

Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges

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ABSTRACT

Though it has a relatively brief history in Central and Eastern Europe, public interest litigation (PIL) has contributed significantly to the consolidation of the rule of law. PIL faces numerous obstacles in the post-Communist region, including inadequate legal aid; a limited *pro bono publico* tradition; and rules of procedure and judicial practice that are unreceptive to joint claims, proof of systemic problems, and equitable remedies. This article reviews the development of PIL, surveys the challenges, and offers concrete recommendations for donors and others concerned to foster sustainable and effective PIL in the future.

I. INTRODUCTION

Public interest litigation (PIL) in Central and Eastern Europe¹ has a relatively brief history. Prior to 1990, PIL as now understood was unknown in any of

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Research assistance for this article was provided by Andrea Armstrong, a student at Yale Law School; Andreea Craciun, a Justice Initiative Fellow and graduate of the Central European University in Budapest; and Emma Elizabeth Daschbach, a student at Columbia Law School. This paper was initially prepared in support of a publication to be issued in 2006 by the United Nations Development Programme on broadening access to justice for the poor.

1. The phrase *Central and Eastern Europe* (CEE) is used to refer to the region encompassing the following Member States of the Council of Europe, all of which were part of

the countries of the region. Under Communism, the state was, by definition, an expression of the public's interest; and law and politics were fused as one. The idea of articulating an alternative, nongovernmental vision of the public interest through law was impossible. Independent courts capable of vindicating such a vision did not exist.²

As such, PIL is a post-Communist phenomenon. The transformation of law, legal culture, and judicial systems wrought by the fall of Communism opened the way for—and was in part fueled by—PIL. Over the past fifteen years, independent-minded lawyers, advocacy-oriented nongovernmental organizations (NGOs), and concerned individuals have sought to use PIL to address many problems created by, or left over from, Communist policies, including compensation for lost or stolen property, racial discrimination against the Roma, environmental degradation, and police abuse.

What is PIL's origin? This is a complicated question with no simple answer. PIL is one aspect of a broader process of fundamental change that has helped consolidate the rule of law in Central and Eastern European societies. In this respect, PIL has been reinforced by the continent-wide political transition unfolding with the enlargement of the European Union (EU). The prospect of admission to a community of states united by shared commitment to common economic rules and legal standards acted as a powerful incentive for post-Communist governments to rapidly professionalize their courts and bars and to enhance the independence of the judiciary as an institution. Yet, as necessary as these changes were in laying the foundation for PIL, they were not by themselves sufficient, as evidenced by the relative paucity of PIL in many of the older EU member states.

A second major factor that gave rise to PIL was the important, though distinctly minority, tradition of political and intellectual dissent inherited from the Communist era. Though it has been employed by actors of many different political complexions in different regions, PIL is often a tool of the iconoclast, the victim of human rights abuse, or the minority viewpoint that feels ignored or overridden by majoritarian political decisions. In its earlier incarnations in Central and Eastern European (CEE) countries, PIL was often seized upon by those who had dared to express opposition to rights violations under Communism, including in a number of countries the founders of national Helsinki committees.³ It was these persons who often saw in

the Soviet Union or under Communist rule until 1989, 1990, or 1991, or are successor states thereof: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Serbia and Montenegro, Slovak Republic, Slovenia, Former Yugoslav Republic of Macedonia, and Ukraine.

2. See generally Dimitrina Petrova, *Political and Legal Limitations to the Development of Public Interest Law in Post-Communist Societies*, 3 PARKER SCH. J. E. EUR. L. 541 (1996).
3. Signed in 1975 in Helsinki, Finland, the Final Act of the Conference on Security and Cooperation in Europe—commonly known as the Helsinki Final Act—was the first in-

PIL the possibility of vindicating fundamental, often constitutional, rights or of providing, through court action, the opportunity for newly democratic governments to correct errors. Even as it has expanded beyond the narrow circle of Communist-era dissenters, PIL has continued in many instances to reflect the courage, commitment to fair legal process, and willingness to stand alone on principle that characterized the tradition of dissent before 1990.

Yet, EU accession and a legacy of protest and dissent would not by themselves have been sufficient to spark the growth of PIL absent a third key ingredient: the financial resources of outside donors. Since 1990, PIL has been economically propelled by foreign donor support. As discussed below, this is a reflection, in part, of the poor quality of government-financed legal aid and the absence of a *pro bono publico*⁴ tradition among the private bar for indigent persons who have publicly significant legal claims. It raises serious questions about how sustainable PIL will be now that donors are increasingly withdrawing from countries that are now, or soon will be, part of the European Union.

Notwithstanding this challenge, two powerful forces are nonetheless likely to continue to push PIL forward in coming years: demand and supply. On the demand side, the past fifteen years have witnessed the burgeoning in Central and Eastern Europe of a broad-based civil society movement comprised of activists, monitors, and constructive critics who have become growing consumers of legal services to pursue their goals. While litigation is only one in a rich arsenal of tools for social change, it has become a particularly important one for many. Post-Communist civil society groups in Bulgaria, Hungary, and Poland have both demonstrated and experienced firsthand the tangible value of going to court to achieve public interest objectives. NGOs from across the region increasingly employ attorneys or contract with them on a case-by-case basis to pursue litigation. In short, demand for PIL has grown substantially and it is not likely to abate.

At the same time, the legal and judicial infrastructure on which PIL rests has deepened measurably. As noted above, domestic court systems have grown more competent, efficient, and receptive to public-interest based

ternational agreement to accord human rights the status of a fundamental principle in regulating international relations. In its wake, local organizations were formed in several countries to monitor government compliance with the Helsinki Final Act's human rights commitments. The first of these, the Moscow Helsinki Group, was formed in May 1976 by Dr. Yuri Orlov, Yelena Bonner, Anatoly Shcharansky, Anatoly Marchenko, Ludmilla M. Alexeyeva, and other Soviet citizens. In January 1977, Charter 77 was founded in Czechoslovakia; and in September 1979, the Helsinki Watch Group was founded in Poland. Groups were also formed in Western European countries, in Canada, and in the United States. Many of these Helsinki Committees continued to serve as monitors of human rights after the fall of the Berlin Wall.

4. *Pro Bono Publico* (from the Latin, "for the public good") is the principle that encourages public service-related legal work free of charge.

claims, although at a somewhat uneven pace and with significant exceptions. The improvement of national courts has been reinforced by Central and Eastern Europe's integration into the Council of Europe system and its premier judicial mechanism, the European Court of Human Rights. The Strasbourg Court has become the lodestar for an entire generation of young PIL lawyers in the region who view it as the ultimate guarantor of human rights. And with the accession to the European Union of eight Central European countries in 2004, and two more likely by 2007, the European Court of Justice, the European Union's supreme judicial body based in Luxembourg, is becoming the object of increased attention on the part of PIL proponents.

Indeed, one indication of the explosion of PIL since 1990 is the rapid growth in cases brought to, and decided by, the European Court of Human Rights. The number of applications to the Court has increased from 5,279 in 1990 to 10,335 in 1994; 18,164 in 1998; 34,509 in 2002; and over 40,000 in 2004.⁵ And while the vast majority of these applications did not timely raise cognizable claims, the number of final Court judgments in cases implicating questions of fundamental human rights protection increased from fewer than 100 per year in the mid-1990s to over 700 per year after 2000.⁶ This increase was due to both the accession of new States Parties to the Council of Europe (thirteen new states joined between 1994 and 2004) and a general increase in the quantum of cases in all States. Applications from Central and Eastern Europe alone increased from 19,000 in 2002 to nearly 25,000 in 2004.⁷ At present, applications from Central and Eastern Europe constitute more than 60 percent of all the applications received by the European Court.⁸ In 2005, over half of the applications pending before the Court came from just four states: Russia (17 percent), Turkey (13 percent), Romania (12 percent), and Poland (11 percent).⁹

And the rapid growth in PIL shows no sign of subsiding. In 2004, the Council of Europe opened for signature Protocol No. 14 to the European Convention of Human Rights,¹⁰ in part to address the surge in litigation that threatened the capacity of the Court to function effectively. As the Explanatory Report to the Protocol explained, "Forecasts from the current figures by

5. Data from EUROPEAN COURT OF HUMAN RIGHTS, *SURVEY OF ACTIVITIES 2004*, at 37, available at <http://www.echr.coe.int/NR/rdonlyres/461D3893-D3B7-4ED9-AC59-8BD9CA328E14/0/SurveyofActivities2004.pdf>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *European Court of Human Rights is Saturated with Applications*, AGENCE EUROPE, 4 Jan. 2006.

10. Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 13 May 2004, ETS No. 194 (not entered into force), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>.

the registry show that the Court's caseload would continue to rise sharply if no action were taken."¹¹

II. WHAT IS PUBLIC INTEREST LITIGATION?

PIL is one phrase for a phenomenon that has been described with many different terms: human rights litigation, strategic litigation, test case litigation, impact litigation, social action litigation, and social change litigation are among the most common. Some see the defining feature of PIL as "seeking to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms."¹² Others note that PIL is "litigation designed to reach beyond the individual case and the immediate client";¹³ that it involves "court-driven approaches in producing significant social reform";¹⁴ and that it amounts to "espousing causes through litigation."¹⁵ Still others suggest that PIL seeks "to help produce systemic policy change in society on behalf of individuals who are members of groups that are underrepresented or disadvantaged."¹⁶ In the US context, where much PIL originated, the phrase *public law litigation* has been used to refer to cases involving "allegations broadly implicating the operations of large public institutions such as school systems, prisons, mental health facilities, police departments and public housing authorities; and remedies requiring long-term restructuring and monitoring of these institutions."¹⁷

Similarly, in Central and Eastern Europe, PIL (and analogous issue-specific terms, such as *Roma rights litigation* or *mental disability rights litigation*) refers to law-based advocacy intended to secure court rulings to clarify, expand, or enforce rights for persons beyond the individuals named in the case at hand. This may be no easy task in a region in which most countries have not developed formal precedent directing courts to follow *stare decisis*.¹⁸

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11. Explanatory Report for Protocol No. 14 (2004), ¶ 13, CETS No. 194, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.
 12. HELEN HERSHKOFF, PUBLIC INTEREST LITIGATION: SELECTED ISSUES AND EXAMPLES (n.d.), available at <http://www1.worldbank.org/publicsector/legal/PublicInterestLitigation.doc>.
 13. PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS 81 (Edwin Rekosh, Kyra A. Buchko, & Vessela Terzieva eds., 2000).
 14. Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1769 (1993).
 15. ARYEH NEIER, ONLY JUDGMENT 226 (1982).
 16. Helen Hershkoff & Aubrey McCutcheon, *Public Interest Litigation: An International Perspective*, in MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 283, 284 (Mary McClymont & Stephen Golub eds., 2000).
 17. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1017 (2004); See also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).
 18. *Stare decisis* (from the Latin, "to stand by what is decided") is the doctrine of precedent, known to many common law systems, which holds that once a question has been decided, it generally binds courts of the same jurisdiction in future cases.

Primacy must often be placed on giving a judgment significant persuasive power in the arena of public opinion, even if it is not strictly binding on other courts as a matter of law. Judgments of the European Court of Human Rights are legally binding only on the state(s) concerned.¹⁹ However, as Strasbourg jurisprudence proliferates and becomes more widely disseminated among domestic judges and lawyers, it acquires near-precedential value in practice.

III. CHALLENGES TO PUBLIC INTEREST LITIGATION IN CENTRAL AND EASTERN EUROPE

PIL in any environment faces a number of challenges, including ignorance and/or hostility on the part of substantial segments of the bench and bar, the deterrent effect of potential retribution upon potential claimants, and the uncertainty of judicial outcomes. But in Central and Eastern Europe, these risks are magnified by a number of other factors.

First, lawyers and the law have yet to fully escape the legacy of a Communist tradition that made them both mere appendages of the state. In any society, victims of human rights violations are often hesitant to register formal complaints, press charges, or seek redress. This reluctance is exacerbated in Central and Eastern Europe by widespread distrust of the legal profession and disbelief—bred by the absence of example—that law can contribute to positive reform.

Second, PIL is expensive. Research and documentation of systemic patterns of wrongdoing—the evidence that often forms the basis of successful PIL litigation—take time, money, and skilled human resources. Lawyers are also costly, and many potential beneficiaries of PIL lack the funds to retain private counsel. The measures that many countries have taken to mitigate such costs are absent or deficient in Central and Eastern Europe.

In most CEE countries, *loser pays* rules for cost allocations deter indigent plaintiffs from seeking to vindicate claims. Thus, litigants may bear the burden not only of their own costs for research, legal representation, and victim services but also, if their claims fail, those of their opponents. Plaintiffs in a civil action may be required, at the time of filing, to deposit with the court a fixed percentage of the amount of damages sought. In some countries, this can be prohibitive.²⁰ In addition, legal aid—inconsistent and

19. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5, art. 46(1) (*entered into force* 3 Sept. 1953) [hereinafter European Convention].

20. In Romania, for example, plaintiffs in a civil action must pay as a “tax” at the time of filing 8 to 10 percent of the amount sought in damages. See Law 146/1997 (regarding official judicial taxes), *published in* Official Gazette No. 173/29 (July 1997), *as modified*

underfunded in criminal cases—is rarely available for the kinds of affirmative civil claims that are employed in much PIL.²¹ Because of this, much PIL has been and will for the foreseeable future continue to be supported by interested donors.

In addition, most countries in the region lack a tradition of *pro bono publico* as a reflection of the bar's contribution to society. Indeed, a number of bar associations go so far as to formally prohibit their members from performing services for less than a prescribed fee.²² Relatedly, some bar association rules forbid lawyers from performing legal services in any capacity other than in a private law office. Among other things, this prevents even those lawyers who might wish to do so from seeking employment as salaried employees on the staffs of NGOs. While NGOs may still contract for legal services with private counsel, the effect of these prohibitions is to retard the development of institutional legal capacity within NGOs that might foster better and more systematic PIL.

Third, in most Central and Eastern European countries, rules of procedure do not permit the joining of a number of similar claims into what some jurisdictions refer to as *class action*. A court will generally entertain only the claims of those plaintiffs specifically named in the complaint before it—not those of others who are not named but are similarly situated. In some cases, court rules that allow for consideration of the legality or constitutionality of legislation on its face (not necessarily as it is applied to one or more individuals) facilitate judgments with broad-ranging effect. But in general, while a court may address an issue that affects large numbers of persons, the remedy ordered will be limited to the individual plaintiffs in the lawsuit.

by Government Decision No. 752 (16 Sept. 1999) (regarding the updating of the official judicial taxes established by Law 146/1997, published in Official Gazette no. 454/20 (Sept. 1999)).

21. A few countries have begun to address the enormous gaps in legal services provision. In January 2005, Lithuania's Parliament adopted legislation establishing a professional, nationwide system of legal aid delivery in criminal and civil cases. The law introduces a corps of full-time legal aid lawyers in five cities across the country to practice alongside private lawyers, currently the sole providers of aid services. Open Society Justice Initiative, Lithuanian Parliament Revamps Legal Aid (20 Jan. 2005), available at http://www.justiceinitiative.org/db/resource?res_id=102479.
- In April 2004, a new "People's Attorney" law came into force in Hungary, establishing a state-funded program to provide legal services in civil cases to indigent Hungarian and European Union citizens. However, given the low levels of payment set forth in the scheme, it is unclear how many lawyer will sign up to take part. Public Interest Law Initiative, Hungary Improves Access to Justice with New Civil Legal Aid Law (Sept. 2004), available at <http://www.pili.org/2005r/content/view/67/62/>.
22. In Bulgaria, although the Law on the Bar provides that lawyers shall provide free legal aid to those who have financial need, there is no mechanism for enforcement. As a result, this provision is generally ignored. MARGARITA ILIEVA, BULGARIA: LEGAL ANALYSIS OF NATIONAL AND EUROPEAN ANTI-DISCRIMINATION LEGISLATION 5 (2001), available at <http://www.migpolgroup.com/multiattachments/2387/DocumentName/Bulgariaelectronic.pdf>.

Fourth, although PIL has been associated with empirical research and data about the actual impact of laws and public policies from the time of Brandeis,²³ many courts in Central and Eastern Europe have traditionally been reluctant to consider statistical evidence. For example, in many countries, historical experience and concerns about data protection constrain the availability of ethnic data to support relevant legal claims. This is so, notwithstanding the fact that recent European legislation expressly authorizes the use of statistical data in court.²⁴

Fifth, although legislation is evolving rapidly, legal remedies do not always exist for violations that may be the subject of PIL. Thus, until recently, although racial and ethnic discrimination is a widespread problem throughout the region, few countries had laws on their books specifically prohibiting nonviolent acts of discrimination. In contrast, legislation has for some time provided criminal penalties for hate speech and racially motivated violence, though these have been inconsistently applied. Thus, victims of discrimination who sought redress in court were often forced to rely upon—and many courts have been reluctant to accept—general provisions of civil law protecting human dignity.²⁵

Relatedly, court systems in Central and Eastern Europe often do not provide for equitable remedies. In some Western countries in which PIL is well-developed, it has achieved some of its greatest success through the imposition of powerful equitable orders, which may range from court injunctions to cease and desist a practice, to the full-scale assumption of court supervision over the operation of an entire institution, such as a school or prison system.²⁶ Throughout Central and Eastern Europe, remedies are generally, though not uniformly,²⁷ limited to a finding of violation and an order

23. Louis Dembitz Brandeis was an important US litigator, Supreme Court justice (from 1916 to 1939), and developer of what became known as the *Brandeis Brief*. In 1907, prior to his appointment to the Court, Brandeis was retained to represent the state of Oregon in *Muller v. Oregon*, 208 U.S. 412 (1908), a case that involved the constitutionality of limiting hours for female laundry workers. To support his argument that excessive work harmed workers' health, Brandeis cited in his brief statistics culled from articles in medical and sociological journals. The practice of relying on extra-legal data in support of a legal submission quickly became commonplace.

24. See, e.g., Council Directive 2000/43/EC of 29 June 2000, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22, at recital 15 (indirect discrimination "may be established by any means, including on the basis of statistical evidence"), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf [hereinafter EU Race Equality Directive].

25. See, e.g., CIVIL CODE § 11 (Czech Rep.).

26. See Sabel & Simon, *supra* note 17, at 1018.

27. For examples of innovative remedies that extend beyond the mere declaration of a violation, see the *Goman* case from Hungary and the Bulgarian employment discrimination case, discussed *infra*. In addition, effective January 2002, the Constitutional Court of Slovakia was given expanded powers, not only to reverse an unconstitutional decision,

of damages. And damages in some countries may be limited to pecuniary harm, even when the greatest portion of harm may be nonpecuniary in nature (i.e., pain and suffering).

Finally, PIL, like almost all litigation, can take a long time to produce a final judgment. The case of Mario Goral, a Romani boy killed by skinheads in 1995, is emblematic. It took ten years for an appellate court to hold that Goral's mother was entitled to recover damages for emotional suffering from the perpetrators.²⁸ Many cases can take several years to exhaust all tiers of the domestic judicial system, only to be followed by several more years of consideration by the European Court of Human Rights. If "justice delayed is justice denied," PIL's impact in Central and Eastern Europe can be significantly diminished by the length of the judicial process. A common challenge, then, for those who rely on PIL is to utilize complementary tools that simultaneously reinforce and build upon the litigation so that intermediate objectives of awareness-raising, community empowerment, and others may be pursued prior to final judgment.

IV. ASSESSING PUBLIC INTEREST LITIGATION'S IMPACT: HOW SUCCESSFUL HAS IT BEEN?

PIL may be used to pursue a wide variety of goals. At its most fundamental level, PIL may seek to secure a concrete, enforceable remedy for a breach of law. Such remedies often consist of: a judicial declaration that certain rights have been violated and/or that existing law should be enforced; an order to pay compensation to the victim; and/or a decision to prosecute the wrongdoer(s) when a crime has been committed.

PIL may also aim to improve the state of the law by generating judicial precedent on an issue of significance. Rulings by constitutional and supreme courts are often legally binding and carry political influence. Even in civil law systems, higher courts may be called upon to interpret or to apply to a particular set of facts the broad protections contained in constitutional text and in some legislation.

but also to prohibit unlawful treatment, to award financial compensation, and to order parties to fulfill the decision or to restore the matter to a pre-violation condition. JÁN HRUBALA, SLOVAKIA: LEGAL ANALYSIS OF NATIONAL AND EUROPEAN ANTI-DISCRIMINATION LEGISLATION (2001), available at <http://www.migpolgroup.com/multiattachments/2428/Document-Name/Slovakiaelectronic.pdf>.

28. See Press Release, ERRC, Roma Rights Advocates Win Compensation for Mother of Skinhead Victim (7 Feb. 2005), available at <http://www.errc.org/cikk.php?cikk=2131> (describing 19 January 2005 ruling by Regional Court in Banska Bystrica, Slovakia, upholding the award of the Slovak currency equivalent of 7,800 Euros in damages for emotional harm suffered by mother of seventeen-year-old Romani youth who was beaten and burned to death in 1995).

Further, PIL may be used to pursue broader goals that do not necessarily require—though they may benefit from—victory in the courtroom. A lawsuit based on a claim of public interest may galvanize popular and political attention or reinforce other means of spotlighting problems such as advocacy, monitoring, and research. Further, PIL may serve as a fulcrum for common action by a class of victims to improve their condition. In this way, PIL may complement and give added impetus to ongoing efforts to organize certain communities. PIL may also help change the terms of public debate about a problem. Thus, the very process of articulating legal claims for court action may require a potentially transformative reformulation of the question to one involving legal rights and remedies rather than only including historical causes, social attitudes, or political barriers. While certain legal arguments are unlikely winners in court today, PIL may help preserve them for future generations of judges to consider by sparking dissenting decisions that provide a written record of injustice and the claims explaining why it should end.²⁹

More generally, one of the principal contributions of PIL and those who engage in it is

to strive by example to change the way that law is thought about and practiced. This means acting as if judges were independent, did know and relied on comparative and international case law, and had the courage to vindicate individual rights in the face of public criticism and state authority. . . . In short, it means acting as if the rule of law already existed, and by doing so, challenging others . . . to do so as well.³⁰

In Central and Eastern Europe, all of these goals have at various times been the object of PIL. Given its novelty, PIL's value in contributing to public dialogue and shaping public understanding can be particularly great. This stems as much from the novelty of the method as from the fact that many of the issues that form the subject of litigation have not previously been discussed so openly by a broad spectrum of society.

To what extent has PIL contributed to legal change in Central and Eastern Europe on matters of public importance? How, if at all, has it altered public attitudes? And in what ways? To what extent has it contributed to coalition-building and concerted action among vulnerable groups?

Any assessment of the impact of PIL is notoriously difficult and must be qualified by several considerations. First, particularly given how long it often takes to secure a final judgment, the PIL era in Central and Eastern Europe has been brief. Many PIL cases are presently underway that have

29. See Jules Lobel, *Losers, Fools and Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331 (1995).

30. James A. Goldston, *Race Discrimination in Europe: Problems and Prospects*, 5 EUR. HUM. RTS. L. REV. 462, 463 (1999).

yet to reach their final judicial stage. More time will be needed to evaluate the contribution of this tool.³¹

Second, PIL alone cannot carry the burden of redressing the many and wide-ranging needs of legal systems in CEE countries emerging from Communist rule. As noted above, PIL is just one aspect of a far more comprehensive process of consolidation of the rule of law in this region. Finally, calibrating the effects of PIL has been notoriously difficult, even in places with more extensive experience. One leading observer has noted:

The literature [on PIL] shares no common definition of goals or of success; nor is there a general theory of the relation between judicial action and societal reform. Some analysts look for linear and instrumental approaches to causation; others emphasize the constitutive and radiating effects of legal decisions. Empirical studies are limited in design, fraught with methodological difficulty, and few in number. Moreover, public law litigation is not monolithic, and commentators frequently recite that its effects are uneven across institutions and regions.³²

These limitations apply equally—if not more so—in Central and Eastern Europe.

The above qualifications notwithstanding, the limited experience with PIL in Central and Eastern Europe to date allows for some preliminary observations. In general, the assessment of impact varies depending on the substantive theme that is the subject of litigation and the country in which it is employed. This should not be surprising. Some issues, such as access to government-held information, police maltreatment of detainees, and discrimination against ethnic minorities, may be more susceptible to change through litigation than other issues, such as corruption. Similarly, for reasons of size, legal and political tradition, and relative exposure to comparative forms of legal process, courts in Russia may be less amenable to reform through PIL than those in Bulgaria or Hungary.

In general, PIL has been driven by the strategic choices of certain NGOs that have seen law and court-centric advocacy as important tools in bringing about changes in their fields of interest. Most of the cases described below were launched by, or in alliance with, NGOs. From the Budapest-based European Roma Rights Centre to the Bulgarian Helsinki Committee to the Russian NGO Sutyajnik, these groups are committed simultaneously to the *end* of enhanced substantive rights protection and to PIL as a valuable *means* to bring about that end. This constellation of NGOs that consciously use PIL as one tool of reform reflects a global trend. Thus, as a major comparative

31. By way of comparison, it might be recalled that the legal campaign to end racial segregation in American schools spanned nearly three decades before its major victory with the Supreme Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954). Indeed, half a century later, the United States is still struggling with this issue.

32. HERSHKOFF, PUBLIC INTEREST LITIGATION, *supra* note 12, at 17.

study of PIL in several countries argued, the key ingredient of litigation-fueled “rights revolutions” is a nucleus of well-organized legal resource groups working effectively over many years to generate streams of cases to higher courts.³³

Perhaps in no field has the impact of PIL been felt more directly than in racial discrimination and minority protection, particularly concerning the rights of the Roma minority across Central and Eastern Europe. Nor has any other issue benefitted from more attention outside the courtroom—i.e., by European regional institutions and complementary broad-based grassroots efforts to forge community alliances, promote rights education, and intensify political engagement.

Much litigation on behalf of Roma victims of discrimination and physical abuse over the past decade has been aimed at securing legal remedies for crimes or civil wrongs and also at raising consciousness about the nature and pervasiveness of rights violations that many Roma suffer. In addition, PIL in the field of Roma rights has begun to generate significant legal precedents that—if systematically monitored and enforced—have the potential to improve the conditions of life for many in the Roma community.

Progress has been most notable in the realm of police misconduct, but somewhat less so concerning acts of nonviolent discrimination. PIL in Central and Eastern Europe has been building upon a body of evolving, but relatively well-established, European law concerning police treatment. By contrast, until recently, norms prohibiting discrimination on grounds of race or ethnicity were unknown in most of Central and Eastern Europe. At the same time, the litigation against police abuse benefitted from greater public receptivity to the claims at issue. Whereas physical abuse in detention is a phenomenon that most of society can readily understand, even if only a minority have experienced it, racial discrimination is a relatively new concept in much of the region. Racial discrimination is often more difficult to prove. As a consequence, allegations of discrimination are often met with misunderstanding, if not outright rejection, on the part of the general population, and the courts.

A. Police Abuse against Minorities

Litigation challenging police mistreatment of Roma has made substantial headway in a number of countries, including Bulgaria and Hungary. The case of *Assenov v. Bulgaria* significantly expanded the role of legal precedent.³⁴ The power of the case emerged in large part from its ordinary, everyday facts.

33. CHARLES EPP, *THE RIGHTS REVOLUTION* (1998).

34. *Assenov v. Bulgaria*, App. No. 24760/94, Eur. Ct. Hum. Rts., Judgment of 28 Oct. 1998.

The case concerned allegations of police maltreatment following the arrest in the autumn of 1992 of fourteen-year-old Anton Assenov, a Romani boy, for gambling in the market square in the provincial town of Shoumen. Assenov was taken to a nearby bus station, then handcuffed, and finally, along with his father, brought to the police station, where the two were detained for approximately two hours before being released without charge. Assenov alleged that during this time the police struck him with truncheons and pummeled him in the stomach. A medical certificate issued two days after his release documented large, purple-bluish bruises on the boy's head, chest, and right arm, which the examining physician viewed as consistent with the alleged police mistreatment.

Over the next two years, Assenov and his parents filed complaints with every available criminal investigative authority, up to and including the Chief General Prosecutor. None of the investigative bodies initiated criminal proceedings against the police. Assenov eventually filed an application with the Strasbourg Court, and the case reached the European Court of Human Rights in September 1997.

In its ruling the following year, the Court unanimously found that the government had violated several different provisions of the European Convention. However, the decision's most significant "law-making" contribution was its extension of the protection afforded by Article 3 of the Convention. On its face, Article 3 contains no procedural requirement. Rather, it states simply, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."³⁵ Notwithstanding the absence of an explicit textual command, the Court in *Assenov* held that Article 3 not only prohibits certain misconduct, it also obliges states to enforce the prohibition by carrying out adequate investigations under specified circumstances. Specifically, the Court held that

[w]here an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in . . . [the] Convention," requires by implication that there should be an effective official investigation.³⁶

The Court went on to specify that "[t]his investigation . . . should be capable of leading to the identification and punishment of those responsible."³⁷ The Court further explained why it was willing to read into the text of the Convention words that are not obviously apparent and, in the process, impose on States an additional obligation above and beyond the clear textual prohibition

35. *Id.* ¶ 90, citing European Convention, *supra* note 19, art. 3.

36. *Id.* ¶ 102.

37. *Id.*

against torture and inhuman or degrading treatment or punishment. Absent such a procedural obligation to investigate, the Court reasoned that

[t]he general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance . . . would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.³⁸

The *Assenov* ruling, the first ever by the European Court of Human Rights involving a Roma applicant from Central or Eastern Europe, has potential significance not only for Roma but also for all persons who are subjected to police detention. Whereas Article 3 was previously understood simply to require states to refrain from engaging in torture or inhuman or degrading treatment or punishment, *Assenov* made clear that the European Convention imposes an affirmative obligation to investigate credible allegations of mistreatment. The ruling raises the possibility of changing the dynamics in everyday police interactions with members of the community.

Indeed, NGOs using PIL have in fact used and courts have affirmed the *Assenov* principle in subsequent cases.³⁹ However, the full potential of the judgment has yet to be realized. Most Roma, most police, and most people in Central and Eastern Europe are unaware of the case or of the principles that it articulated. Too little effort has been invested in educating governments and affected communities about the implications of the Court's ruling and how it can be a tool for local advocacy.

In Bulgaria, the government has made some efforts to address police misconduct. In August 2000, a specialized human rights committee was established within the National Police Department to improve police conduct and organize human rights training for the police. Additionally, a pilot project launched in Plovdiv in 1999 to promote enhanced cooperation and dialogue between the police and minority groups was subsequently extended to other regions. Nonetheless, police ill-treatment of Roma in Bulgaria remains a concern, and inadequate investigative and disciplinary measures continue to generate "a feeling of impunity among certain members of the police."⁴⁰

38. *Id.*

39. See, e.g., *Kmetty v. Hungary*, App. No. 57967/00, Eur. Ct. Hum. Rts., Judgment of 16 Dec. 2003 (unanimously finding violation of Article 3 of European Convention, *supra* note 19, on account of government's failure to carry out an effective investigation into allegations of police ill-treatment); *Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, U.N. GAOR, Comm. Against Torture, 33rd Sess., U.N. Doc. CAT/C/33/D/207/2002 (2004) (finding government in violation of, *inter alia*, its obligation to carry out prompt and impartial investigation of victim's complaint of police torture).

40. EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, THIRD REPORT ON BULGARIA (*adopted* 27 June 2003), at 19 ¶¶ 76–79, available at http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/Bulgaria/Bulgaria_CBC_3.asp#TopOfPage.

B. Racial Discrimination⁴¹

When tackling racial discrimination, PIL has faced a greater challenge. Until recently, most countries in Europe did not have comprehensive legislation expressly prohibiting discrimination on grounds of race or ethnicity. Europe's judicial bodies had squarely addressed the issue only once, in 1973, when the European Commission of Human Rights held that "discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention."⁴²

Attempts to challenge racial discrimination in the courts foundered on widespread public and judicial ignorance of the problem and the absence of an adequate legislative foundation for addressing it. In the past five years, European law has taken a leap forward with the adoption of the European Union Race Equality Directive in 2000 (the Directive).⁴³ The Directive expressly outlawed both direct and indirect discrimination on grounds of race or ethnicity. Both member states and those who wished to join had to transpose the Directive's provisions into domestic legislation. Moved by this powerful impetus for reform, most governments have modified their laws.

Also in 2000, the Council of Europe opened for signature Protocol No. 12 to the European Convention of Human Rights.⁴⁴ This Protocol establishes a freestanding nondiscrimination guarantee, expanding significantly the protection afforded by Article 14 of the European Convention, which prohibits discrimination only in the enjoyment of Convention rights. On 1 February 2005, upon its tenth member state ratification, the Protocol entered into force.

These legislative developments have provided normative and political support for PIL aimed at challenging discriminatory practices in education, housing, and access to services and public accommodations. In recent years, Roma rights NGOs, working closely with Roma communities, have affirmatively challenged entrenched and widely accepted patterns of discrimination in all walks of life. A number of groups have employed "testing" techniques to develop empirical evidence of disparate treatment. Working together with attorneys, they have generated streams of cases in domestic courts across the region, a number of which have reached and are now pending in the European Court of Human Rights.

41. The term *racial discrimination* is used consistent with its definition in International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, 660 U.N.T.S. 195 (*entered into force* 4 Jan. 1969), *reprinted in* 5 I.L.M. 352, art. 1 (1966).

42. *East African Asians v. United Kingdom*, 3 E.H.R.R. 76 (1973), ¶ 196.

43. EU Race Equality Directive, *supra* note 24.

44. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 11 Apr. 2000, ETS No. 177, *available at* <http://www.ena.lu/europe/council/human-rights-fundamental-freedoms-rome-2000.htm>.

1. Access to Public Accommodations

In September 1995, Gyula Goman, a Romani man, was refused service in a pub in the town of Pécs in southern Hungary.⁴⁵ The owner's explanation was unabashed: "[N]o Gypsy is allowed to eat, drink or enjoy himself in [this] pub."⁴⁶ Subsequently, the owner was quoted by a national newspaper, calling Goman a "troublemaker."⁴⁷ Among other remedies,⁴⁸ Goman's attorney, the director of a leading Budapest-based human rights NGO, filed a civil action. The civil action was based principally on Article 76 of the Civil Code, which condemns "violation[s] of inherent rights," including "discrimination against private persons on the grounds of race, ancestry, national origin."⁴⁹ Here the case broke new legal ground. First of all, there was no known precedent for the attorney's novel attempt to apply Article 76 to claims of racial discrimination. Second, the attorney asked for unusual remedies, seeking an award of not only costs and damages but also an order (1) forbidding the owner from again committing a similar act of exclusion and (2) compelling the owner to pay for an apology worded by the victim, approved by the court, and published in the largest-selling Hungarian daily newspaper. The court agreed, finding that the owner had violated Goman's civil rights by refusing to serve him because of his ethnic origin. The court adopted the remedies sought by the plaintiff and also awarded payment of damages in the amount of the Hungarian equivalent of approximately US\$690. The judgment of violation and the specific remedies were all upheld on appeal.⁵⁰

In a February 2002 case, the Regional Court of Pilsen, Czech Republic, found the owner of a disco in Karlova Vary guilty of discrimination in denying

45. See LEGAL DEFENCE BUREAU FOR NATIONAL AND ETHNIC MINORITIES (NEKI), *WHITE BOOKLET 1997*, at 53–56 (describing decision of the Baranya County Court, 3 Feb. 1998).

46. *Roma Plaintiff Wins Civil Suit Contesting Restaurant Discrimination in Hungary*, ROMA RTS. Q. (1997), available at <http://www.errc.org/cikk.php?cikk=41> (citing LEGAL DEFENCE BUREAU FOR NATIONAL AND ETHNIC MINORITIES (NEKI), *WHITE BOOKLET 1996*).

47. See James A. Goldston, *Race Discrimination Litigation in Europe: Problems and Prospects*, ROMA RTS. Q. (n.d.), available at <http://www.errc.org/cikk.php?cikk=1566>.

48. Two days after the denial of service, Goman, through his attorney, filed a criminal complaint against the pub owner with the local authorities for defamation. . . . The complaint alleged that the owner had harmed Goman, not by the act of excluding him from the pub on the grounds of race, but rather through his speech. Goman was convicted of the petty offense of slander and sentenced to one year of probation.

Simultaneously, an administrative action was filed with the mayor's office. While fining the pub owner the equivalent of ten dollars for refusing to register Goman's complaint in the pub's complaint book, the mayor's office flatly rejected a claim of discriminatory exclusion, stating, "The entrepreneur's refusal to serve you unfortunately cannot be sanctioned for there is no legal regulation providing for it." See Goldston, *Race Discrimination Litigation in Europe*, *supra* note 47.

49. *Polgár Törvénykönyv (PTK)*, Art. 76 (Hung.) (Ministry of Justice of the Hungarian People's Republic).

50. Goldston, *Race Discrimination Litigation in Europe*, *supra* note 47.

entry to a Roma man on the grounds of his ethnicity. The court ordered the disco owner to cover the complainant's legal costs and to write a letter of apology acknowledging that "[o]ur staff denied you entry, thus causing you discrimination and diminishing your dignity."⁵¹ The court denied an award of non-pecuniary damages. Additionally, in July 2004, the Sofia District Court in Bulgaria found that a Romani woman who had been banned from the premises of a clothing shop on the grounds of her race had suffered unlawful racial discrimination and, thus, awarded her compensation.⁵²

2. Residential Exclusion

In 1998, a Slovak woman of Romani origin challenged the resolutions of two town councils in eastern Slovakia that expressly barred Roma families from settling there.⁵³ After exhausting local remedies, she sought redress in an individual communication before the United Nations Committee on the Elimination of Racial Discrimination. In 2000, the Committee held that the resolutions violated Slovakia's obligations under Article 5(d)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination,⁵⁴ as the resolutions failed to secure nondiscriminatory enjoyment of the rights to freedom of movement and residence.⁵⁵

In June 2004 in the Czech Republic, the Regional Court of Ostrava found the management of a residential housing complex guilty of discrimination in refusing to rent an apartment to a Romani woman.⁵⁶ There was no justification, the Court held, for the management's refusal, in light of its simultaneous offer of an apartment to a non-Roma family. The complainant was awarded a written apology, damages amounting to the Czech currency equivalent of almost US\$2,000 and coverage of legal costs. The case was organized by a Czech NGO that developed a testing strategy and ensured that relevant evidence was obtained through the presence of witnesses and audio recording equipment.

51. See Kovák v. AZ ALFA s.r.o., Judgment of 21 Feb. 2002, Regional Court of Pilsen, Czech Rep., available at http://www.pili.org/resources/discrimination/judgment_kovak.htm.

52. See Press Release, ERRC, First Five Roma Rights Victories Under New Bulgarian Equality Law (30 Sept. 2004), available at www.errc.org/cikk.php?cikk=2022.

53. See Koptova v. Slovak Republic, reprinted in Report of the UN Comm. on the Elim. of Racial Discrimination, Comm. No. 13/1998, U.N. Doc. CERD/C/57/D/13/1998 (8 Aug. 2000), available at http://www.bayefsky.com/.pdf/100_slovakiacerdvws13.pdf.

54. International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(i), adopted 21 Dec. 1965, 660 U.N.T.S. 195 (entered into force 4 Jan. 1969), reprinted in 5 I.L.M. 352 (1966).

55. See Press Release, ERRC, United Nations CERD Finds Slovak Anti-Romani Municipal Ordinances Violate International Law (27 Sept. 2000), available at <http://www.errc.org/cikk.php?cikk=230&archiv=1>. See also Koptova, *supra* note 53.

56. See Public Interest Law Initiative, Housing Discrimination Case in the Czech Republic, available at <http://www.pili.org/lists/piln/archives/msg01134.html>.

3. Access to Public Services

In 2004, NGOs seeking to apply provisions of Bulgaria's newly-enacted comprehensive antidiscrimination legislation⁵⁷ successfully secured court judgments in July and August 2004 in three cases finding discrimination in access to electric services.⁵⁸ Two of the cases concerned Romani electricity customers who refused to accept an agreement, used by the electric company only in Romani neighborhoods, that would have placed the electric meter on a pole too high for tampering. A third judgment held that a company's refusal to restore electricity following a power grid breakdown to paying, as well as nonpaying, Romani customers amounted to unlawful discrimination on grounds of race.⁵⁹

4. Segregation in Education

School segregation has been the subject of PIL in several countries in the region. In parts of Central and Eastern Europe, disproportionate numbers of Roma children are assigned to special remedial schools or special remedial classes for the mentally disabled. For years, though widely known, this phenomenon was considered, depending on one's viewpoint, a cultural problem relating to the failure of Romani parents to value education sufficiently; a biological problem of Romani children's inferior intelligence; a language problem; or a historical problem of intractable social prejudice. It had not generally been thought of as a legal problem with a legal remedy that lawyers, judges, and legislative bodies could do something about.

The first legal challenge to racial segregation in the schools commenced in 1997 in the town of Tiszavasvári, Hungary.⁶⁰ At the time, approximately 17 percent of the town's inhabitants were Roma. The lawsuit was brought against Ferenc Pethe School, one of three primary schools operating in Tiszavasvári. In 1997, of 531 pupils attending Ferenc Pethe, 250 of them were Roma. Of this number, 207 were assigned to Roma-only classes, thirty-eight to classes for the mildly mentally handicapped, and five to mixed classes of Roma and non-Roma. The school was physically divided into two principal structures: a central building in good condition (containing the gymnasium and caf-

57. See Press Release, ERRC, Bulgaria Adopts Comprehensive Anti-Discrimination Law (18 Sept. 2003), available at <http://www.errc.org/cikk.php?cikk=314>.

58. See Press Release, ERRC, Five Roma Rights Victories under New Bulgarian Equality Law (30 Sept. 2004), available at <http://www.errc.org/cikk.php?cikk=2022> (describing Sofia District Court determinations in *Nanova v. VALI Ltd.*, 23 Jul. 2004; *Kochev v. Sofia Electric Co.*, 6 Aug. 2004; and *Grigorov v. Sofia Electric Co.*, 12 Jul. 2004).

59. See ERRC, United Nations CERD Finds Slovak Anti-Romani Municipal Ordinances Violate International Law, *supra* note 55.

60. See *Roma Sue School in Northeastern Hungary: the Submission Against the Principle of the Ferenc Pethe Primary School, Tiszavasvári, Hungary*, ROMA RTS. Q. (n.d.), available at <http://www.errc.org/cikk.php?cikk=1807>.

eteria) and an auxiliary structure 230 meters away, in very bad repair, with little educational equipment. Roma-only classes and classes for the mildly mentally retarded were held in the auxiliary structure. For more than ten years, Roma had not been permitted to enter the cafeteria or gymnasium in the main building. Separate records were maintained for Romani classes, marked C for *Cigany* (*Gypsy* in Hungarian).

In June 1997, after the school convened separate graduation ceremonies for its Romani and non-Romani students, fourteen Romani students sued the school principal for discrimination.⁶¹ The students were assisted by a Hungarian NGO, the Foundation for Romani Civil Rights. In December 1998, the City Court of Nyíregyháza issued a verdict in favor of the plaintiffs, finding violation of a number of rights including those to nondiscrimination. The Court ordered the local government to pay approximately 500 US dollars to the family of each child in damages and court costs. The judgment was subsequently affirmed by the County Court of Nyíregyháza and by the Hungarian Supreme Court.

In September 1999, the Minister of Education and the Parliamentary Ombudsman for Ethnic and Minority Rights announced the results of an investigation into segregation in Hungarian schools, prompted in part by the Tiszavasvari litigation. The investigation concluded that segregation was widespread in the Hungarian educational system, and that the system of “special schools” for mentally disabled children excluded socially disadvantaged children from normal public education. A National Board for Public Education, Evaluation, and Exam Administration was proposed to monitor and review the special educational system.⁶²

In 2002, the Hungarian government adopted a National Integration Program, which pledged to desegregate all schools by the year 2008.⁶³ However, progress toward desegregation remains slow. In September 2002, the UN Committee on the Elimination of Racial Discrimination continued to express concern “about discriminatory practices resulting from the system of separate classes for Romani students and from private schooling arrange-

61. The court found breach of the children's personal rights as set forth in the Constitution, HUNG. CONST. ch. XII (Fundamental Rights and Duties of Citizens); Law 79/1993 on Public Education, art. 4(7); Law 77/1993 on the Rights of National and Ethnic Minorities (which prohibits discrimination against private persons on the basis of gender, race, nationality, or religious conviction); CIVIL CODE, art. 76 (Hung.).

62. See REPORT ON THE 1997 ACTIVITY OF THE PARAMILITARY COMMISSIONER FOR THE RIGHTS OF NATIONAL AND ETHNIC MINORITIES (1998).

63. *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Hungary*, U.N. GAOR, Comm. for Elim. Of Racial Discrim., 61st Sess., ¶ 382, U.N. Doc. A/57/18 (2002) [hereinafter CERD, *Concluding Observations: Hungary*]. See also 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 (Public Interest Law Initiative ed., 2004), available at www.pili.org/2005/r/dmdocuments/SU_three.pdf.

ments" and recommended "that new programs integrate Romani children into mainstream schools."⁶⁴

In October 2004, the Budapest Metropolitan City Court of Appeals upheld a finding that the placement of the children of nine families (most of them Roma) in segregated classes with an inferior curriculum for five years constituted unlawful segregation, absent any prior certification of their mental inability to attend regular classes. The families were each awarded damages in the Hungarian equivalent of approximately US\$1,500.⁶⁵

In recent years, challenges to educational segregation have also been filed in Bulgaria, Croatia, and the Czech Republic.⁶⁶ In Bulgaria, in October 2005, a district court in Sofia affirmed that racial segregation in education is unlawful. The case concerned School 103, located in the Roma ghetto of Filipovtsi. Like many other ghetto schools in Bulgaria, School 103 was attended only by Roma students and suffered from substandard material conditions and educational performance. The court found that the racially discriminatory patterns of school assignment violated Bulgaria's newly enacted antidiscrimination legislation, which faithfully incorporates the European Union Race Equality Directive.⁶⁷ As Bulgaria prepares for EU accession, the decision is significant not only for the children at School 103 but also for the thousands of Roma across Europe shunted into second-class schools and denied equal educational opportunities.⁶⁸

The Czech case, which represents the first challenge to systematic racial segregation in education in Europe to come before the Strasbourg Court, was brought by eighteen Roma children from the southeastern city of Ostrava. All were placed in special remedial primary schools for those deemed mentally deficient. Students in special schools receive a markedly inferior education. Most graduates are shunted into vocational secondary schools limited to training in basic manual skills. Few Roma attend university. Romani unemployment rates in the Czech Republic, as in much of Europe, far exceed those for the rest of the population.

The complaint submitted to the European Court built upon and highlighted extensive research revealing extraordinary racial disparities. At the time of the application, more than half of the Romani child population in Ostrava was schooled in remedial special education.⁶⁹ Similarly, a major-

64. See CERD, Concluding Observations: Hungary, *supra* note 63, ¶ 382.

65. See Press Release, ERRC, School Segregation Declared Unlawful by Hungarian Courts, available at <http://www.errc.org/cikk.php?cikk=2024>.

66. See Goldston & Ivanov, *supra* note 63. See also D.H. and Others v. The Czech Republic, App. No. 57325/00, Eur. Ct. Hum. Rts., Judgment of 7 Feb. 2006.

67. EU Race Equality Directive, *supra* note 24.

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

69. See Press Release, ERRC/Open Society Justice Initiative, Historic Deliberations in Roma Rights Cases at Europe's Premier Human Rights Tribunal (23 Feb. 2005), available at <http://www.errc.org/cikk.php?cikk=2148>.

ity of the population of remedial special schools was Romani. All told, a Romani child was, on average, more than twenty-seven times more likely to be placed in a school for the mentally disabled than a similarly situated non-Romani child.⁷⁰ The extent of segregation was such that, despite the fact that Roma comprise approximately 10 percent of the local population, more than 15,000 Czech children of primary school age attended school every day without meeting a single Romani classmate.⁷¹

In challenging racial segregation, the Ostrava applicants asked the Court to find that they had been subjected to degrading treatment in breach of Article 3 of the European Convention and to denial of their right to—and racial discrimination in access to—education in breach of Article 14, read together with Article 2 of Protocol 1.⁷² In April 2005, the Court ruled inadmissible the Article 3 claim and agreed to consider on the merits the nondiscrimination claim under Article 14.

In February 2006, by a vote of six to one, a chamber of the Court found that the applicants had not sustained their claim.⁷³ The majority acknowledged that the applicants' complaint was "based on a number of serious arguments."⁷⁴ In particular, "Council of Europe bodies have expressed concern about the arrangements whereby Roma children living in the Czech Republic are placed in special schools and about the difficulties they have in gaining access to ordinary schools."⁷⁵ Moreover, the majority affirmed that, "if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being discriminatory cannot be ruled out even if it is not specifically aimed at or directed at that group."⁷⁶ Nonetheless, the panel held that because "the system of special schools was not introduced solely to cater for Roma children," the applicants had not proven their case.⁷⁷

Concurring with the majority "only after some hesitation," one judge observed that, "[g]enerally speaking, the situation of the Roma in the States of Central Europe . . . undoubtedly poses problems."⁷⁸ When it comes to the special school system at issue in this case, "[t]he danger is that, under cover of psychological or intellectual tests, virtually an entire, socially disadvantaged, section of the school population finds itself condemned to low

70. See *id.*

71. See *id.*

72. See European Convention, arts. 3, 14; Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 262 (*entered into force* 18 May 1954), art. 2, available at <http://www1.umn.edu/humanrts/euro/z20prot1.html>.

73. D.H. and Others v. The Czech Republic, *supra* note 66.

74. *Id.* ¶ 45.

75. *Id.*

76. *Id.* ¶ 46.

77. *Id.* ¶ 48.

78. *Id.* at Concurring Opin., ¶ 2.

level schools, with little opportunity to mix with children of other origins and without any hope of securing an education that will permit them to progress."⁷⁹ The concurring opinion noted that the Court's Grand Chamber might be "better placed than a Chamber" to revisit the case law applicable in this area.⁸⁰

The lone dissenting judge noted that the Czech government had previously conceded that at the time relevant to the applications before the Court, "Romany children with average or above-average intellect [were] often placed in [special] schools on the basis of results of psychological tests";⁸¹ "[t]he tests [were] conceived for the majority population and do not take Romany specifics into consideration";⁸² and in some special schools, "Romany pupils made up between 80% and 90% of the total number."⁸³ Taken together, these concessions amounted to "an express acknowledgment by the Czech State of the discriminatory practices complained of by the applicants."⁸⁴

The judgment was clearly a setback to the Roma rights movement. As of March 2006, the applicants were considering whether to exercise their right to request referral to the Court's Grand Chamber.

5. *Employment*

Long before antidiscrimination litigation arrived in Central and Eastern Europe, employment was often the one area of public life in which discrimination was explicitly prohibited. Until recently, however, antidiscrimination provisions of employment codes were rarely applied. That has changed; and, as in other fields, NGOs are increasingly employing formal "testing" and audio recording techniques to secure evidence of discriminatory acts. One recent case concerned an applicant who replied by telephone to a public announcement for employment by a food production and distribution company.⁸⁵ The applicant, a Romani man, was told that the company had a strict policy of not hiring Roma. The conversation was heard on loudspeaker by other witnesses. The court found that the company had engaged in unlawful discrimination on grounds of race, awarded compensation to the plaintiff, and ordered that the company change its hiring practices.

79. *Id.* at Concurring Opin., ¶ 4.

80. *Id.* at Concurring Opin., ¶ 7.

81. *Id.* at Dissenting Opin., ¶ 2.

82. *Id.*

83. *Id.*

84. *Id.*

85. See Press Release, ERRC, Bulgarian Court Fines Employer for Denying Access to Employment to Roma (16 Nov. 2005), available at <http://www.errc.org/cikk.php?cikk=2415>.

6. Racial Discrimination in the Administration of Justice

Notwithstanding the ruling in *East African Asians v. United Kingdom*, discussed above in reference to racial discrimination as degrading treatment under the European Convention,⁸⁶ it was not until February 2004 that the European Court of Human Rights found a violation of Article 14, the non-discrimination guarantee of the European Convention of Human Rights, on grounds of racial or ethnic discrimination.

The case of *Nachova v. Bulgaria*⁸⁷ concerned the 19 July 1996 shooting death by military police soldiers of two Roma conscripts. The victims, recently absconded from a military construction crew, were known to be unarmed and not dangerous. The killing, by automatic weapon fire, took place in broad daylight in a largely Roma neighborhood, where the grandmother of one of the victims lived. Immediately after the killing, a military police officer allegedly yelled at one of the town residents, "You damn Gypsies!" while pointing a gun at him.

Relatives of the victims, represented by counsel, sought redress before the European Court. In February 2004, the First Section of the Court, consisting of seven judges, unanimously found that both the shootings and a subsequent investigation that upheld their lawfulness were tainted by racial animus. In particular, the Court found breaches of the right to life (Article 2 of the European Convention) and nondiscrimination (Article 14). The landmark judgment made clear that the right to nondiscrimination has both substantive and procedural components. The Court ruled that the importance of the prohibition against discrimination and the difficulties of proof are such that, in certain cases involving complaints alleging discrimination, it may draw negative inferences or shift the burden of proof to the respondent government. At the request of the Bulgarian government, the case was referred to the Grand Chamber of the European Court.

The Grand Chamber unanimously affirmed in part the panel's finding of racial discrimination in breach of the procedural component of Article 14, making clear that European governments have an obligation to investigate possible racist motives behind acts of violence.⁸⁸ As a result of this decision, European states are now under an explicit legal mandate to investigate and punish acts of racial violence. Failure to investigate adequately when there exists "suspicion" that racial attitudes underlay the violence is thus actionable.⁸⁹ This is no small matter in countries in which complaints of violence against racial minorities are regularly ignored.

86. See generally *East African Asians v. United Kingdom*, *supra* note 42.

87. *Nachova v. Bulgaria*, App. Nos. 43577/98, 43579/98, Eur. Ct. Hum. Rts., Grand Chamber Judgment of 6 July 2005.

88. *Id.*

89. *Id.* ¶ 160.

At the same time, the Grand Chamber declined to follow the earlier panel's conclusions and reasoning with respect to the substantive claim of racial discrimination in the killings and, relatedly, the burden of proof in assessing claims that violent acts have been motivated by racial hatred. Thus, the Court made clear that "in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and—if they fail to do so—find a violation of Article 14 of the Convention on that basis."⁹⁰ However, by a vote of eleven to six, the Grand Chamber did "not consider that the alleged failure of the authorities to carry out an effective investigation into the alleged racist motive for the killing should shift the burden of proof to the respondent Government."⁹¹ The Grand Chamber held it inappropriate to reverse the burden of proof with respect to a criminal offense, took a narrower view of the facts than did the panel, and declined to draw similar inferences. Accordingly, the Grand Chamber held that there was no substantive violation of Article 14.⁹²

C. The Impact of Roma Rights Litigation

In three subsequent cases involving Roma applicants, the European Court reaffirmed the prohibition of racial discrimination in the administration of justice. Thus, the Court found violations of the prohibition against racial discrimination in respect of: (1) judicial proceedings concerning compensation claims for destruction of property arising out of anti-Roma violence;⁹³ (2) the right to freedom of movement within a state;⁹⁴ and (3) the obligation to investigate possible racist motives underlying police abuse.⁹⁵

Over the past decade, hundreds of cases have been launched on behalf of Roma victims of police abuse and nonviolent discrimination. Unlike the more orchestrated, thirty-year-long antidiscrimination campaign in the United States that led to the Supreme Court's landmark desegregation ruling in *Brown v. Board of Education*,⁹⁶ many of the cases in Central and Eastern Europe concerning Roma rights are the product of local initiatives, often uncoordinated with one another. The Roma rights movement—diverse and, at times, disaggregated—has made great strides in recent years; and PIL has made a substantial contribution to that achievement.

90. *Id.* ¶ 157.

91. *Id.*

92. *Id.* ¶ 159.

93. *Moldovan v. Romania*, App. Nos. 41138/98, 64320/01, Eur. Ct. Hum. Rts., Judgment of 12 Jul. 2005.

94. *Timishev v. Russia*, App. Nos. 55762/00, 55974/00, Eur. Ct. Hum. Rts., Judgment of 13 Dec. 2005.

95. *Bekos v. Greece*, App. No. 15250/02, Eur. Ct. Hum. Rts., Judgment of 13 Dec. 2005.

96. *Brown v. Board of Education*, *supra* note 31.

The fact that Roma rights is today on the agenda of European institutions and national governments in a way unimaginable ten years ago is attributable at least in part to the role of PIL in raising awareness of the obstacles that Roma systematically confront. It is perhaps impossible to parse out the respective contributions to this process of PIL, of non-law-based activism within the Roma community, or of the broader political agenda of original EU member states seeking to stem a tide of disaffected Roma from fleeing west. Nonetheless, each of these factors has reinforced one another; and PIL has played an increasingly significant role. Its significance is likely to grow as a number of the hundreds of cases currently wending their way before courts throughout the region generate legally significant judgments.

Indeed, the sheer precedential value and the contribution to law reform of PIL have already been significant. As the above summary indicates, in its first decade, Roma rights-related PIL in Central and Eastern Europe has achieved a series of “firsts.” At the regional level, these have included European Court of Human Rights rulings expanding the obligations of governments to investigate police abuse and opening the possibility of shifting the burden of proof in certain cases of discrimination. These advances, to date, have not been mirrored in European Court cases involving nonviolent acts of discrimination. At the national level, domestic courts, prodded by NGOs and activist lawyers, have given meaning to the new legislative prohibitions against racial discrimination in all walks of public life. These legal actions have concretely demonstrated the possibility of actually addressing discrimination and segregation through legal means.

Even if PIL has helped to place Roma rights on the political agenda, its actual impact on the day-to-day conditions of Roma are less certain. On the one hand, it would be hard to conclude that instances of police abuse against Roma have declined or that broad patterns of discrimination and segregation in schools have ended. Among other things, most countries in the region resist collecting the ethnic data that would be needed to conclusively document such trends.

But on the other hand, the effects of Roma rights PIL on the public discourse and attitudes of non-Roma and Roma alike—even if measured only anecdotally—cannot be ignored. Even where litigation fails to achieve victory in the courts, it has already generated substantial debate in different parts of the region about the merits and legality of deeply entrenched practices of racial discrimination and exclusion. It has helped to make visible the Roma as a group and the problems they face. Whereas leading non-Roma human rights advocates were uninhibited in expressing hostility and prejudice when referring to Roma, even up to ten years ago, such open discrimination is less likely today. While anti-Roma animus remains common among members of the non-Roma majority, some—including those with more education, employment opportunities, and contact with

European institutions—have begun to change the way they speak—and, to some extent, think—about Roma.

Roma rights litigation has also contributed to the Roma community's own sense of possibility and empowerment. The example of the first decade of PIL has sufficiently persuaded numerous young Roma of the potential value of law as a tool for needed change, so as to generate a new generation of public-minded Roma lawyers. And for many others, the very process of registering a complaint and taking a case to court, formally declaring that one's rights have been violated and demanding a remedy, is courageous and empowering. It often has more than trivial value for the individual claimants and, as such cases gain publicity, for the community at large.⁹⁷

V. OTHER FIELDS

NGOs and others working in many different fields have begun to employ PIL in Central and Eastern Europe as a lever for reform, albeit with varying results. Some of the cases have involved vulnerable and marginalized groups, such as lingual and religious minorities, the mentally disabled, and prisoners. Other cases address issues that cut more broadly across different population groups, such as access to government-held information.

A. Vulnerable Groups

A series of cases launched on behalf of the Russian-language minority in Latvia has established minimal boundaries on the discretion of state authorities to limit rights of residence and political participation. In *Slivenko v. Latvia*, a Russian military officer stationed in Latvia had been required to leave following Latvia's independence in 1991, pursuant to a treaty between Latvia and Russia.⁹⁸ The officer's wife and daughter, who were both born in the Baltic states, objected when they too were given an expulsion order. The European Court of Human Rights held that the order breached Article 8 of the European Convention in not giving adequate weight to the rights of the mother and daughter to the enjoyment of family life. In another case, *Podkolzina v. Latvia*, the Court found the government in breach of the Convention in striking a member of the Russian-speaking minority from a list

97. Cf. HERSHKOFF, PUBLIC INTEREST LITIGATION, *supra* note 12, at 14: "Litigation is an important participatory activity that complements and supports electoral politics; for marginalized groups, litigation sometimes offers the only, or least expensive, entry into political life at a given time."

98. *Slivenko v. Latvia*, App. No. 48321/99, Eur. Ct. Hum. Rts., Judgement of 9 Oct. 2003, ¶¶ 22, 23, 32, 37, 44.

of candidates for election to parliament for failure to demonstrate Latvian language proficiency.⁹⁹ In a separate matter, a Russian-speaking, stateless woman born in Latvia was denied permission to legalize her residency status and that of her family and was issued an expulsion order following her return from a period spent living in Russia. After her claims were rejected by domestic courts, she sought redress at the United Nations Committee of Human Rights, citing the internationally-recognized right to enter her own country. Following the Committee's request that the government explain its actions, but before the case had been decided, the expulsion order was canceled and the family registered as permanent residents.¹⁰⁰

These cases built upon—and were reinforced by—political and diplomatic suasion by the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe, and the European Union. Though the Russian-speaking minority in Latvia continues to experience discrimination, access to citizenship and residency has improved; and the government has modified language requirements to reflect the needs of a more diverse population.

A community of advocates has sought in recent years to raise awareness of the particular problems facing the long-overlooked population of mentally disabled persons throughout Central and Eastern Europe. Among other issues, they have focused on the arbitrariness of detention procedures, the inhuman and degrading conditions of some forms of detention, and questions of individual liberty implicated in certain guardianship schemes. In a few cases from the region, the European Court of Human Rights has made clear that significant changes may be required in a number of countries in the procedures for detention.

In *Varbanov v. Bulgaria*, the Court found it improper for detention on the grounds of mental disability to be decided upon by a prosecutor with medical input.¹⁰¹ The Court underscored that a medical opinion must be obtained, and the assessment of the individual must be based upon actual mental state rather than solely upon past events. In *Kawka v. Poland*, the Court made clear that the conditions for deprivation of liberty must be clearly defined, and that the relevant law be foreseeable in its application.¹⁰² In *Rakevich v. Russia*, the Court reaffirmed the need for authorities to make clear, and then to comply with, a lawful procedure for detaining persons on

99. Podkolzina v. Latvia, App. No. 46726/99, Eur. Ct. Hum. Rts., Judgement of 9 Apr. 2002, ¶ 38.

100. See OPEN SOCIETY INSTITUTE/EU ACCESSION MONITORING PROGRAM, MONITORING THE EU ACCESSION PROCESS: MINORITY PROTECTION 311 (2001) (discussing the case of Marina Agafonova, Supreme Court Case No. 2-1535/5, 1995).

101. Varbanov v. Bulgaria, App. No. 31365/96, Eur. Ct. Hum. Rts., Judgment of 5 Oct. 2000.

102. Kawka v. Poland, App. No. 25874/94, Eur. Ct. Hum. Rts., Judgment of 9 Jan. 2001.

the grounds of mental disability.¹⁰³ However, the practical effects of *Rakevich* are unclear. The judgment singled out the Russian Law on Psychiatric Treatment for failing to provide detainees with a direct right of appeal in order to secure release.¹⁰⁴ More than a year later, however, the law remained on the books, unchanged.¹⁰⁵

In recent years, religious minorities have pursued PIL, along with other measures, to secure their rights to freedom of belief and expression in countries in which a single, state-supported church has long dominated. In December 2001, the European Court of Human Rights found that the Moldovan authorities' refusal to recognize the Metropolitan Church of Bessarabia infringed on their freedom of religion.¹⁰⁶ Three years later, the European Court found that the Bulgarian government had improperly interfered with the rights of the Muslim community to freely organize themselves and to choose their religious leadership.¹⁰⁷ By contrast, in November 2005, the European Court's Grand Chamber affirmed the power of Turkey's government to require that adult women refrain from wearing Islamic headscarves while attending university classes. The Court went out of its way to note that Turkey is "a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith."¹⁰⁸

Prisoners are another marginalized population group that have sought to use PIL to raise awareness of poor conditions, unlawfully prolonged detention, and inadequate opportunities to seek redress. In 2002, the United Nations Human Rights Committee drew attention to the overcrowded and inadequate sanitary conditions in Russian pretrial detention centers. In a case involving a man who died one month after being placed in a pretrial detention facility, the Committee found that the Russian government breached its obligations under the International Covenant on Civil and Political Rights to protect the right to life (Article 6) and to respect the inherent dignity of detained individuals (Article 10).¹⁰⁹ The Committee made clear that govern-

103. *Rakevich v. Russia*, App. No. 58973/00, Eur. Ct. Hum. Rts., Judgment of 28 Oct. 2003, ¶¶ 27, 33.

104. *Id.* ¶ 45.

105. See ANTON BURKOV ET AL., *THE LEGAL ORDER OF THE RUSSIAN FEDERATION AND THE COUNCIL OF EUROPE STANDARDS 8* (2004), available at http://www.sutyajnik.ru/eng/news/2004/russian_legal_order.html.

106. *Metropolitan Church of Bessarabia v. Moldova*, App. No. 45701/99, Eur. Ct. Hum. Rts., Judgment of 13 Dec. 2001, ¶ 105.

107. *Supreme Holy Council of the Muslim Community v. Bulgaria*, App. No. 39023/97, Eur. Ct. Hum. Rts., Judgment of 16 Dec. 2004, ¶ 85.

108. *Leyla Sahin v. Turkey*, App. No. 44774/98, Eur. Ct. Hum. Rts., Judgment of 10 Nov. 2005, ¶ 115.

109. *Lantsova v. The Russian Federation*, U.N. Hum. Rts. Comm., Comm. No. 763/1997 (22 July 1996), U.N. Doc. CCPR/C/74/D/763/1997. See also *International Covenant on Civil and Political Rights*, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, arts. 6, 10, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976).

ments must ensure adequate conditions of detention and provision of medical assistance to detainees. Further, in *Kalashnikov v. Russia*, the European Court of Human Rights found that overcrowded and unsanitary conditions in a detention facility so negatively impacted the applicant's health and welfare as to constitute degrading treatment, a breach of Article 3 of the European Convention.¹¹⁰

The right of married prisoners to have conjugal visits with their spouses is at issue in a 2004 application pending before the Constitutional Court of the Russian Federation and brought by Sutyajnik, an NGO based in Ekateringburg.¹¹¹ The applicants are a man sentenced to life imprisonment and his wife who suffers from a medical condition that may lead to infertility. The couple fears that a criminal code provision prohibiting conjugal visits during the first ten years of incarceration will prevent them from having a child.¹¹²

Unsurprisingly, conditions in Russian prisons have not markedly improved as a result of this litigation. In the course of the *Kalashnikov* case, the Russian government readily conceded that "conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other member States of the council of Europe."¹¹³ However, as of early 2006, the government had undertaken little noticeable effort to change the situation. PIL on behalf of prisoners' rights, particularly in a country as vast and as resistant to the rule of law as Russia, is a long-term enterprise. For the foreseeable future, its main achievement is likely that of helping to focus increased attention, both from within Russia and outside, on the substandard conditions of those detained.

B. Access to Information

Since 1990, twenty countries in Central and Eastern Europe have adopted freedom of information (FOI) legislation, guaranteeing public access to government-held information, establishing procedures for organization and dissemination of such information, and providing for narrow exceptions.¹¹⁴

110. *Kalashnikov v. Russia*, App. No. 47095/99, Eur. Ct. Hum. Rts., Judgment of 15 July 2002.

111. Public Interest Law Initiative, *The Right of Prisoners to Have Children* (7 Oct. 2004), available at <http://pili.org/lists/piln/archives/msg01168.html>.

112. See generally *My Dad is in Prison: The Right of Prisoners and Their Spouses to Have Children*, SUTYAJNIK, 7 Oct. 2004, available at http://www.sutyajnik.ru/eng/news/2004/conjugal_visits.html (referencing Russian criminal code provision prohibiting conjugal visits in the first ten years of incarceration).

113. *Kalashnikov v. Russia*, *supra* note 110, ¶ 94.

114. Albania (1999), Armenia (2003), Bosnia and Herzegovina (2000), Bulgaria (2000), Croatia (2003), Czech Republic (1999), Estonia (2000), Georgia (1999), Hungary (1992), Latvia

A growing network of FOI NGOs and individual advocates have launched campaigns to increase awareness of the new legislation and how to use it among both government officials (who often must comply with new affirmative disclosure requirements) and the general public. A number of organizations have sought to test the new laws by asking government offices for different kinds of information, then by going to court in the event of unjustified refusals. The result has been, on the whole, a number of significant court rulings affirming the right of public access. Virtually all of these decisions have been at the domestic level. The goals of increased government transparency and responsiveness will take time. But in several countries in the region, PIL has already made a mark.

In December 2001, the Bulgarian Helsinki Committee (BHC), a leading human rights NGO engaged in monitoring police misconduct, asked the Regional Military Prosecutor, which has jurisdiction over police abuse investigations, for information on the number of reports of unlawful use of force and firearms, and the commensurate number of ensuing investigations. The Prosecutor refused to provide the information, on the grounds that prosecutors are members of the judiciary, not the government, and are thus exempt from the FOI law's provisions. The Military Prosecutor's Office of Appeal affirmed the initial refusal, reasoning that the requested information was an "official secret."¹¹⁵ BHC went first to a regional court, and then to the Supreme Administrative Court, which held, in January 2003, that, under the Bulgarian Constitution, the judiciary, including the prosecution, forms part of the government, and thus must comply with FOI disclosure obligations. The Court further ruled that the requested information was not secret, because only aggregate statistics were sought, not individual case details.¹¹⁶ This ruling was particularly significant in a country in which the prosecution has long been largely unaccountable.

On 4 November 2004, in response to an FOI act claim, the Supreme Administrative Court overturned the refusal of the Supreme Judicial Council (SJC) to provide access to its sessions and ordered that such sessions be open to the public.¹¹⁷ As of early 2005, PIL was pending before Bulgarian courts concerning FOI claims for independent expert statements underlying an environmental impact statement concerning construction of a nuclear

(1998), Lithuania (2000), Macedonia (2006), Moldova (2000), Montenegro (2005), Poland (2001), Romania (2001), Serbia and Montenegro (2004), Slovakia (2000), Slovenia (2003), Ukraine (1992). Also, the territory of Kosova adopted FOI legislation in 2003.

115. See ALEXANDER KASHUMOV & KIRIL TERZIISKI, *2 ACCESS TO INFORMATION LITIGATION IN BULGARIA: SELECTED CASES* 59, 59–79 (2004).

116. The case before the Supreme Administrative Court is Reg. No. 6269 (2002) and Judgment No. 708 (2003).

117. Documents on file with Open Society Justice Initiative. See also Vassil Chobanov v. Supreme Judicial Council, Supreme Administrative Court, Case No. 7897/2004.

power plant, a report of the Supreme Cassation Office of the Prosecutor on the misuse of intercepted telecommunications, and a security services report on alleged business transactions between firms close to the Bulgarian Socialist Party and Saddam Hussein.¹¹⁸

PIL in other countries has successfully pursued a number of cases seeking broadened access to government-held information. In April 2004, the Lori Region First Instance Court in Armenia ordered the Municipality of Vanadzor to release copies of a number of decisions adopted by the Mayor and the Council on the Elderly. The Court made clear that, pursuant to the country's FOI law, the municipality should pay for the costs of photocopying.¹¹⁹

Another case in Armenia showed that successful PIL can change the way in which a government department responds to FOI requests. In March 2003, the Association for Investigative Journalists launched legal action against the Ministry of Ecology to challenge repeated failures to respond to requests for information from journalists on environmental issues.¹²⁰ The litigation led to mediation among the parties that resulted in a settlement. In the months thereafter, the Ministry of Ecology has reportedly begun to respond more expeditiously and favorably to requests for information from journalists. Monitoring performed in 2004 by the Justice Initiative and its Armenian Partner, the Centre for Freedom of Information, showed that the Ministry answered a comparatively high percentage of requests for information.¹²¹

In Romania April 2003, the Bucharest Court of Appeal upheld a lower court order requiring the Prosecutor General's Office to release information concerning the number of cases of secret surveillance conducted on individuals.¹²² When the Supreme Court dismissed an appeal of the ruling, the Prosecutor General initially refused to comply, then released the information six months beyond the required deadline. This was the first time Romanian authorities had published information concerning secret surveillance. The data showed that a far larger number of persons were subjected to surveillance than were ultimately brought to justice.¹²³

118. Freedom of Information Advocates Network (FOIANet), News: Three Strategic Information Cases, *available at* <http://www.foiadvocates.net>.

119. Helsinki Citizens Assembly Vanadzor Office v. Mayor of Vanadzor, Civil Case No. 2/609 (First Instance Court of Lori Region), Decision of 30 Apr. 2004.

120. Association of Investigative Journalists (AIJ) v. Ministry of Environment (ME), Central & Nork-Marash First Instance Court, Amicable Settlement.

121. Documents on file with Open Society Justice Initiative. For further information about the Access to Information Monitoring, see Open Society Justice Initiative, *Access to Information Monitoring Tool*, in *Activities*, *available at* www.justiceinitiative.org/activities/foiofoe/foi/foi_aimt.

122. Court papers on file with Open Society Justice Initiative. See generally ASSOCIATION FOR THE DEFENCE OF HUMAN RIGHTS IN ROMANIA, ANNUAL REPORT 2003, *available at* <http://www.apador.org/old/rapoarte/anuale/report2003.htm> (describing case).

123. *Id.*

Also in Romania in 2003, relying on newly adopted FOI legislation, the Bucharest Court of Appeal ordered disclosure of information concerning waivers of court fees and ruled, over the objections of the Ministry of Public Finance, that the information was of public interest, that it was aggregate data not violative of personal data protection norms, and that the Ministry was required to organize its files so as to provide the information in due time.¹²⁴ When the Ministry continued to refuse disclosure, advocates went back to court to secure compliance with the court's order.

In Ukraine, environmental rights advocates have used PIL to secure court orders disclosing information concerning, *inter alia*, the environmental impact of one oil facility and the development of a separate oil field in a protected water reservoir.¹²⁵

C. Maximizing the Impact of Public Interest Litigation

If the impact of PIL in Central and Eastern Europe has been, to date, varied, uncertain, or "too early to tell," what can lawyers, NGO activists, and other supporters of PIL do to ensure that it has the greatest value in the future?

First, keep in mind that PIL is only one of many tools for change. Seeking legislative reform is one obvious alternative. Adoption of antidiscrimination legislation and freedom of information legislation in a number of CEE countries in recent years was a major step forward, brought about as much through politics as through law. At the European level, the adoption in 2000 of the EU Race Equality Directive and the Framework Employment Directive¹²⁶ was the product of more than ten years of lobbying by grassroots NGOs.

Another tactic is direct action. Over the past several years in Bulgaria, Romani advocacy groups, working with the Open Society Institute, have achieved integration of previously segregated schools—not by filing lawsuits, but by hiring additional teachers, renting buses, and organizing parents and children to attend newly mixed classes.¹²⁷

Mobilizing political leadership is another important tactic. In February 2005, prime ministers from eight CEE countries endorsed a ten-year initiative, the Decade of Roma Inclusion, aimed at ending discrimination by channeling

124. Documents on file with Open Society Justice Initiative. See *Romanian Helsinki Committee (RHC) v. Minister of Public Finances (MPF)*, Bucharest Court of Appeal (BCA), file no. 115/2003, Decision No. 76/03.02.2003.

125. THE REGIONAL ENVIRONMENTAL CENTER FOR CENTRAL AND EASTERN EUROPE, *HANDBOOK ON ACCESS TO JUSTICE UNDER THE AARHUS CONVENTION* 197–200 (2003).

126. EU Race Equality Directive, *supra* note 24. See also Council Directive 2000/78/EC of 28 Nov. 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16.

127. See Open Society Institute, *Roma Initiative: 2004 Activities*, available at <http://www.soros.org/initiatives/roma/about/2004>.

and increasing resource investment and committing to reform with respect to education, housing, employment, and healthcare.¹²⁸

PIL may have more impact where it builds on and helps to reinforce these other tools. In 2004, NGOs quickly seized upon Bulgaria's newly enacted antidiscrimination legislation to gather evidence and to develop cases that relied upon and aimed at implementing its provisions. More generally, the EU Race Equality Directive has given impetus to a continent-wide surge of litigation aimed at deploying its definitions of direct and indirect discrimination and its favorable provisions regarding the burden of proof.¹²⁹

Second, a PIL strategy designed and pursued in collaboration with local communities is more likely to succeed. NGOs and issue-oriented activists have time and energy that lawyers often lack to devote to public education about particular cases. Timing litigation to coincide with other activities outside the courtroom, such as the publication of a report on the topic, the introduction of a bill in a legislature, or the convening of a public hearing, may help to focus attention on the case in a beneficial way. And when the case is decided, it will often be interested communities of non-lawyers who have the interest and perseverance to ensure that the judgment is not forgotten.

Third, working with the media is also an important strategy. Judicial decisions have enhanced meaning if people know about them, understand their significance, and enforce them. Explaining to the media why a ruling matters, what its implications are for ordinary people, and how the government can comply with it in a reasonable manner may be crucial to ensuring greater public acceptance and support. Given the length of some litigation, it is often important to use different stages—a hearing, the filing of an application, or a lower court decision that will be appealed—as an opportunity for public education. In this way, even if the end result is less than optimal, the PIL will have provided a number of opportunities for raising awareness about the issue as it proceeds.

Fourth, lawyers, NGO activists, and PIL supporters must be creative and flexible in making use of available legal resources. In the absence of clear legislative rules expressly governing the conduct at issue, it may be necessary to argue that more general provisions, ordinarily thought not to apply, should be considered. Similarly, even in a jurisdiction that does not treat court rulings as legally binding precedent, it may be possible to rely upon the persuasive force of a decision's reasoning in maximizing its significance in other settings. If court rules do not provide for collective remedies through a "class action," it may still be possible and desirable to join together the complaints of several similarly situated individuals into one legal action. In the event of protracted litigation, joinder may protect against the risk

128. See *id.*

129. EU Race Equality Directive, *supra* note 24.

that one or more complainants drops out. It may also lay a foundation for presenting evidence of harm to more than one complainant, which can be helpful in establishing the existence of a systemic problem.

Fifth, beyond supporting PIL, efforts to enhance the underlying human and institutional infrastructure of the legal system can, if appropriately targeted, reinforce the potential effect of PIL in contributing to change beyond the courtroom. Expanding knowledge of rights in vulnerable communities, nourishing a strong network of NGOs, and increasing access to the courts enlarge the pool of potential cases and clients, and ensures that more effective follow-up activities can focus on implementing court rulings once secured. Court rules that broaden notions of *standing* to permit NGOs and other advocacy organizations to act as interested parties help insure that victims' fear of retribution does not prevent important PIL claims from being presented.

Sixth, a major challenge for the future is to establish the financial resource base for PIL to continue, if not expand. This is especially urgent given the inevitably changing priorities of foreign donors, who until now have provided the principal economic support for this activity. To date, domestic philanthropy in Central and Eastern Europe has been modest, with almost none of it devoted to PIL. In recent years, the European Commission has expanded its support for monitoring, advocacy, and legal training; but (for perhaps understandable reasons) it has not offered substantial financing specifically for contentious litigation against the governments of EU member or accession states. Reform of domestic legal aid systems—long overdue in most Central and Eastern European countries—could help address this resource gap. But even if successful, such reform will inevitably be a long-term process; and it may not be sufficient to generate the streams of litigation over time often necessary to get issues onto the judicial agenda. Greater contributions of in-kind support from the private bar, coupled with more flexible rules to allow supervised law students taking part in clinical programs to provide assistance in individual cases, would also be useful. But for the foreseeable future, those interested in sustaining PIL in this region might consider involving a broad range of actors, including foreign donors, domestic governments, and local businesses, in establishing a multi-year endowment expressly dedicated to litigation in the public interest.

Finally, a sense of realism coupled with humility about PIL enterprise is useful. On one hand, this requires a recognition that PIL in any environment is a long-term process. It may be necessary to temper undue expectations of quick success. On the other hand, significant results are possible, notwithstanding the numerous obstacles confronting those who seek to use PIL. Though the "public interest bar" in some countries may be counted on one hand, the experience of the past decade shows that even one talented lawyer working in collaboration with local communities and an effective NGO can accomplish a great deal.

VI. RECOMMENDATIONS FOR DONORS AND OTHER SUPPORTERS OF PUBLIC INTEREST LITIGATION

PIL in Central and Eastern Europe is a relatively new phenomenon. Nonetheless, as the above discussion suggests, there exists a substantial body of experience and knowledge concerning its possibilities and limits. Together with the richer and deeper PIL experience in other parts of the world, this provides a basis for suggesting a number of measures that private donors, bilateral institutions, and other potential supporters might consider to foster more, and more effective, PIL in Central and Eastern Europe in the future:

1. Establish a sizeable fund specifically dedicated to PIL in Central and Eastern Europe. The fund might be administered by a committee of concerned persons from within the region and beyond to promote the use of PIL to foster legal and social reform. The fund could support individual court cases. It might provide resources necessary to cover, in each case, the costs of activities including documentation, client identification, legal services, paralegal services, travel, and printing and reproduction. The fund could actively solicit proposals that would set forth in reasonable detail the claims at issue, the remedies sought, and the reasons why litigation would serve a broad public interest. The fund should provide support for PIL on a continuing basis for at least a decade to allow the necessary time to produce results.
2. Provide institutional support for NGOs that pursue PIL as part of their substantive mission. Over time, institutions with adequate human, technical, and financial resources will be necessary to select, build, and sustain strategic cases of sufficient quantity and quality to make a difference.
3. Support the development and professionalization of university-based legal clinics involving law students, under appropriate supervision from qualified attorneys, in various activities related to PIL, including legal research, documentation, and witness and victim interviewing. Support the development of coursework, law faculty, and academic publications focused at least partly on PIL and related fields. Law students can assist lawyers and NGOs in pursuing PIL. Moreover, once exposed to the rewards of work in the public interest, they become the foundation for a growing pool of qualified PIL lawyers for the future.

4. Support the following activities:

- a. Engaging members of the private bar who are not full-time PIL lawyers but who can, on occasion, participate in or offer professional assistance to PIL on a pro bono, or reduced fee basis. These efforts might include periodic training for members of the private bar in PIL subjects and reform of bar association rules that unduly restrict the ability of lawyers to work *pro bono* and/or as staff of NGOs.
- b. Bridging the gap between PIL lawyers and members of affected communities. These efforts might include establishing and strengthening organizations of paralegals capable of supplementing litigation through field research, fact-finding, and pursuit of administrative remedies; identification and creation of computerized databases of the needs or problems that might be addressed by PIL; and promoting rights-based education to help community members be more informed and active consumers of PIL.
- c. Developing more PIL lawyers from among the ranks of affected communities by sponsoring scholarships for university education in law for members of vulnerable minority groups.
- d. Nourishing, broadening, and consolidating the growing network of PIL advocates and activists across the region and within each country through improved web-based communications platforms, enhanced comparative legal resources, and systematic recording and dissemination of PIL judicial decisions among the bar, the judiciary, and the general public.
- e. Modify legal and procedural rules so as to expand public access to courts through PIL, including improving publicly financed legal aid for indigent persons, liberalizing standing requirements to allow NGOs to act on behalf of victims, and providing for attorney fee recovery for legal claims that vindicate broad public interests.
- f. Encourage indigenous philanthropy for PIL within Central and Eastern Europe.