**Open Society Justice Initiative**

**Presidential portfolio review: Antidiscrimination**

**August 2015**

Parameters of the portfolio

Elements of this portfolio go back to the early days of the Justice Initiative and illustrate the evolution of our mix of tools and our strategy, with lessons learned at each stage. While we could have narrowed the chronological scope of this review, this would have obscured the extent to which our more recent work is rooted in lessons taken from earlier work. Antidiscrimination work is deeply context-dependent, and even without the benefit of a portfolio review procedure in the past, we articulated specific conclusions that dictated shifts of ambition and focus that we believe are important to reflect here.

The work reviewed here is contiguous with several other areas that have already been the subject of portfolio reviews:

* Germany school segregation litigation and advocacy, Justice Initiative Board review, April 2014
* Citizenship litigation, Justice Initiative Board review, October 2014
* Equality Data Initiative, staff review, October 2014
* Ethnic profiling in Europe, joint with OSIFE, Presidential review, April 2015
* My City Real World, joint with Youth Exchange, Presidential review, March 2015
* DH implementation, staff review, April 2015
* Italy, OSIFE staff review, July 2015

Because there are no bright line divisions between the work reviewed here and these other portfolios, this review makes liberal reference to reviews already conducted, and will identify any conclusions drawn here that we believe to be more broadly applicable.

This review will not analyze in-depth cases that were brought prior to 2012, but it is important to mention that at the outset, nearly a decade ago, Justice Initiative’s antidiscrimination work focused on litigation before the European Court of Human Rights. This led to our intervention in the case of *D.H. and Others v. Czech Republic* (decided in 2007), as well as a number of cases against Russia.

This review deals in more depth with more recent cases and non-litigation work: a few cases we supported directly, third party interventions in others, and the substantial effort, including litigation, outreach, advocacy and movement building, mounted to challenge racial profiling in France.

Our ambition

Our highest-level ambition has been to bring international antidiscrimination norms addressing racial or ethnic discrimination to bear at the national level in order to secure judicial remedies. We noted substantial gaps between national laws and practice and applicable international norms, and because others were not exploiting this gap (largely, it seemed, because national lawyers had little familiarity with international antidiscrimination litigation) we saw an opportunity to test the potential for international law to redress local bias.

We started with Council of Europe antidiscrimination norms and chose to focus on Russia because discrimination there was widespread and often explicit. OSF at the time had an active Russia program which was highly supportive and co-funded some of this work through grants to partners. We developed and filed several cases.[[1]](#footnote-1)

However, we found our efforts largely stymied by the reluctance of potential plaintiffs to use the legal system, which they (likely correctly) perceived as making them more visible, and thus more vulnerable to arbitrary action by racist elements, local authorities and police against which courts could offer little protection.

In 2007, in response to riots in France linked with discrimination against that country’s non-white population, we increased our capacity by hiring a lawyer based in Europe, and shifted our geographic and normative focus to the European Union (EU), on the basis that the EU antidiscrimination regime, specifically the Race Equality Directive (RED), was stronger than the Council of Europe’s, and that national courts in EU countries functioned better. We also launched our work documenting ethnic profiling in France, establishing a standing relationship with a consultant based in France.

Despite this geographic shift, we maintained our theory of change, which was based on giving advice and financial support to lawyers to encourage them to bring cases, or submitting third party interventions. We thought that, through these means, we would bring our expertise on European antidiscrimination law to bear at the national level and educate lawyers in diverse countries in how to bring antidiscrimination cases.[[2]](#footnote-2)

The persistently low level of antidiscrimination litigation across Europe was partly explained by the fact that the non-discrimination provision of the European Convention on Human Rights (Article 14) is not a stand-alone provision; a finding of discrimination can only be made in conjunction with a finding that another, “substantive” right has been engaged. Discrimination claims are often omitted entirely from decisions, thanks to the European Court’s tendency to dismiss discrimination claims where it finds a violation of another Convention article.

Actors engaged in antidiscrimination litigation and advocacy in Europe have also tended to focus on (or only have access to) Council of Europe, as opposed to EU, protections. An important assumption underlying our shift to EU countries was that we would be able to make use of the RED and other EU law protections effectively despite the Strasbourg bias within the legal circles engaged in antidiscrimination and broader human rights work.

Notwithstanding our convening five separate meetings of antidiscrimination lawyers in five different countries to describe the resources we offered and to encourage more litigation challenging racial or ethnic discrimination, our opportunities to intervene were relatively few. Inexperience among many national level lawyers doomed cases to dismissal on threshold issues, limited the developments of potential antidiscrimination claims and generally undermined their strategic value. Overall, many of the issues we hoped to see come before the courts never materialized. The gap between international law and national law or practice was real, but could not, as we had hoped, be readily exploited by our contributing to cases identified and shaped by others.

As our impatience with the number and quality of our opportunities to intervene mounted, in 2009 we shifted our approach yet again. Drawing on the Justice Initiative’s own legacy experience[[3]](#footnote-3) of building the *D.H.* cases with the families of 18 Roma school children, we began to focus on developing, from the ground up, two significant antidiscrimination cases: one challenging racial profiling in France, and the other challenging ethnic segregation in Berlin schools. While our Berlin litigation ultimately failed to reach a legal finding of discrimination, it (and the threat of litigation in a second case) prompted desegregation of at least some classrooms.

These attempts to build cases in Europe allowed us to better understand the reasons for the low level of antidiscrimination litigation that we had found frustrating, and led us to modify our thinking about how to approach social change litigation in this field. First, the lack of statistical evidence, combined with the further obstacle that national level courts were hostile towards statistical evidence even where it existed, made it extremely difficult to prove the existence of systematic and often indirect discrimination. This led us to a direct and complementary initiative to advocate for the systematic collection of “equality data” by EU states. Notwithstanding European Commission guidelines that required the collection of equality data, the majority of countries in continental Europe, including minority constituencies, viewed the collection of such data as itself discriminatory (see staff level Equality Data Initiative [portfolio review materials](https://osf.box.com/s/v5l5oukpabmcwggfz70jy1nke54s14rb)).

Second, we were surprised to find reluctance on the part of potential plaintiffs, caused not so much by the threat of racist violence (as in Russia), as by the social and political context. Individuals (whether born in Europe or not) identified with immigrant communities were often too alienated from and often distrustful of state institutions to believe that legal remedies could be effective (France) or too reluctant to play into stereotypes of immigrants to challenge the practices of state institutions such as schools. In Berlin, school children who were victims of discrimination and their families also faced the real threat of ostracism if they openly challenged discrimination in the system.

We came to understand that some of the same factors—lack of experience of lawyers, lack of faith on the part of potential plaintiffs that the judicial system could deliver an effective remedy, lack of a socio-political context supportive of attempts to tackle discrimination—that limited the number of antidiscrimination cases also limited the effectiveness of the cases that were brought. Even *D.H.*, the seminal Grand Chamber precedent to which we contributed, has faced widespread and persistent resistance to its implementation. Thus, from 2013, our ambition to develop cases from scratch led us beyond litigation into complementary attempts to build and foster a social and political context that would support the broader changes we seek.

Alongside our investment in non-litigation advocacy, we sought opportunities to bring antidiscrimination cases before the Court of Justice of the European Union (CJEU). We believed, as noted above, that the protections offered by the less well-known Race Equality Directive (RED) were stronger than those of the ECHR. Bringing cases to the CJEU depends on persuading a national level judge that a case concerns an unsettled question of EU law, such that a referral to the CJEU is necessary before the national level judge can make a decision in the case. In 2014, we were fortunate to identify a case from Bulgaria challenging denial of equal access to services, *Nikolova v. CEZ Electricity*, in which the victim complained that, due to the location of her shop in a predominantly Roma neighborhood, her electricity meter was placed so high up the pole that she could not read it. Thanks to Yonko Grozef, then a Justice Initiative Board member from Bulgaria, we were able to establish that that the victim in this case was unrepresented and gain her authority to act as counsel. At the time it came to our attention, the case had already been referred by the national level court to the CJEU, providing a perfect opening for us to intervene in a key antidiscrimination case.

Our place: How is antidiscrimination law put into practice?

When we first began engaging in legal challenges to racial and ethnic discrimination in Europe in 2005, we were virtually alone in the countries where we worked. Frequently, neither lawyers nor victims perceived discriminatory practices as discriminatory. Potential plaintiffs tended to believe rather that what they suffered was a personal misfortune rather than systematic practice, or, even if they perceived discrimination, ignored it because they saw no way to fight it and their slim resources were focused elsewhere. Lawyers, conditioned by the lack of statistics to prove discrimination, the impossibility of class actions or equitable remedies at the national level, general hostility of their societies towards minorities and the inability of most potential plaintiffs to pay, usually did not consider litigation a viable option. Thus, our commitment to litigation was to demonstrate its utility as a tool to address racial or ethnic discrimination, in addition to bringing “paper” norms to life.

Even at this writing, regional European institutions, states and quasi-state bodies are the predominant actors and funders in the antidiscrimination field (these dynamics were captured particularly well in the joint [OSIFE-OSJI portfolio review on ethnic profiling](https://karl.soros.org/communities/strategy-unit/files/results-assessment/portfolio-reviews/2015-materials-from-presidential-portfolio-reviews-documents-for-internal-use-only/open-society-initiative-for-europe-osife-ethnic-profiling-in-europe-april-1-2015/osife_ethnic-profiling-prd-4.1.2015.docx/) in Western Europe, at p. 3-5). This phenomenon goes hand in hand with the top-heavy normative structure, whereby institutions at a significant remove from realities on the ground define the legal framework. A thread throughout our work has therefore been to animate victims of discrimination to fight on their own behalf, and build the capacity of lawyers and civil society to be successful advocates for equality, in some cases despite an unhealthy level of financial dependence on state largesse. The story of our shifting ambitions over time is the story of our varied attempts to translate laws into practice at the national, local, community and individual level, while struggling with the constraints of a somewhat subordinate European civil society.

As was recently observed in the [July 2015 review of OSEPI’s Italy portfolio](https://osf.box.com/s/v5l5oukpabmcwggfz70jy1nke54s14rb), which is closely linked with the Justice Initiative’s antidiscrimination work, OSF’s willingness to take on politically sensitive topics like discrimination against religious and ethnic minorities or discrimination against non-citizens stands out among donors. While being outsiders can give us clarity of vision and the ability to take risks, this status has been significant, and sometimes negative, in the eyes of others: for example, the judge in our German schools cases mentioned the involvement of the Justice Initiative as if it threatened the integrity of the German legal system, and queried whether the cases constituted “strategic litigation,” implying that such common law conceits had no place in Germany. On the other hand, many of the leading civil society actors and thought leaders on these issues in countries where we have been deeply embedded – like Italy, France and Germany – are both Justice Initiative partners and OSF grantees. In France, our long-term Paris-based consultant (recently transformed into a staff member) who has lived in France for many years gave us the ability to participate in community-level processes, encouraging and steering groups and individuals in the local antidiscrimination movement, essentially as one of them.

Our role in the field of equality data follows this pattern. In the face of widespread disregard of the EU level norm mandating equality data collection, a [staff level portfolio review](https://osf.box.com/s/v5l5oukpabmcwggfz70jy1nke54s14rb) of the Equality Data Initiative (EDI) described “a handful of significant players” pushing for the collection of disaggregated data on ethnic minorities and disability data (the EDI project is now incorporated as a cross-cutting aspect of all of the Justice Initiative’s antidiscrimination work). European equality bodies and the Fundamental Rights Agency (FRA) of the EU are the dominant proponents, with an absence of critical support within civil society at the national level in most European countries. Our interest in equality data was at least in part an outgrowth of our litigation ambitions, since equality data is essential to proving discrimination (more on this under Our Work). But we cannot use litigation alone to generate compliance in this field, so we have invested in building demand for change among those most affected, who should be our natural allies. We have undertaken research, education and network building to develop constituencies that understand and advocate for equality data collection.

Our work

Surprises, Regrets, Successes

Over the years, we changed our approach several times as we gained experience and sought ways around various obstacles: third party interventions (TPIs), direct litigation as parties (“ground-up” strategy), and non-litigation advocacy.

Beginning with our focus on EU countries in 2007, we turned to the cost-effective and relatively low-capacity practice of acting as third party interveners, primarily before the European Court of Human Rights. Unfortunately, for the reasons described above, we found that the limitations of the cases themselves undercut the value of our third party interventions; and in at least one case (*S.A.S. v. France*, achallenge to France’s ban on the full-face veil brought by British lawyers without the guidance of French partners) the political naiveté and lack of understanding of local context prompted us to intervene in order to limit the damage that we (correctly) believed could result. The experience of intervening without a significant opportunity to shape the cases fostered a preference for joining cases earlier, as counsel or co-counsel.

However, harboring a strategic objective that precedes a specific case complicates our role as counsel. In our work building cases, we were humbled by the difficulty of finding plaintiffs. Although the discrimination may be clear to us, potential plaintiffs either do not see it or, more likely, do not think that seeking judicial remedies will substantially improve their situation. In the latter belief, they are often correct. Counsel for “strategic” antidiscrimination litigation must often ask lead plaintiffs to sacrifice on behalf of a community. Our experience shows that under such circumstances, willing plaintiffs can still be found, but only if the community they are hoping to serve or other civil society actors are behind them.

As outsiders, we are poorly placed to carry forward the long, slow work of building a social movement, but we came to understand that we could help reframe the case or cause in a way that fostered support. In Germany, for example, alongside the litigation described above, we produced a photo exhibition and publication containing a small selection of personal statements about the effects of discrimination in education. We launched the photo exhibition in a prominent municipal building, with a party featuring a successful DJ and comedian who were both of immigrant background. We sought to make the problem contemporary, personal and immediate, and highlight that others already cared. We were told by local partners that the interest of an international organization (us) and the framing educational discrimination as a human rights issue would make people in Germany take notice.

We also sought to appeal to educational professionals by organizing a semi-academic symposium on the topic of discrimination. Held the day after the photo exhibition launch, in the same municipal building, it attracted 300 participants, vastly beyond what we had anticipated. As German groups assumed leadership of the discussion, their conclusion was that the time was ripe to press for an institutional response to discrimination in education in Germany, in the form of a complaints mechanism for discrimination that is independent of any school. We are now trying to support this push by building the expertise of the lead organization, not only in complaints mechanisms, but also in fundraising, so that the work can become genuinely independent of us.

In France, taking into account the national context, we adopted a strategy that explicitly combined litigation with other tools, so that our litigation would buttress broader political and social pressure to address ethnic profiling and also benefit from these developments. In 2007, prior to deciding to litigate, we undertook a rigorous statistical study, modeled on one we did in Moscow in 2005, to show racial disparities in those stopped by the police for identity checks. We gained substantial credibility by working closely with French academics and deploying a rigorous and innovative methodology. Although the resulting report attracted attention to profiling, it did not bring about any change in practice. When we began exploring litigation, to our surprise, notwithstanding what we believed was (rare) compelling statistical evidence, it was still extremely difficult to convince French lawyers, NGOs active in the antidiscrimination field and academics that the extreme differential in stop rates for whites and non-whites was justiciable in French courts. We were able to move beyond this rejection of a litigation strategy to a strategy tailored to the French context, through identifying a handful of creative lawyers, who participated in a collective reflection process. Rather than being antidiscrimination lawyers, they were chiefly labor lawyers experienced in union battles, which necessarily have a collective aspect and combine legal and political tactics to achieve change. In line with their experience and our own intuition, we sought to put profiling on the mainstream public agenda, build political pressure to address profiling, catalyze a supportive movement and engage those directly affected.

As in Germany, the search for French plaintiffs was costly in time and effort and required direct grassroots efforts that did not rely on mainstream antidiscrimination actors, which would never have been possible without a full-time person on the ground. We undertook extensive outreach in the form of community meetings and information sessions, music videos by prominent French rap artists, and creation of a text message hotline for victims of profiling. We also created an identifiable coalition of civil society actors to support this effort and stand beside plaintiffs. Thus, the search for plaintiffs itself encompassed raising awareness, field building and using concerned public figures in the arts. Along the way, ethnic profiling became such a prominent public issue that it was included in the Socialist party platform. Despite these extensive efforts and the fact that thousands of identity checks are carried out across the country, we identified only about a hundred potential cases and ultimately went to court with thirteen. We lost at the first instance with the state insisting that non-discrimination norms do not apply to the police and we had not presented evidence that any discrimination had occurred.

In contrast to Germany, however, in the French litigation we had a significant legal victory: on June 24, 2015, the Paris Court of Appeal accepted that there had been discrimination in five of our 13 cases—a giant step forward for French jurisprudence. The court accepted several of our key arguments, such as that the burden of proof should shift to the state once a prima face the case of discrimination has been presented by the plaintiff; the statistical evidence presented helped to make this prima facie case. The court also identified a positive obligation to take all necessary measures to prevent discrimination, pointing to the lack of any record of stops as an obstacle to effective recourse. Before, such a judgment was seen by many as impossible, and it has transformed the legal landscape. At the very least, it has established the legitimacy of an argument that can provide the basis for other cases of profiling to be challenged in court. We will also take the cases that we have lost to the Cassation Court, and if we lose again, likely to the European Court of Human Rights.

However, the cases we won have limited immediate impact at the systemic level – the judgment orders payment of compensation to individual claimants, not a comprehensive remedy. We are now trying to encourage widespread (and in the aggregate, very expensive for the state) use of this individual recourse to push for adoption of broader policy changes that would create more effective remedies for systemic violations.

Even more recently, we had a significant legal victory in *Nikolova v. CEZ Electricity*, the electricity meter case. The CJEU accepted all of our arguments, rejecting the idea that racial discrimination cannot exist when a mixed ethnic district is affected and affirming that a non-Roma affected person in the district is also a victim of racial discrimination. It also addressed what the national court must assess when considering whether the plaintiff has shifted the burden of proof, and the high level of justification required for such stigmatizing measures.

What would we do differently?

Many lessons can be drawn from this vast and varied portfolio. Our first several years saw us focused on litigation exclusively, and we further defined our work by geography. We gradually came to realize that not only is broad public awareness and the presence of a supportive social movement against discrimination essential to identifying plaintiffs, these are also important to implement positive decisions. In the early years, we overlooked other tools as we concentrated on “finding a case.” Now, we have changed our practice to include, at a minimum, media work, and often other public advocacy. For an issue such as equality data, frequently a sine qua non for antidiscrimination litigation, we know that we will have to work with civil society and politicians to change the perception and practice related to such data. The strong resistance, even fear, that European minority groups have of equality data is based on knowledge of the Nazi past, which may be exploited by governments that may wish to avoid collection and transparency with respect to equality data. Without the support of these groups, equality data will be politically untenable. Thus, we need to broadly educate people about data protection, the flip side of equality data, emphasizing the basic principles of anonymity and self-identification.

We have learned a lesson with regard to framing discrimination issues too narrowly. An appeal to minority rights alone will not attract broad support, and may even create a backlash within the majority population. In our recent strategy, we therefore changed from defining our work by tool, forum, or geography, and set out three themes that we believe will enable us to frame the imperative for equality as broadly as possible, since they are important to everyone: education, employment, and housing. No longer limiting ourselves to litigation alone, we are doing research and plan to create positive proposals for, for example, inclusive housing policies. Such positive proposals will strengthen our litigation, if and when we do it, by furnishing the basis for a truly meaningful remedy.

Our recent victories, as much as our losses, have highlighted for us the limitations of judicial remedies for systematic practices such as discrimination. We have overcome the most obvious barriers to use of the courts—expense and inaccessibility of lawyers and, in the case of France, lack of statistical evidence of discrimination—thanks to our unique position and financial resources. However, we still face the fact that in most of continental Europe, class actions are not possible or are not available to redress claims of discrimination, most court decisions apply only to the plaintiff and do not set a precedent, and courts give only monetary, rather than equitable, remedies. For example, in *Salkanovic* *v. Ministry of Interior* (challenge to a Roma census database before the Rome civil court), notwithstanding the victory, the database of Roma was maintained; only the records of the single plaintiff in the case and his family were deleted. This is due to the fact that collective, public interest or class actions mechanisms are not currently available to challenge racial or ethnic discrimination in Italy (as they are not possible in France or Germany). The court would not order an equitable remedy or change in the law; this is considered the purview of the legislative branch. Yet although monetary compensation may provide satisfactory redress for victims our clients included, as strategic litigators we are also interested in a broader impact. Because *Salkanovic* was won at a relatively low level, rather than the supreme or constitution court level, the judgment of the court has no precedential value.

In response to our new recognition of the limitations of legal victories, our new strategy foregrounds the problem of remedies, alongside our new thematic spheres. Our commitment to equality data is explained in terms of its necessity in revealing discrimination (a first step in finding a remedy) and testing the effectiveness of policy responses. Within our thematic spheres, we are examining and advocating for alternative accessible, independent administrative remedies that complement courts and facilitate access to justice for all, such as a complaints mechanism for education in Berlin. In 2016 we will invest in a comparative study of such mechanisms.

Finally, we have initiated, as of 2014, a new engagement in Latin America, based on our understanding that recognition of discrimination is growing in the public discourse. We intend to ensure that our years of experience in Europe are reflected in how we build the Latin America portfolio. Our first small grant, in 2015, supports the Peruvian Ombudsman in a systematic review of discrimination claims brought to its complaints arm, as well as some support to specific cases and education of the judicial sector. This intervention gives us valuable insight into antidiscrimination claims in the national context, without the burdens and risks of entering as an outsider or developing cases “from the ground up.” We are adding complementary research on the collection of equality data in the Americas later this year, which will draw on the European EDI project, both for methodological development and for comparative cross-fertilization.

We are starting in Latin America by tackling one of the primary obstacles we faced to successful engagement of legal norms in Europe – the evidentiary hurdle. Building the evidence of discrimination through research will give us time to develop our relationships with civil society and establish ourselves as careful, credible actors. Examining our potential evidence will give us deeper understanding of what cases would be ripe to bring to the courts; and publicizing the findings of our research will enable us to contribute to the nascent public discourse on discrimination.

1. *Makhashev v. Russia*, a case of ill-treatment and torture by the Russian police, which we won in 2012; *Timishev v. Russia*, a case of ethnic profiling on the highways of Chechnya, and *Mikhaj and Others v. Russia*, a case challenging a segregated school for Roma children in the Russian city of Tula, both of which were found inadmissible by the European Court; and *Bagdonavichus and Others v. Russia*, which is still pending since 2006, and challenges discriminatory demolition of a Roma village. [↑](#footnote-ref-1)
2. These cases address: the right to wear a headscarf while teaching (German Constitutional Court: expert opinion by Justice Initiative; the case was favorably decided 2015); the right to wear a face covering in public (*S.A.S. v. France*, ECtHR: third party intervention by Justice Initiative; the court upheld the ban in 2014); the right to build a mosque with minarets in Switzerland (*Ouardiri v. Switzerland*, ECtHR: third party intervention by Justice Initiative; found inadmissible for lack of standing in 2011); data protection (Italian civil court (Rome): *Salkanovic v. Ministry of Interior*,in which the Justice Initiative funded a lawyer; the court found the maintenance of a database of Roma residents to be discriminatory in 2013). [↑](#footnote-ref-2)
3. The *D.H.* case was built by Jim Goldston in his prior role as Legal Director of the European Roma Rights Center. [↑](#footnote-ref-3)