SPECIAL ISSUE

White Knights On Chargers: Using The US Approach To Promote Roma Rights In Europe?

By Morag Goodwin[*]

A. Introduction

North Carolina has, like most American states, played its (not always positive) part in the struggle against what Clinton, back in 1997 when the U.S. had more domestic concerns on its mind, called "America's constant curse".[1] But racial discrimination is not, of course, simply America's curse. Europe, for all its self-righteousness of late, has certainly not escaped it. Despite the prevalence of racial discrimination right across the geographic expression of Europe, this paper shall concentrate on a particular set of countries – those termed Central and Eastern Europe[2] – and on a particular group – the Roma, widely acknowledged as the most marginalised and discriminated in Europe today.[3]

The writing of this paper began in homage to the U.S. civil rights movement and the impact it has had not just in the U.S. but around the world, and in the transition

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[1] Cited in Katrina Sanders, 'America's Quest for Racial Tolerance' 2 *Journal of Gender, Race and Justice* 99, 99 (1998).

[2] I concentrate on Central and Eastern Europe because this is where the majority of Roma live and where the problems that beset them are most acute, as well as because as transition countries they have been more open to external influence. This is not to say, however, that the Roma are not discriminated against in western Europe and a number of such countries have records of abuse to rival CEE countries. For a country-by-country breakdown of the difficulties Roma face, see http://www.errc.org/Factsheets_index.php and for in-depth country reports, http://www.errc.org/cikk.php?cikk=115

[3] This acknowledgment that Roma are everywhere at the bottom of the social heap and the victims of discrimination has reached the level of the popular press. See 'Zigeuners meest gediscrimineerd', *de Volkskrant*, 11 October 2004.

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countries of CEE in particular. What better way of joining the celebrations marking the 50th anniversary of *Brown v. Board of Education*[4] than a short paper detailing how others make use of its legacy? The civil rights tradition developed here at a pace and precedent unseen elsewhere. This may have been because the particular history and nature of the problems manifested themselves on a scale not seen in other countries; or because the predominant self-understanding of this new country – as the land of the free, of opportunity etc – demanded that reality be reconciled with such ideals (only in the US perhaps could the doctrine of 'separate but equal' have been so elaborately constructed in an era in which few other countries gave a damn about equality), but also because of the pioneering spirit of the early activists and their tenaciousness and belief in the face of what must have seemed a battle they could only dream of winning.[5] Whatever the reasons, it is largely the US civil rights movement to which all others turn for inspiration. What this paper aims very simply to do is to examine the way in which strategies and techniques developed in the course of the American civil rights movement are being used by Romani and pro-Romani organisations in an attempt to combat the deep hostility and prejudice that Roma face in their every-day lives.

B. Roma and the changes of 1989

The mass of changes heralded by the revolutionary events of 1989 in central and eastern Europe had a particularly dramatic impact on the Roma. The fall of communism saw Roma, traditionally marginalised, pushed even further to the fringes of society – they were the first to lose their jobs, housing, means of subsistence, access to education. Roma were again the societal scapegoat for the widespread popular discontent that followed market reforms, which expressed itself in pogroms, lynch mobs, frequent incidents of racially-motivated violence and ingrained public hostility.[6] Roma remain popularly characterised as dirty, thieving, sly, liars, work-shy and stupid.

However, the hard-fought for civil freedoms for all, which followed in the wake of 1989 saw the beginnings of a revival of civil society in these countries, and the

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[4] *Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 493 (1954).

[5] KEVIN VERNEY, BLACK CIVIL RIGHTS IN AMERICA (2000), for a concise history.

[6] While the pogroms have ceased, incidents of racial violence and police abuse remain frequent. Moreover, a large section of the populations in CEE remain implacably hostile to Roma. For details of such incidents and for an up-to-date record thereof, see 'Snapshots' in each edition of *Roma Rights*, on-line at http://errc.org The OSCE *REPORT ON THE SITUATION OF ROMA AND SINTI IN THE OSCE AREA* (2000) also provides a useful overview of the type and prevalence of Roma rights abuse.

region flooded with international organisations and NGOs, staffed by well-meaning western souls – overwhelmingly English-speaking and largely American – to assist in the transition to democracy. As the transition process began in earnest, racial discrimination that had been overt and blatant became less so; although open violent attacks on Roma continue, more covert forms of discrimination are now the norm.

C. The US civil rights approach: a crude analysis

So what was the strategy and what the techniques of the American civil rights movement and how has this been translated to CEE?

Their approach was defined primarily by the nature of the discrimination being faced. The system of Jim Crow laws, based on the 'separate but equal' principle laid down in *Plessy v. Ferguson*, meant that equality was understood as integration.[7] If discrimination was segregation, equality was integration.

The strategy of the U.S. civil rights movement has been primarily legal, seeking integration through legislation, law enforcement and court-enforced remedies based on high-impact litigation. *Brown v the Board of Education* is of course the best-known example of this and is felt by many to be the high-point of the movement's battle. There have been a number of reasons for the intense focus on legal approaches.

Anti-discrimination litigation is widely understood to achieve a number of different things, with the same ultimate goal: it raises awareness that there is a problem; where successful, it gains justice for the victims, both by punishing the perpetrators with either criminal or civil sanctions and by providing financial compensation and/ or an apology; it acts as a deterrent to those who would continue to discriminate; it can act as inspiration to the oppressed and stir them into revolt[8]; and most importantly, it can change wider societal perceptions. The domination of the litigation strategy in the struggle for enforceable civil rights was also dictated

[7] The MARGOLD REPORT, drawn up in 1930, established a driving strategic logic for the NAACP, which was, in the words of Jack Greenberg, "that if wherever there was segregation there also was inequality, which was invariably the case, segregation, therefore, was unconstitutional". From 1950, the NAACP resolved to file only those cases that attacked the *Plessy* principle head on, rather than also indirectly by highlighting the material failure of separate to be equal. JACK GREENBERG, CRUSADERS IN THE COURTS, 59, CH. 5 and CH.7 (1994).

[8] The MARGOLD Report, in determining litigation as the main strategic weapon, noted that it would "stir … the spirit of revolt among blacks". *Id.*, 59.

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by the lack of political power and thus an inability to achieve equality through the political process. Moreover, the civil rights movement has been largely dominated by lawyers, and lawyers do what they know best: they litigate.

If the strategy was de-segregation through litigation, the focus was education. The struggle for equal access to education was seen by generations of early civil rights activists as the means to achieving greater economic and political power.[9] Those activists correctly perceived that denial of education was a deliberate means of perpetuating subjugation and of negating the emancipation they had achieved on paper. Moreover, injustice in access to an equal standard of education has an impact that endures throughout the victim's whole life, in a way that segregated seating in a restaurant does not. In *Brown*, the Court stated that, "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity… is a right which must be made available to all."[10] The importance of *Brown* was, of course, not that it recognised the significance of or the right to education – the Court had shown that it was willing to act on this in previous cases brought by the civil rights movement[11] – but that it marked the overturning of *Plessy v. Ferguson*[12] and declared for the first time that segregation itself was injustice and that separate could not be equal. The victory against segregation in *Brown* laid the path for the challenge of segregation in other fields, such as public transport, housing and access to public spaces

Where the strategy is litigation, evidence needs to be collected verifying the presence of the discrimination claimed. The U.S. civil rights movement has sought to do this in two main ways. The first is through the use of comprehensive statistical surveys documenting the placement of children, convicts and so on by race. Statistical evidence is presented to show that specific racial groups are more likely than others to fall foul of a particular law or practice and thus challenge the application in a specific case.[13] It is thus designed to show adverse impact

[9] STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW. THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT, 7-9 (1995).

[10] *Brown v. Board*, 347 U.S. 493.

[11] In *State of Missouri ex rel. Gaines v. Canada* (305 U.S. 337 (1938)), the Supreme Court had of course ruled the refusal by the State to admit a black man to its law school where no equivalent facility for African-Americans was available in-State as unconstitutional, and in *Sweatt v. Painter* (339 U.S. 629 (1948)) it ruled that Texas had failed to provide equal educational opportunities because the whites-only Law School at the University of Texas was simply a better School on any number of grounds.

[12] *Plessy v. Ferguson*, 163 U.S. 537 (1896)

[13] E.g. *McCleskey v. Kemp*, in which the Supreme Court accepted the presentation of statistical evidence to show impact race discrimination.

discrimination. It is relatively straightforward, but requires a large investment of resources.

The second is the technique known as testing.[14] Testing can be for research, in which case it involves results that can be generalised and that affect a specific unit, whether that be an industry or a neighbourhood. This kind of testing is large in scale and requires a considerable pool of testers, co-ordinators and evaluators acting over time. It can also be for the purposes of enforcement, to establish a legal breach and to pursue it through the courts. Such testing is generally complaint driven and confined to one company.

Testing has been around since 1977 and has been driven in the U.S. by groups campaigning for fair access to housing. It was first accepted as a means of establishing racial discrimination in the Supreme Court ruling in *Havens* in 1982[15] and is now also used to document and prosecute discrimination in entry-level hiring, getting a cab, access to health care, quote for mortgages and insurance and for bargaining in car sales.[16]

The repeated use of testing by both civil rights groups and federal agencies and their extensive co-operation has seen the establishment of an accepted methodology for testing and created a broad acceptance of testing as a means of documenting the existence of discriminatory treatment. So accepted is testing now, that in a recent case the Dept of Justice included as part of a settlement with the *Cracker Barrel* restaurant chain an order that the company pay an independent organisation to set up a testing programme to check that all customers receive equal treatment.[17]

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[14] The core of testing is the paired test, in which a member of the majority is paired with a member of a minority group, equal in every other regard such as age, physical appearance, qualifications etc; they are sent in turn to a transaction, whether it be a job application, housing rental, entry to a bar or restaurant or the purchase of an item requiring negotiation, such as a car, and their experiences are reported and documented. Their reports are compared by a third party and any difference is considered to be evidence of differential treatment.

[15] *Havens Realty Corp. v. Coleman*, 445 U.S. 363 (1982).

[16] M. Fix and M.A. Turner, 'Measuring Racial and Ethnic Discrimination in America', in *A National Report Card on Discrimination in America: The Role of Testing* (Fix/ Turner eds., 1998).

[17] Department of Justice, 'Summary of the Cracker Barrel Consent Order', May 3, 2004, http://www.usdoj.gov/crt/housing/documents/crackerbarrelpr.htm

D. A comparison with the civil rights approach in CEE

I. Litigation

It is not difficult to see that the litigation strategy dominates the approach of the Romani civil rights movement. The European Roma Rights Center, the most prominent pro-Romani civil rights actor and an umbrella for the myriad of small and very small organisations working throughout the region, was established as a public interest law organisation in 1996, and, despite diversification, the legal side of its work remains the core. Its main aim is strategic high-impact litigation across a variety of fields in order to bring about social change beneficial to the Roma.[18] It runs a legal defence programme, assisting local lawyers in their work through funding and expertise, identifying and supporting cases that raise an issue of general public interest, with a wider impact on existing jurisprudence. The Legal department trains local lawyers in the various countries in the techniques of high impact litigation, such as the selection of cases, international treaties and jurisprudence upon which they can draw in their arguments, as well as running regular workshops on the technique of testing. As a result of their work, a sizeable network of lawyers trained in and prepared to take such cases on behalf of Romani clients has been formed across the region.

The language an organisation such as the European Roma Rights Center chooses to use in describing its activities also suggests that the most prominent pro-Romani organisation is a devotee of the U.S. belief in litigation as the means to achieving a fairer society. From just one of the many examples available on their website, the now-former Legal Director of the ERRC wrote in an article entitled 'Fighting Discrimination Through the Courts', that, "the only available avenue for recourse to victims of discrimination is often through the courts, where creative lawyers have … persuade[d] judges to issue rulings recognising an enforceable right to be free from discrimination."[19] Such opining is no surprise when the majority of money (at least in the early days) and of influential lawyers in the region are American (as Ms. Garland is), American- trained or the recipients of training workshops by these U.S. or U.S.-trained lawyers. Theodore Shaw, for example,

[18] In their own words, their "core work" is "to initiate impact human rights litigation on behalf of Roma before domestic and international courts to achieve the following: a) encourage more interest among local lawyers for Roma rights litigation, b) generate judicial opinions which expand human rights jurisprudence, and c) ultimately, bring about social change on a scale which would benefit Roma throughout Europe." http://www.errc.org/Archivum_index.php

[19] Gloria Jean Garland, *Fighting Discrimination Through the Courts* 1-2 ROMA RIGHTS (2003). http://lists.errc.org/rr_nr1-2_2003/noteb8.shtml

currently President of the NCAAP Legal Defense Fund, sits on the ERRC Legal Advisory Panel and has been a familiar face in Budapest.[20]

Moreover, the focus has also been similar. Much of the work of the ERRC is an attempt to combat a form of segregation in education. Across the whole region, Romani children are overwhelmingly placed in schools for the mentally-handicapped, known as Special Schools, on the basis of their ethnicity. The case of *Ostrava* – a small Czech town – still pending before the ECHR, was one of the first major pieces of impact legislation concerning the Roma and provides an illustration of the transplantation of strategy, focus and technique.

In 1999 there were 8 Special Schools in the district of Ostrava. The ERRC spent months collecting statistical data from every primary school in the area, both special and basic, and got each to sign a document detailing the number of Romani and non-Romani pupils. The data results showed that a Romani child was 27 times more likely to be in a special school than a non-Romani child. On the basis of the evidence collected and the expert opinion of statistical experts in the US that no other factor but race could explain the disparity, the Czech government was moved to concede that more than 75% of Romani children are in schools for the mentally-retarded, although it denied that racial discrimination is a motive in placing them there. In October 1999, the Constitutional Court dismissed the twelve cases brought on behalf of Romani pupils from Ostrava's special schools. While the Court acknowledged the "persuasiveness of the Applicants' arguments", it did not accept the use of statistical data, failing to find for the applicants because it deemed itself not competent to consider evidence demonstrating a pattern or practice of racial discrimination but could only deal with individual legal acts. This case is pending before the Strasbourg court and if successful, could hasten the government's hand in ending the *de facto* segregation of Roma in education.

Moreover, more recently on 7 October 2004, in a similar case to *Brown*, the Budapest Metropolitan Court of Appeals upheld the first instance court decision ordering the local governments of Tizatarján and Hejőkürt to pay 3,650,000 Forints (approximately 15,000 euros) to nine families whose children were unlawfully kept in a segregated classroom and taught a special i.e. inferior curriculum by an unqualified teacher, in breach of the Hungarian Public Education Act.[21] The

[20] Moreover, the travel is not simply one-way; the Columbia Public Interest Law Initiative played host in 1997 to a Working Group Luncheon, for example, to which Romani rights activists travelled from CEE to hear the insights of prominent U.S. civil rights activists, such as Jack Greenberg and Ted Shaw. A transcript of the meeting is available at http://www.pili.org/publications/roma/luncheon.html

[21] 'School Segregation Declared Unlawful by Hungarian Courts', http://www.errc.org/cikk.php?cikk=2024

Budapest court took up the applicants' argument that as a result of their segregation the children had suffered psychological harm.

Similar cases are pending in the domestic courts of both Croatia and Bulgaria and across the region the automatic placing of Romani children in special schools is being challenged through the courts. Further, a long list of impact litigation concerning discrimination against Roma in access to goods and services, such as housing and health care, in addition to education, concerning racially-motivated violence against Roma, and immigration and asylum cases is pending in Bulgaria, Czech Republic, Greece, Hungary, Romania, Serbia and Slovakia.[22]

Whilst the aim of the litigation is to achieve redress in domestic courts, on the basis that domestic judgements are more likely to have an effect on social change and will provide quicker redress to the victims, the Romani civil rights movement has become practised at taking cases to international bodies, mainly the ECHR. A series of cases from the UK concerning Article 8 rights, the right to housing, has seen it established that Roma have a distinct way of life and that there is a positive obligation upon the state to facilitate that.[23] While the margin of appreciation has thus far protected the UK government, the vote of 5-4 in the latest group of cases, known as *Chapman v. the UK*[24], means that their margin is diminishing and is likely to be overturned in a subsequent case.

A second focus of Romani rights litigation has been the demand for thorough investigations into racially-motivated violence against Roma and activists were recently responsible for the first-ever finding by the Strasbourg Court of a breach of Article 14 in this regard in February this year. In *Nachova and others v. Bulgaria*[25], the Court found that the respondent had failed to show that the killing of two Romani men by military police officers and its subsequent lack of investigation into their deaths was not racially motivated. In finding a violation of Article 14 in conjunction with Article 2, the Court appeared to accept the arguments in the amicus brief submitted by the ERRC in relation to changing standards of the burden of proof within a human rights context.

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[22] For lists of cases pending according to country, see http://www.errc.org/Archivum_index.php and for a consideration of segregation and de-segregation as it relates to Roma, see special issue of ROMA RIGHTS 3-4 2002. The volume contains an article in celebration of *Brown*.

[23] *Buckley v. the UK*, Judgement of 25th September 1996, http://www.echr.coe.int/Hudoc.htm for ECtHR case-law.

[24] Judgement of 18th January 2001. See also Luke Clements, 'An emerging consensus on the special needs of minorities: the lessons of *Chapman v. UK*' 2-3 ROMA RIGHTS 90 (2001).

[25] Judgement of 26th February 2004. For a detailed description of the ERRC amicus brief, Branimir Pleše, 'The Strasbourg Court Finally Addresses Racial Discrimination' 1 ROMA RIGHTS 109 (2004)

II. Testing

In addition to the use of statistical evidence, testing is taking off in CEE.[26] This is due in no small part to the training workshops held up the ERRC around the region, often benefiting from the presence of US experts. Testing is seen as a major weapon in tackling anti-Romani discrimination. In addition to being used as evidence in actual lawsuits, mapping the extent and nature of discrimination across places, areas of economic life and actual groups – identifying the beast, so to speak – it can provide understandable and compelling evidence of the persistence of inequality and put pressure on the authorities to act. For this to be the case, however, there needs to be a consensus within society that there is a beast out there in the first place. This is not the case in many CEE countries in relation to the Roma. While statistical evidence collected and collated by NGOs can increasingly be used before the courts and to embarrass governments through international publication, as well as obviously providing useful information for the plotting of any civil rights strategy, it is unlikely to bring much in terms of the general public. Even if it is widely accepted that inequality exists, it is unlikely to be deemed a beast at all.

Furthermore, statistical surveys, to be really useful, need to be big and that takes a level of resources and expertise that is difficult for NGOs in CEE to muster. Moreover, in a number of the countries of CEE, the collection of ethnic data is severely restricted by strict consent rules and as such, it is extremely difficult for activists to collate sophisticated ethnic statistics in order to document discrimination.[27] The value of testing is that it is also contextual in a detailed way; it can show that discrimination in access to housing is greater in segregated areas than in integrated areas, that there is more discrimination in access to public places in rural areas than big cities etc. It provides a textured analysis.

But testing also has the added benefit of telling an individual story and for this reason is ideally suited to application in CEE. Testing, in the words of one US expert, "generates studies that are stories".[28] Because testing shows through direct

[26] The Hungarian Legal Defence Bureau for National and Ethnic Minorities (NEKI) has been applying testing in response to complaints of discrimination by Roma since 1997 and has knocked up a number of victories before Hungarian courts and in out-of-court settlements. BEA BODROGI, TESTING FOR DISCRIMINATION: IDENTIFYING AND PROSECUTING HUMAN RIGHTS ABUSES. NEW TACTICS IN HUMAN RIGHTS (2003); download http://www.newtactics.org. The US is explicitly recognised as the source of the tool.

[27] Moreover, with widespread under-reporting of Romani population numbers by national authorities it is difficult to know their proportion of the wider population, without the inevitable attendant difficulties of deciding who is Romani. See ROMA RIGHTS 2/2004 for a special issue on Roma and ethnic statistics.

[28] M. Benedick cited in Fix and Turner, 'Measuring Racial and Ethnic Discrimination in America' 11.

comparison equals being treated unequally, it has a tremendous narrative force and is something that the general public can easily recognise and understand. Its technique is transparent and one needs no knowledge of statistics in order to understand it. It has the potential to create Rortyan 'sad sentimental stories'[29], which could be of vital importance in challenging the apathy with which the majority approach the now well-documented discrimination against Roma.

In producing both figures and the stories behind the numbers, testing appeals to both the minds and hearts of the general public. It can help not only to show that there is 'something' out there, but can begin to persuade that that 'something' is in fact a beast. In CEE, it can show that Roma can be equals, that there are young (testers are invariably young), educated, presentable, well-spoken Roma who can stand alongside their peers. The power of this should not be under-estimated. It is such ability to empathise that will effect real and lasting change.

III. The importance of legislation: Bulgaria, the Race Directive and EU accession

The importance of having the appropriate laws in place – paralleled in the battle for the 1964 Civil Rights Act to sit alongside Constitutional protection – has also not been lost on the Romani civil rights movement. In September 2003, for example, following intensive lobbying by the ERRC and national Romani organisations, the Bulgarian parliament adopted a comprehensive anti-discrimination law that came into force on 1st January this year. Crucially, it allows for the shift of the burden of proof once prima facie cases of discrimination have been established, opening the door for the use of statistical evidence. The Romani civil rights movement has already chalked up five victories under the new law.[30] Pro-Romani civil rights organisations also lobbied hard for the adoption of the EU 2000 Race Directive, which fundamentally overhauls the way in which Member State courts deal with cases of discrimination and racially-motivated crime.

IV. Substance v. strategy

In arguing that the influence of the Black struggle for equality in the US has had a profound influence upon the civil rights momentum just under way in CEE, it

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[29] Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in: ON HUMAN RIGHTS (SHUTE AND HURLEY EDS. 1993).

[30] ERRC Press Release, 30 September 2004: 'First Five Roma Rights Victories under New Bulgarian Equality Law'. http://www.errc.org/cikk.php?cikk=2022

needs to be noted that it differs also; some features of the US movement have proved untransplantable – the early co-operation between civil rights activists and the labour unions, the important involvement of the churches of the south or class-action lawsuits, for example – and crucial parts of the strategy are the region's own. The one feature most worth mentioning in this regard is the willingness of Romani rights activists to use international bodies where domestic remedies fail. In addition to the many cases brought and being brought before the European Court of Human Rights, there have been successes before CAT, the Human Rights Committee and persistent lobbying efforts have produced repeated statements of condemnation from all the major international human rights committees.[31]

It is important also to mention that the U.S. has not been of course the only influence on the human rights movement in the region. Strasbourg case-law and the considerable moral authority it has garnered over the last 50 years have been important, as have the inspiration of international standards, such as the ICERD, where domestic provisions are absent or woeful. And recently, of course, the 2000 EU Race Directive provides standards that members and prospective members of the EU must achieve in their legislation – Bulgaria's decision to adopt its new anti-discrimination law is directly related to the Race Directive and its position in the *acquis* – and is now probably the most progressive legal statement on racial discrimination in force, moving beyond the jurisprudence of both the ECtHR and the US Supreme Court.

Yet while the substantive standards are being set by the Council of Europe and the EU, without the inspiration of the US civil rights movement, its Romani equivalent would arguably not be notching up the successes it is now achieving in the courts and legislatures.

E. Too much law?

While this paper began as a celebration of the US civil rights movement, there are increasing reasons to question whether the legal strategy it so exemplifies has really achieved what it intended and claimed. So entrenched does the US approach now seem that it feels almost absurd to question it: can separate be anything but

[31] Although the US civil rights movement has never, as far as the author is aware, taken a case to a regional or international court, activists were well aware, however, of the benefit of using international public opinion to aid them in their cause. At the height of the Birmingham, Alabama, protests in May 1963, 1400 anti-American commentaries were published in the worldwide media. The propaganda value of oppressed Black citizens to the Soviet Union gave renewed impetus at the highest levels of government to end inequality. VERNEY, *supra*, note 5, at 40.

unequal? Probably not. But this does not necessarily imply the flipside – that equality equals integration, or that the courts are the best place to pursue it. The 50th anniversary of *Brown* is a good point to question the real legacy of this landmark piece of litigation. For if the legal approach has not created lasting change here, perhaps the Romani movement has been taught the wrong lessons from the US.

Much has now been written by US commentators on the legacy of *Brown*, particularly in this anniversary year and there is no time to examine it in any detail, except to say that *Brown* has not achieved de-segregation in US schools. The 1990s marked a reversal of the trend towards integration. Segregation is on the increase, not just through the fact of residential segregation but through techniques such as ability tracking which place a disproportionate number of African-American and Latino children in special education classes.[32]

Stephen Halpern has forcefully argued that it is the excessive concentration on the legal approach that is responsible for this.[33] He makes the case that the factors that adversely affect minority schooling and the reforms needed to overcome them fit poorly with solutions available through legal rights. Should segregation really be the sole focus of civil rights? He notes that litigation strategies continued to focus on de-segregation long after so many inner city areas were so overwhelmingly non-white that an inability to find white children with whom to integrate rendered the policy close to meaningless. Halpern's analysis suggests that the real point of all the effort – the improvement of Black lives through equality with the majority – became buried under a need to formulate the issues in court-friendly terms. The law is good for many things, but it is inevitably distorting.[34]

Somewhere along the way, the goals were re-defined and the legal initiatives became divorced from the historic struggle for access to education as a means of achieving greater political or economic power. The dominance of lawyers in the civil rights movement has meant that non-lawyers have lost the opportunity to

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[32] Beth A. Ferri and David J. Connor, 'Special Education and the Subverting of Brown' 8 *Journal of Gender, Race and Justice* 57 (2004).

[33] HALPERN, *supra*, note 9.

[34] For example, Halpern argues that enforcement litigation of Title VI has tended to concentrate not on the substantive rights of the provisions but on the procedures for processing complaints of discrimination; *Adams v.Bell*, 711 F.2d 179 (D.C. Cir. 1983) changed the way in which the OCR processed complaints of discrimination but did not affect the substantive rights in any way. "The injustice that black children experience… is hardly a procedural injustice. It is substantive... It is the gross inadequacy of the substance, quality, character and end results of the public education provided to the mass of black children that constitutes the central injustice to which they are subjected." *Id.*, 309.

define both the problems and the remedies. They have lost control over the public discourse on racial discrimination. By failing to take the public along with them on their quest, the lawyers have risked their efforts being perceived as imposition by (judicial) force and fuelled an unwillingness to support implementing policies that will ensure actual changes to people's lives.

Litigation will not change hearts and minds, quickly if at all. And this should be a warning to those in the Romani civil rights movement that are pursuing litigation as the dominant approach. There is little evidence that their efforts are changing public opinion towards Roma in CEE. While cases such as *Ostrava* seek to end the indirect discrimination of placing Roma in schools for the mentally-handicapped are arguably concerned as much about equality of education received as it is about physical segregation from white children, their high profile has arguably had little impact on the way in which Roma are perceived by the majority, and a successful outcome for *Ostrava* in Strasbourg is unlikely to change that.

Moreover, not only has the legal approach failed to effect change but, as Halpern has argued, an excessive concentration on the law has meant a failure to address the real issues that perpetuate inequality by masking those continuing inequalities with the illusion of progress.[35]

What the lesson of the US movement tells us is that the political is more important than what the courts are doing. Halpern suggests that the 1964 Civil Rights Act was introduced precisely because of the recognition of the political classes of the failure to implement de-segregation through the courts. The hope was that giving federal agencies the ability to cut off funding where racial discrimination persisted would provide an effective alternative to litigation. It did not, and the reason it did not is critical. Title VI has been no more successful because the envisaged enforcement of termination of federal funding has rarely been used because, in Halpern's own words, "[t]here is a broad political consensus that the racial inequalities that pervade our nation's 'desegregated' educational system are not the result of racial discrimination, or that if they are, the wrongs do not warrant the disruptions that would be occasioned by interrupting the flow of federal dollars."[36] Legislation and litigation are weak weapons when confronted with a lack of political will.

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[35] Halpern cites a study by two educational specialists, who found that the poor academic achievement of black children was a combination of any number of factors that included low wages and high unemployment among black men, inappropriate academic evaluation and placement, poverty and poor schools, poor physical health, high rates of teenage pregnancy, instability in home life, social isolation of the black poor from other classes, the physical deterioration of poor urban neighbourhoods, and so on. D.S. Strickland and C. Ascher, 'Low-income African American Children and Public Schooling', in *Handbook of Research on Curriculum*. (Philip W. Jackson ed., 1992); cited by HALPERN *Id*. 11-12.

[36] HALPERN, *Id*. 295.

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A myth has been created that the advances in civil rights movement came about primarily through litigation – the title of Jack Greenberg's memoirs is 'Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution' – and it appears to be the accepted account in both popular and scholarly imagination. The great legal success in achieving victory in *Brown* perpetuated the illusion that the law was the best means to fight the equality struggle. It is well known that the verdict itself, in merely calling for desegregation 'with all deliberate speed', was not as radical as it is now popularly perceived to be, and the little girl on whose behalf the case was brought, did not, despite her victory, get to attend a de-segregated school. The costs of victory in *Brown*, in terms of other ways of thinking about achieving meaningful integration, mean it would not be hyperbolic to label it Pyrrhic.[37]

Yet, the US civil rights movement was not solely a legal one. An image of it as overwhelmingly focused on litigation or unified in this strategic approach would deny the intense debate and tensions within the movement over the appropriate focus.

If the dominating focus on the law and litigation was not 100% supported, it is not 100% reality either. The civil rights movement was made up of more than simply lawyers and legal approaches. Grassroots actions and protests were also a fundamental part of the civil rights approach, but not in the sense that legal victories stirred the spirit of the wider Black population; such a condescending attitude misses the more complicated way in which legal and grassroots action fed off one another. Protest at the discriminatory treatment of Black workers in the defence industry in 1941 led the President to issue an executive order establishing a Fair Employment Practices Committee to monitor hiring procedures; this was wound-up at the end of the war but the point that mass protest could force change just as effectively as a court ruling had been made.[38] It is unlikely that the Supreme Court would have declared segregation on public transport unconstitutional in 1956 were it not for the Montgomery bus protests that began a year earlier. Furthermore, the importance of personalities such as Martin Luther King, whose ability to inspire crossed the racial line, or the protest marches and the favourable media coverage thereof[39], the poverty reduction programmes, efforts at political

[37] Victory in *Brown*, in line with the truism that one gets what one measures, had the consequence that achieving an equal black-white ratio became the real objective, rather than promoting de-segregation as the means to achieving meaningful equality of opportunity.

[38] VERNEY, *supra*, note 5, at 34.

[39] The position of liberals in the media by choosing to cover the Birmingham protests, in which scenes of police violence against peaceful protesters were beamed into the homes of white middle America,

mobilisation[40], appropriate moral leadership from the top[41], and more all played a fundamental part in producing the forward momentum that led from the regular lynchings and dire situation in the early decades of the twentieth century to the improved situation today, despite the many problems that still exist.

F. Romani political activities

The Romani rights movement is also not without its grassroots and political elements.

Litigation is not the only means through which the Romani civil rights movement is challenging segregation. With echoes of the famous Montgomery Bus protests, the Bulgarian Romani group Organisation Drom, supported by the OSI Roma Participation Programme, took direct action to de-segregate schools in the Vidin area of Bulgaria. Under 'the Vidin Project'[42], for the first time in the school year 2000-2001, about 460 Romani children attended integrated normal schools. The organisation of the project was non-confrontational and involved convincing the directors and teachers of normal schools, Romani and non-Romani parents and the wider community not just of the feasibility of de-segregating the schools but the desirability of doing so. In this they were remarkably successful. Money was raised to pay for buses in order to bus the Romani children to their new schools, bus monitors were found from among parents of the children and educational assistants were hired to work in the normal schools in order to provide the Romani children with assistance in making the leap. The dramatic improvement of the school results for the majority of Romani pupils taking part in the project and also the improved results of the non-Romani children in the classroom has convinced the authorities of the benefits of de-segregation and they have pledged their support for extending the project. The Vidin project has made a real difference to

turned the public tide in favour of civil rights legislation in a way in which litigation probably could not have done.

[40] As part of the 1948 Presidential election, in awareness of the importance of black votes, Truman issued an Executive Order ending segregation in the military; the 66% of African-American votes he secured were crucial in the narrow victory Truman won. VERNEY, *supra*, note 5, at 39.

[41] Histories of the Black civil rights movement nearly always note the personal attitude of the President as extremely significant in affecting real change, not just in terms of introducing new legislation, as Johnson did with the '64 Civil Rights Act, but in terms of changing the attitude of the wider public. Under Roosevelt, lynchings effectively stopped, even though no anti-lynching law was introduced or order given to police forces to crack down on it.

[42] For a description and analysis of the project by two of the activists involved: D. Panayotova and E. Evgeniev, 'Successful Romani Desegregation: The Vidin Case' 3-4 *Roma Rights* 44 (2002).

the lives and future of the Romani children involved and, in bringing the two communities, Romani and non-Romani, together through co-operation or acquiescence in the project, has begun to break down the barriers of mutual dislike and distrust.

Many other smaller grass-roots projects also exist, such as the good work going on to tackle poverty and empower people by self-help groups such as the Hungarian-based Autonómia or the Czech-based Life Together, which provides start-up grants, financial loans and development expertise to Romani communities. The desperate levels of poverty among many Romani communities in the region mean that so-called high impact litigation has little or no impact on the lives of those in whose wider name such cases are brought. Yet, like the legal approach, combating poverty alone is not going to affect lasting change, although in terms of improving lives it is more effective than court cases.

The critical part of any approach is political. However, Roma across CEE have failed to make a sustained assault on mainstream political representation at the national level, with gains in the early 1990s giving away to retreat to reserved minority seats or separate representation structures.[43] While elected representatives are not the only way to influence public policy, the dominant advocacy actors are generally pro-Romani organisations, rather than those that are founded and run by Roma themselves. Effective political mobilisation is thus something that desperately needs to be addressed and it is thus suggested that some of the money used to support local lawyers involved in impact litigation could be better re-directed to supporting Romani grassroots organisations, building political leadership, tackling poverty and empowering individuals at local levels.

G. Concluding Remarks

Although its image is primarily litigious, in reality the US civil rights movement had a number of crucial components in the early years, although Halpern's book appears to suggest that US activists today have allowed themselves to become dominated by the lawyers and their way of approaching problems. The worry in transplantation is that the rich history is left behind and the contemporary problems that beset the U.S. movement today infect the young Romani rights movement, limiting creative thinking about ways to move forward. 1989 also saw the effective rebirth of a pan- Romani political movement and here there are

[43] Peter Vermeersch, 'Roma and the politics of ethnicity in Central Europe: a comparative study of ethnic minority mobilisation in the Czech Republic, Hungary and Slovakia in the 1990s.' (unpublished PhD thesis, University of Leuven, 2002).

attempts to think diffusely about the problems faced and the different ways in which to tackle them. But political mobilisation needs to come about at the national political level if the opportunities and experiences of Roma in their everyday lives are really to change for the better. This is not to say that other strategies do not have their role to play – the transnational political, poverty reduction, direct action and, of course, litigation – but that the main focus must be political, and at the moment, in terms of where the money and emphasis is, it is not.[44]

The main lesson to be learnt from the U.S. movement perhaps is that only sufficient national political consensus recognising the fact of injustice and a willingness to rectify it, or a leader courageous enough to see it, can affect change in the long-term. The end of apartheid did not come about through litigation and the law, clearly, cannot achieve more than the political climate in which it is situated. Litigation is useful where it pursues justice for the individual wronged, but not for effecting wide-scale social change. One of the simple suggestions of this paper is that testing, because of its uses both in litigation and in public education, can remedy some of the failings of the legal approach, but only if it is understood as much more than a technique in the service of litigation.

The issues at stake in campaigning for equality are ultimately questions of public policy and political philosophy, and not easily controllable through legal rights. It is to be hoped that the passionate and idealistic people propelling the nascent Romani civil rights movement in CEE, learn all the lessons from the US experience and don't simply perpetuate the myth that the law can achieve miracles. Halpern has described the self-belief of civil rights lawyers as the "contemporary manifestation of the medieval knight-errant".[45] The conclusion is not that the law has no role to play; but simply, that it cannot be the main game in town for a civil rights movement. Those knights need to come down off their horses, plant their feet on the ground and recognise the limitations of the law.

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[44] The argument is often made that legislation and litigation act as a precursor to change and there is a sense in which this is the case. However, the feeling here is that those who suffer today must be the priority, for it is a luxury of those who themselves do not face discrimination to argue that it is better to prioritise spending on a legal strategy that may or may not pay off in the future. Moreover, there is a fear that the 'precursor to change' argument masks the fact that the law is sexy in comparison with the dirty, difficult and protracted nature of poverty reduction and political horse-trading.

[45] HALPERN, *supra*, note 9, at 310. For a good example of this attitude in relation to Romani rights: James Goldston, *Race discrimination litigation in Europe: problems and perspectives*, ROMA RIGHTS 3 (1998).