

## INTRODUCTION

*Ellen Hey\**

This issue of the *Erasmus Law Review* focuses on the Racial Equality Directive (RED),<sup>1</sup> 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.<sup>2</sup> 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*,<sup>3</sup> 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:

---

\* Editor in Chief.

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

<sup>2</sup> 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).

<sup>3</sup> 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.