

# LIMITED ENFORCEMENT POSSIBILITIES UNDER EUROPEAN ANTI-DISCRIMINATION LEGISLATION – A CASE STUDY OF PROCEDURAL NOVELTIES: *ACTIO POPULARIS* ACTION IN HUNGARY

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## Abstract

Adopted in 2000, the Racial Equality Directive is a new-age human rights instrument whose enforcement mechanism is directly rooted in the national sphere through equality bodies and judicial oversight culminating in preliminary referrals to the European Court of Justice. It is supported by procedural tools that member states were either obliged to introduce in their domestic legal regimes or opted to provide themselves, such as *actio popularis* standing of non-governmental organisations. In the context of the changing political realities at the European level and the shortcomings of the individual justice model under the European Convention on Human Rights, this article looks at the procedural and substantive legal implications of *actio popularis* claims from four angles: (i) to establish what the added value of *actio popularis* standing may be in the context of effective protection against discrimination; (ii) to investigate what consequences *actio popularis* could have in relation to remedies; (iii) to demonstrate that *actio popularis* is especially important in relation to remedying structural discrimination, first and foremost in public education; and (iv) to analyse how *actio popularis* in public education operates in Hungary. It seeks to demonstrate through Hungarian case law that *actio popularis* claims are capable of addressing structural discrimination in civil law and that they are able to secure structural remedies. It argues that *actio popularis* standing also has implications for sanctions, ultimately determining the speed of European integration in public education.

## 1 Introduction

It is common wisdom among human rights lawyers – including anti-discrimination lawyers – that any human rights instrument is worth only as much as its enforcement mechanism. This, of course, is true for any international, regional or domestic legal regime established to safeguard any particular social interest or value. However, bearing in mind the sheer volume and nature of discrimination – i.e. that it is deep-rooted in human nature, recurring, institutional and structural – the quality and efficacy of the mechanism enforcing the obligation of equal treatment is of paramount importance. Domestic legal regimes pertaining to racial discrimination within the European Union, which for a long time were shaped by constitutional equality provisions, Article 14 of the European Convention on Human Rights (ECHR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) were all given new impetus in 2000 when the Racial Equality Directive (RED) was adopted.

Given the key role of enforcement mechanisms in the international human rights framework, it is worth emphasising RED's similarities in scope, principles and concepts – and even in wording – with the ICERD. Arguably, the RED goes further than the ICERD, especially in relation to enforcement. First and foremost, its enforcement mechanism is directly rooted in the national sphere in a twofold manner. Under Article 13, national equality bodies must be established to broadly oversee and ensure its implementation – a feature of new-age human rights instruments such as the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention

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Against Torture. Moreover, national level enforcement is complemented by judicial oversight at the level of the Court of Justice of the European Union (ECJ), to which preliminary questions on the application of the RED can be referred by domestic courts, which are then bound by the judgment of the ECJ. Second, the enforcement of rights arising from the RED is supported by further procedural tools that member states were either obliged to introduce in their domestic legal regimes – such as the reversal of the burden of proof, the right of NGOs to represent or support victims of discrimination and protection from victimisation – or opted to provide of their own accord, namely the standing of NGOs to bring discrimination claims in their own name (*actio popularis*).

The extent of data available at the European level depends on the grounds and field of discrimination concerned. Structural and systemic discrimination against Roma children in public education is one of the best-documented issues. Arguably, the extensive research data on this issue are not the result of mere coincidence but of the gravity of discrimination and the paramount effect that access to good quality public education has on access to and equal treatment in other fields and, above all, on integration.

The right to education is an empowerment right: it not only provides citizens with the skills necessary to partake in democratic societies (one needs to be able to read and write in order to vote) but also enables them to find a suitable job and make a living. As the UN Economic and Social Council has noted, education ‘is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities’.<sup>1</sup> The right to education is also a special right in that it is coupled with children’s obligation to attend school and, to complement this, the member states’ duty to guarantee racial and ethnic minority children full respect of their rights to and in education, free of discrimination. It is in this context that adequate and preventive remedies are called for against potential violations of the right to education.

Discrimination often does not surface at the individual level: it is a reflection of long-standing, structural and institutional concerns reflecting deficiencies in political, social and economic processes. Thus, it cannot be prevented or remedied by legal means alone, and it may also be impossible to remedy such discrimination at the individual level. However, given the dissuasive effect of legal remedies and their ability to redress the wrong done to victims, and given the imperative inherent in societies governed by the rule of law to express individual or group needs through the language of law, efforts are being made to improve sanctions as well as enforcement mechanisms.

Following a short summary of recent practical and theoretical developments at the European level in relation to remedies, this article looks at the procedural and substantive legal implications of *actio popularis* claims from four angles: (i) to establish what the added value of *actio popularis* standing may be in the context of effective protection against discrimination; (ii) to investigate what consequences *actio popularis* could have in relation to remedies; (iii) to demonstrate that *actio popularis* is especially important in relation to remedying structural discrimination, first and foremost in public education; and (iv) to analyse how *actio popularis* in public education operates in Hungary.

## 2 Enforcement Models

McCrudden distinguishes between three concepts of equality and – accordingly – three distinct models for enforcing anti-discrimination law. In practice, protection provided in law is available in the framework of the individual justice model, the group justice model and the equality of participation model.<sup>2</sup> The individual justice model typically provides justice to victims who challenge discriminatory treatment in judicial or administrative proceedings (the later most often before labour or consumer protection inspectorates). The main focus of this model is on ‘eliminating from decisions

<sup>1</sup> General Comment No. 13 of the Committee on Economic, Social and Cultural Rights (ECOSOC), *The right to education (Article 13)*, 8 December 1999, E/C.12/1999/10, at 1.

<sup>2</sup> C. McCrudden, ‘National Legal Remedies for Racial Inequality’ in S. Fredman and P. Alston (eds.), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001) at 253-259.

illegitimate considerations' based, inter alia, on race and ethnicity. It is based on merit and achievement and is 'markedly individualistic'. This model proceeds from a twin focus on the intention of the perpetrator and the victim's sense of grievance. Judgment does not rely on complex socio-economic facts. Under the individual justice model, three main elements can be identified: a criminal justice model, a civil justice model and an enforcement agency model. In the first model, complaints of discrimination are treated under criminal law, while the second perceives them as matters of civil law. The enforcement agency model – which appears in Article 13 of the RED – seeks to ensure that individual grievances are remedied with the assistance of a specialised equality or human rights body that typically has investigatory powers in assisting victims of discrimination.

As Fredman points out, both the civil and criminal remedies available in this system are retrospective, individual and based on proof of breach or fault. Moreover, in this system, perpetrators take a defensive approach and are not encouraged or required to correct the institutional structure. In addition, claims are ad hoc, which makes enforcement patchy and random.

The group justice model concentrates on the outcomes of the decision-making process from a redistributive angle. It breaks away from the individual victim focus and seeks to redress discrimination suffered by groups or classes through class, collective or representative action. Given that this model's main preoccupation is with the 'relative position of groups and classes', it requires law to conceptualise discrimination as including indirect discrimination. Under this model, group-based remedies are sought, including affirmative/positive action. This approach signals a shift from negative to positive duties – from non-discrimination to the provision of equal opportunities. In some countries, the focus on groups has led to giving standing to institutional plaintiffs 'without the need for an individual victim' (*actio popularis*). Significantly, an agency's investigatory powers may also serve the group justice model by unveiling systemic and institutional discrimination.

The third model – equality as participation – requires that policies of non-discrimination are woven 'into the fabric of decision-making' at the governmental, company and local level by 'involving the affected groups themselves'. This process envisages direct participation from all government departments and strong links with civil society. This model therefore focuses on pluralism and diversity. The statutory duty in the United Kingdom to promote equal treatment is the procedural solution that comes closest to putting *equality as participation* into practice. It is therefore disheartening to read Fredman's account of criticism concerning this truly promising and proactive remedy: that in under a decade it has become a simple and formalistic management tool, chiefly due to a lack of political commitment; that there is a participatory vacuum from the side of protected groups; that it has already created 'consultation fatigue'; that the 'duty has primarily been manifested in procedure and paperwork; and that it is regarded as a policy-based, discretionary mode of delivering equality.'<sup>3</sup>

These enforcement models are rarely implemented in their pure form. McCrudden argues that the RED adopts an approach that is fundamentally based on the individual justice model, regardless of several elements that are meant to overcome this model's limitations, including the prohibition of indirect discrimination and the provision of broader standing, reversed burden of proof and protection from victimisation.<sup>4</sup> Under Articles 11 and 12, which pertain to social dialogue and dialogue with non-governmental organisations, equality as participation is only faintly present.

Under Article 8, non-governmental organisations and trade unions are entitled to standing only as long as they act on behalf or in support of actual victims of discrimination. This is usually ensured by giving NGOs the right to represent victims in court. In some countries, they can also act as friends of the court (*amicus curiae*). In some member states, trade unions have for some time had the right to act on behalf of their members. It is a positive step that, as a result of the transposition of Article 8, some countries allow

<sup>3</sup> S. Fredman, 'Making a Difference: The Promises and Perils of Positive Duties in the Equality Field' (2008) *European Anti-discrimination Law Review* 6-7 at 45-49.

<sup>4</sup> McCrudden, above n. 2, at 294-297.

any NGO or trade union employee to represent victims in court. However, Article 8 does not impose an obligation on member states to provide for representative, collective or group standing. On the other hand, the RED also does not prevent member states from providing for *actio popularis* under national law. Moreover, bearing in mind the systemic and structural nature of discrimination, it could certainly be argued that providing some form of group standing is necessary.

### 3 Theoretical and Practical Groundwork at the European Level

Since the adoption of the RED in 2000, the bulk of analysis and innovative initiatives have – perhaps not surprisingly – originated in the United Kingdom, which has the longest-standing legislation in the field of non-discrimination. Far less has been written and said by continental European academics and practitioners on sanctions (Article 15 of the RED) and the enforcement mechanism in general (Articles 7, 8 and 13 of the RED). What has been said has focused mainly or solely on the field of employment.

In her 2005 report produced for the European Network of Legal Experts in the Non-Discrimination Field, Christa Tobler restates the relevant legal principles, highlights inventive domestic solutions and analyses the upper limits of compensation.<sup>5</sup> Those conclusions from her report that are relevant here include:

- The term ‘sanctions’ as used in the RED refers mainly to remedies in the sense of relief and redress to victims of discrimination (remedies in a substantive sense).
- Under general EC law and case law developed under the European Convention on Human Rights (ECHR), remedies that are made available under national law for breach of the relevant legal provisions must provide adequate judicial protection.
- Remedies must be of a personal nature.
- Remedies must be effective, proportionate and dissuasive – the meaning of these concepts must be determined in concrete cases.
- Few member states have developed (elements of) a forward-looking and non-individual approach to remedies that address, inter alia, exclusion or participation in public procurement.

In 2004, Barbara Cohen assessed both the procedural (existence of administrative or judicial arrangements and specialised bodies) and substantive (actual sanctions and powers) aspects of enforcement mechanisms in the field of employment, using Great Britain and Northern Ireland as examples.<sup>6</sup> Her words remind us of the importance and impact of the procedural aspects of remedies in relation to their substantive aspects:

To be effective, remedies and sanctions must achieve the desired outcome; to be proportionate, they must adequately reflect the gravity, nature and extent of the loss and/or harm; and to be dissuasive, sanctions must deter future acts of discrimination. Whatever may be written into national laws or procedures, *sanctions will be none of these if there are no effective, simple, swift and sustained mechanisms for enforcement.* [emphasis added]

Fredman and Bell have described the changing enforcement norm in the United Kingdom, namely the passage from individual litigation to the imposition on public authorities of the statutory duty to promote equal treatment,<sup>7</sup> while Christopher McCrudden has highlighted the beneficial effects of using anti-discrimination clauses in public procurement.<sup>8</sup>

<sup>5</sup> C. Tobler, *Remedies and Sanctions in EC Non-Discrimination Law* (European Communities 2005).

<sup>6</sup> B. Cohen, ‘Remedies and Sanctions for Discrimination in Working Life under the EC Anti-Discrimination Directives’ in J. Cormack (ed.), *Discrimination in Working Life: Remedies and Enforcement* – Report of the 4th Specialised Equality Bodies Experts Meeting.

<sup>7</sup> Fredman, above n. 3, and Mark Bell, ‘Duties to promote equality: a new horizon for positive action?’ in *Putting Equality into Practice: What role for positive action?* (European Commission, March 2007).

<sup>8</sup> C. McCrudden and S. Prechal, *The Concepts of Equality and Non-Discrimination in Europe* (2009);



The European Network of Legal Experts, on the other hand, has reported on procedural novelties, such as the possibility of instituting *actio popularis* actions in certain member states before both courts and specialised equality bodies.<sup>9</sup> It has also published summaries of national legal regimes relating to sanctions and enforcement. Article 7(2) of the RED requires member states to provide standing to NGOs engaged in judicial or administrative procedures on behalf or in support of victims of discrimination. In line with the relatively high number of member states that have so far failed to properly transpose this provision, there is little willingness to go beyond the minimum requirements of NGO standing. Only a handful of member states allow NGOs and equality bodies to take action in the public interest without representing an individual victim. It is noteworthy that member states seem more willing to grant NGOs the right to take representative action on the ground of disability.<sup>10</sup>

Startlingly, only a few national experts (in Italy and Finland) consider ‘the sanctions in their country to be effective, proportionate and dissuasive’. Across the European Union as ‘a whole, no single enforcement system appears to be truly encompassing. Essentially, they are all based on the individualistic and remedial – rather than a preventive – approach’.<sup>11</sup> Even those that provide specific sanctions to tackle the issue of structural discrimination – such as Cyprus, the Netherlands and Ireland – often see these sanctions unused.

Based on impressions gathered from country reports inquiring into the compliance of national legislation with the RED, it appears that there is a four-tier enforcement system at the EU level:

- 1) Standard setters – the United Kingdom: anti-discrimination legislation dating from well before the RED’s adoption; has tried the models of individual justice, group justice (formal investigations and non-discrimination notices by the Commission on Racial Equality) and, last of all, the participatory model through the statutory duty to promote equal treatment.
- 2) Early birds – the Netherlands, Finland, Ireland and Sweden: relatively long-standing equality bodies with solid case law.
- 3) Good students – France, Bulgaria and Hungary: strong equality bodies and procedural novelties such as situation testing and/or *actio popularis*.
- 4) Bad students – member states that are lagging behind in the transposition of the RED or the implementation of Articles 7 and 13 or that have established weak bodies with enforcement systems focusing solely on the provision of individual justice.

These findings reveal a tension between the nature of discrimination and the enforcement mechanisms available at the EU level. They certainly raise the question what protection from discrimination is worth in the European Union and what can be done to achieve the highest level of protection with the available tools.

#### 4 Group Justice at Procedural Level: Actio Popularis Claims

Certain procedural novelties capable of serving group justice needs have not been introduced in standard setter or early bird member states – despite trade union and NGO lobbying – but have instead sprung up in new member states. Moreover, during the recent review of anti-discrimination legislation, the UK government indicated

C. McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press 2007).

<sup>9</sup> B. Bodrogi, ‘Legal Standing: The Practical Experience of a Hungarian Organisation’ (2007) *European Anti-Discrimination Law Review* 5 at 23-31.

<sup>10</sup> *Developing Anti-Discrimination Law in Europe: The 25 EU Member States Compared* (European Communities 2007) at 55-57.

<sup>11</sup> *Id.*, at 60-63.

its unwillingness to provide for group standing, although in cases where analogous procedures are allowed – such as in the judicial review of administrative practices – their efficacy has been proven. See, for example, the *Prague Airport* case challenging discriminatory immigration practices towards Czech Roma.<sup>12</sup>

*Actio popularis* action available to NGOs and specialised bodies has been introduced by national legislation transposing the European Union's anti-discrimination directives in Bulgaria, Hungary and Romania. Similar standing – including class action – is available in many member states in the field of consumer protection, competition law, animal rights and environmental rights. For instance, Hungarian anti-discrimination law allows *actio popularis* claims to be instituted by NGOs representing the public interest, provided that the discrimination is based on a protected ground that is an essential characteristic of the individual and that the discrimination affects a larger group of potential victims who cannot be accurately identified.<sup>13</sup> Curiously, however, the great majority of member states did not feel the need to introduce such procedural novelties in the field of non-discrimination. If they introduced some kind of group action at all, such as class actions in Austria, they did so in respect of protected grounds other than race.<sup>14</sup>

The following characteristics make *actio popularis* a unique and highly attractive tool. There is no need for an individual victim, as the case is brought by NGOs demonstrating an interest in rights protection. In addition, instead of focusing on injustices suffered by individual victims, it focuses on patterns, trends and scenarios of discrimination. Thus, *actio popularis* is ideal for tackling institutional, structural or de facto discrimination. In lieu of an individual client, there only needs to be a minimal risk of victimisation – in fact no client needs to be identified for the case. Not only do such cases not revolve around the previous conduct and personal qualities of the victim of discrimination, requiring him or her to establish or defend his or her good character, but it is virtually impossible to make arguments that remain at the individual/micro level instead of spilling over to the group/macro level.

In *actio popularis* cases, perennial costs, such as maintaining contact with the client or indeed maintaining a client service for case selection, can be saved. Moreover, considering the number of potential clients and the extensive fact-finding that a case relying on individual victims requires, *actio popularis* claims can produce huge savings during the preparatory phase and later on during trial (bearing in mind the costs of travel, communications, victim support and legal representation) while still showing the gravity and extent of discrimination that is usually at stake in such cases. Given that the evidence used in *actio popularis* cases is based primarily on documents obtained from the defendants pertaining to their internal decision-making processes or on statistics collected prior to or during the trial phase, virtually no witnesses need to be heard – except for (forensic) experts – unless evidence is based on situation testing.

*Actio popularis* claims can be orchestrated or designed in any fashion NGOs choose. They can be limited or broadened, or constructed in such a way as to steer the public discourse away from hackneyed, stereotypical arguments. Furthermore, *actio popularis* claims provide excellent opportunities for advocacy, awareness-raising and lobbying. No energy and funding needs to be allocated to find and support a victim who is ready and willing to risk his or her emotional well-being by appearing in the media and reliving discrimination during every public testimony he or she makes – whether before MPs or local decision-makers. Lastly, such claims minimise the risk of miscommunication. Instead of an emotionally involved victim with no media experience, the case can be advocated by the most suitable NGO activist.

There are several EU member states that allow collective actions under the Revised European Social Charter (ESC), including France, Greece, Finland, Sweden, Belgium, Ireland, Italy, the Netherlands and Portugal. Arguments based on the RED can also be raised in proceedings under the ESC.<sup>15</sup>

<sup>12</sup> *R v. Immigration Officer at Prague Airport and another ex parte ERRC and others*, [2004] UKHL 55.

<sup>13</sup> Article 20 of the Act on Equal Treatment and the Promotion of Equal Opportunities, Act No. 125 of 2003.

<sup>14</sup> Bodrogi, above n. 9, at 29-30.

<sup>15</sup> For details of proceedings and pending collective complaints, see: <<http://www.coe.int/T/DGHL/Monitoring/SocialCharter>>.

## 5 Individual Remedies for Segregation in Public Education: ECtHR Case Law

*Actio popularis* action is not allowed at the European Court of Human Rights (ECtHR), whose enforcement mechanism is based on the individual justice model. The limitations of this model will be discussed below.

As Rebasti and Vierucci recall, however, there seems to be an opening in the direction of legal actions in defence of a collective or general interest at the international level – notably before the Inter-American Commission on Human Rights and the African Court on Human and Peoples Rights.<sup>16</sup> They suggest that changes will also occur at the ECtHR, initially in the fields of the environment, development and health, and cite *Gorraiz Lizarraga and Others v. Spain* as an example.<sup>17</sup> In this case, the ECtHR admitted a complaint by individuals who had not themselves exhausted local remedies but whose rights were taken up at the national level by the association that was their co-applicant. The Court stated that:

in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. That is precisely the situation that obtained in the present case. The Court cannot disregard that fact when interpreting the concept of "victim". Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory.<sup>18</sup>

As in the case of the standing provided to both individual women and the organisation representing their interests in the *Dublin Well Woman* case, the indication is that NGO standing is dependent on the (potential) victims' membership of the organisation concerned.<sup>19</sup> Would the Court be ready to apply this standing to racial and ethnic minorities in cases of discrimination? If so, how would this apply to ethnic minorities, who are discriminated against based on their real or perceived membership of their own ethnic minority community/group? Given the Court's approach to Roma rights as ethnic minority group rights – from *Chapman* to *Orsus II* – it could be argued that standing could be secured on the basis of membership of a legal defence organisation.<sup>20</sup> However, this has not been tested yet. Instead, Roma applicants and Roma rights NGOs have filed applications on behalf of various numbers of applicants, reaching as high as eighteen.

During the last three years, the ECtHR has delivered three major final judgments relating to the segregation of Roma children in public education. *D.H. and Others v. the Czech Republic* dealt with segregation in special remedial schools resulting from the misdiagnosis of Roma children as mentally disabled. *Sampanis and Others v. Greece* focused on segregation in a separate, lower-quality school building, whereas *Orsus and Others v. Croatia* examined segregation in separate classes (allegedly in order to address language deficiencies and minority language needs).<sup>21</sup> In all three final judgments, the Court found ethnicity-based (indirect) discrimination against Roma children in their enjoyment of the right to public education. Instead of dwelling on theoretical issues and the de facto incompatibility of these judgments with the RED, this section focuses on the shortcomings of the individual justice model demonstrated by these rulings.

In all three cases, the Court limited itself to making orders for the payment of just satisfaction. Not only did it shy away from spelling out what measures ought to have been considered in order to cease or alleviate discrimination in the instant cases, but it also

<sup>16</sup> E. Rebasti and L. Vierucci, *A Legal Status for NGOs in Contemporary International Law?* (2002).

<sup>17</sup> Judgment of 27 April 2004. The case concerned the flooding of some villages caused by the construction of a dam.

<sup>18</sup> *Id.*, at para. 38. A distinction is made between the interests pertaining to an NGO per se and the interests it claims to be representing on behalf of the people establishing it in order to represent their interests.

<sup>19</sup> *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992.

<sup>20</sup> *Chapman v. the United Kingdom*, judgment of 18 January 2001; *Orsus and Others v. Croatia*, judgment of 16 March 2010 (Grand Chamber).

<sup>21</sup> *D.H. and Others v. the Czech Republic*, judgment of 7 February 2006; *D.H. and Others v. the Czech Republic*, judgment of 13 November 2007 (Grand Chamber); *Sampanis and Others v. Greece*, judgment of 5 June 2008.

fell short on clearly enumerating the manifold failures of the respondent governments that were obvious from the facts. Certainly, member states enjoy a certain margin of appreciation in designing and maintaining their public education systems. However, insofar as the Court made note of reports pertaining to the structural limitations and shortcomings of these systems in relation to the Roma, it should also have indicated desirable steps to be taken, if for no other reason than to avoid repeat applications.

Pursuant to Article 15 of the RED (proportionate, effective and dissuasive remedies for racial and ethnic discrimination), domestic courts and/or the ECJ should impose positive action as the only effective, proportionate and dissuasive remedy in cases of structural discrimination such as *D.H. and Others*. This is the only way to end segregation. Otherwise, there is a danger that, as in *D.H. and Others*, culturally biased tests and diagnostic protocols will remain the same and misdiagnosis will continue. More importantly, if the segregation of misdiagnosed but intellectually sound Roma children is to end, this entails their referral to normal classes/schools. Surely, this cannot take place without providing extra education to bridge the gap between special remedial and normal education. If positive measures are not taken, how is segregation to be terminated? In failing to make the connection between the finding of discrimination, the need to end this discrimination and the resulting need to use all possible means (positive measures) to end it, the ECtHR failed to provide effective judicial protection to the applicants and tens of thousands of Roma children across Europe. In addition, let us not forget that when the respondent governments introduced certain measures to alleviate some of the wrong done to Roma children, they did so not as a result of the judgments but as a result of public pressure generated during the course of lengthy domestic and regional litigation by the NGO representing the victims – the European Roma Rights Centre. There is certainly room for the Court to stretch its muscles and follow the example of the European Court of Justice. In indirect sex discrimination cases, the ECJ has reversed the burden of proof to ensure effective judicial protection. A similarly bold step needs to be advocated in relation to Roma and mandatory positive action in the ECtHR context.<sup>22</sup>

The ECtHR's perception of de facto discrimination resulting from (in)directly discriminatory legislation, and the tacit understanding, supported by the relevant Council of Europe treaties and mechanisms, that minority rights are collective rights, virtually transformed *D.H. and Others* from an application brought by eighteen individual applicants, as well as *Sampanis*, into an *actio popularis* or collective complaint – hence the finding that there was no need to examine the applicants' individual cases.<sup>23</sup> It is therefore a shame that the ECtHR did not accord a remedy suitable for structural discrimination or a collective complaint. In *Orsus*, however, the ECtHR did not follow this type of reasoning and, based on the individual circumstances of the applicants, spelled out in detail what the facts were and how they amounted to discrimination.<sup>24</sup>

It is also noteworthy that, in keeping with the Czech Republic's approach in *D.H. and Others*, Croatia introduced special – if somewhat token – measures to remedy the harm done to the applicant Roma children during the proceedings in *Orsus*.<sup>25</sup> Whether this regional 'naming and shaming' did the trick is merely a matter of speculation – although one that proved correct in the Hungarian context.

<sup>22</sup> See, e.g., Case C-127/92 *Enderby v. Frenchay Health Authority and the Secretary of State for Health*, [1993] ECR I-5535.

<sup>23</sup> *D.H. and Others* (Grand Chamber) at para. 209: 'the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases'. In *Sampanis*, the 'Facts' do not provide details concerning individual children (paras. 24-30) but the Roma as a class. Children are referred to as members of a disadvantaged group in para. 94.

<sup>24</sup> *Orsus*, at paras. 20-51.

<sup>25</sup> Pursuant to *D.H. and Others*, the Czech government reformed its public education law to shut down the special schools complained of (*D.H. and Others* (Grand Chamber) at para. 208). Although the European Roma Rights Centre reported that discrimination continued unabashed under different names. See the ERRC's submissions to the Committee of Ministers on the lack of proper implementation, available at: <<http://www.errc.org/cms/upload/file/third-communication-to-the-committee-of-ministers-on-judgment-implementation.pdf>>. The Croatian government, on the other hand, provided the possibility of further



In *Orsus*, the Grand Chamber's vote on the claim relating to discrimination in education was very tight (nine votes to eight votes). Less than half of the costs and expenses claimed were finally granted (EUR 10,000). One can only speculate how much cheaper this litigation could have been if it had been conducted as an *actio popularis* action.<sup>26</sup>

## 6 Actio Popularis-Based Strategic Litigation in Hungary

What works in this field in Hungary? Is it court-ordered structural remedies for structural discrimination, (the threat of) naming and shaming or the need for additional/EU funds for local governments to maintain their schools? These issues are explored through judgments and decisions rendered in response to claims initiated by the Budapest-based Chance for Children Foundation (CFCF).<sup>27</sup>

### 6.1 Integration Plans: Extra Finances or Eligibility Criteria for EU and International Funds?

Segregation is illegal under Hungarian anti-discrimination law, but there is no public authority enforcing this prohibition in public education, especially in the case of local governments, which control 90 per cent of primary schools in the country. This is partly due to a possible misinterpretation of local government autonomy enshrined in the Constitution. A more realistic reason for the lack of enforcement could also be a lack of public funds for this purpose.

Against this backdrop, the Ministry of Education has introduced innovative financial incentives to facilitate integration in education. The significance of financial incentives cannot be underestimated, as bigger cities that can afford to do so are reported to co-fund primary schools, adding as much as 40 per cent to central budget funding. Smaller towns and villages are generally unable to provide co-funding, which impacts adversely on Roma and socially underprivileged children, but this is a topic for another discussion.

Between 2002 and 2010, financial incentives for voluntary integration in accordance with a set of ministerial recommendations and timetables were granted to many towns and villages where the proportion of Roma children in schools was below 40 per cent. However, the implementation of this integration was not centrally monitored.

A further financial incentive was introduced in 2006. According to Article 105 of the Public Education Act, towns and villages are under a duty to review their schools and make reforms to ensure a balanced distribution of socially underprivileged children – most of these children are Roma, but ethnic origin is sensitive data, and detailed rules for collecting and handling such data are lacking – among different catchment areas/schools.<sup>28</sup> The exercise does not require consultation with local Roma representatives or

education for Roma children who failed to complete primary education by the age of fifteen. *Orsus*, at para. 183.

<sup>26</sup> *Orsus*, at para. 193.

<sup>27</sup> For details, see: <<http://www.cfcf.hu>>.

<sup>28</sup> Under Article 105(1) of the Public Education Act, Act No. 79 of 1993: As part of their plan of action local governments define the measures promoting the equal opportunities of children and students (equal opportunities action plan for public education). (2) In order to participate in calls for proposals based on domestic or international funds for public education, local governments shall possess an equal opportunities action plan for public education. Applications from local governments educating over 25 per cent of students coming from a socially deprived background, as well as local governments jointly maintaining schools and having at least one socially deprived local government member, shall be given priority. Pursuant to Article 132(6), the local governments' equal opportunities action plan for public education prepared in pursuance of Article 85(4) shall be reviewed prior to 31 December 2007 as it relates to the provision of pre-school placement from the age of three, the provision of free meals and books, and as it relates to the equal/even distribution of socially deprived children among schools. In order to participate in calls for proposals based on domestic or international funds for public education, local governments shall possess an equal opportunities action plan for public education. In case there is a shortage of pre-school places, following 1 September 2008 local governments have the duty to ensure that socially deprived children receive pre-

with any other NGOs, including those representing the very poor. Moreover, even equal opportunity action plans that lack a startlingly high amount of data on the number of socially underprivileged children satisfy the criteria of the Public Education Act.

## 6.2 Enforcing Anti-Discrimination Law: An NGO or State Obligation?

Notwithstanding the fact that domestic law expressly prohibits segregation and only allows for a very narrowly defined exception,<sup>29</sup> the Hungarian state has been as unwilling to enforce this prohibition as it has been to create positive action measures to end it. This reluctance may partly flow from a general legitimacy deficit that has been prevalent since the political changeover of 1989-1990, which transformed the public administration's perception of itself from an 'enforcer and implementer' of legislation to a 'drafter and maker' of legislation. Indeed, the termination of centralised inspection of public education predates the political changeover, as liberalisation in this area started in the mid 1980s. On the other hand, despite rapidly decreasing student numbers, potential and real social conflict and political losses relating to the desegregation and integration of Roma children into majority classes may have played an equally important part in governmental non-enforcement. It is against this backdrop that the CFCF launched its social experiment to demonstrate ways in which the prohibition of segregation could be enforced in practice 'by imposing an obligation' on the state through advocacy coupled with litigation.

## 6.3 The Miskolc Desegregation Cases I and II

In 2005, the CFCF initiated its first *actio popularis* action against Miskolc, a town in the north-east of Hungary where Roma represent approximately 17 per cent of the population and live in four distinct settlements. The town reorganised its primary schools, decreasing the number of school directors for financial and administrative reasons. This process also led to the merger of so-called Gypsy schools – schools that had had a majority Roma student population since the mid-1990s – with majority Hungarian schools, but without providing Roma students with the opportunity to enrol in the better quality schools. The CFCF lost in first instance, when the court ruled that Miskolc could not be held liable for violating the right to equal treatment as it had not acted intentionally.

The case attracted considerable public attention and the Parliamentary Commissioner for National and Ethnic Minority Rights submitted an *amicus curiae* brief to the Appeals Court, detailing, inter alia, that intention was not a constitutive element of discrimination under European law, the necessary element of informed consent and justification for segregation under international law.<sup>30</sup> One cannot overestimate the impact of this *amicus* brief on the CFCF's success in establishing on appeal that the local government's *failure to end spatial segregation* in the course of its action directed at reorganising local public education amounted to segregation.<sup>31</sup> Regrettably, however, the Appeals Court refused to order Miskolc to end segregation, as it agreed with the town that it had already done so.

It is noteworthy that this ruling complies with the relevant general recommendation of the Committee on the Elimination of All Forms of Racial Discrimination,<sup>32</sup> which

school education. Prior to 31 August 2011 all parental needs relating to pre-school education shall be fulfilled. Available at: <[http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=99300079.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99300079.TV)>.

<sup>29</sup> Article 10(2) of the Act on Equal Treatment and the Promotion of Equal Opportunities, Act No. 125 of 2003.

<sup>30</sup> Available at: <<http://www.kisebbsegiombudsman.hu/hir-278-nemzeti-es-etnikai-kisebbsegi-jogok.html>>.

<sup>31</sup> Borsod-Abaúj-Zemplén County Court, Judgment No. 13.P.21.660/2005/16; and Debrecen Appeals Court, Judgment No. 13.P.21.660/2005.

<sup>32</sup> CERD, General Recommendation No. 19: Racial segregation and apartheid (Art. 3), 18 August 1995, point 4. CERD also condemns discrimination against Roma children in public education in General Recommendation No. 27: Discrimination against Roma, 16 August 2000.

stresses that although ‘racial segregation can also arise without any initiative or direct involvement by the public authorities’, states ought to ‘work for the eradication of any negative consequences that ensue’.

Given that Miskolc in fact maintained its only remaining Gypsy school despite the 2006 appeal judgment and that negotiations and further administrative action before the Equal Treatment Authority were unsuccessful, the CFCF took the local government to court again in 2007. It sought a judgment establishing that the town was maintaining segregation despite the 2006 judgment and an order to terminate this illegal practice. In the spring of 2010, the local councillors finally passed a resolution ordering the closure of the Gypsy school. The case was discontinued at the trial stage.

#### 6.4 The Nyíregyháza and Győr Desegregation Cases

An action against Nyíregyháza in 2007 resulted in negotiations and the local government’s decision to close down the Gypsy school and bus children to six other schools in town. The CFCF subsequently dropped its claim at the trial stage.<sup>33</sup> Győr decided not to close down its school but to transform it into a magnet school instead. Thus, although the case is still at the trial stage, the local government has prohibited the Gypsy school from enrolling children into grade 1 for the academic year 2010-2011. The case is pending at first instance.<sup>34</sup>

#### 6.5 The Hajdúhadház Desegregation Case

Until the early 1990s, education in the town was integrated. Following its own initiative in 1994, the local government maintained two schools, both of which operated in three school buildings. The main buildings housed the majority Hungarian student body, while the Roma children were educated in the run-down, smaller school buildings. For over a decade, domestic human rights organisations regarded Hajdúhadház as a prime example of local government racism, unyielding to the many initiatives and financial incentives offered to it.

This case turned on the evidence produced by a court-appointed forensic education expert who collected school level data in collaboration with members of the local Roma minority self-government. The data were based on membership of the local Roma minority community as known to the Roma minority self-government, perceived membership of this community and the place of residence as proxies for the ethnic origin of Roma children. The trial court found that the two schools and the local government segregated Roma children in buildings other than the main school buildings and that they directly discriminated against them by providing them with inferior physical conditions. The court ordered the local government to publish an apology through the Hungarian Press Agency, ordered the schools to end segregation by 1 September 2007 and ordered the local government, which ran the two schools, to refrain from interfering in desegregation.<sup>35</sup>

The CFCF hailed this judgment for its dogmatic clarity and for bravely embracing procedural novelties, despite fierce attacks by the defendants. The defendants collected signatures from Roma parents to support the school and to show that the CFCF had no institutional standing, as the number of victims could be identified. However, the trial court agreed with the CFCF (1) that it had fulfilled the initial procedural criteria of standing; (2) that it was impossible to identify the victims of potential future violations; and (3) that it was impracticable to establish the ethnic identity of each parent involved in the petition, which would be necessary in order to refuse standing. Moreover, the trial court found a way in which reliable ethnic data could be generated without violating data protection rules. The significance of this judgment is that since 2007, when it was

<sup>33</sup> Szabolcs-Szatmár-Bereg County Court, Judgment No. 9.P.22.020/2006.

<sup>34</sup> Győr-Moson-Sopron County Court, File No. P.20.950/2008.

<sup>35</sup> Hajdú-Bihar County Court, Judgment No. 6.P.20.341/2006/50.

handed down, it has served as a model for other trial courts, as well as for the Equal Treatment Authority, when dealing with segregation in lower level education (direct discrimination).

On appeal, the Debrecen Appeals Court upheld the finding of direct discrimination, ordering that it be put to an end, but quashed the remainder of the first instance judgment.<sup>36</sup> The plaintiff – the CFCF – was granted judicial review before the Supreme Court. The CFCF argued that the first instance judgment should be upheld in its entirety and requested a referral to the ECJ asking the following questions:

- 1) Does the spatial segregation in the instant case amount to direct discrimination contrary to Article 2.2(a) of the RED (direct discrimination)?
- 2) If the answer to question 1 is yes, can the respondents justify such direct discrimination under provisions other than Article 5 of the RED (positive action)?
- 3) If the answer to question 2 is no, can the respondents justify their conduct on the basis of Roma ethnic minority education, small classes or special education as provided in the respondent schools?

Given that the facts of the case were based on ethnic statistics that were compiled during litigation but whose collection was otherwise not expressly permitted under domestic data protection legislation, it was hoped that, through its guidance to the domestic courts, the ECJ would facilitate the use of such statistics and flesh out the procedural framework for requesting such evidence from respondents and assessing it.

The Supreme Court turned down the referral. More importantly, however, it did not uphold the first instance judgment in its entirety. It also held that a date for ending segregation could not be specified.<sup>37</sup> This clearly poses serious challenges to enforcement.

By this time, however, the local government that ran the schools had closed down one of the three buildings and integrated the Roma children into mainstream classes. The CFCF has raised private funds to implement an integration programme in the remaining school buildings in collaboration with the local Roma minority self-government.

## 6.6 The Kaposvár Desegregation Case

The CFCF initiated proceedings against the town of Kaposvár because, among a total of twelve schools with an average student population of 400, it also maintained a ‘Gypsy school’ of 160 children. This school provided teaching for two of the three major groups of Roma (Lovari, Beash and Romungro) living in a nearby settlement. The trial court established that the Roma children in this ‘Gypsy school’ were segregated and that they received education of inferior quality. It ordered the town to end this violation but rejected the CFCF’s request to eliminate segregation by shutting down the ‘Gypsy school’. The court argued that segregation could be eliminated in many different ways, but that all these solutions would require a decision by the local councillors. An order to put an end to segregation could therefore not be enforced by courts.<sup>38</sup>

In its appeal to the Pécs Appeals Court, the CFCF primarily argued that, in practice, an order to end segregation could be enforced by imposing fines on the town as long as it failed to act in accordance with a court order and by requesting the competent Office of Public Administration to take action against the councillors for failing to act. Secondly, it pointed out that local government autonomy (including decision-making by councillors in relation to local education and property) as safeguarded by the Constitution related to the town’s status vis-à-vis the state and not vis-à-vis the citizens. Thus, local government autonomy could be curtailed by the competing constitutional right of citizens to equal treatment stemming from the right to human dignity. Thirdly, the CFCF stressed that

<sup>36</sup> Debrecen Appeals Court, Judgment No. Pf.I.20.361/2007.

<sup>37</sup> Supreme Court, Judgment No. Pfv.IV.20/936/2008/4.

<sup>38</sup> Somogy County Court, Judgment No. 24.P.21.443/2008/35.



the town was guilty of segregation through its omissions and inaction as regards the integration of Roma children from the ‘Gypsy school’. Thus, if an order to refrain from segregation was imposed on the town, in essence it could not be enforced in any other way than by requiring it to take action in order to integrate Roma children. Whichever way one looks at it, refraining from segregation is tantamount to taking action in order to eliminate segregation.

It is worth noting that this is exactly the kind of argument that was used in the US desegregation cases from the early days. Up until the 1990s, needless to say, US courts have been far more active and forthcoming in terms of ordering desegregation – going as far as ordering school districts to introduce bussing and remedial reading classes and to ban legislators from intervening in the allocation of private funds to further desegregation.

The Pécs Appeals Court amended the trial court’s judgment in relation to segregation but quashed as unsubstantiated the part pertaining to the direct discrimination claim (physical conditions and quality of education). In ordering the town to end segregation in its Gypsy school, the Appeals Court admitted the CFCF’s arguments in part. However, in refraining from making a detailed order in relation to the course of action the local government ought to take to end segregation, it stressed that, given the public law character of the claim, it could not be satisfied by a civil court.<sup>39</sup>

This finding, if upheld by the Supreme Court, will set the limits of *actio popularis* action in civil courts. Significantly, it also supports the CFCF’s case against the Ministry of Education, given that in public law only the ministry is entitled to initiate or take action against local governments.

### **6.7 State Obligation to End Segregation in the Framework of School Inspection: the CFCF’s Civil Action against the Ministry of Education**

Given the lack of enforcement of anti-discrimination provisions – and more notably the prohibition of segregation – by the Ministry of Education, the CFCF instituted a civil action against the ministry, seeking (i) a finding that the ministry’s failure to enforce the law contributes in great part to segregation; and (ii) an order requiring the ministry to act. The lawsuit has been declared admissible, which is a victory in itself, as public authorities and bodies other than local governments have never before been held liable before civil courts for their (in)actions in public law.

The CFCF is using this claim to lobby for the (re-)establishment of school inspection in general and the strengthening of oversight in relation to ethnic discrimination in particular. The case has already attracted huge media coverage. With the recent change in government, which is more favourable to centralisation in public education, it remains to be seen whether the CFCF will need to pursue its case through all the instances. The case is currently pending before the Metropolitan City Court.<sup>40</sup>

### **6.8 Individual Actions for Compensation**

Following the judgment in the first Miskolc desegregation case, the CFCF sought to ‘place a price’ on segregation. It identified five Roma children previously educated in the schools found to be segregated in 2006 and brave enough to take the municipality on in a civil action for damages arising from their segregated education. Morley Allen and Overy represented the children pro bono throughout the proceedings, which, following defeat at the trial and appeal stages, ended with a victory in the Supreme Court in June 2010.<sup>41</sup> Referring to the final judgment handed down in Miskolc I, the Supreme Court

<sup>39</sup> Pécs Appeals Court, Judgment No. Pf.I.20.061/2010/7.

<sup>40</sup> Fővárosi Bíróság, Case No. 19.P.24.588/2009.

<sup>41</sup> Borsod-Abaúj-Zemplén County Court, Judgment No. 13.P.20.580/2008; Debrecen Appeals Court, Judgment No. Pf.I.20.125/2009/4; Supreme Court, Judgment No. Pfv.IV.20.510/2010/3.

found that, regardless of the children's individual fate after they had left primary school, their segregation in and of itself amounted to less favourable treatment, which translated into harm in civil law.

The Supreme Court therefore ordered Miskolc to pay €350 plus default interest to each child. This is the first ever ruling handed down by a national court in Europe in which Roma children have been provided with compensation for being ethnically segregated during their primary school education. Although the ECtHR has recently ruled in favour of Roma applicants in *D.H. and Others*, *Sampanis* and *Orsus*, it has so far failed to clearly spell out that compensation was due to these children because of ethnic segregation.

The CFCF also took over representation in misdiagnosis cases initiated in Hungary in the wake of the *D.H. and Others* judgment. Courts in all cases recognised the procedural shortcomings of diagnosis procedures (failure to ensure parents' informed consent and participation in the process and failure to ensure their right to appeal), but only in the case tried in Nyíregyháza was it found that such failures caused actual harm and that the two plaintiffs did not receive adequate education as a result.<sup>42</sup> The trial court ordered the defendants to pay EUR 3,500 to each of the two Roma children. This judgment was quashed on appeal, in which the Debrecen Appeals Court described but failed to identify indirect ethnicity-based discrimination.<sup>43</sup> Curiously, the questions asked during the appeal hearing and the arguments advanced in the written judgment show great similarities with the *D.H. and Others* judgment and the questions asked by the dissenting judges during the hearing before the Grand Chamber. The Supreme Court found that the procedural shortcomings amounted to harm caused in an official capacity but that the substantive questions at the time, – (i) whether the tests had been culturally biased; and (ii) whether the definition of special educational needs (including mild intellectual disability) – had been too broad to be answered by the Constitutional Court or the ECtHR.<sup>44</sup> The Supreme Court terminated the proceedings against the remedial school – arguing that, in lieu of a finding of a violation of law relating to the substantive issues, it could not be held liable. It ordered the local government that administered the third defendant to pay EUR 1,050 to each plaintiff. Given that the third defendant – the remedial school that houses the expert panel diagnosing the children – missed the deadline for appeal, the plaintiffs should receive the full amount of compensation ordered at first instance. The plaintiffs are taking their case to the ECtHR to secure just compensation on the basis of a finding that they had been discriminated against by being misdiagnosed as intellectually disabled. They were both rediagnosed at the trial stage, and the older child was found to possess normal intellectual abilities despite having spent eight years in a remedial school.

The central role that the courts have played in Hungary in protecting Roma children from discrimination deserves ample praise. The attitude of the Supreme Court bench that has so far reviewed all the cases initiated by the CFCF has been a decisive factor. One wonders whether the same case law could have been built up at the national level if this bench had held different views on the need for desegregation. Clearly, if victories had not been secured at the domestic level, the relevant litigation would not only have taken 2-5 years longer (depending on the regional forum) but it would also have proved far more challenging to generate such an attitudinal change.

## 7 Conclusion

As suggested by their meaning under Roman law, *actio popularis* claims are undertaken in the public interest, for the public good. Ten years ago, there seemed to be a consensus within the European Union that racial and ethnic discrimination was wrong and that it was in the public interest to provide protection against them. This article has argued that once the enthusiasm of the early days had worn off, the member states failed to carry

<sup>42</sup> Szabolcs-Szatmár-Bereg County Court, Judgment No.3.P.20.035/2008/20.

<sup>43</sup> Debrecen Appeals Court, Judgment No. Pf.II.20.509/2009/10.

<sup>44</sup> Supreme Court Judgment No. Pfv.IV.20.215/2010/3..

out the promise so boldly made in the Racial Equality Directive. Most transposed RED into their individual judicial enforcement models, thus providing the least effective protection both in terms of the way in which justice against discrimination can be sought and in terms of the means available to rectify wrongdoing.

Member states have been unduly reluctant to upgrade the most crucial elements of the system to ensure that forward-looking sanctions that are designed to repair discriminatory structures and enforcement mechanisms that cater to group justice needs are available. In countries where remedies are primarily provided under criminal law, enforcement is further limited by the lack of reversal in relation to the burden of proof (Article 8) and the victim's lack of independent standing, as well as by the limited role that NGOs/trade union can play in assisting him or her during the procedure (Article 7).

Would it not be more (cost-)effective to establish, under Article 13, equality bodies that have strong powers to investigate and support victims in securing a remedy and/or to allow representative and group actions that by definition seek systemic changes? In addition, such actions would minimise the risk that individuals who have suffered discrimination are victimised again in court in what are often hostile proceedings. The fact that victims of discrimination seeking justice have no other choice than to initiate an adversarial procedure does not put them on the winning side.

One may also wonder why the system of protection against discrimination fails to include group justice needs in so many member states, when a great majority of them provide for similar standing and accompanying structural remedies in the fields of consumer protection, competition law and environmental or animal rights. Even more thought provoking is the solution that singles out disability over race and other grounds protected under EU law in providing more solid means of enforcement, such as class actions.

Public officials of national governments and various EU institutions often express concern about the discrepancy between the estimated number of discriminatory incidents and the number of cases brought to justice by victims. NGOs and victims, on the other hand, are critical of the European Union and national governments for keeping the level of protection low and for even failing to fund individual litigation. One would presume that mainstreaming equality – taking account of the needs of ethnic and other minority groups throughout the decision-making process – can provide a panacea for all our problems. However, the UK example of the duty to promote equal treatment shows that the participatory model is not capable of repairing discriminatory structures. At present, we are forced to conclude that a combination of the three enforcement models may be the ideal solution.

The recent judgments on Roma education of the European Court of Human Rights<sup>45</sup> aptly demonstrate the shortcomings of the individual justice model, especially given the fact that the enforcement of judgments by the Committee of Ministers is the 'weakest link' in the Convention mechanism, being predominantly political in nature. A considerable amount of time and money therefore needs to be invested in this system to generate case law and distil certain basic principles on state obligations. The Court's relevant case law has so far been somewhat confused. It has failed to find ethnicity-based segregation in clear-cut cases but has established the following principles: (1) Roma parents must be adequately informed about the education of their children (informed consent); (2) no consent can be given to ethnic discrimination; (3) the special needs of Roma children in public education (including teaching in minority languages) must be reasonably accommodated; and (4) indirect discrimination in this field is also prohibited and can be established via ethnic statistics. On account of the Convention's focus on the individual, the ECtHR has so far been unwilling to provide remedies against structural discrimination, even though the complaints in the Roma education cases were brought before it by sizeable groups of individual Roma applicants. Structural changes were not generated directly by the Court or its judgments but by leveraging litigation before the ECtHR, as well as by the regional advocacy of the clients' representative, the European

<sup>45</sup> See above nn. 20-21.

Roma Rights Centre and its NGO coalition partners. This of course raises the question what structural impact any ECtHR judgment may have if it is rendered in the case of a lone victim of discrimination with limited financial resources.

In contrast, it has been demonstrated through Hungarian case law arising from strategic litigation that *actio popularis* claims are capable of addressing structural discrimination in civil law and that they are able to secure structural remedies. Significantly, *actio popularis* standing also has implications for sanctions. As counsel for the applicants explained to the ECtHR Grand Chamber in *D.H. and Others*, if a case is not about the violation of the rights of an individual victim, then remedies also ought to be tailored accordingly; in other words, they have to tackle ‘system failures’. This is precisely the question that Hungarian desegregation litigation is raising before the domestic courts and potentially before the ECJ. Similar to *D.H. and Others*, arguments based on the RED can be also raised in proceedings under the European Social Charter, and structural remedies going further than the mere adoption of government programmes for Roma can be sought. As the final judgment in the Kaposvár desegregation case indicates, domestic civil courts have the power to impose an order to end segregation, but can a deadline and the way in which integration ought to take place also be prescribed and enforced? *Actio popularis* litigation continues to establish the speed of school integration in Europe – let us hope it will be quicker than Brown’s ‘all deliberate speed’.<sup>46</sup>

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<sup>46</sup> This expression refers to the case following *Brown v. Board of Education of Topeka*, 347 US 483, in which the US Supreme Court established that the principle of ‘separate but equal’ education for black students was unconstitutional. In *Brown II*, 349 US 294 (1955), the Supreme Court ‘remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit the parties to these cases to public schools on a racially nondiscriminatory basis with all deliberate speed’ (at 301), available at: <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=349&invol=294>>. Background information on the US school desegregation cases can be found here: <[http://en.wikipedia.org/wiki/Brown\\_v.\\_Board\\_of\\_Education#cite\\_note-48](http://en.wikipedia.org/wiki/Brown_v._Board_of_Education#cite_note-48)>.