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INTRODUCTION

*Ellen Hey**

This issue of the *Erasmus Law Review* focuses on the Racial Equality Directive (RED),¹ which was adopted by the European Union in 2000 and was transposed into national legislation by the ‘old’ member states in 2003 and somewhat later by those member states that joined the Union in 2004 and 2007. The RED has been hailed as particularly progressive, both in terms of its material scope and in terms of its pioneering focus on remedies and enforcement. What the two articles in this issue illustrate is that, despite these innovative aspects of the RED, the extent to which equal treatment can become a reality in Europe ultimately depends to a large extent on the way that courts – at both national and European level – interpret and apply the standards introduced by the RED. Given the recent political developments in Europe regarding Muslims and Roma, this issue of the *ELR* is timely to say the least.

The articles in this issue were originally presented at a seminar at the Erasmus School of Law (ESL) that was held on the occasion of the defence of two doctoral theses on the RED.² The doctoral supervisor, Kristin Henrard, and the two new doctors, Monika Ambrus and Marjolein Busstra, present some of their joint findings in the first article (Ambrus et al.). This article and the two doctorates are the product of a four-year research project funded by the Netherlands Organisation for Scientific Research (NWO). In the second article, Lilla Farkas, a Hungarian human rights lawyer, presents an account of the role of Hungarian courts in the implementation of the RED, in particular with regard to the right to education of Roma children, in the context of the enforcement models developed by McCrudden.

Both articles support, either explicitly or implicitly, the ruling of the ECJ in *Feryn*,³ in which the Court ruled that the fact that Article 7 of the RED does not require member states to incorporate the *actio popularis* into their national legislation does not prevent them from doing so. Ambrus et al. suggest that, by pursuing this route, the Court remedied a mismatch between the RED’s broad substantive provisions and its more restricted procedural provisions. Farkas suggests that incorporating the *actio popularis* into national law is the way to ensure proper implementation of the RED, both because it avoids victimisation of claimants in individual cases and because it avoids the situation that has come about as a result of the individual justice model employed by the European Court of Human Rights (ECtHR). In pertinent rulings, the ECtHR has ordered that compensation be paid to victims of racial discrimination but has refrained from explicitly ordering the member states concerned to rectify the fundamental issue at stake, namely systemic discrimination in the education system. As Farkas illustrates, the ECtHR has thus far not recognised the *actio popularis*, although it has granted standing to associations of those who have suffered harm as ‘victims’. Farkas also points out that broad standing has been recognised in other policy areas such as environmental law.

During the late 1990s, the influence of international law apparently did not materialise insofar as equal treatment in the European legal order is concerned. However, it did materialise in the case of environmental law, in the form of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which provides broad standing for NGOs. Article 2(5) of the Aarhus Convention provides that:

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¹ Council Directive 2000/43/EC of 29 June 2000, OJ 2000 L 180/22.

² Mónika Ambrus, *Enforcement Mechanism of the Racial Equality Directive and Minority Protection* (Utrecht: Eleven International Publishing 2010); Marjolein Busstra, *The Implications of the Racial Equality Directive for Minority Protection within the European Union* (Utrecht: Eleven International Publishing 2010).

³ C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for equal opportunities and combating racism) v. Firma Feryn NV*, [2008] ECR I-5187.

‘The public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 9 of the Aarhus Convention prescribes broad access to justice for various entities, including NGOs. Moreover, the convention applies not only to its state parties but also to the European Union itself. If the courts are to fulfil their role of providing justice, it is to be hoped that they will use the discretion that the RED affords them to ensure that equal treatment becomes a reality in Europe.

Ambrus et al. analyse two other ‘mismatches’ pertaining to the interpretation and application of the RED. In their view, the ECJ can and should address these mismatches, although it unfortunately did not do so in the *Feryn* judgment. These mismatches concern the ‘fuzzy’ demarcation between direct and indirect discrimination and the consequences of this fuzzy demarcation for the burden of proof in court proceedings. The article argues that, if the ECJ were to apply its conceptually unclear demarcation between direct and indirect discrimination, which it developed in gender-based discrimination cases, to cases concerning racial discrimination, legal uncertainty would also ensue in those cases. As a result of this uncertainty, it might be unclear to claimants what it is they have to substantiate – a motive for direct discrimination or the effects of indirect discrimination – and at which stage of the proceedings they need to do so. Unless more clarity is provided, the much-hailed shift in the burden of proof introduced by Article 8 of the RED may prove to be less protective of victims than it promises. Moreover, fuzzy conceptualisations of direct and indirect discrimination are likely to hamper the emergence of a uniform European non-discrimination standard, as national courts struggle with the interpretation and application of the RED and the related ECJ case law.

THE RACIAL EQUALITY DIRECTIVE AND EFFECTIVE PROTECTION AGAINST DISCRIMINATION: MISMATCHES BETWEEN THE SUBSTANTIVE LAW AND ITS APPLICATION

*Monika Ambrus, Marjolein Busstra and Kristin Henrard**

Abstract

The success of the Racial Equality Directive (RED) in terms of effective protection against discrimination depends inter alia on the coherence and correlation between its substantive and procedural provisions, both in terms of the wording of the Directive and in terms of its interpretation and application. In this article, three ‘mismatches’ between the substantive law and its application are identified. Effective protection against discrimination requires that these mismatches are avoided. First of all, a teleological interpretation of a substantive provision should be matched by corresponding (broad) enforcement provisions. Secondly, the interpretation and application of the definitions of direct and indirect discrimination need to ensure a proper delineation of these substantive concepts. Thirdly, these substantive concepts have to be appropriately translated in terms of the enforcement dimension. In this respect, the ECJ has an essential role to play. In view of its special position as ultimate interpreter and guardian of the unity of EU law, it needs to take up the task of ensuring the ‘match’, while providing adequate guidance to the national courts. Although the ECJ remedied the first mismatch through its generous interpretation of the ‘flawed’ enforcement provision, it has failed to avoid the two other mismatches and thus has not realised the most effective protection possible against discrimination. It is to be hoped that the willingness to avoid mismatches between substantive law and its application will manifest itself more broadly in the future.

1 Introduction: The Importance of Effective Protection against Discrimination

Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter, the Racial Equality Directive or RED)¹ lays down European rules for one of the most fundamental rights of human beings. As such, it has often been called an important – if not the most important – avenue for the protection of ethnic minorities within the EU.² In order to satisfy these expectations, its provisions have to be matched by effective protection in practice. The importance of effective protection of fundamental rights is often underscored.³ This is certainly the case for the prohibition of discrimination, not in the least because it is considered to provide crucial protection for vulnerable, often disadvantaged groups.

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¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

² See, inter alia, B. De Witte, ‘The Constitutional Resources for an EU Minority Protection Policy’ in G.N. Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (2004) 107 at 116-117; G.N. Toggenburg, ‘The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe’ (2001/2) 1 *European Yearbook on Minority Issues* 231 at 234; J. Swiebel, ‘The European Union’s Policies to Safeguard and Promote Diversity’ in E. Prügl and M. Thiel (eds.), *Diversity in the European Union* (2009) 21 at 27-29.

³ The European Court of Human Rights steadily emphasises that the rights enshrined in the Convention should not be purely theoretical or illusory but should rather be practical and effective. See, inter alia, G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007) at 79;

Several factors are relevant to effective protection against racial discrimination. While one tends to think first and foremost in terms of actual, effective enforcement,⁴ several substantive matters and related matters of ‘application’ also have a bearing on this issue.

The text of the RED contains several indications that the drafters intended to provide strong and effective protection against racial discrimination. This can be deduced, *inter alia*, from the broad definition of prohibited forms of discrimination (such as an instruction to discriminate and racial harassment),⁵ the unusually broad material scope of the Directive (by 2000 standards) and the very restricted possibilities it offers to justify differentiations on the basis of racial or ethnic origin.⁶ Furthermore, the RED has been hailed in particular for its innovative focus on remedies and effective enforcement.⁷ In this context, attention tends to focus on the rule on the special allocation of the burden of proof (Article 8), which facilitates the position of the claimant,⁸ the protection against victimisation (Article 9) and the provision on the legal standing of organisations with a ‘legitimate interest’ to bring enforcement actions ‘either on behalf or in support of the complainant’ (Article 7(2)).

Still, the extent to which the RED provides effective protection against racial discrimination also depends greatly on the way in which it has been interpreted and applied by the ECJ. The European Court of Justice is the highest authority as regards the interpretation and application of the concepts and standards of EU law and thus influences the practice of national courts.

This article focuses on a particular concern in the area of effective protection against discrimination, namely the need to avoid mismatches between substantive law, on the one hand, and its application, on the other. Indeed, optimal and effective protection against discrimination presupposes and requires that the substantive provisions and the protection they appear to offer are ‘matched’ by their application. In this context, the word ‘match’ refers not only to the relationship between substantive law and concepts, on the one hand, and the related enforcement provisions, on the other, but also to the actual application of particular concepts and provisions.

In this article, three ‘mismatches’ pertaining to the interpretation and application of the RED are identified and analysed. The underlying aim of the article is to clarify what is needed to avoid these mismatches. The first mismatch concerns the lack of adequate coverage of the enforcement provisions in relation to a teleological interpretation of a substantive provision (*telos* versus *text*). The second mismatch pertains to the lack of a clear and consistent line of interpretation concerning the basic substantive concepts (direct and indirect discrimination) and their respective scope. Finally, the third mismatch

A. Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5 *Human Rights Law Review* 57 at 72-78. This line of case law can be traced back to *Marckx v. Belgium*, 13 June 1979, A 31, para. 31; and *Airey v. Ireland*, 9 October 1979, A 32, para. 24.

⁴ H. Rombouts, P. Sardaro and S. Vandeginste, ‘The Right to Reparation for Victims of Gross and Systemic Violations of Human Rights’ in K. De Feyter et al. (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systemic Human Rights Violations* (2006) 345 at 360; I. Higgins, ‘Enforcement and the New Equality Directives’ in C. Costello and E. Barry (eds.), *Equality in Diversity: The New Equality Directives* (2003) 391 at 397; Toggenburg, above n. 1, at 239-240.

⁵ Article 2(3) and (4) of the RED.

⁶ See, *inter alia*, M. Bell, *Anti-Discrimination Law and the European Union* (2002) at 75-78. See also D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (2007) at 269-271.

⁷ See, *inter alia*, M. Bell, ‘Combating Racism through European Laws: A Comparison of the Racial Equality Directive and Protocol 12’ in I. Chopin and J. Niessen (eds.), *Combating Racial and Ethnic Discrimination: Taking the European Legislative Agenda Further* (2002) 7 at 17; U. O’Hare, ‘Enhancing European Equality Rights: A New Regional Framework’ (2001) 8 *Maastricht Journal of European and Comparative Law* 131 at 151-153.

⁸ ‘These difficulties of proof inevitably have an impact on the effective protection of equality rights.’ See INTERRIGHTS, ‘Written comments in the case of *Nachova and others v. Bulgaria*’ (2005) at 1. Kokott emphasises that ‘[l]egal scholars in the United States have demonstrated the mutual dependency between applying adequate rules on the apportionment of the burden of proof, including the adoption of adequate measures of persuasion, and the full enforcement of individual rights’. See J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (1998) at 57.

flows from the lack of an adequate translation of the different substantive concepts of discrimination in the Directive into procedural terms, especially in the RED's provisions on the allocation of the burden of proof and the underlying review model.

The following evaluation relies on the definitions used in the RED, contemporary non-discrimination doctrine and the ECJ's non-discrimination case law. It pays special attention to the one and only (substantive) judgment that has been issued in relation to the RED so far, namely the ECJ's preliminary ruling in *Centrum voor gelijkheid van kansen en racismebestrijding v. Firma Feryn NV* (hereinafter, the *Feryn* case).⁹ The analysis of the three mismatches proceeds in the above-mentioned order. While the discussion of the first mismatch focuses purely on the *Feryn* case, the other two are evaluated according to a broader frame of reference, using the *Feryn* judgment as an illustration.

The *Feryn* case concerns a public announcement by an employer that he would not hire persons of Moroccan origin because his customers would not accept them. The judgment has been hailed for its message that a public statement can in itself amount to an instance of prohibited discrimination.¹⁰ The Court recognised that discriminatory speech can deter people from applying for work and thus blocks their access to the labour market.¹¹ This interpretation is in line with the *ratio legis* of the Directive, which is to provide robust protection against racial discrimination, and clearly heightens the effectiveness of the protection against racial discrimination.

2 Mismatch I: Telos v. Text

The teleological interpretation of legal texts is a commonly accepted and widely supported method of analysis.¹² The judgment in the *Feryn* case clearly reveals the use of such teleological interpretation.

Article 2(2)(a) of the RED stipulates that direct racial discrimination 'shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'. Explicitly excluding certain ethnic groups from the pool of potential employees seems to imply less favourable treatment for them *because of* their membership of an ethnic group, and in that sense would seem to constitute direct discrimination. This remains so even though the wording of the RED, more particularly the use of the word 'treatment', would seem to suggest some form of action.¹³ After all, the aim of the RED is to eradicate discrimination in the widest sense possible. Indeed, according to the ECJ in the *Feryn* case, the mere public statement of discriminatory selection criteria (or more generally a recruitment policy) can qualify as 'treatment' and suffice to constitute an instance of direct racial discrimination, irrespective of whether there are actual victims of this policy or whether victims actually come forward.¹⁴

The critical paragraph of the judgment reads as follows:

⁹ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for equal opportunities and combating racism) v. Firma Feryn NV*, [2008] ECR I-5187 (hereinafter, ECJ, *Feryn* or AG, *Feryn*).

¹⁰ See, inter alia, F. Bayreuther, 'Drittbezogene und hypothetische Diskriminierungen' (2008) *Neue Zeitschrift für Arbeitsrecht* 986-990; J. Cavallini, 'Une déclaration publique d'un employeur peut constituer en elle-même une discrimination fondée sur la race ou l'ethnie' (2008) 15 *La Semaine Juridique – Social* at 25-26; A. Potz, 'Öffentliche Äußerungen eines Unternehmers im Lichte des europäischen Gleichbehandlungsrechts' (2008) *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 495-505; L. Fabiano, 'Le "parole come pietre" nel diritto antidiscriminatorio comunitario' (2008) *Diritto pubblico comparato ed europeo* 2054-2058.

¹¹ See below for a quote of the critical paragraph (para. 25).

¹² See, inter alia R. Alexy, *A Theory of Constitutional Rights* (2004) at 371-373; Mowbray, above n. 2, at 59-60.

¹³ See, inter alia, T. Makkonen, 'Main Causes, Forms and Consequences of Discrimination', action.web.ca/home, at 8.

¹⁴ In this respect, the ECJ seems to follow the approach taken by the House of Lords, which emphasises that words or acts of discouragement can also be regarded as 'treatment'. See K. Monaghan, *Equality Law* (2007) at 290-291.

The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. *The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim.*¹⁵

This teleological reading of the concept of discrimination triggered heated discussions during the hearing of the case before the ECJ. In several interventions, the implications of this understanding of the concept of direct discrimination for the scope and conditions of legal standing were questioned by third states.

According to the intervening states, accepting that a mere statement could amount to an instance of discrimination, irrespective of the presence of actual discriminatory practice and thus actual victims, would not be in line with the provision on legal standing of the RED. This provision limits state obligations in respect of defence of rights (obligations to ensure that judicial or administrative procedures for the enforcement of the obligations under the Directive are available) to cases where there are actual victims. Indeed, if complaints are not brought by the actual victims themselves, this can be done by ‘associations, organisations or other legal entities, which have ... a legitimate interest in ensuring that the provisions of this Directive are complied with’ but only in so far as they would ‘engage on behalf or in support of the complainant with his or her approval’ (Article 7(2)). This limitation was consciously inserted in order to ensure that states were not obliged to provide for *actio popularis* claims.¹⁶ The intervening states claimed that, as a consequence, the concept of direct discrimination could only be applied to cases in which there were actual victims and not to mere instances of discriminatory speech.

The ECJ acknowledged the alleged mismatch between the robust, teleological interpretation of the concept of direct discrimination, on the one hand, and the enforcement provisions, on the other, but refused to ‘mend’ it by levelling down the protection against discrimination by excluding mere speech as a potential instance of discrimination. It attempted to resolve the ‘mismatch’ between its teleological reading of the concept of ‘direct discrimination’ and the enforcement provisions by pointing out that the absence of an obligation on states to provide *locus standi* to particular associations did not prevent them from doing so. Although this argument may not be wholly convincing, it is positive that the Court addressed the mismatch by opting for the higher level of protection against racial discrimination rather than the lower one. The Court bypassed the textual limitations of the enforcement provisions through its generous interpretation of those provisions, so as to provide the appropriate level of protection against discrimination.

Ideally, in order to avoid this type of mismatch, the wording of new legislative provisions should ensure that the legal standing provisions are able to ‘keep up’ with teleological readings of the substantive provisions. To the extent that this does not materialise, it is essential that the ECJ maintains its generous teleological interpretation of both the substantive concepts (and provisions) and the corresponding enforcement provisions.

3 Mismatch II: Text and Theory v. Practice – The Delineation of Direct v. Indirect Discrimination

The second mismatch discussed in this article is a hypothetical one in the sense that it has not yet materialised in practice but could do so in the near future. An investigation of

¹⁵ ECJ, *Feryn*, para. 25 (emphasis added).

¹⁶ The general view of Article 7(2) of the RED is indeed that it cannot be interpreted as either permitting or obliging states to provide for *actio popularis* claims, since the consent of the victim is required. See Higgins, above n. 3, at 399-400; E. Barry, ‘Different Hierarchies – Enforcing Equality Law’ in C. Costello and E. Barry (eds.), *Equality in Diversity: The New Equality Directives* (2003) at 421. Some argue that it would still enable member states to introduce an *actio popularis*. See B. Bodrogi, ‘Legal Standing – The Practical Experience of a Hungarian Organisation’ (2007) 5 *European Anti-Discrimination Law Review* 23 at 25.

the ECJ's case law in the field of gender equality reveals that the Court does not apply a fully consistent and coherent approach as regards the delineation of the concepts of direct and indirect sex discrimination. This raises the question whether the ECJ will similarly obfuscate the difference between the concepts of direct and indirect discrimination in the context of the RED, even though the text of this Directive contains clear and sensible definitions that allow for a conceptually sound delineation of both concepts. In other words, there is a risk that the text of the RED will not be matched by clear and coherent practice of the ECJ: a potential mismatch between text and theory versus practice.

It is important to emphasise that the question is not of mere theoretical relevance, because the RED provides a higher level of protection against direct discrimination than against indirect discrimination. While the RED allows for a general objective justification possibility for alleged indirect discrimination, instances of alleged direct discrimination only know two narrowly interpreted exception possibilities.¹⁷

The following sections discuss: the theoretically most appropriate delineation arising from the definitions in the text of the RED (3.1); the unclear practice of the ECJ in the field of gender equality (3.2); and possible consequences of this case law for case law concerning the RED (3.3).

3.1 Delineation of Direct v. Indirect Racial Discrimination Arising from the Text of the RED

The most obvious starting point for the delineation of direct versus indirect racial discrimination can be found in the definitions contained in Article 2 of the RED. Article 2(2)(a) of the RED provides that

direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.

Article 2(2)(b) of the RED provides that

indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

On the basis of these two provisions, a number of observations can be made.

3.1.1 Direct v. Indirect Causal Link

First of all, the term 'direct discrimination' implies a *direct* causal link between a person's racial or ethnic origin and the treatment complained of, whereas 'indirect discrimination' points to an *indirect* causal link. A direct causal link can be understood as a link that can be immediately established, without the help of an additional circumstance that connects the measure to the person's racial or ethnic origin. For example, a sign above a shop stating 'No Turks allowed' involves a direct causal link, because there is no intermediary circumstance necessary to ascertain that it is a Turkish person who cannot enter the premises. In other words, there is a direct connection between being Turkish and the disadvantage of not being able to enter the shop. One does not need to look at the particular situation of Turkish persons in general or at the effects that the sign has in practice in order to know that it disadvantages persons on the basis of their racial or ethnic origin.

In cases of indirect discrimination, there is no direct causal link and additional circumstances are needed to establish the causal connection with the person's racial

¹⁷ The definition of indirect discrimination in Article 2(2)(b) of the RED makes clear that objectively justifiable, proportionate measures do not amount to indirect discrimination. No such general statement is contained in Article 2(2)(a) of the RED, which contains the definition of direct discrimination. Instead, the RED explicitly – and exhaustively – mentions two exceptions to the prohibition of differences in treatment based on race: using race as a genuine and determining occupational requirement (Article 4 of the RED) and taking positive action in favour of a particular racial or ethnic group (Article of the 5 RED).

or ethnic origin. Take, for example, a language requirement for a particular job. It is necessary to take into account the additional circumstance that it is usually people of foreign origin who do not speak the majority language in order to establish a causal link between the disadvantage of not qualifying for the job and the protected characteristic of being of foreign origin. This link is indirect, because it is based on the characteristic of not speaking the majority language.

There is a complicating factor regarding racial and ethnic discrimination that is relevant here. The notions of racial and ethnic origin are social constructs, which means that they are constructed in the minds of people and do not refer to objectively identifiable categories. The meaning of racial and ethnic origin is established for each society by the practice of its members: in-groups and out-groups are determined through social interaction. Consequently, the characteristics used by the members of a particular society to determine whether a person belongs to a perceived in-group or out-group may vary. In the Netherlands, for instance, Muslims and Turkish and Moroccan people are typically perceived as out-groups. Dutch people use the characteristics of Arab-sounding names, language, physical traits and religious wear to determine whether a person belongs to one of these perceived racial or ethnic groups. In other words, these characteristics are used as proxies for the perceived categories of 'Turks' and 'Moroccans'. In fact, racial and ethnic categorisation always involves the use of proxies, because there are no objective criteria for establishing racial or ethnic groups.

Some of these proxies invariably come with membership of a racial or ethnic group as perceived in society and cannot be thrown off by their bearers. This is the case, for example, with skin colour, a proxy that is often used to identify persons belonging to a perceived racial group, since a person cannot choose to have a particular skin colour. Differences in treatment on the basis of these characteristics, which are inextricably linked to race and ethnic origin, should automatically be categorised as differences in treatment on the basis of racial or ethnic origin, that is to say, as direct racial discrimination. Thus, if a person is treated differently because of his dark skin colour or because of the shape of his nose, he is directly discriminated against on the basis of his – perceived – racial or ethnic origin.

However, most proxies involve characteristics that are less obviously connected to the membership of a perceived out-group, because they involve an element of choice. For example, speaking Arabic or wearing a headscarf are proxies that are often used in daily life to establish a person's assumed different racial or ethnic origin, but they are not inextricably linked to the membership of the racial or ethnic group. Some persons belonging to the particular group will speak the majority language fluently or not wear a headscarf. One might be inclined to treat differences in treatment based on these proxies as indirect discrimination, since they appear not to be directly causally linked to racial or ethnic origin. This is true only to some extent. If language or religion are the real reasons for the differential treatment, direct discrimination on the grounds of racial or ethnic origin is indeed not the appropriate label. If an employer genuinely needs his employees to speak fluent Dutch, his decision not to hire someone who only speaks Arabic cannot be considered to amount to using the applicant's language affinity as a proxy for his perceived racial or ethnic origin. Given that differentiations based on religion or language tend to disproportionately affect particular ethnic groups, this is actually an example of indirect discrimination.

Still, if language, religion or a similar characteristic is actually used as a proxy for a person's perceived racial or ethnic origin, direct discrimination is the more appropriate label. If an employer refuses to hire a person whose mother tongue is Arabic because he does not want any 'Muslims' on his team, he is directly discriminating on the basis of racial or ethnic origin. After all, the applicant's membership of the group of 'Muslims' is the real reason for the way in which he has been treated. This qualifies as a direct causal link.

Clearly, each claim of racial or ethnic discrimination involving the use of a characteristic that may or may not be used as a proxy for membership of a perceived racial or ethnic group deserves careful consideration in order to determine whether it relates to direct or indirect discrimination.

3.1.2 Motive and Cause v. Effects

Secondly, the definitions of direct and indirect discrimination in the RED reveal that direct discrimination is about the underlying *motive or cause* for some difference in treatment, whereas indirect discrimination focuses on the *effects* of a particular treatment. The definition of direct discrimination speaks of a less favourable treatment ‘on the grounds of’ racial or ethnic origin, whereas the definition of indirect discrimination refers to an apparently neutral provision, criterion or practice that ‘would put at a particular disadvantage’ certain racial or ethnic groups. This means that, in concrete cases, direct discrimination is established by looking at the underlying cause or motive for the treatment that is claimed to be discriminatory, whereas indirect discrimination is established by looking at the particular effects of the treatment on the perceived racial or ethnic group.

If I claim that an employer directly discriminated against me by not hiring me for a post because I am Dutch, the relevant question to ask is whether my being Dutch was the reason why the employer did not hire me. If I claim that a requirement for a particular post in the United Kingdom according to which I must speak fluent English constitutes indirect discrimination on the grounds of my Dutch origin, the relevant question to ask is whether this requirement disproportionately affects people not belonging to the majority ethnic group in the United Kingdom.

In line with general anti-discrimination theory, it should be emphasised that intent is not required for a qualification of direct discrimination.¹⁸ In other words, it is not necessary that the alleged perpetrator of direct discrimination is consciously seeking to disadvantage persons belonging to a particular racial or ethnic group. Indeed, prejudiced beliefs about persons belonging to particular racial or ethnic groups can operate at a subconscious level.¹⁹ It is therefore possible that a person’s actions amount to direct discrimination, because of their reliance on a stereotypical or biased belief, without that person actually wanting to disadvantage persons belonging to a particular racial or ethnic group.²⁰

Whereas discriminatory intent is therefore not requisite, it should be stressed that where such intent is present, the qualification of direct discrimination should automatically be applied, regardless of the formal reason given by the alleged perpetrator for his behaviour. If an employer claims, for instance, that the real reason for his refusal to hire a particular person was the person’s insufficient command of the majority language, whereas evidence shows that he did not want to hire the person due to his apparent membership of an ethnic group, his behaviour should be qualified as direct discrimination. After all, the real motive for the rejection of the person’s application was his different ethnic origin. These cases are often referred to as covert direct discrimination, since the discriminatory component is not visible at first glance.²¹

However, covert direct discrimination should not be confused with indirect discrimination, which also involves cases where the discriminatory component only becomes visible when one considers additional circumstances of the case. In cases of covert direct discrimination, there is a direct causal link to the protected characteristic, since the *real* reason behind the facially neutral measure was to disadvantage persons belonging to a particular perceived racial or ethnic group. Such a direct causal link is

¹⁸ E. Ellis, *EU Anti-Discrimination Law* (2005) at 103.

¹⁹ C. Bayart and C. Deiteren, ‘Direct en indirect onderscheid’ in C. Bayart, S. Sottiaux and S. Van Drooghenbroeck (eds.), *De Nieuwe Federale Antidiscriminatiewetten* (2008) 172 at 195; Ellis, above n. 18, at 103.

²⁰ See Lord Nicholls’ argumentation in the UK House of Lords case *Nagarajan v. London Regional Transport*, [1999] ICR 877: ‘human beings have perceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.’

²¹ See, for instance, D. Schiek, L. Waddington and M. Bell (eds.), *Non-Discrimination Law* (2007) at 185-186.

not present in a case of indirect discrimination, which involves facially neutral measures for which the underlying reason is not connected to a person's perceived racial or ethnic origin.

3.1.3 Direct v. Indirect Discrimination: Appraisal

These two observations (direct versus indirect causal link and motive versus effect) warrant the conclusion that the qualification of 'direct discrimination' should be reserved for those instances of disadvantageous treatment for which the underlying motive or cause is a protected ground and which can therefore be directly causally linked to this ground. In contrast, 'indirect discrimination' covers measures that are not based on a protected characteristic but have a disadvantageous impact on members of a particular racial group because their special needs are not taken into account. In this way, the disadvantageous impact is indirectly causally connected to the protected characteristic. In other words, in the case of indirect discrimination, the causal link only appears when one considers its effects or takes into account information about the characteristics of the persons belonging to the protected group.

This delineation turns direct and indirect discrimination into mutually exclusive concepts, which enhances their applicability in practice. It is acknowledged that this theoretical delineation cannot change the reality that issues of proof can make it difficult in specific cases to know whether direct or indirect discrimination is involved. From a conceptual viewpoint, however, the delineation as proposed in this section produces two neatly distinguishable categories of discrimination.

3.2 Delineation of Direct v. Indirect Sex Discrimination in ECJ Case Law

The original equality provisions of European gender equality law prohibited 'discrimination' as such without referring to different types of discrimination.²² From quite early on, however, the ECJ developed a two-tiered approach of direct and indirect discrimination, following the example of US and UK anti-discrimination law.²³

Over time, the ECJ arrived at a particular understanding of direct discrimination that it continued to use for many years. According to this understanding, direct discrimination is present if the *fundamental reason* for the disputed treatment is one which *applies exclusively to one sex*.²⁴ This understanding of direct discrimination actually hinges on two thoughts, since it focuses not only on the underlying motive for a difference in treatment (*fundamental reason*) but also on its effects in practice (*applies exclusively to one sex*). This ambiguity reveals that the label of direct discrimination is not used exclusively for differences in treatment for which the underlying cause or motive is a person's sex.

First of all, the ECJ sometimes applies the qualification of direct sex discrimination in cases in which the disadvantage exclusively affects a protected group but is not based on or motivated by the person's sex and therefore does not involve a direct causal link. Pregnancy cases are a well-known example in this regard. According to a consistent line of practice of the ECJ, disadvantageous treatment on account of pregnancy or pregnancy-related characteristics constitutes direct discrimination of women, because it 'affects only women'.²⁵

²² S. Fredman, *Discrimination Law* (2002) at 93-94.

²³ For an extensive overview of this development, see C. Tobler, *Indirect Discrimination* (2005) at 101-277.

²⁴ Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941, para. 10; Case C-421/92, *Habermann-Beltermann v. Arbeiterwohlfahrt*, [1994] ECR I-1657, para. 14; Case C-25/02, *Katharine Rinke v. Ärztekammer Hamburg*, [2003] ECR I-8349, para. 32.

²⁵ D. Schiek, L. Waddington and M. Bell (eds.), *Non-discrimination law* (2007) at 192-193; E. Ellis, *EU Anti-Discrimination Law* (2005) at 107. See, inter alia, Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941, para. 12; Case C-394/96, *Brown v. Rentokil*, [1998] ECR I-4185, para. 24; Case 207/98, *Mahlburg*, [2000] ECR I-549, para. 20; Case C-116/06, *Sari Kiiski v. Tampereen kaupunki*, [2007] ECR I-7643, para. 55.

A more recent case provides another clear example of this effects-based approach. *Nikoloudi*²⁶ concerned a rule reserving established staff positions only for persons with full-time jobs. The part-timers at the company were all women, as staff regulations made it possible only for women to obtain a part-time contract for the particular job category. The ECJ ruled that the rules for becoming an established staff member amounted to direct discrimination based on sex, even though the criterion for obtaining the established staff status was ‘ostensibly neutral as to the worker’s sex’. The determining factor for the Court was the fact that the measure impacted negatively on a category of workers that could only be composed of women.

The same effects-based reasoning is visible in *Maruko*, in which the ECJ considered that a rule granting survivor’s pensions only to surviving spouses, thus excluding the category of ‘life partners’, constituted direct discrimination on grounds of sexual orientation.²⁷ This was remarkable, because the rule itself did not distinguish according to sexual orientation. The most obvious explanation for the ECJ’s choice is the fact that, in German law, ‘life partners’ are necessarily partners of the same sex, which means that the criterion of being married excluded a category uniquely composed of homosexual persons.

Secondly, the ECJ sometimes employs the label of direct discrimination for cases in which there is a lack of attention for the special needs of particular vulnerable gender-related groups, even though there is no direct causal link with the persons’ sex. In *Kiiski*, a woman requested interruption of the childcare leave she was enjoying, because she had become pregnant. The employer refused, because the relevant regulations did not allow for interruption of childcare leave on grounds of a new pregnancy. Even though this refusal was clearly not based on the gender of Mrs Kiiski or on her pregnancy, the ECJ still considered that the case amounted to direct discrimination on grounds of sex. It considered that the relevant provisions should have allowed for alteration of the childcare leave period in the case of a new pregnancy, since such a circumstance seriously influences the extent to which a mother can achieve the aims sought after by childcare leave.²⁸ Thus, the ECJ in fact considered the lack of provision for the special needs of pregnant women to amount to direct discrimination. Based on a similar argumentation, the ECJ also developed a principle of special consideration of the needs of transsexuals in the context of the prohibition of direct discrimination.²⁹

Substantively speaking, it is possible to sympathise with the ECJ’s choice to include in the category of direct discrimination disadvantageous treatment based on characteristics that are closely connected to a person’s sex as well as certain omissions to provide for the special needs of vulnerable groups. However, the ECJ approach does not seem to be based on a clear understanding of the difference between direct and indirect discrimination. Rather than relying on a sound conceptual framework, the ECJ seems to distinguish between the two concepts by looking at the perceived seriousness of the particular case. This makes it very difficult to know when exactly to use which concept. The fact that the advocates general in *Nikoloudi* and *Maruko* used the qualification of indirect discrimination instead of direct discrimination is telling in this respect.³⁰

²⁶ Case C-196/02, *Nikoloudi v. Organismos Tilepikinonion Ellados AE*, [2005] ECR I-1789, paras. 31-36.

²⁷ Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, [2008] ECR I-1757, paras. 65-73. The ECJ left the final word to the national court, however, stating that there would only be direct discrimination if that court were to find that national law treats spouses and life partners as comparable. For a discussion of the appropriateness of applying a comparability test, see section 4.3.4.

²⁸ Case C-116/06, *Sari Kiiski v. Tampereen kaupunki*, [2007] ECR I-7643, paras. 49-55.

²⁹ In Case C-423/04, *Richards v. Secretary of State for Work and Pensions*, [2006] ECR I-3585, paras. 27-38, a male-to-female transsexual claimed to have been discriminated against on grounds of sex because she was denied a retirement pension after having reached the age upon which other women received a pension. The ECJ acknowledged that the disadvantageous treatment was ‘based on Ms Richards’ inability to have the gender which she acquired following surgery recognised’, and thus implicitly acknowledged that the fundamental reason for the denial of the pension was not her change of gender. Still, it considered that this lack of provision for the special situation of transsexuals constituted discrimination on grounds of sex, with which it apparently meant direct discrimination, since it did not mention or explore any objective justification possibilities.

³⁰ Opinion of Advocate General Stix-Hackl in *Nikoloudi*, 29 April 2004, para. 45; Opinion of Advocate

3.3 Practical Implications for the RED: A Potential Mismatch?

If anything, the above analysis makes clear that distinguishing between direct and indirect discrimination is a complex exercise. National courts will probably struggle to find the appropriate qualification for particular instances of discrimination when applying the RED. Even though it is clear that the ECJ's case law in the field of gender equality will not simply be transposed to the field of racial equality,³¹ the apparent lack of a clear understanding of the difference between direct and indirect discrimination in the ECJ's gender case law at least raises the question whether a similarly incoherent approach will be taken with regard to the RED.

Imagine, for instance, a case coming up with regard to a rule requiring all persons with temporary residence permits to fulfil extra conditions in order to obtain a mobile telephone contract. Since the rule does not rely on a person's racial or ethnic origin as a fundamental reason, this is not direct discrimination. However, the exclusive and thus disproportionate impact on a particular group, namely persons not belonging to the majority ethnic group in society, suggests that this is an instance of indirect racial discrimination. Still, following the reasoning applied in the *Nikoloudi* case, one could argue that direct racial discrimination is involved, because the rule exclusively affects persons not belonging to the dominant ethnic group in society.

Another example might involve a claim by traveller communities that the local government systematically disregards their specific housing needs in its housing policy. The obvious qualification here would be indirect racial discrimination, given that there is no underlying racial cause or motive for the local government's neglect of the particular needs of this community. Smart lawyers, however, could find inspiration in cases such as *Kiiski* to argue that scant regard for the pressing needs of vulnerable ethnic communities constitutes direct racial discrimination.

Clearly, this lack of conceptual clarity is undesirable not only from the point of view of legal certainty but also in view of the need for a uniform standard of non-discrimination across the European Union. It is therefore important that a coherent, workable conceptual framework is adopted for the RED. Having such a framework would at the same time avoid the second (potential) mismatch identified here. Indeed, a proper application of the substantive concepts used in the RED undoubtedly furthers effective protection against racial discrimination.

3.4 The *Feryn* Case as an Illustration of the Conceptual Confusion over Direct and Indirect Discrimination

The *Feryn* case – in particular the questions posed by the national court – illustrates the difficulty national courts have in determining the exact dividing line between direct and indirect discrimination. The Belgian court referring the case to the ECJ asked several questions, including:

- (4) What is to be understood by 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of Directive 2004/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?
- (a) To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of [Directive 2000/43]? ...
- (d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants? ...
- (f) Having regard to the facts in the main proceedings, can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer?³²

General Colomer in *Maruko*, 6 September 2007, para. 102; Opinion of Advocate General Kokott in *Kiiski*, 15 March 2007, paras. 31-47.

³¹ K.A.M. Henrard, *Equal rights versus special rights? Minority protection and the prohibition of discrimination* (2007) at 22.

³² The most relevant parts of the extensive questions submitted by the national court read as follows:

These questions attest to a lack of clarity concerning the distinction between the two concepts. The national court seemingly assumed that mere speech in itself was not sufficient to identify an instance of some form of discrimination and thus attempted to identify relevant 'practice'. This proved to be complicated, however, because there were no actual victims available. The court subsequently found it very hard to translate the facts of the case into the frame of either direct or indirect discrimination. In view of the profound uncertainty visible in the questions of the national court about the dividing line between direct and indirect discrimination, it is unfortunate that the ECJ did not explicitly clarify this distinction. At most, it could be argued that the Court provided an implicit answer, since its response to the first and second questions only refers to direct discrimination (paras. 22-26).

A proper conceptual understanding of the distinction between direct and indirect discrimination would have been furthered if the Court had clarified that, once an employer has stipulated explicitly that it does not want to employ people from a particular ethnic origin (and thus because of this ethnic origin), a direct causal link is established with the protected ground. In such a clear instance of direct racial discrimination, there would be no need to consider subsequent practice or the particular effects of the announcement on a particular ethnic group, as one would have done in order to establish indirect discrimination.

When one is serious about qualifying a public statement about recruitment policy (selection criteria) as a (possible) instance of discrimination because of its strong dissuasive force, one should keep this separate from the assessment of actual recruitment practice. Even if an employer were to hire one or two persons belonging to the ethnic or racial group in question, this would not undo the dissuasive force of the public statement, which would continue to resonate.

Hence, in order to be consistent in terms of the reading of the concept direct discrimination and to enhance conceptual clarity for the national courts, the ECJ should have distinguished between two different possible instances of discrimination in the *Feryn* case: one in relation to the statement as such (the 'speech' instance) and one in relation to the actual recruitment actions (the 'practice' instance).

By not consistently distinguishing between discriminatory speech and (possible) discriminatory practice, the ECJ left the questions of the national court about indirect discrimination (relating to the impact and effects and thus actual practice) unanswered. Hence, the ECJ did not reduce the uncertainty of the national court about the respective reach of direct and indirect discrimination and thus missed an opportunity to further develop an effective protection against discrimination.

(1) Is there direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin where an employer, after putting up a conspicuous job vacancy notice, publicly states: "I must comply with my customers' requirements." ...

(4) ... (b) Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy? Having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: "I must comply with my customers' requirements." ...

(d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants?

4 Mismatch III: Substantive v. Enforcement Provisions

4.1 Direct v. Indirect Discrimination and the Allocation of the Burden of Proof

Effective protection against discrimination requires, *inter alia*, an appropriate translation of the substantive concepts of discrimination into procedural terms. One of the most important cornerstones of effective protection in terms of enforcement is a satisfactory regime for the proof of direct or indirect discrimination that does not impose an undue burden on the claimant (alleged victim).³³

Article 8 of the RED stipulates a special rule for the allocation of the burden of proof in racial discrimination cases, stemming from the case law of the ECJ on gender discrimination.³⁴ Pursuant to this rule, the applicant must first ‘establish ... facts from which it may be presumed that there has been direct or indirect discrimination’. Once the presumption of discrimination has been established, ‘it shall be for the respondent to prove that there has been no breach of the principle of equal treatment’. The applicant therefore only has to establish a presumption of either direct or indirect discrimination. As soon as he has done so, it is for the respondent to prove that no discrimination has taken place. As this definition itself indicates, the special allocation of the burden of proof creates two phases. These phases can serve as a basis for a theoretical review model. One can refer to the first phase of this model as the *prima facie* phase and the second phase as the refutation phase.

Although neither this definition nor the two phases seem particularly complicated, it remains unclear in theory as well as in the case law of the ECJ what these phases actually entail when taken together with the concepts of direct and indirect discrimination. In practice, the lack of conceptual clarity concerning the review model results in a mismatch between the substantive concepts and the allocation of the burden of proof.

4.1.1 The *Prima Facie* Phase

Pursuant to Article 8 of the RED, the applicant shall establish facts from which it may be presumed that there has been (direct or indirect) *discrimination*. Nevertheless, it remains unclear what it takes to establish a *prima facie* case of discrimination, and the case law of the ECJ does not provide a helping hand in this respect. The case law of the ECJ only illuminates that statistics can establish a presumption of discrimination³⁵ and that this presumption can be established with the help of comparisons.³⁶ As these explanations do not provide much clarity, one can only turn to the concept(s) of discrimination in order to identify relevant markers for a presumption of discrimination.

The concept of discrimination arguably entails that there is a causal link between the harm and the protected ground as well as between the behaviour complained of and the harm. As far as these causal relationships are concerned, as explained above, a

³³ See, *inter alia*, O. De Schutter, ‘Methods of Proof in the Context of Combating Discrimination’ in J. Cormack (ed.), *Proving Discrimination – The Dynamic Implementation of EU Anti-Discrimination Law: The Role of Specialised Bodies* (2003) at 23; M.H.S. Gijzen, *Selected Issues in Equal Treatment Law: A Multi-layered Comparison of European, English and Dutch Law* (2006) at 73; F. Palmer, ‘Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof’ (2006) *European Anti-Discrimination Law Review* 23 at 23; O.M. Arnardóttir, ‘Non-discrimination under Article 14 ECHR: The Burden of Proof’ (2007) 51 *Scandinavian Studies in Law* 13 at 16.

³⁴ See, *inter alia*, Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, [1989] ECR 3199; Case C-243/95, *Kathleen Hill and Ann Stapleton v. The Revenue Commissioners and Department of Finance*, [1998] ECR I-3739; Case C-127/92, *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, [1993] ECR I-5535; Case C-237/94, *John O’Flynn v. Adjudication Officer*, [1996] ECR I-2617.

³⁵ Case C-127/92, *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, [1993] ECR I-5535; Case C-237/94, *John O’Flynn v. Adjudication Officer*, [1996] ECR I-2617.

³⁶ See, for instance, Case C-226/98, *Birgitte Jørgensen v. Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg*, [2000] ECR I-02447, para. 29.

clear distinction needs to be made between cases of direct and indirect discrimination. In cases of direct discrimination, the less favourable treatment is directly based on the victim's protected characteristic, while in cases of indirect discrimination a particular disadvantage is or can be 'merely' related to a protected characteristic. This conceptual distinction entails that, in cases of indirect discrimination, a disparate impact (particular disadvantage) on a group immediately establishes a presumption of an indirect causal link between the protected ground and the harm. For instance, a regulation that requires a person to wear a helmet when riding a motorcycle can have a disparate impact on the Sikh community, whose male members wear turbans. Common knowledge and/or statistics concerning the disparate impact on this minority group could help to establish an indirect causal link. Conversely, in direct discrimination cases, the applicant should focus on providing some indication that the underlying reason or motive for the behaviour complained of was the protected characteristic. In the case of refusal to serve persons of Roma origin in a restaurant, for instance, situation testing can be carried out. If the treatment of members of non-Roma groups turns out to be markedly different to the treatment of members of the Roma group (while the members of both groups are similar in all other respects), this would help to establish a presumption that there is a causal link between the treatment (refusal) and the protected characteristics (Roma origin).

Due to the lack of clarity about the concepts of discrimination and the review model, there is a potential danger that fact-finders will not make a distinction between the concepts of direct and indirect discrimination when applying the review model. The lack of adaptation of the concepts to this procedural provision and the lack of conceptual clarity as to what presumption means can result in the following mismatches. First of all, in direct discrimination cases, fact-finders can require more than simply a presumption, expecting victims to prove that the respondent had the intent to discriminate. In the case of refusing to serve Roma people, this would mean that the fact-finder would require the applicant to prove that the owner of the restaurant had the intent to discriminate against the Roma. In cases of covert direct discrimination it is almost impossible to prove this. Secondly, in indirect discrimination cases, fact-finders might require the applicant to prove or at least make it very credible that the challenged measures were based on his protected characteristic instead of simply establishing that they had a disproportionate impact on the group to which he belongs. Taking the example of the regulation requiring motorcyclists to wear helmets, it would be conceptually incorrect if fact-finders were to look for evidence of the existence of an intent to discriminate against Sikhs, as they only need to establish that the rule disproportionately affects this minority group.

Insisting on the need to prove the existence of a causal link instead of establishing a 'mere' presumption of such a link in an alleged case of direct discrimination and insisting on the need to establish a presumption of the kind belonging to the concept of direct discrimination in an alleged case of indirect discrimination can result in mismatches that hamper effective protection against discrimination.

4.1.2 The Refutation Phase

As soon as the applicant establishes facts that give rise to a presumption of discrimination, the burden of proof is placed on the respondent. More precisely, the respondent's burden of proof is created by the establishment of a *prima facie* case of discrimination. In the refutation phase, the respondent bears the burden of persuading the fact-finder that he has observed the principle of equal treatment.

In the case law of the ECJ, the respondent's burden of proof is interpreted as (objective) justification.³⁷ However, based on the concepts of discrimination, it can be argued that in conceptual terms this phase of the assessment includes another stage prior to objective justification, namely the stage of negation of the causal link.

³⁷ See, inter alia, Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, [1989] ECR 3199, paras. 16 and 22-23; Case C-243/95, *Kathleen Hill and Ann Stapleton v. The Revenue Commissioners and the Department of Finance*, [1998]

Since the existence of the causal link is only at the level of presumption (established by the applicant) at the end of the *prima facie* phase, it could be argued that, in order to refute the allegation of discrimination, the respondent should first attempt to negate the causal link between the harm and the protected characteristic. If he is not able to negate this link, the defendant can come up with an objective justification.³⁸ The claim that there is no causal link relates to the question whether a distinction has been made on the grounds of the victim's racial or ethnic origin, while the claim that there is an objective justification pertains to the question whether the distinction based on or related to the protected characteristic is lawful, that is to say, whether or not the distinction constitutes discrimination.

As mentioned above, the conceptual distinction between direct and indirect discrimination influences the respondent's ability to use the distinctive stages of the refutation phase. In cases of direct discrimination, the respondent's ability to rely on objective justification is limited, as the RED only allows very few exceptions to the prohibition of direct discrimination. However, he can try to negate the causal link by showing that the actual reason or motive for the behaviour complained of was not the victim's racial or ethnic origin. In contrast, in cases of indirect discrimination, there is more scope for objective justification, but it is almost impossible to negate the causal link (i.e., the disparate impact on the protected group). The impossibility of negating the causal link in cases of indirect discrimination is due to the fact that the question whether a particular measure has a disparate impact on a group is a question of fact and not of presumption.

The lack of a sound translation of the concepts of discrimination in terms of the review model can have serious practical implications. For instance, in an alleged case of direct discrimination, the argument of a restaurant owner that his refusal to serve people of Roma origin is based on their non-compliance with the dress-code would generally be understood as a claim of justification ('I had a very good reason not to serve them'). In actual fact, the owner is trying to negate the causal link between his refusal and the customers' Roma origin ('It was not because of their Roma origin that I did not serve them'). The flawed understanding of the different stages of the review model can result in incorrect findings of discrimination because the negation of the causal link as put forward by the respondent is not considered or accepted. In view of the meagre possibilities for justifying direct discrimination in the RED, the denial of the negation stage almost certainly leads to a conclusion of prohibited discrimination. Only if a respondent can show that the claimant's ethnic or racial origin constituted a genuine and determining occupational requirement or that he was applying a positive action scheme, will his differentiation on the basis of racial or ethnic origin be accepted.

This conceptually incorrect approach thus affects the defence position of the respondent, who has fewer possibilities to refute the alleged direct discrimination. Realising this, fact-finders may try to redress this imbalance, for example by imposing a heavier burden of proof on the applicant concerning the causal link. In practice, this heavier burden would mean that the applicant needs to prove the existence of discrimination instead of merely establishing a presumption thereof. This would clearly contradict the aim of the RED to lighten the burden of proof for the applicant.

In order to ensure effective protection against discrimination, the above-mentioned mismatches should be avoided, first and foremost, by adapting the two phases of the allocation of the burden of proof to the concept of discrimination at hand. Moreover, the theoretical review model elaborated above should be followed by fact-finders when assessing alleged cases of racial discrimination. Finally, the ECJ should provide more clarity on the implications of these phases of the assessment. This clarification would also assist national (quasi-)judicial bodies in their deliberation of cases.

ECR I-3739, para. 43; Case C-17/05, *B. F. Cadman v. Health and Safety Executive*, [2006] ECR I-09583, para. 31.

³⁸ C. Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (2005) at 69.

4.2 The *Feryn* Case as a Manifestation of the Flawed Translation of the Concepts of Discrimination in Terms of the Allocation of the Burden of Proof

In the *Feryn* case, the ECJ failed to properly transpose the interpretation of the concept of discrimination that it had adopted to the domain of the special allocation of the burden of proof and the related review model. The national court asking the preliminary questions was clearly unsure about how to apply the special allocation of the burden of proof and, more particularly, the application of the ‘presumption of discrimination’ concept. By asking whether the same constellations of fact amounted to discrimination and also to a presumption of discrimination, the national court manifested its profound confusion about how a finding of discrimination is related to the establishment of a presumption of discrimination.

The ECJ failed to dispel these uncertainties and instead increased the confusion by qualifying a *public statement* revealing a discriminatory recruitment policy both as a presumption of discrimination and as prohibited discrimination in itself without explicitly applying the review model and without explaining the respective qualifications in this context.

In paragraph 28 of its judgment, the ECJ explicitly states that ‘the fact that an employer states publicly that it will not recruit employees of a certain racial or ethnic origin *constitutes* direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43’ (emphasis added). The Court subsequently stipulates in paragraph 31 that the statements concerned ‘*may* constitute facts of such a nature as to give rise to a *presumption* of a discriminatory recruitment policy’ (emphasis added). Hence, what a few paragraphs earlier is said to *constitute* direct discrimination, is now possibly merely a *presumption* of discrimination.

It is commendable that the ECJ uses the term ‘presumption’, thus attempting to apply elements of the review model. However, the Court should have acknowledged that, in this particular factual setting, the public statement actually amounts to full proof of overt direct discrimination. Furthermore, in order to provide further insights into the way in which a ‘speech’ instance of discrimination relates to the review model, the ECJ could have pointed out that, even if one were to merely regard the public statement as a presumption, this presumption could neither be negated nor justified as an exception. Indeed, the public statement precludes a negation of the causal link, since the causal link was made explicitly and in public by the employer himself. Consequently, one should check the ‘system’ inherent in the RED for possible exceptions. Clearly, none of the very limited exceptions included in the RED are applicable, since the statement can be considered neither a genuine and determining occupational requirement (Article 4) nor a measure of positive action (Article 5). Hence, one is forced to conclude that this constitutes an instance of prohibited direct racial discrimination.

Interestingly, the statement that in itself constitutes direct discrimination is also relevant for the subsequent assessment of the *recruitment practice* of the employer (as a separate potential instance of discrimination). More specifically, the public statement on recruitment policy could be regarded as establishing a presumption of discrimination in relation to the recruitment practice of the employer. If he says that he will discriminate, one can presume that he will do so. This presumption could still be rebutted by proof that the actual practice of the employer is not racially discriminatory, but this would be difficult to prove. For instance, showing that one person from a minority ethnic background has been employed by the employer would arguably not be sufficient, as this would not necessarily prove that racially discriminatory motives had not played a role in other instances or even in the great majority of instances. This also implies that it would be inappropriate (incorrect) to determine a particular percentage of personnel that should be from an ethnic background in order to rebut a presumption of the ‘practice’ instance of discrimination. At the same time, it seems unreasonable to demand a review of all recruitment decisions ever taken.

The ECJ arguably has a long way to go to apply the review model correctly and to make sure that the distinct concepts of discrimination are always properly translated in

terms of the special allocation of the burden of proof and the related review model. This is not only important for the coherence of the Court's own case law but will also provide the required clarification and guidance for national courts.

5 Conclusion

A general conclusion that can be drawn from the preceding analysis is that the success of a particular instrument in terms of the effective protection that it offers against discrimination depends as much on the coherence of the substantive and enforcement provisions in the text of the instrument as on the sound and coherent interpretation and application of those provisions. This implies a need for suitably broad enforcement provisions, so that they match teleological interpretations of substantive provisions. Furthermore, as regards the second and third potential mismatch identified in this article, the adopted interpretation must include a proper and consistent delineation of the substantive concepts as well as an appropriate translation of these concepts in terms of the enforcement provisions. The ECJ remedied the first mismatch through its generous interpretation of the 'flawed' enforcement provision (on legal standing), in order to bring it into line with its teleological interpretation of the concept of 'direct discrimination'. Unfortunately, it has failed to avoid the two other mismatches, which are the result of a flawed interpretation and application of the substantive provisions outlawing discrimination. Indeed, the ECJ has not provided conceptual clarity concerning the substantive provisions or concerning the two phases of the review model and their translation in terms of the substantive provisions. Consequently, it has failed to realise the most effective protection possible against discrimination.

As regards the Racial Equality Directive, it is essential that the ECJ, in view of its special position as the ultimate interpreter and guardian of the unity of EU law, takes up its task of ensuring this 'match', while providing adequate guidance to the national courts. In this respect, it is to be hoped that the Court's willingness to avoid mismatches between substantive law and its application will manifest itself more generally in the future. Scholars arguably also have a role to play in identifying mismatches and offering suggestions on how to remedy them, but in the end it is up to the courts, and the ECJ in particular, to ensure that the procedural framework of the Directive and the interpretation and application of its provisions work together to ensure the most effective protection possible against racial discrimination.

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

Lilla Farkas*

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’.¹ 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.² 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

¹ 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.

² 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.'³

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.⁴ 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

³ 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.

⁴ 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.⁵ 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.⁶ 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,⁷ while Christopher McCrudden has highlighted the beneficial effects of using anti-discrimination clauses in public procurement.⁸

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

⁶ 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.

⁷ 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).

⁸ 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.⁹ 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.¹⁰

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’.¹¹ 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).

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

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

¹¹ *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.¹²

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.¹³ 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.¹⁴

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.¹⁵

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

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

¹⁴ Bodrogi, above n. 9, at 29-30.

¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰ 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).²¹ 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

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

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

¹⁸ *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.

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

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

²¹ *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.²²

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.²³ 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.²⁴

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*.²⁵ Whether this regional 'naming and shaming' did the trick is merely a matter of speculation – although one that proved correct in the Hungarian context.

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

²³ *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.

²⁴ *Orsus*, at paras. 20-51.

²⁵ 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.²⁶

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).²⁷

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.²⁸ 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.

²⁶ *Orsus*, at para. 193.

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

²⁸ 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,²⁹ 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.³⁰ 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.³¹ 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,³² 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>.

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

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

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

³² 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.³³ 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.³⁴

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.³⁵

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

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

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

³⁵ 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.³⁶ 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.³⁷ 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.³⁸

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

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

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

³⁸ 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.³⁹

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.⁴⁰

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 2010.⁴¹ Referring to the final judgment handed down in Miskolc I, the Supreme Court

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

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

⁴¹ 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.⁴² 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.⁴³ 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.⁴⁴ 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

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

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

⁴⁴ 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 Rights⁴⁵ 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

⁴⁵ 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’.⁴⁶

⁴⁶ 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>.