for the purposes of catching up, reinforcing the misinterpretation that catch-up education was a legitimate aim for Roma minority education.

[380] Article 94(4) z, of Act No 190 of 2011 on national public education (NPEA) was amended by Act No 105 of 2014, in effect since 1 January 2015 gives power to the government to adopt a decree on the particular conditions The legal provision is a tremendous linguistic construction, to which justice cannot be done in English. Delegating legislative power to the government on issues that are regulated in detail both in Article 28 ETA, the NPEA, the Act on the Rights of National Minorities and CADE promulgated in an Act of Parliament constitutes regression to previously existing national rules transposing the RED and are therefore not in compliance with Article 14 and 16 of the directive. CADE was proclaimed in Act No 11 of 1964:

[381] Legalnet report: Slovakia - Parliament Adopting a Schools Act Amendment with Provisions Likely to Perpetrate Segregation of Roma Children, 13 August 2015.

[382] *Yordanova and Others* v *Bulgaria*, Application No. 25446/06, judgment of 24 April 2012.

Bulgaria, the Supreme Administrative Court curtails the equality body's room of maneuver - at times justifiably[383] - while the PADA's interpretation by lower administrative and civil courts has been more progressive. In Slovakia and the Czech Republic, interpretation is in the hands of civil courts and is generally considered restrictive. The Czech Constitutional Court has taken steps to counterbalance the most outstanding impediments erected by civil judges.[384]

Studies of judicial attitudes and practices paint a bleak picture of access to justice. The scarcity of litigation was characteristic to the Czech Republic between 2004 and 2014,[385] making it more likely that plaintiffs would be condemned to pay substantial costs rather than receive damages. Not surprisingly, individuals complained to public authorities instead, because there proceedings were free of charge.[386] In Romania, the "legal aid provisions do not counterbalance Court fees unaffordable for vulnerable groups."[387] Ethnic prejudice among judges, the high level of distrust among the Roma *vis-a-vis* courts, the judiciary's failure to "acknowledge discrimination faced by vulnerable groups particularly the Roma" and its underestimation of social vulnerability constitute severe structural impediments.

The Czech Public Defender of Rights received an equality mandate in 2009 and she is a key actor in the desegregation campaign, collaborating with the European Commission and other ombuds institutions.[388] Her Slovak colleague was mobilised in 2015, when the European Commission launched pilot infringement proceedings against the country on account of segregated schools. The Czech, Slovak and Hungarian (Minorities) Ombudses have been mobilised by the European Commission and collaborate on desegregation in the framework of the Visegrad mechanism.[389]

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[383] See, for instance, in Chapter 3 the Supreme Administrative Court's ruling in the CHEZ litigation, requiring the KZD to identify the protected ground.

[384] Constitutional Court judgement Case No. III. ÚS 880/15 of 8 October 2015 on the burden of proof.

[385] Legalnet report: Czech Republic - Research report by the Czech Ombudsman: Victims of discrimination and obstacles in access to justice, 13 August 2015: Access to justice for victims of discrimination in the Czech Republic. The Ombudsman obtained 56 judgments of first instance courts in discrimination cases between 2004 and 2014. Since September 2009, an average 6 applications have been filed annually with a low success rate.

[386] Between 2010 and 2014, the Labor Inspection received 317 complaints on workplace discrimination annually, 74 complaints were filed with the Czech Trade Inspection and the School Inspectorate dealt with 15 complaints annually. The levied fines for discriminating job advertisements reached EURO 883 on average. Ibid.

[387] Legalnet report: Romania - Report on access to justice for Roma and other vulnerable groups published by the Superior Council of Magistracy, 12 February 2015. The Report was published in the framework of the project "Improving access to justice. An integrated approach with a focus on Roma and other vulnerable groups" in collaboration with the Norwegian Courts Administration and the Council of Europe, funded by the Norwegian Financial Mechanism 20092014 Program RO 24 "Judicial capacity building and cooperation."

[388] The Public Defender of Rights has been a national equality body since 2009 pursuant to sec. 21b of Act on the Public Defender of Rights.

[389] Csaba Törő, Earman Butler and Károly Grüber, Visegrád: The evolving pattern of coordination and partnership after EU enlargement, Europe-Asia Studies 2014, Vol 66, Issue 3.

Following 2010, the Hungarian equality body's politically motivated retreat spurred the Minorities Commissioner to request representative standing under the ETA, to no avail. This was not necessarily problematic, because if granted, an adversarial role could have eroded his legitimacy. Ultimately, the Minorities Ombuds threw his support behind NGO litigation by issuing *amicus curiae* briefs and reports, thus the institutional competition played to the benefit of the Roma.[390]

The EU adopted soft law measures after 2007 to spur enforcement and bridge compliance gaps in practice. National legislations complied with the Framework Decision on combating racism and xenophobia by means of criminal law[391] even before its adoption in 2008. The Victims Directive safeguards the right of victims to access victim protection services and legal aid[392] and pertains to hate crime victims, complementing the Framework Decision.

The Council Recommendation on effective Roma integration measures adopted in 2013 did not require transposing legislation,[393] nor did it lead to changes in already existing Roma policies. The Recommendation was to compensate for the shortcomings of domestic policy processes unscathed by the 2011 EU Framework for National Roma Integration Strategies.[394] It was followed by desegregation guidance[395] that fell well short of activist aspirations to hold recalcitrant member states accountable breach of funding contracts abuse and compel the European Commission to sanction non-compliance. The Recommendation represents an attempt by the Commission hierarchy to resolve Roma-specific issues neglected during the accession and subsequent policy processes.[396] The document aims to counterbalance the RED's over-

[390] See, for instance, Report on the conclusions of a study on the processing of ethnically disaggregated data, Parliamentary Commissioner for the Rights of National and Ethnic Minorities and the Parliamentary Commissioner for Data Protection and Freedom of Information, 9 November 2009.
[391] Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328 of 6/12/2008).
[392] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.
[393] Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States (2013/C 378/01).
[394] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions An EU Framework for National Roma Integration Strategies up to 2020, COM/2011/0173 final.
[395] Guidance for Member States on the use of European Structural and Investment Funds in tackling educational and spatial segregation, EGESIF_15-0024-01 11/11/2015, European Commission, European Structural and Investment Funds.
[396] In response to, for instance Programming the Structural Funds for Roma Inclusion in 2014-20 by Angela Kóczé, Adam Kullmann, Agota Scharle, Orsolya Szendrey, Nora Teller, Viola Zentai, March 2014 and Making the Most of EU Funds for Roma Inclusion to Conclude in 2015–16, press release, Open Society Foundations, February 6, 2015.

emphasis on formal equality[397] by enhancing enforcement,[398] without addressing legal remedies, however.

The RED's shortcomings in this respect may be overcome by reference to the July 2013 Commission Recommendation on collective redress mechanisms to the anti-discrimination field,[399] whose broad interpretation can lay the ground for opt-in class action and equality body enforcement. The Recommendation is used by Czech NGOs to advocate for collective standing after a government bill on representative action was voted down by Parliament in 2013.[400] A group of 12 members of the Chamber of Deputies proposed to amend the Anti-Discrimination Act in order to permit class actions and strengthen the rules on reversing the burden of proof.[401] A prime example of positive developments at the domestic level is the 2009 amendment to the Slovakian ADA, permitting representative action.[402] It is notable that legislative backsliding left procedural innovations intact in the anti-discrimination legislation, even in cases when representative action pertaining to fundamental rights was curtailed - such as under Hungary's constitutional amendments following 2010, a shortcoming discussed in Chapter IV.

The latest soft law instrument, the Commission Recommendation on standards for equality bodies addresses the enforcement regime's Achilles heel, namely the shunning in the RED enforcement by public bodies and the extent of funds allocated for such bodies from the central budget, as well as their independence.[403] The Recommendation proposes to broaden the powers of the existing bodies with respect to assisting victims or engaging in litigation,

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[397] See, for instance, Yana Kavrakova, Roma Issue in the European Multilevel System: Ideas, Interests and Institutions behind the Failure of Inclusion Policies, European Yearbook of Minority Issues, Volume 10, Issue 1, 2011, pp. 371-372.

[398] Preambular indent (20).

[399] Werner H. & Caracciolo di Torella, E, Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment, January 2017, Brussels, European Commission.

[400] The Czech Public Defender recommended that representative action be permitted, already in 2003, see, Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: Challenges and Innovative Tools, edited by Marie Mercat-Bruns, David B. Oppenheimer and Cady Sartorius, Springer International Publishing, 2018, p. 167.

[401] Legalnet - Czech Republic: A group of MPs propose a bill to amend the Anti-Discrimination Act, Flash Report, 12 April 2019. "A class action could be filed in a situation where an infringement of non-discrimination laws may relate to a higher or undefined number of victims or where such infringement could interfere with the public interests." Compensation would not be available in class action suits. "In cases where (a) particular victim(s) of discrimination would be identified in the lawsuit, the filing of such lawsuit would be subject to their approval."

[402] Pursuant to Article 9 a, of the Slovak ADA "If the violation of the principle of equal treatment could affect the rights, interests protected by law or freedoms of higher or an indefinite number of persons, or if such infringement could seriously endanger the public interest in other way, the right to claim the protection of the right to equal treatment belongs also to legal person according to § 10. 1. This person may claim the determination that the principle of equal treatment was breached so the person violating the principle of equal treatment refrain from such conduct, and if possible, rectify the illegal situation.

[403] Commission Recommendation of 22.6.2018 on standards for equality bodies, Brussels, 22.6.2018 C(2018) 3850 final.

representing clients or taking representative action. It also recommends that equality bodies should have the power to issue binding decisions.

Within the European Commission, the Anti-discrimination unit was merged with policy staff, and under the mandate of Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reading (2010-2014) moved to Directorate General for Justice and Consumers, being now based within Directorate 1 Non-discrimination and Roma coordination with a smaller legal staff than before and a sense that the gender ground enjoys political priority.

Given that formal compliance was more or less ensured in the decade following the RED's adoption, uniting legal and policy staff to bolster substantive compliance seemed reasonable. However, ensuring institutional and policy compliance is a more arduous task, necessitating more, rather than less legal expertise, unless political commitment is lacking, which may indeed be the case judging from the lack of infringement proceedings addressing substantive compliance with the 2000 anti-discrimination directives. This means that even though in theory the European Commission has enforcement powers, in practice it lacks both the expert resources and the political will to exercise them. What remains therefore is working for substantive compliance through policy processes in the EU's multi-level governance structure, a prime example of which is the Roma integration related mechanism within FRA established after 2011, following the adoption of the Framework Strategy.

2.3.5. Compliance level in 2019

Formal compliance peaked at the time of accession, following which rule of law reform understandably slowed down. Given that new treaties relevant for the Roma were not adopted during the last decade, only small adjustments had to be made to comply with international obligations. The Roma-dense CEE countries' dismissive attitudes *vis-a-vis* social rights continued, meaning that they did not heed to Strasbourg rulings requiring legislation on the Roma's right to housing, what is more, they continued to block access to international tribunals. It is beyond the scope of this thesis to speculate whether the disinclination to grant social rights resulted from political agendas in the CEE Fiver or from external pressure by international organisations and/or states to which the CEE Five owe considerable debts.

As an important indication of narrowing political opportunities, standard setting on equal treatment came to a standstill within the EU itself and due to insufficient political commitment, the European Commission did not launch a public enforcement campaign addressing substantive compliance with the 2000 anti-discrimination directives. The pilot infringements

concerning desegregation in the Czech Republic, Slovakia and Hungary represent a positive exception, even though also lacking sufficient political will to complete the process. The Commission took cautious steps to bolster the public enforcement of existing standards at the member state level, and race/Roma equality also benefitted from initiatives launched from within core economic competences, such as collective action concerning competition law, etc.

As the limelight shifted to substantive compliance, the importance of mainstreaming equality and non-discrimination in the national legal order came to the fore, accompanied with the realisation that international organisations lack the capacity and/or political commitment to go beyond broad-brush compliance reviews. With decreased external political pressure following accession, the room for maneuver diminished, with new legislation adopted to conceal negative policy changes and/or the unwillingness to comply with the EU's ambitious social integration agenda. In minor, particularly procedural issues progressive amendments were also made, however.

The failure to comply with social inclusion policies targeting marginalised social groups, such as the Roma constitutes the backbone of both illiberal-populist and conservative-nationalist policies, whose global expansion favours majoritarian interests, but reserves the right to define the majority itself.[404] The populist turn apexing in BREXIT within the EU comes after the shock of the 2008 global economic meltdown and take the limelight away from (racial) minorities in general and Roma rights in particular.

Still, anti-discrimination law remains the key frame within the Roma rights field, with the last decade witnessing the explicit prohibition of segregation - except in the Czech Republic - and the improvement of enforcement related provisions. The lack of access to social rights remains a crucial concern, even if alternative frames can offer some remedies, such as in the field of housing. Recent EU initiatives on collective and public enforcement may improve enforcement in the future, if political commitment increases and the EU finally decides to provide the necessary resources to private individuals who bear the brunt of litigation under anti-discrimination law.

2.4. Conclusions

[404] On the populist turn and backlash on (international) courts, see, Kim Lane Scheppele, Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary), 23 Transnat'l L. & Contemp. Probs. 51 (2014); Ran Hirschl, Opting Out of "Global Constitutionalism," The Law & Ethics of Human Rights, Volume 12, Issue 1, Pages 1–36 and Eric A. Posner, Liberal Internationalism and the Populist Backlash, 49 Ariz. St. L.J. 795 (2017). On European populism, see, Rogers Brubaker (2017) Between nationalism and civilizationism: the European populist moment in comparative perspective, Ethnic and Racial Studies, 40:8, 1191-1226.

In the last three decades, Roma-dense CEE countries have run an unprecedented course from socialist legality to the rule of law and then to defying constitutionalism in the context of increasing populism. EU accession (2004-2007) represents the peak of Euro-Atlantic integration and the mid-point in the transnational Roma rights movement's history enveloped in the approximation of national legal systems to the EU *acquis*.

EU law proper provides inadequate legal protection to the Roma, because social and minority rights particularly relevant for the group are external to it and basic civil rights are also more readily accessible under international human rights law. The density of Roma-relevant norms can easily conceal important deficiencies in the international legal order. First and foremost, direct access to social rights under treaties is in general blocked by Roma-dense CEE countries. Second, the most easily accessible international mechanism, the ECHR – that became a benchmark for Roma rights before EU accession - essentially limits the scope of action to civil rights and education. Third, full access to equal treatment opened only at the time of accession, with the (over-)transposition of the Racial Equality Directive. Fourth, having stabilised the region, minority rights and minority institutions lost their relevance, failing to adequately connect to other frames.

The post-accession legal regimes are multi-source and inter-ordinal with several peak courts, which may give rise to legal uncertainty and interpretive inconsistencies,[405] while domestic legal orders are not equally open to dialogue with international tribunals.[406] Inter-ordinality inspires, but does not necessarily facilitate forum shopping due to discrepancies between the "rules of engagement." Collective action is limited by the emphasis on individual complaint, while collective complaints under the European Social Charter are seldom available to domestic NGOs. Adjudication in the CJEU can be indirectly triggered through courts and the European Commission.[407]

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[405] Gordillo, 2012, supra. D. Spielmann, "Human rights case law in the Strasbourg and Luxembourg courts: conflicts, inconsistencies, and complementarities," in P. Alston (ed.), The EU and Human Rights, Oxford, Oxford University Press, 1999, p. 757.

[406] The Strasbourg Court in particular has an "external influence" over the interpretation of EU law. Gordillo, 2012.

[407] Dawson, Muir and Claes, supra, 2012, pp. 276. Direct citizen involvement in matters of compliance is not encouraged arguably because in the EU system of checks and balances the institutions bear a duty to protect the Union's *general interests* above all else. Richard Rawlings, Engaged Elites Citizen Action and Institutional Attitudes in Commission Enforcement, European Law Journal, Vol 6 Issue 1, March 2000, pp. 4-28. Mark Dawson and Elise Muir, Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma 48 Common Market L. Rev. 751 (2011) and Michael Blauberger & R. Daniel Kelemen (2017) Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU,

The trajectory of legal opportunities was shaped by powerful Western states, but the CEE Five successfully reduced the compliance burden as regards norms sourced outside the EU. Even powerful Roma rights groups, such as the ERRC lacked the resources to meaningfully impact on norm adoption at the international level. Conversely, EU accession and the openness of liberal-left governments and the support of more influential minorities created an unprecedented opportunity for domestic human rights groups to 'over-transpose' anti-discrimination law to the particular benefit of the Roma. International advocacy concerning norms on hate crimes generated on-going political pressure for legal reform at the domestic level, in which, again, mainstream human rights organisations played a leading role.

Journal of European Public Policy, 24:3, 321-336. Marcus Höreth, The least dangerous branch of European governance? The European Court of Justice under the checks and balances doctrine in Judicial Activism at the Court of Justice edited by Mark Dawson, Bruno de Witte and Elise Muir, Edward Elgar Publishing Ltd., 2013. In situations when domestic interpretation does not comply with EU standards and courts refuse to refer, dispute may be resolved by other international tribunals, which is also the case when European institutions fail to take action against recalcitrant member states. The ECtHR provided "a form of "external" control of the compliance with the CJEU caselaw (in particular the Cilfit decision)." ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter, Module 6 – Non-discrimination, Prof. Fabrizio Cafaggi (Scientific Coordinator) Dr. Federica Casarosa (Project Manager), Dr. Rita Giao Hanek – Module Coordinator, 2017. September, pp. 56-58. The EU's accession to the ECHR was meant to regulate the role of the CJEU in such scenarios. Otherwise only a non-judicial remedy before the European Ombudsman is available. See, Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission. At para. 46. the Ombudsman stated that "the vast majority of Member State actions, taken in the context of EU cohesion policy, will be actions taken in the implementation of EU law," in relation to which it is imperative "to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved." As underlined in Case C-198/13 Hernández and others v. Spain, para. 47.

Chapter III

Resources, organisations and relational capital

Chapter III chronicles the evolution of the Roma rights movement's resources, key social entrepreneurs and organisational basis to map the context in which the law was used for collective action. It sets the scene for a discussion of legal strategies in the next chapter and the critical exploration of collaboration and conflict in the Transnational Roma Rights Network in Chapter VI. It fills the gap between literature that considers the engagement of legally focused NGOs with supranational courts as an indispensable element of a "rights revolution"[408] and accounts of the Roma ethno-political movement that subsume legally focused and mixed profile NGOs under political organisations.[409] With a light touch on political opportunities, whose discussion dominates the literature, the chapter sheds light on the importance of key social entrepreneurs, their relational and linguistic capital, as well as legal expertise as resources relevant for the emergence of the Transnational Roma Rights Network. Importantly, it also calls attention to the scarcity of progressive ethnic minority activists at the domestic level and the constructive role that interethnic collaboration plays, particularly in domestic legal mobilization.

Bárány's 2002 account about the organisational basis and political opportunities defines the contours of research on the Roma movement in Eastern Europe.[410] Research on identity based collective action for political change has generally downplayed the significance of resources[411] and legal opportunities that augmented ethno-political mobilisation. Chapter II has partly addressed these shortcomings and this chapter opens the way for a more nuanced analysis in Chapters V and VI.

While observing the existence of a transnational network, the literature does not attach relevance to the fact that the NGOs constituting it are not properly situated in the Roma political movement, operating somewhat independently, contingent on access to legal expertise, linguistic (English) and relational capital. A discussion of legally focused agents is crucial when it comes to understanding legal mobilisation, whose theoretical underpinnings bring to the fore

[408] Cichovski, supra and Anagnostou (ed), 2014, supra.
[409] Vermeersch, 2007 and Guy, 2001.
[410] Bárány, 2002. See subsequent analyses, such as Alexander-Klimova (2005), Vermeersch (2007) and McGarry (2010).
[411] With the notable exception of Ram 2011.

the significance of networks in social movements,[412] rather than the distinction between networks and social movements.[413] Initially, access to resources provided an explanatory frame for social movements and political contention.[414] Later, the movements' organisational structure and political opportunities dominated the inquiry,[415] followed by the realisation that legal opportunities can also significantly shape collective action.[416]

The most recent frame (relational approach) fits the focus of the thesis as it questions basic tenets of social movement theory, namely that 1. the "study of social movements is tantamount to the study of organizations active within them"; 2. networks "are distinctive of (new) social movements focusing on the issue of identity rather than political change" and that 3. "social movements tend to coincide with public challenges against authorities and opponents."[417] As the story unfolding in the following chapters shows, the Roma rights movement needs to be studied in the context of legal opportunities as they shape legal strategies and impact on collaboration and conflict. It also shows that the Transnational Roma Rights Network focuses on policy and social change rather than on strengthening minority identity, while there is an important layer of social movement life that foretells shifts in agenda and discourse that appears in the public discourse somewhat belatedly.

Against this backdrop, Chapter III inventorises 1. resources, 2. social entrepreneurs and their relational capital, and 3. the inception, form, governance structure and agenda of organisations in each historical period. Changing political opportunities are weaved into the analysis throughout the chapter that opens questions about the importance of social entrepreneurs and their organisations, the necessity and difficulty of planning - given time lags in legal action and multiactor advocacy processes - and perhaps most importantly, the characteristics of key actors and organisations that explain domination, collaboration and conflict critically assessed in the analytical chapters.

Several organisations in this chapter have been described in the literature as part of a social/political movement, a transnational advocacy network and/or as distinct (international) non-governmental entities of a world polity.[418] The analysis is nuanced here by distinguishing

[412] Diani and McAdam, 2003.
[413] Social movements can be defined as networks "of informal interactions, between a plurality of individuals, groups or associations engaged in a political or cultural conflict, on the basis of a shared collective identity." In Diani, 1992, p. 13.
[414] McCarthy and Zald, 1978.
[415] McAdam, 1999.
[416] Hilson, 2002.
[417] Mario Diani, in Diani and McAdam, 2003, p. 317.
[418] Weiss and Gordenker (ed.), 1996.

between international and national organisations,[419] donors and grantees, legal and political NGOs, as well as those that do not fall neatly into these binary categories as concerns their goals, agendas and activities. Mixed profile NGOs can blur the lines between donors and grantees, but also between the "legal wing" (NGOs undertaking litigation, legal advocacy, etc.) and the "political wing" (NGOs undertaking policy advocacy, representation in international organisations, etc.).[420] Chapter III discusses NGO activities by employing a fluid approach, rather than rigid dichotomies.

The Roma movement is generally postulated as a political and/or a "rights" movement, but never as a mass social movement. This is not problematic, because theory does not consider mass membership as a prerequisite of analysis, given that collective action better signifies the existence of a movement, than the size of its membership.[421] Legal, advocacy, direct, and mixed (legal as well as political) action can indicate the existence of an ethno-political, as much as a rights movement, granted it represents (at least parts) of the Roma community and shares a common identity spanning across a historic period and geographic space.

International NGOs within the Roma rights movement have been mistaken for transnational advocacy networks,[422] but more importantly, attention to INGOs has prevented research from capturing the distinctly transnational mode of operations and contrasts them with “bad” transnationalism, i.e. centrally planned and imposed cross-border cooperation. The chapter teases out genuine and organic transnational traits understood as a collaboration of equals in each organisation’s respective advocacy realm and as a collective at the European level, i.e. as a continuum between national and international operations. It magnifies the role of NGOs and social entrepreneurs in facilitating or impeding transnationalism, shining a light on *transnational idealists* committed to knowledge transfer and a cross-border cause without the constraints of a particular organisation or leadership status.

The chapter deviates from previous accounts, because it employs “the Helsinki prism” as indicated in the Introduction, in other words, it portrays the Roma rights movement and TAN as closely linked to the human rights movement, particularly in times of crisis. In terms of relational capital and legal expertise the Network draws support from the Helsinki movement. This means that in countries where the Helsinki movement pre-existed the political transition,

[419] NGOs working in their own locality are not in fact accounted for, but local outreach is noted.

[420] This distinction is used for the description of the most widely studied social movement, the US civil rights movement. Doug McAdam, Political Process and the Development of Black Insurgency, 1930-1970, 1999 (2nd edition), The University of Chicago.

[421] McAdam et al 2003.

[422] McGarry 2010.

it has impacted on the Roma rights agenda as much as Romaphobic violence and the deterioration of economic conditions after 1989,[423] particularly because Roma poverty was already problematic during the end of the communist era.[424] The *Helsinki prism* highlights the inter-ethnic character of Roma rights lawyering, i.e. collaboration between the Roma and the *gaje* (non-Roma, "white") activists and lawyers throughout the last three decades and the ways in which in which the movement has navigated its way between majoritarian and minoritarian interests.

Dissidents resisted state power and adhered to the basic tenets of social justice with a decidedly functionalist view of the law. They relied on international human rights treaties to vindicate individual freedom and dignity, to hold the regime accountable and expose the lie it forced citizens to endure. Legality mattered, but as Vaclav Havel put it: "even in the most ideal of cases, the law is only one of several imperfect and more or less external ways of defending what is better in life against what is worse. By itself, the law can never create anything better. Its purpose is to render a service and its meaning does not lie in the law itself. Establishing respect for the law does not automatically ensure a better life for that, after all, is a job for people and not for laws and institutions. … The most important thing is always the quality of that life and whether or not the laws enhance life or repress it, not merely whether they are upheld or not."[425]

Inspired by their concern with "real human beings" dissidents harboured skepticism not only about the absolute rule of law, but also "toward alternative political models and the ability of systemic reforms or changes."[426] Their vision of social order was based on a "post-democratic system" of autonomous and "parallel polis"[427] beyond the constraints of parliamentary democracy.[428]

Until the 1980s, a consensus prevailed between reform communists and non-communists about the desirability of more freedom and democracy without necessarily higher living

[423] This is contrary to a recent account of Czech and Slovak developments, claiming that the Roma rights movement in those two countries emerged in response to post-1989 events, rather than the dissident movement, and the socialist Roma policies were more beneficial for the minority than individual minority rights, following the failure of collective minority entitlements. As demonstrated in Chapter 1, the minority rights prism is a misnomer, given its loss of significance even before EU accession. See, Alexandra Donert, The Rights of the Roma, 2017, Cambridge University Press

[424] Kis János, Kőszeg Ferenc, Beszélő-beszélgetés a Szeta kezdeményezőivel, 12. szám (1985/1.), Évfolyam 1. szám 14. SZETA's establishment was inspired by the imprisonment of the signatories of Charter 77.

[425] Vaclav Havel, The Power of the Powerless: Citizens against the State in Central-eastern Europe, Routledge Revivals, 2009, p. 35.

[426] Ibid, p. 44.

[427] Ibid. p. 46.

[428] As concerns the economic order, Havel believed in "the genuine (i.e., informal) participation of workers in economic decision making, leading to a feeling of genuine responsibility for their collective work." Ibid, p. 45.

standards,[429] a vision of society labelled "socialism with a human face."[430] This began to change in the 1980s with the observation that “the price of democracy may be capitalism," but only in 1989 did the goal become capitalism.[431] The inability of the socialist elite to reproduce itself and the political class’s readiness to transform itself “into a propertied class” and its “interest in "constructing" the political crisis of state socialism and designing political capitalism as a way out” explains how capitalism emerged as the only way to democracy.[432]

The dissidents’ vision was not in synch with the socialist ruling elites’, because they vindicated rights in defiance of socialist legalism inasmuch as it repressed individuals, but did so without questioning the system based on social welfare for all.[433] During communism, the public interest was represented by public prosecutors, the symbol of ideological oppression and material injustice, particularly as growing poverty began to crack the surface and societies grew “tired of social experiments."[434] Dissidents adhered to a new understanding of the law,[435] whereby the oppressed could claim civil and political rights, as well as the recognition of their identity, while holding on to basic social welfare (democratic socialism). Human rights NGOs, more precisely Helsinki groups in the CEE region embrace this legacy, even if not necessarily dealing with social rights in their everyday work.

3.1. The early years: 1989-1995

Part 1 tells the story of the short period following the fall of communism, when the "Gypsy problem“ was reframed as the Roma (rights) issue by specialised organisations that emerged across the region at the instigation of progressive minority activists, former dissidents and US rule of law crusaders. It inquires into the way the Helsinki movement’s resources facilitated

[429] Ivan Szelenyi and Balazs Szelenyi, Why Socialism Failed: Toward a Theory of System Breakdown - Causes of Disintegration of East European State Socialism in Theory and Society, Vol. 23, No. 2, Special Issue on the Theoretical Implications of the Demise of State Socialism (Apr., 1994), pp. 211-231, p. 218.

[430] Which was “the rallying cry of the Prague Spring in 1968." See, Hilary Putnam, Realism with a Human Face, Harvard University Press, 1990, p. xv.

[431] Szelényi and Szelényi, supra, p. 219

[432] Ibid.

[433] Paul Blokker, New democracies in crisis?: a comparative constitutional study of the Czech Republic, Hungary, Poland, Romania and Slovakia, Routledge, London, 2013

[434] Sadurski makes this point in the Introduction to *Rethinking the Rule of Law after Communism.* Ed. Adam Czarnota, Martin Krygier, and Wojciech Sadurski. Budapest: Central European University Press, 2005. In the same volume, Ivan Krastev calls the rule of law “the white myth of transition’, p. 323.

[435] Snyder, S.B., *Human Rights Activism and the end of the Cold War,* CUP, 2011, pp. 115-134. Moyn, The Last Utopia: Human Rights in History, 2010, The Belknap Press of Harvard University Press, Cambridge Massachusetts and London, England, 2010 and Daniel C Thomas, The Helsinki effect: International norms, human rights sand the demise of communism, 2001, Princeton University Press, Princeton and Oxford.

this development in the context of limited access to justice and an intensifying claim for minority recognition by leaders, some of whom engaged in legal advocacy, particularly when the opportunities of parliamentary representation weakened after the end of the first cycle in 1994. Simultaneously, ethno-political mobilisation in the international advocacy realm proved inadequate.

Legal strategies addressed criminal justice and status rights, without meaningful advocacy for the inclusion of the Roma in the redistribution of collective property, which had serious repercussions on the Roma's housing situation and tied down considerable legal resources as detailed in Chapter 4.3.2. The political dissidents' vision of (Roma) rights as primarily civil and political played a crucial role, because Helsinki groups had access to legal expertise and used the law as a matter of course, but only with a limited scope. Conversely, few Roma leaders used the law, and lacking access to legal expertise, they reverted to advocacy.

Academics, journalists, and the *literati*[436] constituted the core of the dissident movement that did not attract masses in Czechoslovakia and Hungary, being repressed in Romania and Bulgaria.[437] Even though concentrated in urban hubs, dissidents were aware of socio-economic problems, so that the Czechoslovaks thematised forced sterilisation and the overrepresentation of Roma children in special schools,[438] while Hungarian sociologists studied Roma poverty. The first national survey on the living conditions and assimilation of the Hungarian Roma was conducted in 1971[439] with the involvement of Roma intellectuals. The political leadership placated the survey results[440] and sociologist István Kemény, the survey's director emigrated after falling out of grace on account of his view that material shortage rather than ethnicity determined the fate of the Roma. The term "poor" was tabooed during communism, which is why registering SZETA, the Fund Supporting the Poor - including destitute Roma - was not even attempted.[441]

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[436] The linguist Milena Hübschtmanova is a reference person in every account I collected from the Czech Republic.

[437] Michael Bernhard, Civil Society and Democratic Transition in East Central Europe, *Political Science Quarterly*, Vol. 108, No. 2. (Summer, 1993), pp. 307-326. Je describes SZETA's establishment at p. 318.

[438] MUDr. Posluch a MUDr. Posluchová, „Problémy plánovaného rodičovstva u cigánskych spoluobčanov vo Východoslovenskom kraji," In: Zdravotnícka pracovníčka č. 39/1989, (Problems of planned parenthood among Gypsy fellow citizens in Eastern Slovakia in Medical Worker, No 39/1989). Find misdiagnosis reference from 1980s

[439] Kemény István, Beszámoló a magyarországi cigányok helyzetével foglalkozó; 1971-ben végzett kutatásról.

[440] Kovács Éva, Lénárt András, Szabadi vera, (Fel)talált tudomány: Az 1971-es Kemény-féle reprezentatív cigánykutatás idején keletkezett kvalitatív szociológiai források utóélete.

[441] Kis and Kőszeg, 1985.

3.1.1. Resources

Following the political transition, the European Community established the PHARE Program to help democratic transition in Poland and Hungary. PHARE extended to other countries in the region later on and became an important funding source for Roma rights organisations in the early years, facilitating cross-border cooperation. PHARE funded the first cross-border exchange, the EUROMA Project. Launched in 1995, EUROMA paired Romanian-Bulgarian and Slovakian-Hungarian organisations to build legal defence capacity. Activists fondly remember a key staff member from this period, Eva Eberhardt - a Belgian citizen born to Hungarian emigres - who was easy-going and highly committed to the cause of equality, breezing through applications "unlike today's Eurocrats,"[442] but her administrative constraints were also far fewer.

The EU and Western governments financed training and exchange programs delivered by international human rights organisations, such as INTERIGHTS, the key London-based exporter of human rights practices[443] and the Netherlands Helsinki Committee working in collaboration with the Council of Europe. Academic institutions were also involved, such as the International Academy of Law in The Hague, the Netherlands Institute of Human Rights at Utrecht University and the Birmingham University's course[444] directed by Jeremy McBride, INTERIGHTS treasurer. Human/Roma rights lawyers working in NGOs and governments passed through these courses, while Western rule of law crusaders travelled to the CEE to train activists. Interns placed at INTERIGHTS were given the opportunity to work on submissions to international tribunals by drafting third party interventions, the INGO's signature tool.

US public and private foundations - such as the United States Agency for International Development (USAID), the Ford Foundation, the MOTT Foundation, the German Marshall

[442] Interview with Bíró and Ina Zoon. As a law student and member of the Feminist Network, I co-organised a conference on gender equality with her participation and PHARE funding in Budapest in 1994.

[443] INTERIGHTS, the International Centre for the Legal Protection of Human Rights, created in 1982 and closed in 2015 assisted judges and advocates, NGOs and the victims of human rights violations in accessing and applying international and comparative human rights law and mechanisms. It undertook regional and national projects in Central and Eastern Europe, Africa and South Asia in partnership with local organisations both to enhance the capacity of human rights organisations and individual lawyers and to develop jurisprudence which effectively protect human rights. It (i) offered assistance or legal representation in cases of strategic importance with the aim of developing, interpreting and applying international human rights norms; (ii) organised training sessions for judges and practicing lawyers; (iii) prepared and distributed legal materials and publications in a variety of languages; and (iv) maintained an Internet database containing summaries of international human rights judicial decisions.

[444] Zdravka Kalaydijeva, a lawyer working on early Bulgarian cases in the beginning studied at the Sofia English Language School between 1965 and 1970 and after a second degree in sociology attended these courses prior to 1995.. Kalaydijeva served as a judge of the European Court of Human Rights between 2007 and 2015.

Fund and George Soros' Open Society Foundations (called Open Society Institute at the time) - disbursed funds to NGOs and promising individuals, but unlike Europeans, US actors proactively shaped the organisational landscape and indoctrinated activists in the American way of seeing and doing things.

Helsinki Watch Europe, a US-based NGO established to monitor compliance after the adoption of the Helsinki Final Accord (1975) provided crucial expert resources, while also shaping the human rights and Roma rights movements in the CEE. The political transition was long awaited by Helsinki Watch that established the International Helsinki Federation for Human Rights (IHF) in 1982 to defend activists in the communist bloc. In 1992, Helsinki Watch molded into Human Rights Watch, bringing forth its long-standing contacts, resources and eagerness to influence US foreign policy.[445] Led by seasoned human rights activists, it was supported by philanthropists like OSF founder George Soros, himself active in the CEE region since the 1980s.[446]

The international community was concerned about Yugoslavia, where ethnic animosities accompanying the economic crisis dovetailing the fall of communism were the most dire and Russian influence the most prevalent. Ethnic minority protection depended on political leverage, so that even though in neighbouring Bulgaria, for instance, the pro-democracy movement's Ethnic Model signified a break with *de iure* discrimination and assimilationist policies against ethnic Turks,[447] the Roma continued to be perceived as a socio-economically vulnerable group.[448] While Bulgaria shared a border with Turkey, the Roma lacked a kin state.

Bulgaria's strategic geopolitical situation drew funds to civil society organisations perceived as the vanguards of democratisation, capable of leading social movements "without self-destructing fundamentalism."[449] The crisis created by the 1993 Czech Citizenship Law adopted at the partition of federal Czechoslovakia also attracted resources from international organisations keen to avert mass migration in the heart of Europe. The Roma-dense CEE states did not substantially support Roma rights NGOs, still, relational capital could garner public funds for the key social entrepreneurs' NGOs.

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[445] Dezalay and Garth, 2006.

[446] Marta T. Kaufman, Soros: The life and times of a messianic billionaire, 2002, Alfred a Knopf Incorporated.

[447] Bernd Rechel, "The 'Bulgarian Ethnic Model'. Reality or Ideology?," 59(7) Europe-Asia Studies (2007), 1201-1215.

[448] Ilona Tomova, 7he Gypsies in the Transition Period (IMIR, Sofia, 1995), at 59; Michael Wyzan, "Bulgarian Economic Policy and Performance 1991-1997," in John Bell (ed.), Bulgarian Transition(Westview Press, Oxford, 1998), 93-122.

[449] Andrew Arato and Jean Cohen, Civil Society And Social Theory, Thesis Eleven, no, 21,1988, 40-64, p. 40.

Roma rights mobilisation relied on the expert resources of Helsinki groups[450] that also made provisional loans to bridge gaps between project funding or administered projects involving Roma rights NGOs. Initially, Roma rights organisations lacked in-house legal expertise and relied on external lawyers, who were not, however, Roma themselves. In Bulgaria, Romania and the Czech Republic, Helsinki Committees were the key legal service providers. Seen by the communists as a bourgeois vestige, their numbers kept decidedly low, lawyers were a rare commodity,[451] and after 1989, few were attracted - or rather left - to service human/Roma rights organisations, because participation in privatisation and/or politics promised more profit and public recognition. Staff lawyers were gradually hired by Roma rights NGOs, but few were of Roma origin and even fewer Roma passed the bar exam or represented clients in court. Generally, non-Roma filled key legal positions.

IHF was the focal point of trans-Atlantic exchange. It spurred the establishment of Helsinki groups on a multi-party basis.[452] Once registered, groups governed and managed by former dissidents were admitted to IHF as voting members. The Hungarian Helsinki Committee's antecedents were somewhat special, because it grew out of the Independent Legal Protection Agency, an informal group established by dissident lawyers in 1988 to aid victims of police ill-treatment. Given that HHC president Ferenc Kőszeg was elected as a liberal MP in 1990, organisational development ran a somewhat belated course, however. Ties between former dissidents in politics and human rights remained strong across the region.

Helsinki groups came to play an important role in the burgeoning Roma rights field, because criminal justice forms the core of Helsinki mandates and Romaphobic violence can only be stemmed if the criminal justice systems are reinforced.[453] The Bulgarian, Hungarian and Romanian groups litigated, the Slovakian lacked legal expertise and the Czech was cautious about adversarial legalism that could have compromised its members in

[450] Daniel C. Thomas, International NGOs, State Sovereignty, and Democratic Values, 2 Chi. J. Int'l L. 389 2001.

[451] Teitel, Ruti G. "Transitional justice genealogy." Harv. Hum. Rts. J. 16 (2003): 69, Kritz, Neil J., ed. Transitional justice: how emerging democracies reckon with former regimes. Vol. 1. US Institute of Peace Press, 1995. Leebaw, Bronwyn Anne. "The irreconcilable goals of transitional justice." Human Rights Quarterly 30.1 (2008): 95-118, Stan, Lavinia, ed. Transitional justice in Eastern Europe and the former Soviet Union: Reckoning with the communist past. Routledge, 2009.

[452] András Mink, The Defendant: The State: the Story of the Hungarian Helsinki Committee, 2005, Hungarian Helsinki Committee, Budapest.

[453] Report concerning the discrimination of minorities in the administration of criminal justice Rita Izsák, the United Nations' special rapporteur on minority issues, 2015. Incidentally, Ms Izsák is a Hungarian national of Roma origin, who started her career at the ERRC, where she was inspired to enroll in law school.

Parliament/government.[454] Helsinki lawyers spoke foreign languages with diplomas from elite (high) schools and foreign universities that equipped them with the skills necessary for international human rights litigation. They litigated signature Roma rights cases,[455] challenging institutional racism before the Strasbourg Court.[456]

The IHF secretariat in Vienna coordinated regional projects, published reports and lobbied the CSCE/OSCE. Advocacy based on reporting, labelled the "human rights method" by Aryeh Neier, HRW deputy executive dominated legal practice at the time.[457] IHF annual reports covering Roma rights were a rare asset,[458] but national groups also reported in the national languages. The Czech Helsinki Committee addressed citizenship, the Hungarian and Romanian focused on Romaphobic violence, while he Bulgarian reported also about discrimination and social rights. Prominent Roma activists maintained regular contact with domestic Helsinki groups or joined as members.[459]

In today's reporting overkill a simple internet search yields dozens of documents, but until about 1997 up to date information about Roma rights, particularly in English, was a rare commodity. The first comprehensive reports played a gap-filling role. Interviews with former dissidents and fledgling Roma activists formed the basis of HRW reports that created opportunities for international advocacy, but were old news to the locals from whom information and analysis was gleaned in the first place.[460]

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[454] Barbora Bukovska who joined the prison program as a law student in 1993 transferred to Tolerance three years later precisely because of this aspect. Bukovska hails from a family of Slovakian Christian dissidents, who formed the core of dissent there during communism. While Czech dissidents congregated at the concerts of alternative bands such as the Plastic People of the Universe, religious hymns were sung at the Catholic pilgrimages and fairs where Slovakian dissidents gathered. The CHC prison program was headed by a Slovakian dissident and Bukovska's mother contacted her once she decided to work on Roma issues following an incident during which she stood up for the rights of a Roma passenger riding a tram in Prague and was "physically removed by the driver and left on the side of the road." Bukovska interview. Jonathan Bolton, Worlds of Dissent: Charter 77, The Plastic People of the Universe, and Czech Culture, Harvard University Press, Cambridge Massachusetts, 2012.

[455] Grozev co-represented the applicants in Nachova v Bulgaria, for instance.

[456] The Romanian Helsinki Committee APADOR represented the applicants in Affaire Soare et Autres c. Roumanie, Requête no 24329/02, Arrêt 22 février 2011 and in Application no. 57885/00 by Iren Gergely against Romania, 9 December 2003. About the early Hungarian cases, see, Farkas Lilla, Kis magyar jogvédelem történet, 2009, Fundamentum.

[457] Neier, supra, 2012.

[458] The office was rented from the city council until 2007, when IHF filed for bankruptcy following a massive fraud committed by its chief financial officer, who, according to rumours, spent the money for romantic purposes.

[459] Schlager, 2017, supra, p. 63.

[460] In Bulgaria, for instance, Dimitrina Petrova and Krassimir Kanev were credited for their assistance. In Romania, Nicolae Gheorghe's role was acknowledged, while in Hungary, Ferenc Kőszeg was thanked for his cooperation.

The first HRW report on Bulgarian Roma was published in June 1991, followed in August by the Romanian report.[461] The Czechoslovak report came out in August 1992[462] with the Hungarian being the last.[463] The HRW reports channeled Roma rights advocacy to the international level, initially geared to the CSCE *human dimension* process.[464] For instance, the report on Czechoslovakia began with the coercive sterilisation of Roma women, followed by an analysis of the misdiagnosis of Roma children and segregation in practical schools. Few years later, strategic litigation also focused on these themes, indicating a continuity between the dissidents' diagnosis of structural discrimination, international human rights reporting and litigation.

Following partition, the threat of statelessness became the primary concern in the Czech Republic, where the resources of global donors made an unprecedented difference. The Czech Helsinki Committee's prison monitoring program handled complaints from Roma detained pending expulsion under the 1993 Citizenship Law.[465] The law's poorly disguised aim was to transfer former federal citizens of Roma origin back to their "native" Slovakia even though the overwhelming majority were born on Czech territory, where their ancestors were resettled in the 1950s to fill in for the repatriated Sudeten Germans. In order to stem the impending humanitarian disaster that could have led to the statelessness of tens of thousands the UN High Commissioner for Refugees (UNHCR) funded citizenship projects. The CHC's team of law students and activists inspired by middle-ranking, US-trained legal staff at the UNHCR's Prague office flooded courts with requests to stay expulsion after identifying clients in prisons and childcare facilities.[466]

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[461] Theodor Zang, Destroying ethnic identity: the gypsies of Bulgaria. Human Rights Watch, 1991 and Cartner, H. Destroying Ethnic Identity: The Persecution of Gypsies in Romania, a Helsinki Watch Report, 1991.

[462] Rachel Tritt, Struggling for ethnic identity: Czechoslovakia's endangered gypsies. Vol. 1245. Human Rights Watch, 1992. She is now vice president at the East West Management Institute, engaging in development and rule of law projects financed by, for instance, USAID.

[463] György Fehér, Holly Cartner and Whitman, L. Struggling for Ethnic Identity: The Gypsies of Hungary. Vol. 1245. Human Rights Watch, 1993. The son of dissident philosopher Ágnes Heller, who was forced into emigration after criticising the soviet invasion of Czechoslovakia in the 1968 Korčula Declaration.

[464] The section on international law first referenced documents and reports adopted by the CSCE, only then moving on to UN treaties ratified by the country. The European Convention was not invoked. Czechoslovakia was party to the UN treaties, but only following partition in 1993 did the successor states sign and ratify the ECHR. The report did not assess the violation of domestic constitutional provisions. In the second round, the focus shifted to non-discrimination. See, Rights Denied: The Roma of Hungary, Human Rights Watch/Helsinki, July 1996 by Human Rights Watch. The report was written by Ms. Guglielmo and Mr. Waters and Roma in the Czech Republic: Foreigners in Their Own Land, June 1996, Vol. 8, No. 11 (D), HRW.

[465] Will Guy, The Czech Lands and Slovakia: Another false dawn? in Guy 2001, pp. 285-332, and O'Nions 2007.

[466] The United Nations Commission on Human Rights also funded Roma projects.

Owing to the thousands of US citizens who set up residence in Prague after the Velvet Revolution and due to the popularity of Czech dissidents,[467] particular attention focused on this country.[468] Locals and foreigners, academics and NGOs published reports about the Roma, reinforcing each other in a circular trading process of information for political leverage.[469] Initially baffled, official Czech responses quickly changed to an ostensibly pro-human rights approach, in line with the political conditionalities of Euro-Atlantic integration and pressing defense needs. The reporting fervour also meant that by 1996, when HRW released its second round of country reports, its voice was overpowered by European and Czech actors.

The United Kingdom-based Minority Rights Group International (MRG) supported the Roma ethno-political mobilisation and its flagship NGO, the International Romani Union since the 1970s. Western and US influence was not specific to the Roma rights movement,[470] nor to its legal wing alone. Exchanges and trainings were organised for mainstream human rights organisations, with several organisations modelled on existing US NGOs.

Trans-Atlantic knowledge transfer initially targeted legal reform[471] and capacity building for political activists, and only secondarily, the civil sector. Exchanges involving both state and NGO agents were rare.[472] The US government and OSF established their own organisations focusing on Roma rights with a view to bolstering political mobilisation first and legal mobilisation afterwards.

3.1.2. Social entrepreneurs

Personal ambitions and career choices contributed to the evolution of the organisational structure, which necessitates a description of individuals with significant relational and linguistic capital. Social entrepreneurs working on Roma rights came from diverse backgrounds, but

[467] "The Czechs were exceptionally good at self-promotion. As soon as a text was finished, Havel and his friends made sure it was smuggled to the West." Interview with Cornelius Zoon.
[468] Rick Fawn (2001) Czech Attitudes Towards the Roma: 'Expecting More of Havel's Country'?, Europe-Asia Studies, 53:8.
[469] See, CHC report 'Roma in the Czech Republic from 1993 to 1997'. The assessment was posted on 26 February 2000 and I downloaded it on 28 April 2018.
[470] ACCEPT, the leading LGBT NGO in Romania was founded by foreigners living in Bucharest. See, Stychin, C. F. (2003) Governing Sexuality: The Changing Politics of Citizenship and Law Reform, Oxford, Hart Publishing, 2003. Resources were crucial in solidifying the organizational infrastructure. See, Voichita Nachescu, Hierarchies of difference: National identity, gay and lesbian rights, and the church in postcommunist Romanian Sexuality and Gender in Postcommunist Eastern Europe and Russia, edited by Edmond J Coleman, Theo Sandfort, Routledge, New York and London, 2005.
[471] Thomas Carothers, The Rule of Law Revival, 77 Foreign Aff. 95, 106 (1998)
[472] Even though advisable. See, Stephen Holmes, Can Foreign Aid Promote the Rule of Law, 8 E. Eur. Const. Rev. 68, 74 (1999)

surprisingly few from the law. Academics and social scientists with linguistic skills had already been well networked internationally, but speaking English was a prerequisite of forging connections with US funders after 1989. Romanes was the medium of ethno-political mobilisation and activists were generally committed to the Roma rights cause.

Networking at both the national and international level, with international organisations and funders, as well as nurturing followers and disciples was a complex task that few could muster. Social entrepreneurs were generally involved in a plethora of domestic NGOs, academic institutions, campaigns and even political parties. They became members of international coalitions formalised as international NGOs or informal "cliques," but none could attract enough resources to establish her or his own INGO alone.

3.1.2.1. Progressive Roma leaders

Progressive Roma leaders commenced transnational networking first, advocating for Roma rights in the United Nations[473] and the Conference on Security and Cooperation in Europe. Some activists of the transitional generation gained visibility in national politics by standing up for the rights of the Roma already during communism and forging coalitions with the Helsinki movement.[474] In Czechoslovakia and Hungary Roma activists collaborated with an internationalist elite that was liberal in respect of civil and political rights and reform-socialist in respect of social justice.

In Hungary, dissident sociologists framed the Roma issue and supported Aladár Horváth, who rose to fame in the Roma-dense North-East city Miskolc's rehousing campaign in 1988-1989.[475] The Provisional Anti-Ghetto Committee countered the threat of eviction from the city center.[476] Horváth provides a sobering view of the limitations of direct action in his memoirs, noting with reverence that the 50 families whose housing the Committee secured "deified", while the remaining 150 who enjoyed security of tenure but lived in deplorable conditions "cursed" it.[477]

This did not dissuade Horváth from demanding housing as a matter of human rights. He co-founded Phralipe, the first independent Roma political formation that organised a festival in

[473] Alexander-Klimova, 2005.
[474] Vermeersch, 2007.
[475] The same sociologists played a key role in Roma policy advocacy around Horváth in the following decades and in 2014, when Miskolc waged a frontal attack to expel scores of Roma from its territory, the same sociologists lay the ground for mobilisation.
[476] Vermeersch, 2007, p. 45.
[477] Aladár Horváth, Indulás: A roma polgárjogi mozgalom személyes története 1, Wesley Kiadó, 2017, p. 98.

Budapest on the eve of the French revolution's bicentenary with the motto "200 years from human rights".[478] Another PAGC and Phralipe member with both Romanes and English language skills, Ágnes Daróczi used human rights as a discursive weapon. A communist party-approved ambassador of Gypsy culture since the 1970s, Daróczi was elected to represent EU-ROM, a short-lived international Roma organisation in 1991 and founded the European Roma Information Office (ERIO) in 2002. A founding member of the European Roma and Travellers Forum (ERTF) in 2004, she now serves as its deputy president. Daróczi signed the petition announcing the endorsement by OSF and the Council of Europe of the European Roma Institute for Arts and Culture (ERIAC), but as a member of ERTF she questioned its legitimacy in policy work. While skirting on the periphery of domestic pro-European politics, she has steadfastly held on to a leading position at the international level.

Ágnes Daróczi is an iconic representative of the progressive elite dominating international Roma politics since the transition.[479] Regardless of their personal beliefs, the transitional generation does not in fact promote young leaders.[480] It dominates political mobilisation at the international level and discursively positions itself *vis-a-vis* other agents, claiming to be a legitimate representative of the European Roma, but being unelected, necessarily "travelling on an ethnic ticket." [481]

There exist alternatives to this type of activism, exemplified by leaders, such as Karel Holomek based in Brno, the Czech Republic. Holomek followed a similarly proliferous, but politically perhaps less savvy path, one in which political, cultural and legal tools, Roma and *gaje* actors peacefully co-existed. Chair of the Roma section of the Helsinki Citizens' Assembly Holomek established NGOs to preserve Roma culture, provide legal services and report anti-Roma incidents, peacefully collaborating with a wide range of actors over the years through his NGO, ROMODROM.[482]

Yugoslav and soviet Roma leaders were overrepresented in the International Romani Union, because during communism they enjoyed their countries' support that were intent on propagating a positive self-image through ethnic diplomacy, and possibly also on infiltrating

[478] Horváth 2017, p. 102.

[479] ERTF secretariat was provided by the Council of Europe between 2004-2014, consisting of one contracted bureaucrat and part time employees/interns. ERIO's office in Brussels employs 3-4 permanent staff and a much larger volume of interns.

[480] This partly explains why the Council of Europe terminated its exclusive cooperation with the ERTF and launched a new Roma dialogue in 2015.

[481] Roma Rights, 2002. Gheorghe made this observation about the OSF Roma structure, but it seems equally relevant for the European Roma structure that depends greatly on OSF's interlocutory/interloping role vis-a-vis international organisations.

[482] Vermeersch, supra, 2007.

the ranks of the international Roma leadership.[483] The IRU lacked resources that members sought to overcome by reaching into their own pockets, to no avail.[484]

Rather than the old IRU establishment, fledgling progressive Roma leaders were in great demand in the early 1990s, when the US government decided to fund the Project on Ethnic Relations (PER), an initiative set up at Princeton in 1992. PER engaged with Roma academics and political leaders as early as 1992 and maintained a Roma-specific program until its closure in 2009.

OSF was less circumspect in selecting the first set of Roma leaders for collaboration. The international Roma elite approached George Soros to enlist his financial support for what became the Soros Roma Foundation (SRF). SRF was set up in Switzerland in 1993, headed by a Roma activist of Russian origin, who played an influential role in securing Soros' personal commitment. SRF meetings were convened in Romanes and were therefore seen as highly non-transparent. Roma from the former Soviet Union and the former Yugoslavia dominated decision making, which was problematic given that the bulk of the European Roma live in the five Roma-dense CEE countries.

The Soros Roma Fund financed cultural projects, including those of its board members. It was dissolved in 1995 upon András Bíró's recommendation, who was engaged in New York by Soros himself to conduct a review.[485] SRF argued against closure by envisioning a broader engagement based on integrated education on the one hand and the preservation of Roma language and culture on the other. Incidentally, this approach came to characterise the agenda of the OSF Roma structure,[486] but suspected of nepotism, SRF could not be saved, despite the shared vision. OSF chose to collaborate with Rudko Kawczinsky, a Roma leader from Germany and a renegade who left the International Roma Union and established a competitor INGO, the Roma National Congress in 1992.[487]

3.*1.2.2. Bulgarian internationalists*

[483] Marushiakova and Popov underline that in the 1970s and 1980s the Yugoslav state financed the involvement of Roma activists in the international Romani Union in order to embellish its minority-friendly reputation. Marushiakova and Popov, 2004.

[484] Klimová-Alexander 2005.

[485] Bíró interview.

[486] Weiss and Gordenker (ed.), 1996, *supra*.

[487] Identifying itself as the "Umbrella Organization Of the Roma Civil Rights Movement," after 2004, when Kawczinsky became the president of the ERTF, its board included the following members: Ondrej Gina (Czech Republic), Jozef Cervenak (Slovakia), Katalin Sztojka (Hungary), Nicolleta Horvat (Sweden), Asmet Elezovski (Macedonia), US-Office Prof. Ian Hancock (USA) .

Commissioned by Helsinki Watch to finalise a report about the Bulgarian Roma[488] that intended to provide information about ethnic assimilation during the Zivkov era, but incidentally chronicling Romaphobic violence in its immediate aftermath,[489] Harvard graduate Theodor Zang returned to Sofia in 1992. Zang's other mission was uncommon for an international advocacy organisation: he was in search of a Roma activist who would establish an NGO to defend Roma victims.

Zang visited Bulgaria first in 1991, amidst fear of spill-over from Milosevic's ethnonationalism in neighbouring Yugoslavia. Believing in the viability of the US model - a civil rights organisation with a minority leadership - in the middle of the Balkans, he canvassed potential leaders with the help of interpreter Savelina Danova, an English major at the University of Sofia, who came on the job accidentally[490] but devoted her entire career to Roma rights subsequently.[491] Best intentions notwithstanding, Zang could not identify anybody with the original profile and eventually settled on an individual, who brought a very different skill set and legitimacy to the job.

Zang chose Dimitrina Petrova, a philosopher, professor at the law faculty in Sofia, rising to national fame in the environmental movement (Ekoglasnost) and an MP in the first parliamentary cycle after 1989. She was married to Krassimir Kanev, another dissident academic and leader of the Bulgarian Helsinki Committee (BHC). Owing to their excellent transatlantic connections,[492] both taught at universities in the US and Petrova studied US political institutions on exchange visits.

Petrova was a member of the Bulgarian Helsinki Committee and a collaborator of the International Helsinki Federation for Human Rights. A polyglot of multiethnic background she worked on reports about the Yugoslav crisis, a formative event for the international human rights movement and OSF.[493] However, this is not where she first made contact with George

[488] Helsinki Watch became part of Human Rights Watch, when the regional units were unified in 1992. Aryeh Neier, Taking Liberties: Four Decades in the Struggle for Rights, 2003, p. 15.
[489] Zang, T. Destroying ethnic identity: the gypsies of Bulgaria. Human Rights Watch, 1991.
[490] Roussinova-Danova interview.
[491] Danova started working for the Human Rights Project as soon as it was established, transferring to the European Roma Rights Center with her husband, Rumyan Roussinov in 2000, then following him to Sofia, form where she worked for OSF's Making the Most of EU Funds for the Roma.
[492] Petrova was part of the dissident academic group that Soros reached out to before the transition. Petrova interview.
[493] Named Open Society Institute at the time. Dezalay and Garth track how this process was embedded in US foreign policy and ultimately gave rise to the international human rights elite. Dezalay and Garth, 2006.

Soros' philanthropy. As a dissident academic, she participated in meetings organised from Soros funds already in the 1980s.[494]

While Kanev was influential in IHF and OSF without ever leaving his position at the BHC, Petrova settled in Budapest in 1996, where OSF commissioned her to establish the European Roma Rights Center (ERRC). She headed the INGO until 2006, lectured at the Central European University (CEU) and filled various decision making positions within the OSF Roma structure. From Budapest she moved to London to head the Equal Rights Trust, a global initiative funded by the Ford Foundation, OSF and the British Foreign Office. Her path lead from academia to political dissent and then to human rights, never clearly delineating political and legal activism. Petrova and Kanev practiced law without law degrees, using the law in every forum except in national courts.[495]

As strange as it may seem, as apt it is to begin a story in the post-soviet CEE with an American rule of law crusader like Zang. Though trans-Atlantic transfer had not yet begun in earnest, the ambition of US agents to shape the meaning and practice of racial justice activism was as important as the resources US funders brought to the field. Outstanding in terms of the direct nature of US influence, the Bulgarian storyline is telling of the way American missionaries exported ideas to the CEE assuming that they would automatically take root in the post-communist social and political context, but also of the enthusiasm with which internationalist dissidents received them to then "co-produce" human rights knowledge, norms and practices.[496] The path of dissidents less open to internationalism or more limited to networking in Europe deviated from the Bulgarians, as will be seen below.

At this point, it is worth exploring the Bulgarian social entrepreneurs' competitive edge: prolific language skills. English language skills and education in English speaking universities became important assets after 1989. Bulgarians were in possession of substantial linguistic capital in English, the neighbouring Slavic languages and/or French owed to the existence of elite high schools and an American University operating already during the Zivkov era. Established by progressive communists, elite high schools cherry-picked the most talented children,

[494] Petrova interview.

[495] Kanev even represents a client in the Strasbourg Court.

[496] Hammerslev, supra, 2012, p. 135. Europeanisation was supported by "massive investments in Western discourses" and the export-import of social science knowledge. "In the West, and specifically in the US, discourses and knowledge production professionalized and intertwined with institutions that exported" specific forms of governance, that, imported to the CEE became pivotal in institution building. Based on the notion of co-production, Hammerslev explains how leading American and European lawyers, think tanks and agencies were involved in the reorganisation of the Bulgarian field of power.

particularly from a critical-reformist background, inadvertently becoming a basis for the dissident elite.

The scarcity of linguistic capital in other countries propelled Bulgarian human rights lawyers into important positions. In 1996, the post of INTERIGHTS' program manager for the CEE was filled by Borislav Petranov, a Bulgarian lawyer trained in Essex, Oxford and Moscow - a detail that evoked suspicion in some at the time. Petranov went on to work for philanthropies investing in the rule of law: the Ford Foundation, the Sigrid Rausing Trust and OSF.[497] Leading human rights lawyer Yonko Grozev's CV reveals another path of knowledge transfer, one that is linked to the US.[498] With a law degree from Sofia University, Grozev started working for the Bulgarian Helsinki Committee in 1991, leading the legal program and Roma rights litigation, but taking a sabbatical in 1994-1995 to earn an LLM degree from Harvard. He served on the boards of various OSF related INGOs until his appointment as a Strasbourg judge in 2015.

These careers inspired OSF president Aryeh Neier's observations about the leading role of young Bulgarian lawyers in the human rights movement.[499] Indeed, the transitional generation occupied high-ranking positions with ready linguistic and academic skills and an openness to transplanting Western knowledge, discourse and litigation as a governance tool.[500] The versatility of the Bulgarians' language skills proved particularly useful at the time of the Yugoslav and Chechen crises.

Linguistic skills were not enough in and of themselves. The most successful activists attributed importance also to raising and cultivating trusted followers. At the Sofia University's Law Faculty Petrova's formidable personality attracted students to the Roma rights cause. Nicolai Gughinski became her domestic lawyer and once she moved to Budapest, he followed as the ERRC's first staff lawyer.[501] Daniela Mihaylova, another disciple is Bulgaria's renowned Roma rights lawyer today.[502] Her role and outstanding relations to philanthropies built under Petrova's guardianship are described in subsequent chapters. Another key collaborator and

[497] Today, Petranov is director of Global Rights and accountability for the Open Society Human Rights Initiative. His portfolio "supports the organizations anchoring the human rights movement and work on transitional and international justice."

[498] Grozev attended the First English Language School in Sofia, where he found friends such as Ivan Krastev - perhaps the best known political theorist of the region - with whom Grozev collaborated in the Sofia based Centre for Liberal Strategies.

[499] Neier, supra, 2012, p. 158.

[500] Hammerslev, supra, 2012.

[501] Ghuginski interview.

[502] Mihaylova interview.

trusted ally is Savelina Danova, who met Petrova when interpreting for Zang and collaborated with her afterwards.

Petrova invested in the legal training of her Roma staff, who did not practice law in Bulgaria, however, because she drew them quickly to the international level. Ivan Ivanov was hired at the ERRC as staff lawyer and Toni Tashev as advocacy officer,[503] wherefrom Ivanov transitioned to another INGO, the Brussels-based European Roma Information Office (ERIO), while Tashev left Europe with his wife, a US citizen in the diplomatic service.[504]

3.*1.2.3. Francophone Romanian activists*

The first generation of human rights lawyers/activists proceeded to the international level from other countries too by way of political engagement[505] or paths outside OSF's influence. Key Romanian activists function as MEPs or academics.[506] Due to their easy rapport in French, Romanians are overrepresented in the Council of Europe structure. None engaged with OSF and brought their collaborators into the philanthropy's sphere of influence as much as the Bulgarians.

Zang conducted research in Romania too, but he was not as influential on the organizational structure there as in Bulgaria. Romanian social entrepreneurs ran a different course from the Bulgarians, because they spoke French as their first foreign language that necessarily oriented them towards Europe. This was clearly the case with Ina Zoon, who became the "Roma rights person" in the French-inspired Romanian Federation of Human Rights once witnessing the violent attack of miners on a Roma neighbourhood in Bucharest during the 1990's Mineriada, a counter-mobilisation by former communists and the Securitate to regain political power.[507] She pursued this line of work upon her transfer to the Romanian Helsinki Committee, and later on, when she moved to Prague with her Dutch journalist husband in 1993, learnt English and retrained as a lawyer. Zoon played a key role in legal mobilisation for Roma rights in the Czech Republic, the Council of Europe and the EU, but later transitioned to criminal justice,

[503] He left the Roma rights field and Europe altogether when his wife, a US diplomat was stationed elsewhere.
[504] Email exchange with Toni Tashev.
[505] For instance, Renate Weber, a founding member of the Romanian Helsinki Committee, former director of the Romanian Soros Foundation and founder of the Romanian Legal Resource Center has been an MEP since Romania's accession to the EU. Monica Macovei, a former prosecutor and founding member of the RHC became a minister of justice and later, an MEP. Weber played a crucial role in the adoption of Romanian anti-discrimination law in 2000 and Macovei represented Roma clients in the Strasbourg Court.
[506] Co-founder of the Romanian Helsinki Committee, Gabriel Andreescu teaches political science in Bucharest. Andreescu interview.
[507] Ina Zoon interview.

leading the Open Society Justice Initiative's Latin-America Program's criminal justice branch and contributing to the OSF Human Rights Initiative's work on criminal justice.

Nicolae Gheorghe, an "unstoppable force from Romania"[508] also drew inspiration from French intellectuals for the establishment of the country's emblematic Roma rights NGO. Gheorghe - a polyglot academic, like Petrova - was the first Roma activist from the CEE, who made an impressive international career, but given his dedication to the Roma cause, his path was more limited than Petrova's. Besides Romanian, Gheorghe spoke French, English and Romanes that he taught himself as an adult.[509] Romanes was pivotal in local and European ethno-political formations, while English (and French) in international relations.[510] Gheorghe's path lead from academia through ethno-politics to Roma rights, treading closer to Europe-focused intergovernmental settings, than US-dominated INGOs.

A sociologist and member of the Romanian Academy of Science Gheorghe connected to French academics already during the Ceausescu era,[511] criticising the communist regime's Roma policies in letters to Radio Free Europe.[512] Gheorghe and a French academic co-authored a report about the Roma for the Minority Rights Group in 1995.[513] Gheorghe and Andrzej Mirga - a Polish ethnographer of Roma origin and also a member of the International Romani Union - penned another important reference text released by the Project on Ethnic Relations in 1997.[514] Seeking to debunk Western approaches inspired by contemporaneous westward migration and misplaced analogies with Western Travellers, they argued for a conception of the Roma as an ethnic minority subjected to discrimination.

Gheorghe launched his international career before establishing an organisational basis in Romania. He was the first to join the International Romani Union from the region and becoming its deputy president, represented the organisation at various CSCE events.[515] Gheorghe

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[508] Thpmas Acton, Nicolae Gheorghe, the sociologist in In Search Of A Contemporary Roma Identity: In Memoriam - Nicolae Gheorghe, Roma Rights 1/2015, pp. 25-28.

[509] Bitu interview.

[510] The unprecedented level of assimilation among Hungarian Roma explains their low level of participation in European and international Roma political self-organisations. Linguistic abilities and the varied state of language tuition in the CEE countries shows correlation to the participation of Roma activists in regional venues.

[511] Acton, 2015, supra.

[512] Mozes F. Heinschink and Mirjam Karoly, Rombase, Data » Personalities » Nicolae Gheorghe. Bitu interview.

[513] "Up until recently, there has been little recognition of the Roma/Gypsy as a distinct ethnic, linguistic and cultural group and hence a lack of recognition that many of the problems they encounter result from the violation of their rights as a minority." Alan Philips' Preface in Liegeois, J.-P. and Gheorghe, N., *Roma/Gypsies: A European minority*, Minority Rights Group International, 1995, p. 5.

[514] Andrzej Mirga and Nicolae Gheorghe, The Roma in the twenty-first century: A policy paper, 1997}, Project on Ethnic Relations.

[515] Schlager,, 2017, supra, p. 63.

was also the first Roma to fill an executive position in an international organisation. Planned since 1994, the Contact Point for Roma and Sinti Issues was established in the OSCE in 1998 with Gheorghe at the helm.

3.1.2.4. Hungarian dissidents

Progressive Hungarian Roma activists ambitioned international careers more than the *gaje* committed to Roma rights. A notable exception, András Bíró is a transnational entity onto himself: born in Bulgaria to a Hungarian father and Serbian mother. Fluent in Bulgarian, Serbian, Hungarian, French, English and Spanish, as a reform communist he was involved in the 1956 revolution, fleeing via Yugoslavia to a job at the UN Food and Agricultural Organisation in France, Italy, Mexico and Africa before returning to Budapest in 1986. His linguistic and relational capital positioned Bíró uniquely well as funds started pouring in for both development and rule of law projects.

Bíró rekindled relations with political dissidents and joined anti-racist organisations, but first and foremost established and chaired the Hungarian Foundation for Self-reliance (Autonómia) that provided Roma entrepreneurs microcredit for agricultural activities. As his close friend Gheorghe, Bíró believed that the violent outbreaks of racism had to be tackled with legal tools and enlisted attorney Imre Furmann to carry this idea forward.

Furmann came from a blue-collar family, studied law in evening classes and worked as a juvenile prosecutor in Miskolc that was becoming the symbol of Romaphobic attitudes as poverty grew in the wake of the city's crumbling heavy industry. During a debate with the police in the late 1980s, he criticised ethnic profiling - the frequent stop and search of the Roma - but escaped repercussions due to the impending regime change.[516]

Furmann was a prominent literary figure, a public opinion leader and an important actor in the local counter-cultural scene. He was the Roma-dense region's foremost political dissident, a liberal conservative who could bridge gaps between the opposition's patriotic (népies) and urbanist (urbánus) wings without himself being an internationalist.[517] Disillusioned from

[516] Révész Sándor, „Én mindig más úton mentem," beszélgetés Furmann Imrével, *Beszélő* 2003. március, Évfolyam 8, Szám 3.

[517] Széchenyi Ágnes, Népi, liberális, nemzeti (Popular, liberal, national), Korunk, 2012/7, pp, 62-73 and Szabó Máté, A szocializmus kritikája a magyar ellenzék irányzatainak gondolkodásában (1968–1988), Politikatudományi Szemle XVII/1. pp. 7–36. Szabó draws attention to the extensive transnational relations of elites other than the popular wing.

politics as a grassroots organiser for the governing conservative party riddled with anti-Semitism and an unwilling collaborator in privatisation, he rallied to Bíró's call.

Furmann believed that transnational collaboration was "purely a matter of financial resources,"[518] but this was not the only reason he was not so eager to engage in cross-border exchange. While dominating outputs in Hungarian, he could not control events that required proficiency in English. The privilege to interpret for him fell to me between 1995 and 1998. Not a week went by without journalists, human rights monitors, Western (legal) experts, project staff and researchers visiting NEKI's office situated between Budapest's two Roma-dense districts. The easy rapport with international actors aroused suspicion, but my linguistic skills were never as seriously tested as during a turf battle between Furmann and Petrova at a transnational exchange meeting organised in the framework of the EUROMA Project in 1995. In retrospect, the exchange between the two prominent activists provided a taste of future conflicts between the European Roma Rights Center and domestic organisations.

Petrova's legal English and more importantly, her legal instincts were impeccable, even though she was not a lawyer herself. This was not the case with every activist, which could at times give rise to misunderstandings.[519] The national Roma rights vocabulary and authoritative references were different from the international reporting lingo. The former was grounded in domestic law in the early years, but as local constitutional jurisprudence opened up to international human rights law, so did lawyers within the newly established Roma rights organisations.

3.1.3. The inception, form and governance of organisations

More robust repression in communist Romania and Bulgaria meant that the Roma and the human rights movements developed simultaneously and Roma activists engaged in legal and political mobilisation concurrently after 1989.[520] Conversely, in Czechoslovakia and Hungary, the Roma issue had been part of the mainstream dissident agenda and Helsinki groups dealt with

[518] Vikman László, Dr. Furmann Imre interjú, Jogász Fórum, 2002. november 20, p.35.

[519] While I appreciated working and learning from activists of diverse backgrounds, I was less enthusiastic when ordered to redraft case studies after the legal terms were translated into "normal" Hungarian. To my mind at the time , credibility depended on the dry, often repetitive legal language.

[520] Iulius Rostas, The Romani Movement in Romania: Institutionalization and (De)mobilization in Romani Politics in Neoliberal Europe edited by Nando Sigona and Nidhi Trehan, 2009. Rostas underlines that Romani Criss, Agentia Impreuna, the Ruhama Foundation and the Center Amare Romentza came to the forefront of Roma political activism when the conditions of establishing Roma political parties were severely curtailed in 1996. p. 163-164.

Roma rights as a matter of course,[521] while not only Roma leaders promoted by the communist regime, but also those embedded in the dissident movement could access parliamentary politics on party lists in 1990.

[521] The signatories of Charter 77 in Czechoslovakia wrote: “Legally the Romanies do not exist, while government, regional and district offices have been created which put them all on files and then categorize them according to absurd criteria. Special schools have been created which suppress rather than help to develop their culture; and orders are issued calling for the solution of the "gypsy problem" on the part of the regional offices. In official documents they are marked down only as "citizens of gypsy origin" or perhaps simply as "less well integrated inhabitants." See, Tritt, supra, 1992, p. 25.

3.1.3.1. *The Human Rights Project*

The Sofia based Human Rights Project (HRP) was established in the summer of 1992 literally as a project within Dimitrina Petrova's NGO. She led it until 1995 and after leaving, she mobilised her expanding relational capital to raise funds for the organisation and its collaborators, expanding the list of donors from US entities to the EU and its member states. HRP self-identified as a legally focused NGO, even though it was never actually led or staffed by practicing lawyers. Nevertheless it was not a predominantly political organisation either.[522]

Chaperoning the organisation's establishment, Zang was keen to convey the vital importance of Roma participation in decision making and Petrova was receptive. Her first Roma colleague was the son of an influential Roma leader, who recruited his friend Rumyan Roussinov upon a chance encounter.[523] A student of economics Roussinov came from a privileged background, a Roma family of teachers in Dunavtsi, a small town with a high percentage of educated Roma close to the Danube river and the trilateral border with Yugoslavia and Romania. His father was a well-respected educator in the local secondary school, while his aunt, Donka Panayotova taught in Vidin and held important positions in the communist party. Sometime later Ivan Ivanov and Toni Tashev, both of Roma origin joined the team. Ivanov grew up in a Turkish speaking community, where he witnessed firsthand the power of ethno-political mobilisation.[524] Trained as a medical doctor, he worked for the ambulance service, but retrained as a lawyer during his time at HRP. Tashev came from Law School directly.

The Human Rights Project's Roma staff oversaw community outreach that required fluency in the languages Bulgarian Roma speak - Bulgarian, dialects of Romanes and/or Turkish. They were deployed in settlements to collect complaints, identify victims willing to take legal action and support them through lengthy criminal proceedings. HRP started out as a *gaje*-led interracial NGO, but that changed over time.

Petrova and her staff inhabited both the legal and political realms, providing legal services, organising communities, researching and reporting incidents, advocating for legal and policy reform and maintaining a strong media presence. This was not a problem in Bulgaria, where the organisation and its leader played a gap-filling role in both political and legal

[522] Bárány lists the HRP among Roma political organisations, noting its initial function as a legal aid based promoter of equality, Bárány, supra, 2002, p. 215.
[523] Roussinov interview.
[524] Ivanov interview.

mobilisation. At the regional level, things got more complicated, however, and Petrova failed to replicate the HRP model as detailed below.

HRP offered legal representation in selected cases of serious human rights abuses, primarily on Romaphobic violence and the failure to investigate crimes committed by law enforcement officials.[525] It hired lawyers affiliated with the Bulgarian Helsinki Committee and the Bulgarian Lawyers for Human Rights (BLHR) on a case by case basis. Legal representation in *Assenov v Bulgaria* that was not only HRP's, but also the Roma rights movement's first Strasbourg case started in 1994.[526] Later on, HRP regularly cooperated with BHC legal director Yonko Grozev, who remained Petrova's key legal resource person even after she left Bulgaria.[527]

"Selective representation" was not specific to HRP, because due to resource constraints, legally focused organisations across the region provided free legal advice but retained the right to select whom to represent. Once engaging in a case, however, they saw it through until the end, which would have taken three years at the minimum. The lack of in-house lawyers was also common. The organisations provided client care and a triangular relationship formed between the client, the NGO and the external lawyer. HRP's agenda was singular inasmuch as Petrova ambitioned litigation in international fora - specifically before the Strasbourg Court - to lay bare the law enforcement bodies' *modus operandi* seemingly untouched by the political transition.

3.*1.3.2. Romani Criss*

Romani Criss (Roma Center for Social Intervention and Studies) was set up in Bucharest in April 1993 by the Roma Ethnic Federation, the Research Center of Roma/Gypsies from the Rene Descartes University in Paris, and the Sociology Institute of the Romanian Academy,

[525] The information is taken from a press release – downloaded from the BHC website, as HRP does no longer have one. The Human Rights Project Press Release: Bulgaria Violates its International Obligations by Rejecting the Draft for Establishment of a Fund for Educational Integration of Minority Children was published on 14 October 2004.

[526] Assenov and Others v. Bulgaria, application no. 24760/94, judgment of 28 October 1998. The case concerned the ill-treatment in police custody of a Roma minor and his victimisation by the authorities following the Strasbourg complaint. Zdravka Kalaydiyeva of BLHR provided legal representation in Strasbourg, where she later served as a judge.

[527] Velikova v. Bulgaria, Application No. 41488/98, judgment of 18 May 2000, Anguelova v. Bulgaria, Application No. 38361/97, judgment of 13 June 2002, Nachova and Others v. Bulgaria, Applications Nos. 43577/98 and 43579/98, Grand Chamber judgment of 6 July 2005, Ognyanova and Choban v. Bulgaria, Application No. 46317/99, judgment Of 23 February 2006, Angelova and Iliev v. Bulgaria, Application No. 55523/00, judgment of 26 July 2007, Dimitrova and Others v. Bulgaria, Application No. 44862/04), judgment of 27 January 2011.

Nicolae Gheorghe's workplace at the time. Roma-led and staffed from the first day on,[528] Romani Criss owes its existence to Gheorghe, who set out to vindicate civil rights in court, while attaining social rights through collaboration with state authorities.[529] Gheorghe made personal sacrifices for the cause and uniquely, he also made donations from his own wealth if needed,[530] but more importantly, he mobilised resources at the international level to facilitate Roma rights work in his home country and just like Petrova, remained connected to his organisational base throughout his career.[531]

True to its emblematic leader's vocation, Criss served as a hub for fledgling Roma intellectuals. Gheorghe was an adherent of the Socratesian method and discussions starting in the office often finished in his kitchen late in the night.[532] His activism was exemplary, exceptional, non-partisan and ecumenical. After commemorating his untimely death in 2014, activists no longer on speaking terms gathered to share anecdotes about this truly formidable figure. Most remembered his generosity and brilliant intellect, the passion for debate, the clarity of his vision and analytical skills that did not abate even when his health deteriorated.

Gheorghe was ready to use the courts to secure civil rights but opposed adversarial legalism when it came to social rights, because social provisions presumed the state's meaningful engagement. Initially, lacking legal expertise Criss did not litigate, but monitored rights violations with the help of a network of local activists. It started training, policy and social intervention programs in education and housing in 1994.

3.*1.3.3. Project-based operations in the Czech Republic*

[528] Pro Europa Liga, an interethnic NGO active in Transylvania collaborated with Roma rights NGOs on the CEE's most shocking anti-Roma pogrom that took place in Hadareni, Romania. The case inspired Toni Gatliff's film Gajo Dilo and inspired lengthy litigation before the Strasbourg Court, see below.

[529] In Search of a New Deal for Roma: ERRC Interview with Nicolae Gheorghe, Roma Rights 2001/3.

[530] For instance, in 1994 Romani Criss received 28.792 USD, of which 2000 came from Gheorghe, 10.000 from the US Kaplan Foundation and 10.000 from the EU delegation. Following a practically penny-less 1995, he raised steadily growing amounts for Criss from Christian charities, the International Red Cross, Western European states, the OSCE, the Council of Europe, the EU and Canada. In 1996, Criss received more than 80.000 USD. Its legal activities were supported by EU funds disbursed via the Hungarian Foundation for Self-reliance (EUROMA I and II) in 1996, by OSF and the ERRC from 2000 and 2002 onwards, while in 2010-12 funds were gleaned from the Balkan Trust for Democracy and more recently from EEA (colloquially: Norwegian) Funds. See, Lista Programelor/proiectelor 1994-2003, Romani Criss, retrieved from the Romani Criss website on 28 April 2018.

[531] In the second half of the 1990s, Criss received several grants from the OSCE.

[532] Gergely interview.

Operations were project based in the Czech Republic,[533] where the Czech Helsinki Committee was the first to engage in citizenship litigation. In the Tolerance Foundation, where Ina Zoon, a Romanian human rights activist[534] led the Article 8 Project, free legal services were offered and the activists "endeavoured to alter legal practice."[535] Between 1993 and 1997, legal aid was provided to approximately 18.000 clients through a handful of projects.[536]

The mass filings were exceptional in the history of the movement and blocked the judicial system, sparking the courts to plea for legislative amendments. Simultaneously, the US threatened to withdraw its support for the establishment of a NATO missile locator base and exerted its diplomatic influence, while Canada - a popular destination for "Czechoslovak" Roma asylum seekers - was considering the reintroduction of a visa-regime for all Czechs. The Citizenship Law was amended in 1996, by which date the UNHCR-sponsored projects built trust between *gaje* rights defenders and Roma communities across the country, laying a basis for future legal defence activities.

In the former Czechoslovakia, sterilisation mandated by a 1972 ministerial decree was an important tool to control birth rates among the poorest strata of society.[537] The solicitation of sterilisation by social workers in exchange of financial incentives was criticised by dissidents[538] particularly because it disproportionately affected the Roma, with Roma women

[533] My account is based on interviews with Barbora Bukovska and Pavla Bouckova. It dates domestic NGO engagement with citizenship issues earlier than other accounts, because it looks at substantive work, rather than project designation. See, Jirina Siklova; Marta Miklusakova, Denying Citizenship to the Czech Roma, 7 E. Eur. Const. Rev. 58 (1998) p. 62. Citizen associations intent on lending aid to the Roma began forming in 1995 … For example, with the efforts of the Czech Helsinki Committee, the Advisory Center for Citizenship was established and students from Charles University … (with financial aid from the Open Society Fund) began as early as 1995 to assist Roma."

[534] Zoon relocated to Prague from Bucharest, following her Dutch journalist husband. According to information gleaned from the NGO's website on 28 April 2018, it "was designed to resume the Tolerance Foundation's effort to call the general public attention to the questionable Czech Citizenship law and its negative and discriminating impact on the Roma "Slovak" minority which has been resident in the Czech Republic for a long time. Nine young people - lawyers, law students, social workers, etc. - work on this project, initiated in April 1996 by Ina Zoon, a law student from Bucharest. The project is sponsored by the Open Society Institute, New York."

[535] According to the project description available on the NGO's website.

[536] This is Bouckova's final estimate. See also, Jirina Siklova; Marta Miklusakova, Denying Citizenship to the Czech Roma, 7 E. Eur. Const. Rev. 58 (1998) p. 63. Helsinki Committee has roughly 4,000 clients registered with it. Among them are several hundred minors placed in foster homes.

[537] Directive No. 01/1972 of the Ministry of Health and Social Affairs of the Czech Socialist Republic. The directive's guidelines set forth indicators under which sterilisation could lawfully be performed.

[538] MUDr. Posluch a MUDr. Posluchová, „Problémy plánovaného rodičovstva u cigánskych spoluobčanov vo Východoslovenskom kraji," In: Zdravotnícka pracovníčka č. 39/1989, (Problems of planned parenthood among Gypsy fellow citizens in Eastern Slovakia in Medical Worker, No 39/1989) and M. Stejskalová and M. Szilvasi, Coercive and Cruel: Sterilisation and its Consequences for Romani Women in the Czech Republic (1966-2016), Budapest: ERRC, 2016.

representing over a third of those sterilised.[539] Condemned by Czechoslovak Roma leaders as genocide[540] the practice was officially terminated in 1990.[541] Roma women brought criminal complaints against doctors following the transition, but investigations were regularly discontinued and neither human rights, nor women's rights NGOs focused on the issue.[542]

3.*1.3.4. Hungarian NGOs*

In 1993, an exceptionally brutal police raid on a Roma settlement in Hungary prompted the establishment of the Legal Defence Bureau for National and Ethnic Minorities (NEKI), a foundation chaperoned by chair András Bíró and director Imre Furmann with a handful of staff. In the early years, NEKI prioritised criminal justice work, given also that its director was a former prosecutor whose advocacy efforts benefitted from his outstanding connections. NEKI started reporting annually in 1994 both in Hungarian and English, and from 1995 onwards it built a network of local monitors and lawyers.

In Hungary, like in Czechoslovakia and Bulgaria, by the end of the first parliamentary cycle (1994), the few progressive Roma MPs left with nominal achievements under their belt as national political opportunities considerably narrowed.[543] Conservatives and socialists chose to collaborate with the national Roma elites that promised less confrontation and more willingness to compromise Roma interests on the altar of the "national security doctrine" and promote their own well-being.[544] It seemed likely that democratic parties would "embrace the 'Gypsy judges,' voivods, informers and voluntary policemen favoured [in the past] by the presidents of local councils, the secretaries of the party and party youth organisation as much as by police

[539] V. Sokolova, Cultural Politics of Ethnicity: Discourses on Roma in Communist Czechoslovakia, Verlag Stuttgart: 2008), p. 208

[540] See, Cahn, 2014, supra. In contrast, see Rúbio-Marin and Möschel, 2015, supra.

[541] Decree No. 590/1990 of the Coll. L. Decree of the Ministry of Labor and Social Affairs of the Slovak Republic from 20 December 1990, On the Amendment and Modification of the Decree of the Ministry of Health and Social Affairs of Slovak Socialist Republic No. 151/1988 of the Coll. L. Afterwards, Roma women in the Czech Republic filed around 300 (criminal) complaints to bring doctors to justice. See, Gwendolyn Albert and Marek Szilvasi, Intersectional Discrimination of Romani Women: Forcibly Sterilized in the Former Czechoslovakia and Czech Republic, Health and Human Rights Journal, December 2017, Vol 19 No 2, p. 26.

[542] Ibid.

[543] Aladár Horváth and Jenő Zsigó - as a delegate of the Roma Parliament - took part in the minority roundtable negotiations that led to the adoption of the Minority Rights Act in 1993.

[544] Rostas, 2009, supra and Judd Nirenberg, Romani political mobilisation from the first International Romani Union Congress to the European Roma, Sinti and Travellers Forum, in Trehan and Sigona, 2009.

chiefs."[545] Marginalised from mainstream politics,[546] progressive political activists retreated, playing a pivotal role in the NGO-isation of both political and legal mobilisation.

NGOs opened paths to national advocacy fora and minority constituencies. Aladár Horváth established the Hungarian Roma Civil Rights Foundation (RCRF) in 1995. His insufficient language skills nipped aspirations of an international career in the bud,[547] but at home he became one with RCRF and gained a reputation as an advocate against forced evictions, racial violence[548] and segregated education.[549] The RCRF benefitted from the expertise of dissident sociologists and a team of Roma activists, social workers and journalists of Roma origin (Roma Press Center). The main source of legal expertise came from Tibor Bós, a *gaje* attorney whose friendship with Horváth originated in their college years, but for its most emblematic case, RCRF drew on external legal expertise as chronicled in the next chapter.

3*.1.3.5. Assessment*

Dissidents were central to the formation of the organisational basis of both the human rights and the Roma rights movement. Their legitimacy derived from resisting communist oppression based on domestic constitutions read in the light of international human rights norms, so they harboured a keen understanding and fierce belief in the law as a tool of control *vis-a-vis* the authoritarian state.

In the early years, dissident legalism gave rise to constitutional litigation akin to public law litigation in the US,[550] i.e. using the law for political purposes in coalition with young Roma activists, aspiring to influence criminal justice and citizenship policies. The lack of legal

[545] Horváth, 2017, p. 107. "[S]tate policies in Eastern Europe and the subordinate Gypsy organizations were key factors for the development of the Gypsy community and the implementation of new civil ideas in it, though this was far from the goals of the state policies. This is not a paradox and history has witnessed quite a few such processes." Marushiakova and Popov, 2004, p. 74.
[546] Bárány, 2002, p. 214.
[547] Moldovan and Rostas v Romania, Applications nos. 41138/98 and 64320/01), Judgment No. 1 (friendly settlement), 5 July 2005 Moldovan and Others v Romania (no. 2.), judgment of 12 July 2005.
[548] For instance, the Zámoly incident led to diplomatic difficulties between the EU candidate Hungary and France that recognised the community fleeing racial violence as refugees. See, Harper, K. and Vermeersch, P. (2011) 'Great Expectations? The Changing Role of 'Europe' in Romani Activism in Hungary', East European Politics and Societies.
[549] Tiszavasvári separate school leaving ceremony in Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, eds. Dagmar Schiek, Lisa Waddington and Mark Bell, Oxford, Hart Publishing, 2007.
[550] Chayes, supra, 1976.

training did not prevent activists from influencing policies by juggling political as well as legal tools.[551]

Peripheral in the early period, involved on account of their monopoly to represent clients and fluency in the rights language, lawyers were needed to put activist visions into practice. Their legitimacy derived from the interracial coalition of political dissidents and progressive Roma leaders, who set the agenda for legal defence. A new generation of idealists educated after 1989, familiar with human rights law, conscious of social problems and ready to sacrifice lucrative careers in private law was necessary for the emergence of legally focused NGOs.

Few of the rights claims were domestically justiciable in the early 1990s, while the middle of the decade witnessed the weakening of national political opportunities. These conditions necessitated, while European integration's beneficial impact on legal opportunities facilitated engagement with international human rights law. Linguistic capital - particularly the knowledge of the English language - became a crucial asset for both social entrepreneurs and lawyers to raise funds, advocate and litigate.

3.2. The "golden age": 1996-2006

Part 2 chronicles the decade preceding EU accession that activists interviewed for the thesis generally perceive as the "golden age." The period between 1996 and 2006 was characterised by the increasing involvement of the Open Society Foundations that injected its own Roma-specific organisational structure between domestic NGOs and international organisations. The fast expansion of legal opportunities and the example of the civil rights movement in the US - OSF's home base and the benchmark for its activities - inspired a focus on legal mobilisation, apexing in the establishment of the European Roma Rights Center. The period also witnessed the growing activism of international monitoring bodies that framed the Roma issue in the language of human rights and completed the formation of the Transnational Roma Rights Network in which the ERRC's dominant position simultaneously ignited and concealed intramural conflicts among both Roma activists and domestic agents. Helsinki groups and newly established agencies - national human rights institutions and equality bodies - played an important role in providing legal resources, while European networks built a framework for genuine cross-border collaboration.

[551] Yves Dezalay and Bryant G. Garth, Corporate Law Firms, NGOs, and Issues of Legitimacy for A Global Legal Order, 80 Fordham L. Rev. 2309 2011-2012, pp. 2309-2345.

3.2.1. Resources

The European Union encouraged cross-border cooperation both among candidate countries and between member states and countries awaiting accession. In 1995-1996, the EUROMA Project facilitated knowledge transfer between the Bulgarian Human Rights Project and the Romanian Romani Criss, the Hungarian NEKI and the Slovakian Good Romany Fairy Kesaj Foundation. The Project was instrumental in bringing to life the Transnational Roma Rights Network by connecting key domestic organisations and social entrepreneurs and providing a platform for knowledge transfer and the formation of common values and identity. András Bíró and Nicolae Gheorghe played a key role in breathing life into the project, to which their NGOs at home provided organisational support. Even though funds for EUROMA were raised from the EU, Bíró was specifically well connected to UN funds, while Gheorghe to the OSCE and its resourceful Western and North-American members.

Reflecting its central role in Roma community life *pakiv* (trust, respect, credibility)[552] was chosen as an acronym for Gheorghe and Bíró's transnational initiative bolstering political mobilisation, the Pakiv European Roma Fund that was established in 2000 from a World Bank grant complemented by the Ford Foundation and the Freudenberg Foundation. Beyond harnessing the activities of 'their own' NGOs (Autonómia and Romani Criss), they also indoctrinated a new generation of young Roma activists, many of whom collaborated with Roma rights NGOs subsequently.

EU funding for Roma NGOs increased in the run up to accession.[553] Much of it was absorbed by traditional Roma leaders, who used funds to maintain a clientele, but progressive Roma activists and NGOs also gained access to resources - particularly in Romania[554] and Bulgaria, where professionalised NGOs took on tasks carried out by the public administration in the other three countries. European resources and the limitations of the public administration

[552] As Bíró explained, pakiv "refers to trust, credibility and respect in the Roma language and so we adopted this for building bridges between the vernacular and organisational culture of the Roma." András Bíró, The Price of Roma Integration, pp. 11-41 in András Bíró, Nicolae Gheorghe, Martin Kovats et al, From Victimhood to Citizenship: The Path of Roma Integration - A Debate, Will Guy (eds.), 2013, Kossuth Publishing Corporation, Budapest.

[553] Melanie H, Ram 'Interests, Norms and Advocacy: Explaining the Emergence of the Roma onto the EU's Agenda', Ethnopolitics, 9, 2: 2010, 197-217.

[554] Reliance on external donor-funding increasingly challenged traditional power structures in Romania Miscoiu, S. (2006) 'Is There a Model for the Political Representation of the Romanian Roma?' Sfera Politicii, 123-124: 78-89. The progressive Roma elite countered traditional Roma politics by embracing the rights discourse and NGO-ising its institutional structure, The well-educated and well-travelled new elite challenged 'the political oligarchy' from this baseline.

spurred Romani Criss' profound involvement in policy work on education and health care that steered the NGO away from adversarial legalism, while engagement in NGO-led desegregation by the Bulgarian Romani Baht led to a break between its programmatic and legal departments.

As a financial supporter of the Helsinki groups, OSF indirectly funded Roma rights defense, national Soros Foundations supported projects on Roma education, culture and arts, while the Human Rights and Governance Program funded Roma rights defense. Its Roma rights budget was USD one million per year for the whole region, including the funds earmarked for the European Roma Rights Center.

From 1997 onwards, young human/Roma rights lawyers were trained in the US as fellows of PILNET, the Public Interest Law Network, an initiative co-financed by the Ford Foundation and OSF, based in New York (and later in Budapest as PILI, the Public Interest Law Initiative). Barbora Bukovska from the Czech Republic, Fitsum Achemyeleh Alemu from Hungary, Romanita Iordache from Romania, Ivan Ivanov and Daniela Mihaylova from Bulgaria were all fellows of PILNET, studying at the Columbia Law School and interning with civil rights organisations of their choice.

Bukovska trained with the NAACP Legal Defense and Educational Fund (LDF), Mihaylova joined the Human Rights Monitoring, Advocacy and Legal Department of Romani Baht and became a PILNET fellow in 1998, studying street law.[555] Situation testing was imported to the CEE by Alemu, an Ethiopian citizen trained as a lawyer in Budapest, Hungary in the framework of what remained from the communist regime's international aid program for developing countries.[556]

Upon his return from New York, Alemu diffused his skills to colleagues in NEKI and conducted the first testing campaigns.[557] His paper on testing was published in Hungarian first,[558] its English version being the most popular article ever published in Roma Rights, the European Roma Rights Center's quarterly journal.[559] Alemu trained the ERRC staff too and

[555] Street law denoted the provision of legal aid by trained community member.

[556] Alemu came from an elite family, his father in the public service being critical of the country's communist leadership. Originally, he wanted to study philosophy in Germany, but courses on that subject were offered in Hungary when his turn came to travel. This is how he ended up in Budapest, where he transferred to the law faculty in Budapest. Two of his siblings followed him to Budapest and his sister still lives there, while his brother transferred to Washington in his wake. Alemu interview.

[557] NEKI conducted situation testing in 1999, see White Booklet 1999, Otherness Foundation, NEKI, Budapest.

[558] Fitsum A. Alemu, A Tesztelés Mint Bizonyítási Módszer A Bírósági Eljárásban, Fundamentum 2000/2, pp. 74-79.

[559] Fitsum Alemu, Testing to Prove Racial Discrimination: Methodology and Application in Hungary, Roma Rights 2004.

NEKI subsequently diffused the practice to NGOs, ombuds offices and equality bodies across the CEE,[560] and later on, in collaboration with the Migration Policy Group[561] in Europe.[562]

The Bulgarian Helsinki Committee was a key driving force in regional collaboration on human rights reporting to UN and Council of Europe monitoring bodies, and also on Strasbourg litigation. The ERRC organised trainings in Strasbourg, where junior lawyers lined up to showcase the strength of the movement.

This was the time, when NGOs began to submit alternative, so called shadow reports to monitoring bodies overseeing state compliance with UN treaties. Relations with the newly erected Council of Europe reporting mechanisms were more intimate, because the European Commission Against Racism and Intolerance, the Advisory Committee of the Framework Convention for the Rights of National Minorities and the Council of Europe's Commissioner for Human Rights paid country visits and organised meetings with NGO stakeholders, inviting written comments and follow up communications.

Activist public officials from ombuds offices played an important role in the governing structures of bodies, like ECRI that began to issue guidelines and recommendations on Romaphobia and racial discrimination. The monitoring bodies' country-specific work, conferences and seminars contributed greatly to stabilising the Transnational Roma Rights Network. Reporting during the accession process built relations with EU delegations and the European Commission.

The EU invested in capacity building for both NGOs and equality bodies. While neither the general capacity building projects,[563] nor the SOLID Project[564] dedicated to knowledge transfer on strategic race equality litigation left a lasting impact, the twinning projects targeting

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[560] See, Bea Bodrogi, Testing for Discrimination: Identifying and Prosecuting Human Rights Abuses, published by The Center for Victims of Torture New Tactics in Human Rights Project, 2003.

[561] Klára Iványi and Erika Muhi, A diszkrimináció feltárásának speciális eszköze: Tesztelés, 2006. and Erika Muhi, A tesztelés hazai és nemzetközi gyakorlata, Másság Alapítvány, NEKI 2006.

[562] Isabelle, Rorive, Proving discrimination cases: the role of Situation Testing, 2009, MPG and the Swedish Centre for Equal Rights.

[563] The EU-funded project "Capacity Building of Civil Society dealing with Anti-Discrimination" in 2005 with the aimed at training NGOs in the ten new member states, Bulgaria, Romania and Turkey on European and national anti-discrimination law and policy. The "Awareness-raising in the areas of non-discrimination and equality targeted at civil society organisations" (ART) project aimed at strengthening the capacity of NGOs working on non-discrimination and equality by developing training materials and dissemination activities for 32 countries across Europe. The project was launched in December 2010, lasted 18 months and involved EU, EEA/EFTA states Croatia, FYROM, Turkey and Serbia.

[564] Strategies on Litigation tackling Discrimination in EU Countries (SOLID) was implemented in 2005-2006 by the Northern Ireland Council for Ethnic Minorities (Lead Partner), the European Network Against Racism (Core Partner), the Public Interest Law Initiative, the European Roma Rights Centre, Interights, the Dutch National Bureau against Racial Discrimination (LBR) and the Danish Documentation and Advisory Centre on Racial Discrimination (DRC/DACoRD).

equality bodies were more adequately financed and implemented over extended periods with Western experts actually based in and collaborating with the bodies themselves.[565]

European NGOs and networks garnered relations with their CEE counterparts through the Open Society Foundations and the ERRC, whose representatives regularly attended European advocacy events. The Starting Line Group and its successor, the Migration Policy Group - a coordinator of the European Network of Legal Experts on Gender Equality and Non-discrimination (Legalnet)[566] - as well as ENAR, the European Network Against Racism collaborated with CEE agents already before accession, drawing on their litigation expertise. Neither MPG, nor ENAR litigate directly, even though both engage in legal advocacy and capacity building.[567]

3.2.2. Social entrepreneurs

Social entrepreneurs sought to influence Roma policies in their own countries, but also across the CEE. The fine line between being an interlocutor and interloper was hard to navigate for individuals - and as we will see - organisations as well. For instance, the contributions to national policy advocacy of the Project on Ethnic Relations with Gheorghe in the lead was not necessarily welcome by domestic activists. For instance, in 1999-2000, the Project on Ethnic Relations consulted the Bulgarian government on the Roma strategy proposed by a national coalition brought together by the Human Rights Project's Rumyan Roussinov. The priorities of PER's Roma experts (Gheorghe and Mirga) differed from the consensus among local leaders,[568] who called in support from the Bulgarian Helsinki Committee and the Soros Foundation to stave off external influence, demonstrating that transnational Roma representation could be problematic due to the lack of legitimacy and thorough knowledge of the national context, even when undertaken by Roma activists.

Neither this, nor other differences pierced through the apparently seamless fabric of the Transnational Roma Rights Network, however, at least not to the outside world. On the

[565] For instance, the capacities of the Hungarian Equal Treatment Authority were built by the Ludwig Boltzmann Institut für Menschenrechte in the framework of the European Commission funded Twinning Light Project conducted between February and July 2007. The project produced a Final Assessment report, Strategies report, Communication strategy report and Guidebook.
[566] Legalnet is maintained by MPG and Human European Consultancy. The former is the successor of the Starting Line Group, while the latter is managed by a former SLG member, Dutch human rights activist Marcel Zwamborn.
[567] ENAR advocates the use of litigation as a social change tool, an example of which was its involvement in the SOLID Project, in which the ERRC and Western NGOs teamed up to transfer knowledge to the CEE about strategic litigation prior to accession. Once the project ended, so did collaboration among the participating NGOs.
[568] Roussinov interview.

contrary, the increasing attention to the Roma issue from INGOs and international organisations - particularly from the Council of Europe, whose monitoring mechanisms started to build their own networks in state parties - and the involvement of a growing number of international bureaucrats detached the Network from its grassroots base, feeding it with a sense of legitimacy as an *expert advocate*, rather than an *elected representative*, an important distinction explored in Chapter VI.

OSF president Aryeh Neier and deputy Deborah Harding became kingmakers in this period, themselves key social entrepreneurs in the human rights and development worlds already before joining the Open Society Foundations. Born into a Jewish family in Poland, Neier survived the Holocaust in the United Kingdom, where his family fled from Germany. Following studies in political science at the New York University and involvement in the progressive student leadership, Neier was hired by the American Civil Liberties Union in 1963 and became its executive director in 1970. He was instrumental in shaping the ACLU agenda on free speech by defending Nazis marching on Holocaust survivors in the village of Skokie,[569] an example that played a significant role in OSF's take on Roma rights as detailed in Chapter V. In 1978, Neier co-founded Human Rights Watch and acted as its deputy director until 1993, when he transferred to OSF as its president until his retirement in 2012.

Neier was involved in appointments, but gradually, Harding assumed responsibility for human resource decisions and set the path of social entrepreneurs of the Transnational Roma Rights Network. Dr. Deborah Harding majored in applied linguistics and served in various positions within the Peace Corps in Africa from the 1970s until 1986, developing the organisation's entry into the CEE in the 1990s. Thereafter, she served as Program Officer for political development in the CEE at the German Marshall Fund until 1996 to then become OSF vice president between 1996 and 2005 in charge of the Roma portfolio. After her retirement, Harding returned to Liberia, where she focused on women's rights and the education of girls.

OSF executives and INTERIGHTS chair Anthony Lester QC, who also sat on the ERRC Board insisted on finding a highly educated and experienced native English speaker to lead the Legal Department, but the costs seemed extra-orbital. The language requirement implied that the legal director would have a common law background and Neier recommended that his former HRW intern, James A. Goldston be hired. A graduate of Columbia University and Harvard Law School and a prosecutor in the Office of the US Attorney for the Southern District of New York, Goldston was serving as director general for human rights at the OSCE Mission to

[569] Aryeh Neier, Defending My Enemy: American Nazis in Skokie, Illinois, and the Risks of Freedom, 1979.

Bosnia-Herzegovina when executive director Dimitrina Petrova's fax reached him. Goldston functioned as the ERRC's legal director between 1996 and 1999, building his own network of trusted collaborators, which proved indispensable later on, when he rose to higher positions within OSF, first as deputy director of the Budapest headquarters (2000-2004), and later, as the executive director of OSF's in-house public interest law firm, the Open Society Justice Initiative established in New York in 2003.[570]

A new generation of progressive, Europeanised Roma leaders commencing their careers within the OSF Roma structure constituted another important set of social entrepreneurs. They played an instrumental role in making desegregation into a key policy objective and spearheaded policies on school desegregation in their homelands. They could not, however, successfully step out of the "institutional" constraints of the OSF Roma structure and the Transnational Roma Rights Network, unlike their mentors, the transitional generation of progressive Roma leaders.

Rumyan Roussinov garnered a policy coalition of Bulgarian Roma leaders and kick-started NGO-lead desegregation modelled on Donka Panayotova's project in Vidin. Succeeding Rudko Kawczinsky as the executive director of OSF's Roma Participation Program, Roussinov transformed the radical ethno-nationalist direction to one based on interracial collaboration dedicated to school desegregation. In 2004, he joined the newly established Roma Education Fund as its deputy executive to then return to Sofia in 2006 for a political career with the socialists, but the witch-hunt against his program and himself ended his political ambitions and distanced him from the OSF Roma structure.

The political and legal wings' coalition between old colleagues from the Human Rights Project crystallising around desegregation profoundly impacted activists within the ERRC's advocacy and research departments, including Iulius Rostas and Viktória Mohácsi. Rostas, a Transylvanian Roma and a Gheorghe disciple with a diploma from the Central European University was instrumental in the first wave of desegregation policies in Romania and cooperated with Roussinov already before becoming RPP's deputy director. After occupying positions at the Central European University, he recently moved to Berlin to join his wife, a colleague at OSF's Human Rights Initiative/Human Rights and Governance Program.

Ágnes Daróczi's niece, journalist Viktória Mohácsi worked as a journalist for the Hungarian public television before joining the ERRC as a researcher and part-time staff for RPP.

[570] Goldston shares a passion for international criminal law with Neier and spent a year on sabbatical as a prosecutor at the International Criminal Court in The Hague.

Married to Gábor Bernáth, director of the Roma Press Center and a key background expert in the Hungarian Ministry of Education's desegregation infrastructure, Mohácsi was appointed as Ministerial Commissioner for the integration of Roma and socially impoverished children in 2003. Her iconic leadership inspired a new generation of Roma desegregation activists in Hungary. She was elected as a MEP on the Free Democrats' party list in 2005 and after her tenure, emigrated to Canada.

3.2.3. The inception, form, governance and agenda of organisations

The decade preceding EU accession witnessed the establishment of key organisations at the international level that stalled or derailed organic transnational developments, transforming cross-border exchanges into a centrally planned, top-down process.

3.*2.3.1. The crown jewel: the European Roma Rights Center*

Nominally, the European Roma Rights Center was set up by Ferenc Kőszeg, president of the Hungarian Helsinki Committee in 1996. In reality, the idea came from OSF executives supported by leading Roma activists, while the organisational concept and mission statement were developed by Dimitrina Petrova, who moved to Budapest in 1996 and was stationed at the OSF-sponsored Constitutional and Legal Policy Institute, next to the Central European University (CEU). She was promised a steady stream of funding contingent upon raising matching funds from the EU. From its inception, therefore, the ERRC was poised to attract EU funds earmarked for the CEE and redistribute them on its own terms, infusing the process with its own and its actual founder's objectives.

The ERRC was registered as a foundation under Hungarian law, with Gheorghe, Bíró, Ina Zoon, Kawczynski, a Bulgarian Roma teacher and sociologist Hristo Kyuchukov, writer Isabela Fonseca and INTERIGHTS founder and chair Anthony Lester QC. Kawczynski led the OSF Roma Participation Program at the time, while also presiding over the radical Roma National Congress established in 1992 in Germany, following his break from the International Romani Union. He welcomed the ERRC enthusiastically, but these sentiments did not endure

for long.[571] By the time the ERRC moved to its own offices in 1997, the Roma board members were dismayed by the lack of meaningful Roma participation.[572]

OSF was represented on the ERRC Board that gradually involved leading Western academics, and high ranking public officials. A board member until her retirement, OSF vice Harding helped executive director Petrova steer the organisation with an iron fist.[573] Close ties between the two organisations took various forms: sending in a management consultant and seconding an interim executive, while also involving ERRC executives in the OSF Roma structure. Close institutional ties remained even though gradually a greater portion of funding began to flow from the EU and European donors, such as the Sigrid Rausing Foundation and the Swedish International Development Agency. Upon Harding's retirement in 2005, Robert Kushen took over her function, overseeing the OSF Roma structure as a kind of "OSF Roma Plenipotentiary."

The first executive and legal directors were selected by OSF. Later, the Board made recruitment decisions with input from the OSF representative whose opinion was customarily respected. The pattern of OSF's involvement resembled the Ford Foundation's in the 1960-70s US public interest law field: setting a liberal agenda with the progressive legal elite's support to spark public policy reform through court-centered action.[574] Similar to Ford, OSF collaborated with legal idealists who shared its vision of social change. However, unlike the American Bar Association in the civil rights movement, the organised bars in the CEE did not play a part in the Roma rights movement. OSF relied on the international human rights elite to fill this gap, so that the ERRC was chaperoned by native English-speakers educated in elite Western schools, whose careers wound through INGOs, governmental appointments, academia and international organisations. From the ERRC the exit route lead to other INGOs and international organisations, away from the 'provinciality' of the CEE region.

Native English speakers steered the legal department, except for a brief period in the 2000s when Branimir Plese, a Serbian national educated in an English-speaking environment

[571] Rudko Kawczynski in Roma Rights 1997/1: Nationality: Roma Citizenship: Europe wrote: " The main problem confronting the Roma is racism. Poverty, lack of education, unemployment, and cultural deprivation are the results of society's hostility toward the Roma. As such, they are symptoms and not the core of the problem. Through active participation and civil rights work in the societies in which they live, Roma must contribute to the eradication of prejudices and stereotypes."

[572] Kyuchukov interview.

[573] Interviews with Kyuchukov and Bíró.

[574] Thomas Miguel Hilbink, *Constructing Cause Lawyering: Professionalism, Politics, & Social Change in 1960s America*, 2006, unpublished Ph.D. dissertation, NYU.

filled the position.[575] Still, education as a common law lawyer did not automatically make remarkable strategists, as will transpire in the next chapter.

The ERRC's Mission Statement underlined the importance of organising for and within, rather than *by* the Roma[576] with two-fold objectives: to defend "the human rights of the Roma" and to win "*equal access to government*, education, employment, health care, housing, *voting rights* and public services" (emphasis added).[577] The approach to using the law consisted of two, hardly reconcilable tiers that both required substantial resources, with the caveat that the Legal Defense Program response to access to justice needs of the "most deprived" promised to be far more costly than the its aspiration to drive legal reform.

As a legal service provider, the ERRC's role was conceived as controlling others, i.e. "to stimulate, sponsor (where necessary), advise and *watch the services provided by the lawyers' network*" (emphasis added). A similarly hierarchical approach was discernible as concerns planned litigation, in relation to which the ERRC staff attorneys were to be "the driving force behind (and, where possible, directly litigate in) a limited number of lawsuits of primary importance for the Roma." From this perspective, planned litigation functioned as a tool of domination and control over domestic agents and agendas. The ambitious objectives seemed practically incompatible, particularly because the ERRC began its operations with a single junior staff lawyer.

The Programs Department published a periodical, Roma Rights, an important resource before the wide availability of the internet and the establishment of Roma-specific news agencies. It also published a manual on researching Roma rights violations.[578] The Legal Department did not produce similar materials, nor did it make its legal submissions public,[579] thus manuals published by other legally-focused international (non-governmental) organisations served as the primary vehicle of practice diffusion.

While domestic Roma rights NGO staff ranged between five and ten, the ERRC employed approximately 20 full time staff and dozens of consultants and country researchers/monitors. The Legal Department was generally staffed by four-five lawyers, mainly from the East, while Programs had more Western involvement - being headed by native English speakers from

[575] He left for a registry job at the European Court of Human Rights.

[576] Mission Statement, Roma Rights, 12 October 1996. The education program was to cultivate 'a generation of educated Roma rights activists recruited from their communities'.

[577] The emphasis on voting rights conjures up analogies with the civil rights movement, but in the CEE disenfranchisement was based on exclusion from citizenship and residence, rather than voting.

[578] ERRC 2000 manual

[579] For instance, the D.H. submissions were first published on the website of the Public Interest Law Initiative.

the other side of the Atlantic most of the time. While the ERRC staff was four times the size of domestic NGOs, its budget was 8-10 fold higher, a substantial part earmarked for travel and lavish salaries that stood out even in comparison to Western NGO standards.

In 2001, the ERRC joined an INGO coalition brought together by the Migration Policy Group (MPG) to facilitate the implementation of the Racial Equality Directive and Protocol 12 ECHR. Funded by OSF, the Project Implementing European Anti-Discrimination Law ran between 2001 and 2004 and built capacities on strategic litigation against racial discrimination in the old member states and candidate countries for judges, lawyers and NGO activists.[580] It published the Strategic Litigation Manual,[581] but equally importantly, it brokered links between CEE actors and MPG, a key player in the EU equality field.[582] Lawyers from Helsinki groups later recruited for Legalnet[583] made their first contact with MPG in the framework of this project.[584]

Due to dense personal allegiances and institutional ties it seemed as if there was no boundary between the domestic Bulgarian and the international advocacy realms during the "golden age." Petrova and the ERRC's approach to Bulgarian agents was friendly and nurturing, unlike in Romania and Hungary, where domestic organisations had stabilised by the time the ERRC was established, or in Slovakia, where the ERRC sparked a volatile conflict analysed in more detail in Chapter V. In the Czech Republic, where activists and lawyers benefitted from prior collaboration with the UNHCR and the ERRC staff nurtured friendly personal relations, connections were exemplary.

3.*2.3.2. The OSF Roma structure*

The Roma issue is an important personal preoccupation of the OSF founder George Soros, predating his escape from Hungary. Nonetheless, whether official or critical, biographies[585]

[580] Implementing European Anti-Discrimination Law, ERRC press release, 10 April 2001.

[581] ERRC/Interights/MPG, Strategic Litigation of Race Discrimination in Europe: From Principles to Practice, Nottingham: Russell Press Ltd., 2004.

[582] At the time, MPG also functioned as a secretariat for the association of national equality bodies, a role that is now undertaken by EQUINET.

[583] Until 205, Legalnet reported on racial or ethnic origin, disability, age, sexual orientation and religion and belief. Gender reporting was handled independently by the Network of Independent Experts on gender equality. The two networks had to be unified as a requirement of the tendering process.

[584] Usually, as authors of the national compliance reports or speakers at seminars dedicated to strategic litigation, but some also participated in discussions on the Strategic Litigation Manual.

[585] See, for instance the "official" biography by Chuck Sudetic and George Soros. The Philanthropy of George Soros: Building Open Societies. PublicAffairs, 2011 and a recent critical account by Anna Porter, Buying a Better World: George Soros and Billionaire Philanthropy. Dundurn, 2015.

about the billionaire have not yet produced a comprehensive account of his Foundations' Roma portfolio that comprises a vast array of fields and activities from political representation to public interest litigation, and from university grants to social policy transfers, particularly in the field of education.[586]

After closing down the Soros Roma Foundation in 1995, OSF became entangled with the Roma movement beyond the wishes of Roma leaders and perhaps beyond its own expectations. In the summer of 1995, president Aryeh Neier called a meeting to the Central European University's Prague branch to discuss the concept of a Roma Legal Resource Centre, with Gheorghe and Bíró in attendance.[587]

The new structure rested on four pillars: (i) the Roma Participation Program (RPP) was dedicated to Roma political mobilisation, (ii) the Roma Education Initiative Support Program promoted ethnic identity, (iii) OSF vice Deborah Harding as focal point mainstreamed Roma issues across network programs and national Soros Foundations with the assistance of Roma Boards, while (iv) an entity with the working title Legal Resource Center for the Roma – an entity separate from OSF ostensibly to attract funding from the EU, but also as not to involve the philanthropy directly in adversarial legalism. It was named the European Roma Rights Center once Petrova got to work on it.

Beforehand, organic, project based transnationalism left the existing organisational basis intact, while OSF's involvement had a profound impact that favoured legal mobilisation particularly in international tribunals and recruited staff from domestic NGOs, presenting the dilemma of staying true to the cause and carrying on at home or moving to Budapest-based INGOs for prestigious and well-paid positions.

The Human Rights Project suffered from brain-drain particularly badly, so much so that the NGO folded in 2004. Petrova's move to Budapest in 1996 defined her colleagues' career paths, as she built a unique, symbiotic relationship with the OSF Roma structure, even though OSF formally separated itself from the ERRC. Before establishing its in-house litigation program, the Open Society Justice Initiative in 2003, OSF did not itself engage in legal action, maintaining a neutral image in order not to jeopardise Roma programs collaborating with national bureaucracies.[588]

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[586] Andrea Krizsan and Violetta Zentai. "From civil society to policy research: the case of the Soros Network and its Roma policies." *ODI-GDN Case Studies* 16 (2003).
[587] Bíró interview.
[588] Hilbink, supra, 2006.

OSF involvement in the movement's political wing was different. Having closed the Soros Roma Foundation, the philanthropy brought Roma ethno-politics within its own walls. The Roma Participation Program was set up in OSF's Budapest headquarters in 1996 under Kawczynski's tempestuous leadership. After he left and the Program operated without a director for some time, Roussinov was recruited from the Human Rights Project in 2000, with a focus on integrated education as a means of self-empowerment.[589] ERRC-bred activists collaborated with RPP, whose role in desegregation is explored in subsequent chapters.

OSF Programs and NGOs organised by OSF (DONGO) focus on the international advocacy realm, assisted by the Open Society European Policy Institute (OSEPI)[590] in Brussels, with limited transparency *vis-à-vis* domestic actors.[591] Advocacy centers on Romaphobic discrimination and (school) desegregation. A Roma rights program was never established within OSF, which is particular to this identity group. Conversely, a quintessentially political program was not established for disability, gender and LGBTQI issues, making the Roma Participation Program and its successor, the Roma Initiatives Office a unique entity within OSF.[592] Roma rights advocacy in Europe involves Roma activists and policy experts.[593]

OSF functions as a "meta-NGO" that is itself embedded in both national and international advocacy realms and replicates the work of the (I)NGOs it funds.[594] Some network programs are dedicated to the Roma cause, such as the Roma Education Support Program, RPP/RIO and the Making the Most of EU Funds for the Roma Inclusion Program.[595] Others, such as the Human Rights Initiative/Human Rights and Governance Program (HRGP), the Public Health Program and OSJI deal with Roma rights as part of their portfolio. When network

[589] Roma Participation Program Reporter, Special Desegregation Issue, August 2002 that includes Director Rumyan Russinov's address to the US Congressional Commission on Security and Cooperation in Europe.

[590] In 2014-2015 Russian hackers downloaded scores of files from a top OSF executive's laptop and made the data available on the internet. The files relating to OSEPI reveal a strong focus on the Roma both within EU social and neighbourhood policies.

[591] For instance, the Open Society European Policy Institute was registered on the EU Transparency Register for lobbyists on 21 August 2008 with the ID number 8557515321-37. Its annual budget amounts to 5,4 million Euros, of which it spends roughly 1,5 million on lobby activities. The ERRC and the European Roma Policy Coalition are not registered, but ERIO is, with a total annual budget and lobby costs of approximately 240000 Euro. The European Roma Information Office was registered on 18 May 2015, with ID number 055189017390-88.

[592] In the field of mental disability OSF has a dedicated network program that works alongside the Mental Disability Advocacy Center, an OSF DONGO.

[593] See, for instance, Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States (2013/C 378/01).

[594] Weiss and Gordenker, 1996, supra.

[595] Making the Most of EU Funds for Roma Inclusion to Conclude in 2015–16, press release, Open Society Foundations, February 6, 2015. See, for instance, Programming the Structural Funds for Roma Inclusion in 2014-20 by Angela Kóczé, Adam Kullmann, Agota Scharle, Orsolya Szendrey, Nora Teller, Viola Zentai, March 2014.

programs conduct their own projects in fields where grantees operate, they transform into grant seeking organisational units that compete with grantees for funds and recognition.

National Soros Foundations - particularly before 2012 when they "gained" financial independence[596] - operated as a transnational network of NGOs with Roma Boards and specific Roma (rights) portfolios. National foundations engaged in domestic advocacy. The Bulgarian OSF was particularly active in the Roma rights field, publishing agenda setting reports.

The working language within OSF and the regional advocacy space is English. The ERRC's working language is also English, but speaking or understanding the local languages is an asset. On the other hand, in national Roma Boards the national language was spoken.[597] The RPP organized meetings for local Roma activists in Romanes and English. RIO's official language is also English, but Romanes is seen as a plus. Presently, the overrepresentation of Roma from the former Yugoslav space in RIO's and the OSF DONGOs' leadership alleviates linguistic difficulties in everyday communication.

3.*2.3.3. Organisational succession in Bulgaria*

Bulgarian NGOs worked in symbiosis with the ERRC. Petrova marshalled ERRC resources and her contacts to make the Bulgarian Roma rights field thrive in exchange of a steady stream of cases. She raised funds from Western governments - particularly the UK. Roma dominated the Human Rights Project staff and governing structure by the second half of the 1990s, but after colleagues transferred to the ERRC and OSF, the NGO could not replace them and terminated its operations in 2004.[598]

The ERRC co-funded Romani Baht, an NGO with 11 full time staff at the height of its activities in 2001. Romani Baht was set up in 1996 to oversee foreign development projects in one of the country's biggest segregated Roma district, the 70-80,000 strong Fakulteta in Sofia. It focused on mediation; good race relations; advocacy for equal status; legal education and

[596] Christopher Stone was brought in to ensure that the "creative chaos" would transform into an explicitly stated and clear strategy to enable the smooth hand-over once George Soros is gone. David Callahan, The Givers: Wealth, Power, and Philanthropy in a New Gilded Age, Alfred A. Knopf, New York, 2017, p. 275. Stone handed in his sudden resignation in September 2017.

[597] Josip Nunev, a teacher in segregated Roma schools and later a key figure in the Bulgarian desegregation movement was a member of the first Roma Board of the Bulgarian Soros Foundation. Nunev interview.

[598] In 2004, the HRP's Board of Directors was headed by Ivanov, then ERRC staff lawyer. The members included Dimitar Georgiev, Mitio Kemalov, Dimitrina Petrova and Rumyan Russinov.

legal service provision in cases of ethnic discrimination and ill-treatment.[599] Petrova's former student, Daniela Mihaylova joined the legal team in 1998 and the all-Roma Board was established the following year.

OSF supported the NGO-led desegregation movement inspired by the Vidin project[600] and the Roussinov-led RPP funded desegregation in Fakulteta too, where 150 children participated in the program's first year.[601] They were transported to integrated schools, received school materials, food and extra tuition. Support staff supervised attendance and achievements.

Romani Baht's legal department pursued a court-centered adversarial legal strategy that was unproblematic as concerns civil rights, while disputed as concerns school desegregation. Legal action was taken against the schools refusing to admit Roma children. Romani Baht and the Bulgarian Helsinki Committee also challenged the provision that prevented Roma children from transferring to integrated schools.[602] The tension was not rooted in human rights, but a turf battle between fields of expertise and attitudes *vis-a-vis* state authorities, whereby development activists sought collaboration as compared to the legal staff's perceived adversarialism. Tension between the two was particularly salient in this country, where desegregation was project-based, therefore dependent on voluntary engagement from schools and the public administration. Romani Baht's program staff and leadership perceived litigation as undermining organisational sufficiency and legitimacy, as well as jeopardizing resources.[603]

In reality, both the program and legal departments were embedded in the communities, but one worked behind the scene, while the other went public with disputes. Conflicts were inevitable in both settings, but the program staff perceived litigation as preventing compromise

[599] It participated in the US funded cross-border program Enhancing Institutional Capacity of Central and Eastern European Roma Organizations to Provide Services to Roma Communities. NGO representatives from Bulgaria, Hungary, Poland and Slovakia visited the US to gain experience on racial justice mobilisation and share it upon return.

[600] The desegregation project turned into an after-school program by the time I visited Donka Panayotova in October 2015. Based in the city center, the walls of her office were laiden with photos with personalities, such as Deborah Harding, George Soros and World Bank executives who paid a visit before launching the Roma Education Fund. I drove her to the Roma district and its school, walled off from the rail tracks with tin panels, hoping that the rented car will not suffer a defect on the dirt roads covered in pot holes. The size of the district, the level of poverty and the imminent public health hazards came as a surprise, even though I had been well accustomed to Hungarian Roma settlements. The most shocking was, however, the presence in the middle of shacks and huts a row of villas along the well designed streets of the center. Unlike in Hungary, the local "Gypsy aristocracy", the loan sharks, drug pushers and police informers stay in the settlement, where they do not pay for utilities, just like those who cannot actually afford the charge.

[601] Bulgaria is unique in the region in terms of the size of its Roma districts, which renders community outreach easier and cheaper than anywhere else. 1.200-1.300 children belong to the catchment area of the school in Fakulteta, which is the biggest in the country. The project also sought to monitor a Dutch development program aimed at improving the physical conditions of education in Fakulteta.

[602] Article 36 of the Enforcement Rule of the Public Education Act. No reports on the outcomes could be found.

[603] Interviews with Mihaylova, Kolev and Roussinov.

and sacrificing practical results on the altar of principles and ideology. Development work seemed reconcilable with the speed and course of institutional change, while litigation demanded immediate results. The split within Romani Baht in Bulgaria led to the establishment of the Equal Opportunities Initiative Association (EOIA) in 2004 headed by Mihaylova and well connected to western donors.[604]

3.*2.3.4. Roma-dominated legal defence in Romania*

Romani Criss worked on racially motivated crimes, the repatriation of Roma migrants from the West, access to public services, health care and hate speech.[605] It provided funds for litigation and groomed young lawyers of Roma origin. Owing to Gheorghe's contacts and the momentum created by the overrepresentation of Romanian Roma among westward migrants, the organisation became an important actor in the European advocacy realm.

3.*2.3.5. "Whites" defending Roma in the Czech Republic and Slov*akia

Inspired by the Hungarian NEKI, Kesaj director Anna Koptova operated the Legal Defence Bureau for Ethnic Minorities in Slovakia between 1996 and the early 2000s.[606] Kesaj's original mission was to maintain a Roma theatre and Koptova drew on her bohemian contacts for a socially not yet accepted activity. Koptova and community organiser Miroslav Lacko became ideological plaintiffs before the CERD Committee as discussed in the next chapter.

The Czech Poradna Citizenship Counselling Center, the key NGO dealing with Roma rights due to its lawyer, Barbora Bukovska's interest was established in 1997, bringing together the staff of former citizenship projects. The organisation was not dedicated to Roma rights only, but it was the key NGO as concerns Roma rights litigation in all walks of life. Poradna introduced situation testing as a method of proof and litigated widely in the field of social rights.

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[604] For instance, the Housing Rights of the Roma Community in Bulgaria program 2006-2011 was supported by the Center for Housing Rights and Evictions - the ERRC's close collaborator - and the Association was also one of the few domestic Roma rights NGO funded by the Sigrid Rausing Trust - the ERRC's major financial contributor.

[605] According to a web search of the organisation's website on 26 April 2018 the first expert meeting on education was organised in April 1994. Criss published the first report about its activities in the field of education as early as 1995. See, Analiza Proiecte Educationale Romani Criss, 1995: Egalizarea sanselor si cresterea accesului la educatie al copiilor romi. In 2011, Criss launched a guide on public discourse concerning the Roma (Romii In Disbursal Public Romans').

[606] Aubrey McCutcheon: Eastern Europe: Funding Strategies for Public Interest Law in Transitional Societies in Many Roads To Justice: The Law-Related Work of Ford Foundation Grantees Around the World, eds. Mary McClymont and Stephen Golub, The Ford Foundation, 2000, 233-266, at pp. 252-253.

An extreme and - as it later turned out - futile reputational conflict arose in relation to the Slovakian forced sterilisation cases between the ERRC and domestic activists, culminating in the establishment of the Slovakian Poradna while also wringing a wedge between the ERRC and the Czech Poradna on account of the latter's involvement in the Slovakian developments. The ERRC experienced serious difficulties in Slovakia after the fall-out.[607]

Despite the 1992 Human Rights Watch report's focus on coercive sterilisation,[608] NGOs did not do much until 2001, when Ina Zoon and Barbora Bukovska stumbled upon an official account of the practice[609] in a Slovakian police station and went in search of Roma women subjected to sterilisation without consent.[610] Bukovska sought funding from the ERRC for legal action, but following a series of misunderstandings, ended up with a grant from the Oak Foundation and the Center for Reproductive Rights (CRR), a US based INGO that framed coercive sterilisation as gender (plus race) discrimination.[611]

In 2003, Bukovska, lawyer Vanda Durbakova and Vladislav Zamboj, a fellow Slovakian at the Czech Poradna established the Slovak Poradna, while their clients set up a self-support group.[612] They ventured into international advocacy on the side of an ERRC competitor, the Center for Reproductive Rights,[613] which met with a hostile response. The ERRC demanded[614] that the Slovakians hand over cases and when they did not budge, its researchers "fact-checked" their account. Surprised by the sudden surge of interest form the *gaje*, the Roma denied or misrepresented involvement in litigation, which was reasonable in light of a governmental campaign that sought to discredit the activists and included criminal proceedings against

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[607] For instance, former ERRC Programs director Claude Cahn who gerrymandered the Czech connection was based in the Czech Republic for years and wrote his dissertation about forced sterilisation.

[608] Tritt, supra, 1992.

[609] Bukovska was to interpret for Zoon and help with potential legal hurdles. Ina Zoon, A Call to Action to Improve Romani Access to Social Protection, Health Care, and Housing edited by Mark Norman Templeton, A report to the Open Society Institute, 2001.

[610] As Bukovska remembers, the practice was inadvertently revealed to them by a police officer. The researchers then documented a score of complaints in Zoon, I, On the margins: Roma and public services in Slovakia, Open Society Institute, 2001.

[611] Laying the ground for feminist academics and the European gender lobby has successfully instrumentalised the issue to support intersectionality in the sense of mainstreaming gender equality within anti-racist policies as well.Kristina Koldinská, Multidimensional equality in the Czech and Slovak Republics: The case of Roma women in Schiek and Chege, 2008, supra. See, also, Sandra Fredman, Intersectional discrimination in EU gender equality and non-discrimination, May 2016, European Commission.

[612] Later, this cooperation led to Poradna's representative action challenging segregation in maternity wards. The German Filia Foundation supports the women's self-help group.

[613] For an analysis of the racial discrimination claim and its rejection by the Strasbourg Court both in relation to Article 3 and 8, see, Lindsay Hoyle, V.C. v. Slovakia: a Reproductive Rights Victory Misses the Mark, 36 B. C. Int'l & Comp. L. Rev. [i] (2013).

[614] Center for Reproductive Rights and Poradna Pre Obcianske a Ludske Prava, Body and Souk Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia, (2003).

Bukovska on account of her apparently false accusations tarnishing the country's and the medical professionals' reputation.

The ERRC filed a complaint at the bar association, accusing Bukovska of solicitation,[615] involving an incident with a pram given to a client allegedly as a financial incentive to draw her into litigation. The pram enabled this mother of three to satisfy the hospital's demand for her to be physically present when making a copy of her file, therefore the disciplinary proceedings were closed without reprimand. Once the criminal case was also terminated, Bukovska left to pursue an LLM at Harvard.[616]

The Slovakian forced sterilisation complaints ended up in the Strasbourg Court, which found in favour of the women in two waves - first on account of the denial of access to medical files and later for inhuman treatment and the violation of their right to private and family life.[617] Acknowledged sporadically,[618] the Slovakian lawyers' pivotal role in giving Roma women a voice is overshadowed by INGO narratives in the international advocacy realm.[619]

In the end, the ERRC joined the CRR's campaign in the UN[620] and launched its own advocacy efforts[621] in collaboration with the Czech Poradna's competitor, the League of Human Rights in Europe. Given that the legal campaign was largely successful in the Czech

[615] For the use of champerty and solicitation against public interest lawyers see, Carol Harlow and Richard Rawlings, Pressure through law, Routledge, London, 2013.

[616] Interviews with Bukovska and Durbakova.

[617] V.C. v Slovakia, Application no. 18968/07, judgment of 8 November 2011, N.B. v Slovakia, Application no. 29518/10, judgment of 12 June 2012, I.G. and others v. Slovakia, Application no. 15966/04, judgment of 13 November 2012, and a recent case concerning compensation by a Slovak District Court (2017). The Court did not discuss anti-Roma or intersectional discrimination, even though both were raised in the original complaints.

[618] Poradna received the French Republic's human rights price in 2012, upon the nomination of the French Embassy.

[619] Elizabeth K. Tomasovic, Robbed of Reproductive Justice: The Necessity of a Global Initiative to Provide Redress
to Roma Women Coercively Sterilized in Eastern Europe, 41 Colum. Hum. Rts. L. Rev. 765 (2010), p. 768. 'This Article asserts that a joint effort of non-governmental and international organizations is the key to overcoming the barriers to achieving redress under domestic law."

[620] The mix of domestic and INGOs called for the full investigation of the claims in the CRR Report. Press Release, Center for Reproductive Rights, Human Rights Groups Call on Slovakia to Address Illegal Sterilization of Romani Women, July 22, 2003 cited in Tomasovic, 2010, supra, p. 769. fn. 21. Tomasovic intimates that the major difference between the CRR and the ERRC approaches lay in the former's push for litigation and the latter's focus on legislative amendments. According to the Slovakian lawyers, CRR's focus was international, just like the ERRC's.

[621] In 2004, it submitted a report about forced sterilisation in the Czech Republic to the UN Committee Against Torture. ERRC, UN Committee against Torture urges the Czech Republic to Investigate Alleged Coercive Sterilisation of Romani Women, 29 July 2004. It has been reporting to the CEDAW, CERD and UPR ever since. Prior to April 2018 the ERRC submitted 18 shadow reports dealing specifically with forced sterilisation, mainly on the Czech Republic and Slovakia.

Republic, the ERRC would have been left without an international case, had a fortunate event not saved the day, making the Slovak incident a futile episode developed in Chapter V.[622]

Since its establishment in 2002, the Slovak Poradňa pre občianske a ľudské práva focused on forced sterilisation and racial violence, extending its litigation portfolio to employment, service provision, education, health and housing, and becoming a leading force in the implementation and interpretation of domestic anti-discrimination law.[623]

3.*2.3.6. Interethnic activism in Hungary*

A complaint about a bar's refusal to serve a Roma man in 1996 opened NEKI's practice to discrimination challenges under civil law, an approach favoured by young staff lawyers.[624] NEKI received 100-120 complaints each year and selected approximately 15 cases for representation. Even though director Imre Furmann was adamant to maintain a lawyer network, he rarely entrusted representation to external attorneys in high profile cases. As a one-man *tour de force*, he used the Roma cause to lobby for criminal justice reform ranging from the recording of interrogations and victim rights to restitution.[625]

In 2003 the Ministry of Justice established the Roma legal aid network and recruited its initiator, Furmann to co-manage it with a public servant whom he followed to the Equal Treatment Authority, becoming its deputy president in 2005. Furmann employed Roma in administrative or assistant positions in NEKI and offered internships to Roma law students,[626]

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[622] Michaela Kopalová, Coercive Sterilisation in Czech Republic: Civil and Criminal Law Aspects, Roma Rights, 16 May 2007. Bukovska functioned as a principal for the League of Human Rights lawyers. Litigation was successful at the domestic level, except for *Maderová*, which is pending before the Strasbourg Court - the ERRC and the League submitted third party interventions. - and a 2016 complaint submitted jointly with the ERRC to the CEDAW Committee.

[623] The Slovak Poradna has published biannual reports since 2008, available on its website accessed on 19 August 2019. https://www.poradna-prava.sk/en/documents/?type=annual-reports.

[624] The Góman case was the first access to services complaint that went to judgment in the CEE. First reported in NEKI's White Booklet 1996, it ran a mini career in INGO and academic publications in the late 1990s.

[625] NEKI published a comparative report about the topic covering Austria, Romania and the Czech Republic as well. The project was financed by COLPI, the OSF funded Constitutional and Legal Policy Institute. As a result of NEKI's advocacy and the fatal Pusoma case - reported in White Booklet 1997 - the Criminal Procedure Code was amended to facilitate criminal restitution.

[626] For instance, László Fórika interned with NEKI before joining the ranks of the Minorities Ombuds. Fórika who originally trained as a teacher and played an important role in Roma summer camps - an initiative that collected promising Roma youth prior to 1989 - as well as a tutor at Romaversitas - a program initiated by Angéla Kóczé and established in collaboration with Aladár Horváth's Roma Civil Rights Foundation - became a renowned expert of segregated education. He collaborated in training programs, but also played an active role - together with various other staff members at the Minorities Ombuds - in supporting desegregation litigation in Hungary with thematic reports.

recruiting the first and last Roma staff lawyer, fresh law graduate Tímea Borovszky in 2003. The organisation never had a Roma board member.

NEKI's most important asset was its professional credibility.[627] To earn a public profile it published annual reports in Hungarian and English between 1994 and 2013.[628] Furmann published his own articles about signature cases and reform initiatives, and national newspapers printed interviews with him. Organisational and personal reputation became conflated and he vigilantly guarded both, bringing NEKI funds from home,[629] and foreign donors, such as OSF/ERRC, USAID, Western European states, the EU, the Ford Foundation, the CEE Trust, and the EEA Fund. At the height of activities in 2002, NEKI raised approximately EUR 150.000.[630] In 1996-1997, it implemented a transnational exchange project funded by the EU PHARE Program, involving Karel Holomek from the Czech Republic, the Slovakian Kesaj and a Romanian NGO.

Established at the end of 2003, the Hungarian Chance for Children Foundation (CFCF) pursued a court-centered strategy, augmenting the desegregation policies of the Liberal Democrats - holding the Ministry of Education between 2002 and 2008 - and their Roma allies.[631] The NGO was conceived by Ministerial Commissioner Viktória Mohácsi and board member András Ujlaky,[632] who had previously overseen Roma education related PHARE projects misused by schools and local governments to cement in segregation. CFCF was to counterbalance the deference of the education bureaucracy towards the enforcement of equal treatment law.[633] A "public-private" enforcement agency governed by a Roma-dominated board, CFCF enforced a court-centered strategy based on representative actions.

Funding came from OSF (Human Rights and Governance Program), following an informal pre-approval by RIO deputy Iulius Rostas, who insisted that the legal strategy be

[627] Viszló Éva, Meddig Tart A Neki? „Legfontosabb Tôkénk A Szakmai Hitelesség." in Fundamentum 1998/1-2, pp. 141-145.
[628] Reports between 1995 and 2011-2012 are available on the organisation's website, together with reports compiled to comply with statutory requirements of charities working in the public good, Közhasznúsági Jelentések 2010-2015.
[629] The Hungarian Civil Sector Fund, Hungarian Ministries, the Hungarian Lottery Fund and the Hungarian Public Fund for Roma.
[630] Révész, 2009, supra.
[631] Like Viktória Mohácsi and Judit Szira, who supported her agenda as an expert for the liberals and later, as the executive director of the Roma Education Fund. Gábor Daróczi, Mohácsi's successor worked in RPP and was a Board member at CFCF between 2013 and 2017.
[632] They met in 2002 at the CEU Roma summer school and Ujlaky was soon offered a job to oversee PHARE projects on education, which made him realise that extent to which EU funds were misused to bolster segregation.
[633] Zolnay János, „Túl Későn Jöttünk," 2016. november 3., Beszélő-beszélgetés Ujlaky Andrással az Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány (CFCF) elnökével.

complemented with community outreach.[634] Desegregation litigation commenced in 2005 and will be discussed in the following chapter. The foundation enabled the Ministry to avoid antagonising policy incentives, while the Ministerial Commissioners repeatedly used CFCF to leverage local councils into compliance. CFCF operational costs ranged between EUR 100-180.000, with HRGP's contribution stagnating at USD 100.000 per annum. Other than the executive director, the organisation employed a senior and a trainee/junior staff lawyer, three community organisers, a financial officer and a media officer (between 2012 and 2016), hosting various interns from the US and CEE countries. Ujlaky and gaje interns worked *pro bono*.

3.*2.3.7. Assessment*

The organisational structure developed vertically, rather than horizontally in the decade preceding EU accession, which put a strain on the limited pool of CEE agents, while also opening exciting career opportunities. The most significant change in the pre-accession decade resulted from OSF's intervention that brought stable financial and expert resources, but it also fundamentally reshaped the field by pulling resources to OSF that in turn prioritised legal mobilisation and legally focused NGOs, facilitating the transfer of US knowledge and discourse on race, equality and the law, and channeling (legal) action towards the Council of Europe and the EU. Monitoring bodies, particularly the newly established European ones framed the Roma issue in the language of human rights, contributing to the formation of the Transnational Roma Rights Network.

Bringing advantages as well as disadvantages, these changes opened front lines within the movement and triggered a sense of autonomy loss and brain-drain *vis-a-vis* the philanthropy and ultimately, international organisations. OSF was perceived as an interlocutor between the local and international organisations, but more critical observers perceived it as an interloper imposing itself on the genuine representatives of the cause.[635] Animosities centered on the

[634] CFCF worked with a host of community organisers. The most remarkable is Katalin Sztojka, a feminist, journalist and activist. She was a founding member of Phralipe and collaborated with the public television's Roma program. A proud ethno-nationalist, Kati has been an advocate of inclusive education, supported primarily by her *gaje* friends, a paradox so common in life. The liberal mayor of her native Kalocsa facilitated the local desegregation campaign. While collaborating with CFCF, Kati stood in trial for embezzling funds from the Austrian Holocaust Relief Fund that she was framed for by long-standing adversaries in the criminal justice system and community members who actually profited from the scheme. After she was sentenced and an organisational review by HRGP recommended otherwise, CFCF continued collaborating with Kati. Presently, her salary is raised from individual donations.

[635] Sidney G. Tarrow, Power in Movement: Social Movements and Contentious Politics, Revised and Updated Third Edition, Cambridge University Press, 2011.

European Roma Rights Center's relations with the international Roma elite on the one hand, and domestic legally focused NGOs on the other. The analytical chapters explore these dynamics in detail.

3.3. Organic transnationalism: 2007-2019

Part 3 tells the story of the period following EU accession, defined by the global economic meltdown and the upsurge of populist politics intent on dismantling the rule of law. As pre-accession scrutiny gave way to soft governance within the EU, governments in Romania, Hungary and Bulgaria antagonised societies and surrendered the economy to oligarchs, whereas in Bulgaria the state was captured by mafia-type entities even before. Befitting the EU's internal governance model in the social policy field, the Open Method of Coordination, OSF's focus shifted to policy advocacy and the ERRC succumbed to a crisis that undermined strategic legal work, particularly because it was not adjusted to the complex inter-ordinal regime governing Roma rights after accession.

Domestic NGOs responded well to new legal opportunities and community needs, but became financially unstable due to the onerous bureaucratic burden accompanying EU funds and increasingly, of OSF grants as well. Deteriorating political opportunities and decreasing financial resources impacted negatively on the organisational structure and the role of mainstream human rights NGOs became more prevalent in the Roma rights field. Shortly after the radicalising OSF Roma elite assumed leadership in the ERRC, the organisation essentially relocated to the EU advocacy hub in Brussels amidst increasing doubts about the usefulness of legal action in the context of a renewed campaign for Roma participation, grassroots mobilisation and direct action.

3.3.1. Resources

With EU membership the financial resources available to Roma NGOs increased, but access became contingent on extensive administrative capacity in terms of writing applications, administering grants, reporting to donors, finding matching funds, and pre-financing activities.[636]

[636] Buzogány, 2011, supra.

Moreover, the bulk of funding was administered by national governments intent on avoiding trouble in their backyard, therefore unwilling to fund adversarial activities, especially those challenging segregation as a form of structural inequality.[637] Calls for applications prioritised social change tools, such as reporting, training, advocacy, media work and legal aid. Public funding became nominal under authoritarian governments.

With the exception of OSF, US philanthropies left the region and years elapsed before the European Economic Area Funds (the Norwegian and Swiss grants) became available. This negatively affected Roma rights NGOs, whose small size was a shortcoming, because the same onerous administrative burdens applied to them as to resourceful (I)NGOs. EU bureaucratisation reinforced dependence on OSF that remained the only reliable donor when it came to legal mobilisation.

Following Aryeh Neier's retirement in 2012, the *modus operandi* fundamentally changed, as the new OSF executive Christopher Stone (2012-2017) centralised and streamlined both grant making and programmatic activities.[638] OSF stopped funding national foundations that used to co-finance Roma rights organisations. While centralisation made it easier to oversee the Roma portfolio, bureaucratisation meant that the discretion of grant making programs diminished, pre-approval was put in the hands of the New York office and followed a uniform process oblivious to grantee or field specificities, while OSF investment decreased to a third of the grantee's annual budget without long term commitment characteristic of Neier's era.

Even though the ERRC continued attracting substantial funds from global donors, these came with more and more strings attached. A constraint arose from the strict geographic scope of grant-based activities. OSF contributed to the core activities in a flexible manner and the ERRC easily satisfied the 1/3 requirement, but the Swedish International Development Agency (SIDA) that became the organisation's primary financial supporter after the Sigrid Rausing Fund's withdrawal around 2010 focused exclusively on the Western Balkans, Turkey and the Ukraine, which jeopardised activities in the CEE. Smaller grants supported work in the old EU.

SIDA required a transfer to result-based management (RBM), the meticulous planning and measuring of outputs (publications, court victories, etc.) and outcomes (social, attitudinal,

[637] In Romania, where Roma NGOs gained unprecedented access to EU funds, Romani Criss focused on policy advocacy and local projects. In Hungary, where CFCF raised funds from DEMNET 1 and 2 for mixed activities, the tender aimed at knowledge transfer on (legal) action for desegregation from NGOs like CFCF to local groups was withdrawn when the organisation filed a claim against the Ministry of Education that oversaw the applications in 2009. As former ERRC managing director Claude Cahn noted, "Before accession, getting funding from the UK Foreign Office was peanuts, even when we [the ERRC] took them to court in the Prague airport case, but afterwards the scene dramatically changed." Cahn interview.

[638] The East-East Network Program supporting cross-border projects closed down in 2013.

legal or policy change). The analytical chapters explore the academic debate and recent attempts concerning the measurability of impact, so suffice it to say at this point that the transplantation of RBM consumed vast organisational resources. Whether it was beneficial for the ERRC is contestable, particularly because the tool was developed for development organisations, with which the unpredictability of legal advocacy and litigation that responds to emergencies involving multiple actors and institutions over a protracted period cannot easily be reconciled. Given that SIDA is a public agency under the scrutiny of the Swedish government and public, it requires compliance with Swedish transparency standards that are practically unimplementable in the Western Balkans. By outsourcing compliance checks to the ERRC, SIDA diminishes its own risk for breaching Swedish norms at the expense of potentially destabilising the INGO by withholding payment for invoicing defaults.

3.3.2. Social entrepreneurs

Rather than social entrepreneurs creating their own networks and organisations, the period following EU accession was dominated by actors who built careers in international (non-governmental) organisations and rather than due to their own inventions and individual achievements in programmatic work, they gained leverage as part and parcel of a global funder, the Open Society Foundations. Maneuvering during internal intrigue required an entirely different skill set than scoring results ‘in the real world’.

Upon Harding’s retirement in 2006, the Roma Participation Program was reorganised into the Roma Initiatives Office with the mission to mainstream Roma issues not only in the OSF Roma structure, but also within OSF proper. Since 2012 RIO has represented OSF in the Roma DONGOs, the CEU’s Roma Access Program and Romani Studies Department.

Zeljko Jovanovic, a Roma man from Serbia came to lead RIO around this time. Following his engagement in the youth movement opposing the Milosevic regime, Jovanovic earnt a degree in law, but never practiced as a lawyer. After managing projects for a Christian aid organisation, he moved to the OSCE, where Nicolae Gheorghe became his mentor. He left for the highest ranking Roma executive position in OSF. Jovanovic selected several of his colleagues from the former Yugoslavia, endorsing a Macedonian Roma candidate as the Roma Education Fund’s executive director and a Serbian Roma candidate as a co-executive for the ERRC in 2016. These appointments signaled an important change that turned the limelight from the CEE Five to the Balkans.

Harding's successor, Robert Kushen's portfolio included the Roma Initiatives Office, the Decade of Roma Inclusion, the Roma Education Fund, the ERRC, and incidentally the Mental Disability Advocacy Center too. Kushen led the ERRC out of its managerial crisis. However, unlike Harding, Kushen was retained as a consultant, rather than a core OSF staff, meaning that his remuneration was proportionate with the number of hours he spent on addressing problems that seemed rather counter-effective as far as resolving these problems.

A science major with excellent Russian language skills, Kushen worked with Neier at Human Rights Watch during the political transition and later held positions in various human rights projects in his native US. After serving as the "OSF Roma plenipotentiary" between 2006 and 2018, he went on to work for Porticus, a global donor based in the Netherlands.

Kushen's successor as president of the ERRC Board is another US citizen. An avid advocate of identity-based self-empowerment,[639] associate professor at Rutgers' Department of Women's and Gender Studies. Ethel Brooks teaches at the CEU, participates as a US delegate in OSCE Roma-themed discussions and advocates on behalf of the European Roma Institute for Arts and Culture. She is a representative of the radical Roma elite, on whose agenda self-empowerment and the reattribution of a racialised identity plays a central role. She acts as a bridge between the ERRC and RIO, but also between the OSCE and the OSF Roma structure.

3.3.3. Organisational agendas

EU accession brought new challenges to the CEE region, because it not only signaled the end of abundant pre-accession rule of law oriented funding, but also more influence in the allocation of EU funds by member states. With the accession pull gone, compliance became a matter of soft governance measures: trans-border exchanges, peer review, etc., which necessitated the realignment of NGO agendas as well.

3.3.3.1. The ERRCs crisis

[639] According to Brooks "Europe has a gadje problem" that must be fought by ending "cultural apartheid." She calls for "solidarity amongst the oppressed. We call for a renewal of blackness, for thinking about its possibilities when Romani people are taken into account. For we, too, are Black. We have varying skin tones, eye colour, hair colour and textures–but we are Black." See, Europe Is Ours: A Manifesto by Ethel Brooks, retrieved from the ERRC website on 25 January 2018.

Following founding director Petrova's farewell in 2006 the ERRC slid into a downward spiral sustained by ill-advised governance decisions and staff turnover. The founder syndrome,[640] doubting whether a non-profit can survive its creator's exit may have played a part in how events unfolded. Petrova recommended that the Board hire Vera Egenberger, a German trade union and race equality activist who left her executive position at the European Network Against Racism amidst allegations of managerial misconduct. Petrova herself was subjected to unrelenting criticism on similar accounts, which may have inspired her to overlook similar shortcomings in the hope that a seasoned activist embedded in the INGO's important advocacy space will manage the transition well. Regrettably, the new executive stayed for less than two years. Geraldine Scullion, the legal director who moved to Budapest from the Norther Irish equality body left at the same time.

Not only did the new management lack the vast expertise of its predecessors, but more importantly, the funding, legal and policy environments also changed significantly, while the ERRC's lobbying potential diminished. With EU accession, the CEE Five reached the plateau and as full-fledged members, they were no longer subject to compliance scrutiny, which now softened into policy coordination.[641] OSF invested in new Roma-themed DONGOs and initiatives dedicated to policy advocacy and knowledge transfer in key policy areas, but also to mainstreaming race equality in planning processes connected to the EU Structural Funds.[642]

Due partly to OSF's shifting priorities, the ERRC lacked a clear day-to-day direction as concerns legal activities. The deteriorating quality of legal work was not immediately noticeable, because cases filed in the "golden age" bore fruit after 2007 but following the "golden age" the ERRC never came close to the goals set in the Board-approved legal strategies.[643]

With policy advocacy at the forefront, the Programs Department gained prominence, particularly because the ERRC engaged in contract work for the EU Agency for Fundamental Rights[644] and other EU institutions. Contract work gathered the necessary information, but did

[640] Michael J Worth, Nonprofit management: Principles and practice, 2018, SAGE, p. 130.

[641] Fritz W. Scharpf, Governing in Europe: Effective and democratic? Oxford University Press, Oxford/New York, 1999.

[642] "The law, it must be recalled, does not have only one (litigation-based) trick up its sleeve, and it is perfectly capable of harnessing its normative power to establish mechanisms that respond to these needs, through the imposition of positive duties on key actors to implement proactive change in their selection criteria, or to set up institutionalized fora for negotiation between different groups." Luke Mason, The Hollow Legal Shell of European Race Discrimination Policy: The EC Race Directive, American Behavioral Scientist 53(12) 1731–1748, 2010, p. 1741.

[643] These are not public documents and the author had access to them in her capacities as an external reviewer for SIDA in 2011 and a Board member in the period 2014-2016.

[644] Fundamental Rights Agency, Comparative report on the housing conditions of Roma and Travellers in the EU, October 2009.

not leave sufficient capacity for advocacy outside the European Roma Policy Coalition. In contrast, funding for legal work substantially decreased - even though it never actually exceeded a third of the overall budget - and fund-raising tied down staff time leaving little room for knowledge transfer. Experienced staff lawyers stepped down as the Legal Department's significance decreased and legal work pursued individual interests and aptitudes even more than before. After Programs director Tara Bedard left, no senior employee remained to carry institutional memory forward and Isabela Michalache, a Romanian Roma activist groomed to become the next executive transferred abruptly to the Council of Europe.

In this context, the ERRC focused less and less on the CEE Five. In 2011 Dezideriu Gergely was hired to put the house in order, but Board overreach[645] unmitigated by the major funders curtailed his room of maneuver. In March 2014, Gergely abruptly left the ERRC and the Board stepped in to manage in the interim. Before the year was out, CFCF founding member András Ujlaky was hired to lead the INGO amidst intensifying Board involvement that practically paralysed management. After surviving an internal coup, Ujlaky was ousted at the end of 2015.[646]

The ERRC carries on with Adam Weiss at the helm since 2016. Mending fences with domestic NGOs, Weiss is the first executive from overseas to learn local languages. Between Goldston, who framed the legal strategy and the similarly ambitious Weiss, other legal directors continued in their predecessors' footsteps or worse, lacked vision, commitment or expertise.[647] Weiss brought the strategy up to date, with a focus on migration and citizenship that attract western funding and coincide with his specific interest and expertise, although peripheral to the lives of the overwhelming majority of CEE Roma.

The ERRC's budget has been kept over EURO 1,5 million per year, approximately a third of which is spent on litigation and legal advocacy.[648] Following significant changes in Hungarian charity law - requiring for instance that 2/3 of the board reside in the country - the

[645] SIDA commissioned an internal review in 2013, during which several interviewees indicated this.

[646] Unsuccessful with proposals to formalise Roma participation in the governance structure and weary of growing ethno-nationalism, I resigned.

[647] An example of which was a complaint filed with the ECtHR against UNMIK, the UN Mission in Kosovo concerning the placement of internally displaced Roma in north Mitrovica near a lead-poisoned waste land. Given that the respondent was not a state party to the Convention, the filing was misled. The former legal director, Diane Post pursued the case before the UN Human Rights Advisory Panel that found UNMIK in violation of various Convention provisions, including the right to life in N.M. and Others v. UNMIK, Case No. 26/08, Opinion of 26 February 2016.

[648] Email exchange with Adam Weiss, the only executive in the OSF Roma structure who responded to the query concerning budgetary allocations.

organisation became "Roma-led."[649] The head office relocated to Brussels in the summer of 2018, leaving a small representation in Budapest. Former board members function as a consultative body and the actual Board includes Brooks, Weiss and Djordje Jovanovic, with the latter two co-managing. The website pays particular attention to the identities of Board members, which brings out with force that for the first time in organisational history, rather than persons external to the NGO, ERRC executives make up the majority of the Board, while Roma from the CEE are underrepresented within the staff and European *gaje* are only tolerated as external experts.

3.*3.3.2. The OSF Roma structure and EU policy processes*

Around 2004, the year marking the Czech Republic, Slovakia and Hungary's accession to the EU, OSF launched promising policy initiatives. The Decade of Roma Inclusion (2005-2015) introduced an assessment process based on indicators in the care of national experts, transferring knowledge on the adoption and monitoring of action plans. The Roma Education Fund, an INGO established in cooperation with the World Bank and operational since 2004 is a focal point of policy initiatives not only for desegregation but also for early childhood and university education. REF pools Swiss, Norwegian and EU funds to run flagship projects and provide grants to Roma university students across Europe, who can also further their academic careers at the CEU's Roma Access Program and Department of Romani Studies.

The European Roma Information Office set up in collaboration with the European Commission and the Dutch government in 2003 is less visible.[650] OSF is also active in the informal coalition of NGOs created in 2008, the European Roma Policy Coalition that brings together Western and Eastern stakeholders within the EU.[651] Of all the policy oriented organisations, only REF participates in legal action as an *amicus* in international and domestic tribunals.[652]

OSF's engagement in Roma rights litigation following 2004 underwent changes as key social entrepreneurs shifted within the philanthropy and policy advocacy addressing

[649] Brooks, 2018, supra.

[650] Weiss and Gordenker (ed.), 1996, supra.

[651] ERPC is committed to improving the living conditions of Roma and to promoting Roma participation in all relevant processes affecting them. It has successfully contributed to the effective development of an EU Framework for National Roma Integration Strategies. Its membership is constituted by Amnesty International, OSF, ENAR, REF, the Fundación Secretariado Gitano, the European Roma Grassroots Organizations Network, the ERRC, ERIO, the Policy Center for Roma and Minorities and MRG.

[652] It submitted a third party intervention in the D.H. case and various Hungarian cases detailed in Chapter 3.

governmental compliance with legal standards gained more relevance. Following the establishment of the New York-based Open Society Justice Initiative led by Goldston and Kushen's involvement in the ERRC management, OSF's engagement in litigation has expanded over the years and now comprises three pillars: (i) funding domestic Roma rights organisations; (ii) acting through the ERRC as a proxy, and (iii) litigating through OSJI. The order depicts a chronological development and the growing intensity of the philanthropy's influence over international litigation. While OSF's role was limited to deciding whether to fund domestic litigating NGOs, it is involved in shaping the ERRC's legal strategy and fully controls OSJI, whose involvement partly removes Roma rights lawyering to the US, away from the political wing and CEE agents.

3.*3.3.3. Domestic Roma rights NGOs*

As the ERRC turned inwards to handle its crisis and adjust to the changing resource, political and legal environments, domestic Roma rights organisations faced new constraints from the "technically oriented day-by-day routine of managing projects" financed from EU sources but disbursed and controlled by national governments that generally favour less adversarial social change activities.[653] Litigation's deprioritisation in the member states' funding policies is not counterbalanced by the EU, even though the Racial Equality Directive's court-centered private enforcement model that cannot effectively operate without the initiative of private individuals and adequate resources is inadequate in the CEE.

National policies and funding structures fundamentally influence NGO operations, compelling a move away from (just) legally focused activities. One route is to shift to policy and development work that inevitably requires growth in terms of staff dedicated to social service provision and administration. An example is the Czech Poradna that opened local offices to provide social assistance and (legal) advice, while publishing manuals and legal commentaries on the internet. Poradna's rebranding was also necessitated by exceptionally limited legal opportunities in the Czech Republic, where public opinion is also less supportive of litigation against Romaphobic discrimination than elsewhere in the CEE.

[653] Buzogány, 2011, supra.

Funding from EU sources does not fully cover the costs of activities, so that long term engagement with communities is only an option if additional funds are made available. An example is Romani Criss that instrumentalised EU funds for policy advocacy on desegregation in education augmented with pilot desegregation projects in several localities that ultimately landed the organisation in severe financial difficulties. The requirement of "own resources" - approximately 20-30% of the EU grant - and robust administrative and financial capacities drove the organisation close to bankruptcy in 2017 and the necessity to effectively cease activities in 2019. Importantly, Criss refused to meaningfully collaborate with other NGOs and its competitive approach did not help in overcoming financial difficulties, as a result of which it lost its grip on both policy advocacy[654] and legal action.[655]

Development NGOs absorbed the greater share of Roma-related EU funds already before accession and this trend continued afterwards as well. More favourable legal opportunities in the CEE Four magnified frictions between development and human rights approaches as Romani Baht's example showed in Bulgaria. Schisms were particularly salient in school desegregation, because litigation posed an immediate threat to the *status quo*, unlike, for instance in housing, where both litigation and community work remained within the confines of segregated spaces as highlighted in the next chapter.

The Bulgarian Equal Opportunities Initiative Association sought to overcome resource shortages by engaging in development projects or litigating together with mainstream human/social rights organisations. In Slovakia, Poradna's key role in Roma rights litigation is indisputable, yet its financial stability is uncertain. The fact that the Norwegian and Swiss grants are administered by the Slovakian Soros Foundation delayed but could not avert resource shortages as far as adversarial activities are concerned.

NGO activists suffered the consequences of populism, particularly after 2010. In Hungary, (extreme) right wing politicians and a television station associated with the governing FIDESZ brought criminal (libel) and civil action against CFCF and HCLU staff speaking out against segregation.[656] In 2016, following years of verbal abuse, Krassimir Kanev, president of

[654] Dumenica interview.

[655] New initiatives pursue legal aid-type activities, funded partly by the Council of Europe's JUSTROM Project constructed and administered by Isabela Michalache. JUSTROM funding came partly from the EU and amounted to EUR one million a year. The project focused on providing legal aid to Roma women in Italy, Greece and Romania.

[656] The radical rights wing mayor of Kerepes charged CFCF president Erzsébet Mohácsi with libel but the proceedings were discontinued in 2012, while Hír TV associated with the populist party FIDESZ mounted libel cases both in criminal and civil courts against CFCF and HCLU staff, including the author over allegations of discrimination in Gyöngyöspata, a radical stronghold. See, Pesti Központi Kerületi Bíróság, 1.B.31.144/2013/7 and Kúria, Pfv.IV.21.995/2014/6.

the Bulgarian Helsinki Committee was physically attacked on the streets of Sofia on account of his human rights activism. Margarita Ilieva, BHC's legal director and a key Roma rights litigator in Bulgaria was also subjected to verbal violence on various occasions.

Changes in the public discourse dictated by extremist media outlets, endorsed by politicians in public office were more harmful, sparking a wave of anti-harassment action in Bulgaria, Romania and Hungary from the mid-2000s as chronicled in Chapter V. The media painted human rights organisations in the same corner as extremists. The Czech Republic was an exception, because majoritarian bias in that country constrained Roma-specific advocacy from the get-go.

The Hungarian Roma Civil Rights Foundation bankrupted in 2008 due to serious problems with accounting. After 2010, the government's general hostility to the civil sector and watchdog organisations hampered access to funding.[657] NEKI suspended its activities in 2015 and CFCF decided to phase out. Specialised NGOs lack the capacity to resist populist backsliding, so that Roma rights defense reverted to mainstream human rights organisations with substantial administrative and financial capacities. The Hungarian Civil Liberties Union launched a Roma Program in response to a series of Romaphobic murders in 2008-2009, mobilising resources inaccessible to minority-specific NGOs.[658]

3.*3.3.4. Transnational networking*

Following EU accession, exchanges facilitated by international organisations - focusing on their own expertise, but failing to address gaps in the interordinal legal regime - was embellished by EU networks engaging with racism and Romaphobia in general and Roma rights lawyering in particular.[659] The role of European NGOs, such as ENAR and MPG is mentioned above. ERIO and the European Roma Policy Coalition do not participate in transnational knowledge transfer when it comes to legal tools. OSF and Amnesty International collaborate on legal advocacy mostly in the framework of the *D.H.* campaign, but the two emblematic INGOs have not built a network to facilitate transnational legal exchange, even though they occasionally involve domestic NGOs and ENAR in campaign events.

[657] The Hungarian government even waged an attack on NGOs administering the Norwegian Funds in 2015 and later became subject to infringement proceedings on account of legislation curtailing the independence and activities of human rights NGOs.

[658] The Program is partly funded by the Sigrid Rausing Fund that refused to respond to the queries of other Roma rights NGOs before.

[659] The Handbook on European non-discrimination law, published jointly by the FRA and the ECtHR first in 2010 and updated in 2018 is an exception, but it still fails to properly address discrepancies between the Luxembourg and Strasbourg Court's jurisprudence.

Since its establishment in 2005, Legalnet's non-discrimination strand, in charge of monitoring compliance with the 2000 anti-discrimination directives has undertaken legal advocacy and training.[660] Legalnet is a platform of genuine and reciprocal transnational knowledge transfer. The management, the majority of national and some senior experts have NGO backgrounds and come from transnational networks, such as SLG and the Helsinki movement. Legalnet employs a ground coordinator on race/Roma.

The European Commission contracts the organisations maintaining Legalnet on the basis of public tenders every three-four years.[661] Reporting is template based and subject to approval.[662] Relations with the Commission have become more formal over the years as activist bureaucrats moved away from the field. Legalnet publishes Roma-specific thematic and *ad hoc* reports, as well as articles in its periodical, the European Anti-Discrimination Law Review. Roma rights have been the focus of ground-specific reports[663] and publications dealing with migrants and migrant integration,[664] a division that mirrors the duality of approaches to race within the EU. Attempts to combine the two strands have been made, but migrants continue to be perceived as a Western, while Roma as a fundamentally Eastern problem.[665]

Equality bodies assisted by EQUINET, the European Network of Equality Bodies exchange information about race equality and Roma rights. It is planning joint litigation, but the inter-ordinality of European anti-racist law, the fragmentation of racial(ised) communities and the state-specific enforcement powers impede transnational collaboration.[666] EQUINET seldom reaches out to Legalnet and legally focused NGOs, but its members maintain regular contacts with civil society organisations.

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[660] Council directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 , 02/12/2000 P. 0016 - 0022.

[661] The management is shared between MPG and the Human European Consultancy, a firm based in Utrecht, the Netherlands. HEC's executive director, Marcel Zwamborn was involved in the Dutch campaign for anti-racist legislation - which was somewhat separate from the SLG campaign - as head of Amnesty International's Dutch Chapter.

[662] Thematic reports require the approval of the terms of reference and questionnaires to national experts by the Commission. Before publication, the final text is reviewed by the Commission. Thematic reports are published by the European Commission, carrying a waiver as to the opinions expressed in the reports.

[663] Such as the reports on school segregation. Lilla Farkas, Segregation of Roma children in education: addressing structural discrimination through the Race Equality Directive, July 2007 and Report on discrimination of Roma children in education, November 2013.

[664] See, most recently, Olivier De Schutter, Links between migration and discrimination, European Commission, Brussels, July 2016.

[665] See, for instance, Julie Ringelheim and Nicolas Bernard, Discrimination in Housing, European Commission, Brussels, February 2013.

[666] This is equally true for equality bodies that cooperate at the EU level through an INGO, EQUINET. In November 2017 they held a seminar on strategic litigation against racial discrimination in Europe. Budapest …

Transnational Roma rights activism draws on the resources of legally focused NGOs, European networks, cross-border projects and dedicated individuals. Actors dedicated to transnational knowledge transfer tend towards INGOs, where they can build their own network. Domestic (NGO) lawyers are underrepresented in the Transnational Roma Rights Network, thus political leaders and the international legal elite - based in INGOs and international organisations - plays a part in international relations by using the law for political purposes.

In 2011, the Slovakian Poradna initiated a transnational exchange on desegregation litigation[667] excluding the ERRC and inspiring CFCF to seek financial resources for a transnational coalition. Applications with EU grant mechanisms were unsuccessful, chiefly because the Foundation's annual turnover and administrative capacities were deemed insufficient. As a last project funded by the OSF East-East Network Program under the condition of hosting a Romanian intern, CFCF published a handbook on desegregation litigation in English and national languages, following a conference at the CEU in 2013 involving the Bulgarian EOIA, the Greek Helsinki Monitor, the Slovakian Poradna, the Czech League of Human Rights, two lawyers from Romania - Legalnet expert Iustina Ionescu and equality body commissioner István Haller. Collaboration continues informally.

Romani Criss refused to engage in the CFCF-brokered transnational exchange, but shortly afterwards, a cross-border project funded by the EU was facilitated by Criss' former director Margareta Matache. The DARE-NET project (Desegregation and Action for Roma in Education Network) was based in the FXB Center for Health and Human Rights at Harvard University, where Matache works as an instructor. DARE-NET set out to create a transnational network to analyse desegregation tools and strategies in Romania, Croatia, Greece, Hungary, the Czech Republic and Bulgaria, with the ERRC as the *Hungarian* project partner. Considering how vigilantly Criss guarded the Romanian advocacy space from the ERRC, this choice seemed perplexing. On the other hand, DARE-NET was planned when former Criss lawyer, Dezideriu Gergely headed the ERRC. In the end, CFCF was subcontracted to carry out the Hungarian component and DARE-NET did not become an enduring transnational network. Its comparative study - the Matache Report - is discussed in Chapter V.

3.4. Conclusions

[667] The meeting in Kosice was financed and 'moderated' by Amnesty Slovakia.

Domestic Roma rights organisations emerged from the interethnic collaboration of dissidents, progressive young Roma intellectuals and Western human rights activists after 1989, tapping into linguistic capital and pre-existing political and academic networks. Funds came from rule of law donors and legal expertise from the Helsinki movement. Polyglot social entrepreneurs well connected to key funders played a crucial role in fledgling cross-border exchanges among legally focused NGOs. Already organised transnationally, the Roma political movement was wrought with internal conflicts that led to its fragmentation.

The legal and political fields were complex at the national level, perhaps more than at the European stage that took precedence over developments in the United Nations. The challenge in the Roma rights field came from evolving legal opportunities that facilitated, but also pulled legal action into many different directions as treaty mechanisms under the auspices of international organisations gradually became accessible. Gaje lawyers were undisputedly adequate representatives of the cause at the domestic level, but in the international advocacy space, where legal and political representation were more closely interlinked, rivalries ensued between the resource-ful European Roma Rights Center and the relatively resource-less political movement. Still, rather than the adequacy of representation by the ERRC, its accountability *vis-à-vis* the ethnic minority leaders came under scrutiny and critique.

Representation of Roma rights was transnational throughout the last thirty years but concerns about legitimacy arose during the “golden age” due to the intervention of the US-based philanthropy, the Open Society Foundations that injected its own Roma-specific organisational structure between domestic and international organisations. The European Roma Rights Center engendered an international reputation for itself and the cause at the expense of domestic agents and mutual cross-border collaboration. Simultaneously, Roma leaders within OSF competed with the ERRC for the primacy of representing the cause.

The OSF Roma structure rested on four pillars: (i) programs in charge of political mobilisation, (ii) Roma education programs, (iii) an OSF "Roma Plenipotentiary" mainstreaming Roma issues, and (iv) the ERRC, where legal mobilisation was "outsourced." Over time, OSF’s engagement in Roma rights litigation developed into a three-pronged system: (i) funding local Roma rights organisations; (ii) acting through the ERRC, and (iii) litigating *via* the Open Society Justice Initiative, whose involvement removes Roma rights lawyering from the oversight of CEE agents.

New NGOs were set up in the early 2000s, resulting from additional resources from the EU. With the expanding European monitoring mechanisms and a density of institutions, the Transnational Roma Rights Network developed more dynamically than the movement’s

grassroots basis. Monopoly in the international advocacy space, geographic expansion and stable resources from global donors enabled the ERRC to retain a dominant position.

The period following EU accession was defined by the global economic meltdown and increasing populism intent to dismantle the institutional basis of the rule of law - except in the Czech Republic, a reluctant reformer from the get-go. In the wake of the ERRC's crisis triggered by the EU's changing role, genuine transnational collaboration recommenced, but cumbersome access to funds destabilised domestic Roma rights NGOs. Increasing collaboration with mainstream human rights organisations supporting the movement from the background since 1989 or new funding opportunities provisionally salvaged the situation, but shortly after the radicalising OSF Roma leadership assumed control over the ERRC, the organisation relocated to Brussels amidst increasing doubts about the usefulness of litigation in the Roma rights context.

This is surprising, because litigation as a social change tool has been employed in the Roma rights field since the early days, assuming its full potential once access to international treaty mechanisms opened or as a result of domestic legal reform. Interestingly, the use of litigation by mainstream human rights organisations that often greatly impact on the Roma has not given rise to doubts, implying that the underlying issue is control over resources within the narrow confines of the Roma rights movement.

Chapter IV

Legal strategies

Chapter IV presents a transnational account of legal strategies by treating domestic and international litigation for Roma rights of equal relevance. It assesses strategies in the time frame familiar from the previous chapters with equal attention to private and public enforcement, i.e. litigation financed from private and public funds. The assessment runs along a rule of law typology that queries whether strategies address formal compliance by revising laws, strengthen key "law-related" institutions, or seek more profound and substantive change through "the deeper goal of increasing government's compliance with the law."[668]

Part 1 chronicles legal action in the early years characterised by advocacy for legal and institutional reform in the field of criminal justice. It ventures beyond the original geographic scope to capture attitudinal changes in the Strasbourg Court in response to the Traveller litigation campaign driven by complaints from the United Kingdom. Part 2 delves into the decade leading up to EU accession, highlighting the western rule of law crusaders' desire to influence legal practice by transplanting public interest litigation from common law countries, rather than to facilitate cross-border exchanges among civil law countries in the CEE. The over-transposition of EU anti-discrimination law chronicled in Chapter II increased the appetite for collective action to reform laws and spur governmental compliance, while also foregrounding the role of equality bodies in enforcing the right to equal treatment. EU accession drew to a close before the Strasbourg Court handed down its final judgment in *D.H. and Others v the Czech Republic*, the European 'precedent' on racial segregation.

EU law played a central role in the post-accession era by pulling strategies towards equal treatment arguments and increasing the significance of domestic legal action, particularly before public agencies. Part 3 showcases how these developments should have prompted INGOs to amend strategies and foster closer collaboration between the CEE locals. Due to time lags, international litigation bore fruit in this period that also witnessed the proliferation of housing challenges using the equality and civil rights frames. Given indirect access to the CJEU, Roma rights litigation could not achieve a sea change at the EU level as it did in the

[668] Carothers, 1998, supra.

Council of Europe, nonetheless (judicial) borrowing between the two international organisations meant that Strasbourg litigation did in fact impact on EU policy processes as well.

The Chapter concludes that formal compliance and institutional reform were both achieved through advocacy buttressed by legal action before domestic courts and enforcement agencies, while the Strasbourg Court was activated to leverage CEE states. Except the *D.H.* litigation, these processes were put into motion by domestic agents cognisant of the key role of national legislatures in legal reform and public agencies in spurring governmental compliance. These tendencies showcase the significance of national courts, legislatures, and the important, yet secondary function that mobilisation before international courts can play in rule of law reform.

Domestic agents lawyered for Roma rights both in legally focused NGOs and public institutions. Given that international/European political and legal opportunities were reliably friendly *vis-a-vis* the CEE Roma, domestic lawyers were poised to latch onto these, just like their international colleagues. However, in view of their positionality, they needed to gain traction and accountability at home that divested significant resources from international litigation. Domestic lawyers used international tribunals when political and legal opportunities closed off at the national level, starting with the Traveller litigation campaign and continuing with challenges against the forced eviction of CEE Roma. Despite the OSF Roma structure's - and more particularly, the ERRC's - discursive focus on international strategies, the *modus operandi* seldom changed and when it did, it sought to accelerate or avoid the domestic litigation phase.

Domestic lawyers participated in agenda setting and framing Roma rights claims, and in certain instances, their agendas and frames were successfully exported to the European level. Conversely, as Chapter V explores, their interpretation of European policies and jurisprudence may have differed from the international canon. International agendas and frames also gained traction at the domestic level when beneficial for national advocacy purposes. Activists and lawyers only provisionally succeeded in overcoming "the fundamental problem of leaders who refuse to be ruled by the law."[669] Nevertheless, naming and shaming in court was an indispensable element of these successes both home and away, even in situations when political opportunities were exceptionally advantageous.

4.1. Early years: 1989-1995

[669] Ibid, p. 100.

Roma rights lawyering commenced with advocacy for legal and institutional reform in the context of civilian attacks and police raids in Roma districts. NGOs reported[670] about Romaphobic violence that sent shock and tremor down the spine of Eastern Europeans sheltered behind the Iron Curtain.[671] It took time to develop international strategies first for advocacy and then litigation, and maneuver among international organisations and treaty bodies with diverse, yet overlapping mandates and varying degrees of leverage on national politics. The High Commissioner for National Minorities was surprisingly candid about the shortcomings of inter-ordinality,[672] admittedly overstepping his mandate to deal with socio-economic vulnerability, while urging cooperation among international organisations to avoid the duplication of efforts.[673]

Mass filings from the United Kingdom concerning minority-specific housing (the Traveller litigation campaign) provided a valuable opportunity for the increasingly activist Strasbourg Court to protect the newly recognised ethnic group and set the stage for Roma rights adjudication, therefore the chapter explores this litigation strand. Weak endogenous resources hampered the development of similarly robust legal and political mobilisation in the East. Domestic NGOs channeled the resources of global donors to compensate for this shortcoming by offering legal services.

4.1.1. Hate crime advocacy and legal services

Donor-funded legal services developed relatively quickly, but given the length of proceedings and bias within the criminal justice system, it took time to secure "landmark" judgments. Jurisprudential outcomes appeared after 1996 and will be dealt with in Part 2. In the early period, attention focused on the failure to recognise racial motivation and the structural shortcomings of investigating and prosecuting police ill-treatment, which seemed to disproportionately affect

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670 See, for instance, Associatia Pentru Apararea Drepturilor Omului and the Romanian Helsinki Committee (Apador), Report on the Fact-finding Mission in Bucharest and Hadareni, 1992. See, also, Annual Report of the Human Rights Project, HRP, January-December 1994. Prosecuting and Preventing Violences and Intolerance Against Romanies (Gypsies), The Case of Romanies in Romania, Fondatia Romani 'Baxt', 1994 and White Booklet, Extracts from the Documentation of the Legal Defence Bureau for National and Ethnic Minorities, NEKI, January-December 1994.

671 Amnesty International was unique in that it reported about individual incidents.Amnesty International opened its national offices from the late 1990s onwards. Beforehand, reporting was spearheaded by Yugoslav émigré Ivan Fiser who worked from the London-based international headquarters.

672 Roma (Gypsies) in the CSCE Region, Report of the High Commissioner on National Minorities, CSCE Communication No. 240 of 14 September 1993 and Add.1 of 17 September 1993. Press Statement, 21 September 1993, Statement of the HCNM on his study of the Roma in the CSCE region.

673 The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990 mentioned the Roma situation first. The "unequivocal condemnation" of discrimination against Roma was reiterated at Geneva and Moscow in 199l and the Helsinki Follow-up Meeting in 1992.

the Roma. The strategy was simple: report crimes and represent victims from start to finish. However, legal action alone was inadequate to address structural shortcomings, such as the lack of effective investigation, the shortcomings of victim protection, the length of pre-trial detention and torture inflicted to extract confessions.

Advocacy led to legal and institutional reform on the long run, but litigation brought to light examples of systemic shortcomings and provided ammunition for criminal justice campaigns. States began to prohibit racially motivated crimes towards the end of the decade and Strasbourg litigation contributed to improving investigation and detention practices, but police raids, racial profiling,[674] and racially motivated murders are recurring, particularly at times of social unrest. Official responses and practices have improved[675] due to multi-level strategies combining national and European campaigns, training and advocacy, in which the OSCE has played a leading role. A lesson from the 1990s is that collective legal action for damages in civil courts is a viable alternative to criminal law remedies that are hampered by the near impossibility of establishing the individual liability of perpetrators.

Roma rights advocates evinced a suspicion of ethnic discrimination from the shortcomings of criminal justice, whereas from a mainstream human rights perspective systemic problems clearly impacted on other groups as well. Helsinki groups naturally focused on law enforcement agencies - through which the communist regimes used to repress dissent - and addressed structural shortcomings more effectively on account of their broader mandate and client base, owing to which they did not need to invest in outreach, trust building or community lawyering, unlike Roma rights NGOs.

In the Czech Republic the dominant strand of litigation concerned expulsions arising from the discriminatory citizenship law that came into effect after partition from Slovakia. The legal strategy of challenging as many expulsion orders and ensuing detention as possible (mass filings) proved to be surprisingly effective, because not only did it directly increase the judges' workload, but also coincided with an international advocacy campaign and diplomatic intervention from the US inspired by concerns of the westward migration of the Roma who lost their status due to the citizenship law.

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[674] Joel Miller, Philip Gounev, András L. Pap, Dani Wagman, Anna Balogi, Tihomir Bezlov, Bori Simonovits, Lili Vargha, Racism and Police Stops: Adapting US and British Debates to Continental Europe, European Journal of Criminology, April 1, 2008.

[675] This paradigm shift was noticeable in the prosecution of racially motivated murders in 2008 and 2009 in Hungary spurred by human rights reports, including Amnesty International, Erőszakos támadások a romák ellen Magyarországon: Itt az idő a rasszista indíték kivizsgálására, 2010, Budapest. Equality bodies and courts condemned the police for racial profiling and failing to properly protect the Roma vilified by extremist groups, see for instance HCLU v Heves County Police et al, , Kúria, Pfv.IV.21.274/2016.

4.1.2. The Traveller litigation campaign

Seeking the annulment of legislation repressing the Travelling way of life, the Traveller litigation campaign opened up the Convention system to complaints under the right to private and family life (Article 8).[676] The period when the Council of Europe became a site of legal action on behalf of Travellers[677] coincided with the accession of Roma-dense CEE countries, which made this campaign relevant for the Roma. Still, the Traveller litigation campaign is an example of a missed opportunity of knowledge transfer between westerners and easterners and across generations of Roma rights lawyers.

The Travelling way of life is the centerpiece of group identity, rather than a lifestyle or a choice. In the second half of the 20th century, the United Kingdom gradually curtailed the right of Travellers and Gypsies to lawfully stop and park their Caravans. As a knock-on effect, they lost "security of tenure" and access to social services, education, etc. Adopted in 1994, the Criminal Justice and Public Order Act repealed the duty of local authorities to accommodate Travellers, nomads, Gypsies, etc. It abolished the statutory, full-scale budgetary grants for site provision, while giving wider powers to local authorities and the police to evict, effectively criminalising those unable or unwilling to find lawful halting sites.[678] Rules became stricter also in relation to self-identification, which depended on the individual's stay on sites, while planning regulation made it more cumbersome to obtain permission to buy land and park Caravans there.[679]

Gypsies and Travellers wanted back what the repressive amendments took away. The government's intention to restrict "new nomads" whose numbers increased after the 1980s and who were not members of the ethnic community exacerbated their struggle.[680] Mobilisation was driven by interracial organisations, where Travellers took care of community outreach and

[676] Prior to the 1994 legislation, complaints were found inadmissible. For instance, *Smith v UK* (1993) concerned a criminal provision, which made it an offence "for a Gypsy (but not a non-Gypsy) to camp in certain "designated" areas (unless he or she lived on a legal site). Luke Clements, Thomas, P.A, and Thomas, R. "The Rights of Minorities—A Romany Perspective." *ODIHR Bulletin* 4.4 (1996): 3-10., 1996.

[677] While in Ireland, Travellers were not recognised as an ethnic minority, they were protected under anti-discrimination law as members of the Traveller community. In the UK, Gypsies were protected under the Race Relations Act.

[678] At What Cost? The Economics of Gypsy and Traveller Encampments, Rachel Morris and Luke Clements, Policy Press, Bristol, 2002.

[679] Including a charge of ethnic cleansing, in Derek Hawes, The Gypsy and the State, Hawes and Perez (Bristol: SAUS publications 1995, cited by Wheeler, p. 235.

[680] Luke Clements, Human Rights And Gypsy Identity In British Law in Alessandro Simoni (a cura), Stato Di Diritto E Identita Ro-M, pp. 99-123., L'Harmattan, Italia.

"Traveller-friendly" lawyers provided legal expertise. The first case was filed from Ireland, where Pavee Point, established in 1985 to empower the community with the financial contribution of a religious organisation began to use a human rights frame against "racism from the majority population."[681] Domestic litigation was facilitated by a generous legal aid scheme.[682]

In the UK, litigation was based on complaints filed with the Telephone Legal Advice Service for Travellers (TLAST) based in the Cardiff Law School's Traveller Law Research Unit. The project sought to overcome access to justice obstacles that resonate in today's Roma rights context as well.[683] Due to marginalised living conditions and bias, access to legal aid was hampered as the scheme did not fund advice by telephone, nor personal visits to Caravan sites, whereas due to their underrepresentation in the official economy and high illiteracy rate, Travellers found it difficult to prove their financial means as concerns eligibility. *Pro bono* work was declining and only after 1996 did litigation benefit from the Strasbourg Court's generous legal aid scheme. Following 1996, lobbying was spearheaded by the Traveller Law Reform Coalition and the former Commission for Racial Equality's Gypsy Commissioner.[684]

Financial resources came from the Nuttfield Foundation, supplemented by the Law School and later, the Rowntree Foundation. Luke Clements, the only lawyer in an "odd mixture of teachers" was the source of legal expertise. Despite their affiliation with the human rights organisation Liberty, the group of activists was a "bit awkward," because of its strong grassroots connections. "We would attend massive demonstrations against evictions, call the press and film events" remembers Clements, who identifies as "always left of labour, definitely a socialist, but never a party member."[685]

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[681] Walsh, Jim and Sarah Craig. "Illustrative Examples of Local Partnerships." *Local Partnerships for Social Inclusion?*. Dublin, Ireland: Oak Tree Press, 1998. p. 88

[682] Pavee Point was active in the Starting Line Group and remains an active member of both the European Roma and Travellers Forum and the European Network Against Racism. Among the founders was Anastasia Crickley, who became the first executive director of the EU Monitoring Center on Racism and Xenophobia. Established in 1995, the EUMC was the forerunner of the EU Fundamental Rights Agency. Later, she served on the Committee for the Elimination of All Forms of Racial Discrimination. Legal professionals working on Travellers' rights included Mary Robinson, later UN High Commissioner for Human Rights. Luke Clements remembers collaborating with Pavee Point and Mary Robinson in the early days. Robinson represented the applicants in *X v Ireland* (1983) filed by 13 Roma on the basis of Articles 3, 8, 14 and Article 2 of Protocol 1. Clements interview.

[683] Paul Wheeler, Accessing Legal Services - Traditional Travellers in England and Wales, 1 J. C.L. 230,-245 (1996), p. 237.

[684] Thomas Acton (2005) Conflict Resolution and Criminal Justice - Sorting out Trouble, The Journal of Legal Pluralism and Unofficial Law, 37:51, 29-49.

[685] Clements interview.

TLAST started in 1995, with evictions dominating case work.[686] The service advised clients and legal practitioners and released activity reports. 64 legal professionals participated in the referral network in 1996, which was still considered inadequate. Further recruitment was planned through publications, such as "Legal Action". After operating for a year, TLAST recognised that unless legislation was amended, only "procedural access to justice" could be obtained, without substantive changes on the ground.[687]

Clements took a series of cases at the domestic level, because he "felt the way the UK was behaving was disgraceful." He was contacted by professionals and Travellers as word got out. Legal action itself was not planned or designed "but the continuous, incremental action for getting planning applications, getting access to trailer places was more effective and therefore strategic in retrospect."[688] Few challenges were victorious at the domestic level and Clements - who is still a solicitor now based with the University of Leeds and working on disability rights - believes that litigation did not have an impact beyond the 40-50 clients he directly served, not that this should be seen as negligible. Clements also collaborated with academics dealing with the Roma and advised the ERRC.[689]

Given the lack of regional norms on minority rights, the Traveller cases were framed as discrimination under Article 14 of the European Convention that prohibits unequal treatment on any ground including race, colour, language, national or social origin and association with a national minority. The Convention safeguards the right to private and family life, the provision invoked by Travellers in conjunction with the prohibition of discrimination, but discrimination can only be established if there is an arguable claim under another Convention right.

The ambivalence to minority rights[690] compounded by the difficulty to fit Travellers under the minority category and the misuse of this frame by ethnic majority Caravan dwellers hampered admissibility.[691] Prior to *Buckley v the United Kingdom* the Traveller complaints

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[686] Two Dutch complaints against eviction from mobile homes came before the Commission, both by applicants whose ethnic origin was not Traveller or Roma. *Beckers v Netherlands* (1991) and *Van De Vin v Netherlands* (1992). Clements noted that had they been filed by Roma applicants, they would have been successful. In Clements et al 1996.

[687] Wheeler, 1996, supra, p. 244.

[688] Clements was involved in political and legal action. Clements interview.

[689] Thomas Acton and Nicolae Gheorghe, Citizens of the world and nowhere: Minority, ethnic and human rights for Roma, in Guy, 2001.

[690] Clements et al, 1996, supra, p. 5. "… creation of a Sub-Committee on Minorities in 1957 and a proposal in 1959 for an additional Protocol on Minorities. Since that time the Protocol has remained on the drawing board for 37 years, with the Parliamentary Assembly becoming ever more insistent about the need for its adoption." Philip A. Thomas was Professor of Socio Legal Studies at Cardiff Law School and Director of the Traveller Research Unit.

[691] Ibid.

were found inadmissible.[692] Indeed, the great breakthrough in *Buckley* that concerned the criminalisation of the occupancy of land by English Gypsies was admissibility itself.

Even though the Council of Europe was the first international organisation to single out Roma and Travellers for attention, a quarter century passed between the adoption of its recommendation on "Gypsies and other travellers" in 1969 and the admissibility decision in *Buckley*.[693] Beforehand, individual complaints were found inadmissible by the European Commission for Human Rights, the first port of call until 1998, when the single Court was established. The Commission's test appeared "disproportionately harsh"[694] in cases preceding *Buckley*.

The European Court of Human Rights did not find a violation in *Buckley,* missing the momentum to critique discriminatory legislation that could have reverberated across Europe.[695] The Court did, however, seize the momentum to note *obiter dicta* that the *vulnerable position of Gypsies as a minority* means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.[696] In dissent, judge Lohmus observed that equal treatment in case of an ethnic minority required special measures. Judge Pettiti urged the Court to adopt a more activist approach also to alleviate the plight of Eastern Roma, while judge Repik was concerned about the message the Court's first judgment on Roma will send to the minority community.

The synchronicity of regional standard setting on minority rights, awareness of the situation of Eastern Roma and the adjudication of Traveller complaints created a fortunate constellation. Before scrutinising a single Roma complaint, the Strasbourg Court recognised the group's vulnerability. Traveller complaints provided an opportunity, but the Court's activism was also needed to make the link between the Traveller and Roma *causes* and mold the two minority groups into one legal category and reinforce an emerging political consensus. Conversely, without the accession of Roma-dense CEE states and standard setting on minority rights, the judicial recognition would have taken longer or would not have occurred.[697] Had the Traveller cases not been raising awareness and actually pending with the Court, the Roma may

[692] Buckley v the UK, report by the European Commission for Human Rights, 11 January 1995 and Buckley v. the United Kingdom, judgment of 25 September 1996,

[693] Recommendation 563 (1969) of the Consultative Assembly on the situation of Gypsies and other travellers in Europe (1969).

[694] Clements et al 1996.

[695] As noted by judge Pettiti in dissent. For an analysis, see, Nikolai Gughinski, The European Court of Human Rights Turns Down the First Case Involving a Gypsy Applicant, Roma Rights, 12 October 1996.

[696] Buckley judgment, paras 76, 80 and 84.

[697] Ireland recognised the Travellers as an ethnic group only in 2016. The point of contention had been that according to the government the Travellers were ethnically Irish.

have had to wait longer for recognition. As it is, Travellers won the battle for the whole minority group before the Roma began to use the Convention in earnest.

4.2. The “golden age”: 1996-2006

During the decade preceding EU accession, domestic NGOs continued legal service provision and designed legal strategies by utilising situation testing and constitutional complaints. Eager to build a reputation, they jealously guarded the domestic legal field, in which they held monopoly over litigation and responsibility both to the general public and Roma clients.

Conversely, the European Roma Rights Center sought to litigate in international tribunals "alone or with domestic partners". In order to mitigate dependence on domestic NGOs and expedite international adjudication, the ERRC "jump-started" cases by selecting the least effective and fastest domestic remedy in countries, where Roma rights organisations agreed to "getting to Strasbourg as soon as possible." The ERRC spearheaded the adaptation of public interest litigation in order to attract resources from global funders, but also to manage and control the Roma rights field. Public interest litigation came to signify a social change tool generating top-down structural reform, but it neither changed lawyering in the vernacular, nor yielded more impact than other tools transplanted by the locals or carried forward from the dissident movement’s reformist agenda.

4.2.1. Soldiering on

For much of the 1990s, the Czech citizenship projects were engaged with mass filings, but the adequate prosecution of racially motivated crimes was also a concern. Poradna litigated cases of discrimination in housing (access to social housing and evictions), employment and access to services, using situation testing and complaint based lawsuits. The symbol of racial exclusion and stigmatisation, the *Usti nad Labem case* concerning a wall built around the Roma district was challenged in this period, but the decade-long litigation was resolved only after EU accession.[698]

In Hungary, the Roma Civil Rights Foundation campaigned against forced evictions with the support of the Minorities Ombuds, who filed constitutional complaints against

[698] See, David M. Crowe (2008) The Roma in Post-Communist Eastern Europe: Questions of Ethnic Conflict and Ethnic Peace, Nationalities Papers, 36:3, 521-552 at p. 523.

discriminatory laws and local decrees undermining the legal protection of tenants. RCRF initiated a civil suit on behalf of Roma children in Tiszavasvári, because they were segregated from their non-Roma peers during a school leaving ceremony. Litigated by István Horváth, the son of the Hungarian Bar Association's president, the case became the first in the region to challenge segregation. The Hungarian courts upheld the claim on appeal and the Supreme Court judgment laid out why public health considerations (alleged lice infection) could not justify segregation. The judgment was published as a unified opinion, becoming a benchmark for lower courts.

Subsiding racial violence refashioned NEKI's case portfolio. Following Alemu's return from the US,[699] the organisation started to design litigation campaigns based on situation tests, involving the progressive Roma youth as ethnic minority testers in challenging access to services and employment. NEKI filed its first Strasbourg complaint concerning racially motivated torture in collaboration with INTERIGHTS in 1997,[700] followed by other cases. Importantly, during the socialist-liberal government (1994-1998) the Roma Civil Rights Foundation's housing advocacy yielded more effective remedies (eviction moratoriums and rehousing) than NEKI's legal approach.

NEKI's signature education case started in 1998 with the complaint of an incoming school director and local councillors fearful of liability arising from the outgoing mayor's complacency in the former director's grossly illegal placement practices. The *Tiszatarján case*[701] became the "Hungarian *Brown"*, providing ammunition for desegregation advocacy for some time.[702] The final judgment established the violation of human dignity under the Civil Code and ordered the payment of substantial compensation for the stigma suffered. It was an important reference for the Minorities Ombuds, whose thematic reports published regularly after 1997 cross-fertilised subsequent desegregation litigation.

Legal action was based on social science expertise. Unaware of US desegregation litigation until after filing, it summoned Gábor Havas as a witness to support the argument that segregation inflicts psychological suffering. A teacher and social scientist, Havas was

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699 Alemu interview.

700 Following an internship at INTERIGHTS, I co-drafted the complaint on the so called Benzidine case, in which Roma witnesses were tested with a cancerous substance during the investigation of a murder case. See, White Booklet 1997, NEKI, Budapest, pp. 68-72..

701 See, White Booklet 1998, Minorities Commissioner report 2004 and Dr. Farkas Lilla: Elkülönítés az oktatásban:
a törvényesség szempontjai Esélyegyenlőség – deszegregáció – integráló pedagógia: Egy stratégia elemei, Educatio Társadalmi Szolgáltató Közhasznú Társaság, 2008, pp. 41-52 .

702 Borsod-Abaúj-Zemplén Megyei Bíróság 10.P.21.080/2001-77. and Fővárosi Ítélőtábla 9.Pf.2931/2004.

researching the Roma since 1971 and his willingness to come forward on behalf of the plaintiffs was decisive in this, as well as subsequent cases. A founder of the Fund Supporting the Poor and a former liberal MP, he collaborated with progressive Roma leaders, being instrumental in the development of governmental desegregation policies, as much as in mobilising against mass evictions. Havas was not the only social scientist supporting litigation, but he was certainly the most committed and approachable.

4.2.2. The ERRC and international human rights litigation

Initially, litigation was not key to the ERRC's activities, because Petrova made report based advocacy the centerpiece of the organisational *credo*. Before the early 2000s, when litigation before the European Court of Human Rights picked up, the ERRC's reputation rested on the credibility of its advocacy papers, country and thematic reports, and the periodical Roma Rights. Staff attended a remarkable number of events to lobby and construct organisational reputation in the international advocacy arena.

Advocacy began at the Organisation for security and Cooperation in Europe in 1997 and soon embraced the UN, the Council of Europe and the EU. Reports on racial violence extended to statelessness and immigration, as well as social rights. ERRC advocacy played a part in the adoption of the CERD general recommendation on the Roma in 2000[703] and the organisation developed close working relations with monitoring bodies, such as ECRI,[704] the FCNM Advisory Committee and the Commissioner for Human Rights of the Council of Europe that all issued Roma-specific reports and/or recommendations and heavily relied on the information transmitted by the ERRC, especially during the "golden age".[705]

ERRC reports matched themes with countries, with the first report focusing on Austria and immigration practices.[706] Roma Rights took "snapshots"[707] of problems at the grassroots level and became a vehicle for agenda setting and framing. It was published in print between two-four times a year in the period 1996-2015, when it went online. Reporting and advocacy placed researcher-activists at the heart of the organisation, but did not give them a prestige

[703] CERD General Recommendation XXVII on Discrimination Against Roma adopted on 16 August 2000, A/55/18, annex V.
[704] ECRI General Policy Recommendation N°3 on combating racism and intolerance against Roma/Gypsies - adopted on 6 March 1998.
[705] Human Rights of Roma and Travellers in Europe, Council of Europe Publishing, 2012.
[706] Divide and Deport: Roma and Sinti in Austria, ERRC, Budapest, 1996.
[707] Including a section entitled Snapshots until 2007.

lawyers possessed by virtue of their monopoly over litigation and fluency in the rights language. Nonetheless, being a philosopher, not a lawyer did not prevent Petrova from engaging intimately with human rights lawyering.

The ERRC disbursed individual grants to lawyers and organisational funding to NGOs to boost international litigation. Racial violence dominated the case docket, the most horrendous incidents originating from Bulgaria and Romania, where violence claimed more lives and was less adequately handled, than elsewhere in the region. In the case dealing with the Hadareni pogrom, *Moldovan and Others and Rostas and Others v Romania*[708] the legal staff achieved important procedural victories by managing to have the applications declared admissible, given that the events predated ratification.

The most widely cited judgment was *Nachova and Others v Bulgaria*,[709] in which the chamber found that not only was the death of two Roma conscripts at the hands of the military police racially motivated, but the inadequate investigation was also tainted with racial bias. The much criticised Grand Chamber verdict in *Nachova* upheld the finding of discrimination only in the latter respect, i.e. in relation to the procedural limb of the right to life (Article 2).

Criticism has been levelled at the Strasbourg Court for its failure to recognise the racial animus as concerns Romaphobic violence.[710] The Court's jurisprudence is undoubtedly telling of the European "silence on race" according to which the Old Continent's self-professed anti-racism impedes legal action against racial bias.[711] At the same time, this approach compels national authorities to investigate and prosecute Romaphobic crimes, which is an optimal solution to ensure that the racial animus is recognised at the national level, compelling the general public to reflect on the consequences of violent racism.

4.2.2.1. From legal defence to public interest litigation: a discursive change

On a study trip to the US, Petrova familiarised herself with public interest litigation in African-American, native American and Latino organisations.[712] As the first CEE disciple, she

[708] Admissibility decision, Applications nos. 41138/98 and 64320/01 joined by Iulius Moldovan and 13 others and Octavian Rostaş and 10 others against Romania. The events inspired Toni Gatliff's film Gadjo Dilo.
[709] Grand Chamber, Nachova and Others v. Bulgaria, (Applications nos. 43577/98 and 43579/98), judgment of 6 July 2005.
[710] Mathias Möschel, Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?, Human Rights Law Review, Volume 12, Issue 3, September 2012, pp. 479–507, and Law, Lawyers and Race: Critical Race Theory from the US to Europe, Routledge, London, 2014.
[711] Alana Lentin, Europe and the silence about race, European Journal of Social Theory, 2008, 11 487.
[712] Petrova interview.

pioneered in researching the concept as an academic and made it discursively central to Roma rights. She was a critical transplanter, however, believing that the Roma cause showed more similarities with the native American, than the civil rights movement and cautioning against the use of the label 'public interest', because it was tainted during the communist era, but also because the hitherto formalistic judicial attitudes needed to change to accommodate such claims.[713] One thing was certain, however, the transplant meant something else and something more than "legal defence," i.e. legal service provision, as it was indeed used as its antidote to denote a more pro-active approach, one best described as a 'legal offensive'.[714]

The ERRC"s first regional conference was organised in Budapest in 1997 with the title "Public Interest Litigation on Roma Rights".[715] It opened with Lester's keynote speech in the CEU auditorium, focusing on the *East African Asians*, a case concerning discriminatory immigration law the then highly esteemed QC litigated before the European Commission for Human Rights. In Lester's account, the case of *de iure* discrimination against British citizens of Asian descent expelled from East Africa during decolonisation was the key precedent on the prohibition of racial discrimination and the "Article 3 argument", according to which discrimination amounted to inhuman or degrading treatment was inspired by a colleague from the US. Lester did not focus on *Buckley* and the *Belgian Linguistic* cases,[716] even though that would have greatly benefitted the locals, who did not subscribe to the Strasbourg case report series, being nonetheless in need of insights on discrimination in housing (evictions) and education, which incidentally formed the basis of complaints in these two rulings.

Local lawyers used to hearing common law-centred examples from rule of law missionaries received Lester's contribution with little enthusiasm,[717] because in their legal systems, discrimination was actionable only as a violation of human dignity under the Civil Code, if at all. They could not make a claim for equal treatment in any other way than arguing that it was "in-human" to discriminate. The Article 3 argument has resurfaced many times since, without

[713] Petrova, 1996, supra. See, also, Rekosh, Edwin. "Who defines the public interest." Public interest law strategies in Central and Eastern Europe. Columbia University Budapest Law Center (2005). Contrary to their view, lawyers litigating soon began to notice changes as Constitutional Courts were established and judicial (re)training began.

[714] The change was swift. Roma Rights, Autumn 1998 was dedicated to legal defence, but the articles in this volume advocated for something more. The editorial used the concepts "precedent" and public interest", while Goldston wrote about US public interest litigation and Plese about "creative human rights litigation."

[715] The Ford Foundation co-funded the event and their consultant, Edwin Rekosh attended it.

[716] Case "Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium" v. Belgium, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, judgment of 23 July 1968.

[717] The accounts of the human rights elite provoked similar reactions on other occasions as well, such as for instance at the Conference on Strategic Litigation organised by the European Network Against Racism in London in 2005. ENAR Strategic Litigation Conference London 17-18 December 2005, Proceedings.

success outside the context of criminal justice.[718] An important characteristic of the UK immigration campaign was that it combined legal and political tools[719] without actually reaching judgment in Strasbourg, but the focus on international litigation concealed these aspects.

The conference gathered the representatives of philanthropies and INGOs supporting the rule of law movement, who made presentations in plenary sessions and facilitated workshops. The main topic of discussion was racial violence and participants instinctively sensed the near impossibility of planning legal action when it came to criminal conduct. Most had already been engaged in legal advocacy concerning racially motivated crimes, so the international human rights elite could not contribute much to their skills in that regard. It did, however, convey the importance of Strasbourg litigation and the necessity to update terminology from "legal defence" to "public interest litigation."

4.2.2.2. *Constructing an international legal strategy*

The ERRC staff spent considerable time and resources on strategising. The extent of segregation and other forms of serious injustices was shocking both in housing and education, but the legal opportunities were rather different. While the Traveller litigation campaign[720] cautioned against housing challenges in Strasbourg, education litigation seemed promising, because the Convention categorically guaranteed the right to education (Article 2 Protocol I) and generally prohibited discrimination (Article 14). Importantly, unlike housing rights under Article 8, racial discrimination in education had never been tested before, therefore the ERRC could not only be the first to explore this territory, but also occupy and fill it with jurisprudential successes.

In the end, school desegregation and discriminatory sentencing were selected by a group including the Bulgarian Helsinki Committee's legal director Yonko Grozev, Peter Rodrigues from the Dutch Equal Treatment Commission,[721] Anthony Lester and Luke Clements from the UK, and Theodor M. Shaw from the National Association for the Advancement of Colored

[718] Mainly because the Court requires inhuman treatment to reach a certain level of severity to fall under Article 3, which Romaphobic discrimination has repeatedly been found unable to reach.
[719] John Darwin, British Decolonization since 1945: A pattern or a Puzzle? European Decolonization, Martin Thomas (ed.), 2017.
[720] Following Buckley, approximately two dozen applications were made with the Strasbourg Court, most of which were found inadmissible, however. The ERRC intervened in some of these cases that came before the Court in 2004.
[721] Rodrigues interview.

People Legal Defense Fund.[722] Discriminatory sentencing was becoming a huge controversy in the US and even though Shaw expressed his doubts about transplanting desegregation litigation - given the mixed results and the negative turn in the US Supreme Court's jurisprudence in the 1980s[723] - in the end both issues were transferred across the Atlantic to be tested on the Roma.

Lester held legal committee meetings and convened an exchange of views between the ERRC and INTERIGHTS,[724] but the legal strategy was ultimately designed by Goldston, who visited Roma rights NGOs and organised meetings to discuss the practicability of a European desegregation and a discriminatory sentencing case.[725] The meetings did not bear fruit, because domestic NGOs decided not to involve the ERRC, when the right complaints came along, leaving no other choice for the Legal Department than to pursue a strategy based on the solicitation of clients directly by the ERRC.

The ERRC's legal strategy was modelled on US litigation campaigns, namely the post-*Brown* school desegregation campaign and the discriminatory sentencing strategy epitomised by the *McKlesky* case that challenged racial bias in relation to capital punishment.[726] A European *McKlesky* did not finally materialise,[727] despite the knowledge transfer in which the LDF's African-American racial justice lawyers underwrote the ERRC's legal strategy. Brown was emulated in the Czech case known as *D.H. and Others v the Czech Republic*, or the "European Brown." The ERRC challenged racial profiling also in this country, namely in the *Prague Airport Case,* a suit launched by Czech Roma disproportionately stopped and questioned by UK

[722] Shaw's legal career began as a Trial Attorney in the Department of Justice, Civil Rights Division, where he worked from 1979 until 1982. He was the fifth Director-Counsel and President of the NAACP LDF, where he worked in various capacities over the twenty-six years. He litigated a wide range of civil rights cases in all levels. From 1982 until 1987, he directed LDF's education litigation docket. Between1990-1993, he taught at the University of Michigan Law School, where he played a key role in initiating a review of the law school's admissions practices that was upheld by the Supreme Court in 2003 in *Grutter v. Bollinger*. In 1993, he returned to LDF.

[723] Shaw interview.

[724] Interviews with Petrova and Ivanov.

[725] Other legal directors did not network so extensively. An exchange meeting was organized in 2003 by Plese in the build up to *Orsus* and another exchange between Bulgarian and Hungarian lawyers took place in 2005.

[726] James Goldston, Race Discrimination Impact Litigation in Eastern Europe - A Discussion of Legal Strategies to Confront Racial Discrimination, 1997/2, Roma Rights.

[727] Helsinki groups were actively sought out for certain Roma related projects, including the discriminatory sentencing project. See, for instance, Csorba József – Farkas Lilla – Loss Sándor – Lôrincz Veronika, A Törvény Elôtti Egyenlôség Elve a Büntetôeljárásban: Egy Kutatás Problematikája in Fundamentum 2002/1, pp. 125-136. and Lilla Farkas - Gábor Kézdi - Sándor Loss - Zsolt Zádori, A rendőrség etnikai profilalkotásának mai gyakorlata, Belügyi Szemle, 2004/2-3. The project did not result in litigation during this period. Once transferring to the Open Society Justice Initiative Goldston relaunched the project under the theme of racial profiling in selected European countries. The international precedent condemning racial profiling is not a Roma case, however.

immigration officers in the Czech capital's airport.[728] The ERRC intervened and Lester (co-)represented the clients in both cases, lending his own research facilities to the cause.

Locals were not invited to these exchange events, which may partly explain why the iconic European cases came about spontaneously. *Stoica v Romania*[729] litigated by Romani Criss concerns an attack against a Roma district by local police and racial bias in the prosecution, while *Paraskeva Todorova c Bulgarie*[730] relates to racial slur in a prosecutorial indictment. Even though the ERRC was involved in the *Stoica* litigation at the Strasbourg level, the staff has not showcased the judgment as an important precedent, while *Paraskeva* was conducted in French by a local lawyer and has gone relatively unnoticed by commentators. Rather than these 'precedents', *Williams v Spain*, a decision by the UN CERD Committee on the profiling of a naturalised African-American woman, in which the Open Society Justice Initiative acted as legal representative together with another INGO, Women's Link Worldwide has become the standard reference.[731]

Goldston's former professor and a keen observer of desegregation litigation in the CEE, Jack Greenberg headed the LDF during the period that served as a benchmark for the "European *Brown"*. Interestingly, it was *after Brown* that the NAACP Legal Defense Fund moved from complaint based litigation to a strategy that solicited individuals to come forward as plaintiffs in cases conceived in the LDF headquarters.[732] This post-*Brown* strategy was emulated by the ERRC in *D.H*. Notably, however, solicitation without some kind of signalization - a complaint or press report - was hardly ever used in national contexts, which cautions against conceiving desegregation litigation through the post-*Brown/D.H.* perspective.

Unlike in the pre-*Brown* US, segregation took many shapes and forms in the CEE and *D.H*. did not focus on the most common, i.e. physical separation between mainstream classes or schools. Challenging segregation first in special schools was a strategic choice supported by

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[728] Regina v Immigration Officer at Prague Airport ex parte ERRC, [2004] UKHL 55.. The Prague Airport Case sought the judicial review of an administrative practice and as such, could be brought by a public interest organisation. Following the adoption of an ostensibly Romaphobic scheme by the UK immigration services in 2001, the ERRC) began monitoring implementation at Prague airport, observing gross disparities between the treatment of passengers on the basis of ethnicity. "Any individual Roma was therefore 400 times more likely to be refused than a non-Roma. Liberty, the ACLU's affiliate in the UK represented the ERRC and six Roma individuals who had been refused entry clearance in a case claiming systemic discrimination. The claim was rejected by both the Administrative Court and the Court of Appeal, but the plaintiffs prevailed before the House of Lords. Enargy, Issue 15 of February 2006, pp. 21-24.

[729] Stoica v. Romania, (Application no. 42722/02), Third Section, Judgment of 4 March 2008.

[730] Affaire Paraskeva Todorova c. Bulgarie, (Requête no 37193/07), judgment of 25 March 2010.

[731] Rosalind Williams Lecraft v. Spain, Communication 1363/2005, CERD concluding observations of 19 October 2009.

[732] Jack Greenberg, Crusaders in the Courts: How a dedicated band of lawyers fought for the civil rights revolution, 1994 - Basic Books New York.

Bulgarian activists, to whom this pattern seemed peculiar, given that in Bulgaria, compulsory school districts 'did the job' without necessitating segregating practices, such as misdiagnosis, i.e. the ill-founded diagnoses of children as mentally disabled and their separation in special schools for the mentally disabled.[733] It was believed that dismantling segregation in special schools would be easier, because it would require institutional reform on a scale more manageable than the complete overhaul of enrolment rules in mainstream education.[734]

4.2.2.3. The "Czech connection"

In his study of the pre-*Brown* litigation campaign, Mark Tushnet shows that the success of test case litigation depends on a legal strategy, but more importantly, on local contacts and, as always, on luck.[735] What Thurgood Marshall's "Maryland connection" meant for the NAACP, David Chirico and Claude Cahn's "Czech connection" signified for the ERRC.[736] Chirico, a British national majoring in Czech literature and finalising his dissertation in Prague became indispensable for getting desegregation litigation off the ground. Having translated key works of contemporary Czech literature, Chirico befriended humanists, who opened the door to the dissident network, when he became the ERRC's first local monitor in 1996.

Chirico and Cahn - a historian and ERRC Program staff from the US, who relocated to Budapest after years of teaching English in Czech schools - contributed greatly to the report on segregated education in the Czech Republic.[737] Starting in 1997, their research mapped the patterns of segregation, identified a sizeable Roma community to show robust disparities, found families willing to cooperate and tested the children's intellectual abilities with the assistance of psychologists flown in from the US. Data was collected from school directors, parents, Roma leaders and experts, who were 'deposed' for a case never actually 'tried' in court in the sense that neither the plaintiffs, nor witnesses or experts were never heard by judges.

Before the report was published, Chirico returned to London, because his salary was insufficient to cover increasing living expenses.[738] He was replaced by Deborah Wintebourne, a junior lawyer, who applied to the ERRC after a short career in corporate legal practice in

[733] Interviews with Roussinov and Kanev.
[734] Interviews with Roussinov, Danova and Kanev.
[735] Tushnet, 1994, supra.
[736] This section is based on interviews with David Chirico, Deborah Winterbourne, Claude Cahn, Kumar Wishvanathan, Pavla Bouckova, Barbora Bukovska, Ina Zoon, Anna Sabatova and David Strupek.
[737] ERRC, A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech Republic, June 1999.
[738] He retrained as a barrister specialising in immigration law. Chirico interview.

London.[739] The Hungarian authorities refused to issue her a work permit, which left no other option than to deploy Winterbourne in Ostrava, a town that became the centre of pro-Roma development work after the 1997 flood and consequently, the centre of desegregation litigation.[740]

Winterbourne received help from Lubomir Zubak, a Roma activist who became dedicated to the civil rights movement whilst in exile in the US and gained recognition at home when protesting against plans to build a pig farm on the site of a Roma concentration camp.[741] He interpreted for Winterbourne and she also relied on the local contacts of Kumar Wishvanathan who was helping Roma dislocated by the flood. Moving with his Czech wife from Moscow after studying physics, Wishvanathan was teaching at an elite English language school in neighbouring Olomouc. He left for an uncertain existence in Ostrava, followed by his wife and new born son and has been working with the local community ever since, anchoring OSF activities in connection with the *D.H. campaign*.

Chirico collaborated with the Helsinki Committee, particularly with Bukovska, who became an important resource person for the ERRC and more particularly, for Goldston as she moved on to Tolerance and then Poradna.[742] On desegregation, however, their views differed, because Bukovska believed in direct action, i.e. enrolling Roma children in mainstream schools. Consequently, she referred the ERRC to David Strupek - her principal - who represented the applicants in *D.H.* While maintaining his practice in a law firm in the centre of Prague, Strupek litigated scores of cases for Poradna too.[743]

The legal strategy was geared towards the ECHR that promised political leverage, closely mirroring the 'federal court-centered' strategy pursued in *Brown*.[744] The Czech Republic became the site of litigation, because of the ERRC's excellent contacts, the lack of competing local NGOs and the willingness of Czech agents to cooperate. Czech activists successfully

[739] Winterbourne never returned to corporate practice. At the time of the interview, she was working as a counsellor on domestic violence in London. Winterbourne interview.
[740] Wishvanathan interview.
[741] Ina Zoon interview. See his obituary by Paul Polansky at http://www.irr.org.uk/news/lubomir-zubak-1957-2015/.
[742] Goldston and Bukovska first met in the CHC office, when she was on a silent strike, communicating in writing only. Goldston involved her in the discriminatory sentencing project that he carried forward when moving up the OSF structure. Zoon recalls that Bukovska was a "one of a kind" human rights lawyer in the Czech Republic, autonomous, critical and brilliant. Interviews with Ina Zoon, Chirico and Bukovska.
[743] At some point, he applied for the position of judge at the Strasbourg Court, but was not shortlisted. Strupek interview.
[744] Tushnet, 1994.

collaborated with the UNHCR before and witnessed firsthand the positive outcomes of engaging with the international human rights elite.

Foreign researchers were not blinded by the ingrained self-justificatory explanations of racial discrimination, nor yielding to the apparently benevolent professional discourse. In this sense, they did a service to the Czech Roma akin to Gunnar Myrdall and his study on "An American dilemma" in the US.[745] There was an important difference between Myrdall and the ERRC, however, because the Swedish sociologist was invited by *local* racial justice activists to help make their case at home, whereas the ERRC started litigating without a local Roma rights NGO's support or even a local organisational anchor in order to shame the Czech Republic into action before the Strasbourg Court.

The report published in 1999 brought together sociological, psychological and pedagogical data with a legal analysis vested in the stigma argument the US Supreme Court made central to *Brown*, namely that physical separation creates a feeling of inferiority in the minority race. It was different in other respects. First, it petitioned the Constitutional, then the Strasbourg Court to *find* in/direct discrimination, given that both the constitution and the European Convention had already prohibited discrimination itself. Second, it argued that segregation was the result of "administrative practices", in other words, it was structural and institutional.

The research identified children misdiagnosed and wrongfully placed in special schools, but also few who were indeed mentally disabled. The latter were kept in the case, because of the responsibility the ERRC assumed *vis-a-vis* the clients solicited to come forward against the state. *D.H.* was launched with the Czech Constitutional Court, and a year later, when the constitutional complaint failed, an application was filed with the ECtHR on behalf of 18 students seeking a finding of direct or indirect ethnic discrimination and damages in the sum of EUR 396.000.[746]

The chamber judgment delivered in 2005 found no violation, due to the lack of racist intent.[747] The lawyers decided to seek referral to the Grand Chamber and after years of silence the ERRC legal staff appeared in Ostrava to persuade the applicants to continue litigating.[748]

[745] Gunnar Myrdall, An American dilemma: The Negro Problem and Modern Democracy, 1996, New York, Routledge.
[746] Grand Chamber judgment, D.H., para. 213.
[747] Morag Goodwin, DH and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe, German Law Journal, Vol. 07 No. 04, 2006, pp. 421-431.
[748] Ivanov intervie4. Ivanov and Plese stayed in Ostrava for a week to collect power of attorney for the appeal and organize the community.

The final judgment was delivered in November 2007 and will be discussed in Part 3, given that it proceeded EU accession.

4.2.3. Transnationalism, where are you?

A striking hiatus in the ERRC Mission Statement is collaboration with the locals and the promotion of cross-border exchanges. Unilateralism, hierarchy and control were coded in the organisation's DNA, exacerbated by the executive director's style and the finance department's compliance fear when it came to satisfying contractual terms. The majority of NGOs experienced hardships in their day-to-day dealings with the ERRC, which was far from a relationship of equals.

Notwithstanding the general attitude, personal style, pre-existing connections, common language and the need for financial and legal expertise did at times counter-balance domination. Some executives cultivated good relations with trusted locals in order to build their own professional networks, which was the case, for instance, in the ERRC's second education case.

4.2.3.1. The "Yugoslav connection"

The ERRC's second desegregation case, *Oršuš and Others v Croatia*[749] has received little attention, even though it addresses a highly salient issue for racial minorities across the EU, the lack of minority language education. Plese's contacts in the former Yugoslav space were crucial[750] for collaboration with the Croatian Helsinki Committee and their volunteer lawyer, Lovorka Kusan. She represented the applicants in Croatian courts, with Plese overseeing the case from the research phase, bringing expertise from *D.H,* and the Hungarian cases he monitored at the ERRC.

"The ERRC did not invent the case, it was already on the table," Kusan recalls.[751] In 2000, Roma leaders complained to the Croatian Ombuds about segregation.[752] The Deputy Ombuds in charge of children's rights investigated the complaint, finding discrimination a year

[749] *Oršuš and Others v Croatia*, Application No.15766/03, Grand Chamber judgment of 16 March 2010.
[750] Previously, they collaborated on property and asylum issues. Kusan interview.
[751] In 1997, Lovorka Kusan was invited to a seminar organized by the ERRC in Strasbourg. Secic was the first case they cooperated on, then Orsus. Kusan first worked with Branimir Plese, then Theodoros Alexandridis. Kusan was not in direct communication with legal director Gloria Jean Garland.
[752] Vidakovic, former deputy ombuds interview.

later.[753] The Helsinki Committee conducted further research that involved experts on psychology and pedagogy. Kusan and Plese collaborated on a daily basis. He attended court hearings, read submissions, visited Roma settlements and talked to parents together with Kusan. Fearful of victimisation, not all parents joined the litigation. Their concerns proved right, when the local schools and social services began to harass those who signed on to the claim.

"We planned the case together. There were several options of remedies. We chose one that does not exist anymore: action against the abuse of public authority under the administrative procedure act, actionable in regular court. We sought a judgment establishing discrimination, providing extra Croatian lessons and mixing classes. Expertise was our common idea: we wanted to show how the children felt: the stigmatisation and moral damages and that they in fact were motivated to study as opposed to what the schools had said. We talked about *Brown* and how our case was different from *D.H.*" - says Kusan. The legal strategy had one thing in common with *D.H.*, however, namely that the ERRC wanted to jump-start the case to the Strasbourg Court and chose the domestic remedy accordingly.[754]

Proceedings before the Constitutional Court slowed down the jumpstart strategy. Filing a complaint in Strasbourg, even though the case was still pending before the Constitutional Court, was also a joint decision.[755] Plese prepared the application and sent drafts to Kusan. By the time the negative chamber judgment was delivered, he left the ERRC for a registry position at the ECtHR. The Grand Chamber judgment came out in 2010 and will be dealt with below.

*4.2.3.2. Supporting the Traveller litigation campa*ign

In order to lay the ground for the Roma related cases, the ERRC supported the Traveller litigation campaign with third party interventions. Litigation accelerated in the Strasbourg Court after *Buckley*, but the circa two dozen applications from the UK were found inadmissible with few exceptions, even though the majority became more sympathetic to the cause.[756]

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[753] Even though Roma Rights suggested that she was forced out of office, because of her involvement in this case, she had to leave, because of her findings that the confiscation of property owned by citizens of the Serbian Federal Republic was unconstitutional and should be restituted. See, Croatian Deputy Ombudsman Under Pressure for Condemning Racial Segregation in Croatian Primary Schools, 14 October 2003, Roma Rights.

[754] Branimir Pleše, Racial Segregation in Croatian Primary Schools: Romani Students Take Legal Action, 07 November 2002, Roma Rights.

[755] Municipal Court of Čakovec, judgment no.P.313/02 of 26 September 2002 and Croatian Constitutional Court, decision no.U-III/3138/2002 of 7 February 2007.

[756] In *Beard, t*he ECtHR restated *obiter dicta* that "the applicants' occupation of their caravan is an integral part of their ethnic identity." Beard v The United Kingdom, Application No. 24882/94, judgment of 18 January 2001,

While not actually finding in favour of Travellers, the Court observed that the positive obligations of states parties to enforce Convention rights require the adoption of measures that reasonably accommodate the needs of the minority group with a view to preserving its identity.[757] A growing number of judges steered adjudication towards a more robust reading of minority rights,[758] but the Court did not go as far as to impose a duty on states parties to adopt positive action measures to remedy past discrimination.[759] This would have been impossible, given that discrimination in the Traveller cases was not in fact established.

The margin of appreciation was finally curtailed in the 2004 *Connors* judgment, in which the Court held that the legislative restrictions placed on the Travelling way of life violated the right to private and family life.[760] Afterwards, however, complaints failed to pass the admissibility test and by 2007 this litigation strand teetered out. Still, the Traveller litigation campaign incrementally made a lasting impression on the Court and without a doubt paved the way for progressive jurisprudence adopted first in relation to the Roma, and subsequently to Travellers in western Europe.

4.2.3.3. Needs-based collaboration

The Slovakian Kesaj lacked legal expertise that were instead provided by the ERRC, explaining the prevalence of a "jump-start" strategy in the Slovakian cases launched in this period. Kesaj was exceptional, because not only did it mobilise the director's social capital in a multiethnic arts and culture environment, but Koptova and community organiser Miroslav Lacko became "ideological plaintiffs".[761] Other leaders did not put themselves on the frontline this way.

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para 84. In *Chapman*, the majority recognised that vulnerability resulted from an asymmetry between the situation of the Roma and Travellers as compared to ethnic majorities, which merited different treatment both in administrative practice and legislation. Chapman v the United Kingdom, Application no. 27238/95, Grand Chamber judgment of 18 January 2001, para. 96.

[757] Ibid.

[758] Luke Clements, An emerging consensus on the special needs of minorities: the lessons of Chapman v. UK, Roma Rights, 15 August 2001 and Ralph Sandland, Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights, Human Rights Law Review 8:3(2008).

[759] Claude Cahn, Towards Realising a Right to Positive Action for Roma in Europe: Connors v. UK, Roma Rights, 2005/1. pp. 13-26.

[760] Connors v. the United Kingdom, no. 66746/01, § 84, 27 May 2004.

[761] LL Jaffe, The citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, University of Pennsylvania Law Review, 1968.

Koptova and Lacko were applicants in the first two Roma cases filed with the CERD Committee. [762] Lacko tested discrimination in access to restaurant services and Koptova represented a community that suffered disparate impact on account of a municipality's discriminatory housing policies, against which the Slovak Republic failed to provide effective remedies. They were represented by the ERRC that also engaged in domestic follow-up litigation after the Koptova decision, but failed to showcase the activists contribution as the 'European Plessy and Rosa Parks' to make comparisons between the iconic figures of the civil rights and Roma rights movements.

Bulgarian NGOs worked in symbiosis with the ERRC and OSF, being the clear beneficiaries of funding opportunities and the providers of Strasbourg complaints in exchange. Romani Baht's desegregation activities financed from the 2001-2004 Godi e Romenge Project was implemented in partnership with the Human Rights Project and the UK based European Dialogue.[763] The concurrent Anti-discrimination Litigation Project involved Romani Baht, HRP, the Bulgarian Helsinki Committee and the ERRC. It was funded by the ERRC that had already launched *D.H.* in Strasbourg and *Oršuš* in Croatia. However, submissions were not shared[764] with other domestic partners of the ERRC and the Bulgarian lawyers were not connected to local lawyers litigating elsewhere.[765]

Romani Baht's Legal Department staffed by Mihaylova and part-time practitioners was assisted by an external network of lawyers, including BHC's Ilieva. Mihaylova collaborated with the Bulgarian staff in the ERRC, while being supervised by BHC legal director Grozev, who oversaw the litigation portfolio. Mihaylova was grateful for the ERRC's input on international human rights law, but "strategies for court procedures" were developed in collaboration

[762] Anna Koptova v Slovakia, CERD/C/57/D/13/1998, 1 November 2000, Communication No 13/1998 : Slovakia. CERD/C/57/D/13/1998. *Miroslav Lacko v. Slovakia*, CERD/C/59/D/11/1998, UN Committee on the Elimination of Racial Discrimination (CERD), 9 August 200.

[763] Report of the Romani Baht's Activities for the Period 2001 - 2002. Other reports are not available. It brokered an agreement with the Regional Inspectorate of Education and conducted two surveys on the educational achievements of Roma children. Furthermore, the project set up a radio station in Fakulteta's segregated school, improved the physical environment of the school, published a manual on interethnic education and provided adult schooling.

[764] "I was trying to explain domestic legislation to ERRC colleagues but not very successfully. I had the impression they wanted to go through the domestic stage as quickly as possible and get to an international forum. I had internal disagreement with this strategy: to me the domestic level is important, particularly for the clients. Otherwise, you are just using them or sometimes even generate negative impact on the clients and/or domestic organizations. First, it is not so easy to convince Bulgarian courts with international law. Second, domestic litigation is not so fast." Mihaylova interview.

[765] The ERRC organised one exchange meeting in 1999 on US desegregation litigation, but the lawyers engaged in subsequent cases did not attend this event. See, Branimir Pleše, Bringing Cases Challenging Discrimination against Romani Children in Remedial-special Schools, 15 July 1999, Roma Rights.

with the BHC, not the ERRC and led to court victories in fields covered by the Bulgarian Protection Against Discrimination Act.[766]

Roma activists initiated desegregation projects[767] and the Human Rights Project coordinated policy advocacy.[768] Given that HRP had lost its legal expertise to the ERRC by then,[769] it fell to Romani Baht to take legal action against segregation. With few exceptions, however, desegregation cases failed, due to the shortcomings of the Bulgarian provision prohibiting segregation as discussed in Chapter II.

Showing that segregation was 'forced' seemed an insurmountable challenge. In a case launched by Romani Baht and the ERRC in 2003 regarding segregation and substandard education (not accommodating the students' mother tongue), the courts ruled that the authorities did not *force* them to study in the given school.[770] Conversely, in another case, filed subsequently on behalf of the ERRC alone, the trial court found that the absence of *de facto* free choice not to study in isolation in a ghetto school constituted *compulsion* under the PADA.[771] The appeal court repealed this judgment, finding that the students suffered indirect discrimination because the school did not positively secure them an equal opportunity by disregarding their ethnic and linguistic differences. It invoked the ECtHR's *Thlimmenos judgment* to declare that different treatment was required for students situated differently.[772] Despite the negative rulings, not even cases involving individual plaintiffs were taken to Strasbourg, partly because

[766] Daniela Mihaylova, Legal Practice Under the Bulgarian Protection against Discrimination Act, 11 March 2005, Roma Rights.

[767] Donka Panayotova, (2002), 'Successful Romani School Desegregation: The Vidin Case', Roma Rights, 2002/5, Krassimir Kanev and K. Vassileva (2004), 'Local Initiatives: Desegregation in Bulgaria'. In Edwin Rekosh and Maxine Sleeper (eds.), Separate and Unequal: Combating Discrimination against Roma in Education, Budapest : PILI, and Torchin, L. (2008), Influencing Representation: Equal Access and Roma Social Inclusion, Third Text, 22 : 3.

[768] Rumyan Russinov. (2011), Segregation and the Roma, Eur. Y.B. Minority Issues 10 : 415.

[769] Ivanov was in charge of litigation in Bulgaria. James A. Goldston & Ivan Ivanov, Combating Segregation in Education through Litigation: Reflections on the Experience to Date, in Separate and Unequal: Combating Discrimination against Roma in Education, A Sourcebook, 117, 151.

[770] Romani Baht Foundation and ERRC v the 75th school Todor Kableshkov, Sofia Municipality and the Ministry of Education and Science.

[771] ERRC v Ministry of Education et al concerning the 103rd School in the segregated Filipovtsi district, Sofia District Court, judgment in case N 11630 of 2004 delivered on 22 July 2005, Panel 41. The judge reasoned that the absence of real free choice for Romani students not to study in isolation in the ghetto school constituted compulsion for purposes of the definition of segregation under PADA.

[772] Sofia City Court, judgment in case N 3139 of 2005 delivered on 27 February 2007. This was partly overturned on appeal with reference to Thlimmenos v Greece, application No, 34369/97, judgment of 6 April 2000. The Supreme Court of Cassation upheld the appeal judgment. Decision No 723 of 01.08.2008, civil case No 6402 of 2007.

by the time of judgment, the staff overseeing the project within the ERRC left and funding ran out.[773]

Information about lost cases was not disseminated[774] probably because of fear from reputational loss that compels self-censorship, which in turn impedes knowledge transfer on strategies and structural constraints, impeding planning at other times and places.[775] Another plausible explanation is the quick turn-over of the (legal) staff and the juniority of the lawyers involved, as a result of which the information could not be engraved in movement memory. In the end, the ERRC's engagement in Bulgarian litigation suggests that it is more beneficial for the cause to pursue a jump-start strategy investment-wise and at times when legal opportunities are weak.

4.2.3.4. Resisting dominant behaviour

Animosities with the ERRC concerning forced sterilisation litigation had a chilling effect on collaboration with the Slovak Poradna that undermined the flow of international complaints from this country. Developments in Slovakia had repercussions in the Czech Republic too, where the League of Human Rights became a cautious partner.[776] The Hungarian NEKI and the Roma Civil Rights Foundation grudgingly collaborated, drawing on the ERRC's resources, but otherwise trying to keep it at arm's length. Initially, Romani Criss lacked legal expertise, which is why early Romanian cases were litigated by the ERRC. The collaboration led to a fall-out, however, over the 'ownership' of reports and the division of financial resources. Between 2003 and 2011, the organisations were hardly on speaking terms.

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[773] This was the case in a civil action launched in Blagoevgrad at the instigation of Roma parents, who had witnessed the gradual withdrawal of *gaje* children from the previously mixed school. *Roma children from 1st school "Saint Kiril and Methodius" against the Blagoevgrad Municipality.* Decision No 139 of 01.12.2005 of the Blagoevgrad Regional Court in case 1154/2004, confirming a negative trial court ruling on appeal. The 1st school existed for 42 years and educated both Bulgarian and Roma children, but gradually became segregated. The Head Teacher alerted Romani Baht, petitioned the Municipality and organised "silent marches" in front of the municipality. The School Board`s president also petitioned the municipality. RBF petitioned the Ministry of Education, the regional school inspectorate and the City Council. The civil action was filed in 2004, seeking a finding against the Municipality and the City Council for ethnic segregation and an order to stop segregation and ensure integrated education. The local press and the national media were very active and regularly reported about the case. The first instance court dismissed the claim, because under the Education Act parental choice determines where the child will study, not the municipality`s action. The judgment was upheld on appeal. The courts found that the authorities had not actively segregated, nor could they curtail segregation, because the right to choose was absolute.

[774] Adél Kegye and C.rina Elena Morteanu, Handbook on Tackling the Segregation of Roma Children in Nursery and Primary Schools: From Investigation to Decision Making, Lilla Farkas (ed), CFCF, Budapest, 2013.

[775] A lesson from the Bulgarian cases is that given that NGOs as representative plaintiffs cannot qualify as applicants in Strasbourg, it is imperative to involve individuals in the proceedings as interveners, who can then pursue action before the Court.

[776] Interviews with David Zahumensky and Jiri Kopal.

The fall out can explain the relatively low volume of Strasbourg cases from Romania, whose Roma population is otherwise the most sizeable in the whole EU (approximately two million, a fifth of the total Roma population). Conversely, it may have inspired Romani Criss to pursue a legal strategy focusing on enforcement before public agencies that bear the brunt of establishing facts before decision making. This was also the time when Criss turned to development work in health care[777] and education, and began to publish annual reports and legal analysis of domestic jurisprudence, relaying best practices from the West to the Romanian legal profession.[778] It is notable that access to EU funds opened up around this time, which pulled Roma NGOs in Romania towards development work.

The consensual view in Romania is that Criss' main legacy lies in fighting Romaphobic violence and hate speech. The NGO took eight complaints before the ECtHR, including the only one in which racial discrimination concerning the substantive limb of Article 3 (racially motivated police ill-treatment) was found: *Stoica v Romania*. However, this branch of case law is little known, owing to the ERRC's tendency to highlight cases it litigated 'alone', regardless their significance for the cause.

However, Criss' legacy concerning school desegregation is also notable. The organisation filed complaints with the Romanian equality body (CNCD),[779] from 2003 onwards and given that the Anti-discrimination Ordinance did not explicitly prohibit segregation, the CNCD found that it amounted to "a severe form of discrimination."[780] Legal action focused primarily on class-level segregation without particular criteria for case selection. Romani Criss made submissions, when its project team uncovered breaches or local monitors reported anomalies.[781] Later the CNCD also responded to press reports by launching *ex officio* investigations.

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[777] The Roma health program started in 1992, according to reports on the organisation's website downloaded on 28 April 2018. Accessing health care with the assistance of health mediators serves as the backbone of the OSF Public Health Program's advocacy on Roma. See, also, Dezideriu Gergely, Mihaela- Cătălina Vicol, Interdiction of Discrimination in The European Union and the Relevance of This Principle in the Medical Practice, Romanian Journal of Bioethics, Vol. 9, No. 2, April - June 2011.

[778] The first annual report is from 2003 and legal analysis started in 2004. Dezideriu Gergely, Practici Pozitive: Jurisprudenţa internaţională privind discriminarea romilor în accesul la locuri publice - Un studiu comparativ privind cazuri de discriminare în faţa instanţelor naţionale şi internaţionale, legislaţie şi mecanisme specializate în combaterea discriminării, Bucharest, Romani Criss, year of publication not given; Roma and the Framework Convention for the Protection of National Minorities, Bucharest, Romani Criss, year not given and Respectarea drepturilor omului si protectia impetria discriminarii in Romania, Bucharest, Romani Criss, year not given.

[779] Dezideriu Gergely, Segregarea copiilor romi în sistemul educaţional românesc şi protecţia juridică împotriva discriminării, Noua Revistă de Drepturile Omului New Journal for Human Rights, 1/2009, pp. 35-56.

[780] Romani CRISS v. Cehei School. Decision no. 218/23.06.2003. See, Gabriel Andreescu, Analytical Report Phare RAXEN_Minority Education, Report on Minority Education in Romania (2004), Vienna. The CNCD emphasized that the grades obtained by the pupils could not justify segregation and issued a warning to the school to stop less favourable treatment.

[781] Kegye and Morteanu, 2013, supra.

In *Bobesti-Glina School No. 1* initiated *ex officio*, the CNCD held that *de facto* segregation amounted to unjustified direct discrimination[782] and issued an administrative warning.[783] It stated that the positive obligation to ensure compliance with the European Convention places a burden on the school leadership 'to make sure that pupils from a vulnerable ethnic group are not segregated in one classroom … it is the duty of the educational personnel to assign the children in classes without taking into consideration criteria (*such as the choice of the parents*) *which might infringe the right of the pupils*.' (emphasis added)[784] In another school in Bobesti-Glina, no violation was found, because segregation was justified by education in the minority language based on parental consent.

Hungary is the only Roma-dense CEE country where a mainstream party - the Association of Free Democrats (SZDSZ) - made desegregation part of its program during the 2002 general elections and social scientists transformed desegregation into a key building block of systemic education reform,[785] also assessing the impact of policies.[786] Experts and specialised institutions played a particularly significant role in the beginning of the Hungarian litigation project that shortly followed the final ruling in the *Tiszatarján case* discussed above.

In *Miskolc I*, a case launched in 2005, the Minorities Ombuds submitted an *amicus curiae* brief to the Debrecen Appeals Court[787] that ruled in favour of the plaintiff NGO, the Chance for Children Foundation, overturning the negative trial judgments.[788] Collaboration between the Ombuds and CFCF became regular, regardless of changes in the political context.

Resistance by domestic NGOs triggered negative reactions within the ERRC, which may explain why desegregation litigation in Romania and Hungary that began before EU

[782] It relied on the Strasbourg Court's non-discrimination jurisprudence pursuant to which less favourable treatment can be reasonably justified.

[783] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), file 22A Bis/2006, 27 August 2007, Glina segregation case.

[784] Romania, National Council for Combating Discrimination, Decision 559, file 52-2012, 12 December 2012.

[785] Zöld könyv A magyar közoktatás megújításáért, Oktatás és gyermekesély, Magyarország Holnap, szerkesztette Fazekas Károly, Köllő János és Varga Júlia, ECOSTAT, Budapest, 2008.

[786] See, for instance, Havas Gábor és Liskó Ilona, Szegregáció a roma tanulók általános iskolai oktatásában, Segregation of Roma students in primary schools, Felsőoktatási Kutatóintézet Budapest, 2005. Kézdi, Gábor; Surányi, Éva (2010) : Mintavétel és elemzési módszerek az oktatási integrációs program hatásviszgálatában, és a hatásvizsgálatból levonható következtetések, Budapest Working Papers on the Labour Market, No. BWP - 2010/2, Hungarian Academy of Sciences, Institute of Economics, Budapest. Havas Gábor és Zolnay János, Sziszifusz számvetése, Beszélű, 2011. június, 16. évfolyam 6. szám. Kertesi, Gábor; Kézdi, Gábor (2012): Ethnic segregation between Hungarian schools: Long-run trends and geographic distribution, Budapest Working Papers on the Labour Market, No. BWP - 2012/8, Hungarian Academy of Sciences, Institute of Economics, Centre for Economic and Regional Studies, Budapest and János Zolnay, Commuting to segregation: The role of pupil commuting in a Hungarian city: between school segregation and inequality in Review of Sociology 28(4): 133–151.

[787] Debrecen Appeals Court judgment no. Pf.I. 20.683/2005/7.

[788] The judgment served as reference in the applicants' submission in the D.H. appeal.

accession received little attention in its publications, similarly to the Slovakian sterilisation cases. An additional explanation is that the domestic campaigns did not tally with the ERRC's focus on misdiagnosis and a single, leading case setting the European 'precedent'. The progressive Romanian case law concerning desegregation is little known also because it emanates from a *quasi*-judicial forum whose decisions are hard to access.

Despite heroic efforts to broaden the Roma rights portfolio in Strasbourg, the "golden age" did not witness a breakthrough on racial discrimination jurisprudence, especially because in Nachova the Grand Chamber narrowed the Chamber's bold findings, establishing a violation of the general principle of equal treatment in relation to the procedural limb of the right to life (Article 2). A plethora of groundbreaking judgments were handed down by domestic courts, but the lack of genuine cross-border exchanges prevented substantial knowledge transfer. Had the ERRC invested more in nurturing organic transnationalism, the Roma rights field would have probably developed at a greater speed to the ultimate benefit of the minority communities. This scenario would have brought a greater level of recognition for domestic agents as well.

4.3. Organic transnationalism: 2007-2019

In 2006, Petrova argued for a "stronger prioritising of equality" within the human rights movement, seeking to develop the principle into a broadly construed right, without giving in to fragmentation based on grounds.[789] She left the ERRC to direct the London-based Equal Rights Trust, established with the financial support of OSF, the Ford Foundation and the British government, and involving former ERRC board members based in the UK. ERT's contribution to Roma rights has been marginal.

The ERRC did not abandon its substantive focus on anti-Gypsyism, nor did it act on the procedural implications of Petrova's vision, which would have required that complaints be channeled under Protocol 12 ECHR, the UN covenants and domestic anti-discrimination laws. The Legal Department carried on with the Strasbourg Court-centred strategy, filing complaints on Romaphobic violence from the Western Balkans and the former soviet space. It also challenged measures treating eastern Roma in the West as threats to public security (securitisation), including the Italian fingerprinting scandal disproportionately targeting immigrant Roma from

[789] Dimitrina Petrova, Implementing Anti-Discrimination Law and the Human Rights Movement, 17 Helsinki Monitor 19, 38 (2006).

the former Yugoslavia and the French expulsion campaign against Romanian Roma.[790] Collective complaints on housing rights were also launched under the European Social Charter.

Following Petrova's exit, the old staff gradually left and the ERRC succumbed to reactive legal service provision overshadowed by social policy work. In light of decreasing domination, domestic NGOs ventured more into international litigation fostered by an increased level of expertise. They supported or spearheaded desegregation and launched legal campaigns against forced eviction, hate speech and hate crimes recurring in the aftermath of the global economic crisis. Efforts made at cross-border exchanges were limited by the scarcity of funds and the dominance of the OSF Roma structure at the European level.

4.3.1. Desegregation litigation

The dominant narrative on desegregation revolves around the Grand Chamber judgment in *D.H.*, the 'European *Brown*'.[791] In reality, however, local desegregation jurisprudence preceded the final *D.H.* ruling and has been more complex than Strasbourg litigation.

4.3.1.1. Local desegregation campaigns: formal and substantive compliance

Legislative and policy developments in Romania, Hungary and Bulgaria went beyond what the Strasbourg Court settled for in the *Roma education cases.* Domestic litigation and jurisprudence are more extensive and diverse, addressing a plethora of practices and imposing remedies not available under the Convention. Several policies and projects are implemented voluntarily.

In Bulgaria, segregated schools constituted the main form of discrimination,[792] whereas in Romania and Hungary segregated classes and school buildings/annexes were equally common. Consequently, tackling misdiagnosis was not a priority in these countries, unlike in the Czech Republic and Slovakia, where every second Roma child was educated in special schools.[793]

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[790] ERRC reported on both. The Italian scandal started before the 2004 accession, triggered by domestic political processes, but at the EU level came to support securitisation.

[791] Goodwin, 2009, supra.

[792] Margarita Ilieva and Daniela Mihaylova, Court Action Against Segregated Education in Bulgaria: A Legal Effort to Win Roma Access to Equality, Roma Rights, 2004.1.

[793] The overrepresentation of children from cultural and linguistic minorities in special education is endemic worldwide and CEE is no exception, but the ratio was 'only' 25% in Hungary and less in Bulgaria and Romania. See, Julia M. White, Pittfalls and Bias: Entry testing and the overrepresentation of Romani children in special education, Roma Education Fund, April 2012. 60 percent of children in special schools in Slovakia in the 2008–

Bulgaria

The Bulgarian litigation campaign had run its course by the time adjudication in Strasbourg picked up. New cases were not filed after Romani Baht's project came to an end, and the PADA's provision prohibiting segregation stands unchallenged, even though it is in flagrant violation of international law. None of the Bulgarian cases proceeded to Strasbourg, most likely because the legal strategy failed to resolve the admissibility conundrum associated with representative standing, namely that organisational plaintiffs (NGOs) only have standing under the European Convention in matters directly affecting them. Bulgarian activists have not mobilised the equality body as concerns school desegregation, despite its beneficial interpretation and pro-Roma stance.[794] Few desegregation projects continue and the successor of Romani Baht's legal department, the Equal Opportunities Initiative Association has collaborated with activist public officials on legal and policy amendments.[795]

2009 school year were Roma. Se, Eben Friedman, E., Gallová Kriglerová, E., Kubánová, M., Slosiarik, M. School as Ghetto, Systemic Overrepresentation of Roma in Special Education in Slovakia, Roma Education Fund, September 2009 and Gallová Kriglerová, E., Gažovičová, T., Kosová, I., Disbursement of EU Funds for Projects: Increasing the Educational Level of Members of Marginalized Romani Communities from the Standpoint of (De-)Segregation of Romani Children in Education, Roma Education Fund, 2012.

[794] In a misdiagnosis case instituted *ex officio*, the Bulgarian equality ordered the Minister of Education to cease the admission of non-disabled Roma children in special schools. Decision No 80 of 16.10.2007 by PADC.

[795] Interviews with Nunev and Kolev.

Romania

Desegregation was also NGO-driven in Romania, where the Romani Criss-led coalition achieved policy change within the Ministry of Education and bridged the schism between the development and human rights frames by adopting a less contentious legal strategy mobilising the equality body. Stepping in for the unwilling and unable state structure Criss implemented programs on multi-ethnic education and launched a desegregation program, but policy diffusion and social service provision tied up resources from legal reform and legal action in court, where representative standing was not as straightforward as before the equality body, as described in Chapter II.[796]

Dezideriu Gergely, Romani Criss' home-bread lawyer was instrumental in designing this strategy. After returning from a PILNET fellowship, Gergely became an ERRC monitor and staff lawyer at Criss, publishing key texts on domestic anti-discrimination law.[797] In the period 2005-2012, he served as a councillor for the National Council for Combating Discrimination (CNCD), represented Romania in the European Commission's Governmental Expert Group on Non-discrimination and acted as President of the Expert Committee on Roma and Travellers within the Council of Europe. Between 2011 and 2014, he was the ERRC's executive director.[798]

Gergely's appointment to the equality body weakened Romani Criss' in-house legal expertise, but in turn, him and István Haller came to bolster desegregation from within the public administration. The descendant of ethnic Hungarian noble families, Haller worked as a geologist during the Ceausescu era.[799] Becoming a journalist and Roma rights activist in the early 1990s, he was instrumental in bringing justice to the victims of the Hadareni pogrom. He was elected as a councillor to the CNCD in 2002, where he still serves, having earnt a law degree in the meantime. As a child, Haller attended a segregated Roma school, a detail that sealed his dedication to integration.[800]

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[796] Criss started implementing the UNICEF promoted 'A Good Start' program in 2001-2002 and continued for over a decade, drawing funds from EU and EEA grants.

[797] Romani Criss, Implementarea legislatiei anti-discriminare in Romania: Combaterea discriminarii etnice prin proceduri judiciare, Bucharest, 2004.

[798] Another home-bred Roma lawyer, Oana Michalache left Criss to pursue a LLM at the CEU and later moved to Strasbourg to clerk at the Court.

[799] Haller interview.

[800] Deszegregációs pereskedés Közép-Európában, Farkas Lilla jogvédőkkel beszélget (Desegregation litigation, Lilla Farkas interviewing Roma rights lawyers, Fudamentum, 2013/3. p. 49-54.

Following initial difficulties,[801] the equality body's investigations improved and sanctions tightened[802] in response to a campaign led by a coalition of identity-based NGOs.[803] Investigations began to target the school inspection to enlist this field-specific body for the enforcement of anti-discrimination law, but this strategy bore fruit only in part.[804] Following 2012, when Criss' desegregation projects came to an end, complaints fizzled out. One case has been brought before civil courts by a Roma parent instrumentalised by the local establishment in a political witch-hunt.[805] In a representative action before the CNCD, brought by the Center for Advocacy and Human Rights (CADO) against the BP Hasdeu School and the Iasi School Inspectorate direct discrimination, harassment, and a violation of the general prohibition of discrimination in education and the right to dignity was established.[806] The case is presently pending judicial review.[807]

The equality body's inter-ordinal approach crafted by activist civil servants is vested in the Strasbourg Court's equality and Roma education jurisprudence, while also being cognisant of international human rights law and the interpretation of treaty bodies. Given that Romanian anti-discrimination law does not specifically prohibit segregation, the body has interpreted cases with reference to direct or indirect discrimination.[808] Normative opacity has become

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[801] In 2006, Romani Criss and Amaro Suno, filed a complaint because of class level segregation in School No. 19 Craiova. The investigation team did not hear all interested parties and the equality body found no discrimination, but following judicial review the CNCD conducted a new procedure, established discrimination and ordered the schools to desegregate.Decision No. 395 from 14.01.2008.

[802] In a case initiated *ex officio* against the Macin School in Galati County the CNCD found class level segregation and ordered the school director to terminate the breach. Decision 75/02.03.2006.

[803] Iordache and Ionescu, 2014.

[804] In Romani Criss v. Şcoala „Bogdan Petriceicu Haşdeu" and the Judeţean School Inspection in Iaşi the CNCD found segregation between school buildings and imposed a fine of EUR 668 on the school and EUR 1113 on the inspectorate. In a 2012 case, it fined the school and the inspection EUR 460 each, ordering the latter to desegregate classes and monitor the school. Decision 559, file 52-2012, 12 December 2012.

[805] In Ciurescu Pompiliu v. Daba Lenuta a teacher refused to allow a Roma student to join her classes so that she was unable to attend school for weeks and was severely traumatised. Only the interventions of the local school inspectorate and of the media normalised the situation. The father filed a criminal complaint, a torts claim under the Civil Code and a complaint with the CNCD. The Prosecutor of Strehaia levied a EUR 25 fine for abuse in service damaging the individual interest under Art. 246 of the Criminal Code. The equality body dismissed the case due to lack of sufficient evidence. In the civil case, the Strehaia Court ruled in favour of the plaintiff in January 2009, ordering the defendant together with the local school inspectorate to pay EUR 360 in moral damages. In February 2010 the Mehedinti Court of Appeal increased the award to EUR 5,000. The Court of Appeal Craiova on judicial review increased the damages to EUR 10,000. István Haller who led the equality body's investigation believes that the Roma father's complaint succeeded mainly because of the local political context, including animosities between the teacher's husband, a local politician, the local mayor and deputies.

[806] Romania, CNCD decision 769 from 7 December 2016.

[807] Court of Appeal Iasi, Administrative and Misdemeanours Section**,** Civil decision 90/2017 from 29 May 2017, *Centrul de Advocacy si Drepturile Omului* v. *Scoala Gimnaziala Bogdan Petriceicu Hasdeu and Inspectoratul Scolar Judetean Iasi.* The case is presently pending review before the High Court of Cassation and Justice.

[808] In Romani Criss v. Josika Miklos School **t**he equality body held that class level segregation constituted discrimination and ordered the school authorities to remedy it. In Romani Criss v. Auto Professional School and

problematic recently, concerning a CNCD decision that established segregation between school buildings pursuant to a complaint filed by an NGO.[809] The appeal court reviewing the decision found that the practice was reasonable and justifiable and the case is presently pending before the High Court of Cassation and Justice.

Hungary

The Chance for Children Foundation operated in an exceptionally favourable political, legal and professional environment, because Hungarian desegregation activists gained political leverage through the liberal party (SZDSZ) and constructed a strong legislative basis, while building institutions from EU funds around the Ministry of Education. Expert resources were extensive, nurtured in public institutions since the 1970s,[810] connecting to a new generation of activists under ministerial commissioner Viktória Mohácsi's iconic leadership. Nonetheless, activists have failed to trigger education-specific public enforcement, because the liberals supported decentralised governance and the local councils maintaining schools until 2011 resisted desegregation.

School building and class level segregation was established in *CFCF v Hajdúhadház,*[811] *Tiszavasvári v Equal Treatment Authority (ex parte CFCF)*[812] and *CFCF v Gyöngyöspata and Others*.[813] Damages for segregation were ordered in *Kolompár and Others v Miskolc*.[814] Inter-school segregation was established in *CFCF v Kaposvár I*[815] and *CFCF v Győr*.[816] Segregation between private and public schools was established in *CFCF and Roma Civil Rights Movement*

Romani Criss v. Sports High School direct and indirect discrimination were established, because of the segregation of Roma children in separate classes, and material differences. Decision 103/24.06.2007 and 338/03.09.2007.

[809] Romania, Court of Appeal Iasi, Administrative and Misdemeanours Section**,** Civil decision 90/2017 from 29 May 2017, Centrul de Advocacy si Drepturile Omului v. Scoala Gimnaziala Bogdan Petriceicu Hasdeu and Inspectoratul Scolar Judetean Iasi. (Center for Advocacy and Human Rights (CADO) against the BP Hasdeu School and the Iasi School Inspectorate). The CNCD fined both defendants and requested them to produce a desegregation plan. CNCD decision 769 from 7 December 2016.

[810] Zolnay, 2016, supra.

[811] Supreme Court judgment No. Pfv.IV.20.936/2008/4.

[812] Supreme Court judgment No. Kfv.VI.39.084/2011/8

[813] Egri Törvényszék, judgment No. 12.P.20.351/2011/47.

[814] *Borsod-Abaúj-Zemplén* County Court, judgment No. 13.P.20.580/2008, Debrecen Appeals Court, judgment No. Pf.I.20.125/2009/4. Children who attended segregated schools during the period covered in CFCF v Miskolc sued for damages. The Supreme Court found that "in light of the fact that 'disadvantage' is an element of the disposition" of discrimination, "beyond showing [res iudicata concerning discrimination], there is no need to provide further evidence in this regard." Supreme Court judgment No. Pfv.IV.20.50/2010/3. at p. 8. and Supreme Court, judgment No. Pfv.IV.20.510/2010/3. The Supreme Court ordered Miskolc to pay EUR 350 plus default interest to each child.

[815] Supreme Court judgment No. Pfv.IV. 21.568/2010/5.

[816] Supreme Court judgment No. Pfv.IV.20.068/2012/3.

in Jászság v Jászladány and Others.[817] Damages were ordered for procedural failures leading to misdiagnosis in *Horváth and Kiss v Szabolcs-Szatmár-Bereg County and Others*.[818] Liability for failing to stem misdiagnosis was established in *CFCF and ERRC v Heves County and Others*. Liability for failing to stem segregation was established in *CFCF v Ministry of Human Resources*.[819]

The Chance for Children Foundation was originally only a small and hardly tolerated element of the Hungarian desegregation movement that made impressive headway until 2011, when political support dissipated, and the policy changed. CFCF suddenly found itself in the epicentre of public policy debate as re-segregation forced a tight coalition on the progressive side. The organisation pursued a legal strategy seeking to secure preliminary referrals to the CJEU, participated in OSF's internal discussions as the desegregationists' proxy[820] and facilitated the cross-border exchange of legal strategies.[821]

Funded and planning in three year cycles, CFCF dealt with schools and local governments between 2006 and 2009, while its focus shifted to the public administration's failure to enforce desegregation regulations in the next funding cycle.[822] Following 2012, its activities became reactive to governmental counter-mobilisation that set the organisation up as a chief adversary and forced it to abandon the original plan of challenging the failure to implement equal opportunity plans, a criterion on which local governments' access to EU funds was conditioned, as well as the breach of contractual obligations to desegregate.

The legal strategy was based on social research, matching key issues with actual schools and supporting local desegregation activists.[823] While striving for a geographic and political

[817] Supreme Court judgment Pfv.IV.20.037/2011/7.

[818] Supreme Court judgment No. Pfv.IV.20.215/2010/3.

[819] 18 April 2018, judgment No. 40.P.23.675/2015/84 Metropolitan Court and Budapest Appeals Court**,** 2. Pf.21.145/2018/6/I, 14 February 2018.

[820] CFCF published a comprehensive review of the Hungarian public education system. See, Lilla Farkas, Szilvia Németh and Attila Papp Z., Equal Access to Quality Education for Roma: Hungary, Monitoring Reports 2007, Volume 1, Open Society Institute EU Monitoring and Advocacy Program, Budapest, 2007.

[821] I served as the leading attorney for CFCF between 2005 and 2014, afterwards as a Board member.

[822] "Most cases are tried in the country – starting at county court level and often remaining in the country for second instance. They always go to appeal and many for review by the Supreme Court. On numerous occasions we have asked for preliminary referrals to the Court of Justice of the European Union – so far to no avail. We have taken two cases before the European Court of Human Rights and are presently preparing another complaint. Actions before international judicial fora are necessary for advocacy purposes even if a case decided in a Hungarian court may have more profound public appeal." CFCF Narrative report on core funding to the Human Rights and Governance Program of the Open Society Foundations, 2013.

[823] For instance, in Hajdúhadház and Jászladány, where schools became segregated after the political transition, local Roma leaders campaigned against segregation before the adoption of the ETA, using the existing legal opportunities. The Minorities Ombuds condemned local decision makers in both cases, but his recommendations to restore the status quo ex ante were not followed and the lawsuit launched by the Office of Public Administration

balance, the NGO focused on urban hubs, where desegregation was more feasible, leveraging policy initiatives by playing the 'bad cop' opposite development NGOs, activists and the Ministry. Centered on civil courts and seeking to "carve desegregation into stone" the legal strategy sought to utilise enforcement opportunities unlocked by EU law.[824]

It was hoped that the CJEU would provide a robust interpretation of effective, proportionate and dissuasive remedies (Article 15 RED), surpassing the limitations inherent in the Strasbourg system. In this sense, the Hungarian enforcement strategy shared common features with the Belgian equality body's in *Feryn*[825] and the Romanian NGO coalition's in *ACCEPT*.[826] While all three sought governmental compliance**,** the latter two focused on the sanctioning powers of public enforcement agencies, with CFCF mobilising national courts through transnational judicial dialogue.

A request for referral was first made in 2009 (the *Hajdúhadház case)*, but the Supreme Court chose to interpret EU law itself, thankfully in line with the RED. Referrals were requested in subsequent cases and also from lower courts, but to no avail.[827] Trial courts consistently ruled in favour of the NGO and the Supreme Court refused to refer, therefore CFCF adapted the strategy by associating individuals with representative actions to satisfy the standing requirement in international tribunals. Domestic courts have held that intervention is obsolete as judgments in representative cases would necessarily bind members of the group on behalf of whom the NGO litigates (*res iudicata*). The Strasbourg Court came to a different conclusion in *Amanda Kósa v Hungary*, holding the application inadmissible by reference to the applicant's individual circumstances that were allegedly different from the facts established in *Nyíregyháza II*.[828]

Parental choice, positive action measures, and residential segregation have been the most often invoked justifications. The Supreme Court interpreted the ETA as permitting segregation as long as it emanated from positive action measures[829] and subsequent cases clarified

v Jászladány concerning the review of a local government decision sanctioning a contract renting out part of the public school building to a private school was not successful.

[824] Von Bogdandy, 2017, supra.

[825] Case C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, ECLI:EU:C:2008:397

[826] Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării, Case C-81/12.

[827] The Supreme Court refused to refer in Horváth and Kiss and the trial court n Kaposvár II.

[828] Amanda Kósa v Hungary, inadmissibility decision of 21 November 2017, application No 53461/15.

[829] The relevant passage reads as follows: "discrimination based on race or ethnic origin may only be justified by positive action measures (legal acts) that take into account the interests of the children, the conscious parental conduct and are aimed at ensuring equal opportunities." Para. 6.1. of Supreme Court judgment No. Pfv.IV.20.936/2008/4, Hajdúhadház case, p. 15.

that minority education - the most commonly invoked, but inadequate measure[830] - cannot justify segregation.[831] Romanian and Hungarian case law diverge in this respect, due partly to the high level of linguistic assimilation in Hungary, and partly to the fact that the minority rights regime in Romania rests upon instruction in the minority language.

As a rule, parental choice was not a permissible justification,[832] but exceptions were sometimes made,[833] most importantly in the *Nyíregyháza II case*[834] that focused on the choice of religious education.[835] Here, the overwhelming majority of parents chose the denominational school because of its proximity and because of harassment in mainstream schools, so that parental choice was in fact illusory. The trial court found segregation and the judgment was upheld on appeal, but the Supreme Court dismissed the claim by 'editing down the facts' and applying the religious exception in a way that disregarded the second leg of the test for the permissibility of segregated minority education (ETA Article 28), which would otherwise have required an inquiry into the quality of education. The Court shortchanged parental choice for that of the elected Roma representatives in Nyíregyháza, who acted in line with the new governmental

[830] Jelentés az AJB 6010/2014 sz. ügyben az oktatási elkülönülésre vonatkozó szabályokról (Report on legal provisions regarding school segregation).

[831] In Kaposvár I the children belonging to four ethnic subgroups and three different language groups - Hungarian, Beash and Romanes - were offered language classes in Beash. The trial court held that the minority curriculum did not necessitate spatial segregation, which was also upheld by higher courts. "In the material case the voluntary nature of segregation - capable of rendering it lawful - could not be established, having regard to Article 43(4) of Act No 77 of 1993 on the rights of national minorities and Article 28(2) ETA. Neither the parental consent to education in [Romani culture and of the Beash language], nor the parental choice of school, neither the fact that in view of the rezoning now 66 out of the 157 children reside outside the school district can be conceived as a conscious manifestation of parental will regarding segregation … the defendant [local government] failed to fulfill its obligation to integrate: it has tolerated and maintained a situation that resulted from spontaneous segregation. This omission … served as a basis of its liability [under civil law]." (emphasis added) Supreme Court judgment No. Pfv.IV. 21.568/2010/5, pp. 5. & 9. In the Győr case the school did not offer a language component.

[832] Legally safeguarded parental choice pertains to the type of education, not a particular institution, school building or teacher. In Hungarian cities, parental choices that take higher status students away from a school district impact most profoundly on school segregation, while the impact of residential segregation is negligible. See, János Zolnay, School Segregation, School Choice and Education Policies in 100 Hungarian Cities, Roma Education Fund, 2013.

[833] "A court order that complied with the claim concerning this particular sanction would, however, not be executable without endangering the operation of the school concerned by the lawsuit, nor without violating the parental right to the free choice of school as laid down in Article 13(1) of the public education act. Hence, the claim cannot be satisfied." Supreme Court judgment No. Pfv.IV.20.068/2012/3., p. 9. In the *Győr case* the Supreme Court held *obiter dicta* that the Roma parents could not be compelled to select integrated schools. The argument was instrumental in refusing to impose an injunction on the town suspending admissions as long as the school would remain segregated, but the Court did not clarify whether finding segregation on the one hand was reconcilable with the implication on the other that Roma parents could not be denied the choice of an unlawfully segregated school.

[834] In CFCF v Nyíregyháza and Others (Nyíregyháza II) the Supreme Court found that the choice of religious education justifies ethnic segregation. Supreme Court judgment No. Pfv.IV.20.241/2015/4. Defendant no 2, the Greek Catholic Church was established in 1909 with its seat in Hajdúdorog, but the bishops moved to Nyíregyháza early on. According to the 2011 census, approximately 180.000 Hungarians declared themselves Greek Catholic.

[835] Although the meaning of the purpose - to run a Roma mission - remained vague throughout the proceedings, it did include proselytisation and the prevention of illiteracy among the Roma.

policies. The verdict is published as a *principle opinion*, being thus *quasi*-binding on lower courts.[836] Having supported governmental desegregation before, in a compromise with the new executive the Supreme Court gave a green light to a subtle, yet intentional breach of anti-discrimination law, but not yet to policy of re-segregation itself.

Initially, it seemed as if a junior civil servant in the equality body possessed more power in terms of ordering remedies than a civil judge.[837] Courts gave a mixed response to CFCF's ambition to mobilise judicial power for the enforcement of the explicit prohibition of segregation in the Equal Treatment Act, but jurisprudence has become more robust recently, inspired by resistance against political attacks against the bench, rather than a growing support for desegregation.[838] CFCF attempted to mobilise the Strasbourg Court as well, but representative action could not pass the admissibility test due to the lack of direct link between the alleged violation and the applicant (victim status).[839]

Over a decade into the legal campaign, the Pécs Appeals Court[840] made an order to enforce a desegregation plan drafted by plaintiff's expert and the verdict was upheld by the Supreme Court.[841] Afterwards, in *CFCF v the Ministry of Human Resources*[842] the trial court issued an order that imposed a substantial public interest fine and regulated admission, zoning, ethnic data collection and monitoring of implementation.[843] The Budapest Appeals Court

[836] According to EH 2015.07.P6 "Segregation cannot be found in relation to the establishment and maintenance of a faith school that teaches overwhelmingly Romani children if the choice of school is based on the parents' voluntary and informed decision and if the students do not suffer disadvantage due to the quality of education [Act No 125 of 2003 (ETA) §§ 10(2), 19 and 28]."

[837] However, implementation has stumbled upon the Authority's reticence. Supreme Court judgment No. Kfv.VI.39.084/2011/8 Tiszavasvári v ETA (CFCF intervening).

[838] The Hungarian Patient: Social Opposition to an Illiberal Democracy edited by Peter Krasztev, Jon Van Oil, 2015 and Gábor Halmai, The Early Retirement Age of the Hungarian Judges, in EU Law Stories: Contextual and Critical Histories of European Jurisprudence (eds., Fernanda Nicola and Davis), Cambridge University Press, 2017. The president of the Supreme Court bench regularly reviewing the judgments of lower civil courts in desegregation cases, Mátyás Mészáros was effected by legislation that forced the retirement of judges in an attempt to purge the judiciary from senior justices installed prior to 1989. He was rehired and sat on the bench again, for instance in Nyíregyháza II. Former Strasbourg judge András Baka, who presided over the other Supreme Court bench reviewing civil rights claims changed his approach between the Győr and the Kaposvár II cases. He himself became an applicant in the ECtHR, because he was forced out of his office as president of the Supreme Court. See, Baka v Hungary.

[839] Application no. 786/14, Esélyt A Hátrányos Helyzetű Gyerekeknek Alapítvány against Hungary, (Second Section), inadmissibility decision of 25 March 2014.

[840] Pf.III.20.004/2016/4, Kaposvár II .

[841] Judgment no. Pfv. IV. 20085/2017 of the Curia.

[842] 18 April 2018, judgment No. 40.P.23.675/2015/84 Metropolitan Court.

[843] The defendant was ordered to 1. prohibit new admissions in segregated schools; 2. instruct Government Offices to place new students in integrated schools; 3. instruct maintainers to draft desegregation plans and rezone school districts; 4. publish desegregation plans on the internet; 5. monitor implementation and publish results; 6. amend the inspection protocol to permit the handling of ethnic data based on third party identification; 7. pay a public interest fine of EUR 159,000 earmarked for the NGO monitoring of desegregation programs. Ibid.

substantially diminished the trial judgment's impact, however,[844] and even more alarmingly, used the *D.H.* test that permits the reasonable justification of discrimination to override the ETA provision that categorically excludes the applicability of this general test to cases of segregation.

Even though considered highly litigious, CFCF dedicated the majority of its resources to community organising, advocacy and training.[845] Given the favourable political and legal context, the organisation was under relatively little pressure to compromise between litigation and other social change tools, still, accountability to the communities selected as sites of legal action required engagement.[846] CFCF divorced litigation from other desegregation tools in an increasingly illiberal context, transferred collaborative operations to the Rosa Parks Foundation in 2013 and secured ERRC funding for on-going cases with a view to winding up activities.

Hungarian desegregation litigation has mobilised the judiciary, but it has failed to mobilise field-specific public enforcement and this country remains the only one without centralised school inspection in the EU. CFCF as a public-private enforcement agency decreased the level of segregation - on the rise after the political transition[847] - in urban hubs, which then stagnated until the mid-2010s.[848] The organisation magnified the views of experts and policy makers in public debates.[849] Its Strasbourg complaints created opportunities to broaden the scope of the *D.H.* campaign and flag systemic shortcomings concerning collective enforcement.[850] Misdiagnosis was stemmed as a result of legislative and institutional reforms in Hungary, to which a litigation campaign apexing in *Horváth and Kiss v Hungary* sponsored by CFCF contributed.

Slovakia

[844] Hungary, CFCF v Ministry of National Resources, Budapest Appeals Court**,** 2. Pf.21.145/2018/6/I, 14 February 2018. The court struck down sanctions requiring immediate or structural changes (points 1-2 and 5-6.).

[845] Közösségi részvételen alapuló oktatási integrációs program tapasztalatai, Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány, Budapest, 2009.

[846] Engagement included enrolment actions; testing admission policies; monitoring diagnostic practices; promoting parental participation in decision making; and organising summer camps for children on whose lives CFCF litigation impacted. CFCF assisted mothers in Csörög to establish their own association in order to facilitate the enrolment of their children in nearby Vác. In 2009, the Sajószentpéter pilot community participatory project enhanced the efficiency of the local school integration program.

[847] Havas-Liskó 2005.

[848] However, implementation has stumbled upon the Authority's reticence. Supreme Court judgment No. Kfv.VI.39.084/2011/8 Tiszavasvári v ETA (CFCF intervening).

[849] Zolnay, 2016.

[850] OSJI and the ERRC submitted third party observations concerning *Kósa v Hungary* and started a debate about collective enforcement under the European Convention.

In the Slovak Republic, Poradna addresses country-specific segregation patterns in a comparatively underdeveloped institutional, policy and legal context. The Slovak equality body does not engage in desegregation and the ADA does not specifically prohibit segregation, which is outlawed instead in the Education Act. Claims must therefore be framed in terms of direct or indirect discrimination with the concomitant dilemma of justification. The Plenipotentiary facilitates desegregation in the wake of litigation, engaging NGOs on a project basis. Amnesty International Slovakia advocates for integration, but development NGOs generally work in segregated settings without challenging the *status quo*.

Class level segregation was established in *Poradňa pre občianske a ľudské práva v Elementary School in Šarišské Michaľany,* in which the trial court held that white flight could not justify segregation and ordered the school to publish the ruling in a special professional periodical and mix students.[851] It emphasised that the obligation to integrate was inherent in the compulsory nature of education. The Regional Court in Prešov upheld the ruling, addressing the wider social context.

Poradna subsequently launched cases concerning misdiagnosis, school level segregation and segregation in so called container schools, i.e. makeshift buildings constructed near Roma districts to avoid the integration of Roma children in perfectly well-equipped schools situated in majority neighbourhoods. The first challenge against container schools was lost in 2017,[852] but other cases are still pending. The Slovak Public Defender submitted an *amicus curiae* brief in *Poradna v Stara Lubovna*, a case concerning segregation between schools, which is still pending.[853]

4.3.1.2. Desegregation litigation in the Strasbourg Court

Desegregation litigation in Strasbourg came to fruition after a considerable gestation period. The Grand Chamber delivered judgment in *D.H. and Others v the Czech Republic* seven years after filing (2007), establishing that the overrepresentation of Roma children in special schools

[851] Regional Court in *Prešov*, judgment of 30 October 2012 (ref. No 20Co 125/2012, 20Co 126/2012). The Roma and the non-Roma classes were separated physically and segregation was not justified by pedagogical considerations. The school sought to justify segregation with reference to the Roma children's `socially disadvantaged backgrounds´ and 'white flight'.

[852] Legalnet report, Slovakia: Obligation to consider public interest in a building permit proceedings does not include considering impact of a potential building on segregation of racial minorities, 24 October 2017.Supreme Court of the Slovak Republic from 20 June 2017, delivered on 18 August 2017, file no. 10Sžo/53/2016.

[853] Legalnet report: Slovakia: District Court: Education of Roma children in segregated Roma only school does not constitute discrimination based on ethnic origin, 1 February 2017. District Court Bratislava III from 6 October 2016 delivered on 12 December 2016, file n. 11 C 351/2015 – 387.

amounted to indirect discrimination and ordering the respondent state to pay EUR 4000 to each applicant, less than fifth of the amount claimed. The *D.H.* litigation set out to achieve domestic anti-discrimination legislation, but when the final judgment was delivered, the Czech Republic remained the only EU member state without it.

Even if doubts existed as to the interpretation of international human rights treaties that prohibited racial discrimination in education when the application was filed, they dissipated later on and the Grand Chamber came under pressure to align interpretation with the multi-sourced normative prescriptions.[854] References to the reports of monitoring bodies in the final verdict bear witness to the context in which the chamber judgment's shortcomings were corrected and the Court's legitimacy was reinforced *vis-a-vis* Council of Europe monitoring bodies and the EU legislator.[855]

A year after the *D.H.'* landslide', no violation was found by the chamber in *Orsus*, at which point Theodoros Alexandridis began to work on the referral to the Grand Chamber. Kusan characterised him as exceedingly helpful and "definitely the best human rights lawyer." He brought her attention to *Sampanis and Others v Greece*, the Greek Helsinki Monitor's first Roma education case.[856] Kusan is convinced she could not have litigated *Orsus* as an individual attorney and the ERRC's involvement was necessary also, because domestic NGOs in Croatia lacked the necessary skills.

An ERRC team collected signatures for the referral and compensated for erratic client care - erratic despite the involvement of various domestic NGO agents, and complicated by the fact that parents who had refused to join the original claim now wanted in, incredulous of legalistic explanations on why that was not feasible. Before the Grand Chamber, OSJI director and ERRC Board member James A. Goldston addressed the court on the law, while Lovorka Kusan covered the facts.[857] The Grand Chamber ruled in favour of the applicants in the 2010 final verdict, following a tight vote (nine to eight), granting EURO 4000 to each.

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[854] ECRI General Policy Recommendation N°7 (revised) on national legislation to combat racism and racial discrimination, 13 December 2002 - revised on 7 December 2017. ECRI framed segregation as *de facto* discrimination, which can take the form of either direct or indirect discrimination. ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial intolerance.

[855] Which references the relevant international and EU sources.

[856] Sampanis et autres c Grece, Requête No. 32526/05, arrêt 5 juin 2008.

[857] Kusan remembers the hearing as follows; "When the judges started with questions, I knew that we would win the case. The most important moment for me was when the Icelandic judge asked the Croatian agent why Mirjana Orsus did not have additional Croatian classes if her knowledge of Croatian was the reason for placing her in a Roma-only class. Exactly, that is the point, It was also very symbolic that the judge from faraway Iceland asked the Croatian agent why one small girl from some village did not have what she was entitled to. He knew her name, her grades, her regular and additional school activities."

The Roma Education Fund stepped in to bolster desegregation in Croatia, but the trend did not meaningfully change, because schools receiving substantially more Roma students in the wake of the litigation and fearing white flight on the part of the majority held onto their unlawful practices. While enrolment increased, segregation resisted a plethora of social change interventions. The case is the most significant precedent on equality in the Croatian national context.[858]

Four more Strasbourg verdicts were delivered in quick succession, and even though the Court's approach grew bolder, international litigation could seldom achieve what states were not prepared to grant. The ERRC itself was re-engaged in *Horváth and Kiss v Hungary* by CFCF that hoped to benefit from the INGO's international advocacy potential. This case and another five domestic misdiagnosis challenges were originally filed by a private law firm in 2005, sponsored by MEP Viktória Mohácsi, who organised a summer camp to identify plaintiffs. While the other challenges were lost, CFCF won compensation for István Horváth and András Kiss in domestic courts, but the Supreme Court refused to find discrimination, suggesting that systemic reform be sought from the Constitutional or the Strasbourg Court. By then, however, misdiagnosis was severely curtailed by law passed in 2007.

On the one hand, *D.H.* was useful in arguing that parental consent should not be construed as overriding the children's right to equal treatment.[859] On the other hand, it seemed to undermine the conception of segregation as unjustifiable structural or concealed direct discrimination, where IQ testing served to hide the intent to separate. Qualification came to the centre of debate[860] and it could not be foretold that the Strasbourg Court would never find discrimination justifiable in the *Roma education cases*, rendering the dogmatic discussion practically

[858] During the parliamentary hearing preceding appointment to the Constitutional Court in 2016, Kusan's role in it was discussed. Kusan interview.

[859] D.H. Grand Chamber judgment para. 203. In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures. It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism, and special schools where the majority of the pupils were Roma. 204. In view of the fundamental importance of the prohibition of racial discrimination … no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest.

[860] CFCF challenged the indirect discrimination finding in *Horváth and Kiss* with reference to the CJEU's *Maruko* judgment, according to which even if not *prima faciae* apparent (legislative) measures effecting only one social group should qualify as directly discriminatory, but the ECtHR refused to engage with this reasoning.

irrelevant.[861] As mentioned above, the Strasbourg approach reverberates in domestic courts, bringing to the fore that in *D.H.* the Convention was interpreted in contradiction with UN treaties, such as ICERD and CADE that categorically prohibit segregation.

4.3.1.3. The D.H. campaign

Initially, the *D.H.* campaign addressed the Committee of Ministers,[862] being unsuccessful in bolstering follow-up litigation in the Czech Republic, where one misdiagnosis case was taken and lost after 2007.[863] To boost the campaign, OSF's Roma Initiatives Office, the Open Society Justice Initiative and the Wishvanathan's Life Together conducted an enrolment campaign in Ostrava in 2014 that finally yielded a follow-up case on behalf of children whose admission to school was refused. Discrimination was established by the trial court and the case is now pending appeal.[864]

The *D.H.* campaign is conducted by an NGO coalition spearheaded by the OSF Roma structure. The Council of Europe's - and especially the Court's - interests align with the campaign, even if its main motivation may be different, such as to decrease workload and increase its own legitimacy.[865] While under the Convention the Strasbourg Court has powers to establish a violation and provide just satisfaction,[866] it also uses the binding nature of judgments to

[861] The fact that indirect discrimination was established in D.H. - following Hoogendijk v the Netherlands, Zarb Adami v Malta and Thlimmenos v Greece - did not change the conception of discrimination under the Convention (treating persons in analogous situations unequally and those in different situations equally). Notwithstanding the reference in *D.H.* to indirect discrimination under EU anti-discrimination law and the reference to *D.H.* in subsequent cases, the Strasbourg Court's equality maxim has not changed. For a detailed analysis of the equality maxim, see, Oddný Mjöll Arnardóttir, Equality and Non-Discrimination Under the European Convention on Human Rights, 2003, Martinus Nijhoff, The Hague-London-New York.

[862] Elisabeth Lambert-Abdelgawad, The Execution of Judgments of the European Court of Human Rights, Volume 88, 2008.

[863] Supreme Court judgment No. 30 Cdo 4277/2010 of 13 December 2012**,** J. *Suchy* v. the Czech Republic – the Ministry of Education, Youth and Sports. Similarly, one education case was litigated after *Orsus* in Croatia concerning exclusion from vocational training, in which the plaintiffs were represented by Lovorka Kusan. Municipal Court in Varaždin, 7 February 2012, L.I. and Ž.B. (both minors) v. Branka d.o.o. and B.J., P.817/11. Plaintiffs, both Roma students of the Commercial school in Varaždin, were denied access to mandatory training at the defendant company. The trial court found that the applicants were discriminated because they were Roma, forbade defendants any further discriminatory actions and awarded 1.066 EUR to each applicant.

[864] Judgment of the District Court in Ostrava of 1 March 2017, File No. 26 C 42/2016-124. The plaintiffs were represented not by a Prague-based attorney Filip Schmidt. Life Together issued a press release afterwards, defending the school principal who was found liable for discrimination.

[865] The implementation of judgments by states parties reinforced its authority and alleviated the caseload, whose incessant increase weakened the Court's bargaining power on its budget.

[866] Just satisfaction is available pursuant to Article 41 of the Convention. The Court has carved out further remedial powers under Article 46 that prescribes the binding nature of judgments on states.

impose individual and/or general measures.[867] It has broadened desegregation remedies in two ways: first by prescribing general measures[868] and second, by imposing positive obligations.[869]

One of the Strasbourg Court's key NGO partners has been the Greek Helsinki Monitor (GHM) - led by the charismatic political scientist Panayote Dimitras - that engages with Roma communities in response to complaints and press reports. Dimitras' subversive legal consciousness and Theodoros Alexandridis' commitment contributed to the construction of an outstanding Strasbourg case docket in general and on Roma rights in particular.[870] GHM is exceptional as a domestic organisation that pursues a regional advocacy agenda[871] and plays a gap-filling function, being the only litigating NGO in Greece.[872]

In the Greek education cases, the Court's activism was instrumental with respect to admissibility and remedies.[873] The more advanced domestic legislation and interpretation, the more difficult to pass the admissibility threshold and the Greek cases were admitted in reference to the obscure national law and the view that *ex post* remedies such as compensation would be inadequate, therefore non-exhaustible in the context of segregated education.[874] The Court's ambition to reinforce governmental compliance made a fortunate alliance with the facts in *Lavida,* in which evolving case law on general measures inspired GHM's request for the implementation of the Ministry of Education's desegregation plan abandoned in the face of protest from majority parents.

The viability of this strategy *vis-a-vis* other states parties and other issues is uncertain, however. For instance, the Hungarian and Romanian units in the ECtHR have been less welcoming to experimental complaints. Still, the long-awaited jurisprudential breakthrough, the approximation of positive *action* measures for overcoming historic discrimination and positive *obligations* stemming from international treaty obligations was pronounced in *Horváth and*

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[867] Valerio Colandrea, On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases, Human Rights Law Review, Volume 7, Issue 2, 1 January 2007, pp. 396–411.

[868] In Ioanna Sampani et autres c Grece, Requête No. 59608/09, arrêt 11 decembre 2012 and Lavida et autres c Grece, Requête No. 7973/10, arrêt 30 mai 2013.

[869] In *Horváth and Kiss v. Hungary, Application No. 11146/11, judgment of 29 January 2013.*

[870] Dimitras credits Petrova with teaching him how to transform a complaint into legal action. Still, it was his own idea to bring the three Roma education cases from Greece directly to the ECtHR.

[871] See, for instance its intervention in Lautsi v Italy, Grand Chamber judgment of 18 March 2011, Application no. 30814/06) and Aksu v Turkey, Grand Chamber judgment of 15 March 2012, Applications nos. 4149/04 and 41029/04.

[872] Interview with deputy ombuds, Kalliopi Lykovardi.

[873] Interestingly, even though the submissions were drafted in English, the Greek lawyer assigned to the cases decided to proceed in French, which, regrettably diminished the judgments' standing not only in the Strasbourg Parthenon, but also in academic commentary.

[874] Interview with Theodoros Alexandridis, counsel in the Greek education cases.

Kiss v Hungary, in which the Chamber *obiter dicta* bridged the two normative prescriptions.[875] The *Roma education cases* indicate varied degrees of activism within the Court and the significant role of the national unit, i.e. both the elected judge and the unelected registry lawyer.

The *D.H.* campaign extended to the EU level, focusing mainly on the European Commission that launched pilot infringement proceedings against the Czech Republic, Slovakia and Hungary between 2013 and 2015 on account of their non-compliance with the RED.[876] It has maintained regular contact with domestic agents in exchange of information, but many doubt the prospects of meaningful changes on the ground.[877] Be that as it may, the European Commission entered the next phase *vis-à-vis* Slovakia when issuing a reasoned opinion in relation to segregated education in October 2019."[878]

4.3.2. Housing litigation: forced eviction and access to electricity

The *D.H.* campaign overshadows developments in other fields, particularly housing and hate speech - dealt with in the next Chapter - that emerged in response to explicit community needs. By 2007 the Traveller litigation campaign teetered out. Incidentally, a Traveller complaint from France was lodged that year and subsequently became an important building block in the Strasbourg Court's new approach. Housing claims opened the terrain to experiments and it took considerable time to find the most effective argument and forum, because the mismatches between domestic and international legal opportunities are substantial and also because cross-border - but also trans-Atlantic - exchanges in this field are surprisingly weak. As much as school desegregation bears the signs of the OSF Roma structure's overbearing influence, the housing field speaks of an opposite tendency. The next sections depict the search of domestic lawyers for the most favourable and viable legal strategy on housing.

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[875] The Court noted that "the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests." *Horváth and Kiss v Hungary*, supra, para. 116.

[876] Infringement number 20142174, 25/09/2014 Formal notice Art. 258 TFEU, Czech Republic. Infringement number 20152025, 29/04/2015 Formal notice Art. 258 TFE, Slovakia. Infringement number 20152206, 6/05/2016 Formal notice Art. 258 TFEU, Hungary. Proceedings relating to Non-conformity with Directive 2000/43/EC on Racial Equality - Discrimination of Roma children in education.

[877] Skepticism has been expressed by Hungarian experts in an informal group, Legalnet experts from the three countries and by public officials working on these issues at the three ombuds offices. Similar toing and froing in relation to the Barbuta camp in Italy - a segregated camp built from EU funds and subject to embezzlement charges at the domestic level - inspired Amnesty International to consider legal action against the Commission for failing to provide information about the actual state of the pertinent infringement action. NYU Clinic Report 2017.

[878] European Commission, press release, October infringements package: key decisions, Brussels, 10 October 2019, Anti-discrimination: Commission sends reasoned opinion to Slovakia urging the country to comply with EU rules on equal treatment of Roma schoolchildren, p. 7.

4.3.2.1. The social rights strategy

Legal action was first channeled to the European Committee of Social Rights, where the focus of international litigation shifted in 2004, when the revised European Social Charter came into force. The ERRC was a newcomer to the social rights scene and its Charter related work was driven by non-lawyers in the Programs Department, swimming in the stride of specialised INGOs.

The first step was an analysis on housing rights in collaboration with the Center on Housing Rights and Evictions, which was followed by collective complaints. Despite the fact that legal action before the Committee was not hampered by the requirement to exhaust domestic remedies, this litigation trend was short lived, partly because of staff turn-over, but more importantly, because of the unavailability of collective complaints[879] in three out of the five Roma-dense countries and the fact that initially, only Bulgaria permitted collective complaints, while the Czech Republic opened this remedial route as late as 2012.[880]

Interestingly, the jump-start strategy inherent in collective complaints meant that it was more difficult to embed these cases in the domestic advocacy realms. Another important reason why the Committee's progressive jurisprudence[881] has not become standard reference is the mismatch between the social rights and the equality frames and the latter's dominant influence in the CEE. Even though housing litigation pursues the same objective in the East and the West

[879] Even where collective complaint is available, the majority of domestic NGOs is not registered with the Committee.

[880] European Roma Rights Centre v. France, Complaint No. 51/2008, decision on the merits of 19 October 2009, §93 51

[881] Pursuant to which states must show due regard for the specific circumstances of Travellers and the Roma in legislation and decision-making, while serving the public interest by striking the right balance between the interests of the minority and the majority. Centre on Housing Rights and Evictions v. Italy, Complaint No. 58/2009, decision on the merits of 25 June 2010, §§39-40). Furthermore, states have the duty to adopt an overall and co-ordinated approach, consisting of an analytical framework, a set of priorities and measures, and a monitoring mechanism involving all stakeholders. European Roma Rights Centre v. France, Complaint No. 51/2008, decision on the merits of 19 October 2009, §93. The Committee set out requirements for national legislation by turning the limelight away from the question of whether illegal occupation may justify evictions to whether the criteria of illegal occupation are unduly wide, including conditions, such as permanent residence or domiciliation on which access to health care, education and other social services are conditioned. European Roma Rights Centre v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §51 and International Federation of Human Rights v. Belgium, Complaint No. 62/2010, decision on the merits, 21 March 2012, paras. 168-182. This approach is based on the realisation that evictions render the Roma effectively homeless, because individuals or groups are in fact forced to behave reprehensibly, if their membership in a minority would otherwise prevent their enjoyment of a right in a manner enshrined in national legislation. Legislative amendment is needed to ensure the compatibility of minority identity and majority legal norms, so that evictions do not result in homelessness, while specific measures prevent homelessness. European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, § 53 and 57. and European Roma Rights Centre v. Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005, §21.

- preventing homelessness - strategies are channeled through the prohibition of racial discrimination in the former and social rights in the latter, reflecting favourable legal opportunities and the development of national law the national level. As highlighted in Chapter II, the applicability of both the Charter, but more importantly, domestic legal provisions and expertise on social rights are limited in the CEE.

In the East, national legislation and policies do not comply with the standards set out by the Strasbourg tribunals, while in the West, where legislation on the books complies with these requirements, enforcement is inadequate.[882] The UK has not amended its legislation and case law is mostly unfavourable.[883] In France, special legislation[884] protects everyone from homelessness, including the Travellers (gens du voyage) and mayors have the duty to ensure that a sufficient number and quality of halting sites are available. [885] The duty is regularly breached and mayors are rarely sanctioned,[886] even though French high courts tend to rule in favour of occupants[887] and the French equality body has made efforts to end status inequality hindering access to social rights.[888] Bureaucratic contingency, the local administration's resistance to implementing centrally adopted rules and regulations is problematic in Belgium too.[889]

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[882] For instance, in September 1998, Ireland adopted the "Housing (Traveller Accommodation) Act," placing all local authorities under the duty to adopt a five year programme for the creation of halting sites. New halting sites law for Irish Travellers, Roma Rights, 1/1999. Failure to adopt a halting site plan automatically ceded competence to civil servants, whose approach is generally more favourable. Still, in 2015, the ECSR found Ireland in violation of the Charter for failing to provide a sufficient number of sites. See, European Roma Rights Centre v. Ireland, Complaint No. 100/2013, decision on the merits, 1 December 2015.

[883] Davis and Others v Tonbridge and Malling Borough Council, Court of Appeal of England and Wales, CA 26 Feb 2004, [2004] EWCA Civ 194, See, however, Wrexham County Borough Council v Berry; South Buckinghamshire District Council v Porter and Another; Chichester District Council v Searle and Others, House of Lords, 22 MAY 2003, [2003] UKHL 26, [2003] 2 WLR 1547, [2003] 2 AC 558.

[884] Loi no 90-449 du 31 mai 1990 visant a mettre en oeuvre le droit au logement (Lois Besson).

[885] Jacqueline Charlemagne, Le droit au logement des gens du voyage: un droit en trompe l'oeil?, Etudes tsiganes, No 15, pp 66, 2000.

[886] Legalnet reports 2005-2019, France

[887] Such as the Conseil d'Etat on 23 November 2015 in Ministère de l'Intérieur, Commune de Calais c Médecins du monde et autres. See, Dominique Schaffhauser, Droits des occupants de terrain : Evolution récente de la jurisprudence (Intervention au séminaire interrégional d'avocats du 18 mars 2016, co- organisé par Amnesty International, Parcours d'exil, Asav association pour l'accueil des voyageurs, Syndicat de la Magistrature, Romeurope, Gisti, Jurislogement , Atd-Quartmonde, Fondation Abbé Pierre), See, most recently, Conseil d'État, N° 427423, CLI:FR:CEORD:2019:427423.20190213, 13 février 2019.

[888] The National Assembly adopted a bill on 9 June 2015 to repeal Law n° 69-3 of 3 January 1969 on Travellers, ending to their obligation to carry special identity papers and to have them validated. The bill gives effect to the French equality body's recommendations and condemnation by the UN Human Rights Committee and the Conseil d'Etat that invalidated this part of the law (19 November 2014, 10th and 9th Sections no 359223), also ceasing the opportunity to improve the regulation of Traveller sites.

[889] FIDH v Belgium, ECSR, 146. The Conseil d'Etat has ruled that the destruction of a caravan that the applicants planned to make their future residence was an infringement of the right of ownership (C.E. (réf.), judgment of 25 April 2002, no. 106.093, Catteau and Lentz v. Commune de Hotton, p. 10). The FIDH points out, however, that this is only an isolated judgment and that the authorities are still empowered to destroy caravans that are parked without planning permission. CEDH, 7 juillet 2015 Affaire V.M et autres c. Belgique, requête 60125/11.

4.3.2.2. The civil rights strategy

In 2009, when the FRA published a report on the minority's housing rights, the lack of Roma-related case law became apparent,[890] but in the background the Bulgarian Helsinki Committee's legal director, Margarita Ilieva's strategy was successfully channeled the issue of forced evictions to the Strasbourg Court. *Yordanova and Others v Bulgaria* transformed into a landmark judgment[891] once Ilieva petitioned the ECtHR for interim measures to halt enforcement after Convention arguments failed in domestic courts reviewing eviction orders. The measures were granted, Bulgaria complied, and a not too promising strategy - until then interim measures were ordered only in cases involving non-derogable rights (Articles 2-5) — unlocked an immediately effective remedy under Article 8 that guarantees the right to private and family life. The judgment established a violation of the right to family (community) life and requested that legislation be reviewed and Roma districts be regularised, but the state party has not complied with these general measures.

The *Yordanova* strategy was emulated by the Equal Opportunities Initiative Association's Mihaylova in collaboration with an INGO before the UN Human Rights Committee.[892] Ilieva was not the only lawyer experimenting with interim measures, but she was the first to break the ice. A year later, the European Court halted the eviction of 26 gens du voyage families supported by the association Le Mouvement ATD Quart Monde in *Winterstein et autres c France*, indicating that activist units within the Court were keen to improve jurisprudence. The true significance of the French Traveller case lies in the wide interpretation of positive obligations concerning protection from forced evictions, as pursuant to *Winterstein*, states must provide alternative accommodation, except in cases of *force majeur*.

Progressive lawyers with an ambition to expand legal opportunities have played a beneficial role, but professional competition has also sharpened strategies. In Bulgaria not only did the BHC compete with the Bulgarian Lawyers for Human Rights, but also with the Equal Opportunities Initiative Association and a private law firm (Ekimdijev) based in Plovdiv that

[890] European Union Agency for Fundamental Rights (FRA), Housing conditions of Roma and Travellers in the European Union, October 2009.

[891] Ilieva requested referral before the Grand Chamber, seeking a ruling on the discrimination claim as well, but this was not granted.

[892] UN Human Rights Committee, Communication No. 2073/2011, Views adopted by the Committee on 20 October 2012, Liliana Assenova Naidenova et al. (represented by counsel, the Global Initiative for Economic, Social and Cultural Rights and the Equal Opportunities Association) v Bulgaria and Communication No. 1926/2010, Decision adopted by the Committee on 21 July 2014, CCPR/C/111/D/1926/2010, S. I. D. et al. (represented by counsel, Daniela Mihailova and Bret G. Thiele, from the Equal Opportunities Association and the Global Initiative for Economic, Social and Cultural Rights, respectively) v Bulgaria.

pioneered the contingency fee model, taking as many cases as possible and being thus diametrically opposed to well-planned litigation in the public interest.[893] Popularity, community contacts and alliance building with other (I)NGOs, as much as innovative strategies have been essential to prevail in this environment.

Presently half a dozen housing complaints are pending before the Strasbourg Court and former ERRC lawyers call for mass filings.[894] The Court orders interim measures and states comply as a matter of course. In view of the immediacy of the remedy, the Convention strategy, i.e. opening up a new remedial route under civil rights with reference to procedural safeguards with a view to enforcing certain aspects of housing rights (protection from eviction) can more adequately serve the interests of impoverished Roma communities than other approaches. This is because the Court interprets the right to private and family life in a way that can accommodate a limited set of social rights claims.

Still, in the CEE, where violations are intricately linked to the failure of regularising Roma dwellings[895] and states fail to comply with their positive obligations, interim measures can only defer, but cannot resolve homelessness. Mass filings overburdening courts seem more promising in triggering legal reform, particularly if litigation is sustained over a longer period, which is antithetical to the *D.H.* strategy of planned, top-down litigation that builds pressure through a 'Big Case'.

4.3.2.3. The equal treatment strategy

Even though litigation for housing rights has been on the rise since the mid-2000s, the *Yordanova* strategy has not been replicated in other Roma-dense countries. This is due to the lack of transnational collaboration and sporadic networking with social rights NGOs, as much as the pulling effect of EU anti-discrimination law. Injunctive relief is either not available or not imposed under national equality laws, while damages granted *ex-post* cannot adequately remedy homelessness. *Cazacliu and Others v Romania* demonstrates that once some sort of

[893] Bulgaria regularly contested the applicants' claims for legal fees as excessive. Importantly, only the fees connected to the litigation before the ECtHR can be claimed form the Court.
[894] Theodoros Alexandridis and Andi Dobrushi, International Housing Rights and Domestic Prejudice: The Case of Roma and Travellers in Rights Judgments and the Politics of Compliance: Making it Stick, Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds.), Cambridge University Press, 2017.
[895] Daniela Mihaylova and Alexander Kachamov, Roma Evictions and Demolition of Roma Houses: A Sustainable Solution for Roma Integration or a Problem of Roma Discrimination in Bulgaria? Analysis of the legislation regulating the demolition of illegal housing and its implementation in Bulgaria to identify its compliance with the EU legislation on protection from discrimination on grounds of ethnic origin, Sofia, March 2017.

remedy is provided, the Strasbourg Court will be disinclined to review its adequacy, effectiveness or dissuasiveness.[896] Thus, litigating in the equality frame may even be counter-productive as it can block remedies available under the Convention in a broader sense.

Equal treatment arguments have proven less effective than the Convention route also because the institutions in charge of implementing the Racial Equality Directive have not risen to the challenge, unlike their Council of Europe counterparts. Domestic courts and equality bodies seem ill-suited to repel the wave of evictions sweeping through the region, past the European Commission that planned but finally did not react to France's expulsion policies targeting EU migrants of Romanian Roma origin and Italy's failure to spend EU funds on adequate and integrated housing for the so called 'nomads' settled in camps in defiance of their alleged itinerant way of life. Due to insufficient political support in the Commission, France was finally condemned by the European Committee for Social Rights pursuant to the European Roma and Travellers Forum's collective complaint, while the scandal in Rome exposed by Amnesty International was dealt with by domestic courts.[897]

Enforcement agencies and NGOs more often engage in symbolic battles over spatial exclusion, than in challenging administrative decisions that render the Roma homeless. Slovakian NGOs have litigated against the exclusion of Roma tenants from exchanging the lease of social housing - that keeps them out of the city centre - and illegal eviction from council flats situated in the centre to substandard housing on the outskirts.[898] Hungarian NGOs and the Commissioner for Fundamental Rights mobilised Government Offices to review discriminatory local decrees as concerns access to social housing and exclusionary clauses.[899] In Romania discrimination in access to social housing and 'relocation' from the centre have been countered by

[896] Aurel Cazacliu and others against Romania, Application no. 63945/09, decision on inadmissibility of 4 April 2017. The case is linked to the Pata Rat litigation detailed below.

[897] European Roma and Travellers Forum v. France, Complaint No. 64/2011, decision on the merits, 24 January 2012.

[898] The Slovak Constitutional Court dismissed complaint on failures of public prosecution to assess the discriminatory impact of the municipal regulation, 9 October 2018. The decision of the Constitutional court, n.IV. ÚS 435/2018-13, delivered on 10 September 2018 in Poradňa v. District prosecution Prešov concerned the violation of social housing tenants' rights to exchange a lease. Decision of the Regional Court in Prešov from 20 March 2018, n. 13 Co 38/2017 in B.C. and others v. Sabinov and the Ministry of Transport and Construction concerned the illegal eviction of tenants from council flats situated in a central area to the outskirts in new rental apartments of a lower standard. The plaintiffs were represented by the Slovak NGO Via Iuris.

[899] The HCLU, NEKI and the Commissioner for Fundamental Rights mobilised Government Offices to review discriminatory local decrees as concerns access to social housing and exclusionary clauses in ten municipalities, five of which withdrew their decrees in 2015, while the rest were taken to court and condemned. In Decision EBH/549/2016 in HCLU v mayor of Mezőkeresztes, the Hungarian Equal Treatment Authority condemned the mayor for calling on local residents to refrain from selling their real estates to non-local Roma.

public bodies overseeing local council decisions.[900] Miskolc's forced eviction campaign in 2014 was challenged before the Hungarian equality body, but could not be stopped.[901] NGOs litigated against forced evictions in Romania and Hungary but even if courts ordered rehousing in these cases, enforcement proved precarious, rendering the equality argument inefficient.[902]

In the CEE, local and central governments routinely use the law to exclude the Roma from integrated spaces, exemplified by the decade long litigation campaign against the wall in Ústi nad Labem and the Romanian equality body's battle against the wall in Baia Mare.[903] The equal treatment argument is inadequate, because it is irrelevant for the small group of middle class Roma, who can actually afford housing in integrated districts, but also for those, who favour self-segregation. It can restore the dignity of impoverished Roma communities stranded in segregated districts, but cannot safeguard their right to housing. The interests of different groups within the Roma community diverge and although an eviction moratorium can alleviate injustice, only differentiated legislation can resolve residence status. The Bulgarian EOIA has made steps to mobilise the OSF Roma structure for an EU campaign on the legalisation of settlements and it remains to be seen whether the "Bulgarian connection" is still strong enough to set the European agenda on housing into motion as it did on school desegregation.[904]

4.3.2.4. Bulgarian electricity litigation

[900] In Romania the Court of Appeal upheld the equality body's decision finding discrimination in access to social housing in a procedure launched against Reghin *ex officio*. (CNCD decision 511 from 20 July 2016, Târgu Mureș Court of Appeal decision 30/2017 from 17 March 2017). The municipality was fined EUR 400 and ordered to publish the decision on its website. In a case initiated by the Sibiu Prefect, the Romanian equality body fined Sibiu City Hall Office EUR 1200 for planning in the Joint Working Group for Roma to relocate Roma inhabitants to rural areas to resolve access to water concerns (Decision 419 from 15 June 2016 in file no 171/2016, 4A/2016). The information is taken from Legalnet reports as of 28 January 2019.

[901] In judgment no. 6.K.33.048/2015/17. delivered on 25 January 2016 the Metropolitan Administrative and Labour Court of Budapest upheld the Equal Treatment Authority's decision in NEKI v Miskolc in connection with the forced eviction of the residents of the so called Numbered Streets and ordered the municipality to put an end to discrimination by providing adequate housing.

[902] The Costanta Court of Appeal ruled in favour of plaintiffs in a case brought against Tulcea, because of the forced evictions of a Roma community in 2006 assisted by an NGO coalition. Plaintiffs received EUR 500 each in compensation (Curtea de Apel Constanta, Decizia Civilă 101/C from 26.03.2014.). 76 Roma families were forcibly evicted from the centre of Cluj Napoca to a waste dump on the outskirts, in Pata Rat in 2010. Assisted by activists, the families sued the city and the Cluj Tribunal ruled in their favour in January 2014 (file number 8721/117/2011), granting EUR 2000 to each applicant and ordering the city to provide them with adequate housing. The CNCD also investigated the case in 2011, found discrimination and imposed a fine of EUR 1800. The information is taken from Legalnet reports as of 28 January 2019.

[903] High Court of Cassation and Justice, Romania, file 1741/33/2011 from 27.09.2013, decision 640/27.09.2013.

[904] Mihailova and Kachamov, 2017, supra.

The Bulgarian electricity litigation further exemplifies the limitations of equal treatment strategy. Housing conditions have been dire across the region, but nowhere have they been addressed as extensively as in Bulgaria, where the communist regime's major achievements included universal access to electricity, that was maintained after 1989 by bailing out defaulting customers - factories and Roma districts - to which privatisation prompted by EU accession put an end.[905] Modernisation did not reach Roma districts, which increased energy loss that was in turn billed to customers in these segregated spaces.[906] The Turkish speaking/Muslim Roma have been protected from adverse consequences by minority political leaders in the south,[907] but similar political leverage was not available in the north, where CHEZ is the main electricity provider.

Under political pressure, the electricity companies find a way to upholster the grid, install individual meters and/or restructure back-payment. In an exemplary project, the EOIA's Mihaylova was brought in to redraft contracts and payment schemes for the Roma community in Plovdiv, indicating that if political mobilisation does the heavy lifting, lawyering can focus on the details.[908] In other words, if political tools can create a willingness to serve the Roma interest, lawyers can focus on the details of individual and community transactions and economic needs.[909] Nonetheless, the debt crisis itself cannot be resolved without government intervention and a change in consumption habits,[910] because Bulgaria faces the highest level of electricity reliance and waste in the region,[911] while its regulatory environment fails to accommodate vulnerable consumers.

The immediate threat of losing electricity mobilised the Roma across the country. NGOs launched representative and merged claims with civil courts and the equality body. The first

[905] Stanford PACS, Center on Philanthropy and Civil Society: EVN in Bulgaria (B)* – Engaging the Roma Community, prepared by Barbara Coudenhove-Kalergi and Christian Seelos, 20 August 2012.
[906] The regulatory riddle is analysed in detail in Zahariev, B. and Jordanov I., Geography of exclusion, space for inclusion: Non-payment of electricity bills in Roma neighborhoods in Bulgaria in Pallai K. (ed.), Who decides? Development, planning, services and vulnerable groups, OSI-LGI, 2009, Budapest, pp. 55-123.
[907] In Plovdiv, having lost a case in court, the Austrian owned EVN engaged Daniela Mihaylova in its pilot project aimed at modernising the electric grids, installing individual metres, linking illegal dwellings to electricity, reforming payment structures and managing outstanding debts. See, "Stolipinovo," Bulgaria European case study, Renate Lackner-Gass, power point presentation.
[908] Stanford PACS, 2012, supra.
[909] The basic features of community economic development lawyering are "(1) efforts to develop housing, jobs or business opportunities for low income people, (2) in which a leading role is played by nonprofit, non-governmental organisations and (3) that are accountable to residentially defined communities." William Simon, The Community Economic Development Movement, 2002, Wisconsin Law Review, 377, pp. 378-379.
[910] Zahariev and Jordanov, 2009, supra, p. 75.
[911] Julian Lampietti, Power's Promise: Electricity Reforms in Eastern Europe and Central Asia. World Bank working paper series; no. 40, 2004, Washington, DC: World Bank.

suit under the Bulgarian Protection Against Discrimination Act was brought by the Bulgarian Helsinki Committee and the Romani Baht Foundation on power failures in Sofia's Fakulteta district in the framework of the ERRC-funded litigation project in the early 2000s.[912] The NGOs took action on behalf of over 30 paying households[913] and the court found indirect ethnic discrimination.

Starting in 2006, with a complaint from Stolipinovo,[914] a Roma district in Plovdiv, the equality body received various complaints against service providers and established indirect ethnic discrimination. Several investigations were triggered by signals from political leaders at the municipal level, where access to electricity is an important currency one can offer in exchange for votes.

The CJEU's judgment in *CHEZ* is nestled in this litigation campaign. The applicant Ms Nikolova's lawyer initially challenged over-billing, because along with other regularly paying consumers, CHEZ charged her for the neighbours' illegal electricity consumption. The civil case was lost, and despite the fact, that Nikolova was not a Roma herself, the lawyer switched to the widely publicised equal treatment argument.[915] Nikolova complained to the equality body against CHEZ's failure to relocate her meter. Following a finding of indirect nationality discrimination, the body was ordered to repeat proceedings, at the end of which the complaint was upheld based on a new protected ground, the location of business. CHEZ challenged the decision before the Sofia Administrative Court that referred the case to the CJEU in 2014,[916] to seek interpretation on whether the practice constituted direct or indirect discrimination under the Racial Equality Directive.[917]

Following the referral, Open Society Justice Initiative Board member Yonko Grozev undertook to represent Nikolova, a third party who supported the equality body during the judicial review proceedings.[918] The CJEU held that the placement of the electric metres on 7

[912] Civil case No 1262/2004, panel 39, Sofia District Court. Several Roma individuals from Filipovtsi - another Roma district in Sofia - took joint legal action prior to PADA entering into force for power failure and lack of visual control. The Sofia District Court applied PADA and ruled in their favor, Case No 21674/2003, panel 24.

[913] For a detailed description see, Daniela Mihaylova and Iordanov, M., Access to electricity in Roma settlements in Bulgaria, Sofia 2015, pp. 30-33.

[914] Decision No. 58 of 29 November 2006, Case No 107/2006 of First Specialized Permanent Panel, Ibid, pp. 20-22.

[915] Grozev interview.

[916] Ibid.

[917] Opinion of AG Kokott, 20 September 2012, Case C-394/11, Valeri Hariev Belov, para. 99.

[918] Grozev, Maxim Frechtsman - legal officer in charge of identifying test cases amenable for regional level litigation in Europe based with OSJI until his recent appointment to a judicial post in his native Netherlands - and Simon Cox are named as her legal representatives. Delivery is requested to the hands of Grozev and Rupert Skilbeck, OSJI legal director.

meter high poles can be interpreted as direct, as well as indirect racial discrimination, with Ms Nikolova being less favourably treated 'together with the Roma'.[919]

OSJI shouldered the costs of litigation of a non-Roma shop owner - who runs a profitable business in one of the country's poorest Roma districts - to gain access to the CJEU and reframe the case around collective harm and racial stigma, while tying it to the *D.H.* campaign. Nikolova has been the only ethnic majority person to challenge the practice and the only victim who pursued an individual action, which begs questions about the choice of client. Why not support the equality body, especially when it plays such a central role in domestic enforcement?

Given the chilling effect of the CJEU's judgment in *Belov* - an identical case launched by Roma complainants - supporting the equality body that responded to the verdict by abandoning its hitherto pro-active stance would have been more beneficial for the cause of racial equality, embellishing the body's legacy and legitimacy within the target community.[920] Importantly, legal action has failed so far to capture the most vulnerable, who cannot afford to pay market prices. Different complainant classes need different remedies and the regulatory and governance questions - differential pricing and the readjustment of heating habits - should be addressed by re-channeling litigation and advocacy under consumer, energy and environmental laws.[921] As it is, electricity litigation has not accomplished either legal, institutional or policy reform, because even though CHEZ has agreed to change its meter placement practices in the Roma district where Nikolova's shop is situated, legal access to electricity is still out of reach across the country.[922]

4.4. Conclusions

Chapter IV presented a transnational account of legal strategies on Roma rights attributing equal weight to domestic and international developments. Given that international treaty mechanisms were not yet accessible and individual cases at the domestic level did not yield the required result, Roma rights lawyering commenced with advocacy for legal and institutional reform against Romaphobic violence. During the decade preceding EU accession, domestic NGOs designed similar legal strategies from native and imported tools, still, due to the lack of organic

[919] CHEZ judgment, paras. 50. and 60.
[920] Tamás Kádár, The Standing of National Equality Bodies before the European Union Court of Justice: the Implications of the Belov Judgment, Equal Rights Review No 11 of 2013, pp. 13-25.
[921] Zahariev and Yordanov, 2009, supra.
[922] The timeline of litigation following the CJEU judgment is available on the OSF website.

transnationalism, cross-border exchanges were rare and lawyers not embedded in the mainstream human rights movement felt isolated.

The ERRC adapted public interest litigation to manage and control the disconnected national Roma rights fields. It favoured top down reform lawyering, but its precedent-seeking 'federal' strategy was not emulated in the vernacular. Cases 'jumpstarted' at the international level accelerated jurisprudential gains, but owing to the shortcomings of transnational networking, they failed to gain traction in national advocacy realms. The *D.H.* litigation is an exception to how things are customarily done in the CEE, while the ruling itself contravenes UN treaties and domestic laws categorically prohibiting segregation, which could only be remedied through meaningful cross-border exchanges and a "good" transnational strategy responsive to domestic needs.

In the post accession era, burgeoning domestic campaigns received little attention from international actors, partly because they failed to mobilise courts to dialogue with the CJEU - and when they did, the CJEU refused to engage - and partly because they fed into advocacy efforts that differed from country to country. Over-transposition pulled towards equal treatment frames and increased the significance of domestic legal action, but largely failed in transnationalising legal strategies due to the INGOs' failure to adjust to the evolving legal opportunities. Desegregation litigation in the Strasbourg Court bore fruit in this period that also witnessed the proliferation of housing litigation driven by domestic NGOs.

The top-down school desegregation campaign overshadowed developments in housing where litigation responded to explicit grassroots complaints. The civil rights strategy broadened the scope of protection under the ECHR and provided immediate remedies against forced evictions, while the Council of Europe's enforcement efforts were outstandingly effective in comparison to other routes. The incremental change in the field of housing since the 1990s shows that litigation cannot achieve social change, unless it relies on action at the grassroots and focuses on legal service provision, rather than on designing a 'Big Case' and setting a 'precedent' from the top-down. Housing cases from *Buckley* through *Winterstein* to *CHEZ* bears witness to the devastatingly negative consequences that the lack of "good" transnationalism may cause by delaying jurisprudential, legal, policy, as well as social change.

Legal advocacy has been indispensable both for norm compliance and institutional reform, buttressed by litigation before domestic courts as well as public enforcement agencies. Domestic agents play a key role in these processes that highlights the necessity of ensuring adequate resources at the national level, and the secondary importance of INGO action.

"Good" transnationalism has been a priority for domestic agents, who generally suffer from the scarcity of funding structures that would support cross-border exchanges and transnational coalitions, as well as from international NGOs that dominate, rather than service the Roma rights field. "Good" transnationalism would require legal strategies that adequately respond to the inter-ordinal legal regime, being freed from the silos of treaty-based mechanisms and crafted from the local and national level up to the supranational. The key challenge is to respond to social rights claims, because the shortcomings of the relevant legal opportunities necessitate planning out of the box, i.e. moving beyond the boundaries of international human rights law.

4.5. Interim summary

Linking the Roma rights field's dense description to the law and social movements analysis unfolding in the following two chapters, this section shortly summarises the basic facts and conclusions presented in the previous four chapters. It returns to the social and political context, Roma-relevant legal opportunities, organisations and social entrepreneurs, and lastly, to legal strategies that set the scene for a discussion about conflicts and collaboration within the Transnational Roma Rights Network from the perspective of "good" and "bad" transnationalism, and finally, a critique that attempts to walk the middle path between mainstream and critical narratives about the Network.

In the last three decades, Roma-dense CEE countries have transitioned from socialist legality to the rule of law, a process that has been the subject of (governmental) counter-mobilisation in the context of increasing populism. EU accession in the mid-2000s represents the peak of compliance with the EU *acquis* and the mid-point in the transnational Roma rights movement's history.

Importantly, norm compliance with EU law proper did not substantially improve the Roma's legal protection, because social and minority rights particularly relevant for the group are external to this legal order, while fundamental rights are also more readily accessible under international human rights treaties. Roma-dense CEE countries ratified these treaties, but generally block access to the most relevant ones. Initially, the easily accessible ECHR mechanism became a benchmark for Roma rights litigation, but it is limited to civil rights as a rule. Access to equal treatment strategies opened only at the time of EU accession, with the (over-)transposition of the anti-discrimination directives.

Since 2004-2007, legal regimes have been multi-source and inter-ordinal with several peak courts that facilitates legal mobilization on the one hand, but also entails uncertainty and inconsistencies. Inter-ordinality inspires but does not necessarily facilitate forum shopping due to discrepancies between the 'rules of engagement'. Collective action is limited under treaties modelled on individual complaint, while due to the lack of direct access, adjudication in the CJEU can only be triggered by courts and the European Commission, none of which have been activistic when it comes triggering the judicial protection of Roma rights.

Domestic Roma rights organisations emerged from the interethnic collaboration of dissidents, progressive young Roma intellectuals and Western human rights activists after 1989, tapping into pre-existing political and academic networks. Funds came from rule of law donors and legal expertise from the human rights movement. Cross-border exchanges among legally focused NGOs began already in this period, while the Roma political movement was already organized transnationally, given the transnational nature of the minority group itself.

The legal and political fields are complex at the national level, perhaps more than at the European stage that take precedence over developments in the United Nations, due in great part to the geographic location of the Roma. Evolving legal opportunities facilitated, but also hampered legal action by pulling strategies into many different directions as treaty mechanisms under the auspices of international organisations gradually became accessible.

Gaje lawyers were adequate representatives of the cause at the domestic level, but in the international advocacy space, where legal and political representation were more closely interlinked, rivalries ensued between the resource-ful European Roma Rights Center and the relatively resource-less political movement. Still, rather than the adequacy of representation by the ERRC, its accountability *vis-à-vis* the ethnic minority leaders came under scrutiny and critique.

Representation of Roma rights was transnational throughout the last thirty years but concerns about legitimacy arose during the "golden age" due to the intervention of the US-based philanthropy, the Open Society Foundations that injected its own Roma-specific organisational structure between domestic and international organisations and generously invested into legal mobilisation. The European Roma Rights Center successfully built a reputation for itself and the cause at the expense of domestic agents and mutual cross-border collaboration, causing dismay among the international Roma elite that felt threatened as a legitimate representative of the ethnic minority cause.

The OSF Roma structure was complex, reflecting the philanthropy's involvement in both political and legal mobilization, its prioritisation of social inclusion through education and

its understanding of Roma rights as a transnational issue. Over time, OSF's engagement in Roma rights litigation developed into a three-pronged system: (i) funding local Roma rights organisations; (ii) acting through the ERRC, and (iii) litigating *via* the New York-based Open Society Justice Initiative, OSF's program dedicated to public interest litigation.

New NGOs were set up in the early 2000s owing to additional resources from the EU. With the expanding European monitoring mechanisms and a density of institutions, the Transnational Roma Rights Network developed more dynamically than the movement's grassroots basis. The ERRC retained a dominant position in the international advocacy realm.

The period following EU accession was defined by the global economic meltdown and increasing populism intent to dismantle the institutional basis of the rule of law - except in the Czech Republic, a reluctant reformer from the get-go. As the ERRC succumbed to a crisis triggered by EU expansion, genuine transnational collaboration recommenced, but cumbersome access to funds soon destabilised domestic Roma rights NGOs. Increasing collaboration with mainstream human rights organisations that have supported the movement since 1989 and new funding opportunities provisionally salvaged the situation, but shortly after the radicalising OSF Roma leadership assumed control over the ERRC, the organisation relocated to Brussels amidst increasing doubts about the usefulness of litigation in the Roma rights context.

This is surprising, because litigation as a social change tool has been prevalent in the Roma rights field since the political transition, assuming its full potential once access to international treaty mechanisms opened, or as a result of domestic legal reform. Interestingly, the use of litigation by mainstream human rights organisations and public enforcement agencies that often greatly impact on the Roma has not given rise to doubts, implying that the underlying issue is control over resources within the narrow confines of the Roma rights movement.

Given that in the early years international treaty mechanisms were not yet accessible and individual cases at the domestic level did not yield the required result, Roma rights lawyering commenced with advocacy for legal and institutional reform against Romaphobic violence. During the decade preceding EU accession, domestic NGOs pursued analogous legal strategies from native and imported tools, still, due to the lack of organic transnationalism, cross-border exchanges were rare and Roma rights lawyers not embedded in the mainstream human rights movement felt isolated.

The ERRC adapted public interest litigation to manage and control the disconnected national Roma rights fields. It favoured top down reform lawyering, but its precedent-seeking 'federal' strategy was not emulated in the vernacular. Cases 'jumpstarted' at the international level accelerated jurisprudential gains, but owing to the shortcomings of transnational

networking, they failed to gain traction in national advocacy realms. The *D.H.* litigation is an exception to the general *modus operandi* in the CEE, while the ruling itself contravenes UN treaties and domestic laws categorically prohibiting segregation, which could only be remedied through meaningful cross-border exchanges and a "good" transnational strategy adequately reflecting domestic needs.

In the post accession era, burgeoning domestic campaigns received little attention from international actors, partly because they failed to mobilise international tribunals and partly because they fed into advocacy efforts that varied from country to country. Over-transposition pulled towards equal treatment frames and increased the significance of domestic legal action, but largely failed in transnationalising legal strategies due to the INGOs' failure to adjust their strategies to evolving legal opportunities. Desegregation litigation in the Strasbourg Court bore fruit in this period that also witnessed the proliferation of housing litigation driven by Roma communities and domestic NGOs.

OSF's top-down school desegregation campaign overshadowed developments in housing where litigation responded to explicit grassroots complaints. The civil rights strategy broadened the scope of protection under the ECHR and provided increasingly meaningful remedies, while the Council of Europe's enforcement efforts were outstandingly effective. The incremental change in the field of housing since the 1990s shows that litigation cannot achieve social change, unless it arises at the grassroots and focuses on legal service provision, rather than on a 'Big Case' setting a 'precedent' from the top-down. Housing litigation from *Buckley* through *Winterstein* to *CHEZ* bears witness to the importance of respecting the agency of ethnic minority clients, as much as to the devastatingly negative consequences that the lack of "good" transnationalism may have by delaying jurisprudential, legal, policy, as well as social change.

Legal advocacy has been indispensable both for norm compliance and institutional reform across the CEE, buttressed by litigation before domestic courts as well as public enforcement agencies. Domestic agents play a key role in these processes that showcase the necessity of ensuring adequate resources at the national level, and the secondary importance of INGOs in generating social change.

"Good" transnationalism has been a priority for domestic agents, who generally suffer from the scarcity of funding structures that would support cross-border exchanges and transnational coalitions, as well as from the interloping of international NGOs that dominate, rather than service the Roma rights field. "Good" transnationalism would require legal strategies that adequately respond to the inter-ordinal legal regime, being freed from the silos of treaty-based mechanisms and crafted from the local and national level up to the supranational, rather than

the other way around, i.e. top-down. The key challenge is to respond to social rights claims, because the shortcomings of the relevant legal opportunities necessitate planning out of the box, i.e. moving beyond the boundaries of international human rights law.

Chapter V

Discursive domination

The chapter inquires into collaboration and conflict between the international and national elites of the Transnational Roma Rights Network, which is augmented by an ethnic divide discussed in the next chapter. The first-class elite - educated in the West, mainly in the US - favours legal liberalism, i.e. eliminating racial stigma by setting precedent in federal courts. This approach is epitomised by *Brown,* the archetypical case of public interest litigation in the US. The second class elite, Central and Eastern Europeans either subscribe to the dissident's vision of democratic socialism that combines the protection of fundamental rights and the rule of law with social justice or makes broad (ethno-political) claims on behalf of the Roma, crystallising in a reform agenda that simultaneously requires restraint and engagement from the state and envisages institutional reform primarily through legislation and secondarily through constitutional litigation. While the US liberals see justice as equality and equality through the prism of race, for the CEE agents justice is a matter of wealth redistribution based on socio-economic status and within that, race and other identities.[923]

Part 1 of the Chapter introduces OSF's 'official' narrative that also informs the accounts of international organisations and bears on mainstream academic publications as well. The thesis contrasts this 'official' narrative with the critical accounts of social scientists and activists who tend to portray OSF and its proxy, the European Roma Rights Center as hegemonic forces transplanting neoliberal policies that work to the detriment of the Roma by limiting protection to civil rights. This approach forms the backbone of the 'critical Roma narrative' that becomes the subject of analysis in the next Chapter. Other critiques have also been put forward over time and will be dealt with briefly.

Part 2 canvasses conflicts pertaining to reputation, resources, values and access to justice, asking whether they are beneficial, neutral or detrimental for the communities. Is criticism partly or fully embraced to resolve actual conflicts about using the law or is it in fact misplaced? Part 3 delves into the causes of conflict as they relate to legal mobilisation, classifying them as reputational, resource related, value based, and perhaps most importantly, as serving the

[923] This understanding was not specific to the CEE, but a neo-marxist, structuralist view advanced, for instance in Etienne Balibar and Immanuel Maurice Wallerstein, Race, nation, class: Ambiguous identities, Verso, 1991.

domestic US agenda. Part 4 showcases the dominant discourse on strategic litigation that emulates *Brown's* construction in the US, being therefore inescapably oblivious to CEE realities on account of ultimately serving OSF's domestic agenda in the US.

Part 5 concludes by highlighting the mixed, yet altogether positive consequences of philanthropic domination. It puts forward an alternative reading of events, namely that the interordinality of the legal field and European conceptions of key rights divert hegemonic resources and mitigate towards minority-friendly interpretations in the Roma rights movement. Europeans prioritise equality over liberty in the context of Romaphobic hate speech and access over equality in housing, while strategic litigation in the CEE's civil law tradition takes on a different meaning from that envisaged by common law jurisdictions.

Discursive domination conceals the use of resources by domestic agents for purposes that subvert the philanthropic agenda, therefore the focus on international NGOs and the failure to observe their functional differences limits the sway of the 'counter-hegemonic' critique, whose empirical basis is partly skewed and partly counter-factual. Contrary to what has been suggested so far, the OSF Roma structure does engage in both litigation and advocacy for social rights and substantive equality, while behind the scenes CEE agents prevail in curtailing the freedom of expression when it breaches the right to equal treatment. The methodological proposition is that in order to understand power dynamics within a transnational advocacy space, the analysis must extend to domestic developments in specific issue areas, rather than focus exclusively or primarily on 'the international' and/or broad frames, such as a certain generation of rights.

The chapter does not address campaigns against George Soros and OSF on the Eastern borders of the EU, where populists mobilise against political liberalism and the rule of law.[924] OSF and its founder are not their only scapegoats, because as illiberal states are growing in number, so is the list of their enemies: philanthropies, development agencies, watchdog and international organisations, courts and anyone who supports the rule of law financially, programmatically or by setting limitations to arbitrary power. Conversely, while cognisant of its imperfections, the thesis portrays OSF as a fundamentally positive force in the Roma rights field.

5.1. Self-perception and critique

[924] See the recent laws and legislative amendments curtailing the operations of the Central European University, NGOs dealing with migrants and the Stop Soros campaign in the 2018 elections.

Contrary to its self-perception as a committed, generous and successful benefactor of the Roma in Central and Eastern Europe,[925] the supporter of social inclusion policies and more particularly, of strategic litigation in (international) courts,[926] the Open Society Foundations was depicted in rather indelicate terms even before the populist turn, although few wrote about the philanthropy and its donor-organised NGOs (DONGO) as the 'Soros mafia of NGO project elites'[927] that shape global governance by triggering "'soft' ideational and normative policy transfer" and construct expert legitimacy to legitimate and "institutionally consolidate that knowledge."[928]

5.1.1. Philanthropic self-perception and the international narrative

OSF's agenda is anchored in a world view specific to the US,[929] an intrinsic part of which is an explanation of social inequalities with reference to race, rather than class and the courts' fundamental role in shaping public policies that address formal, rather than substantive inequalities.[930] Commitment to racial justice, race conscious policies and legal liberalism has set OSF up as a supporter of the CEE's most sizeable racialised minority, the Roma with a caveat that has proven crucial in the regional context, namely that the Roma are not a dominant minority in the national contexts, unlike African-Americans in the US at the relevant time.

The 'practical and strategic' premises of legal liberalism include a preference for court-centered procedures[931] deep distrusts for "large institutions, especially governments" and

[925] To commemorate the International Roma Day, on 7 April 2019, the OSF website featured a video about the philanthropy's contribution, announcing that over the last three decades over USD 330 million has been spent for the Roma cause, particularly for education, community empowerment and culture.
[926] See, for instance Aryeh Neier's and Deborah Harding's contribution to celebrating the ERRC's tenth anniversary in The 10th Anniversary of the European Roma Rights Centre (Speeches of Bob Hepple, Aryeh Neier, Dimitrina Petrova, Claude Cahn, Deborah Harding, ERRC Staff Members and George Soros), Roma Rights 2-3, 2006.
[927] Steven Sampson, Introduction: Engagements and Entanglements in the Anthropology of NGOs in Cultures of Doing Good, eds, Amanda Lashaw, Christian Vannier, Steven Sampson, Victoria Bernal, Erica Bornstein and Inderpal Grewal, Inderpal, The University of Alabama Press, 2018, p. 2.
[928] Diane Stone, Private philanthropy or policy transfer? The transnational norms of the Open Society Institute, The Policy Press, 2010, pp. 269-287.
[929] Aryeh Neier argues for the primacy of civil rights over social rights. Neier, 2003, supra.
[930] Loic JD Wacquant, Three pernicious premises in the study of the American ghetto, International Journal of Urban and Regional Research, 1997, pp. 341-343, at p. 341.
[931] William H. Simon, Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism, 46 Wm. & Mary L. Rev. 127 (2004), pp. 133-140.

"'extreme sensitivity to the corruptions of power and wealth."[932] Rights are used as trump cards[933] and designating a value as a right implies that it has 'presumptive priority' over competing sets of values.[934] In the Roma rights field US liberal conceptions of rights favour a focus on race rather than class in public policies, the freedom of speech over racial equality in relation to hate speech and tackling stigma v redistributive justice in relation to basic needs, such as housing. Similarly, the US liberal conception of lawyering as court-centered legal reform litigation based on collective action enjoys primacy in the narrative, whereas the CEE practice combines domestic and international, legal and policy advocacy, enforcement financed from both public and private funds, representative actions, community organising, education and training.

The philanthropy has been concerned primarily with regional stability, secondarily with the rule of law and (racial) equality, and thirdly with the *de iure* and *de facto* position of the Roma. More precisely, different OSF units have focused on different parts of this teleological continuum and only few have prioritised Roma rights. In the grand scheme of things, the campaign for Roma inclusion has been part of an agenda seeking to imbue states with the values and norms of liberal democracy and racial justice.

The narrative of international organisations has been heavily influenced by OSF, an interlocutor – or in some accounts, an interloper – between the domestic and international advocacy spaces. It has also been different, however, in line with the different interpretations and frames that key rights and issues receive on the 'Old Continent', such as hate speech, social inclusion and minority rights. This explains why, for instance, the Council of Europe has actively advocated against hate speech, and why – despite the fact that it prohibits racial discrimination in the Racial Equality Directive – the EU promotes the inclusion of Roma in the East and migrants in the West, rather than a single category of persons, such as racial or ethnic minorities.

5.1.2. Social science critique

Critical approaches to global civil society underline that the 'mutual validation process' between the US and European reformers lends 'intellectual credibility' to policy transfers, enabling philanthropies, such as OSF to gain privileged access to the international advocacy realm

[932] Ibid, p. 135.
[933] Ronald Dworkin, Taking Rights Seriously 184-205 (1977).
[934] WH Simon, 2004, supra, p. 136.

and step out of the 'third sector'.[935] Critics from the left conceive of philanthropic domination as contingent on a socio-economic order and constituted as a "private alternative to socialism."[936] It is believed that inquiry into the "cultural-symbolic and organisational capacities" can show how dominant philanthropies are in "global civil society making"[937] where mass membership based social movements are shortchanged for elite-led advocacy NGOs,[938] whose expertise hinges on "new forms of 'policy knowledge'" and the representation of their promoters' interests.[939]

Describing transnational civil society networks as hegemonic is common place in political economy and international relations literature.[940] One model perceives global civil society as "coopted by hegemonic capitalist and political elites [that] promote hegemonic interests by distributing neoliberal values and providing a facade of opposition."[941] Another, however, posits that global civil society can successfully challenge neoliberal hegemony by evolving into a counter-hegemonic 'historic bloc'.

The counter-hegemonic critique explains OSF's involvement in the Roma rights movement as an attempt to legitimate neoliberal economic policies while offering no more than a hollow promise of civil rights.[942] Waged from the left, it focuses on globalisation and the role of global civil society[943] based on the premise that "it is erroneous to limit the conception of hegemony by defining it simply in terms of the power of one state relative to other states."[944] This frame forms an eminent strand of the 'critical Roma narrative' discussed in the following Chapter.

The progressive and radical Roma elite is preoccupied with resource inequalities and argues that INGOs serve their own majoritarian, rather than the Roma community's

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[935] Ibid.

[936] Nicolas Guilhot, Reforming the World: George Soros, Global Capitalism and the Philanthropic Management of the Social Sciences, Critical Sociology 33 (2007) pp. 447– 477.

[937] Ann Vogel, Who's making global civil society: philanthropy and US empire in world society, The British Journal of Sociology 2006 Volume 57 Issue 4.

[938] Ondřej Císař, The diffusion of public interest mobilisation: a historical sociology perspective on advocates without members in the post-communist Czech Republic, East European Politics, 2013, 29:1, 69-82.

[939] Roelofs, J. (2003) Foundations and public policy: The mask of pluralism, Albany, NY: SUNY.

[940] Limiting the use of hegemony as an analytical tool to examine one state's power over another is a thing of the past. Stephen R. Gill and David Law, Global Hegemony and the Structural Power of Capital, International Studies Quarterly, Vol. 33, No. 4 (Dec., 1989), pp. 475-499.

[941] Hagai Katz, Gramsci, Hegemony, and Global Civil Society Networks, Voluntas (2006) 17:333–348.

[942] Sigona and Trehan, 2009, supra.

[943] Diane Stone, Private philanthropy or policy transfer? The transnational norms of the Open Society Institute, The Policy Press, 2010, pp. 269-287. Angéla Kóczé and Márton Rövid, Pro-Roma Global Civil Society: Acting for, with or Instead of Roma?, Global Civil Society 2012, pp. 110-122., Marushiakova and Popov, 2004, supra. The authors claim that philanthropies trying to help cause graver problems than racism.

[944] Steven R. Gill, and David Law, The Global Political Economy: Perspectives, Problems, and Policies, Baltimore: Johns Hopkins University Press, 1988, p. 344.

minoritarian interests.[945] More precisely, it claims that OSF and the ERRC failed to address the dire socio-economic conditions that prevailed within impoverished Roma communities after the political transition. The potency of the 'rights talk' compelled the critics to demand more (Roma-specific) rights, augmenting their call for further investment into community empowerment, and more recently, a positive self-identity ("Roma pride").[946]

In a key publication that brings together critical Roma scholars and activist with experience in the OSF Roma structure, Nidhi Trehan and Nando Sigona claim that OSF contributed to erecting structural barriers that impede collective interest representation by limiting political opportunities.[947] In their account, INGOs enroll Roma activists to legitimate their agendas and function as proxies to international organisations whose policies are shaped by powerful states, for whom the Roma represent a threat of westward migration, and secondarily, a social group disproportionately affected by economic adjustments and recurring crises.[948] They depict the philanthropy as an interloper in international relations and its founder as epitomising the evils of economic liberalism - a minimally regulated market combined with an unduly limited conception of rights.

The ERRC's legal strategy is portrayed as unnecessarily centred on individual harm and civil liberties rather than structural inequalities, but failing to properly situate the INGOs and the OSF Roma structure within the movement, the narrative in Trehan and Sigona's book relies on a vague conception of Roma rights, the law, and legal tools. It lacks a detailed inquiry into the depth and breadth of Roma rights lawyering, but more importantly, it fails to assess the ERRC's work outside the realm of civil and political rights against the legal opportunities available at the material time and the role of all relevant actors, including states and international organisations in shaping legal norms. The critique is launched from the left, but more importantly, it is launched based on ethnicity, combining ideology and race to embellish its legitimacy. It problematises access to justice - not using the law to its full potential - without charting a trajectory that Roma rights litigation could and should follow in the context of existing legal norms.

Trehan and Sigona skate over the fact that domestic Roma rights lawyering was not only impervious to battles in and around the ERRC, but that it was rather independent, frequently extending to fields the ERRC did not venture into. Still, the domestic scene was not

[945] Sigona and Trehan 2009, supra.
[946] Nothing about us without us, Roma Rights, 1/2015 and Bhabha et al, 2017.
[947] Sigona and Trehan, 2009, supra.
[948] Nando Sigona and Nidhi Trehan, Introduction: Romani Politics in Neoliberal Europe in Sigona and Trehan, 2009, supra.

immune to reputational struggles and competition for resources intrinsic to social movements in general.[949] For instance, the dynamics between Romani Criss and other - incidentally not legally-focused NGOs - in Romania showed important analogies with the ERRC's troubles *vis-à-vis* other domestic NGOs, including Romani Criss.[950]

While understating the communities' demand for civil liberties, the counter-hegemonic critique falls short of offering an alternative, yet realistic program for legal mobilisation, as much as it fails to show a way out of the nepotistic, coopted leaders' grip on national Roma politics.[951] The condition of success for progressive agendas is collaboration with pro-European political parties,[952] but often, weak domestic political opportunities pose structural obstacles to mobilisation and frustrate action in politics as well as the law. Pointing a finger at the *gaje*-led INGOs cannot resolve the key puzzle, namely the scarcity of progressive Roma activists at the grassroots level.

5.1.3. Legal critique

The alleged threats and consequences of lawyering for OSF has been studied in relation to civil rights litigation under the European Convention, and the philanthropy has been unflatteringly described as instrumental in manufacturing a "new Cold War."[953] While equally dire claims have not been made in relation to Roma rights lawyering in general, similarly dubious portrayals of the ERRC, for instance as a promoter of purely political and "ulterior purposes" have been made by many, including a prominent Strasbourg judge.[954]

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[949] Sandra R. Levitsky, To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements in Austin Sarat, Stuart A. Scheingold (eds.), Cause Lawyers and Social Movements, Stanford University Press 2006, p. 146: "while legal advocacy organizations do assist other organizations in the movement, inter-organizational relations are not defined by reciprocal but by unilateral cooperation. As a result, many activists in the movement perceive legal advocacy organizations as operating independently from the rest of the movement, imposing their agendas without consultation with grassroots activists and with few opportunities for input from the rest of the GLBT community. And while there was no evidence that legal advocacy groups dominated the movement by steering others toward litigation strategies, their considerable organizational resources did influence agenda setting."

[950] Dumenica interview.

[951] Rostas, 2009, supra.

[952] Contentious politics in Europe : experiences of desegregation policy in Hungary and the push for an EU-level strategy on Romani integration; N. Trehan in conversation with MEP Viktória Mohácsi in Trehan and Sigona, 2009, supra.

[953] Guetan Cliquennois and Brice Champetier, The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a New Cold War?, in European Law Journal, Vol. 22. No. 1, January 2016. pp. 92-126.

[954] Dissenting Opinion of Judge Zupančič, D.H. Grand Chamber judgment, p. 76. "No amount of politically charged argumentation can hide the obvious fact that the Court in this case has been brought into play for ulterior purposes …"

A key figure in the devastating, yet futile conflict over Slovakian sterilisation cases described in Chapter II, Barbora Bukovska expressed strong doubts about the ERRC's relations with its 'clients',[955] underlining that frames and methods, but more importantly the lack of accountability reinforce power imbalance as the minority constituency is substituted by the INGO staff, donors and international organisations.[956]

Bukovska based her critique on David Kennedy's work, a critique of human rights lawyers as moral idealists who partake in 'rulership' by advising 'the princes' rather than 'speak truth to power'.[957] Her approach – and as will be argued below, that of the 'Critical Roma Narrative' - ties in with critical legal theory that portrays the 'dark side' of human rights in terms of 'hegemony as resource allocation', 'hegemony as criticism' and 'hegemony as distortion'. In this account, the institutional and political power human rights hold over resource allocation renders more valuable emancipatory strategies less available. As a "dominant emancipatory vocabulary" human rights can overshadow other frames by implicitly suggesting that they are "'too' ideological" or "insufficiently universal"[958] prompting development and political projects to be expressed in the rights language.[959]

The criticism of American-led legal imperialism[960] and the 'imperial' nature of US transplants[961] has not been as explicit in the Transnational Roma Rights Network, even though it would aptly describe the sentiments of the CEE locals. Lawyers have been less forthcoming, because domination can take benevolent[962] and cooperative forms[963] and - as in the case of OSF - the material incentives and the discursive propagation of the hegemon's norms and values

[955] Barbora Bukovská, Perpetrating good: Unintended consequences of International Human Rights Advocacy, Revista Internacional de Direitos Humanos, São Paulo, n.9, p.6-21, December 2008.
[956] In comparison to domestic human rights NGOs, part of the ERRC staff was always more preoccupied with internal power struggles and its own rights, rather than the geographically and socially distant Roma communities. Staff-management conflicts were also encouraged by members of the Board or top executives as part of their palace wars.
[957] David Kennedy, The dark sides of virtue: reassessing international humanitarianism, 2005, Princeton University Press.
[958] David Kennedy, Laws and Development in Law and Development: Facing Complexity in the 21st Century, John Hatchard, Amanda Perry-Kessaris (eds.), Cavendish Publishing Limited, 2003, pp. 17-26.
[959] David Kennedy, International Human Rights Movement: Part of the Problem?, 15 Harv. Hum. Rts. J. 101 (2002), p. 108.
[960] David M. Trubek & Marc Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, 1974 WIS. L. REV. 1062, 1080 (1974).
[961] Pierre Bourdieu and Loic Wacquant., On the Cunning Imperialist Reason, in Theory, Culture and Society, 1999, Sage, Vol. 16(1): 41-58.
[962] Robert Kagan, The Benevolent Empire, Foreign Policy, No. 111 (Summer, 1998), pp. 24-35.
[963] Sandra Destradi, Regional powers and their strategies: empire, hegemony, and leadership, Review of International Studies (2010), 36, 903–930.

may render it indispensable.[964] Given the lawyers' lack of willingness to openly criticize OSF, the 'legal' critique has been waged by non-lawyers.

The critical literature draws from extra-legal literature, so that it does not reflect on the precursors of domination within the Network, such as the law and development movement in the second half of the 20th century and the Ford Foundations programmatic activities in general. In the early 1970s, law and development came to an impasse, because it equated the "core conception of modern law" with "that found in the West." [965] Without recognising its own limitations, its "ethnocentric and evolutionist generalisations from Western history" it was imposed as "essential for economic, political, and social development in the Third World."[966] More bluntly put, classic law and development was "an attempt to impose U.S. ideas and attitudes on the third world."[967] Once rebranded in the 1990s, its new version, the "'rule of law,' became big business" in the hands of development agencies and philanthropies supporting legal reform, without Western do-gooders learning from past mistakes.[968]

Rule of law crusaders treat locals as savages - the objects of civilising projects - who are conceived as victims to be saved.[969] The locals *en bloc* are subjected to a missionary project, regardless of expertise and ethnicity. However, when the incoherency of human rights becomes obvious,[970] the crusaders who bring important (financial) resources are not held accountable. Roma activists wag their fingers at the local 'whites', the *gaje*, constrained in their criticism by the shackles of financial dependency. Ironically, lacking the jurisdiction to 'hold Soros accountable', populist politicians are also diminished to venting their wrath on the local rule of law disciples.

The critique of legal liberalism, namely that (human) rights subdue the free will of marginalised groups by turning them into victims before the courts of law[971] instead of offering

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[964] What distinguishes hegemony from leadership is that hegemonic behaviour ends once the hegemon's *own* goals are achieved. Ibid.

[965] David M. Trubek, Toward a Social Theory of Law: An Essay on the Study of Law and Development, The Yale Law Journal, Vol. 82, No. 1 (Nov., 1972), pp. 1-50. at p. 2.

[966] Ibid.

[967] John Henry Merryman, Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement, The American Journal of Comparative Law, Vol. 25, No. 3 (Summer, 1977), pp. 457- 49. at p. 483.

[968] David M. Trubek, Law and development: Forty years after 'Scholars in Self-Estrangement', University of Toronto Law Journal, Volume 66, Number 3, Summer 2016, pp. 301-329 at p. 312.

[969] Makau Mutua, Critical Race Theory and International Law: The View of an Insider-Outsider, 45 Vill. L. Rev. 841 (2000).

[970] Chantal Thomas, Critical Race Theory and Postcolonial Development Theory: Observations on Methodology, 45 Vill. L. Rev. 1195 (2000).

[971] Kristin Bumiller, The civil rights society: The social construction of victims, The Johns Hopkins University Press, Baltimore - London, 1988. In the Roma context, see, Andria D Timmer, Constructing the "needy subject":

pragmatic solutions to their problems and embellishing their agency[972] has also been applied to the iconic Roma rights case, *D.H. and Others v the Czech Republic* .[973] The next chapter reflects on these insights, finding them somewhat misplaced, particularly in light of commentary by critical (race) scholars, who celebrate the use of human rights as an empowerment tool, unaware of the caution with which African-American civil rights lawyers participated in using the law to desegregate in the first place.[974]

5.2. Conflicts between the international and CEE elites

Part 2 canvasses conflicts pertaining to values and norms, access to justice and competition for resources. It asks whether conflicts are beneficial, neutral or detrimental for the communities? Is criticism partly or fully embraced in an attempt to resolve actual conflicts or is it in fact misplaced?

The relationship between the dominant international and secondary CEE elites has been complex, characterised by conflicts but also fruitful collaboration, which tallies with the premise of the transnational justice model[975] that posits a balance between idealism and collaboration on the one hand and conflict, competition and professional hierarchy on the other.[976] These dynamics simultaneously shape and erode the Network, where the elites are divided alongside ethnicity, geographic origin, expertise and legal traditions. Far from being "neutral translators," lawyers build their own social capital, playing a role corollary to activists, who struggle to dominate resources, frames and strategies.[977]

Control and coordination over information and knowledge is "an important dimension of power" held by the OSF Roma structure, in which both the dominant international and secondary CEE elites promote legal and policy reform *vis-a-vis* their own governments (boomerang effect), while the dominant elite also holds sway over the international advocacy realm.[978]

NGO discourses of Roma need, PoLAR: Political and Legal Anthropology Review, 2010, Vol. 33, No. 2, pp. 264-278.

[972] William H. Simon, Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism, 46 Wm. & Mary L. Rev. 127 (2004).

[973] William New, Litigating exclusion, inclusion and separation: dilemmas of justice in Roma education reform in Roma Education in Europe: Practices, policies and politics edited by Maja Miskovic, Routledge, London and New York, 2013, pp. 181-191.

[974] Minow, 2013 and Eliason, 2017, supra.

[975] Dezalay and Garth, 2012, supra, p. 5.

[976] Ibid.

[977] Ibid.

[978] Haas, 1992, supra, p. 2.

Discontent sprang up in response to the dominant international elite's failure to formalise the Network, recognize its members and regulate relations among them as among equals. The failure to emulate the model of well-functioning coalitions and federations unnecessarily increased the responsibility of the CEE locals both in national politics and *vis-a-vis* the Roma communities, infusing hierarchy and entropy into the Network and magnifying inequality between individuals and organisations.[979]

Lisa Jordan and Peter van Tuijl argue that representation and accountability can be allocated between dominant and secondary actors in many different ways, but also that the hegemonic vocabulary of human rights can conceal conflicts within transnational advocacy networks.[980] In the c*ooperative* model the parties pursue interlocking objectives in multiple political arenas and political responsibilities are jointly managed. The *concurrent* model signifies coinciding representation of compatible objectives in the NGOs' own political arena and a coexisting management of political responsibilities. The *disassociated* model is characterised by a parallel representation of conflicting objectives in the NGOs' own political arena and a low level of political responsibility. The parameters of the *competitive* model are parallel representation of opposing objectives in different political arenas, no joint review of strategies and a lack of political responsibility. Concurrent campaigns are ideal as well as realistic, because it is generally extremely difficult to advocate effectively and responsibly outside an NGO's own political arena.

The human rights discourse is shared in the Transnational Roma Rights Network, even if the agendas and strategies differ and locals in the national domain prefer concurrent, or - in case of greater value differences - disassociated campaigns. Reputational conflicts and competition for resources drive wedges between the elites, but limiting discursive domination to the organisations' 'native' political arenas can resolve conflicts by permitting parallel value systems to coexist.

Discursive domination - what is being talked about and what is not - shows the OSF Roma structure's imperial DNA more clearly, than its control over resources or other facets of power. The dominant narrative has been constructed around *D.H*. that embodies both a general demand for integration and a sector specific claim for school desegregation. Silence has been

[979] An analysis of global development campaigns has shown that NGO relationships "may reflect as much inequality as they are trying to undo," See, Lisa Jordan and Peter Van Tuijl, Political Responsibility in Transnational NGO Advocacy, World Development Vol. 28, No. 12, 2000, pp. 2051-2065, at p. 2061.

[980] These are articulated along seven parameters: division of political arenas; agenda setting and strategy building; raising and allocating financial resources; information flow; information frequency and format; information translation into useful forms; and the formalization of relationships.

equally significant, for instance as concerns legal action against hate speech and forced evictions. A third layer of discursive domination is the failure to recognise authorship and innovations by the secondary elite.

Recent events attest to the fact that Roma leadership does not *per se* diminish the appetite for discursive domination. For instance, in April 2018 the website entry dealing with the ERRC's history recorded as a 'first' a collective complaint on housing under the European Social Charter. While the 2005 submission was indeed the first for the ERRC, it was not the first collective complaint under the Charter, nor the INGO's first housing case. Moreover, soon afterwards, the Charter strategy was abandoned, and national lawyers set a useful precedent on housing, rather than the ERRC as demonstrated in the previous chapter.

Discursive domination is linked to the concept of hegemony in political science literature. Antonio Gramsci theorised hegemony as "political leadership based on the *consent of the led*, secured by the diffusion and popularization of the world view of the ruling class."[981] Majority consensus is 'manufactured' by the hegemon who uses ideational and material resources in the process.[982] Gramsci distinguishes between civil and political society. The former is composed of "private organisms" such as schools, churches, clubs and political parties that generate social and political conscienceless, while the latter is synonymous with the state. Civil society is the marketplace of ideas, where the intellectuals' success depends on the extent to which they "extend the world view of the rulers to the ruled."[983] This conception of "hegemony emphasizes the inherent conflict involved in constructing networks of power through knowledge."[984]

According to Ernesto Laclau and Chantal Mouffe, discursive hegemony combines linguistic as well as material/institutional practices,[985] denoting a race between different political forces over their conception of 'floating signifiers' that can assume a variety of meanings, depending on the type of discourse they are 'articulated' in (liberal, socialist, etc.).[986] Freedom

[981] Thomas R. Bates, Gramsci and the Theory of Hegemony, Journal of the History of Ideas, Vol. 36, No. 2 (Apr. - Jun., 1975), pp. 351-366, at pp. 352-353.
[982] Wendt and Friedheim, Hierarchy under Anarchy, International Organizations, Vol 49. No. 4, 1995, pp. 689-721, p. 700 and Robert W. Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method', Millennium: Journal of International Studies, 12 (1983), p. 164.
[983] Norberto Bobbio, "Gramsci e la concezione della societa civile," Gramsci e la cultura contemporanea, ed. Pietro Rossi (Rome, 1969), 94, cited by Bates, 1975.
[984] Mark C. J. Stoddart, Ideology, Hegemony, Discourse: A Critical Review of Theories of Knowledge and Power, Social Thought & Research, Vol. 28, Social "Movements" (2007), pp. 191-225, p. 193.
[985] Ernesto Laclau and Chantal Mouffe, Hegemony and socialist strategy: towards a radical democratic politics, London: Verso, 1985, p. 7.
[986] Jules Townshend, Laclau and Mouffe's Hegemonic Project: The Story So Far, Political Studies: 2004 Vol 52, 269–288.

and equality constitute such floating signifiers and when they come into conflict, the different meanings of these terms spring to the fore.[987]

While relying on the theory of discursive hegemony, the thesis prefers the concept of domination to denote the type of power OSF and its DONGOs wield. Hegemony can be categorised as hard, intermediate or soft in reference to the 'power instruments employed'.[988] The conception of soft hegemony provides particularly useful insights into the OSF Roma structure's role in the Network, because even though it seems akin to leadership, it is not consensual as the goals and objectives of the dominant elite supersede local interests. Domination comes from converging norms and values rather than cost-benefit calculations, and the "osmosis of norms and values" between the elites lends the philanthropy a high degree of legitimacy.[989] The dominant elite can successfully "alter the normative orientation and practices of secondary elites without sanctions, inducements, or manipulation," but given long term collaboration socialisation and ideological persuasion can be reciprocal.[990]

OSF employed particularly intrusive instruments of power in the Roma rights field as compared to its involvement in the human rights and the western European anti-racist movements.[991] This may stem from the fact that formalised transnational networks preexisted its engagement in both - the International Helsinki Federation for Human Rights and the European Network Against Racism that cover(ed) a greater geographic scope with strong local membership and access to substantial resources.[992] The Roma issue is prevalent in the CEE Five, whose total population is only about 57 million, with the Roma representing little over 5 million

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[987] In contrast, 'empty signifiers', such as 'order' or 'democracy' are more amenable to taking on diverse meanings. Not having inherent content, they can serve to unite disparate movements. Ibid, p. 271.

[988] Destradi, 2010, supra, pp. 917-918.

[989] GJ Ikenberry, CA Kupchan, Legitimation of Hegemonic Power in World Leadership and Hegemony, Lynne Rienner Publishers, London, 1990, p. 57.

[990] Destradi, 2010, supra, p. 918.

[991] OSF started to focus on Islamophobia in the early 2000s, but turned to western Europe in earnest only after the rise of populism in the wake of the global economic crisis in 2008. It has issued reports and funded litigation in collaboration with locals or as an amicus. OSJI's involvement in CHEZ and the Islamic headscarf cases - SAS v France, Achbita and Bougnaoui - demonstrate the different rules of engagement in the west and the east. In the Bulgarian case OSJI re-designed the legal strategy as a representative before the CJEU, while in the headscarf cases it followed an amicus strategy - submitting a brief in the Strasbourg Court, while publishing one in the latter two cases. Interestingly, rather than moving into the void left by the bankrupted IHF in 2007, OSF funded initiatives seeking to rebuild the network.

[992] Susan L.Q. Flaherty, Philanthropy without borders: US private foundation activity in Eastern Europe, Voluntas: International Journal of Voluntary and Nonprofit Organizations, Vol. 3, No. 3 (December 1992), pp. 335-350 at pp. 341-342. The image of political neutrality is so important that it compelled Neier to debate Moyn's claim that the "ideological ascendency of human rights" was made possible by "the collapse of prior universalistic schemes." In his view Moyn is "mistaken in likening the human rights cause itself to a universalistic scheme, implying that it includes a vision for the organization of society. It does not." Neier, 2012, p. 4. He refers to Samuel Moyn, The Last Utopia: Human Rights in History, Cambridge, MA: Harvard University Press, 2011 p.7.

people. In comparison, the total population of the EU is over 500 million with approximately 24 million European Muslims and eight million Afro-Europeans who can draw resources from kin states, and generally possess more extensive endogenous resources than the Roma. This also means that racial(ised) minorities in Western Europe comprise a sizeable middle class.

5.2.1. An empire of words

OSF is a complex organism that represents a coalition between progressive idealists and capitalist entrepreneurs. Unlike other donors, OSF programs have complemented, substituted and at times competed with grantees, and the philanthropy set up a Roma-specific structure after witnessing the failure of the old Roma elite as concerns tapping into favourable political and legal opportunities in Europe. The OSF Roma structure has substituted the movement's transnational echelon absorbing a great portion of funds available for cross-border cooperation--particularly as concerns Roma rights defence-- and producing an extensive body of reports, policy papers, etc.

The power imbalance between the dominant elite and the CEE locals is coded in an obscure institutional structure, because after unilaterally inserting itself into the Transnational Roma Rights Network, OSF created hierarchies based on (employment and grant) contracts, unwritten 'customary' codes of conduct and discursive practices, while projecting the image of a unified and consensual leader, simultaneously controlling the flow of ideas, information and advocacy.

The *D.H.* campaign has been an important vehicle of discursive domination. In OSF's communication the 'European *Brown*' signifies both Roma integration and the importance of legal tools for social change. OSF publications and OSF-inspired or OSF-sponsored external materials disseminate this message, reconstructing *Brown's* myth in Europe and making it legible for the American public. The judgment's key outcomes--finding indirect discrimination, reversing the burden of proof and permitting the use of statistical evidence--are significant from a US perspective, but across the CEE, legislation transposing the Racial Equality Directive offered these achievements on a plate.

The narrative takes for granted the significance of legal precedents and INGOs in triggering social change. There is no accounting for Europeanisation, including the significant role of domestic courts and equality bodies as agents of EU law, political opportunities, advocacy,

community organising, education and training. As *Brown* in the US, *D.H.* becomes a construct legitimating legal liberalism in Europe as well. Therefore, it becomes irrelevant that the 'European *Brown*' did not in fact do the job, in that the Czech Republic was the last member state to transpose the Racial Equality Directive without implementing the necessary policy reform until recently. As discussed in the previous chapter, the European legal context is not amenable to a 'federal' litigation strategy, moreover, a precedent such as *D.H.* cannot go beyond establishing racial discrimination and order the payment of just satisfaction, because constraints on other effective sanctions are structurally coded in the European Convention.

5.2.2. The original sin

The ERRC is an OSF proxy, external to OSF proper and a grantee of various network programs. Rather than its hegemonic access to financial resources from donors that disburse funds both regionally and locally in the CEE, its absorption of funds earmarked for national NGOs or not limited to global actors has been problematic. Given that OSF established the ERRC in order to attract EU funds, the philanthropy played a significant role in engendering inequality within the Network. Following EU accession, resources facilitating transnational cooperation became even more sporadic, rendering it virtually impossible for national NGOs to sustain cross-border exchanges.

The ERRC's advantage in the competition for resources diminishes the domestic agents' autonomy for which the INGO regularly fails to compensate. What is more, it has pursued questionable practices that bend the playing field, compromising the national NGOs' pride, reputation and accountability. While the ERRC has been a non-consensual, yet generally adequate representative of the Transnational Roma Rights Network - if not the movement - in terms of international advocacy, it has been less adequate and highly contested in domestic arenas, especially in cases of unilateral engagement.

In the mid-1990s, the ERRC and the CEE locals were simultaneously building organisational and personal reputations, which could still not justify the founding executive's verbal ultimatum, announcing that her organisation would, without prior consultation intervene in

national domains.[993] This gesture came to be seen as the 'original sin', because it put domestic agents at risk by increasing their political responsibility and jeopardising client accountability.[994] The rush to being 'the first' was not accompanied by assurances that the ERRC would see its actions through, particularly because it lacked the necessary (human) resources to do so. Its primacy came at a cost that domestic agents had to pay, picking up the pieces of what was coined by more critical activists as the ERRC "parachouting in."

5.*2.2.1. Legal strategy as a function of organisational reputation*

Except for a brief period, when Branimir Plese acted as legal director (2002-2004), the Legal Department has been headed by common law lawyers, which is unwarranted in the geographic context. While generally committed to the cause of Roma rights and/or racial justice, the international elite spearheading the Legal Department is set on bolstering its own professional reputation, wanting to design and argue its own 'Big Case'. This necessarily entails litigation in an international tribunal, which was sufficient before EU accession, but after 2004-2007 the strategy should have been transnationalised to fit the new normative landscape. Adjustments took place in 2014, when András Ujlaky became the executive with a strong transnational vision and experience he gained in the Chance for Children Foundation.

The majority of staff lawyers are not members of national bars and generally lack experience in domestic litigation, which may ironically explain why they seek to counterbalance this deficit with a superior attitude. As Gergely noted: "[In 2001, when I was a local monitor] we were treated as guys from the kindergarten. Everybody at the ERRC treated us like this. They behaved as lawyers in famous law firms."[995] Conversely, domestic actors did not see the ERRC as professionally superior, because information flowed mainly from them to the international level, meaningful professional exchanges were rare and the INGO did not succeed in usefully sharing its legal expertise, especially not in transferring Convention related knowledge, and was inapt when it came to domestic litigation.

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[993] I vividly recall Petrova's first visit to NEKI in 1996. The tension, following her statement described above was tangible in the room and for years afterwards. In response, NEKI's executive sought to curtail not only professional relations between the two organisations, but also interpersonal contacts.

[994] The organisation issued advocacy letters to national authorities and investigated incidents without consulting domestic NGOs involved in the same or similar matters. Involving domestic NGOs in advocacy became widespread practice after the *D.H.* judgment, as demonstrated by the large amount of advocacy material on the ERRC website.

[995] Interestingly, when hired to lead the ERRC in 2011, he was reminded that it was futile to work in Bulgaria, Romania and Hungary, where locals were 'too developed'. Gergely interview.

The ERRC did not simply want to be a 'repeat player'[996] in Roma rights litigation, but - to paraphrase Marc Galanter - its ambition was to become a 'first shotter', which underwrote its self-centered legal strategy. Being 'the first' when it came to setting the Roma rights agenda and framing Roma rights issues in advocacy materials was relatively easy, given that the ERRC was the most resourceful non-governmental player in the Transnational Roma Rights Network. However, becoming 'the first' in litigation proved far more difficult. Four options were open to the ERRC in terms of achieving primacy in the legal field: 1. it could consult local CEE lawyers, 2. pursue an *amicus* strategy independently from the parties in a particular legal dispute, 3. litigate in partnership with national lawyers or 4. litigate alone. Due to the fragmentation of the practice field across national bars, INGOs – such as INTERIGHTS - generally employed strategies 1-3, because litigating alone as an international entity in a domestic setting was practically impossible. It was equally cumbersome to transplant the 'federal litigation strategy' that yielded *Brown* and subsequent cases in the US, because the "European Supreme Courts" - the ECtHR and later the CJEU - could as a rule be reached from the state level. This also explains why the ERRC attempted to jumpstart legal action, i.e. test the quickest and almost certainly ineffective local remedy before filing complaints in an international tribunal. While this worked with the Strasbourg Court, jumpstarting litigation in the CJEU is almost impossible, unless an exceptionally activist trial judge hears the case on first instance.

In order to better control the process and embellish its own reputation, the ERRC preferred to litigate 'alone', which, considering unavoidable timelags, necessitated the take-over of on-going cases, for which purpose grants were disbursed to domestic lawyers and legally focused NGOs. Funds to NGOs without legal expertise fed into the jumpstart strategy, whereby the ERRC would seek out the quickest, often least effective domestic remedy in order to get to the international level as fast as possible.[997] Interestingly, the expanding legal opportunities curbed the jumpstart strategy, because the more favourable the normative context, the more cumbersome the exhaustion of domestic remedies becomes. The *amicus* strategy was rarely pursued prior to 2014, which indicates the determination to dominate, rather than to collaborate with Network members.[998]

[996] Marc Galanter, Why do the haves come out ahead: Speculations on the Limits of Legal Change, Volume 9:1 Law and Society Review, 1974.
[997] *D.H.* was thus filed with the school inspection and the Constitutional Court to circumnavigate lengthy civil proceedings, while in *Orsus* an emergency administrative review was pursued. Few cases were filed directly with UNCAT and the CERD Committee in the early 2000s.
[998] A notable exception is the amicus submitted in support of Traveller complaints in 2004.

The ERRC over-emphasised or worse, misrepresented its own involvement as litigating alone or sitting in the driver's seat. For instance, the ERRC portrayed itself as "acting alone or together with" Bulgarian NGOs testing the Protection Against Discrimination Act,[999] even though its role was limited to intervening in one of a dozen cases and contributing 'international law arguments' to the others.[1000] Staff articles in Roma Rights regularly skated over domestic antecedents and the national lawyers' role in international litigation.[1001] Academic publications lent credence to the ERRC's narrative by using the formula 'ERRC and its local partners' that seemed injurious to CEE locals shunned into anonymity or limited to supporting roles.[1002] Portrayals of the INGO as 'acting alone or together with local partners' would certainly be a misrepresentation of the overwhelming majority of cases discussed in this thesis.[1003]

For instance, following a case dealing with access to municipal housing before the CERD Committee, *Koptova v Slovakia* - the example brought up in Bukovska's critical article - the ERRC launched a domestic case, but it lacked the resources to see it through.[1004] Today *Koptova* does not form part of the dominant narrative, partly because the junior staff 'owning it' moved away and also because UN cases have negligible purchasing power in the region today. There is a consensus among CEE agents that without them, INGOs cannot generate meaningful change, but only few have ever admitted that it is practically impossible to be fully accountable to clients,[1005] "even for the locals."[1006]

[999] The ERRC intervened in one of the first electricity cases filed by a hundred Roma in Fakulteta. Strategic Litigation Undertaken by the ERRC and Local Partners Prompt Bulgarian Courts To Sanction Racial Discrimination Against Roma, Roma Rights, 2004.

[1000] Mihaylova interview.

[1001] This was the case for instance with the first sterilisation case, A.Sz. v Hungary brought before the CEDAW Committee in collaboration with Bea Bodrogi, an attorney affiliated with NEKI. See, Anita Danka, In the Name of Reproductive Rights; Litigating before the UN Committee on the Elimination of Discrimination against Women, Roma Rights, 17 May 2007.

[1002] Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities, Council of Europe, 2004, p. 65.

[1003] "Acting alone or together with local partners, the ERRC files cases with the European Court of Human Rights and various United Nations individual complaint committees." See, Philip Leach, Taking a Case to the European Court of Human Rights, 2011 (Third ed.), p. 23.

[1004] Andi Dobrushi, Litigating Discrimination in Access to Social Services, Roma Rights 1-2/2007.

[1005] On client accountability, see, Anupam Chander, Globalization and Distrust, 114 YALE L.J. 1193, 1234 (2005)

[1006] Mihaylova interview. Discussions about coercing and disempowering vulnerable clients were always limited to the ERRC's misconducts, however. On the difficulties of the lawyers' dual role as representatives and organisers, see, Scott L. Cummings and Ingrid V. Eagly, A Critical Reflection on Law and Organizing, 48 UCLA Law Review 443 (2001), pp. 495–98.

Mainstream NGOs and lawyers loosely connected to the Roma rights scene have been satisfied with the terms of partnership, but specialised NGOs resented high-handedness.[1007] Language is a barrier, so much so that lawyers who do not speak English are not involved in reputational conflicts. French speakers are generally linked to networks outside the OSF Roma structure, where rulings in French receive little attention.[1008] Similarly, if a domestic judgment is not translated into English and published on a well-known website, it remains 'dead letter law' in commentaries. In the end, positionality as a domestic or international actor tallies with professional reputation.

5.2.2.2. *The 'press clause'*

The ERRC required grantees to publicise its 'buy-in' into their budget more widely than other donors. Given the local public's disinterest in the financial details, this contractual term was impossible to satisfy and most ERRC staff overlooked potential infractions. Nonetheless, the so-called 'press clause' remained in effect even after the ERRC's visibility had been well established, causing indignation in activists new to the Roma rights field, such as the president of the Hungarian Civil Liberties Union, who collaborated with the ERRC after 2009 and expressed his dismay in no uncertain terms.[1009]

Visibility requirements were not (fully) reciprocated at the international level. Between 2003 and 2011, Romani Criss and the ERRC were barely on speaking terms, following contestations over copyright of the Hadareni report and other publications, an issue mentioned by every Romanian Roma interviewee.[1010] Given that the ERRC offices were situated in Budapest, Hungarian NGOs endured a disproportionately higher demand for involvement in domestic advocacy and publicity.[1011] The Hungarians faced a catch 22, because in case they left the ERRC

[1007] For instance, Lovorka Kusan and David Strupek - both in private practice - spoke highly of ERRC lawyers. Similarly, Daniela Mihaylova who collaborated with the ERRC said she had the opportunity to argue high profile cases she would otherwise not have been involved in.

[1008] Alexandridis recalled that the Greek Roma education judgments were argued in English but written in French, because of the Registry lawyer's decision. The ERRC had the judgments translated into English but the translations are not available in public, although the Court publishes language versions if available.

[1009] Telephone conversation with HCLU president Balázs Dénes, April 2009. Dénes called the practice "un-f…ing heard of."

[1010] Gergely interview.

[1011] Attorney Bea Bodrogi, NEKI's former executive director and legal representative in the case (A.S. v. Hungary, Communication No. 4/2004, CEDAW/C/36/D/4/2004) recalled the futility of the ERRC director's presence at the last stage of compensation negotiations at the Ministry of Justice - given particularly that the ERRC's involvement in securing compensation for the client was limited to this sole appearance at a meeting held in Hungarian - a language Kushen did not speak. Bodrogi interview.

out, relations could go south, yet contrariwise, they could get overly complicated. For instance, delays in the publication of a report about the gross police misconduct concerning Romaphobic murders in 2008-2009 were largely attributable to the ERRC.[1012]

The ERRC claimed authorship for innovations introduced by others in the Network, which was the case with situation testing, for instance, a tool transferred by NEKI lawyers as discussed above.[1013] Once the generation of the "golden age" left, complaints about the ERRC staff lawyers' inadequacy became widespread,[1014] but Margarita Ilieva goes as far as saying that the international elite: "taught me nothing, in fact they benefitted from my work."[1015] Moreover, according to Ilieva "INGOs have a monopoly in international advocacy and they only promote the cases they fight."[1016]

Reputation constructed in favour of the international elite exacerbated the stark differences in the moral, professional and monetary values attached to national and international lawyering that have remain despite the convergence of practice areas stemming from the Europeanisation of Roma rights. While domestic Roma rights lawyers share in the stigma their clients are subjected to, 'litigating in Strasbourg' or Luxembourg is highly reputed. Rather than compensating for the emotional and psychological distress, salaries are a portion of that earned at INGOs. In fact, the ERRC used to pay its staff so well that it aroused disbelief even in western NGO partners.[1017]

5.3. The classification of conflicts

Part 3 delves into the causes of conflict, classifying them as a function of producing professional capital (reputational), competition for resources (resource related), values and norms (value based) and the internationalisation of public interest litigation (serving the domestic US agenda). Previous sections addressed resource related conflicts, whose impact is difficult to

[1012] Sajtótájékoztató a tatárszentgyörgyi árnyékjelentésről (Press release about the shadow report on Tatárszentgyörgy), 6 May 2009.
[1013] Recently, NEKI staff assisted the ERRC in challenging discriminatory immigration control on the border of Serbia and the former Yugoslav Republic of Macedonia - thus ensuring continuity between the analogous Prague Airport Case and Macedonian challenges.
[1014] This was a common grievance during a review ordered by the Swedish International Development Agency in 2011. The review was conducted by the author, the unpublished report is on file with her.
[1015] Margarita Ilieva interview and ERRC review for Swedish International Development Agency, 2011, on file with the author.
[1016] Ilieva interview. For instance, the Plovdiv based Ekimdijev, a well-known lawyer in his native Bulgaria is not linked to INGOs, which diminishes his professional recognition. Moreover, his language being French and not English, Ekimdijev is not part of the conference circuit.
[1017] Interviews with Isabelle Chopin and Csilla Dér.

estimate, even though it seems that allocating a greater portion of funds to domestic NGOs could have yielded more access to justice for the Roma community, while not necessarily diminishing the volume and impact of European advocacy. Given its complexity and significance, the internationalisation of public interest litigation is dealt with separately in the following section.

Reputational conflicts can hamper partnership, which is why CEE actors generally bury the hatchet and get on. The closer an NGO to the grassroots, the more accountable it is to clients, but client interest or the minority cause may be more easily sidelined at the international level,[1018] where the actual distance tends to decrease the level of accountability *vis-à-vis* clients as well.[1019] The lower ranking internationals more likely to come into contact with clients bear more responsibility, which is why for instance critical voices filled the ERRC corridors during the preparation of the *D.H.* appeal, when staff lawyers went out of their way to rekindle the clients' trust.[1020]

It is difficult to conceive of a scenario in which the international elite's accountability could be put on the line, because they inhabit a rather simple universe defined by powerful states, international organisations and other INGOs. Domestic agents, on the other hand, are accountable to a multitude of actors, toiling under existential and very real physical threat, especially since the rise of populism inconceivable at the international level.[1021]

Simultaneously, however, it is virtually impossible for the OSF Roma structure to dominate domestic advocacy arenas in case of value based conflicts, particularly if the locals' vision aligns with majoritarian conceptions of rights. Nevertheless, internal debates can be equally or perhaps more detrimental for the communities, than public incidents. For instance, had national lawyers not countered Romaphobic speech in defiance of the dominant elite, not only would the harm have gone unrecognised, but it could have raised doubts about the movement's legitimacy in the Roma-dense countries. In the Bulgarian electricity litigation the legal elites have so far failed to transform policy analysis into a social rights strategy that would adequately reflect Roma interests, but domestic strategies focusing on access have been undoubtedly more adequate, than the international focus on racial stigma.

[1018] Dezalay and Garth, 2006, supra.

[1019] Curtis A. Bradley and Jack L. Goldsmith, III, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham Law Review. 319, 361–63 (1998).

[1020] Ivanov recalls rather hostile initial reactions in Ostrava. Later, however, relations normalised and the Life Together NGO also came on board to assist the ERRC. Ivanov interview.

[1021] On private accountability, see, David A. Binder, Paul Bergman, Susan C. Price & Paul R. Tremblay, Lawyers As Counselors: A Client-Centered Approach (2d ed. 2004).

5.3.1. Reputational conflict

The coercive sterilisation scandal, the movement's most severe schism shows that reputational conflict is clearly detrimental to clients. The Slovakian lawyers implicated in the conflict are unenthusiastic about collaboration with both the Center for Reproductive Rights and the ERRC, resenting in particular the INGOs' disinterest in the fate of the very real women, whose stories serve as the backbone of 'groundbreaking' reports. Once the reports are published and the campaigns wind down, the "INGOs do not look back," leaving it to domestic activists to see the cases through.[1022]

The ERRC's intervention in Slovakia was far from commendable, but more importantly, international scrutiny over the alleged local malpractice - both in terms of fact finding and client care - could not have realistically served the interests of the Roma women, especially not by undermining domestic agents without substituting for their services. Given that the ERRC lacked the necessary resources, had it succeeded, it could have jeopardised the interests of Roma clients and Roma rights defence on the longer run.

As a hypothetical, let us consider what would have happened if the ERRC's allegations of solicitation and misrepresenting the facts had been taken up in public! In the domestic advocacy domain, this would have necessarily compromised the claims of coercive sterilisation and undercut the credibility of the Roma women. The ERRC would have gained credibility as a policeman of the movement at the expense of ruining the Slovakian lawyers' reputation and the actual case, while undermining the cause in general.

The ERRC could not have realistically superseded the national actors' agency. Indeed, its reach into domestic affairs was limited, unless it cultivated good personal relations and/or generously funded activities at the national level. For instance, the trust between the Czech League of Human Rights executive Jiri Kopal and ERRC Programme director Claude Cahn facilitated the INGO's work on coercive sterilisation in the Czech Republic, and the 'Czech connection' provided convenient access to EU advocacy platforms at the fortunate moment of the country's accession to the EU.[1023] Still, Kopal was cautious, because of the rumours about the ERRC's shenanigans in Slovakia - "a bit of competition" in his words - but also because of

[1022] Durbakova interview.

[1023] Kopal interview. See, also, Public Defender of Rights, Final Statement of the Public Defender of Rights in the Matter of Sterilisations Performed in Contravention of the Law and Proposed Remedial Measures, Brno, 2005.

his own experiences with high-handed ERRC staff. He first "created a reasonable discourse" - framing sterilisation around informed consent - before calling Cahn in, who "at least understood the situation."[1024]

The League "did not need the ERRC for the domestic legal and advocacy process" and the international legal arguments "were not really useful" in the Czech context either, recalls Kopal. Dealing with ERRC staff was often cumbersome,[1025] partly because the INGO "wanted to exert too much influence on the arguments - pushing for racial intent," which was "key to their funding source."[1026]

In 2004, the ERRC was offered an unforeseen opportunity to reinforce its dominant position in the international advocacy arena. Since 2000, NEKI, pursued a civil suit on behalf of a sterilised Roma woman and by the time the case reached the Hungarian Supreme Court, experts involved by attorney Bea Bodrogi and linked to transnational networks on children's and social rights reframed the issue as intersectional discrimination based on racial origin and gender. The ERRC assisted NEKI in bringing *A. Sz. v Hungary* before the CEDAW Committee, where it became the paradigmatic case of intersectional discrimination.[1027] Beating the Center for Reproductive Rights on its own turf, the ERRC continued international advocacy without Bodrogi and occasionally chimed in to local advocacy efforts in Hungary.[1028] It was years after securing compensation and legal reform from the Ministry of Justice - held by the liberals at the time - that women's rights activists in Geneva learnt about Bodrogi's role in this 'ground-breaking' case.[1029]

The Czech League continues collaboration with the ERRC, whose most horrendous reputational conflict is a thing of the past, leaving unresolved the key ethical dilemmas, i.e. whether an INGO should in fact have clients 'alone', whether it needs to cooperate with locals on planning both legal and advocacy strategies, and whether it should frame issues in the international domain in a way that can also be useful in domestic contexts or pitch issues only with its own

[1024] "I reached out to Kumar and organised roundtables, then secured the ERRC's cooperation. The (battered) women's NGOs did not litigate, this is why Liga came in. My girlfriend, Mihaela Ferencikova - now Kopalova - is part Roma and was working at the IQ Roma Servis at the time. She came in to do the research and liaise with the Roma women, for which her empathy and trust building skills were indispensable." Kopal interview.
[1025] "Other ERRC staff were not very helpful, and the Traveller woman who accompanied us to Northern Bohemia was psychologically unstable." Kopal interview.
[1026] Ibid.
[1027] Danka, 2007, supra.
[1028] Hundreds of Activists Support Campaign for Compensation for Coercively Sterilised Romani Women, Roma Rights Press Release, 15 July 2008: Romani Women's Rights Coalition Successfully Reaches Global Women's Movement, Budapest, Prague, Ostrava.
[1029] Bodrogi interview.

(financial) interests in mind. The Slovakian Poradna is servicing sterilised Roma women, but its efforts do not form part of the dominant narrative on coercive sterilisation, which is to the detriment of the cause. An equally important consequence is the difficulty reputational conflicts create for future collaboration. The Slovakian Poradna and the ERRC do not meaningfully co-operate, which denies the latter of the most effective partner and jeopardises the success of its legal action in Slovakia.

5.3.2. Value based conflict

Value based turf battles have crystalised around Romaphobic hate speech and housing.[1030] US agents resisted pleas to design a regional strategy, litigate and/or fund legal action against hate speakers and deprioritised litigation in the field of housing unless the case displayed an element of racial stigma. In contrast, challenging school segregation fitted the visions of both legal liberal internationals and democratic socialist locals. Given the centralised governance of education and decreasing student numbers, it became theoretically possible to close segregated schools and transfer students to schools in better material conditions, simultaneously putting an end to racial stigmatisation and substandard education. However, as Chapter IV has demonstrated, complaints relating to segregated education have rarely arisen from the grassroots level, meaning that the issue around which the OSF Roma structure designed international advocacy efforts has not been a priority within the Roma communities and vica versa, the communities' priority issues have not been adequately addressed by the most resourceful part of the Network.

5.*3.2.1. Suppressing hate speech*

Whether to tackle hate speech and other types of racial harassment below the threshold of the US constitutional test of 'clear and present danger' was the subject of internal debates over a decade. The camps were divided along US and European approaches to free speech[1031] with reference to the allegedly more lenient US constitutional doctrine and the *Skokie* case, in which

[1030] William H. Simon, The Ideology of Advocacy, 1978 WIS. L. REV. 30, 31 (1978).

[1031] Mirroring the differences between European states and the US in their approaches to the freedom of expression. The US entered a reservation to Article 20, in order to safeguard its broad interpretation of the right to free speech.

Aryeh Neier marshalled the ACLU's resources for the defence of white supremacists marching in a small town populated by Holocaust survivors.[1032] The CEE lawyers were not persuaded by this precedent and the front lines reproduced trans-Atlantic differences concerning restrictions to the freedom of expression under Article 20 ICCPR, to which the US entered a reservation - endorsed by domestic human rights organisations[1033] - while the provision aptly reflects the mainstream European approach.[1034]

The economic crisis sparked a new wave of hate speech in the CEE, which in turn aroused grassroots demand for protecting the dignity of the racialised minority against racist liberty.[1035] The emergence of populist political parties, the frequent intimidation of Roma communities by paramilitary groups[1036] and the increasingly spiteful tone of the public discourse foregoing by a decade the Trump era in the US naturally led to a broad coalition of rights based NGOs that reinforced legislation on hate crimes and hate speech, and also launched a legal campaign against Romaphobic public speech. By the time the European Commission against Racism and Intolerance adopted a general policy recommendation on the issue[1037] and the Council of Europe launched the No Hate Campaign (2014), significant domestic jurisprudence developed in Bulgaria, Romania and Hungary, and Roma groups demanded protection from hate speech in western states as well.[1038]

[1032] National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) Neier, 2003, supra, p. 270.

[1033] David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183, 1993, p. 1191. "Article 20 does not authorise or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."

[1034] It has been argued that the US approach is a particularity in a global context and that political, cultural, textual factors explain variance in hate speech jurisprudence in the US and Europe, where the personal views of leading justices also plays a significant role in changing jurisprudence. See, Kevin Boyle, Hate Speech--The United States Versus the Rest of the World, 53 Me. L. Rev. 487 (2001) and Erich Bleich, Freedom of expression versus racist hate speech: Explaining differences between high court regulations in the USA and Europe, Journal of Ethnic and Migration Studies, Vol 40, Issue 2, 2014.

[1035] Legal advocacy and the legislative process in Hungary is documented on the website of the NGO coalition Gyűlölet-bűncselekmények Elleni Munkacsoport and academic publications. See, for instance Dinók Henriett Éva, A gyűlölet-bűncselekmények szabályozásának általános kérdései - a kiemelt büntetőjogi védelem mellett és ellen szóló érvek Állam- és Jogtudomány, 2014/4, 26–50, Koltay András (szerk.), A gyűlöletbeszéd korlátozása Magyarországon, Alkotmányos és jogalkalmazói megközelítések európai kitekintéssel, 2013, Complex. Gárdos-Orosz fruzsina és Pap András László, Gondolatok a gyűlöletbeszéd jogi szabályozásának jogi és jogpolitikai környezetéről, Állam- és Jogtudomány, 2014/2. szám, pp. 3–26. and Szigeti Tamás, Antológia a gyűlöletbeszéd-vitáról, Fundamentum, 2013/3, 161-169. The coalition was established in 2012. The HCLU and the HHC have been at the forefront of fighting against Romaphobic hate speech and hate crimes.

[1036] R.B. v. Hungary, Application no. 64602/12, Judgment, 12 April 2016.

[1037] ECRI General Policy Recommendation N°15 on Combating Hate Speech adopted on 8 December 2015.

[1038] The first case adjudicated at the international level came from Germany, where the authorities failed to effectively investigate Romaphobic hate speech according to the applicant in Zentralrat Deutscher Sinti und Roma v Germany, Communication No. 38/2006, issued on 22 February 2008. The Committee did not find a violation, but in a subsequent case Germany was found to have breached the Convention. In dissent, Committee member

In Romania, Romaphobic hate speech related decisions made up 161 of 384 cases in the docket of the National Council for Combating Discrimination between 2003 and 2015.[1039] In the Romaphobic discourse fed by politicians, journalists and private citizens, Roma are not only „dirty“ and „criminal," but they stand in stark contrast with the Romanians, who are „proper Europeans."[1040] This distinction is intended to prevent Western Europeans from confusing the term Roma with Romanians, an issue that gained relevance in the context of free movement under EU law.[1041]

Romani Criss filed complaints from 2003 onwards, but its case concerning the statements of Romanian president Traian Basescu in 2007 was the only one reported in the ERRC's quarterly journal Roma Rights. By the time a virtual war broke out about the use of the term Gypsy by the Romanian Academy of Science at the time of EU accession, the European Network of Legal Experts in Gender Equality and Non-discrimination (Legalnet) became the key interlocutor in conveying information to the European level.[1042]

The Bulgarian legal campaign started in 2005, when the public prosecution services were taken to civil court on account of a decision that contained Romaphobic reasons.[1043] A similar case was launched with the Strasbourg Court that found in favour of the Roma applicant (violation of the right to fair trial).[1044] In the first case under the Protection Against Discrimination Act's harassment provision, a "multi-minority NGO coalition" launched a representative action in civil court against a politician in 2006 and since then, approximately three cases have been brought before civil courts and the equality body by representative plaintiffs - LGBTQI, women's and Roma rights groups - every year.[1045]

Vazquez noted a lack of even-handedness, underlining that the German Sinti and Roma would have deserved the same level of protection in as was accorded to the applicant in TBB-Turkish Union in Berlin/Brandenburg v Germany, Communication No. 48/2010, U.N. Doc. CERD/C/82/D/48/2010 (2013).

[1039] Adriana Iordache, A qualitative analysis of hate speech reported to the Romanian National Council for Combating Discrimination (2003-2015) in Sfera Politici, XXIII/4, 2015 November-December, pp. 50-71.

[1040] Ibid.

[1041] Shannon Woodcock „Romania and Europe: Roma, Rroma and Țigani as sites for the contestation of ethnonational identities," Patterns of Prejudice, 41 (2007): 5, 493-515.

[1042] Gabriel Andreescu, O nouă sancționare a domnului Traian Băsescu de către CNCD. Exercițiul libertății de exprimare în dezbaterea politicilor publice pentru romi, Revista pentru Drepturile Omului, 2011, 56 II CNCD Decision on the possibly discriminatory use of the term "gypsy."

[1043] Margarita Ilieva, Hate Speech as Harassment: Case Law of Bulgaria, 30 November 2018, presentation at the annual Legalnet seminar.

[1044] Affaire Paraskeva Todorova c. Bulgarie, Requête no 37193/07, arrêt, 25 mars 2010.

[1045] The defendants, mainly politicians, public figures and media outlets have been ordered to cease and desist, to issue public apologies, publish the ruling and/or pay a fine (up to EURO 500, which amounts to two months salary on average).

The Strasbourg Court's recent judgment in *Panayotova and Others v Bulgaria* clarifies that a remedy under PADA must be sought before a claim can be raised about the authorities' failure to protect the right to private and family life on the basis of ethnic origin in the case of Romaphobic hate speech perpetrated by an extremist political party's electoral candidates.[1046] The judgment also clarifies that in case hate speech does not reach the level of severity required by Article 3 (prohibition of inhuman treatment), the state party is under no obligation to launch criminal proceedings against hate speakers.

This is exactly the juncture where the mainstream European approach deviates from the US legal liberals. In *Feret v Belgium*[1047] - in which an extreme right wing politician complained against his criminal conviction on account of hate speech - the US-inspired position lost, despite strong dissent. In *Panayotova*, however, the tide shifted in the chamber, where Yonko Grozev - whose key role in the human rights and Roma rights movements are chronicled in previous chapters - acted as judge rapporteur. Even though the Strasbourg Court sought to distinguish *Panayotova* from complaints raised against the curtailment of free speech under Article 10, the fact remains that while many Western countries limit (racist) hate speech in their criminal law, this is not the case in the East. This is problematic in light of ICERD that specifically requires that the propagation of racism and incitement to racial discrimination be criminalised.[1048]

Equality bodies have issued several decisions and mainstream human rights organisations have also successfully challenged the police's failure to protect Roma communities from extremist intimidation.[1049] The Greek Helsinki Monitor made a third party intervention before

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[1046] Donka Kamenova Panayotova and Others against Bulgaria, Decision (inadmissible), Application no. 12509/13paras 64-66.

[1047] Féret v. Belgium, application no. 15615/07, judgment of 16 July 2009.

[1048] According to ICERD Article 4(a), states parties "Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof."

[1049] The emerging case law has been reported by Legalnet. In Romania multiple discrimination against Romani women was sanctioned by the equality body in February 2018. The case was brought against a journalist by E-Romnja, a Romani women's organization. The Bulgarian Supreme Administrative Court confirmed the liability of a TV broadcaster for on-line hate comments in January 2017 on account of having failed to moderate its website. The case was brought before the equality body by a Roma NGO as a representative action. The Romanian Court of Appeal in Bucharest upheld the equality body's decision fining the Romanian President for discriminatory statements against nomadic Roma in January 2015, Decision of the Court of Appeal București, Secția a VIII-a No. 2051 from 27.06.2014. The case originated from a complaint filed by Romani CRISS in 2011. The Hungarian Supreme Court upheld the Equal Treatment Authority's decision sanctioning the mayor of Kiskunlacháza for racist speech (harassment) in April 2015, following six years of proceedings. In April 2013 the Romanian High Court of Justice remitted former foreign minister Baconschi's case to the Court of Appeal, directing it to order the equality body to adequately sanction Romaphobic hate speech (harassment), High Court of Cassation and Justice, decision No. 5026 of 17.04.2013. The equality body proceeded upon an NGO coalition's petition. The Romanian equality body sanctioned a local politician for Facebook incitement to sterilising Roma women in November 2013:

the Grand Chamber in *Aksu v Turkey*[1050] - a challenge against Romaphobic speech regrettably lost - arguing that the failure to withdraw from circulation academic publications depicting the Roma as criminals violated the complainant's right under the Convention.[1051]

Roma Rights has published two legal analyses on hate speech in 21 years,[1052] but on the whole the ERRC abstains from legal action,[1053] submitting *amicus* briefs when the manifestation of hate reaches the level of physical violence.[1054] The Network's dominant elite, although refusing to directly lend OSF/ERRC resources to the cause, has not attempted to halt litigation by making compliance with its libertarian values a condition for grants. Simultaneously, however, it has not campaigned against hate speech, facilitated knowledge transfer, transnational advocacy or litigation on the matter.

Resources for challenging Romaphobic hate speech come from European majoritarian institutions: the Council of Europe, mainstream human rights organisations and academics. In Bulgaria and Hungary, Helsinki groups spearhead litigation and legal reform, while in Romania, identity groups lead the campaign. Equality bodies play an indispensable role, which underlines the significance of public enforcement in the CEE. Importantly, racist speech does not come under the scope of the Racial Equality Directive, being prohibited only by a soft law instrument in the EU, the Framework Decision of 2008, and the fact that it is covered by anti-discrimination legislation is attributable to over-transposition owing to the activism of public and NGO lawyers in the Roma-dense countries.

The CEE debates cast in terms of freedom of speech v freedom from racial discrimination foreshadowed those between the American Civil Liberties Union's headquarters and local branches following the Charlottesville incident in 2017, in which the federal leadership

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The decision came after the local prosecutor's office refused to start criminal investigation. In the Czech Republic discrimination of Roma in advertisement was condemned by the Supreme Administrative Court in October 2013, after the NGO ROMEA's criticism sparked administrative procedure.

1050 Aksu v Turkey, supra.

1051 Given that Aksu was appealed the ERRC would have had the opportunity to submit a third party intervention or offer legal representation to Mr. Aksu, a Turkish Roma activists and intellectual before the Grand Chamber. Legal aid was granted by the Strasbourg Court that financed his representation by a Turkish lawyer.

1052 Helen Darbishire, Hate Speech: New European Perspective, Roma Rights, 7 December 1999 and Henry Scicluna, Anti-Romani Speech in Europe's Public Space - The Mechanism of Hate Speech, Roma Rights, 21 November 2007.

1053 Zentralrat Deutscher Sinti und Roma v Germany.

1054 In Vona v Hungary a radical leader who founded a paramilitary group complained against the dissolution of the organisation at the request of the prosecution joined by Jewish and elected Roma representatives. Case of Vona v. Hungary, Application no. 35943/10, judgment of 9 July 2013.

supported racist demonstrators whose actions led to fatal consequences.[1055] As difficult it is to constrain the local ACLU chapters' pro-minority action in the US, as impossible it is to stop local activists in the CEE from limiting free speech in legislation and mobilising anti-discrimination law in favour of minorities under attack.

The legal liberals' position is in fact more lenient towards racial bigotry than necessitated by their own legal tradition, because litigation seeking to sanction hate speakers under civil law - part of the CEE strategy - has long been pursued by the Anti-Defamation League that also successfully advocates for the adoption of hate crime statutes in the US.[1056] Legislation has not put an end to debates about the desirability and constitutionality of speech limitations, which continues to home in on the "civil libertarian's fear of tyranny and the victims' experience of loss of liberty in a society that tolerates racist speech."[1057] By holding on to a libertarian approach, the US-based elite has perhaps been hoping to stave off the appeal of a more lenient European reading of international human rights law. In the end, despite the silence, legal liberals have not succeeded in Europe and seem to represent a minority opinion in the US as well.

4.3.2.2. Housing

Twenty years ago, the ERRC designed 'The Signature Roma Rights Case' in the field of education rather than housing, because of the more advantageous legal opportunities – with the right to education and the prohibition of discrimination explicitly guaranteed in the Convention - and a better fit between the elites' visions of racial equality. Conversely, according to complaint data the communities were always more concerned about housing, especially forced evictions. From the perspective of top-down planning mindful of legal principles and eager to improve the jurisprudence of international tribunals, casting housing aside may have seemed a reasonable decision, because impoverished Roma tend to live in segregated and substandard conditions, and litigation against eviction from this type of dwellings cannot eliminate the structural inequalities.

[1055] Risa Goluboff, Where Do We Go From Here?, in Claudrena N. Harold and Louis P. Nelson (eds.), Charlottesville 2017: The Legacy of Race and Inequity, 2018, University of Virginia Press. Goluboff writes: "Entitlement to free speech is legally crucial, but it cannot answer every question. Indeed, the insistence that these questions can be answered by the law might be the problem."

[1056] Hate crime statutes have been debated and "[d]espite the U.S. Supreme Court deciding on the constitutional concerns in 1993 (*Wisconsin v. Mitchell*, 1993a), opposition continues to surface, driven primarily by legal scholars advocates. (cf. Lawrence, 1999; B. Levin, 1998) and opponents (cf. Jacobs & Potter, 1998). Paul Iganski, Hate Crimes Hurt More, American Behavioral Scientists, Vol 45, Issue 4, December 2001, p. 626.

[1057] Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story in Words that Wound, Critical Race Theory, Abusive Speech and the First Amendment, 2018.

The dilemma is that litigating against eviction could have the unintended effect of cementing in *de facto* segregation, because the petition must necessarily ask the court to protect individuals, who incidentally live in segregated conditions. This can reasonably be viewed as contrary to the demand that governments end segregation, particularly because the CEE governments themselves seem disinterested in providing integrated (social) housing.[1058] These considerations substantially limit the room for legal strategies addressing Roma rights in the field of housing.

Initially, the ERRC executives and the Board shunned action that could have been perceived as (even implicitly) supporting segregation and the first strategy that seemed to resolve the conflict between social rights and equal treatment frames – access and desegregation - was adapted by the Programs Department from the Netherlands-based Center for Housing Rights and Evictions. With Programs at the helm, the ERRC launched collective complaints under the European Social Charter, highlighting shortcomings both in relation to access and segregation in the field of housing. As demonstrated in Chapter II, this treaty mechanism was initially available only in Bulgaria, which greatly diminished the salience of the Charter strategy in the other Roma-dense countries. Even though the Czech Republic permitted collective complaints in 2012, this came too late to make this remedy useful in practice, so much so that no collective complaint has yet been launched against this country. Moreover, once the staff underwriting the Charter strategy left, the ERRC discontinued the Charter litigation and did not design another legal strategy on housing.

Meanwhile, domestic lawyers litigated against forced eviction in response to complaints from the grassroots level, following closely in the footsteps of the UK Traveller cases. From the Strasbourg Court's perspective, there may have been a continuum between the complaints of the Western and later the Eastern Roma under Article 8, the right to private and family life. Today, the growing number of Strasbourg petitions seeking to halt evictions indicates that a strategy addressing a pressing community need is shaping up with the help of activist units within the ECtHR.

Like Travellers, the Roma use the law to uphold their self-imposed separation or ensure they have a roof over their heads regardless of whether or not it occurs in segregated conditions. It is probable that segregation is not central to housing challenges in the CEE, because the Roma middle classes - for whom integration could be a primary goal - are not barred from integrated

[1058] Interview with Gábor Halmai, former ERRC board member.

housing either *de iure* or *de facto*.[1059] In this sense, while housing is a priority for the Roma, the context is different from that in the US, where the NAACP litigated in this field since its establishment, starting with challenges against segregation imposed on all the members of the community, including the well-off, who would have had the means as well as the will to move into integrated neighbouthoods.[1060] Given that many communities in the CEE are driven out of land they have occupied for decades by local councils eager to launch development projects, much could be learnt from community-based lawyering[1061] that makes marginalised clients part of the legal and advocacy processes in the US today, but trans-Atlantic knowledge transfers on this issue have not yet occurred in the Roma rights context.[1062]

Advocacy in the field of housing is inconsistent and presently the ERRC focuses on the right to water, reflecting a particular priority issue in the UN Millennium Development Goals.[1063] Similar to the first collective complaint on housing, the Thirsting for Justice report is featured on the organisation's website as a historic milestone,[1064] but given that it fails to address the underlying issue - illegal occupation of land where water is not available and eviction is impending - it is highly unlikely that it could appropriately channel community claims. Demanding water risks imprinting the international agenda on the community and achieving symbolic victories, rather than using the law to channel claims according to the explicit and overarching needs of the Roma, namely security of tenure.[1065]

The civil rights strategy used from *Buckley* to *Yordanova* and *Winterstein*, and the recent advocacy initiative for the legalisation of settlements discussed in the previous chapter seem to

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[1059] Richard H. Sander, Yana A. Kucheva and Jonathan M. Zasloff, Moving toward integration: The past and future of fair housing, Harvard University Press, 2018.

[1060] Kevin Fox Gotham, Race, Real Estate, and Uneven Development: The Kansas City Experience, 1900-2010 (2nd ed.), SUNY Press.

[1061] Which, although bringing clients and lawyers closer together, cannot resolve the accountability conundrum. Shauna Marshall, Mission Impossible? Ethical Community Lawyering, 7 Clinical L. Rev. 147 (2000). Michael Diamond, Community Lawyering: Revisiting the Old Neighborhood, 32 Colum. Hum. Rts. L. Rev. 67 (2000-2001).

[1062] Michael G. Allen, Jamie L. Crook, and John P. Relman, Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective, Harvard Civil Rights-Civil Liberties Law Review, Vol 49, 2014, pp. 155-196., NYU Furman Center For Real Estate & Urban Policy, The Effects Of Inclusionary Zoning On Local Housing Markets: Lessons From The San Francisco, Washington DC,aAnd Suburban Boston Areas (2008).

[1063] The right to water project is funded by the UN Development Program.

[1064] Thirsting For Justice: Europe's Roma Denied Access to Clean Water and Sanitation, ERRC, 21 March 2017. The report summarises research conducted between 2014 – 2016, covering 93 Roma districts in Albania, France, Hungary, Macedonia, Moldova, Montenegro, and Slovakia with a foreword by Léo Heller, Special Rapporteur on the right to safe drinking water and sanitation.

[1065] The complaints were communicated on 8 April 2015, Applications nos 24816/14 and 25140/14, Branko Hudorovic and Aleks Hudorovic against Slovenia and Ljubo Novak and others against Slovenia lodged on 26 March 2014 and 26 March 2014 respectively. The authorities' failure to provide basic amenities led to questions raised under Article 3 and 8.

constitute more adequate building blocks for the future. It remains to be seen whether the locals can turn the tide on housing and align the OSF Roma structure's agenda and narrative with the interests clearly expressed by the Roma themselves.

5.4. Discursive domination and the internationalisation of public interest litigation

Part 4 showcases the way in which the dominant narrative championing Roma integration and the significance of legal tools in securing social change - epitomized by the *D.H.* campaign - emulate *Brown's* construction in the US. The dominant narrative skates over CEE realities, partly because it is self-promoting from the INGOs' point of view, but ultimately, because it serves OSF's purposes in the US by facilitating circular knowledge transfer about a specific strand of public interest litigation, namely elite-vanguard lawyering.

The transnationalisation of public interest litigation denotes adaptation from the US to the CEE,[1066] while the re-appropriation of this social change tool bathed in the glory of international human rights law is described in the literature as internationalisation.[1067] The term public interest litigation applies to legal challenges that "aggregate the claims of individuals or resolve contested questions in ways that affect broad numbers of individuals."[1068] Until recently, OSF and its proxies have understood public interest litigation as synonymous with progressive elite-vanguard lawyering, but this seems to be changing at present due to internal debates analysed below.

Roma rights lawyering involves diverse practices and ideologies. One strand is characterised by the ambition to serve the immediate needs of clients and achieve incremental change (legal service provision), while another and perhaps better-known strand strives for enduring social change: to reform policies and the law itself (strategic litigation). Strategic litigation in the Roma rights context has been generally understood as involving an element of planning prior to launching a claim, but potentially when identifying clients and issues.

Incidentally, legal service type lawyering has galvanised social change in housing – especially in Western Europe, but to some extent also in the East - while the more planned, strategic legal practices characterizing desegregation litigation in the field of education have wound down without notable impact, except perhaps in Hungary where they served to boost the government's desegregation policies. Regardless of whether impact occurs as planned,

[1066] Cummings and Trubek, 2009, supra.
[1067] Cummings, 2007, supra.
[1068] Hershkoff, 2005, supra, p. 2.

strategic litigation has been conceived as the binary opposite of 'happenstance' and 'justice for just an individual'.[1069] Given that strategic Roma rights litigation promotes racial justice, these characteristics bring this practice squarely under cause lawyering.[1070]

Cause lawyers operate at the intersection of conventional legal activities (serving the client) and serving a greater good (serving the cause). The labels and the causes are diverse, and they reflect a particular political context and professional ethics, which increasingly encompasses not only progressive, but also conservative legal activism.[1071] The cause is described as challenging the "prevailing distributions of political, social, economic, and/or legal values and resources. Cause lawyers chose clients and cases in order to pursue their own ideological and redistributive projects … as a matter of personal engagement."[1072] Their actions are driven by the "belief in a cause and a desire to advance that cause."[1073]

A classification of cause lawyers that seems particularly useful for the analysis here considers their vision of the legal and political system, of the cause they champion and the lawyering practices they engage in.[1074] Roma rights lawyering as conceived by OSF and its proxies takes after the so called 'elite vanguards' of the civil rights era, distinguishable from 'proceduralists' and 'grassroots lawyers', who guard the sanctity of legal procedure or champion the community's interests above all else.[1075] Elite vanguards develop and manage cases in order to advocate for sweeping legal and social reform, which is how the genesis of the seminal *Brown* judgment is generally perceived.[1076] The verdict is a key point of reference in the OSF

[1069] This understanding of strategic litigation diffused across the anti-discrimination field, placing the emphasis on the „method of selection," rather than the objective or the outcome. According to the European Network of Equality Bodies: „Strategic litigation is a method used to select suitable cases ('test cases') to bring to court in order to achieve a specific outcome. The intention is that these legal proceedings will have a positive broader impact on law and policy development as well as setting a precedent for the outcome in similar cases. The objectives of strategic litigation can be intra-legal and extra-legal." See, Strategic Litigation Handbook, Equinet, Brussels, 2017, p. 9.

[1070] Austin Sarat and Stuart A. Scheingold Cause Lawyering and Democracy in Transnational Perspective. In Sarat and Scheingold, 2001, 382-4.

[1071] This type of lawyering can be labelled "rebellious, progressive, transformative, radical, critical, socially conscious, alternative, political, visionary, and activist." See, Carrie Menkel-Meadow: The causes of cause lawyering: Toward an understanding of the motivation and commitment of social justice lawyers, in Cause Lawyering *Cause lawyering: Political commitments and professional responsibilities*, Austin Sarat and Stuart A. Scheingold (eds.), Oxford, Oxford University Press, 1998, pp. 51-68. Ranging from action for social change, social justice, and equal justice, to action for the underrepresented, the subordinated or for the public interest.

[1072] Austin Sarat and Stuart A. Scheingold, State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction, 2001, p. 13.

[1073] Thomas Hilbink, You Know the Type...: Categories of Cause Lawyering, Law & Social Inquiry, Vol. 29, No. 3 (Summer, 2004), pp. 657-698.

[1074] Ibid.

[1075] Hilbink, 2006, supra.

[1076] Even if in reality it was less planned, taking decades of trial and error. See, Tushnet, 1994, supra.

Roma structure, where it exemplifies an important aspiration not only for racial justice, but also for cause lawyering as a practice to become a permanent fixture of the legal profession.

Chapter IV described the ways in which the Roma rights field became the key sight of transnationalising public interest litigation in the CEE, a narrative, rather than an actual process dominated by the international elite. According to the dominant discourse, the ideal type *Brown*-era elite vanguard lawyering was adapted to the CEE context, but this narrative does not acknowledge the ways in which it encountered the practice of human rights/constitutional litigation as a natural continuation of dissident legalism.[1077] *D.H.* was instrumental in making sense of elite vanguard lawyering, coined as planned, *strategic litigation,* an effective tool for securing racial justice in the European context.[1078]

The CEE was not the first part of the world targeted by progressive US forces seeking to counterbalance the transnationalisation of private law,[1079] as much as to win an ideological war against the challengers of Western-style (legal) liberalism.[1080] The Ford Foundation began funding public interest law projects in Latin America and the CEE simultaneously,[1081] but in India, for instance, public interest litigation took roots in the 1970s. Similar to the CEE, it developed as a form of constitutional, rather than civil litigation,[1082] but in India, activist Supreme Court judges,[1083] rather than former dissidents and their disciples spearheaded the process.

[1077] Given the political and social context, an important difference lies between PIL and constitutional litigation lies in the causes of the 'revolutionary moment', namely racial justice for a minority v justice for the majority through democratization.

[1078] See, for instance, Gesine Fuchs, Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries, Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2013, Volume 28, no. 2, pp. 189–208., Ronald Holzhacker, Transnational Strategies of Civil Society Organizations Striving for Equality and Nondiscrimination: Exchanging Information on New EU Directives, Coalition Strategies and Strategic Litigation in The Transnationalization of Economies, States, and Civil Societies: New Challenges for Governance in Europe, pp 219-239 edited by László Bruszt and Ronald Holzhacker, Springer Books, New York, 2009 and Lisa Vanhala, Anti-discrimination policy actors and their use of litigation strategies: the influence of identity politics, Journal of European Public Policy, Volume 16, 2009 - Issue 5, pp. 738-754.

[1079] Dezalay. and Garth, 2012, supra. For an early overview of transnational corporate legal practice see, Richard L. Abel, Transnational Law Practice, 44 Case W. Res. L. Rev. 737 (1994), pp. 737-870.

[1080] Richard E. Posner, 1996, supra. "A central issue of our times is the contest between Western-style liberalism and rival ideologies. A central arena of that contest is the newly liberated nations of Central and Eastern Europe. And a central question for those nations is the role of rights in the political, economic, and legal structure of society." p. 1.

[1081] On Latin America see Meili in Sarat and Scgeingold, 2001, supra and Hugo Frühling, From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America in Many Roads to Justice, 2000. According to Frühling, Latin American grant making began in 1995, p. 70.

[1082] Surya Deva, Public Interest Litigation in India: A Critical Review, Civil Justice Quarterly VOL 28, Issue 1, 2009, p. 21.

[1083] Cooper, ''Poverty and Constitutional Justice'' (1993) 44 *Mercer Law Review* 611, 616–632; Shah, ''Illuminating the Possible in the Developing World'' (1999) 32 *Vanderbilt Journal of Transnational Law* 435, 467–473; Vijayashri Sripati, ''Human Rights in India Fifty Years after Independence'' (1997) *Denver Journal of International Law and Policy* 93, 118–125.

Opening access to courts and providing inventive judicial remedies occurred quickly and were important steps,[1084] but lower courts and weak judicial enforcement minimised the actual impact of *social actions*[1085] in India from the 1990s onwards.

The political context in which lawyers pursue progressive - or conservative - causes differ from country to country. Action on behalf of marginalised groups was couched in the neutral terms of *public interest* to become politically acceptable in the US, but regime changes elsewhere did not initially necessitate terminological caution. In India, for instance, an early critic argued that the indigenous label, *social action* was a better fit for claims against state repression.[1086] However, later, when the focus shifted to public policies, legitimacy debates between the courts and the executive began to resemble those concerning public interest litigation in the US, where litigation challenged public policies inherently disputing wealth redistribution.[1087]

Constitutional litigation in the CEE sought to counterbalance state repression as a natural continuation of the dissident agenda. The need to reform public policies as well came to the fore in relation to marginalised groups, such as the Roma. Today, strategic litigation denotes aspirations for securing collective goods and structural change in a parsimonious manner.[1088] The focus has been on case selection and case design (legal strategy), while the structure that supports strategic legal action is an aspect generally overlooked. In other words, adaptation has focused on public interest *litigation* as a mechanism of social change, while neglecting public interest *law* as a political institution that requires professional structures and stable resources.[1089]

These developments have engendered an 'undefinable' concept in the hands of progressive NGO lawyers enforcing international human rights law.[1090] Strategic litigation *qua* court-

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[1084] Deva, 2009, supra, p. 24. *Gupta v Union of India* (1981) Supp S.C.C. 87, 210.

[1085] Marc Galanter and Jayanth K. Krishnan, Debased Informalism: Lok Adalats and Legal Rights in Modern India in Erik G. Jensen and Thomas C. Heller (eds.) Beyond Common Knowledge: Empirical Approaches to the Rule of Law, Stanford University Press, 2003.

[1086] PN Bhagwati, ''Judicial Activism and Public Interest Litigation'' (1984) 23 *Columbia Journal of Transnational Law* 561. 'The PIL represents for America a distinctive phase of socio-legal development for which there is no counterpart in India; and the salient characteristics of its birth, growth and, possibly, decay are also distinctive to American history.'' Upendra Baxi, ''Taking Suffering Seriously'' (1985) *Third World Legal Studies* 107, 108.

[1087] Varun Gauri, Public Interest Litigation in India Overreaching or Underachieving? Policy Research Working Paper 5109The World Bank Development Research Group Human Development and Public Services Team November 2009.

[1088] For instance, in a 1994 application for funding to OSF, INTERIGHTS used the term strategic litigation.

[1089] Hershkoff, 2005, supra.

[1090] Evangelia (Lilian) Tsourdi, Enforcing Refugee Rights Under EU Procedural Law: The Role of Collective Actors and UNHCR, pp. 99-112. in Claire Kilpatrick, Bruno de Witte and Elise Muir (eds.), How EU Law Shapes

centered legal reform lawyering is inaccessible to the overwhelming majority of vulnerable Roma, who do, however, use the law before equality bodies and human rights institutions on their own terms. Still, despite the significance of public enforcement involving equality bodies and field-specific agencies, the dominant narrative revolves around private enforcement, more particularly the actions of legally focused NGOs funded by philanthropies and international organisations.

INGOs and international organisation approach strategic litigation from the perspective of international tribunals, leading the discourse from the top down. They focus on reinforcing legal principles and ensuring that domestic remedies are exhausted, while locals are problem-solvers, pursuing a combination of legal as well as policy advocacy, court as well as agency-focused legal strategies, education, awareness raising and community organising. Their approach is consistent with the contemporary meaning of public interest lawyering in the US, not the elite-vanguard lawyering of the *Brown* era. [1091] In practice, both international and domestic NGOs do more than *just* litigate, but the dominant discourse is vested in the myth that nurtures the self-portrayal of elite vanguards as the guardians of the jurisprudence of international tribunals with the power to interpret treaties.

By selecting the Roma rights field as a gateway, OSF sought to bolster racial justice in the US as well. *Brown* as the pinnacle of the civil rights movement served as the centrepiece of its vision that simplified the judgment's actual social and political context. It thus became irrelevant that in reality, rather than meticulously planned and executed by a legally focused organisation, *Brown* was but an element of the NAACP's long journey to racial justice[1092] that continued afterwards as well, grappling with mass resistance,[1093] a long battle for enforcement

Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum (EUI Working Paper LAW 2017/17.

[1091] Alan K Chen and Scott L Cummings, Public Interest Lawyering: A Contemporary Perspective, Wolters Kluver Law & Business, 2013.

[1092] Guinier, 2004, supra. See, also Jacquline Dowd Hall, The Journal of American History, March 2005, The Long Civil Rights Movement and the Political Uses of the Past, who claims at p. 1249. that "Seen through the optic of the long civil rights movement, however, civil rights look less like a product of the Cold War and more like a casualty. That is so because antifascism and anticolonialism had *already* internationalized the race issue and, by linking the fate of African Americans to that of oppressed people everywhere, had given their cause a transcendent meaning."

[1093] Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 8 (1993). Cf, David J Garrow, Review: "Happy" Birthday, "Brown v. Board of Education?" "Brown's" Fiftieth Anniversary and the New Critics of Supreme Court Muscularity, Virginia Law Review, Vol. 90, No. 2 (Apr., 2004), pp. 693-729. David J. Garrow, Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education, 80 Va. L. Rev. 151 (1994). Mary Frances Berry, Review: From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality by Michael J. Klarman, The Journal of American History, Vol. 92, No. 2 (Sep., 2005), pp- 686-687.

by the federal executive, the courts[1094] and civil society, diverging interests within the community,[1095] political radicalisation[1096] and the declining significance of litigation.[1097]

Public interest law organisations facilitated a 'rights revolution' after *Brown*, characterised by increasing judicial activism, a steady growth in client groups and the portion, as well as willingness of the legal profession to engage in legal reform lawyering for the marginalised.[1098] *Brown* struck a new deal between the Supreme Court and the federal executive, whereby the justices agreed not to impede any longer public policies favouring both the country's economic growth and its stigmatised racial minority.[1099] This reading appealed to OSF that was eager to reproduce what the critics of literature constructing *Brown* as a beacon of legal liberalism claim had never been.

Importantly, when *D.H.*, the European counterpart of *Brown* was planned, litigation for racial justice was on the decline in the US and progressive lawyers were losing their turf, the federal litigation strategy. As much as *Brown* was a myth conjured up by 'crusaders in the courts'[1100] that should have been 'busted' before becoming an experiment elsewhere,[1101] the 'European *Brown*' was designed as a perfect lawsuit combining pre- and post-*Brown* strategies, and condensing fifty years of legal mobilisation in the seven years that adjudication in the Strasbourg Court had taken - for even the strategy of jumpstarting litigation at the federal/European level was allegedly first tested in *Brown*.[1102]

Coincidentally, political transition in the CEE induced legal reform akin to a 'rights revolution',[1103] and even though social and political factors differed from the civil rights era's US, a "fundamental change in the judicial ideology of decision-making" facilitated human

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[1094] Gerald N. Rosenberg, The Hollow Hope: Can courts bring about social change, University of Chicago Press, 1991, pp. 50. and 99-100 and Hollow hopes and other aspirations: A reply to Feeley and McCann, Law and Social inquiry, Vol 17, No 4, 1992, pp. 761–778. For his critique, see, Michael McCann, Reform litigation on trial, Law and Social Inquiry, Vol 17 No 4, 1992, pp. 15–743. and Causal versus constitutive explanations (or, on the difficulty of being so positive…, Law & Social Inquiry, 1996, Vol 21 No 2, pp. 457–482. See also, Laura Beth Nielsen, Social Movement, Social Process: A Response to Gerald Rosenberg, 42 J. Marshall L. Rev. 671 (2008-2009).

[1095] Derrick A. Jr. Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale. L.J. 470 (1976).

[1096] McAdam, Political Process, 1999, supra.

[1097] Tushnet, 1994, supra.

[1098] Handler, 1978, supra.

[1099] Mark Tushnet, The Significance of Brown v. Board of Education, Virginia Law Review, Vol. 80, No. 1, Twentieth-Century Constitutional History (Feb., 1994), pp. 173-184.

[1100] Greenberg, 1994, supra.

[1101] Carle, 2011, supra.

[1102] Ibid. As Carle shows, the "federal civil rights law developed primarily through the efforts of lawyers who brought high-profile test case litigation in federal courts" is in fact a constructed, present-oriented reading of past events.

[1103] Přibáň and Sadurski, 2006, supra.

rights litigation, while constitutional courts made international human rights treaties a benchmark of domestic adjudication.[1104] Ultimately, the Europeanisation of anti-discrimination law facilitated planned legal action in the CEE, into which the EU and the US invested handsomely.

5.4.1. Transnationalising 'elite vanguard' lawyering

The Ford Foundation spearheaded the transnationalisation of public interest litigation with the support of donors, such as OSF, whose DONGO, the ERRC became a leading partner in this process, dominating the narrative on the receiving end[1105] as a key actor at the Oxford Symposium in 1995 and the Durban Symposium in 1997.[1106] The process was vested in the rule of law movement that emerged after 1989 as a successor of law and development.[1107] In the post-transition, post-soviet space, 'legal crusaders' collaborated with the development community in erecting "legal systems that married a respect for open markets with a commitment to human rights."[1108] Philanthropies balanced the ideologies of human rights and market economy in different ways, visible in their attention to judicial independence and legal enforcement, strict corporate accountability and a limited measure of redistributive justice.[1109]

The USAID-funded International Human Rights Law Group published the first reference material on public interest litigation relevant for the practice of international human rights law.[1110] The Public Interest Law Initiative's handbook co-funded by Ford and OSF was also

[1104] Zdenek Kühn, Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement, The American Journal of Comparative law, 2004, p. 531.
[1105] Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds.), Pursuing the Public Interest: A Handbook for Legal Professionals and Activists, Public Interest Law Initiative in Transitional Societies, Columbia Law School, New York, 2001. The Foreword to this volume was authored by Petrova. See, also, Dimitrina Petrova, Political and Legal Obstacles to the Development of Public Interest Law, 5 E. Eur. Const. Rev. 62 (1996).
[1106] Ford first enlisted the Polish Helsinki Committee "to convene a small meeting of lawyers, judges, and human rights activists" to discuss public interest litigation in 1995. See, Aubrey MsCutcheon, Eastern Europe: Funding Strategies for Public Interest Law in Transitional Societies in Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World, Mary McClymont and Stephen Golub (eds.), The Ford Foundation, 2000, p. 240. Held from June 29 to July 8, 1997 under the auspices of the Public Interest Law Initiative, Columbia University, sponsored by the Ford Foundation and the Open Society Institute at the University of Natal, Durban, South Africa.
[1107] Originally, PIL lawyers in the US opposed foreign aid programs in the 1970s, because their commitment to promoting the rights of marginalised groups conflicted with the development projects that violated fundamental rights and put vulnerable locals at risk of environmental and economic harm. See, James A. Gardner, Legal Imperialism: American Lawyers and Foreign Aid in Latin America, 1981, Madison, University of Wisconsin Press.
[1108] Cummings, 2007, supra, p. 959.
[1109] Amy L. Chua, Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development, 108 YALE L.J. 1 (1998).
[1110] Richard J. Wilson Jennifer Rasmussen, Researched b y Scott Codey, Promoting Justice: A Practical Guide To Strategic Human Rights Lawyering, International Human Rights Law Group, 2001.

published in 2001.[1111] In 2004, when the OSF sponsored Handbook on litigating racial discrimination[1112] came out, the prefix *strategic*[1113] was pasted before the law to denote "a superior form of politics" that "has the capacity to render substantive justice … change substantive law and thereby change society."[1114] Western European NGOs joined in this effort after their vision of strong public enforcement suffered defeat in the European Parliament, and private enforcement, i.e. privately funded litigation remained the only viable option to secure racial justice in the EU.[1115]

The 2004 Handbook describes strategic litigation from the perspective of INGOs without addressing collaboration with national agents or considering a model that would create bridges between legally focused NGOs, legal aid services and the professional bar. Acknowledging the role of legal aid in bringing to the fore cases that may trigger 'lasting effect' the publication focuses on 'selecting and developing cases' to achieve 'broad social change'.[1116] It favours 'international litigation' ostensibly because of resource limitations, while domestic litigation as a prerequisite of international adjudication remains largely unaddressed.[1117]

Rule of law crusaders were the first to discuss strategic litigation in the CEE. Former director of the NAACP Legal Defense Fund and OSF consultant Jack Greenberg authored an assessment of Roma desegregation litigation, calling attention to structural differences between the US and the CEE.[1118] James A. Goldston, who moved from the ERRC to the Open Society Justice Initiative published extensively about Roma rights litigation with a focus on *D.H.* in

[1111] Rekosh, Buchko and Terzieva (eds.), 2001, supra.

[1112] European Roma Rights Center/Interights/Migration Policy Group, Strategic Litigation of Race Discrimination in Europe: From Principles to Practice, Nottingham: Russell Press Ltd., 2004.

[1113] Strategic litigation and agency enforcement in the field of gender equality all demonstrates signs of trans-Atlantic borrowing. See, Barnard, 1995, supra and Claire Kilpatrick, Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ European Law Journal, Vol. 4, No.2, June 1998, pp. 121–147.

[1114] Hilbink, 2004, supra, p. 673. "The cause's substantive goals are delineated by the political ideals of the lawyers themselves, rather than a set of professional ideals. Elite-vanguard lawyers represent groups or principles or the "public interest," emphasizing test-case litigation and substantive law reform by lawyers who are personally invested in the substantive outcomes of their cases."

[1115] Contrary to what is suggested by Case and Evans, namely that the SLG lobbied for strategic litigation as the main tool of enforcement, I suggest this became an objective only after their proposal for a strong public enforcement agency had been defeated by the member states. Indeed, the original proposal sought standing for organizations with or without the consent of clients. In this sense, it conceptualised collective action from a corporatist European, rather than a US class action-based perspective. Case and Givens, 2010. For details on the proposals see, Isabelle Chopin and Jan Niessen (eds.), The development of legal instruments to combat racism in a diverse Europe, Martinus Nijhoff Publishers, 2004.

[1116] Strategic Litigation Handbook, 2004, supra, p. 12.

[1117] Ibid, p. 35.

[1118] Greenberg, 2010, supra.

which he incidentally played a crucial role.[1119] His initial enthusiasm gradually mellowed into realistic reflections about the minimal changes accompanying the Grand Chamber judgment, while more recently, the Open Society Justice Initiative's executive has come to doubt the efficiency of *just* litigation, a twist that reverberates in conflicts between the CEE elites revisited in the next Chapter.[1120]

While less hopeful today, Goldston's vision of the law has not changed, so that his *credo* is the same as it was in 2005, when he wrote about a trial court victory in a Bulgarian desegregation case as follows: the court "made history [by e]choing the U.S. Supreme Court decision of *Brown v. Board of Education*."[1121] This and other "rulings have articulated – with the full legal authority that only courts possess – basic principles that governments may not breach. But the challenge is to enforce them."[1122]

5.4.2. Transnationalising *Brown's* revisionist critique

Once Pandora's box opened, unpredictable consequences ensued, including the transnationalisation of *Brown's* revisionist critique, more precisely, exporting across the Atlantic doubts about the impact of legal mobilisation. Rule of law crusaders eager to see *Brown* emulated in the CEE are now engaged in transplanting the first wave of its critique in the US, following in the footsteps of initial warnings about the unfeasibility of court-centered, contentious legal tactics in Europe.[1123]

Critical insights are recent, because it has taken time to test the transplant in the CEE. Margareta Matache, former executive director of Romani Criss, now based in the US spearheaded research on social change tools for school desegregation. The 2015 Matache Report

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[1119] James A Goldston, Race Discrimination Litigation in Europe: Problems and Prospects (social change litigation), Roma Rights 1998, A Future for Roma Rights? Deputy Director, Open Society Institute, presentation in the Central European University on the occasion of International Roma Day, 8 April 2001.Roma rights, Roma wrongs, Foreign Aff., 2002 Vol 81 No 2, pp. 146-162, James A. Goldston & Ivan Ivanov, Combating Segregation in Education through Litigation: Reflections on the Experience to Date, in Separate and Unequal: Combating Discrimination against Roma in Education, A Sourcebook, pp. 117-151. Public interest litigation in Central and Eastern Europe: Roots, prospects, and challenges, Human Rights Quarterly, 2006, Vol. 28, No. 2 (May, 2006), pp. 492-527, Ending Racial Segregation in Schools: The Promise of DH, Roma Rights, 2008, The Struggle for Roma Rights: Arguments that Have Worked, 32 Hum. Rts. Q. 311 (2010), pp. 311-325.

[1120] James A. Goldston, The Unfulfilled Promise of Educational Opportunities in the United States and Europe: From Brown to D.H. and Beyond in Bhabha et al, 2017, supra, pp. 163-186.

[1121] Some quiet victories for human rights by James A. Goldston, Executive director of the Open Society Justice Initiative, International Herald Tribune on 22 December 2005.

[1122] Ibid.

[1123] Robert A. Kagan, Should Europe Worry about Adversarial Legalism, 17 Oxford J. Legal Stud. 167 (1997) and Morag Goodwin, White Knights On Chargers: Using The US Approach To Promote Roma Rights In Europe?, German Law Journal, Vol 05 No 12, pp. 1431-1447.

found that in Romania, for instance, EU accession exerted more leverage than strategic litigation, policy advocacy and community action.[1124] These conclusions must be read in the context of severe data shortages and feedback from Romani Criss staff, who felt that legal action was more influential than advocacy, despite the lack of effective remedies.[1125]

Doubts raised about the efficacy of litigation by George Soros and the OSF global board[1126] inspired OSJI's assessment of European desegregation litigation. The 2015 Zimova Report found "groundbreaking judicial rulings and significant changes in policy and practice," as well as "disillusionment with the courts and new manifestations of discrimination."[1127] The conclusion is that strategic litigation is but one tool for generating social change, but the focus on international litigation alone throw into doubt whether a study dedicated to mapping the Strasbourg judgments' impact render these insights comprehensive enough,[1128] particularly, because the *Roma education cases* constitute a specific and volume-wise negligible aspect of a multifaceted and variable process, in which domestic adjudication plays perhaps an even more crucial role to which Chapter IV attests.[1129]

Even though litigation has been partly successful and often the only available tool, the mood for change is strong.[1130] Despite data suggesting that other social change tools – especially in and of themselves - do not yield better results, that massive resistance and

[1124] Strategies and Tactics to Combat Segregation of Roma Children in Schools, Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria and Greece, FXB Center for Health and Human Rights, Harvard University, 2015, p. 25. (hereafter, the Matache report). EU accession criteria were "the engine for the development and adoption of progressive Roma related institutions and policies" in the Romanian education sector.

[1125] "Overall, according to the Romani CRISS representatives we interviewed, research initiatives have not been as instrumental to anti-segregation advocacy efforts at the national level as much as legal actions have been. According to Romani CRISS, political will is lacking to understand the issues, consider data, and address them. Institutions tend to react mostly to pressure from the international community or from legal actions (C. David, FXB Interview, February 27, 2013)." Ibid.

[1126] The assessment of global litigation came out after the Zimova Report. See, Strategic Litigation Impacts: Equal Access to Quality Education, March 2017, Open Society Justice Initiative, Education Support Program and Strategic Litigation Impacts: Indigenous Peoples' Land Rights, April 2017, Open Society Justice Initiative.

[1127] Adriána Zimová, Strategic Litigation Impacts: Roma School Desegregation, OSJI, March 2016 and Failing Another Generation: The Travesty of Roma Education in the Czech Republic, OSJI, June 2012.

[1128] As the Matache report shows, NGOs use all available tools to tackle segregation, without relying only on strategic litigation, legal or policy advocacy, community action or multicultural education.

[1129] Zimová, 2016, supra.

[1130] For instance, Aryeh Neier believes that OSF "overestimated our capacity to play a transformative role in that region," he said. "We thought we could remake the education system in different countries, and we really couldn't. We could do a few valuable things, like try to make sure that the Roma weren't excluded from the education system, but we couldn't play a transformative role. There was a degree of hubris about some of the activities. "Outsiders, in the end, can have only limited impact, a lesson that all foundations, governments, and armies eventually learn. Basically an outside donor doesn't make a revolution," Neier concluded. "The most you can do is assist a certain number of people who have their own projects, and some of those people make valuable contributions." Feffer, Helping from Outside, Aryeh Neier, Sep 16, 2013.

governmental disengagement can render illusory political and development approaches as well,[1131] while majority populations have ample resources to frustrate desegregation efforts,[1132] litigation and lawyers are on the losing side of a turf battle within OSF and the global donor community. Without coming into age, strategic litigation may fall victim of a paradigm shift from the rule of law to community empowerment.[1133]

Twenty years after the transplantation of public interest litigation the OSF Roma structure is transplanting the debate and critique about its efficacy.[1134] Few seem to remember the debilitating effect of identical debates among self-doubting donors within the law and development movement before[1135] and the evaluation of the Ford Foundation's grant making activities covering the second half of the 20th century in the US, according to which "public interest litigation has been and remains integral to a holistic social change strategy that may also include community mobilization, leadership and economic development, media outreach, policy analysis, and empirical research."[1136]

Revisionist critiques of legal mobilisation, such as the 'constrained court'[1137] and the 'backlash' theory[1138] - the former claiming that courts alone cannot effect social change and the latter that *Brown* triggered massive resistance - are arguably counterfactual, in that they are based on an inherently unsubstantiated claim, namely that political mobilisation would have been more effective than legal mobilisation or that in the least the former would have been a "more effective and accountable challenger of power."[1139] In reality, the impact of both is difficult to measure and "one never knows what would have happened" had movement leaders chosen a different tool.[1140] Importantly, there are times when political mobilisation is not a

[1131] Timmer, 2017, supra and Margareta Matache and Oehlke, A Critical Analysis of Roma Policy and Praxis: The Romanian Case in Bhabha et al, 2017 supra, pp. 97-114.
[1132] Matache report, 2015, supra.
[1133] Inside the Struggle: The U.S. Civil Rights Movement & the European Roma Rights Crisis, conference at the Central European University, Budapest, 7-8 December 2015. Anna Mirga-Kruszelnicka, Challenging Anti-Gypsyism in Academia: The Role of Romani Scholars, Critical Romani Studies, Vol. 1, No. 1, 2018, 8–28.
[1134] OSF Public Health Program, Advancing Public Health through Strategic Litigation, June 2016 and The International Human Rights Funders Group, Being Strategic about Strategic Litigation: Four Things We've Learned from a Public Health Context, 28 July 2016.
[1135] Gardner, 1980, supra.
[1136] Hershkoff and Hollander, 2000, supra, p. 90.
[1137] See, Rosenberg, 1991 and 1992, supra.
[1138] Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 8 (1993).
[1139] Cummings, 2017, supra, p. 1990.
[1140] Ibid.

viable option, or when politics must be taken to the streets, independent of which the revisionist critiques also suffer from factual and methodological inconsistencies.[1141]

The debate within OSF focused on just litigation at first, but the Open Society Justice Initiative's 2018 Global Study on Strategic Litigation broadened the scope, claiming that strategic litigation - using the courts to change discriminatory structures and practices - is a powerful tool that often "tips the balance" in long standing social conflicts.[1142] The 'essential lessons' are that the impact of legal action can be straightforward, but more often than not, it is way too complex to be measured easily, in terms of positive and negative, anticipated or unexpected, direct or circumstantial, instant or protracted effect.[1143]

With this 2018 publication, OSJI placed the debate in the context of US law and society literature and moved away from the conception of public interest litigation as elite vanguard lawyering. Still, if the study had embraced the methodology of comparative institutional analysis that takes the limelight away from just the law and just the courts,[1144] it could have perhaps better reflected on complex realities, because only by inquiring into the effectiveness and accountability of 'leaders, as well as lawyers' and 'politics, as well as law' can we grasp the nature and extent of social change.[1145]

In order to situate the debate outside of binaries - as suggested by the Global Study - a more adequate research question could have been: what issues do marginalised minorities mobilise for in courts, equality bodes, enforcement agencies, the streets and election booths? While the intention to reflect on oneself is commendable, it cannot necessitate inquiries that are limited to studying the role of (legally focused) NGOs in effecting social change, thus limiting the question to (judicial) enforcement, and even more strikingly, to international tribunals and

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[1141] McCann, 1992 and 1996, supra. For a historical debate see, Guinier 2004, Garrow 2004 and Berry 2005, supra. Moreover, the impact of the Cold War on racial justice in the US has occupied historians for some time now. See, for instance, Mary Dudziak, Cold War Civil Rights: Race and the Image of American Democracy, Princeton University Press, 2011, who argues that the impact was tangible, while Jacquelyn Dowd Hall (2005, supra) provides a nuance alternative account.

[1142] Strategic Litigation Impacts: Insights from Global Experience, 2018, New York, Open Society Justice Initiative (hereinafter: The Global Study).

[1143] Strategic human rights litigation matters, but there is a need to shift from a binary to a multidimensional impact model that comprises three broad categories of impact: material, instrumental, and non-material (i.e. attitudinal, behavioural, discursive, and community empowerment). Strategic litigation is a process, during which litigators, potential plaintiffs, and social activists should act in ways that are mutually legitimising and reinforcing. A strategy of filing mass or iterative cases is often more effective than seeking a single landmark judgment, while strategic value can often be derived from a case *ex post*. Strategic litigation is most effective when carried out for the communities, and together with, non-litigators. Ibid, pp. 18-20.

[1144] Neil K. Komesar, In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative, 79 Mich. L. Rev. 1350 (1981) and Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy, University of Chicago Press, 1994.

[1145] Cummings 2017, supra.

NGOs. This approach is also counter-factual, because international tribunals rely on domestic courts and state parties when it comes to the enforcement of their rulings, therefore their powers are even more limited than that of national high courts, such as the US Supreme Court, which has been in the limelight of revisionist studies. In any case, the dynamics between law and politics is yet to be considered within the OSF narrative.

A closer look at complaint statistics shows that little has changed over twenty years. Roma communities and individuals use the law to secure access to social rights - housing, employment, health care and public services - and protection from Romaphobic hate speech and hate crimes. They take to the streets in defence of housing and use the election booths to side with the powerful majority that can protect them from extremists.

Broadening the scope beyond the OSF Roma structure and focusing on the Transnational Roma Rights Network and the Roma political movement is necessary, but this requires the recognition of the significant role of national actors and agents within public institutions, but most importantly, of the grassroots level. Situating the Roma rights debate within the general human rights context could highlight that the critique of strategic litigation is oddly limited to a specific minoritarian cause - racial justice[1146] - which may be indicative of backlash in the CEE, but also of turf battles between lawyers and activists, characteristic of the Roma rights field, but not necessarily of other identitarian issues or mainstream human rights activism.

5.4.3. Playing to the home crowd

Brown is a benchmark for a vision of racial equality and the belief in the central role of the law and courts in generating social change.[1147] It is a vehicle of cultural imperialism, the *planetization* of US-based concepts and experiences through the *de-particularization* of the specific American context.[1148] As such, it feeds on and reinforces the 'myth of rights',[1149] the belief that

[1146] See, for instance, Ex Ante Publicity For Negotiated Procedure For Low Value Contracts, Feasibility study in the context of the implementation of a preparatory action on Union fund for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights, JUST/2018/RPPI/PR/RIGH/0182, published on 11 April 2019.
[1147] Minow, 2013, supra.
[1148] Philip Bourdieu and Loic Wacquant, On the Cunning Imperialist Reason, in Theory, Culture and Society, 1999, SAGE, Vol. 16(1): 41-58. US scholars too cautioned against transfers. Jurisprudence is local, rather than universal and the US system of legal rights "may not be transportable across national boundaries-certainly not lock, stock, and barrel," especially not when 'rights fetishism' springs from the inability of lawyers to distinguish between the core and the periphery of rights.. Richard E. Posner, 1996, supra, p. 2. and pp. 5-6. Abel speaks specifically of "the anxiety of influence, theories of law and social change, and the promise and limits of liberalism." Abel, 2008, supra.
[1149] Scheingold, 1974, supra, p. 5.

the legal field is autonomous enough so that social change can be triggered by legal action. The legal liberals' narrative skates over explanatory frames that either find legal and political mobilisations equally important or attribute primacy to political mobilization and consequently to the role of racial minority activists.[1150] It also conceals important differences between the salience of racial equality for Blacks in the 1950s US and the Roma in the transitional CEE, while failing to acknowledge the relevance of European integration in legal reform and social change in the latter.

Unless one recognises that this enterprise targets the US on the long run, it may seem inexplicably "missionary in scope, reprising concerns about American legal imperialism voiced during the first law-and-development movement."[1151] There must be a reason why those, who write movement history un-see significant differences between common law and civil law countries, the history and specificities of racism in different geographic areas, the multi-sourced and inter-ordinal nature of European race equality law and the nature of European corporativism that suppresses minority voices, yet guarantees a certain level of solidarity and social welfare to all.

OSF's desire to influence developments in the US is a greater inspiration and impulse than potential impact on European processes. Hence, even though the narrative is slowly moving away from elite vanguard lawyering,[1152] it remains disinterested in the reality of Roma rights lawyering *qua* transnational litigation, because that seems irrelevant on the other side of the Atlantic, particularly because racial justice activism in the CEE uses a wide array of venues ("multiple ports of entry"[1153]), a broad range of legal tools and diverse national and international legal processes ("external strategies"[1154]), none of which are accessible in the US.

At its best, transnational litigation bridges domestic, international and supranational practice fields, while also combining private with public enforcement, but whether it could or should be transferred to the US is debatable. Interestingly, in the European context, the 'scale of advocacy' is unprecedentedly large, which defies the logic of the conventional US practice and critique of public interest litigation.[1155] The 'pluralism' of Roma rights lawyering

[1150] Coleman, Nee and Rubinowitz, 2005, supra. For a distinction between the two types of mobilisations in the Kurdish context, see, Kurban, 2014, supra.
[1151] Cummings, 2007, supra, p. 964.
[1152] Orly Lobel, The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics, 120 Harvard Law Review, 937, 949–50 (2007).
[1153] Judith Resnik, Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry, 115 Yale Law Journal, 1564, 1579 (2006).
[1154] Cummings, 2007, supra, p. 987.
[1155] Cummings, 2007, supra, pp. 1006-1007.

undermines both the methodological and ideological criticisms,[1156] simply because litigation is only part of a "broader repertoire of advocacy techniques," therefore it does not divert attention and resources away from other strategies, while rights are viewed pragmatically, "as means to advance defined political objectives" rather than "ends in themselves."[1157]

OSF engaged in Roma rights when "liberal rights advocacy [fell] out of political favor" in the US, where public interest litigation for conservative causes had been on the rise.[1158] It sought to gain experience in international litigation and transfer that knowledge to the US to benefit civil rights organisations "with the ultimate goal of using internationalism to reclaim the domestic arena once again as a site of progressive change."[1159] The transplantation of public interest litigation in the Roma rights field set out to muster counter-weight against an increasingly conservative federal judiciary in the US,[1160] but in the end, re-importing its actual product may seem too great a leap in OSF's domestic context at present.

5.5. Conclusions

The chapter inquired into collaboration and conflict between the international and CEE elites within the Transnational Roma Rights Network. The dominant international elite favours legal liberalism and policy reform through public interest litigation, while the CEE elites' reform agenda simultaneously requires restraint and engagement from the state, envisaging institutional reform through legislation. The former see justice as equality and equality through the prism of race, while the latter envision wealth redistribution based on socio-economic status, and secondarily, on race.

In diametrical opposition to the positive self-perception and a congratulatory narrative of the Open Society Foundations and international organizations, the key critical frame portrays the global philanthropy and its proxy, the European Roma Rights Center as hegemonic forces transplanting neoliberal policies that do not deliver on their promises and the potentials of international human rights law. The focus on the international advocacy realm and the failure to

[1156] The ideological critique underlines that the promise of legal rights on which public interest law is built is false, because it legitimates the status quo and promotes individualism at the expense of collective action. Richard L. Abel, Lawyers and the Power to Change, 7 Law and Policy, 5, 8–9 (1985); Robert W. Gordon, New Developments in Legal Theory, in The Politics of Law: A Progressive Critique, 413, 418, 1990.
[1157] Cummings, 2007, supra, p. 1015.
[1158] Ann Southworth, Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law," 52 UCLA Law Review, 1223 (2005).
[1159] Cummings, 2007, supra, p. 1036.
[1160] Ibid, p. 907.

observe functional differences among NGOs limits the sway of the 'counter-hegemonic' critique, whose empirical basis is partly skewed and partly counter-factual. This comes into light when the critical claims are measured up against the chronologically evolving legal opportunities and legal strategies described in Chapters II and IV.

The 'counter-hegemonic' critique's premise, namely that OSF uses the Roma issue for its own purposes as part and parcel of the hegemonic neoliberal economic order is counter-intuitive, for why would an organization if indeed it is interested in profit alone make a long-term investment in mobilizing a marginalized group such as the Roma? Why would a US-based philanthropy do that in Europe, where neoliberal capitalism has its own supporters? The key claim in Chapter V is that OSF does in fact care about the cause of racial justice, but it does so with a keener eye on the racial minorities of its native US, than on Europe's 'pariah nation', the Roma. From this perspective, OSF does capitalize on the Roma issue with a view to reinforcing racial justice across the Atlantic and stabilizing a region neighbouring the former soviet space that threatens Euro-Atlantic security. The analysis in this chapter disproves most of the grand claims that constitute the critique of OSF as a conspirator strengthening the hold of neoliberal capitalism on Europe, and more particularly, on its Eastern borders.

Against this backdrop, the chapter is critical *vis-à-vis* OSF and international organisations for failing to properly consider the needs expressed by Roma communities at the grassroots level and respond to these needs adequately. Alarmingly, the failure to watch and listen to the grassroots level means that both the IOs and their interlocutor, OSF pursue agendas that can undermine the political and legal capital built in domestic organisations. Moreover, by supporting INGOs that are similarly inattentive to the grassroots level, they in fact prevent funds earmarked for a minority cause from achieving its potential impact.

OSF's 'original sin' in the Transnational Roma Rights Network emanated not from its zealous intervention which led to the establishment of the ERRC, but its zealous intervention when it came to diverting funds to the ERRC from domestic NGOs and its failure to curb the ERRC's zeal that ultimately harmed domestic agents and hampered the development of organic transnationalism. Curiously, this failure is the single most important cause why a transnational legal strategy - analogous to 'federal' litigation in the US - could not develop in the Roma rights context, and why the domestic agents' trust *vis-à-vis* the ERRC has gradually diminished.

Rather than adequately responding to housing complaints, the OSF Roma structure, and more particularly, the ERRC prioritized school desegregation. The ERRC has used desegregation litigation as a vehicle to transplant a federal litigation strategy based on precedent, designing or inspiring the 'Roma education cases' that constitute the bulk of race discrimination

jurisprudence at the European level. Finally, the OSF Roma structure has failed to lend its resources to litigation and advocacy challenging Romaphobic hate speech, engaging instead in debilitating internal discussions with agents intent on launching ahead.

Conflicts have been generally detrimental for the communities, with criticism often misplaced and seldom capable of resolving actual tensions that can be classified as reputational, resource related, value based, or as serving the domestic US agenda. The dominant discourse has skated over CEE realities and the collective interests of the Roma in fields where values and norms diverge to a greater extent. In the international advocacy realm, discursive domination has rendered the 'ideological promiscuity of rights talk' controllable and lent policy transfers 'intellectual credibility',[1161] while constructing political and ideological power.[1162] Philanthropic domination has mixed, but altogether positive consequences, because it has amalgamated the Network, concealing or delaying but ultimately not preventing the use of resources for contested purposes.

Contrary to critical claims, the OSF Roma structure has litigated and advocated for social rights and substantive equality. Despite OSF's control of the flow of resources, Europeans successfully reappropriated these resources to the benefit of the minority. Discursive domination concerning strategic litigation, in other words of private enforcement in court by legally focused (international) NGOs has been the most enduring dominant value, because Europeans in general have not provided an alternative.

Reputational conflicts appear futile, because international and domestic NGOs prevail in their 'native' advocacy spaces. Conflicts concerning access to justice are symptomatic of power struggles between activists and lawyers, seldom benefitting the community, even if alleviating the hardship of individual Roma at times. As concerns values, secondary elites can prevail in conflicts if their values align with resourceful networks, such as the human rights movement in Europe.

The dynamics of discursive power within a transnational advocacy network can best be captured if the analysis extends to multiple venues and delves into specific issue areas, rather than broad frames. Studying the dominant actor's domestic agenda helps grasp its objectives in other geographic contexts as well. A single cause can seldom explain hegemonic behaviour,

[1161] Richard Ashby Wilson, Afterword to "Anthropology and Human Rights in a New Key": The Social Life of Human Rights, American Anthropologist, 2000, Vol. 108, Issue 1, pp. 77–83.

[1162] Turk distinguishes five types of power legitimated by legal instruments, including ideological and political power useful for the analysis here. Austin T. Turk, Law as a Weapon in Social Conflict, 23 Soc. Probs. pp. 276-291, (1975-1976), p. 280.

while differences between domestic approaches to racial justice may be smoothed out by keeping to the agents' 'native' advocacy spaces.

Chapter VI

Legitimacy and representation

Chapter VI looks at the narrative of the progressive and radical Roma elite, central to which has been the critique *vis-a-vis* resourceful INGOs and the local *whites* constituting the OSF Roma structure and the Transnational Roma Rights Network. Conversely, auto-critique and dissent concerning the representation of collective interests and assuming responsibility in mainstream politics, as well as *vis-a-vis* the ethnic group has been rare or muted. Members of the Roma elite have held multiple functions within the Transnational Roma Rights Network, but more commonly, in the OSF Roma structure, consequently, their positionality magnifies the indeterminacy of those who dominate and those who are dominated.

The analysis starts from the premise that as much as a 'white noise' pervaded Roma public life before 1996, when OSF established its own Roma structure, intramural conflicts will continue should OSF decide to withdraw. The focus of the ethnic minority critique on the legitimacy of the non-Roma as representatives of the cause has offered a distraction from debating crucial constraints endogenous to the community that hamper effective representation from within. The key constraints include the lack of consensus on coexistence with the majority (separatism, integration or assimilation), the elite's actual achievements as concerns the representation of collective interests, and ultimately, its accountability.

Diverse perspectives mold into the ethnic minority critique, termed in the thesis as 'critical Roma narrative'. This chapter seeks to address its analytical shortcomings by shifting the limelight to the law in places so far dominated by political analysis, to *political as well as legal* representation, and public as well as private accountability, meaning accountability to society and 'the clients'. Given the focus so far on international NGOs and IOs, other, often key agents have been unaccounted for, such as a plethora of Roma-friendly public institutions, local and mainstream organisations that holding power and influence in the Network.

The ethnic minority critics' focus on the international has concealed important differences with the domestic level and across diverse national contexts. 'Europe' has offered ample opportunities for advocacy, rendering the Roma elite's engagement in litigation unnecessary. In contrast, while European integration created favourable conditions for legal representation at the national level, political impediments persisted, and intensified after EU accession, while illiberal governments intentionally diminish legal opportunities. The difficulty of interest representation in political processes has inspired domestic activists to frequently use the law, which has not been the case for the international Roma elite.

Part 1 introduces the "critical Roma narrative" underpinning the production of the progressive and radical leaders' social capital and political agenda. It combines insights form the dogma of Roma participation, the counter-hegemonic critique, and critical Romani studies that instrumentalise Critical Race Theory in fields other than the law.

Part 2 situates the Roma elite within the movement, the Network and the OSF Roma structure, inquiring into its conception of the law by canvassing conflicts and querying whether they address symbolic issues of status equality or seek to alleviate social deprivation. Are conflicts generated by or involving the Roma elite beneficial, neutral or detrimental for the communities? Part 2 concludes that the critical Roma narrative has not explored what is wrong with the law, problematising instead the *whites*' control of the legal field and the scarcity of Roma among Roma rights lawyers - a visible element of an allegedly racially unjust power structure.

Part 3 provides a case study of interest representation in the context of school desegregation, bringing to the fore conflicts between the progressive Roma elite and national (elected) Roma representatives, but also within the ethnic minority leadership. It shows that the domestic interest matrix is more complex than its international counterpart, presenting important puzzles for political as well as legal mobilisation.

Part 4 reviews debates about Roma participation and their impact on the representation of collective interests, arguing that a relationship of identity is a desirable, rather than a necessary condition of representation in advocacy and legal disputes. The CEE context necessitates

inter-ethnic cooperation congruent with the conception of representation as advocacy, whereby "proper performance" is preferred over descriptive representation, namely representation anchored in "a relationship of identity."

In conclusion, Part 5 underlines that international litigation and advocacy spearheaded by the international elites are insufficient in and of themselves, so that collective action must not only be political as well as legal, but also transnational and interethnic to gain traction both within national borders and world polity. The analysis sheds light on the shortcomings of the ethnicity-based (race) critique and the importance of interethnic collaboration. Last, it points to the conflation of the ethnicity-based critique and the critique of litigation that has long plagued movements across the Atlantic.

6.1. The 'critical Roma narrative'

Since 1989, progressive and radical Roma leaders, policy experts and academics have oscillated between NGOs, international organisations, governments and academia, developing a critical narrative to promote their own political agenda and social capital. They have been the most vocal critics of the OSF Roma structure and their expertise grounded the critique in political and social theory, based on the dogma of Roma participation that is taken over by the 'counter-hegemonic' critique analysed in the previous chapter, as well as critical Romani studies that seek to transplant Critical Race Theory outside the discipline of the law.

6.1.1. The legitimacy critique

As a minority group, Roma "will always be outvoted," which necessitates a special focus on their participation in social, economic and political life construed as "presence, voice and influence."[1163] Given the nature of the Open Society Foundations' engagement with the Roma movement on the one hand and the Transnational Roma Rights Network on the other, Roma participation becomes a particularly sensitive issue. Over time the protagonists of the Roma participation debate have changed, but the fundamental questions remained: is the OSF Roma structure - particularly OSF DONGOs - legitimate only if led by Roma and do they do enough

[1163] Aidan McGarry, Unpacking the Roma participation puzzle: Presence, voice and influence, Journal of Ethnic and Migration Studies, Volume 40, 2014, Issue 12.

for the Roma otherwise? Roma activists felt that only under their leadership could the ERRC and other entities become true agents of the Roma political movement.

The participation of ethnic minority groups is governed by various international instruments, but in the Roma context the Framework Convention for the Protection of National Minorities is the most salient norm.[1164] The FCNM Advisory Committee's interpretation underlines participation's fundamental function in social inclusion and the functioning of pluralist societies, envisaging participation in public affairs through a broad range of measures, such as "representation in elected bodies and public administration at all levels, consultative mechanisms or cultural autonomy arrangements."[1165]

As part of the Roma elite's struggle for leadership in the movement and the Network, but first and foremost within the OSF Roma structure, the legitimacy critique demanded the presence of more Roma in paid and decision making positions and questioned the mandate of the *gaje*-led ERRC as a representative in the (international) advocacy realm. It doubted the authority and credibility of the European *whites* based on the premise that a minority cause necessarily requires minority representatives, who share the identity and experiences of those represented.

The criticism homed in on the alleged failure of adequately involving the Roma in decision making and the 'usurpation' of financial resources by the non-Roma, without, however, doubting the usefulness of the law, the rights talk and legal mobilization, or proposing alternative agendas, frames or strategies. Even the most vociferous critics embraced the existing frames, advocating for more rights[1166] alongside shared values and norms.[1167]

By focusing on INGOs, the legitimacy critique suppressed misgivings concerning the critics themselves, i.e. that the "international Roma" activists, the "professional Roma" socialised in the NGO sector "are presented as leaders of the community" while Roma representatives "democratically elected in their own countries" are generally absent from international

[1164] Pursuant to which State Parties "shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them" (Article 15).

[1165] Advisory Committee On The Framework Convention For The Protection Of National Minorities, Commentary On The Effective Participation Of Persons Belonging To National Minorities In Cultural, Social And Economic Life And In Public Affairs, Adopted on 27 February 2008, ACFC/31DOC(2008)001.

[1166] Kawczynski and his organisation, the Roma National Congress - a break-away from the International Romani Union - advocates for a "right to cultural difference" and aligning the movement's agenda with indigenous peoples and traditional communities. See, Marushiakova, E., Popov, V. "The Roma - a Nation without a State? Historical Background and Contemporary Tendencies." - In: Burszta, W., Kamusella, T., Wojciechowski, S. (Eds.) Nationalismus Across the Globe: An overview of the nationalism of state-endowed and stateless nations, Poznan: School of Humanities and Journalism, 2005, 433-455 at p. 450.

[1167] Kyuchukov interview.

politics.[1168] By turning the limelight on the illegitimacy of the *whites*, progressive and radical leaders escaped scrutiny and gained recognition in Europe, even though they played a marginalized role in domestic politics.

6.1.2. The 'counter-hegemonic' critique

The second wave of criticism conceives OSF's involvement in the movement as an attempt to legitimate neoliberal economic policies while offering no more than a hollow promise of civil rights.[1169] Waged from the left, the counter-hegemonic frame focuses on globalisation and the role of global civil society[1170] based on the premise that "it is erroneous to limit the conception of hegemony by defining it simply in terms of the power of one state relative to other states."[1171]

The previous chapter discussed in detail the key publication, according to which OSF played a key role in erecting structural barriers that impede collective interest representation by limiting political opportunities.[1172] The critique presents a palace war between ERRC staff and leadership as if representative of the movement, while depicting animosities between the ERRC and the progressive international Roma elite from the perspective of gross resource inequalities characteristic of relations between international and domestic organisations. Simultaneously, however, it fails to account for the role the Roma elite plays in the OSF Roma structure, the critics' own positionality in the domestic and international binary, and structural barriers beyond the INGOs' reach.

The 'counter-hegemonic' critique combined ethnicity with anti-capitalist ideology to embellish the latter's critical clout. It problematised the failure to mobilise the law to its full potential without making a normative claim about the law itself, recognizing legal opportunities and barriers, or taking into account adjustments made to the ERRC's legal strategies over time.

The demand for Roma participation in international advocacy rests on two claims, namely that the Roma do not participate and that they would be better representatives, than the non-Roma. The former is simply not the case, while the latter begs the question whether it would indeed play to the communities' benefit if (only) Roma spoke on their behalf? INGOs are held accountable for both the lack of progressive activism at the grassroots level and

[1168] Marushiakova and Popov, 2005, supra, pp. 454-455.
[1169] Sigona and Trehan, 2009, supra.
[1170] Stone, 2010, supra. Kóczé and Rövid, 2012, supra.
[1171] Steven R. Gill, and David Law, The Global Political Economy: Perspectives, Problems, and Policies, Baltimore: Johns Hopkins University Press, 1988, p. 344.
[1172] Sigona and Trehan, 2009, supra.

competition with the progressive and radical Roma elite in international advocacy venues, which certainly seems like a misconception of these entities' opportunities and constraints.

As the previous chapters show, the transitional generation of Roma leaders has been holding on to its positions in international politics since the transition, while the international Roma elite chose not to engage in legal mobilization, which unequivocally undermine the 'counter-hegemonic' critique. Recently, OSF's Roma Initiatives Office has sought to revitalise Roma representation by bringing young faces to the negotiating table within the Council of Europe, and promoting the establishment of the European Roma Institute for Arts and Culture, none of which has yet produced tangible results. The failure of the Roma elite's efforts to penetrate national politics in the overwhelming majority of Eastern states is a point yet to be addressed by the critical narrative.

6.1.3. Critical Romani Studies

Recently, a new wave of criticism has been issued from the emerging field of Critical Romani Studies (ROMACRIT) that weaves together Critical Race Theory (CRT) and cultural studies borrowed from the US. While a broad meaning of Roma rights is taken for granted in this account, using *legal* tools is not, because the radical agenda is concerned with political power. ROMACRIT is thus uninterested in the law, focusing on resourceful institutions, such as the ERRC, a representative of *gaje* power.

ROMACRIT situates the debate outside the discipline of the law, reversing CRT's trajectory in the US and formulating dilemmas as *just political*.[1173] The critics lack legal expertise, therefore a legal theory is not yet underpinning the old-new radical frame of positive ethnic identity (coined as 'Roma pride').[1174] ROMACRIT provides a new platform for political leaders to question the legitimacy and usefulness of other actors in the movement as they seek to control both the narrative and the resources, but it also extends to international organisations the critics are generally engaged with.

An obvious limitation of the emerging theory is its scope, because it captures the *gaje* who care, while disregarding the overwhelming majority who do not. The further away from the Roma elite they are situated, the less attention non-Roma actors receive, while the fledgling

[1173] On the transplantation of CRT to Europe see, Mathias Möschel, Law, Lawyers and Race: Critical Race Theory from the US to Europe, Routledge, London, 2014. See, however Balibar and Wallerstein, 1988, supra.

[1174] The term has been used in OSF publications for about a decade. For an early mention, see, Come Closer. Inclusion and Exclusion of Roma in Present Day Romanian Society. Gábor Fleck and Cosima Ruginis (eds), 2008, National Agency for Roma.

theory is yet to account for the scores of Roma who are not only not part of the movement, but who seem to be diametrically opposed to its agenda.

The emergence of ROMACRIT has coincided with another important development within OSF, namely the global leadership's increasing doubts about litigation as a viable tool of social change. It is in this context that the Open Society Justice Initiative's executive, James A. Goldston joined in the critical Roma reflections, writing a chapter for Realizing Roma Rights, an edited volume bringing together authors on the ROMACRIT platform, many of whom shaped the narrative that ROMACRIT seeks to dissect.[1175]

The volume leaves significant concepts underdetermined, including 'Roma rights' and 'realizing' - a catch-all phrase that may signify the adoption, transposition, implementation, and enforcement of the law, or a change in legal consciousness. NGOs are equally underdetermined, so that while the conclusion - namely that they are the *conditio sine qua non* of social change - ties in with mainstream theories, it falls short of critical legal approaches that see international NGOs as part of the problem, not the solution.[1176] NGOs are not distinguished as concerns the advocacy fields they occupy, the resources they mobilise, the power they wield, and the tools they employ, remaining a black box throughout the volume.

After three decades, ROMACRIT transports the movement back to the point where it began, culminating in a section on 'The Imperative of Roma Community Mobilization and Leadership'. The analysis focuses on the grassroots level, but it is obvious that without leverage on national and European politics, no lasting change can be achieved. Realizing Roma Rights does not, however, engage with this question, nor with the *long durée* by connecting descriptive accounts to normative aspirations or resolving contradictions between its own vision of grassroots organisation and the findings of empirical studies.[1177]

Old tools, frames and paradigms are reinvented every few decades, as we saw in the previous chapters with the rebirth of the law and development movement. Un-reflexive of broader research agendas and insights, Realizing Roma Rights proposes community organising as a new-found panacea. This thesis provides ample evidence about the pivotal role that community organising has already played in legal mobilisation, and the unsung contribution of local gatekeepers, without whom social progress is unattainable. Their own resources and sacrifices are as important as external funding and expertise, because once the project team leaves, it falls

[1175] Bhabha et al, 2017, supra.
[1176] David Kennedy, International human rights movement: part of the problem?, Harv. Hum. Rts. J., 2002.
[1177] See, for instance, Timmer, 2017, supra.

to the local community to sustain results - a significant aspect Realizing Roma Rights fails to reflect upon.

The book does not break with previous Roma-related scholarship in the sense that the authors are part of the international elite and the legal analysis is provided by Westerners.[1178] Given the limited geographic scope of the chapter on Romaphobic violence and hate speech, important debates, legal strategies, reforms and the bulk of jurisprudence in the Roma-dense CEE are unaccounted for.[1179] As a result, legal mobilisation countering Romaphobic hate speech receives a very different treatment in the book than in this thesis.

The assessment of desegregation litigation underlines that "litigation alone is not the answer" and that social change is up to the Roma themselves.[1180] The author, Goldston notes that "[o]versimplified accounts of *Brown's* impact may have encouraged some to rely excessively on court-centric advocacy at the cost of other routes to change."[1181] His narrative is critical *vis-a-vis* the *D.H*. strategy, but it stops there without inquiring into differences between *D.H*. and other Strasbourg cases, or national desegregation campaigns, most of which do not bear a resemblance to the 'European *Brown'* as chronicled in the previous two chapters.

Goldston draws on *revisionist* approaches for the investigation of legal mobilisation's impact that are contested in the US,[1182] having gradually been supplanted by more complex critical frames that could perhaps better serve the CEE context.[1183] The OSJI executive reaches for a US-specific approach to critique a tool transplanted earlier form the US. Even though the piece fits the ROMACRIT agenda by looking outside the law for tools that can successfully generate social change, it does not break with the typically US-centric perspective, which may in fact be the key problem.

[1178] Even though local (Roma) expertise could be used for the analysis. See, for instance, Dezideriu Gergely, The Segregation of Roma Children in the Romanian Educational System and the Legal Protection Against Discrimination, Nuoa Revista de Dreptulire Omului (The New Review of Human Rights) Nr 1, 2009 and Kristi Bowman and Jiri Nantl, Liability and Remedies and School Segregation in the United States and the European Union, 10 Int'l J. Educ. L. & Pol'y 133 (2014).

[1179] Will Guy, Anti-Roma Violence, Hate Speech and Discrimination in the New Europe: Czech Republic, Slovakia and Hungary, in Bhabha et al 2017, supra, pp. 145-162.

[1180] Goldston in Bhabha et al 2017, supra, p. 184.

[1181] Ibid, p. 183.

[1182] The Rosenberg-McCann debate touched upon quantitative v qualitative research methodologies, as well as the question of what to measure when measuring the impact of public interest litigation. See, supra, Rosenberg, 1991 and 1992, McCann, 1992 and 1996. Others propose a synergistic model, arguing that legal and direct political action contributed to social change in equal measure. See, Coleman, Nee and Rubinowitz, 2005, supra, pp. 666-669.

[1183] Dezalay and Garth, 2006, supra.

Conversely, a recent CRT-inspired account of desegregation litigation calls for more adversarial legalism,[1184] dispelling the fear that the lack of practical change may "devalue law by revealing its powerlessness."[1185] The first suggestion from the African-American experience is more litigation at the grassroots level, given that as an empowerment tool it can lend a voice to minorities. The second is to shift enforcement efforts to the EU institutions - first and foremost the Court of Justice - and the third is to attract more international attention to the cause.

These prescriptions are far from novel as Chapter IV has demonstrated, but they require resources and the endorsement of legal mobilization by donors, which, however, seems to be waning. ROMACRIT is yet to put forward its own theory of Roma justice and prescribe a role for the law beyond the claim that it should be practiced by Roma lawyers. As it is, by the time critical Roma analysis achieves CRT's depth, the infrastructure necessary to test its recommendations may no longer be in place. More importantly, research remaining within the dominant frame of school desegregation may not be able to capture the conditions of successful grassroots mobilization, because, as the previous chapter has shown, the Roma communities seldom turn to the law in relation to education and segregation.

6.2. A critical vision of Roma rights?

This section inventorises progressive and radical minority views of Roma rights. It is important to note at the outset that a group of Roma leaders and intellectuals - typically with experience in domestic activism - have cooperated with the OSF Roma structure without openly criticising its dominant role or instrumentalising minority identity as a trump card in intramural conflicts. Conversely, the most critical leaders have held important positions within the OSF Roma structure. OSF and the Roma activists on its staff are codependent in that the latter legitimate the former's involvement in the cause, while benefitting from the philanthropy's resources and the doors it opens to political representation in the framework of the Transnational Roma Rights Network.[1186] Roma activists in the Roma Participation Program/Roma Initiatives Office have been situated within OSF proper, while others have oscillated in the Network, always aware of the OSF Roma structure's hold on Roma politics and policies.

6.2.1. The progressive Roma and Roma rights

[1184] Eliason, 2017, supra.
[1185] Goldston, 2010, supra.
[1186] Tarrow, 2011, supra.

The OSF Roma structure's first remarkable intramural conflict took place not long after the ERRC Board was set up in 1996 and RPP director Rudko Kawczynski demanded more Roma participation in the organisation. The presence and proportion of Roma staff in the ERRC has been an issue ever since,[1187] so that two decades later, RIO director Zeljko Jovanovic's criticism about the Roma rights NGOs' failure to attract more Roma lawyers did not come as a total surprise.[1188] The new element in the OSF RIO director's critique was that while confrontations with Kawczynski did not home in on the conceptions of Roma rights, Jovanovic has been ambivalent about desegregation, advocating for self-separation at times.

In 2000, Aladár Horváth, president of the Budapest-based Roma Civil Rights Foundation led a rally against the ERRC with support from the INGO's staff, more precisely, from its Programmes Department.[1189] Petrova responded in a Roma Rights editorial, underlining structural conditions, path dependency and the lack of both her and her critics' democratic legitimacy, which in her view made them equals rather than adversaries.[1190]

Criticism was unrelenting, but trust, professional allegiance and personal style held many back from openly waging attacks against the ERRC and/or its charismatic executive, whose strenuous networking undermined her performance as a manager. Petrova was a key gatekeeper to the vernacular, an unparalleled visionary and an indispensable resource on local knowledge, which earnt her recognition from donors and the international elite, in turn sparking envy. She did not yield to ethnicity-based criticism, safe in the knowledge of having done her outmost to promote trusted Roma activists from her native Bulgaria. At the same time, her approach seemed nepotistic, unduly favouring her country(wo)men in a transnational context, in which she could be quite harsh and uncooperative. While admired by the most influential agents, Petrova and her organisation were not held in great esteem within the movement, an unfortunate situation to which the radicalising Roma elite greatly contributed, out of a genuine concern for the cause as much as personal ambitions.

[1187] Interestingly, many Roma professionals can be found in less contentious settings, for instance working as health monitors, education assistants or in administrative positions in IOs.

[1188] December 2015, CEU, The civil rights movement and the Roma rights struggle, Conference invitation.

[1189] Kóczé, 2009, supra. See also, The Romani movement: what shape, what direction?, Roma Rights, 7 November 2001. The article brings together some of the activist critiques voiced on December 7, 2000, at the Central European University at a panel discussion with the same title. The discrepancy between the legalistic and political contributions is striking.

[1190] An advisor was brought in to stem internal conflict and organisational reviews were launched, dragging domestic NGOs into the hostilities by compelling them to take a stand. Vanita Gupta, ACLU's legal director at the time conducted two reviews in the early 2000s while training ERRC legal staff about strategic litigation.

Petrova was one of many poised for debate in comparatively small Network and a claustrophobic movement riddled with turf battles. The formative years were spent in wait for positive results - court victories, statements by international organisations or favourable media reports - that would signify recognition transferrable into personal and organisational reputation. Intramural conflicts were often triggered by frustration many felt at the slow pace of change. Given the movement's entanglement with its key funder, debates served to win favour with OSF, directly commutable to financial and social capital.

Even though the ERRC spent only a third of its budget (about half million EUROs each year) on the Legal Department and two-thirds on research, advocacy and community development, "what it did for the community" was seen inadequate.[1191] Political activists made diverse and contradictory claims *vis-à-vis* the organization that were practically impossible to satisfy. Unlike the political dissidents during communism, critics in the Transnational Roma Rights Network did not present a consistent and comprehensive program, conducting the debate in the ERRC's quarterly, Roma Rights in want of their own political periodical.

In 2006, Roma Rights canvassed activist views about the ERRC's contribution to the cause. While acknowledging its indispensable role, RIO deputy Iulius Rostas provided a succinct summary of grievances from the side of the political movement.[1192] He did not envision a different, more pro-active, extensive, radical or social-justice-minded legal strategy for the ERRC, nor did he wish to turn away from international litigation and advocacy. Socialised in the ERRC during the "golden age," Rostas was himself a figurehead of desegregation, a theme central to the ERRC's strategy. His practical recommendations magnified domestic NGO concerns *vis-a-vis* the INGO, spurring it to reach into domestic affairs while demanding autonomy and a more equitable allocation of resources for domestic agents. The recommendations sought

[1191] The ERRC acted as the secretariat of the Roma delegation to the 2001 Durban Conference on racism and Roma Rights dedicated ample space to discussions on participation and ethnic mobilisation. See, for instance Morag Goodwin, Roma Rights: Visibility on the international stage: The ERRC delegation at the World Conference Against Racism in Roma Rights 2001/4: Mobilisation and Participation.

[1192] "The ERRC did a great job, especially until about 2001-2002. During this time, ERRC managed to put Roma rights issues on the international human rights agenda. But after 2001, ERRC failed to adapt to the new conditions. It became a competitor for other Roma NGOs that emerged and became more and more visible, including in competition for available funds. This competition was not fair, since ERRC received professional and financial support that was not available to Roma NGOs. ERRC has also a problem with legitimacy. One dilemma remained undecided: is it an organization which represents Roma or does it only work for Roma? It speaks about the Roma without being a part of the Roma movement. And in my opinion, it is morally wrong and it is not fair to shape the public discourse on Roma and not have a Roma constituency. I am also concerned about ERRC's litigation strategy: the Legal Department should strengthen the relationship with its clients. The Hadareni case proved that the relation with the clients was a major deficit in the success of the case. However, with all the criticism, I believe that ERRC did a great job. ERRC should continue to exist and it will be good if it would adapt to the new conditions and serve as some kind of laboratory for Roma activists, engage in capacity building and strengthen grassroots organisations in mobilizing Roma communities."

more of everything for the same money, eschewing the contradiction between more intervention in and more autonomy for the domestic Roma rights fields. The critic's positionality as an international actor and RIO's own difficulties with cultivating progressive local leaders and empowering communities were also left unaddressed.

In 2007, a former ERRC staff member made a claim that the INGO's strategy "is out-of-date and no longer useful."[1193] In this view Roma rights as a frame and education as a primary field "reached its limits and will soon become counterproductive" thus a new 'radical' frame of 'equal opportunity for all' should be pursued to win the support of governments and the majority.[1194] Directed at the ERRC, the criticism disregarded the role of other agents, while perfectly aligning with actual normative and policy frames from the perspective of which the 'radical' claim was not that radical after all. Rather, it was counter-factual, given that in Hungary, where the critic focused, desegregation was based on socio-economic status, encompassing Roma integration and the inclusion of children with disabilities as well.

In a coauthored article published in 2012, sociologist Angéla Kóczé, the ERRC's former advocacy director and a key actor in early conflicts, later director of the European Roma Information Office, now chair of the CEU Romani Studies Department recapped the 'counter-hegemonic' critique.[1195] The publication's key conclusions were that 1. the *gaje* NGOs' hegemonic discourse on human rights and the focus on individual harm takes the limelight away from structural inequalities; 2. international actors are at best accountable to donors, not the Roma; 3. they brain-drain Roma activists and transform them into *gaje*.[1196] In the authors' view, unlike global civil society, Roma civil society is not 'running after problems' but acts as a 'catalysts for change', nonetheless INGOs in the Roma rights field compete with Roma political formations in a context where they lack democratic legitimacy.[1197]

The observation on legitimacy distinguishes this account from Trehan and Sigona's, even if it fails to fully recognise that INGO accountability *vis-a-vis* clients is a pervasive problem, regardless of the leaders' identity. Still, the piece does not step away from attributing legitimacy to *just political* tools, particularly local interventions and community empowerment, and while condemning the hegemony of the human rights language, it does not resolve the dilemma presented by the Roma activists' use of that language. Given these analytical

[1193] Timmer, 2017, supra, p. 271.
[1194] Ibid.
[1195] Angéla Kóczé and Márton Rövid, Pro-Roma Global Civil Society: Acting for, with or Instead of Roma?, Global Civil Society 2012, pp. 110-122..
[1196] Ibid, p. 117.
[1197] Ibid, p. 120.

shortcomings, the article ultimately fails to explain why a relationship of identity would be sufficient to resolve these outstanding issues.

The critical Roma narrative recently took a radical turn by subsuming the law under ethno-political aspirations directed at Eastern as well as Western *gaje*.[1198] RIO executive Zeljko Jovanovic has pointed to the limitations of universal human rights, but rather than offering a new paradigm encompassing the law as well, he has looked for an exclusively political "dialogue about a democratic distribution of power and public resources."[1199] The feasibility of assuming control by Roma communities and Roma leaders in European states over resources that - like RIO's - are fully dependent on the *gaje* is yet to be resolved.

The new radical narrative has reverberated within both the operations and the leadership of the ERRC, but as predicted by Petrova, the new identity-based approach has not changed the appetite for discursive domination. More forcefully than ever, the ERRC claims to represent 'us the Roma' and 'us the movement', reattributing the achievements of the previous interethnic period exclusively to Roma agents without acknowledging the adequate representation of the minority in the past.[1200] RIO's control over the management responds to the ethnic minority critique, but leaves OSF domination intact, given that RIO itself is an OSF program. With the legal strategy untouched, the organisation is *de facto* managed by an English speaking *gaje* and advocacy is also conducted in English.[1201] Based partly in Brussels, the ERRC is more inaccessible to the average Roma than before.

6.2.2. Engagement with Roma rights practice

The progressive Roma elite has not succeeded in penetrating the domestic political fields, which is generally populated by nepotistic leaders coopted by mainstream parties[1202] or resourceful

[1198] Matache calls for 'memorialization' in order to radically "break from a long history of injustices [and] remind the majority population of their responsibility, and attain reparations: symbolic, monetary or otherwise." In, Roma Need a Radical Break with a History of Injustices, Harvard's Matache Says, June 18, 2015. See also, Romea interview with Zeljko Jovanovic, Director of the Roma Initiatives Office at the Open Society Foundations, 18.5.2015, Ismael Cortés – PhD researcher, UNESCO Institute of Philosophy for Peace.

[1199] Ibid.

[1200] In April 2018 the ERRC's website told the story of the organisation in the name of 'us' and 'we' without changing the narrative of primacy, which shines through in the number of references to 'first' submissions, reports and events. With Roma leadership came a strictly Roma focus, according to which the ERRC is a "Roma-led international public interest law organisation working to combat anti-Romani racism and human rights abuse of Roma."

[1201] Except for the brief period of 2002-2004, the Legal Department was headed by native English speakers trained in the US or the UK. Indeed, OSF representatives on the Board made it a priority to hire the best lawyers from the US or Western Europe. Kyuchukov interview.

[1202] Rostas, 2009 and Nirenberg, 2009, supra.

Roma NGOs providing services to the communities from (EU) funds.[1203] The reason for this seems to be that national Roma leaders are invested in maintaining the *status quo* and few use the law to leverage majority institutions, while service provision – that pays best – requires amicable relations as described in Chapter 3.

Conversely, at the international level the dogma of Roma participation has enabled the Roma elite to become what can be termed here the 'movement supervisor', i.e. practically unaccountable for anything to anyone. The trump card of ethnicity gagged internal opposition, so much so that former ERRC colleague and OSCE department head, British-Nigerian Larry Olomoofe is the only one to have openly spoken out against it. In his view, the international Roma elite instrumentalises Roma rights for its own individual interests, while refusing to return to the communities.[1204] RIO espoused his point about "giving back" but only as far as concerns young activists. In contrast, Olomoofe's call for auto-critique, particularly among executives has not reverberated in the ethnic minority elite.

Unlike domestic Roma activists who regularly engage in legal mobilisation, the international elite harbours contradicting views about the law, lawyers and legally focused NGOs. It promotes legal reform and strategic cases to end social inequalities, as well as access to justice and immediate response to particularly atrocious incidents. It is thus seemingly oblivious to the costs of legal aid and its inefficiency in triggering structural change. Disillusionment in the lack of immediate results and the limitations of the law in providing redistributive justice is conceived by ethnic minority leaders as a failure of the lawyers - who are incidentally *white* - rather than the legal system and its tendency to serve hegemonic interests.

The progressive and radical Roma elite envisioned a primary role for ethnic minority activists in the provision of justice, assisted by the ERRC as a sort of 'back-up office', in which paradigm the Roma are indispensable for community organising, trust building and client care owing to their likeness with the clients. The way in which *the Roma leadership alone* would use the law is not articulated. That Roma rights practice is to a great extent provided by mainstream human rights organisations and *gaje* public agencies falls outside the critics' purview.

The critical Roma narrative has not explored what is really wrong with the law, problematising instead the *whites*' control of the legal field and the scarcity of Roma among Roma

[1203] RIO has been particularly critical of Roma NGO leaders engaged in service provision and being positioned dangerously close to national governments. RIO Portfolio Review 2013, a document leaked by Russian hackers who downloaded it from an anonymous OSF executive's laptop.

[1204] Olomoofe took issue with the ERRC's periodical, Roma Rights refusing to publish his views, because "After 15 years of doing this kind of work, if they're not the best place to publish it, who is?" John Feffer, The Rubik's Cube of Roma Rights, interview with Larry Olomoofe, 25 May 2015.

rights lawyers - a visible element of an allegedly racially unjust power structure. Even though the ERRC has promoted lawyers of Roma origin,[1205] they have not filled decision making positions, chiefly because lawyers constitute the minority of the staff.[1206] Structural barriers and personal career choices also contribute to the scarcity of practicing Roma lawyers, exemplified by RIO's charismatic leader himself, who trained but never practiced as a lawyer.[1207] Ethnic minority leadership in the ERRC has failed to alleviate the problem, even though *gaje* lawyers have been laid off and recontracted as externals.[1208]

Similarly, at the domestic level Roma seldom choose the law as a career option, and when they do, they seem to disfavour adversarial activities. For instance, the Roma-lead and staffed Romani Criss pursued a legal strategy largely outside civil courts. CFCF president Erzsébet Mohácsi led a quest for a Roma lawyer in Hungary,[1209] but the only individual successfully retained is board member Henriett Dinók.[1210] A teacher by profession, Mohácsi became CFCF's representative in public, media and professional debates, and as her legal skills increased, she cross-examined witnesses alongside legal counsel and delivered closing statements in civil courts. A significant element of Roma participation in CFCF decision making was the approval of the legal strategy and actual legal claims by the Roma-dominated board, which provided a viable alternative to employing a lawyer of Roma origin.

The OSF Roma Initiative Office's approach to the law is paradoxical for other reasons as well. At the grassroots level, it contributes to the *D.H.* campaign and school desegregation, while supporting Roma only schools in theory to cultivate positive minority identity embedded in a separatist frame.[1211] Reconciling the two objectives seems impracticable, because

[1205] Chapter III follows the careers of Ivan Ivanov and Toni Tashev. Rita Izsák, a Hungarian Roma activist began her legal studies while at the ERRC. Following a short detour into academia and governmental positions, she became the director of the Tom Lantos Institute established as a con by the illiberal government. She is the UN special rapporteur for minorities and indigenous people - a post obtained in competition with former ERRC executive Petrova.

[1206] The exception was Gergely, a lawyer nurtured by Romani Criss, who lead the ERRC between 2011 and 2014.

[1207] He has worked in international organisations since graduation from law school. Zeljko Jovanovic CV, available at https://blog.romarchive.eu/?page_id=324.

[1208] This enables the ERRC to represent the legal staff as only Roma. Interview with Judit Gellér.

[1209] CFCF trained Zoltán Budai, who left the organisation as soon as he became eligible to practice. After being disappointed by a wealthy Roma businessman, he transferred to the National Roma Minority Self-government led by Flórián Farkas, an MP in the populist FIDESZ and tacit supporter of resegregation until his indictment for embezzlement. Community worker Béla Rácz began to retrain as a lawyer and represented the organisation before the equality body. In 2013, he moved to Miskolc, continuing Roma rights defense in local NGOs.

[1210] She now leads Romaversitas, an NGO facilitating the education of Roma high school and university students. Despite financial difficulties, the board committed funds to the legal training of activist Attila Varga, who has represented CFCF in court and public rallies, but there is no telling whether he will stay in the field.

[1211] Guy, 2013, supra. RIO supported public rallies asserting Roma pride across the region. See, McGarry 2017, supra.

international human rights standards make integrated education a rule and self-separation an exception subject to extensive safeguards.[1212]

More importantly, RIO's separatist frame is contrary to its predecessor, the Roma Participation Program's position and the agendas of domestic Roma desegregation movements. It is taken from the former Yugoslav space, where ethnic representation based on quotas in public institutions govern public life in the aftermath of violent ethno-nationalist conflicts. The Roma leadership in the post-Yugoslav space has not opted for separate education, however, because of the unavailability of material conditions,[1213] while the shortcomings of the US-sponsored model have been challenged by human rights NGOs[1214] and condemned by international organisations.[1215] Moreover, outside of the post-Yugoslav space, the model can easily play to the hand of re-segregationists as detailed in Chapter IV.

RIO uses ethnic identity and Roma participation as trump cards in its battle for power within the OSF Roma structure, unable yet to prevail over desegregationists.[1216] The more successful its struggle for power, the less use it has for ethnicity, however, because once it prevails over the CEE , it will have to face differences within the Roma leadership, given that its hands are tied *vis-a-vis* the dominant elite that incidentally provides its resources.

Recent debates about strategic litigation within OSF mentioned in the previous Chapter have involved RIO and conjured up intramural conflicts in the US civil rights movement[1217] over the salience of political and legal mobilisations.[1218] There are important differences between the positions of legal and political activists in the US and the CEE, connected closely to the historic context of the civil rights and Roma rights movements, as well as federalism in the

[1212] See, CADE and FCNM AC Opinion in Chapter II. As Thornberry notes international human rights standards are intrinsically integrationist, permitting segregation as long as it protects minority identity (language), but it cannot result in total isolation from majority children, particularly not as part of a political project. Moreover, in practice the quality of education in Roma schools simply does not match that in integrated ones, therefore it is impermissible.

[1213] Legalnet, country report, Serbia, 2017. In the Czech Republic, where a similar model is available, the Roma community has not chosen separated education.

[1214] The model's discriminatory impact on non-constitutive minorities in public life was laid bare in Sejdic and Finci v Bosnia and Herzegovina, in which Roma and Jewish applicants challenged electoral laws. Sejdić and Finci v. Bosnia and Herzegovina, Applications Nos. 27996/06 And 34836/06, Judgment of 22 December 2009, Grand Chamber.

[1215] The practice was challenged by Vaša Prava in Bosnia and Herzegovina and condemned by the OSCE, among others. See, Ari Ruffer, "Two Schools Under One Roof": School Segregation in Bosnia and Herzegovina in Columbia Journal of Transnational Law, and "Two Schools Under One Roof" - The Most Visible Example of Discrimination in Education in Bosnia and Herzegovina, Organization for Security and Co-operation in Europe, 3 December 2018.

[1216] RIO was pitched against the HRGP and the lawyers it brought along to various meetings on desegregation litigation, including the ones held in Prague and Ostrava in 2012 and 2013 concerning the implementation of D.H.

[1217] McAdam, Political Process, 1999, supra.

[1218] Coleman, Nee and Rubinowitz, 2005 and Guinier, 2004, supra.

US and the lack thereof in the EU. The external pressure to resolve Romaphobic discrimination is gone after EU accession, while the Roma movement and the Network experience fractures between the international and national levels. The OSF Roma structure is nestled in the resourceful international echelons, in comparison to which domestic actors operate in disadvantageous conditions without there being a real continuum between decision making and representation in a context whereby CEE member states increasingly pitch themselves against the EU in the hope of easy gains of political support at home. Political constraints are magnified by a general lack of direct action and scarcity of progressive Roma activists at the national and local levels, which is a key factor hampering political mobilisation. It is rather likely; however this cannot be resolved by shifting resources from legal to political entities at the international level, nor by assuming control over legally focused organisations.

On the one hand, the implementation of European policies and laws is deferred back to the member state level, where pro-Roma measures are regularly defied in practice. A "federal executive" supporting the cause is not available in the European context, because member states can effectively hamper the European Commission's compliance action. Given that the Roma issue is not as central to contemporary European politics as civil rights were in the 1950s US, even if a protest comparable to the Montgomery bus boycott emerged, its impact would be insignificant. In the end, the present INGO-heavy mobilizing structure seems less adequate, than "good" transnationalism could be, representing a 'federal' vision of Roma rights activism.

Impediments specific to Europe and the historical period can be resolved only if the political strategy changes and there is a useful lesson that legal mobilisation can offer in this respect. Like the adjustments of legal strategies chronicled in Chapter IV, political strategies must come to serve the interests expressed by individuals and communities, which necessitates direct and durable links between the international Roma elite and ethnic minority communities. In this scenario, the elite would certainly find the law useful and finally make peace with the lawyers who lend their resources to the community.

6.3. Roma interests in education

The multiplicity of interests in collective legal actions and the liability of *white* agents for *mis*-representing the '*Blacks*' sparked a debate about post-*Brown* legal mobilisation *within the law*

as a discipline and became foundational to Critical Race Theory in the US.[1219] While in *Button* the US Supreme Court established litigation as protected speech and reinforced the NAACP's right to solicit clients in its quest for representing the Black community due precisely to underrepresentation in political life,[1220] skepticism emerged as concerns the NAACP lawyers' legitimacy, because desegregation litigation funded by the organisations' middle class, progressive donors did not properly serve the interests of each and every strata of the African-American community.[1221] Against this backdrop, this section provides a case study of interest representation dilemmas in the CEE, using desegregation litigation as a case study.

6.3.1. A principled debate

Real or perceived mismatches between individual, community and public interests do not figure in international Roma rights advocacy, where 'the Roma interest' is modelled on normative prescriptions distilled from international human rights treaties – read from the perspective of the international organization under whose auspices advocacy takes place. Given that in the CEE desegregation has been based on legislation or voluntary participation and given also that legal challenges have as a rule been filed by NGOs in representative actions, the solicitation of clients has not been an issue. Debates have addressed the child's best interest and - similarly to the US - free choice as discussed below.

Local activists and NGOs began desegregation advocacy before OSF sorted out its own priorities,[1222] under Petrova's guidance who assumed that litigation would automatically end both material inequalities and racial stigma.[1223] *D.H.* first served as the baseline for constructing

[1219] Critical race theory: The key writings that formed the movement, Kimberleé Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas (eds), The New Press, New York, 1995.
[1220] NAACP v. Button: 371 U.S. 415 (1963).
[1221] Bell, 1976, supra.
[1222] In the early 1990s, national Soros Foundations supported infrastructural and methodological developments in Roma only schools. In Hungary, for instance, schools subjected to litigation had at some point received funding from 'Soros'.
[1223] "We see segregation as an obstacle to accessing rights and we fight to remove it. … School desegregation in the view of the ERRC is the first step and the backbone of Romani integration. Without it, school success in a ghetto school is inadequate once the child is out in the larger world, competing with non-Roma for university placements or for jobs. Even if the receiving school proves to be a hostile environment for children, ERRC is opposed to any improvement of ghetto schools and insists that these have to be abolished in a short period of time not exceeding five to seven years. Eliminating the current educational disadvantage of the Roma created by segregated schooling must in our view be addressed as a matter of urgency. We do not believe in teaching tolerance first and applying the knowledge only after the lesson is learned. Societies as well as individuals will not learn to be more tolerant before they start to act as if they are. The best project of ethnic tolerance training is the lived experience of the enforcement of anti-discrimination laws and policies." Roma Rights 3-4/2002, Segregation and Desegregation, editorial, Dimitrina Petrova, Executive Director.

the narrative within the OSF Roma structure, becoming the key reference to case law and to reality on the integrationist agenda in the European advocacy space in 2007, when the Grand Chamber ruling was delivered. In this judgment, the Strasbourg Court addressed the potential conflict between the Roma and the majority interests, but also between Roma children and parents, recognising that the children's best interest tantamount to protection from racial discrimination cannot be overridden by parental consent to education that is actually discriminatory. This test was destined to cut across all interests vested in the case.

A lot happened in the seven years between filing and verdict as chronicled in Chapter IV, but a crucial debate took place behind closed doors, involving key actors within the OSF Roma structure. In April 2002, the Roma Participation Program convened a meeting in the presence of George Soros, OSF and ERRC executives.[1224] Lined up on the side of quality education was the teachers' lobby engaged in reforming the education of Roma children regardless of segregation, who were countered by Roma desegregation activists. The stakes were high, because "to every US dollar the Roma Participation Program spent on desegregation, the Roma Education Support Program spent ten on segregated education."[1225] The ethnic minority activists won the debate with two trump cards: they had the right to choose and the authority to speak as Roma parents. Integration became the guiding light of collective interest representation within and by the OSF Roma structure.

D.H. is criticised by US educationalists[1226] for excluding Roma parents from policy making, while being insensitive to the psychosocial needs of Roma children, whose individual development may require separate institutions.[1227] Importantly, *D.H.* deals with misdiagnosis, rather than the positive action measures envisaged by the critics, leaving open the possibility of justifying segregation in case it did indeed serve the child's best interest.[1228] The claim that "the autonomy of the Roma that the ECHR seeks to secure is threatened by their exclusion from the

[1224] Petrova interview.

[1225] Rostas interview.

[1226] William S. New and Michael S. Merry, Solving the "Gypsy Problem": D.H. and Others v. the Czech Republic, Comparative Education Review, Volume 54, Number 3, August 2010. "In absentia, Roma parents and children continue to be represented either as victims of violence and domination that they are powerless to resist or even understand or as witless perpetrators of ethnic parochialism who prefer their children to grow up like them, as Roma, rather than to enjoy the (promised) benefits of mainstream Czech society." New, 2013, supra, pp. 181-191.

[1227] Ethnographic research has also supported the assertion that the attitudes among Roma children and adults who come into contact with a school that strives to open up educational opportunities higher than they had originally hoped for positively changes. Timmer does not support assimilation, nor ethno-centrism. Timmer, 2017, supra.

[1228] Incidentally, this is also an objective for which segregation is permitted, given that achievements are really higher. See, Lilla Farkas, Report on Discrimination of Roma Children in Education, European Commission, October 2014.

conversation in which their interests and identity are determined," rendering both policy making and implementation "manifestly undemocratic with respect to participation" is curious, given that litigation created the first opportunity for parents to have a say.

Other critics perceive *D.H.* as limiting the minority parents' choices.[1229] While the limitation of majority parental choices prevalent in the Court's case law - particularly in the Greek cases - seems to refute insensitivity *vis-a-vis* the Roma only,[1230] the criticism resonates with concerns about the Convention Against Discrimination in Education that imposes stringent conditions on ethnic self-separation in the context of the 'integrationist rationale'.[1231] The ruling's allegedly colonialist approach results from the fact that the Strasbourg Court takes the socio-economically disadvantaged Roma as representative of the community and seeks a solution in the Czech context characterised by the lack of minority-run schools. In other words, *D.H.* models justice, equality and, ultimately, public policy on the most marginalised strata of the ethnic minority group, rather than its middle classes, which is antithetical to the Critical Race Theory critique of post-*Brown* litigation in the US.

Called on to rule about discriminatory administrative practices, the Strasbourg Court openly grappled with the power imbalance between impoverished Roma parents and majoritarian institutions, recognising that perfect choices are not available to the marginalised Roma, whose children are either segregated, or regularly harassed in mainstream schools. In the end, both the Roma autonomy and the parental choice arguments presume that the Roma parents will always act in the best interest of their children and prevail over other actors, which is counterfactual.

5.3.2. The messy business of reality

In national debates, the Roma voice is outflanked by ethnic majorities and dominant minorities. Both the majority and minority interests are represented by competing actors and the Roma interest itself is multi-layered. Parents speak, but do not necessarily act on behalf of their children, because parental and/or familial interests may be contrary to an individual child's.

[1229] Judicial Policy Making: The Role of the Court in Promoting School Desegregation, in Iulius Rostas (ed.), Ten years after: A history of Roma school desegregation in Central and Eastern Europe, CEU Press, 2012, pp. 91-128.
[1230] In the Greek cases the majority parents protested against integration. By finding segregation in violation of the Convention and imposing general measures on Greece and requiring its compliance as a matter of positive obligations, the Court curtailed the right of majority parents to choose segregated education for their children.
[1231] Thornberry argues that the UNESCO Convention Against Discrimination in Education does in fact favour a 'majoritarian view' of integration over ethnic separation in schools. See, Patrick Thornberry, The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary, OUP, 2016, pp. 378-383.

Even if an NGO is well embedded in communities, it does not have the same legitimacy everywhere. In Bulgaria, for instance, Romani Baht enjoyed community support, when acting at the initiative of the local Roma parents in Blagoevgrad, but when it challenged misdiagnosis in the city, fearful of losing eligibility for additional provisions due to disabled children, parents rallied in support of the special school.[1232] Challenging misdiagnosis posed an immediate threat to the families' livelihood, unlike desegregation litigation targeting spatial separation alone.

The lack of adversarial proceedings before the Romanian equality body made it easier to follow the principles set by the Strasbourg Court, because the parents were not involved in hearings or investigations.[1233] Conversely, civil courts faced a complex matrix of interests expressed by parents, elected or self-appointed Roma representatives in Hungary. Elected leaders often sided with defendants that held local political and economic power, and as that power shifted between majoritarian political forces, the Roma leaders followed suit. Desegregation activists also used court rooms as advocacy fora, where they came to support the cause and its champion, the Chance for Children Foundation whose interethnic team symbolised the benefits of integration in schools and beyond.

In the first Hungarian case, Roma leaders in Miskolc abstained from the legal dispute. Given that both the majority and minority leadership was socialist and the NGO was enforcing a national policy introduced by the socialist-liberal coalition, neutrality was a realistic choice. The leaders resisted CFCF's offers to participate in community and legal actions, as long as the city remained under socialist leadership. Their attitudes fundamentally changed, however, when a new populist mayor launched a wholesale eviction campaign in 2014, spurring the community to take to the streets in protest. The march from the so-called Numbered Streets to the city hall in the summer of 2014 was one of the most memorable direct actions after the political transition, but it failed to halt evictions. It is notable that action of this scale has never been taken against segregated education.

CFCF's standing as a representative of the public interest has been upheld by courts, despite challenges by majority politicians, parents, teachers and coopted minority representatives.[1234] Courts have regularly dismissed petitions not only because they did not satisfy

[1232] Mihaylova interview.

[1233] The CNCD curtailed parental consent to segregated schooling unless given in the context of education in the minority language. See the Bobesti-Glina case in Chapter IV.

[1234] In *Kaposvár I*, the president of the Roma Minority Self-Government, designed the curriculum and taught the minority language classes elected by half of the children in lower grades. The local representatives supported the segregated school, but their children and grandchildren attended integrated institutions. In *Győr,* the local Roma leader testified in support of the defendant, but the fact that his son attended an integrated denominational school undermined his credibility.

procedural requirements - having been solicited by majority agents - but because in court the Roma parents stood up for integrated education.

In *Jászladány*, the Roma activist leading the campaign against segregation joined CFCF's suit, but after a decade of animosities, his support within the community decreased and at some point the majority had even taken over the elected minority self-government.[1235] In the Hajdúhadház case, where segregation occurred after 1989, the Roma leaders used political as well as legal tools, and CFCF only magnified their efforts. Still, one of them defected when the case reached the Supreme Court, lured by the promise of infrastructural development in his constituency. In a symbolic gesture of allegiance, he handed a document to defendants' counsel without the Court's permission and faced public humiliation by the presiding judge in exchange of a promise that tarmac will cover the dirt road on which he lived.

In *Nyíregyháza I*, the elected leaders supported the local government's decision to close the segregated school, while a new set of leaders in *Nyíregyháza II* stood behind the decision to resegregate. The significance attributed by the Supreme Court to their 'consent' served to legitimate the majoritarian decision, which was in line with the new policy of re-segregation that undermined CFCF's status as a representative of the public interest. The Court did not examine this aspect, keeping the test for standing procedural. However, as before, the Roma interest was equated with the actual public policy and the Roma leaders' political legitimacy was construed as if it involved legal representation *per se*. In order to override the argument that the children's best interest would require integrated education, the Supreme Court considered the right to religious education as absolute and the leaders' consent as substituting parental choice.

Even though this interpretation stands in contrast with the Equal Treatment Act,[1236] it is consistent with the Court's *contra legem* jurisprudence on parental choice[1237] that has enabled it not to address racial intent. Rather than assessing the conduct of defendants and majority parents, the Hungarian Supreme Court has focused on free choice without considering the child's best interest. The Court has never actually defined the right to choose, nor has it invoked a legal provision expressly protecting it. Rather, it has interpreted parental choice in a colloquial

[1235] Jászladány was the most notorious example of segregation that attracted huge media coverage, because of the protests against the local government's decision to rents its well-equipped school building to a private school established at its initiative. See, McGarry, 2014, supra.

[1236] Article 5 CADE expressly prohibits this choice and so does D.H.

[1237] The voluntary nature of parental choice was highlighted in relation to minority education in the Hajdúhadház, Győr and Kaposvár judgments. In the case, while the argument served a good cause, it was flawed partly because of the emphasis on free choice rather than equal treatment, and partly because of neglecting to discuss racial intent for which the case was notorious.

sense, as the free choice of any school. The judge-made 'parental right' and the children's very real right to equal treatment converged as long as the children were constrained to schools under the obligation to enroll. In *Nyíregyháza II*, however, the two competing rights diverged, because the 'chosen' school was not obligated to admit children from the segregated Huszártelep, where it happened to be situated.

That parental right is not absolute and should therefore be subjected to a proportionality test when conflicting with the child's right to equal treatment was spelt out only recently in a trial court judgment.[1238] Protecting the children's interests from the parents' seems more equitable than balancing them in processes in which the Roma are outnumbered by the majority or which do not exist in the CEE. The autonomy critique stops before this analytical step, while failing to explicate why it is right to dispute the democratic legitimacy of the Court in relation to the argument, but not the finding in *D.H.*

6.3.3. Interest representation within OSF

Debates in the greater OSF structure never reached this complexity and when the interest matrix became cumbersome, the Roma Initiatives Office abstained. This was the case in the conflict between the disability and the Roma rights movements that apparently concerned the framing of misdiagnosis as racial or intersectional (race plus disability) discrimination, but in essence boiled down to competition for resources within OSF, a key funder of legal mobilisation for both identity groups.

Following the Grand Chamber judgment in *D.H.*, the OSF DONGO Mental Disability Advocacy Center (MDAC) criticised the strategy - that racial harm accrued from placement in special schools - for implying that segregation based on disability was compatible with the European Convention. The MDAC demanded that future challenges be framed as intersectional discrimination, arguing that education in special schools is discriminatory on the grounds of both race and disability.[1239]

[1238] CFCF v Ministry of National Resources, Budapest Appeals Court, 2. Pf.21.145/2018/6/I, 14 February 2018.

[1239] Lawson and Schiek, 2009, supra. Racial discrimination derives from the wrongful diagnosis of non-disabled Roma children. A disabled Roma child could not argue racial discrimination. Indeed, a child who embodies both grounds could easily reinforce the racial stigma, namely that the Roma are mentally inferior, which could in turn undermine the racial equality cause and consequently, intersectionality. In short, intersectionality does not serve the Roma interest. Misdiagnosed Roma children are associated with disabled children, but cannot themselves make claims for reasonable accommodation based on disability, because their needs are different. In order to obtain effective remedies, litigation requires applicants with actual disabilities, however, disabled children are not making intersectional claims in practice. Similar to Roma children in misdiagnosis cases, they pursue single-ground

Despite the fact that the European Court used *Horváth and Kiss* to condemn discrimination not only on the basis of Roma ethnicity, but also to indicate *obiter dicta* that education in special schools was discriminatory on the basis of disability too, the debate was reignited between the boards of the MDAC and CFCF that sponsored the case.[1240] *In lieu* of applications from disabled children, *Horváth and Kiss* does in fact serve as the European precedent on the inclusive education of disabled children, but the MDAC succeeded in denying recognition to a Roma rights NGO for this achievement.

In the summer of 2013, representatives of Roma and disability rights NGOs, the Open Society Justice Initiative and other OSF programs were summoned before OSF's Human Rights Initiative (HRI), a global grant-making program that supervises the Human Rights and Governance Program that in turn funds Roma rights NGOs in Europe.[1241] Disability rights advocates on the HRI Board urged action on behalf of children with intellectual disabilities, but given that disability rights NGOs litigated under the UN Convention on the Rights of Persons with Disabilities, it seemed difficult to transform their strategy - seeking reasonable accommodation for children with disabilities in mainstream schools - into an intersectional one. Channeling claims on the ground of disability under the CRPD was the most favourable for disabled children, but it could not address racial stigma against Roma children.

HRI used the debate to legitimate a shift in funding priorities, while RIO abstained, despite the potentially detrimental impact on the interests of Roma children and Roma-related resources in the greater OSF structure. Paradoxically, disabled children benefitted from the Roma driven efforts that lead to the reform of special education in both Hungary and the Czech Republic and created a European precedent on inclusive education.[1242] The lesson is that a single-ground movement can effectively represent multi-ground (intersectional) interests, while a multi-ground cause can play in favour of one identity group over another.

A decade after the first debate about quality v equality launched by the Roma Participation Program, its successor, the Roma Initiatives Office began to emphasise that separate education is desirable to cultivate positive ethnic identity. RIO's ethnic separatist frame

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strategies. Segregation *qua* misdiagnosis is contingent on the existence of special schools, therefore a legal challenge against segregation based on disability could at once put an end to both disability and racial discrimination in practice if the case was framed as a group wrong.

[1240] See *Horváth and Kiss v Hungary*, supra, para. 128..

[1241] Advocating for inclusive education: A Way Forward for Disability and Roma Rights, Roundtable, June 27-28, 2013, Budapest. Oana Michalache of Romani Criss and Erzsébet Mohácsi of CFCF. participated at the meeting, strongly arguing against the intersectional frame.

[1242] For instance, at a meeting in the summer of 2014 at the OSF headquarters in Budapest to discuss the initial findings of the Zimova report on the impact of desegregation litigation.

conceives of the Roma's collective interest distinctly from RPP's desegregationist agenda. Desegregationists presume that integrated education serves the best interest of Roma children, but they can also accommodate identity-driven choices both in integrated educational institutions and the curriculum. Conversely, ethnic separatism presumes that separate education suits Roma interests best, but it cannot institutionally accommodate integration-driven choices, because it rests on the existence of segregated schools. RIO's change of heart and the debate with the disability movement weakened the desegregationist coalition within OSF and drove wedges into the Transnational Roma Rights Network, but it was less detrimental than the official Roma political representatives change of heart within the resourceful donor OSF.

6.4. Political, advocacy and legal representation

This section reviews debates about Roma participation and the impact on the representation of collective interests, arguing that a relationship of identity is a desirable, rather than a necessary condition of adequate advocacy and legal representation. European corporativism steers advocacy towards interethnic NGOs, and so far, this has been an effective and sustainable model in the Roma rights context.

The progressive and radical Roma elite's conception of Roma participation is specific to its own positionality that transpires from the Common Basic Principles of Roma Inclusion - adopted by the participants of the EU Platform for Roma Inclusion[1243] - envisaging experts and NGOs as key stakeholders in public consultations.[1244] International organisations guarantee Roma participation in diverse ways.

Initially, the International Romani Union represented the Roma in the United Nations, but due to the lack of resources, its role was taken over by the ERRC that subsequently became a more visible and effective advocate in a broader range of treaty monitoring processes.[1245] The ERRC made dozens of submissions to UN treaty bodies since 1997 without being criticised as

[1243] Principle No 11: 'Active participation of the Roma' in policy processes "at both national and European levels through the input of expertise from Roma experts and civil servants, as well as by consultation with a range of Roma stakeholders in the design, implementation and evaluation of policy initiatives."
[1244] Principle No 10: Involvement of civil society - Member States design, develop, implement and evaluate Roma inclusion policy initiatives in close cooperation with civil society actors such as non-governmental organisations, social partners and academics/researchers.
[1245] Klimova-Alexander 2005, supra and Mgr. Douglas Neander Sambati, Historical Sociology of the Romani Nationalism: Foundations, Development and Challenges, Doctoral thesis, 2018, Charles University.

an advocacy representative.[1246] In Europe, it focused initially on the OSCE, then the Council of Europe that set up its own Roma-specific structure and played a key role in the establishment of the European Roma and Traveller Forum in 2004. ERTF gathers representatives from NGOs, Roma political parties, denominational organisations and Traveller, as well as Roma groups. The EU let few Roma experts within its walls, facilitating Roma participation through consultative processes that involve national Roma leaders as well.

The identity-based concept of Roma participation is preoccupied with the participation of ethnic Roma activists and/or experts in international advocacy, rather than with bringing the best expertise to bear on policies concerning the Roma. Competition with *white* experts has homed in on the lack of minority identity/experiences and democratic authorisation, even though advocacy does not require formal representation and the Roma experts also lack formal authorization from the ethnic group.

6.4.1. Not soluble by a 'relationship of identity'

Roma participation has become a trump card in turf battles within the OSF Roma structure, but it cannot sufficiently respond to the multi-layered and frequently shifting nature of Roma interests, nor to the diverse claims arising from structural inequalities that have frequently defied ethnicity based representation. The case study demonstrates that it would be unreasonable to assume that a "relationship of identity" should authorise a representative, given that legitimacy is not primarily a function of 'likeness' with the represented.[1247] Rather than a substitute, the representative should be considered in the context of a differentiated relationship with the represented.[1248]

According to the classic definition, to represent is simply to "make present again." so that political representation makes the constituency's voices, opinions, and perspectives visible in public policy processes.[1249] Political theorists distinguish between formal representation - when the representative is elected to represent an electoral district - and the representation of social movements, professional bodies and informal organizations.[1250]

[1246] Prior to 19 August 2019 the ERRC - alone or at times with partner NGOs - made 123 submission to different UN monitoring bodies, including 34 submissions to CERD, 30 to the Human Rights Committee, 18 to CEDAW and 15 to CESCR. Less than ten submissions have been made to the CRC, UNCAT and the UPR.

[1247] Iris Marion Young, Inclusion and Democracy, 2002, OUP.

[1248] Ibid, pp. 125–127. See also, Iris Marion Young, Social Theory and Practice, Vol. 12, No. 1 (Spring 1986), pp. 1-26.

[1249] Hanna Fenichel, Pitkin, The Concept of Representation. Berkeley: University of California Press, 1972.

[1250] Ibid.

In Hanna Pitkin's view, two factors influence the legitimacy of representatives: the cause and the political environment. Pitkin distinguishes four types of representation: formalistic, descriptive, symbolic, and substantive. Authorisation and accountability are intrinsic characteristics of formalistic representation only, but serve as benchmarks for the assessment of other types as well. While formalistic representation is modelled on electoral representatives, symbolic representation on the other end of the spectrum signifies the meaning the representative has for those represented.

Iconic figures symbolising the transnational Roma cause are lacking, which is due as much to the lack of transnational public space – for the majority[1251] as well as the minority[1252] - as the weak and fragmented nature of the Roma media and the underrepresentation of Roma issues in national public debates. Certain issues have been championed by symbolic representatives, however, and Roma rights organisations have also become the symbolic representatives of racial justice in national advocacy spaces.

Other types of representation are more salient for the analysis here. Descriptive representation denotes the extent to which a representative 'is like' those s/he represents in looks, experiences and interests. Defined by "the relationship of identity," this type of representation is congruent with the model the international Roma elite uses as a reference point in the political, advocacy as well as legal contexts. While requiring a "relationship of identity" outside politics may be unnecessary, as argued above. Descriptive representation does not promise to stand for considerations beyond an identity thus it may easily defy accountability.[1253] Identity is subject to co-recognition, so that certain *gaje* may be perceived as adequate descriptive representatives by some or all the Roma,[1254] while certain Roma will be denied this status, especially if they betray the cause and its true representatives, whoever they may be.[1255] The views of local and national Roma communities on the one hand and the international Roma elite on the other may also differ as to the suitability of descriptive representatives.

Substantive representation is the closest to describing the activities of legally focused NGOs, as it signifies actions taken on behalf of, in the interest of or as an agent of the represented. Proper performance as a substantive representative would invite comments, such as "I

[1251] Donatella della Porta and Manuela Caiani, Social Movements and Europeanization, OUP Oxford, May 14, 2009

[1252] Fella and Ruzza, 2012, supra.

[1253] Pitkin, 1972, supra.

[1254] Charles Taylor, The Politics of Recognition in Multiculturalism, edited by Amy Gutmann, Princeton University Press, Princeton, New Jersey, 1994, pp. 23-74.

[1255] This was the case with former OSF staff István Forgács, who spoke out in support of re-segregation in Hungary, calling on the Roma community to engage in auto-critique and self-purification.

could not have said/done it better myself." While Roma rights NGOs are accountable to their members or trustees, lawyers answer to their clients and the bar associations, being both ideologically and professionally, politically and legally, internally and externally accountable. In the CEE Four, where desegregation litigation has been based on representative standing, Roma rights NGOs have been the clients, as well as the sponsors of legal action, so that the lawyers' professional allegiance *vis-a-vis* the cause and the client has not been compromised, because the client was the cause. Whether or not the NGO was an adequate representative of the Roma communities became a political question. Thus, standing rules specific to the CEE limit refer the interest representation dilemma to the political field, where minority and majority activists together make choices about competing interests as trustees, staff members and/or sympathisers, being accountable to both the majority and the minority.

The critical Roma narrative implicitly denies recognition to non-Roma representatives by assuming that *gaje* cannot legitimately represent the cause even if their actions properly serve the Roma interests. This assumption questions the legitimacy not only of the *white* sympathisers, but also of interethnic organisations - whether led/dominated by Roma. Even proper performance, common experiences and a variety of shared identities cannot counterbalance the lack of *ethnic* identity.

Conversely, the congruence of interests, and the propriety of performance is taken for granted when it comes to descriptive representation, in which case the likeness of experiences is not doubted, despite the starkly different socio-economic and political environments the representatives and the represented may, and often do, inhabit. The principle of Roma participation means that the final say on the matter of recognition is due to the Roma elite, regardless of whether it possesses "strong mutual relationships with dispossessed subgroups" within the Roma community, which is proposed by political theorists as a key condition of such claims.[1256]

6.4.2. The desirability of interethnic collaboration

The international Roma elite's lack of formal authorisation and accountability was first noted by Nicolae Gheorghe, whose efforts to equip progressive leaders with legitimate political standing in an elective process failed. Not having directly elected Roma representatives impedes European political representation, because as a rule, leaders elected nationally are not admitted

[1256] Suzanne Dovi, Preferable Descriptive Representatives: Will Just Any Woman, Black, or Latino Do?, The American Political Science Review, Vol. 96, No. 4 (Dec., 2002), pp. 729-743 at p. 735.

to the progressive or radical Roma leaders' table, while those elected on mainstream party lists - including Roma members of the European Parliament (MEPs) - seldom qualify as descriptive representatives.

The crux of the matter is, whether representatives should act as delegates or trustees, i.e. whether they ought to follow the expressed preferences of their constituents[1257] or follow their own understanding of their constituents' best interests.[1258] This dilemma has been debated since the birth of modern democracies and the two approaches expect behaviour from representatives in a contradictory manner, which is an intrinsic characteristic of public life, attesting to the salience of the interest representation dilemma *in politics as well as the law*.[1259]

Reflecting on the growing involvement of non-state actors in international and European policy decisions, recent theoretical insights have addressed concerns about authorisation and accountability outside formal political processes. Representation construed as advocacy requires two main conditions to be fulfilled: 1) the advocacy representatives' passionate link to the cause of the represented and 2) their relative autonomy of judgment.[1260] It is desirable not to conceive of advocacy in and outside formalised political processes according to the same standards, because the offices of 'senator, organiser and activist' require different types of behaviour for 'the effective pursuit of interest' necessary for 'democratic constancy'.[1261] The appropriateness of the representative's actions, i.e. 'proper performance'[1262] can be assessed with reference to fair-mindedness, critical trust building, and good gate-keeping.[1263]

Representative standing, wherever available, frees Roma rights lawyers from the dilemma of sacrificing the 'effective pursuit' of their client's interest on the altar of other considerations, because the NGOs define the cause, give authorisation and foot the bill. In the case of activist state lawyers, the central budget pays, while the authorisation derives from the constitution and public policies in effect. Given that legislation and executive decisions, rather than court rulings drive reform in Europe, interests are weighed up by elected representatives, as well as experts and activists during public consultation. Once the policy choice is made,

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[1257] James Madison, The Federalist Papers, 1787-88

[1258] Edmund Burke, Reflections on the Revolution in France, Dodsley, London, 1790

[1259] Pitkin, 1972, supra.

[1260] Nadia Urbinati, Representation as Advocacy, A Study of Democratic Deliberation, Political Theory, Volume 28 No 6. December 2000, pp. 758-786. and Nadia Urbinati and Mark E. Warren, The Concept of Representation in Contemporary Democratic Theory, Annu. Rev. Polit. Sci. 2008. 11:387–412.

[1261] Andrew Sabl, Ruling Passions: Political Offices and Democratic Ethics, 2009 (2nd edition), Princeton University Press, Princeton and Oxford.

[1262] Suzanne Dovi, The Good Representative, 2012, Blackwell Publishing.

[1263] Suzanne Dovi Theorizing Women's Representation in the United States, Politics & Gender, 3 (2007), 297–319.

interests are reviewed in courts that generally endorse European policies at the regional level and domestic policies at the national.

The intensity of Roma participation in these processes has been country specific, depending on the availability of progressive Roma activists. In Bulgaria and Romania, where the state is less "thick" and the civil sector's valuable expertise is often unmatched by that of public administration, Roma NGOs initiated desegregation, but while they achieved regulation in secondary law in Romania, the Bulgarian NGO projects were never properly canonize din the form of policy or law. In Hungary, Roma activists entered into a coalition with the liberals who made education a campaign item in 2002 and desegregation a key policy objective, bolstering implementation with the help of a strong institutional structure subsidised from EU funds. Legally focused NGOs operated in these contexts, driving policy reform and enforcing the law.

In Slovakia and the Czech Republic, local Roma activists played a secondary role by providing services in support of desegregation. In Slovakia, an interethnic coalition involving public bodies dominated policy processes triggered by litigation. *In lieu* of national regulation and policy, courts were at liberty to tap into or disregard European norms when adjudicating representative claims. The Czech Republic is an exception insofar as the OSF Roma structure tested the US-inspired 'civil rights' model in this country. While Czech resistance to reform is outstanding, developments align with the regional trend, namely that efforts must be made in law as well as politics and involve the Roma as well as the *gaje* to achieve social change. In other words, international litigation and advocacy spearheaded by the international elites are insufficient in and of themselves, suggesting that collective action must be political as well as legal, transnational and interethnic.

6.5. Conclusions

Chapter VI looked at the progressive and radical Roma elite's critique *vis-a-vis* actors in its immediate vicinity, namely the OSF Roma structure and CEE *whites* within the Transnational Roma Rights Network. Compared to the intensity of the critical Roma narrative, it found the ethnic minority elite's auto-critique - or dissent within its ranks – rare, suggesting that the focus on the non-Roma functions as a distraction from discussing schisms or constraints endogenous to the Roma community that hamper effective representation by the Roma themselves. Consequently, the critique fails to address highly salient issues, such as the lack of consensus on the modalities of interethnic relations, the elite's own achievements and effectiveness, and ultimately, its accountability.

Anchored in the conclusion that international advocacy and litigation alone are insufficient, and the prescription that collective action ought to be political as well legal, transnational as well as interethnic, the analysis has offered two important contributions to on-going debates. First, it has brought forth the shortcomings of the ethnicity-based (race) critique and the importance of interethnic collaboration in political, but more particularly, in legal representation. Second, it has pointed to the conflation of the ethnicity-based (race) critique and the critique of litigation that plagues racial justice activism across the Atlantic.

The chapter addressed the analytical shortcomings of the 'critical Roma narrative' by demonstrating that conflicts attributed to the law conceal reputational and resource related battles within the Network. The critics focus on the international, where favourable political opportunities render the Roma elite's engagement with the law unnecessary, employing their narrative – dominant in the ethnic minority context - to overpower the voices of domestic activists who regularly use the law for political as well as legal purposes.

The Roma NGO elite compensates for the loss of agency *vis-à-vis* the OSF Roma structure by transforming Roma participation into a dogma of descriptive representation, while being unable to increase the number of its allies at the national level or solidify its legitimacy at the grassroots. The claim that legitimate representatives ought to demonstrate a "relationship of identity" therefore serves to rhetorically fill these gaps, take the limelight away from the ethnic minority elite's lack of effectiveness and accountability, as well as to justify its function as the controller of both the movement, and the Network.

In comparison with the international advocacy realm, the domestic interest matrix is complex, revealing important puzzles within *politics as well as the law* that can best be overcome by 'proper performance' that requires interethnic cooperation among non-state actors as advocacy representatives. Roma participation is essential to legitimate policies, but legal representation can be satisfactorily performed by *white* lawyers.

Turf battles sparked by the progressive Roma elite negatively impact on the grassroots level, eroding the infrastructure necessary for putting the law to good use by facilitating the minority's political claims. Using Roma participation as a trump card can undermine interethnic relations and silence dissent within the minority, dissent that conceives of representation as advocacy and representatives as trustees following their own understanding of the Roma's best interests. Paradoxically, ethno-centrism risks quarantining the cause and hampering access to mainstream political processes, sidelining the Roma NGO elite in law as well as politics, rendering it ineffective, and ultimately, futile.

Chapter VII

Conclusions

The thesis sets forth a transnational account of Roma rights activism in five Roma-dense countries as a case study of legal mobilisation for racial equality in Europe. The topic is particularly relevant, because resources - especially for domestic litigation - are diminishing in an increasingly populist climate and synergies must be forged between legal and political strategies in order to attain social justice and maintain status equality for marginalised minorities. In the broader context of racial equality and fundamental rights activism in the European Union, the thesis offers important lessons about "good" and "bad" transnationalism that speak to the effectiveness of legal mobilisation and underscore the legitimacy of (ethnic majority) lawyers seeking progressive social change.

The fight of Europe's 'pariah' community for justice has inspired this auto-biographical project that taps into transnational justice theory and employs the 'pathways of transnational influence' model for two reasons. First, the Roma – like so many other minorities – constitute a transnational community spanning across the borders of EU member states, therefore they necessarily mobilise transnationally. Second, Roma rights activism has evolved in the context of an interordinal and multisourced legal order that draws on norms adopted under the auspices of various international organisations and is subject to review by several supranational courts. These characteristics make the relevant legal regime particularly amenable to cross-border exchanges and judicial borrowing.

Even though the four descriptive and two analytical chapters have provided as many answers as they have raised questions, it is hoped that this study of Roma rights activism succeeds in breaking down the walls of provincialism, situating the subject matter in mainstream academic debates. Hard choices had to be made about the direction of the analysis, which explains the density of the descriptive chapters, the lack of thorough treatment of the social rights regimes and the dynamics between social rights and equal treatment norms, as well as the failure to do justice to the breadth of litigation in all relevant fields.

With these caveats it is hoped that the material presented in the thesis sufficiently supports the main argument that addresses concurrent debates about the effectiveness of legal mobilisation, in which the voice of lawyers and Roma activists who use the law has been surprisingly underrepresented. The author's choices have resulted in a study with a light touch on the

law and legal analysis compensated by a firm grip on law and society analysis, which is novel in the Roma rights context, but also in European legal studies that only now begin to explore the transnationalisation/globalization of public interest litigation.

Identifying synergies between legal and political tools, tactics and strategies is imperative, because politicians increasingly and intentionally defy the rule of law, fundamentally question the authority of courts and constrain grassroots initiatives, hampering both legal and political mobilisation for social change. The progressive Roma elite is advocating for a renewed focus on the grassroots, while the communities are increasingly seeking the protection of their most basic needs from public enforcement agencies and courts.

There are lessons to be learned from the local and national level, and the thesis highlights the strengths of indigenous practices relative to a narrow and elitist conception of (international) legal action. It points to the shortcomings of enforcement relying on the resources of private individuals and non-governmental organisations that *strategic litigation* has come to represent.

The necessary condition of top-down, planned legal action is collective standing, which has been in the focus of debate inspired by the activities of (international) legally focused NGOs. Drawing on a broad definition of collective action and collective actors, the thesis shifts the limelight to the financial resources of collective legal action and the Roma communities' overwhelming reliance on public enforcement agencies and legal services provided by NGOs and states.

The thesis explores Roma rights activism from the perspective of domestic versus transnational advocacy arenas, identity-based versus interethnic conceptions of Roma rights, legal versus political tools of social change, and courts versus public enforcement bodies as venues of legal and policy reform. The findings indicate that further analytical work needs to be undertaken to understand the nuances the rich field of Roma rights offers.

In the last three decades, Roma-dense CEE countries have transitioned from socialist legality to the rule of law, a process that has been the subject of (governmental) counter-mobilisation in the context of increasing populism. EU accession represents the mid-point in the transnational Roma rights movement's history, but it is important to note that norm compliance with EU law proper did not substantially improve the Roma's legal protection, because social and minority rights particularly relevant for the group are external to this legal order, while fundamental rights are also more readily accessible under international human rights treaties.

Roma-dense CEE countries have successfully blocked access to the most relevant international complaint mechanisms, precisely because they are external to the EU order. Initially,

the European Convention became a benchmark for Roma rights litigation, but it is limited to civil rights as a rule. Access to equal treatment strategies opened only at the time of EU accession, with the over-transposition of the anti-discrimination directives, but social rights strategies are severely hindered, albeit the most important in the Roma rights context.

Legal regimes in the CEE have gradually become multi-source and inter-ordinal that facilitates legal mobilization on the one hand, while generating inconsistencies on the other. Evolving legal opportunities have also hampered legal action by pulling strategies into many different directions as treaty mechanisms under the auspices of international organisations gradually become accessible. Forum shopping is rendered difficult due to discrepancies between the 'rules of engagement'. Collective action is limited under treaties modelled on individual complaint, while access to the CJEU is dependent on domestic courts and the European Commission, none of which have been activistic enough when it comes to Roma rights.

Domestic Roma rights organisations emerged from the interethnic collaboration of dissidents, progressive young Roma intellectuals and Western human rights activists after 1989. Funds came from rule of law donors and legal expertise from the human rights movement that pre-existed the political transition and drew on majoritarian resources both in the CEE region and globally. Cross-border exchanges among legally focused NGOs began in this period, while the Roma political movement was already organized transnationally.

The legal and political fields are complex at the national level, far more than at the European stage, the key advocacy space due in great part to the geographic location of the Roma. *Gaje* lawyers are generally adequate representatives of the cause at the domestic level, but in the international advocacy space, where legal and political representation are closely interlinked, rivalries ensue between the resource-ful *gaje* INGOs and the relatively resourceless political movement. Despite the adequacy of representation by the European Roma Rights Center, its accountability *vis-à-vis* the ethnic minority leaders has come under scrutiny and critique. This follows from that fact that the access of progressive Roma leaders to national advocacy spaces is severely hindered, consequently, they are frustratingly stranded at the European stage.

Representation of Roma rights has been transnational throughout the last thirty years but during the "golden age" the US-based philanthropy, the Open Society Foundations injected its own Roma-specific organisational structure between domestic and international organisations and generously invested into legal mobilisation. The crown jewel of this donor intervention, the ERRC's international successes came at the detriment of domestic agents and mutual cross-border collaboration, also causing dismay among the international Roma elite.

The OSF Roma structure's complexity reflects the philanthropy's varied involvement in political and legal mobilisation, its prioritisation of social inclusion through education and its understanding of Roma rights as a transnational issue that must somehow be controlled by its *bona fidae* donor. Over time, OSF has involved itself more in the Roma rights field, abandoning its arms-length approach to litigation, in which it is now directly involved *via* the Open Society Justice Initiative.

These developments stand in stark contrast with the philanthropy's actual credo summarised by Aryeh Neier, OSF's retiring president, who said in 2013 that "Outsiders, in the end, can have only limited impact, a lesson that all foundations, governments, and armies eventually learn. Basically, an outside donor doesn't make a revolution, … The most you can do is assist a certain number of people who have their own projects, and some of those people make valuable contributions." Regrettably, as the thesis shows, the philanthropy's financial disinvolvement following 2013 did not put an end to its dangerous interventions in the Transnational Roma Rights Network's organisational structure and legal strategies.

The European Union's contribution to Roma rights activism has also been perplexing. New NGOs were set up in the early 2000s owing to additional resources from the EU. With the expanding European monitoring mechanisms and a density of institutions, the Transnational Roma Rights Network developed more dynamically than the movement's political wing. As the ERRC succumbed to a crisis triggered by EU expansion, genuine transnational collaboration recommenced, but cumbersome access to funds soon destabilised domestic Roma rights NGOs. Shortly after the radicalising OSF Roma leadership assumed control over the ERRC, the organisation relocated to Brussels – the EU advocacy hub - amidst increasing doubts about the usefulness of litigation for Roma rights.

Doubts notwithstanding, litigation as a social change tool has been prevalent in the Roma rights field since the political transition, assuming its full potential once access to international treaty mechanisms opened, or as a result of domestic legal reform. Interestingly, the use of litigation by mainstream human rights organisations and public enforcement agencies that often greatly impact on the Roma has not raised concerns, implying that the underlying issue is the political leaders' control over resources, rather than the legitimacy and efficacy of representation by *white* lawyers or institutions. Substantial geographic differences cannot be shown in the involvement of lawyers of Roma and non-Roma origin either, with the caveat that in Romania, where a quarter of the world's Roma live, one finds more Roma lawyers than elsewhere. Still, across the CEE Five, *white* lawyers service the Roma rights field in general.

During the decade preceding EU accession, genuine cross-border exchanges were rare and Roma rights lawyers not embedded in the mainstream human rights movement were isolated. The ERRC adapted public interest litigation to manage and control the disconnected national Roma rights fields. It favoured top down reform lawyering, but its precedent-seeking 'federal' strategy was not emulated in the vernacular. Cases were 'jumpstarted' at the international level and accelerated jurisprudential gains, but owing to the shortcomings of transnational networking, they failed to gain traction in national advocacy realms. Thus, the *D.H*. litigation is an exception to the general *modus operandi* in the vernacular, while the ruling itself contravenes UN treaties and domestic laws categorically prohibiting segregation. In order to avoid similar mistakes in the future, the Network needs meaningful cross-border exchanges and a "good" transnational strategy reflecting on grassroots needs and actively involving domestic agents from the get-go.

In the post accession era, burgeoning domestic campaigns received little attention, partly because they failed to mobilise international tribunals and partly because they fed into advocacy efforts that varied from country to country and preceded policies adopted at the EU level. Over-transposition pulled towards equal treatment frames and increased the significance of domestic legal action, but the transnationalisation of legal strategies failed due to the INGOs' unwillingness or inability to adjust to new realities inside the EU.

OSF's school desegregation campaign overshadowed developments in housing where litigation responded to explicit grassroots complaints. Incremental change in this field since the 1990s shows that litigation cannot achieve social change, unless it stems from the grassroots and takes the form of legal service provision, rather than 'precedent'-setting from the top-down. Housing litigation from *Buckley* through *Winterstein* to *CHEZ* bears witness to the importance of respecting the agency of ethnic minority communities, as much as to the devastatingly negative consequences that the lack of "good" transnationalism may have by delaying jurisprudential, legal, policy, as well as social change.

OSF is liable for not only failing to recognise and act on the Roma communities' needs in the field of housing and hate speech, but also for imposing on Europe's 'pariah' group its own preferences inspired by the US national context—more specifically by legal mobilisation within the African-American community. Even though the philanthropy could not successfully prevent European agents from responding to community needs using OSF funds, it did delay reform in both housing and hate speech, while divesting important resources towards other issues. School desegregation has been prioritised by few progressive Roma activists and embraced as official public policy only in Hungary, while the fight against ethnic profiling has not

become a priority issue for either the communities or Roma leaders, despite OSF's handsome investment in this topic.

"Good" transnationalism has been a priority for domestic agents, who generally suffer from the scarcity of funding structures that would support cross-border exchanges, as well as from the interloping of INGOs that dominate, rather than service the Roma rights field. "Good" transnationalism would require a formalised transnational coalition with democratic, membership-based decision making, as well as legal strategies that adequately respond to the inter-ordinal legal regime, being freed from the silos of treaty-based mechanisms and crafted from the local and national level up to the supranational, rather than the other way around. The key challenge is to respond to social rights claims, because the Roma communities prefer these over equal treatment frames, and also because the shortcomings of the legal regime necessitate planning beyond the boundaries of international human rights law.

The mainstream human rights movement also plays a significant role in the Roma rights field, but its "good" internationalism has been corrupted by the OSF Roma structure that functions to the detriment of Roma communities when becoming an interloper, rather than an interlocutor between domestic and international agents. The membership based federation of Helsinki groups and newly established agencies - national human rights institutions and equality bodies - provided important legal resources, while European networks facilitated mutual exchanges and knowledge transfers.

The thesis has argued against both ethno-nationalist and liberal internationalist interpretations by showcasing the "good" transnational and interethnic traits of Roma rights activism, as well as successful indigenous practices. Given the generous collective standing rules that the over-transposition of EU anti-discrimination law engendered in the CEE Four, the thesis has shed the light on the important role of public enforcement agencies in providing access to justice for the Roma.

Even though the law is used by the majority to oppress the Roma, it also offers a route to social inclusion, status equality and access to basic social rights. Roma communities need lawyers more than Roma leaders, and Roma activists more often rely on lawyers at the national level than at the international. Progressive Roma leaders use the law to fight symbolic issues, the recognition of harm and the restoration of dignity, especially when they speak to structural shortcomings that require legal or policy reform. Conversely, the communities more often mobilise against tangible harm and litigate when going to court cannot be avoided. The communities use the law to access housing, employment and public services. Progressive Roma leaders, who mobilise based on minority identity seldom use the law to vindicate minority rights or

represent minorities within the minority. Traditional Roma leaders tend not to use the law at all.

Despite doubts and misgivings among ethnic minority leaders, legal mobilisation has been a necessary and successful component of collective action for Roma rights, especially when legal strategies probed and tested the limits of existing laws or facilitated legal and policy reform. Legally focused NGOs have played an indispensable role, garnering interethnic coalitions and resources from the *gaje*.

The thesis has argued that the 'counter-hegemonic' critique's premise, namely that OSF uses the Roma issue for its own purposes as part and parcel of the hegemonic neoliberal economic order is counter-intuitive, for why would an organization if indeed it is interested in profit alone make a long-term investment in mobilizing a marginalized group such as the Roma? Why would a US-based philanthropy do that in Europe, where neoliberal capitalism has its own supporters? The grand claims that constitute the critique of OSF as a conspirator strengthening the hold of neoliberal capitalism on Europe, and more particularly, on its Eastern borders do not stand the test of empirical evidence.

OSF does care about racial justice, but it does so with a keener eye on the racial minorities of its native US, than on Europe's 'pariah nation', the Roma. From this perspective, OSF does capitalise on the Roma issue with a view to reinforcing racial justice across the Atlantic and stabilising a region neighbouring the former soviet space that threatens Euro-Atlantic security.

Nonetheless, the thesis is critical *vis-à-vis* OSF and international organisations for failing to properly consider the needs expressed by Roma communities at the grassroots level and respond to these needs adequately. Alarmingly, the failure to watch and listen means that both pursue agendas that can undermine the political and legal capital built in domestic organisations. Moreover, by supporting INGOs that are similarly inattentive to the grassroots level, OSF and international organisations in fact prevent funds earmarked for a minority cause from achieving their full potential.

OSF's 'original sin' in the Transnational Roma Rights Network emanated not from its zealous intervention which led to the establishment of the ERRC, but its zealous intervention when it came to diverting funds to the ERRC from domestic NGOs and its failure to curb the ERRC's zeal that ultimately harmed domestic agents and hampered the development of organic transnationalism. This failure is the single most important cause why a transnational legal strategy could not develop in the Roma rights context, and why the domestic agents' trust *vis-à-vis* the ERRC and the OSF Roma structure has gradually diminished.

Still, philanthropic domination has mixed, but altogether positive consequences, because it has amalgamated the Network, concealing or delaying but ultimately not preventing the use of resources for contested purposes. Contrary to critical claims, the OSF Roma structure has litigated and advocated for social rights and substantive equality. Despite OSF's control, Europeans successfully re-appropriated resources to the benefit of the minority. Curiously, discursive domination concerning strategic litigation has been the most enduring, because Europeans in general have not provided an alternative model to private enforcement. The fact that the CEE Four did shows the possibilities for resisting dominant behaviour.

The analysis has offered two important contributions to on-going debates. First, it has brought forth the shortcomings of the ethnicity-based (race) critique and the importance of interethnic collaboration in political, but more particularly, in legal representation. Second, it has pointed to the conflation of the ethnicity-based (race) critique and the critique of litigation that plagues racial justice activism across the Atlantic. The final conclusion is that international advocacy and litigation alone are insufficient, while collective action ought to be political as well legal, transnational as well as interethnic.

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