



REPORT ON MEASURES TO COMBAT DISCRIMINATION Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT 2011¹

ITALY

CHIARA FAVILLI

State of affairs up to 1st January 2012

This report has been drafted for the **European Network of Legal Experts in the Non-discrimination Field** (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation), established and managed by:

Human European Consultancy
Maliestraat 7
3581 SH Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

Migration Policy Group
Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

All reports are available on the website of the European network of legal experts in the non-discrimination field:

<http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>

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¹ This report is based on the previous report written by Professor Alessandro Simoni.



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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.

The Italian legal framework guaranteeing equal treatment is mainly based on statute law in the form of acts of parliament or acts of the same force that originate in a decision of the national parliament (legislative decrees). Case law has played quite a marginal role until recently. This was certainly the case before the transposition of the Directives, when quite advanced anti-discrimination rules were contained in a legislative decree of 1998² that covered immigration generally (and the lack of visibility of anti-discrimination provisions, dispersed throughout this piece of legislation devoted to another subject, was indeed problematic). Only recently have we seen significant litigation in the field, albeit very limited by the standards of many EU countries.

The fact that the current state of affairs must be evaluated by looking primarily at statute law does not mean that other sets of legal rules are not potentially relevant. However, such relevance is indeed only potential, and adequate legal protection can be guaranteed only through reference to positive statutory rules. This applies particularly with regard to the ability to enforce the equality principles contained in the Constitution. Notwithstanding the theoretical possibility of basing a civil action (for instance in tort) on the violation of the Constitution's general equality provision, this has never been clearly accepted by the courts.

Despite the bold statement in Article 3 of the Italian Constitution of every citizen's right to equal social dignity and to equality of treatment, the legislator has never adopted a specific law forbidding discrimination that implements this principle of equality *per se*. The only exception was the ban on discrimination in labour law provided by Article 15 of 1970 Workers' Act, which was later amended to cover other grounds of discrimination such as sex, race, language, religion and political opinion included in an open-ended list.

Indeed, the first legislation adopted to forbid discrimination was issued to implement international conventions (such as Racial Discrimination Act 654 of 13 October

² Decreto legislativo 25 luglio 1998, n. 286 Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero. A comparison between the protection provided by the 1998 Decree and the Directive is contained in the EUMC report by A. Simoni and G. Boni, *Italian report for the project 'Implementing European Antidiscrimination Law'*, 2001.



1975)³ or European laws (such as Sexual Discrimination Act 903 of 9 December 1977). Moreover, Article 44 of Act 40/1998 (now Legislative Decree 286/1998),⁴ which instituted a specific civil action against discrimination based on race, colour, descent, national or ethnic origin and religious belief in all instances where either a private entity or a public body has caused discrimination ('...the judge may order the cessation of the detrimental behaviour and adopt any other adequate measure'), reflects its international inspiration as discrimination is defined in terms which recall the definition used by the 1965 UN Convention on the Elimination of All Forms of Racial Discrimination, and its scope of application is limited to fundamental rights.

Nowadays the key legislative provisions are two legislative decrees enacted by the Government in 2003 in order to implement Directives 2000/43/EC and 2000/78/EC.⁵ Legislative Decree 215/2003 covers only racial and ethnic discrimination, while Legislative Decree 216/2003 concerns religion and belief, disability, age and sexual orientation. Moreover, their scope of application is different – the former applies to all the sectors covered by Directive 2000/43/EC, while the latter deals only with employment and occupation as does Directive 2000/78/EC. As far as definitions and remedies are concerned, they provide the same rules.

With regard to sub-national levels of legislation, i.e. the possible relevance of rules promulgated by the Italian regions that have increasingly important lawmaking powers following the reform of Article 117 of the Constitution, the boundary between the legislative powers of the State and the regions as to employment and discrimination (in particular with respect to equal treatment between men and women) is far from being clear. Although the State has exclusive competence regarding the 'determination of the basic standards of welfare relating to those civil and social rights that must be guaranteed in the entire national territory', the new Article 117(7) explicitly establishes that 'regional laws shall remove all obstacles which prevent the full equality of men and women in social, cultural and economic life, and shall promote equal access of men and women to elective office.' The provision thus recognises the power of the regions to legislate on substantive equality, with reference to gender equality.

³ Later amended by the Act of 20 May 1993 and Article 13 of Act no. 85/2006. It is worth mentioning that the criminal law approach of this law has had little success: it has not prevented violations and alleged perpetrators have all too rarely been found guilty.

⁴ *Decreto legislativo 25 luglio 1998, n. 286 Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero* (in *Gazzetta Ufficiale* no. 191, 18 August 1998 - S.O. no. 139).

⁵ *Decreto legislativo 9 luglio 2003, n. 215 Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica* (published in *Gazzetta Ufficiale* no. 186 of 12 August 2003); *Decreto legislativo 9 luglio 2003, n. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro*, (published in *Gazzetta Ufficiale* no. 187 of 13 August 2003). See A.Simoni, 'La discriminazione razziale alla vigilia dell'attuazione della direttiva 43/2000: considerazioni a partire da alcune recenti pronunce giurisprudenziali', in *Diritto, immigrazione e Cittadinanza*, 4/2002, pp. 81 ff.



Although there is no clear reference to the grounds covered by the Directives in the constitutional provisions on sub-national legislative competences, there have been some pioneering experiments at regional level. For instance, in 2004 the Tuscany Region enacted a law prohibiting discrimination on the ground of sexual orientation, although its key provision on equal treatment in the provision of services seems to also be applicable to different forms of discrimination.⁶ The validity of this regional law was challenged by the Government before the Constitutional Court, which in a judgment of 2006 quashed the section of the law which imposed (subject to an administrative sanction) an obligation of non-discrimination on the ground of sexual orientation in commercial activities, since the imposition of such obligations falls under the exclusive competence of the State at national rather than regional level, being an infringement of the individual's freedom of contract.

As far as procedures are concerned, since October 2011 the general fast track procedure (Article 702-*bis* of the Civil Procedure Code) has applied to non-discrimination claims. The competence to decide the case is vested in ordinary judges regardless of the legal nature (public or private) of the persons involved.

Besides the fast track procedure, the equality principle and anti-discrimination laws can be applied by either ordinary or administrative courts; case law is therefore made by decisions of the Constitutional Court, ordinary judges and administrative judges, depending on whether the case concerns a constitutional review, a dispute among private persons, a dispute with public entities, or a specific action against discrimination.

While the growth of case law has been relatively slow, scholars are increasingly dealing with anti-discrimination, on which one can now find a number of relevant publications, while NGOs are increasingly involved in monitoring cases where equal treatment principles have been infringed.

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

⁶ Legge Regionale Toscana 15 novembre 2004, n. 63, Norme contro le discriminazioni determinate dall'orientamento sessuale e dall'identità di genere, Bollettino ufficiale della Regione Toscana n. 46 del 24 novembre 2004. Corte Costituzionale 4 luglio 2006, n. 253; (other measures contained in the same law introducing actions to combat discrimination in employment were not declared to conflict with the Constitution). On this decision see the excellent book on the interrelation between anti-discrimination and freedom of contract by D. Maffei, *Offerta al pubblico e divieto di discriminazione*, Milano, Giuffrè, 2007, at 139.



This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

The Directives were implemented by two Legislative Decrees. Each followed the wording of one of the Directives, and discrepancies with the Directives can easily go unnoticed by the layperson.⁷ The Decrees were introduced without the relevant preparatory work: in the case of the Decree implementing Directive 2000/78 (the 'Omnibus Act') the preparatory documents did not contain specific guidelines, while those referring to the transposition of Directive 2000/43 were very poor. The Decrees did not abolish or consolidate pre-existing anti-discrimination rules, but just added a further legal regime, thus creating a complex legal framework.

Moreover, in 2006 a law was enacted to protect the victims of discrimination on the ground of disability which was based on Article 3 of the Constitution (Act 67 of 1 March 2006 on Measures for the Protection of Disabled People who are Victims of Discrimination/*Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*).

A straightforward amendment and consolidation of relevant anti-discrimination law would be appreciated, but it is not on the agenda of the Government or of the main political parties. In any case, the most recent case law shows that lawyers and judges mix legal provisions: discrimination cases are dealt with as if they involved the same legal issue and non-discrimination rules are applied according to which is the most suitable to the case at hand. This is particularly pertinent to discrimination against migrants on the ground of nationality perpetrated by the several northern local and regional authorities. In principle, this discrimination falls outside the scope of application of Directive 2000/43/EC. However, NGOs, lawyers, judges and UNAR

⁷ Decreto legislativo 9 luglio 2003, n. 215 Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica (published in *Gazzetta Ufficiale* no 186 of 12 August 2003); Decreto legislativo 9 luglio 2003, n. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro (published in *Gazzetta Ufficiale* no. 187 of 13 August 2003).



(the Italian equality body created in accordance with Article 13 of Directive 2000/43/EC) apply Decree 215/2003 (implementing Directive 2000/43) by analogy with Article 43 of the 1998 Immigration Decree, which prohibits discrimination on several grounds, including national origin.

In this regard it is important to stress that cases of nationality discrimination have constituted the vast majority of cases reported in Italy in recent years. We have to constantly remember that the hostility of certain political actors to ethnic and racial groups perceived as 'different' and for one reason or another 'strange' or 'dangerous' is increasingly translated into formally 'ethnic-blind' regulations (in particular enacted by municipalities) which use various pretexts (requirements regarding residence, nationality, etc.) to try to exclude members of these groups from becoming full members of society. Accordingly, the most significant litigation does not formally deal with ethnic and racial discrimination (for various reasons, the route of proving 'indirect discrimination' is seldom used), but with discrimination on the ground of nationality or other legal categories.

The main discrepancies between the Decrees and the Directives can be considered to be the following:

1. With regard to Directive 2000/43, UNAR, the equality body set up in accordance with Article 13, is not independent as it is totally integrated within the Government: it is actually a department of the Ministry for Immigration and Integration;
2. The Decree transposing Directive 2000/78 does not mention the requirement of reasonable accommodation. For this reason the Commission has referred Italy to the Court of Justice with an infringement procedure (C-312/11);
3. It may appear that Italian law allows organisations that are not based on an ethos to discriminate on the ground of religion. Directive 2000/78/EC permits an exception to differences of treatment for 'churches and other public or private organisations the ethos of which is based on religion or belief', while Article 3, paragraph 5 of Legislative Decree 216/2003 specifies only 'churches and other public or private organisations'.⁸ Pre-existing national rules in this area appear to be more restrictive in admitting exceptions than the Decree, which thus goes beyond the discretion granted to Member States, which may implement Article 4, paragraph 2 only in accordance with existing laws or practices.

⁸ 'Differences in treatment based on religion or belief and enacted within churches (*enti religiosi*) and other public or private organisations do not constitute discriminatory acts where, by reason of the nature of the particular occupational activity carried out by such entities or organisations or of the context in which they are carried out, such religion or belief constitutes a genuine, legitimate and justified occupational requirement.'



0.3 Case law

Provide a list of any important case law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

Name of the court: Court of Cassation (*Corte di Cassazione*)

Date of decision: 14 March 2011

Name of the parties: C.T. v. Ministry of Justice (*Ministero della Giustizia*)

Reference number: no. 5924

Address of the webpage: http://www.giurcost.org/casi_scelti/Cass.sent.5924-2011.htm

Brief summary: The decision is the final judgment in disciplinary proceedings against a judge, T.L., who was dismissed because he refused to hold hearings in his court for several months because crucifixes were displayed in courtrooms. T.L. alleged that the presence of the crucifix violated his freedom of religion and the principle of secularism of the State, provided under Articles 2, 3, 7, 8, 19 and 20 of the Italian Constitution.

The Court rejected the claim in part for procedural reasons and in part because the allegation was not founded. The Court's main point was that these were disciplinary proceedings in which the defendant should prove the violation of a subjective right and not of a collective right, such as the freedom of religion. Indeed, T.L. had continually refused to hold hearings even though a special courtroom without religious symbols was arranged and he was permitted to hear cases in his office. The Court also rejected the plaintiff's allegation of discrimination based on the fact that he was forced to hold hearings in a special courtroom and that no other religious symbols – such as the Jewish Menorah – could be displayed in a courtroom. According to the Court, the presence of religious symbols in public spaces is at the discretion of Parliament, which must act in accordance with the principle of secularity.

Finally, the Court rejected the claim of a violation of the principle of secularity and of the freedom of religion caused by the widespread presence of the crucifix in Italian courtrooms. According to the Court, this was not an issue that could be raised by a judge in disciplinary proceedings, who can allege only a violation of his own rights and not of collective rights, which can be defended only by group actions.

Name of the court: Court of Genoa (*Tribunale di Genova*)

Date of decision: 8 April 2011

Name of the parties: O.S. v. Med services Società cooperativa sociale a responsabilità limitata

Brief summary: A worker who was not employed at the end of her probationary period claimed to have been discriminated against by her employer on the ground of nationality. She alleged that her dismissal was based on her nationality and not on her merit. First of all, the Court interpreted the expression 'national origin' provided by



Article 43 of Legislative Decree 286 of 1998 (Immigration Decree) to mean 'nationality'; the Court then stated that Article 4, paragraph 3 of Legislative Decree 215/2003 implementing Article 8 of Directive 2000/43/EC, which does not expressly cover 'nationality', also applies in a case of discrimination based on national origin. The same rule on the reversal of the burden of proof applied in this case: if the plaintiff established facts from which it could be argued with precision and reasonableness that there had been direct discrimination, it was for the respondent to prove that there had been no breach of the principle of equal treatment. The Court held that the employer had given sufficient evidences of the plaintiff's very poor performance, which led to a legitimate dismissal.

Name of the court: Court of Milan (*Tribunale di Milano*)

Date of decision: 29 September 2010

Name of the parties: ASGI v. Municipality of Tradate (*Comune di Tradate*)

Address of the webpage:

www.asgi.it/public/parser_download/save/tribunale_milano_ordinanza_29092010_tra date.pdf

Brief summary: The case concerned a decree passed by the Municipality of Tradate (Milan) which limited eligibility to a child allowance to poor people with the further condition that both parents were Italian and had been resident in the Municipality for at least five years. According to the Court, Legislative Decree 2003 215 implementing Directive 2000/43 and Article 43 of Legislative Decree 286/1998 (Immigration Decree) apply in conjunction in cases of discrimination. Since Legislative Decree 215/ 2003 cannot lower the level of protection against discrimination already in force in a Member State, in a case of discrimination on the ground of nationality, a judge must apply both laws to discrimination on the ground of nationality, not expressly covered by Legislative Decree 215/2003. The Court found that the Municipality had discriminated on the ground of nationality and ordered it to remove the discriminatory condition specified by the Decree and grant the child allowance to every newborn having at least one parent living in the city for at least five years.

Name of the court: Court of Cassation (*Corte di cassazione*)

Date of decision: 15 February 2011

Name of the parties: Names are data protected

Reference number: no. 3670

Brief summary: The case concerned a decree enacted by the Municipality of Brescia which limited child allowance to poor people, with the further condition that at least one parent was Italian and had been resident in the Municipality for at least two years. The plaintiffs argued that this was a case of discrimination on the ground of nationality. The Municipality decided to appeal to the Court of Cassation in order to ascertain what jurisdiction was competent in this case, ordinary or administrative, since the case involved a public authority. According to the Court, ordinary judges are always competent in discrimination cases, even when the action is brought against a municipality, because the rights at issue are subjective rights and not a matter of legitimate interest. (The distinction between legitimate interest and subjective rights is typical of Italian administrative law. Individual rights must be



balanced with public interests, which at times may prevail over the former. This distinction does not apply in cases of discrimination since everyone has a subjective right not to be discriminated against, including when dealing with public bodies.)

Name of the court: Court of Bari (*Tribunale di Bari*)

Date of decision: 25 July 2011

Name of the parties: R.S. v. Municipality of Castellana Grotte (*Comune di Castellana Grotte*)

Brief summary: The case concerned the dismissal of public sector employees after 40 years of service in order to improve efficiency and reduce expenditure. The plaintiffs argued that the criterion chosen by the public authority entailed indirect discrimination on the ground of age. According to the Court, there was no indirect discrimination because the disparate treatment was justified by a legitimate aim and the means used were proper and proportional (Article 3, paragraph 6 of Legislative Decree 216/2003).

Name of the court: Court of Cassation (*Corte di Cassazione*)

Date of decision: 11 February 2011

Name of the parties: Volpi v. Helitalia

Reference number: no. 3821

Brief summary: The case concerned the dismissal of a manager for professional malpractice. According to the company, the manager had contracted a company with links to Scientology and hence with 'a disputable ethical orientation' ('*associazione di orientamento etico discutibile*') to give employees tests examining their private life, causing a negative reaction. The manager claimed that the dismissal entailed discrimination on the ground of religion and belief. The Court rejected the complaint, holding that the dismissal was legitimate because it was not grounded on the religion or belief of the manager, but on his conduct. In particular, the Court found that the manager did not act with due diligence because he had chosen a company with a particular ethos and religion to perform an aptitude test which, moreover, was not based on scientific grounds.

Name of the court: Court of Brescia (*Tribunale di Brescia*)

Date of decision: 29 November 2010

Name of the parties: CGIL v. Istituto comprensivo di Adro (Adro Comprehensive School)

Address of the webpage:

http://www.asgi.it/public/parser_download/save/tribunale_brescia_ordinanza_2798_29112010.pdf

Brief summary: There was discrimination based on personal belief in the case of a municipality which placed the symbols of a political party (*Lega Nord*) within a state school. This act infringed upon the freedom to teach granted by Article 33 of the Constitution and by Article 2 of Legislative Decree 216 of 9 July 2003 implementing Directive 2000/78/EC. The Court ordered the removal of every political party symbol, retaining only the symbols allowed by law, the Italian and European Union flags. Moreover, the Court ordered the publication of the decision in four newspapers: two



local and two national. Finally, the Court ordered the decision to be publicised in the school for seven working days. The action was initiated by the CGIL, the major Italian trade union, which has a special section for workers in the education sector.

Name of the court: Court of Milan (*Tribunale di Milano*)

Date of decision: 7 July 2010

Name of the parties: De Pol v. ATM

Reference number: Riv. critica dir. lav. 2010, 4, 1024

Brief summary: The upper age limit in access to the post of bus driver does not amount to discrimination under Article 3, paragraph 3 and 4 of Legislative Decree 216/2003. As far as the judge was concerned, age in this context constituted, by reason of the nature of the particular occupational activities concerned and of the context in which they were carried out, a genuine and determining occupational requirement, aiming to safeguard users and ensure traffic safety; moreover the judge argued that the positions of applicants and those already in service were not comparable, taking into account the previous experience and the development by the latter of the skills necessary to work as a driver in the city centre.

Name of the court: Court of Rome (*Tribunale di Roma*)

Date of decision: 28 December 2010

Name of the parties: Ferrario v. RAI

Reference number: Foro it. 2011, 2, I, 601

Brief summary: Ms Ferrario, a senior journalist and one of TG1's most popular newscasters, was removed from her role by the new Director, appointed under the Berlusconi Government. She was then charged with other duties, of little importance compared with her previous role. The reasons were mostly political, since Ms Ferrario, together with other colleagues, had openly criticised several choices made by the new Director, deemed to be too pro-government. According to the Court, the Director's decision was based on Ms Ferrario's personal beliefs and therefore amounted to discrimination under Article 15 of Act 30/1970 (Workers' Act) and Article 3 of Legislative Decree 216/2003 implementing Directive 2000/78/EC. The Court ordered RAI to reinstate the journalist to her previous duties.

Name of the court: Constitutional Court (*Corte costituzionale*)

Date of decision: 14 April 2010

Name of the parties:⁹

Reference number: no. 138

Address of the webpage: www.cortecostituzionale.it

Brief summary: Italian law does not allow a same-sex couple to marry. The Constitutional Court found that a same sex couple's right to marry cannot be based on the Constitution (Articles 2, 3 and 29) nor the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union. However,

⁹ The names of the parties are not shown in judgments on a preliminary reference, as in this case. <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=138>.



according to the Constitutional Court, it is up to the national parliament to decide which rights should be granted to same sex couples, even if Parliament did not choose to confer the right to marry among these rights. Moreover, an appeal could be made to the Constitutional Court to argue the legitimacy of different treatment between married couples and same-sex non-married couples.

Name of the court: Court of Padua (*Tribunale di Padova*)

Date of decision: 19 May 2005 (the decision is unpublished, but the first pronouncement and a comment on it can be found (in Italian) on the website of UNAR (<http://www.pariopportunita.gov.it>). The second pronouncement has not been published in the website.

Name of the parties: Names are data protected.

Brief summary: The Court issued an order (*ordinanza*) against a company which owned a bar as it was proved that persons of non-Italian origin were charged higher prices as a way of decreasing the number of '*extracomunitari*' customers ('non community', a term usually used to refer to immigrants of non-Western or 'remote' origin). The order was issued on the basis of summary proceedings foreseen in the 1998 Immigration Decree, which until October 2011 also applied in cases arising under the Decree (215/2003) transposing Directive 2000/43.

The Court recognised the existence of discrimination against *extracomunitari* (the exact nationality of the nine plaintiffs does not appear in the decision). The Court did not specify, however, whether the discrimination was on the ground of ethnic origin or nationality, the latter only being prohibited by the 1998 Immigration Decree not by the Decree transposing Directive 2000/43.

The defendant was ordered to cease the discriminatory behaviour and pay damages for non-pecuniary loss to the plaintiffs and costs. The Court did not respond to the plaintiff's request for publication of the judgement in the press and on the internet.

In the same decision, the Court denied the standing of two NGOs (*Razzismo Stop* and *Associazione per gli Studi Giuridici sull'Immigrazione* - ASGI) to engage in legal proceedings on behalf or in support of the plaintiffs, despite requests from both to intervene in the proceedings. According to the Court, the ground for this exclusion lay in the fact that according to Article 5 of Decree 215/2003, legal standing is restricted to associations and bodies which are active in the field of combating discrimination which are included in a register approved by a joint decree of the Ministries of Labour/Welfare and Equal Opportunities, and since no such decree had been issued at the time of the decision, no association or organisation could be deemed to have legal standing. This interpretation was also based on an opinion of the Department of Equal Opportunities of the Presidency of the Council of Ministers, which was issued on the request of one of the organisations taking part in the present case.

A few months later, the Court partly revised its decision, admitting the standing to litigate (still pending approval of the official register) of one of the two associations on the basis of the provision of a different act (Article 27, paragraph 1, letter b of Act



383/2003 on Grassroots Organisations). However, official approval of the register (see *infra* at 6.2) will probably limit the practical impact of this opening towards alternative ways to prove standing (the association admitted in this case was one of those which had applied for inclusion in the register).

Name of the court: Court of Pistoia (*Tribunale di Pistoia*)

Date of the decision: 30 September 2005 (the decision is unpublished)

Name of the parties: The defendant is the Ministry of Justice as employer of the plaintiff. The name of the plaintiff is subject to data protection.

Brief summary: This is the first known Italian case on discrimination on the ground of disability. The case started from alleged indirect discrimination in a decision to transfer a disabled employee of the Ministry of Justice to a different office. According to the competent administrative commission, the plaintiff was not able to walk very far, both at work and to reach her work place, and she consequently asked to be moved from the court office where she worked to a different one. Her request was accepted and her temporary appointment was renewed twice. When she requested a further renewal, the Ministry invited the plaintiff to apply for appointment to a third nearby court office. She accepted the new position, but after her contract had been renewed several times, the Ministry decided that she had to go back to the second office.

The plaintiff decided to bring an action against the Ministry of Justice, without previously using the pre-trial mediation procedure foreseen in Decree 216/2003. As a preliminary question, the Court decided that the pre-trial mediation foreseen by the Decree was not compulsory. It then declared that the decision to deny renewal of the temporary appointment (which otherwise is at the discretion of the Ministry) constituted indirect discrimination on the ground of disability, ordering the Ministry to stop the discriminatory behaviour and to pay the costs of the proceedings.

Since the defendant did not appear in court, legal arguments were not developed in great detail. It is interesting, however, to note that the Court mentions the definition of indirect discrimination contained in Decree 216/2003, but in order to qualify the behaviour of the administration as discriminatory it refers to recitals 6, 9, and 20 and Article 5 of Directive 2000/78. This is partly explained by the fact that the Italian Government decided not to include any mention of 'reasonable accommodation' in the Decree transposing the Directive. Since the defendant did not take part in the proceedings there was, as observed by the Court, no opportunity to assess whether the indirect discrimination could be considered as one of the 'differences in treatment that, even if indirectly discriminatory, are objectively justified by legitimate aims carried out through appropriate and necessary means', as foreseen by Article 3(6) of Decree 216/2003. For the judge, it was indeed up to the employer to prove in court the existence of such aims.

Other cases:

It is worth noting that the media has sometimes reported cases of discrimination, mainly on racial and ethnic grounds, that caused various political actors to take



action. At the end of 2006, for instance, an Italian citizen of African origin was allegedly denied employment as a waiter in a vacation resort in the Alps once the prospective employer, after a discussion by telephone, discovered her racial background. The Minister of Labour even issued a statement on the illegality of such behaviour, but no legal action was taken. The alleged victim (the facts were controversial as the prospective employer said his decision was based on non-racial factors) was subsequently hired by another employer who learned of the facts from the press.

It is relevant to note that in a judgment referring to a 1999 case, the Court of Cassation¹⁰ clarified that even a simple refusal to serve customers on racial grounds is not only a civil and administrative wrong but is also enough to declare the existence of a crime under the 1993 act on hate speech and discriminatory acts. Potentially interesting in principle, it is not clear whether this clarification will have any practical implications for minor cases of discrimination, taking into account the length and evidentiary problems of criminal proceedings.

Although not primarily decided with reference to the Directives, it is worth mentioning a 2010 case where the Court of Cassation affirmed that a reference to 'racial preferences' in international adoption procedures was illegal.¹¹ As background, under Act 184/1983 on Adoption and Foster Care, prospective parents must preliminarily apply to the juvenile court (*Tribunale dei minori*) in order to obtain a decree declaring their 'suitability for adoption' (*decreto di idoneità ad adottare*). These applications, which are accompanied by a report from the social services, ordinarily contain information on the characteristics of the couple and of the child to be adopted (whom at this stage is not yet identified) to be used in the child's best interest in the following steps of the procedure. In this specific case a juvenile court issued a decree declaring that the prospective parents were suitable on the basis of an application where they stated that they were unwilling to adopt 'children with dark skin or skin that is not typically European'.

In its judgment, the Court of Cassation affirmed that such racial preference cannot be approved by a judge, being in 'striking and unavoidable conflict with [...] fundamental national and supranational principles' as well as with the solidarity which must underlie the choice to adopt. Making reference to the main anti-discrimination instruments at national level (Articles 2 and 3 of the Italian Constitution, Article 2 of Legislative Decree 215/2003, Article 43 of Immigration Decree 286/1998, Article 1 of Act 184/1983 on Adoption and Foster Care) and international level (Article 14 ECHR, UN Convention on Racial Discrimination, Article 6 of the EU Treaty as amended by the Lisbon Treaty, Article 21 of the EU Charter of Fundamental Rights as well as Directive 43/2000) and to the UN Convention on the Rights of the Child, the Court of

¹⁰ Court of Cassation (*Corte di Cassazione*), III sezione penale, judgment no. 2006/1583, released on 16 November 2006.

¹¹ Judgment of the Court of Cassation (civil division, *en banc*) of 1 June 2010, no. 13332. The judgment can be found on the website of the Court of Cassation www.cortedicassazione.it.



Cassation therefore ruled that the ‘decree declaring suitability for adoption pronounced by the juvenile court [...] cannot be issued on the basis of references to the ethnic group of the minor to be adopted, nor contain indications concerning such ethnic group. Where such discrimination is expressed by the adopting couple, this must be evaluated by the judge when deciding on their suitability for international adoption.’

Although important in principle, this pronouncement – as recognised by the Court of Cassation in its reasoning – has limited practical effects since couples interested in an international adoption can easily avoid undesired racial characteristics by selecting the country from which they will adopt a child through one of the authorised agencies operating in accordance with Italian law. It is, however, significant as an indicator of an increased awareness within the highest courts of the importance of racial equality. The judgment was issued by the Court of Cassation on the basis of the – seldom used – power to pronounce a decision affirming a ‘legal principle in the interest of the law’ (*principio di diritto nell’interesse della legge*) in the absence of an appeal lodged by a litigant but on the request of the General Prosecutor (Article 363 of the Civil Procedural Code), thus solely aiming to direct future case law.

Cases involving Roma:

Until early 2009 no significant anti-discrimination cases were brought by Roma, although anti-Romani hostility is becoming an increasingly significant social and political problem. Roma have a disproportionate visibility in local and national debates on urban crime and suffer a high degree of stigmatisation as a result. For example, a relevant issue is the frequent use by municipalities of ordinances that, although not openly targeting the Roma, are quite clearly aimed at facilitating police actions against them, by for instance criminalising various street-level activities such as begging and the like. Many such ordinances were blatantly illegal¹² until the enactment of the recent reforms that gave the municipalities wider policing powers, and even now serious doubts remain as to their constitutionality given their broad formulation.

However, the traditional Italian reluctance to engage in ‘civil rights litigation’ was set aside in an important series of cases challenging the ordinances (widely discussed in the media) enacted by the Government following a decree of May 2008¹³ introducing a state of emergency in three regions (Lombardy, Lazio and Campania) in order to

¹² A well known example in this sense, much debated even in the national press, is represented by the ordinances issued in Florence. On these see A.Simoni-F.Giunta, ‘Il diritto e i lavavetri: due prospettive sulle ‘ordinanze fiorentine’, in *Diritto, Immigrazione e Cittadinanza*, 3/2007, particularly pp. 75 ff.

¹³ *Decreto del Presidente del Consiglio dei Ministri 21 maggio 2008 (in Gazzetta Ufficiale n. 122 del 26.5.2008, ‘Dichiarazione dello stato di emergenza in relazione agli insediamenti di comunità nomadi nel territorio delle regioni Campania, Lazio e Lombardia* (Decree of the President of the Council of Ministers, no. 122 of 21 May 2008, in *Gazzetta Ufficiale*, 26 May 2008, Declaration of a state of emergency in settlements of nomadic communities in the territory of Campania, Lazio and Lombardy).



react to an alleged crisis within the settlements known as *campi nomadi* and that introduced a range of measures, primarily a census and the identification (and fingerprinting) of people living there. The decree and subsequent civil protection ordinances (which were renewed after their initial period of validity expired) do not mention Roma and Sinti populations, and the Minister of the Interior constantly stressed in his statements that the decree was 'ethnic blind' and simply applied to people actually living in the camps. However, the decree refers to 'nomads' (the exact phrase is '*comunità nomadi*', 'nomadic communities') in a way which reflects current use in both popular and administrative Italian language of the term 'nomad' as synonym for Roma, without any reference to an actual travelling lifestyle. It is worth pointing out that the decree was issued after a long political debate which constantly and unambiguously addressed the Roma.

Against this background, several anti-discrimination suits were filed in ordinary and administrative courts by individuals supported by NGOs (including the European Roma Rights Centre) challenging the legality of the decree (and of the measures implemented on its basis) on various grounds: violation of the law on the introduction of a state of emergency, violation of rules on identification measures taken by the police, and use of a category – 'nomads' – which in this context is ethnic. While a case brought before the ordinary court of Mantova was dismissed on jurisdictional grounds, a first ruling by the administrative court of Rome ruled the ordinances partially illegal; this verdict was upheld in 2011.

Name of the court: Council of State (*Consiglio di Stato*, the supreme administrative court)

Date of decision: 16 November 2011

Name of the parties: ERRC (European Roma Rights Centre) v. Italian Government

Reference number: no. 6050

Address of the webpage: http://www.asgi.it/home_asgi.php?n=1907&l=it

Brief summary: The Council of State annulled three decrees issued by the Government on 30 May 2011 which gave special powers to local government authorities (*prefetti*) and appointed an extraordinary commissioner to deal with the Roma. In particular, the Council of State ruled that the declaration of a state of emergency was illegal because there were insufficient grounds to grant extraordinary powers to deal with the *campi nomadi* in three regions: Lombardy, Campania and Lazio.



1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

General protection against discrimination is established by Article 3 of the 1948 Constitution, which recognises equal dignity and equality under the law without distinction on the grounds of sex, race, language, religion (belief is not mentioned *per se*), political opinion, and personal or social conditions. This article also includes the principle of substantive equality and calls on the State to remove the social and economic obstacles which limit the freedom and equality of citizens and prevent the full development of the human being.

The grounds of discrimination listed in Article 3 are more restricted than those mentioned in Article 19 TFEU. Moreover, the expression ‘personal or social conditions’ potentially allows an open interpretation, covering for instance ethnic origin, sexual orientation, age and disability, although the lack of clear case law does not permit a definite answer. Disability is not mentioned in the general equality clause, but disabled people, referred to in the antiquated phrase ‘*inabili e minorati*’, have the right to education and professional training under Article 38.

The situation becomes more complicated with regard to discrimination on the ground of religion. The 1948 Constitution mentions religion within the general equality clause contained in Article 3. It also establishes (Article 8, section 1) that ‘All religious beliefs are equally free before the law’, and (Article 19) that ‘[all] shall be entitled to profess their religious beliefs freely in any form, individually or in association with others, to promote them, and to celebrate their rites in public or in private, provided that they are not offensive to public morality.’¹⁴ However, practical enforcement of the general principle of religious freedom has been somewhat difficult because of its coexistence with other provisions deeply marked by the strong role of the Catholic Church. The Constitution establishes (Article 7, section 1) that ‘The State and the Catholic Church are both, each within its own order, independent and sovereign’. The same article establishes that the relationship between the State and the Catholic Church is regulated by the Lateran Treaty (*Patti lateranensi*) with the Holy See of 1929, amendment of which does not require a constitutional revision. This Treaty makes Catholicism the official religion of the State, but some provisions establishing privileges for Catholicism were incompatible with the fundamental rights introduced in 1948 and were reviewed by the Constitutional Court. The Court was, for instance,

¹⁴ G. Casuscelli, ‘Uguaglianza e fattore religioso’, in *Digesto IV, Discipline pubblicistiche*, Torino, UTET, vol. XV, 1999, pp. 428 ff.



called to evaluate whether restrictions on the appointment, re-appointment and tenure of lecturers in Catholic universities (which are recognised by the Italian State) were compatible with the freedom of academic teaching, since authorisation is required from the Holy See 'in order to ensure that there are no objections from the moral and religious points of view'. The Court¹⁵ upheld this view, considering it as the statement of 'a principle intrinsic to the liberty of instruction and of religion, applicable to any religion or ideology'. The *Lombardi Vallauri* case¹⁶ decided by the ECHR in 2009 focused on procedural guarantees and so does not immediately pose a challenge to this approach.

With regard to other religions, the Constitution establishes (Article 8) that they can 'organise themselves according to their own charters, provided that these are not in conflict with the Italian legal system' and that their 'relations with the State shall be regulated by the law on the basis of agreements with their representative bodies', thus leaving open the possibility of more favourable treatment for religious associations that have signed those agreements. This provision was implemented after the 1984 revision of the Lateran Treaty, which corrected some of the major discrepancies with the Constitution and was followed by the introduction of the first agreements – transposed in statutes approved by Parliament – with the representative bodies of some religious denominations (the Adventists, the Waidensian Movement, the Jewish Communities, the Assemblies of God, the Baptist Movement, and the Lutheran Church). These agreements regulate the effects for the Italian State of the internal regulations of these denominations, while solving several problems specific to each of these, for instance holidays.¹⁷ Within the scope of application of Directive 2000/78, it is therefore clear that the employer enjoys wider discretion to refuse to take into consideration specific needs relating to a religion or belief when the employee is a member of a 'religion without an agreement'. Further problems exist outside employment in any situation where there is a degree of judicial and administrative discretion, as for instance proved by the outright and explicit denial by some local authorities of administrative authorisation to organise any kind of Muslim place of worship. This piecemeal approach means that legal protection of freedom of religion in Italy is still unsatisfactory, primarily as regards denominations that have not been able to sign agreements or to have them transposed in an act of Parliament. Besides Islam, this is the case for instance of

¹⁵ Corte costituzionale, sentenza 1951/972.

¹⁶ ECHR, 20 Oct. 2009, *Lombardi Vallauri v. Italy* (rec. no. 39128/05).

¹⁷ Legge 11 agosto 1984 n. 449 Norme per la regolazione dei rapporti tra lo Stato e le Chiese rappresentate nella Tavola Valdese; Legge 22 novembre 1988 n. 516 Norme per la regolazione dei rapporti tra lo Stato e l'Unione Italiana delle Chiese Cristiane Avventiste del settimo giorno; Legge 22 novembre 1988 n. 517 Norme per la regolazione dei rapporti tra lo Stato e le Assemblies di Dio in Italia; Legge 8 marzo 1989 n. 101 Norme per la regolazione dei rapporti tra lo Stato e l'Unione delle Comunità ebraiche italiane; Legge 5 ottobre 1993 n. 409 Integrazione dell'intesa stipulata nel 1984 con la Tavola Valdese; Legge 12 aprile 1995 n. 116 Norme per la regolazione dei rapporti tra lo Stato e l'Unione delle Comunità Evangeliche Battiste Italiane; Legge 29 novembre 1995 n. 520 Norme per la regolazione dei rapporti tra lo Stato e le Comunità evangeliche luterane. Agreements have been signed with Buddhists and Jehovah's Witnesses, but they have not yet been transposed into law.



Jehovah's Witnesses, whose situation is thus still regulated by the antiquated 1929 act on 'tolerated cults'.¹⁸ The failure to sign an agreement with Muslims is commonly explained by a mix of political reasons and difficulties linked to the absence of a unified body representing Islamic communities.

In order to define the status of religious denominations that have not executed agreements with the State, Parliament has spent considerable time discussing bills which give effect to the principles of Article 9 of the European Convention on Human Rights (ECHR) and other relevant international instruments, while trying to identify a minimum set of guarantees that any religious denomination should enjoy in the absence of any agreement whatsoever with the State.

Other articles of the Constitution concern specifically sex discrimination in labour law (Article 37) and access to elective office (Article 51).

b) Are constitutional anti-discrimination provisions directly applicable?

The principle of equality has played a crucial role in the Italian system. The inclusion in the Constitution of a general statement emphasising the principle of equality (Article 3)¹⁹ has allowed the Constitutional Court to address all disparate treatment that is not based upon a reasonable case-by-case differentiation. The large number of Constitutional Court decisions based upon Article 3 is in striking contrast to the absence of direct application of that principle within the private sphere. In fact, the majority of courts have interpreted the principle of equality expressed in Article 3 as binding only the legislator and also often in conjunction with other fundamental rights protected by the Constitution.²⁰

The Constitution has been considered to contain the principle of 'substantive equality', which consists of an obligation to differentiate taking into account the specificity of each different situation. Labour law is considered a paramount example of a field where the system must protect different identities by respecting formal

¹⁸ *Legge 24 giugno 1929, n. 1159 Disposizioni sull'esercizio dei culti ammessi nello Stato e sul matrimonio celebrato davanti ai ministri dei culti medesimi.*

¹⁹ Article 3.1 states that 'All citizens possess an equal social status and are equal before the law, without distinction as to sex, race, language, religion, political opinions, personal and social conditions.' Article 3.2 provides that 'It is the duty of the Republic to remove all economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the individual and the participation of all workers in the political, economic and social organisation of the country.' The list of forbidden distinctions included in Article 3.1 is not a closed list but affirms a presumption of discrimination with regard to any different treatment based on those grounds. Moreover, the 'social origin' ground listed in Article 3.1 may be construed to include other implicitly forbidden forms of discrimination that everyone is entitled to be protected against. See, regarding disability, the decision of the Constitutional Court, no. 406/1992 of 21 October 1992; regarding sexual orientation decision no. 138/2010 of 14 April 2010 and regarding age decisions no. 256/2002 of 17 June 2002 and no. 125/1992 of 16 March 1992; www.cortecostituzionale.it.

²⁰ We could say that Article 3 has been interpreted much more in line with Article 14 ECHR than with the EU general principle of non discrimination.



equality while promoting equal opportunities in various situations. The concept of equality in the Italian legal system, therefore, allows differentiation as well as positive action, even though the Court of Cassation has declared that there is no general constitutional duty of equal treatment directly binding on the employer.²¹ This is an orientation that will be likely to change due to the recent explicit introduction into the Constitution (Articles 51 and 117) of the principle of equal treatment between men and women beyond the general equality clause of Article 3.

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

According to some authors, constitutional equal treatment provisions are also binding on legal persons and associations and within relationships governed by private law: this is particularly important since it would allow for a broad interpretation of the anti-discriminatory provisions contained in labour legislation. Notwithstanding the open attitude of some scholars, the Court of Cassation still holds quite a restrictive position,²² and it is very difficult to find much case law regarding the application of the non-discrimination principle within private entities, in particular in comparison with the huge amount of case law on the application of the same rule by public authorities.

²¹ Court of Cassation (*Corte di Cassazione*), no. 1101 of 4 February 1987, confirmed by Court of Cassation, no. 6448 of 8 July 1994 and Court of Cassation no. 4570 of 17 May 1996, after a controversial decision by the Constitutional Court (*Corte Costituzionale*), no. 103 of 22 February 1989.

²² Court of Cassation, no. 4177 of 11 November 1976; Court of Cassation, no. 6030 of 29 May 1993; Court of Cassation, no. 4570 of 17 May 1996..



2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

If one puts together the Immigration Decree and the Decrees transposing the Directives, the grounds of discrimination prohibited by statute law (beyond the equal treatment provisions contained in the Constitution) coincide with those covered by the Directives, with the relevant addition of discrimination on the ground of national origin.

A statutory principle of equal treatment was in fact already in force in the Italian legal system before the enactment of the Decrees transposing the Directives, due to the anti-discrimination provisions contained in the 1998 Immigration Decree²³ which provides in its Article 43 a definition of direct and indirect discrimination that is generally in line with the Directives, applicable to the grounds of race and colour, ethnic origin, 'religious beliefs and practices' (*'le convinzioni e le pratiche religiose'*; *non* religious belief is not dealt with as such), and nationality (national origin). The Immigration Decree contains a 'black list' of discriminatory acts, roughly corresponding to the scope of application of the Race Directive (although the list in the Immigration Decree is non-exhaustive) and provides civil law remedies. Besides these rules, some criminal law provisions contained in a 1993 act sanction 'hate speech' and racist propaganda²⁴ and provide harsh punishments for 'acts of discrimination on racial, ethnic, national or religious grounds'. Since the Government has not repealed the pre-existing statutes, these anti-discrimination rules coexist with the provisions implementing the Directives.

Labour law also represents a pre-existing set of statutory rules on discrimination. On the basis of the Workers' Act (*Statuto dei lavoratori*) of 1970²⁵ it was illegal – even before the enactment of the Directives – to dismiss, or discriminate, even indirectly, against a worker in the assignment of qualifications or duties, transfers, or disciplinary proceedings, or to let him/her suffer other harm for political, religious, racial and linguistic reasons or because of gender. A dismissal based on such

²³ The 1998 Legislative Decree is studied in detail by G.Scarselli, 'Appunti sulla discriminazione razziale e la sua tutela giurisdizionale', in *Rivista di diritto civile*, 2001, I, pp. 804 ff., and in the context of religion by P.Cavana, *Pluralismo religioso e modelli di cittadinanza: l'azione civile contro la discriminazione*, in *Il diritto ecclesiastico*, 2000, 1, pp. 165 ff.

²⁴ Legge 25 giugno 1993, n. 205, *Conversione in legge, con modificazioni, del decreto legge 26 aprile 1993 n. 122 Misure urgenti in materia di discriminazione razziale, etnica e religiosa*.

²⁵ Legge 20 maggio 1970, n. 300, *Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e dell'attività sindacale nei luoghi di lavoro e norme sul collocamento* (published in *Gazzetta Ufficiale*, no. 31 of 27 May 1970, Article 15, comma 2).

grounds is explicitly declared to be void,²⁶ and in the Italian legal system this entails *both* the award of damages and a court order requiring the employer to reinstate the worker in his/her employment.²⁷

The Legislative Decrees superimposed provisions on these rules that in their overall structure are very close to the Directives, covering grounds of discrimination that simply reproduce the wording of the latter. The Workers' Act has been amended by the explicit addition of age, disability, sexual orientation and personal belief to the grounds that make dismissal or other prejudicial treatment unlawful (as described above). This was not the case for 'ethnic origin', for reasons which are not clear. However, differences between the concepts of race and ethnic origin are not so sharp in Italy as to make the absence of the latter in the Workers' Act important in practice, especially against the background of the broad equality clause of the Constitution.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation? Is there a definition of disability at the national level and how does it compare with the concept adopted by the European Court of Justice in Case C-13/05, Chacón Navas, Paragraph 43, according to which 'the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'?*

Italian law on discrimination, both the Decrees and the pre-existing statutes, do not contain any definition of these terms, which in the case of the Decrees are simply borrowed from the Directives. With regard to sexual orientation, it can be noted that the words used in the relevant decree are '*orientamento sessuale*', that is to say a direct translation of the English term used in Directive 2000/78, although the Italian phrase used for sexual orientation in the Directive (and in Article 13 EC Treaty) is '*tendenze sessuali*' (sexual tendencies). A first draft of the Decree used the same words, but it was amended upon a proposal by the Labour Committee of the Chamber of Deputies²⁸ following a request by some members of Parliament, gay and lesbian organisations and the *Confederazione Generale Italiana del Lavoro* (one of the major trade unions). When referring to sexual orientation, the majority of scholars

²⁶ *Legge 15 luglio 1966, n. 604, Norme sui licenziamenti individuali* (published in Gazzetta Ufficiale, August 6, 1966, n. 95) art. 4 (as amended in 1970 and 1990).

²⁷ A reinstatement order following unfair dismissal ordinarily applies only to employers having a minimum number of workers (i.e. in the case of small companies the only remedy is represented by damages), but such a limit does not apply to discriminatory dismissals.

²⁸ Opinion of the XI Permanent Commission (Public and private labour) of the Chamber of Deputies. Act n. 217. See also XI Commission Report, 4 June 2003, p. 96.



do not distinguish between behaviour and identity or emotional and sexual aspects. Sexual orientation includes homosexual, heterosexual and bisexual orientation.

- b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a 'disability' sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*

No other definitions are provided by other legislation (see only *infra* for disability), and this is also the case for the concept of 'religion', for which the Italian legal system does not include a statutory definition. The main bill on religious freedom presented in Parliament but not enacted yet²⁹ includes a general definition of 'religion', 'church', 'belief' and 'religious denomination' ('*confessione religiosa*'), which is the term ordinarily used in discussions on the status of religious organisations/groups and their relations with the State. Criteria for identifying the religious character of social groups have been developed in the case law of the Constitutional Court. The main set of standards were set by the Court in a 1995 case³⁰ where that the Court stated that, in the absence of agreements with the State, the 'religious denomination' of a social group can be established on the basis of 'public recognition' ('*pubblici riconoscimenti*') or on the basis of its charter (not alone but examined against the backdrop of the organisation's actual activity) or on the basis of 'common opinion' ('*comune considerazione*'). These criteria have been applied and further detailed especially with regard to Scientology, which according to the case law of the Court of Cassation meets the criteria for the inclusion as a 'religious denomination' protected under the Constitution. However, such criteria have never been tested in the context of anti-discrimination cases.

However, a statutory definition exists with regard to disability outside anti-discrimination law and is contained in Act 104/1992,³¹ which is the basis of current disability rights legislation. This act provides the only clear general definition of a person with disability (in Article 3.1, 'Entitled persons'; other legislation such as the 1999 Quota Act contain narrower definitions of the categories covered) following the definition developed by the WHO in 1976:³² 'A disabled person ("*disabile*") is anyone who has a physical, mental or sensory impairment, of a stable or progressive nature, that causes difficulty in learning, establishing relationships or obtaining employment

²⁹ Camera dei Deputati C 448 *Norme sulla libertà religiosa* (Provisions on religious freedom). The bill aims at ensuring equality between religious denominations and establishing a register, and includes a number of anti-discrimination provisions.

³⁰ *Sentenza n. 195 del 27 aprile 1993, in Foro italiano, 1994, 1, 2986.*

³¹ *Legge-Quadro 5 febbraio 1992 n. 104, per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate, in Gazzetta Ufficiale, 17 febbraio 1992, n. 39* (Act no. 104 of 5 February 1992 on the care, social integration and rights of disabled persons, Supplement to *Gazzetta Ufficiale*, no. 39 of 17 February 1992).

³² World Health Organization, Document A29/INFDOCI/1, Geneva, Switzerland, 1976.



and is such as to place the person in a situation of social disadvantage or exclusion.’ The Disability Discrimination Act does not provide a new general definition of disability outside the field of employment, but the definition just mentioned can be considered to cover the definition provided in the *Chacón Navas* case. There is no direct counterpart of recital 17 in Italian anti-discrimination legislation, although the provision on the ‘work suitability test’ could be seen as reflecting basically the same concern.

- c) *Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

Age as a protected ground is not submitted to any general restriction in the Legislative Decree transposing Directive 78/2000, besides the exceptions described in section 4 of this report below.

- d) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination. Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

Multiple discrimination is not explicitly covered by legislation (or in the practice of equality body) with the very limited exception of the opening provision (Article 1) of the Legislative Decree transposing Directive 2000/78, which says that the Decree has been adopted ‘in a perspective that takes into account the different impact that the same forms of discrimination can have on men and women respectively’. The Decree transposing Directive 2000/43 contains the same statement but with the addition of the ‘existence of forms of racism of a cultural and religious character’. These statements have, however, little practical value. Further legislative action at European or national level would certainly contribute to improve the current situation.³³

- e) *How have multiple discrimination cases involving one of Article 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

There is no case law on the point. Scholars show an increasing interest in the mutual reinforcement effect that discrimination on the ground of nationality and race/ethnicity can have.

³³ See D. Gottardi, ‘Le discriminazioni basate sulla razza e l’origine etnica’, in M. Barbera, *op. cit.*, pp. 24 ff.



2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

In Italy there is no relevant legal debate on the issue of assumed characteristics. However, the wording of the Decrees and of other existing anti-discrimination rules, especially if interpreted in the light of the Constitution, seems able to include this kind of discrimination among those prohibited. This is even more likely with regard to discrimination in employment.

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

In Italy there is no relevant legal debate on the issue of a person's association with persons with special characteristics, or with events or organisations linked to these. However, the wording of the Decrees and of other existing anti-discrimination rules, especially if interpreted in the light of the Constitution, seems able to include this kind of discrimination among those prohibited. This is even more likely with regard to discrimination in employment. A discriminatory dismissal based on such a ground can hardly fall within the concept of 'just cause' or 'justified reason'. According to case law, it is firmly excluded that personal behaviour or private facts and acts can be considered just cause or justified reason for a dismissal if they have no actual or potential negative consequences on a person's performance at work or the nature of the employment relationship.

There is absolutely no case law on the point, but discrimination of this kind could also be considered as an infringement of the freedoms of expression and association protected by Articles 21 and 18 respectively of the Constitution. There is, therefore, insufficient evidence to surmise how facts like those of the *Coleman* case would have been treated under national law.

2.2 Direct discrimination (Article 2(2)(a))

- a) *How is direct discrimination defined in national law?*

The definition of direct discrimination is provided by the Decrees transposing the Directives, and is – as mentioned – very faithful to these. According to their Article 2, direct discrimination occurs when 'one person is treated less favourably than another is, has been or would be treated in a comparable situation.'



- b) *Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).*

Although there is no case law on the point, such statements or announcements are likely to be considered as direct discrimination. It is not clear, however, who can be considered to have standing to litigate or to have suffered an injury because of such statements or announcements. Problems of standing or applicable remedies do not exist, of course, once someone has been actually excluded from employment by an entity that has issued a discriminatory statement.

- c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

Justification of direct discrimination is not admitted generally, but it is allowed on the grounds related to the exceptions foreseen in the Directives with regard to professional requirements.

- d) *In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

No indication is provided on how to make a comparison in cases of age discrimination.

2.2.1 Situation Testing

- a) *Does national law clearly permit or prohibit the use of 'situation testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.*

'Situation testing' is not defined nor covered as such in Italian law, and there are no legislative provisions on the point.

- b) *Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc).*

In principle, situation testing can provide indicators of discrimination which can be used like any other means of evidence in civil cases. The relatively scarce use of litigation in court to fight against discrimination, and the fact that litigation often refers to institutional discrimination by formal acts (where the discriminatory effect on the ground of, for example, race is indirect, while direct discrimination is on the ground of nationality), make situation testing a tool almost never used in practice. It is certainly possible that the idea of 'situation testing' lies behind certain actions aiming to draw



attention to discrimination cases or to collect evidence. It is for example possible that in cases like the one before the Court of Padua in 2005, some of the people facing discrimination had actually decided, in coordination with the NGOs involved, to test the behaviour of the defendant. The facts were, however, not presented as the result of 'situation testing', nor did the Court discuss its admissibility in principle. Parties who could have acted with the purpose of implementing 'situation testing' were therefore treated as ordinary plaintiffs or witnesses.

- c) *Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

The scarce number of cases does not allow us to speak of 'reluctance' but rather of a consequence of the still-weak tradition of proactive anti-discrimination action. It must be said, however, that among lawyers and NGOs involved in combating discrimination there is an increasing awareness of the potential of situation testing (which is a topic often discussed in publications and workshops), and therefore its use could become more frequent in the future. Evolution in other countries is likely to have an influence in Italy, in particular if related to the interpretation and application of EU directives.

- d) *Outline important case law within the national legal system on this issue.*

No cases have been reported that discuss the use of situation testing.

2.3 Indirect discrimination (Article 2(2)(b))

- a) *How is indirect discrimination defined in national law?*

Article 2 of the Decrees defines indirect discrimination as a situation 'where an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons [followed by reference to the specific grounds] at a particular disadvantage compared with other persons'.

- b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

Articles 3(4) (race) and 3(6) (other grounds) of the Decrees establish that 'differences in treatment that, even if indirectly discriminatory, are objectively justified by legitimate aims carried out through appropriate and necessary means are not



discriminatory acts (...).³⁴ The first draft of the Decrees referred to 'adequate and proportionate means', but since the notion of proportionality was elaborated by Italian courts with reference to the concept of indirect discrimination on the grounds of gender, with different implications, the final version is more appropriate. It is interesting to remark that Article 3(6) continues by saying that 'in particular, acts aiming to exclude from an occupation involving the care, assistance or education of minors persons who have been convicted of offences related to sexual freedom of minors or child pornography are legitimate.'³⁵ This provision has quite limited practical implications, since dismissal on the ground of criminal conviction is always lawful if the crime is related to an occupational activity, nor it is apparent which of the grounds of the Directives could be relevant in the case of a criminal conviction of the kind here described, at least if one refuses to include paedophilia as a sexual orientation. It is clear that the roots of this provision are purely political and symbolic and it is not relevant here as it does not concern a formal violation of the Directive in any case.

c) *Is this compatible with the Directives?*

The test described above is in line with the Directives.

d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

No indication is provided of how to make a comparison in relation to age discrimination.

e) *Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?*

As yet discrimination on the ground of race and ethnicity has not focused on the linguistic component of identity (on the protection of linguistic minorities in Italy see *infra*). One minor exception is a blatantly illegal ordinance of a local municipality in Northern Italy, which prohibited the use of languages other than Italian in public gatherings.³⁶ This ordinance, which was rapidly quashed by the local court, was clearly primarily meant purely to put pressure on local immigrants and to obtain visibility in the press rather than to introduce a preference for the national language.

³⁴ *Non costituiscono comunque atti di discriminazione (...) quelle differenze di trattamento che, pur risultando indirettamente discriminatorie, siano giustificate oggettivamente da finalità legittime perseguite attraverso mezzi appropriati e necessari'.*

³⁵ *In particolare, resta ferma la legittimità di atti diretti all'esclusione dallo svolgimento di attività lavorativa che riguardi la cura, l'assistenza, l'istruzione e l'educazione di soggetti minorenni nei confronti di coloro che siano stati condannati in via definitiva per reati che concernono la libertà sessuale dei minori e la pornografia minorile'.*

³⁶ T.A.R. Lombardia, Brescia, Sez. II, Decision no. 19 of 15 January 2010, available at http://www.asgi.it/public/parser_download/save/tar_brescia_sentenza_19_2010_150110.pdf.



2.3.1 Statistical Evidence

- a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?*

Article 28 of Legislative Decree 150/2011³⁷ has reformulated the rule on the burden of proof. According to paragraph 4, when a plaintiff establishes ‘facts, including facts of a statistical character, on which a presumption of discrimination can be based, it is up to the defendant to prove that there has been no discrimination.’ In the Italian context where anti-discrimination litigation is scarce, provisions on the use of statistical data have not, however, often been relied upon. It is possible that knowledge of the importance of statistical evidence in other legal systems could increase its use in Italy, at least if anti-discrimination litigation is increased.

- b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

There have not been any cases involving discrimination in the fields covered by the Directives (unlike gender discrimination) where statistics played a significant role; neither have evolution in other countries or European strategic litigation played a significant role so far.

- c) *Please illustrate the most important case law in this area.*

There is no such case law.

- d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

Employers are prohibited by Article 8 of the Workers’ Act (*Statuto dei lavoratori*, Act 300/1970) from collecting information on their employees concerning ‘their political, religious, or trade-unionist ideas, or facts which are not relevant for the appraisal of the professional skills of the worker.’ Information concerning these issues can exist in the files of the employer for various purposes in the interest of the employer (for instance, special benefits for people with a disability or special menus for religious purposes). Data on racial and ethnic origin, religious beliefs, health and sexual life (thus all information on disability and sexual orientation) are considered as ‘sensitive

³⁷ ‘Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell’art. 54 della legge 18 giugno 2009, n. 69’, in G.U. no. 220 of 21.09.2011.



data' under Article 22 of the Data Protection Act,³⁸ which regulates data collection within and outside employment. There is therefore extremely restricted access to this data, and it can be stored and processed only with the authorisation of the individuals concerned and of the State Agency for the Protection of Privacy. Statistical data are not currently used to design positive action measures.

2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

The Decrees implementing the 2000 Directives contain the first statutory definition of harassment introduced into the Italian legal system. The two Decrees use the same wording (taken from the Directives), saying that the unwanted conduct must have the effect of 'creating an intimidating, hostile, degrading, humiliating or offensive environment'. It must be recalled that, until the correction made in 2008, there was a textual difference between the two Decrees (probably a pure typographical error) since the Decree transposing Directive 2000/43 had the wording 'humiliating and offensive environment' while the Decree transposing Directive 2000/78 already used a wording corresponding to the Directive.

Notwithstanding the lack of statutory definitions until recently, scholars and case law developed a set of principles which to a considerable extent corresponded to the idea of harassment, and provided protection in situations comparable to those foreseen by the Directives. Much has been done for instance under the label of 'mobbing'. This notion can still be useful in some cases that cannot be precisely covered by the Decrees, since the courts have identified a ground for civil liability in some articles of the Civil Code such as Article 2087 on the employer's duty of protection³⁹ and Article 2103⁴⁰ on the employee's duties (as well as Article 2043 on damage compensation), and case law in the field is now abundant.⁴¹ Criminal liability can be established in some extreme cases, but the procedural and evidentiary implications of the use of

³⁸ Legge n. 675 del 31 dicembre 1996, *Tutela delle persone e di altri soggetti rispetto al trattamento dei dati personali*, and the consolidated provisions in the 2003 Data Protection Code (*Decreto legislativo 30 giugno 2003, n. 19, Codice in materia di protezione dei dati personali*).

³⁹ Article 2087 Civil Code: 'An entrepreneur must adopt, in the exercise of the business, and according to the nature of the work, the experience and the technology, the necessary measures to protect the physical integrity and the moral personality of the workers'.

⁴⁰ Article 2103 Civil Code: 'The worker must be assigned to the duties (*mansioni*, i.e. the position and all the activities which make up that position) for which he was recruited, or to the duties relating to a superior category successively reached, or to the last duties that he actually carried out, without any cut in his/her salary. If the worker is assigned to superior duties, he/she has the right to the treatment corresponding to the activity carried out; the assignment cannot be modified, unless the worker has replaced another worker who has the right to be reinstated (...). The worker can be transferred to other productive units only if organisational, production-related or technical needs are proved'.

⁴¹ See S. Mazzamuto, *Il mobbing*, Milano, Giuffrè, 2004, including the text of relevant decisions.



criminal law make it quite an impractical tool for protection against harassment. Although the case law does not seem to include cases of harassment or ‘mobbing’ based on the grounds of discrimination foreseen by the Directives, the approaches developed are fully applicable to our context and build a legal regime potentially concurring with that of the Decrees.

b) Is harassment prohibited as a form of discrimination?

Harassment is clearly defined as a form of discrimination in the Decrees.

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

Apart from the concept of ‘mobbing’, there are no additional sources on the concept of harassment which are valid and binding at the national level. Codes of practice have been identified within specific fields and public bodies.

2.5 Instructions to discriminate (Article 2(4))

Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?

The Decrees implementing the 2000 Directives equate instructions to discriminate with ordinary discrimination in Article 2(4) of both texts. No reference is made to legal persons in this context, although legal persons are included within the scope of application of the Decrees under Article 3 of both of them.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of ‘reasonable’. For example, does national law define what would be a ‘disproportionate burden’ for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?

Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.

The Italian government decided not to include the requirement of ‘reasonable accommodation’ in the Decree transposing Directive 2000/78/EC, something which



has been considered by a leading anti-discrimination law expert as a ‘blatant example of non-compliance with the framework directive’.⁴² For this reason the Commission has referred an infringement procedure to the Court of Justice (C-312/11).

- b) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of ‘disproportionate burden’ in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

Italian law on people with disabilities is not based on the general concept of ‘reasonable accommodation’ neither within nor outside the field of employment.

- c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

There is no clear statutory ground to establish whether failure to meet the duty will count as discrimination, or to establish the extent of any justification defence. In the absence of a general duty on the employer to provide reasonable accommodation, one has to evaluate whether provisions of other statutes achieve similar effects. Italian disability legislation is extensive and includes a wide variety of measures such as arrangements in the educational system, support to integration by local authorities, and so on. Rules of this kind are contained in the ‘framework act’ 104 of February 1992 on the care, social integration and rights of disabled people (here referred to as ‘*persone handicappate*’).⁴³ This act represented a radical change compared to previous legislation, which was almost exclusively based on assistance in specific sectors, but its approach is still quite fragmented, dealing with specific categories of disabled people or specific needs and rights (financial support, health, education, mobility, etc.). This law, however, does not prescribe a general equal treatment duty for the employer. The content of the present legislation and of that mentioned under the following point is certainly not functionally equivalent to the duty introduced by Article 5 of Directive 2000/78 since the general obligation introduced by the Directive is hardly compatible with the many exceptions (for instance, for small enterprises and certain categories of disability), and the acts mentioned above do not contain any provision that is formulated in such broad terms as those of the Directives. The case from Pistoia referred to above, where the court made an

⁴² M. Barbera, ‘Le discriminazioni basate sulla disabilità’, in M. Barbera, *op. cit.*, p. 109. According to Marzia Barbera, ‘It is difficult to conceive of this omission as an accident; it is more likely that the legislator consciously omitted to transpose one – in the Italian context – of the most innovative provisions, which could have caused reactions among employers forced to adopt proactive strategies to remove obstacles linked to disability.’ (p. 110).

⁴³ Legge-Quadro 5 febbraio 1992 n. 104, per l’assistenza, l’integrazione sociale e i diritti delle persone handicappate, Gazzetta Ufficiale, 17 febbraio 1992, n. 39.



autonomous reference to Article 5 of the Directive, represented a potentially interesting development, although it was not followed by a line of comparable case law.

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

No. Religion-specific arrangements (for example, holidays or ritual slaughtering) are contained in the agreements with religious denominations (such as the agreements with the Italian Association of Jewish Communities and the Italian Association of Seventh-day Adventists) but not through the general concept of 'reasonable accommodation'.

- e) *Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

No.

- f) *Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

Italian law provides a complex set of rules for the elimination of architectural barriers, i.e. obstacles to the free movement of disabled people, with certain standards for public buildings and incentives for the adaptation of private ones.⁴⁴ Violation of mandatory requirements contained in these rules could certainly be considered as a form of discrimination, although there is no significant case law on the point. The level of compliance is high with regard to public buildings, while for private ones it is affected by the general problem of enforcing construction standards (the situation can vary greatly from place to place).

- g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

There is no general duty to provide accessibility by anticipation.

⁴⁴ Legge 9 gennaio 1989, n. 13 Disposizioni per favorire il superamento e l'eliminazione delle barriere architettoniche negli edifici privati, in Gazzetta Ufficiale, 26 gennaio 1989, n. 21; Decreto del Presidente della Repubblica 24 luglio 1996, n. 503, in Gazzetta Ufficiale, S.O., 27 settembre 1996, n. 227.



- h) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

There is a variety of rights, deriving from several legal sources. As far as employment is concerned, an important piece of legislation was passed in March 1999 (Act 68/1999)⁴⁵ containing new rules on the right to work of disabled people (here referred to as '*disabili*'), which represents the most important instrument on this matter before the introduction of Directive 2000/78/EC. The Act promotes access to work for people with disabilities through a compulsory employment quota system among other means, establishing that the same standards of legislative and collectively agreed treatment must apply to disabled workers as to other workers. It is applicable to public and private agencies and enterprises with more than 15 employees.

The main general law on disability is Act 104 of 5 February 1992, a very advanced law that lays out several guiding principles and specific rights that must be granted to disabled people in order to achieve their social integration.

Italy also signed (in 2007) and ratified (in 2009) the United Nations Convention on the Rights of Persons with Disabilities. A debate has arisen about the implementation of the Convention regarding the recognition of sign language and the identity of deaf culture. Many experts and two associations have contested the approach behind this recognition, deemed to lower the level of integration and of health assistance afforded to deaf people, in particular children. The question is twofold: first of all there is the scientific issue of which is the preferable treatment for a deaf person (preserving and promoting deaf culture and sign language or promoting early diagnosis and the most appropriate remedy, such as prosthesis); should we choose the latter, it is then necessary to solve a legal question. Can the approach, the rights and the principle enshrined in a national law (such as Act 104/1992) be changed to implement a human rights convention, such as the Convention on Persons with Disabilities, if this convention lowers the level of protection already granted by a State? The answer should be in the negative but it could be very useful to have a pragmatic guideline based on scientific grounds issued by the European Union, as the EU is also a party to the UNCPD.

2.7 Sheltered or semi-sheltered accommodation/employment

- a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

A general system of sheltered accommodation/employment does not exist in Italy. The working conditions of workers with severe disabilities are, however, established

⁴⁵ Legge 12 marzo 1999, n. 68: Norme per il diritto al lavoro dei disabili, pubblicata nel Supplemento Ordinario n. 57/L alla Gazzetta Ufficiale 23 marzo 1999.



on the basis of a medical assessment. The provisions concerning their placement at work, particularly those of Act 68/1999, thus provide a set of protective rules implying a sort of sheltered employment.

b) *Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?*

Different regulations have been introduced in order to implement this Act. For instance, the decree of the President of the Council of Ministers issued in January 2000 and containing guidelines for the compulsory employment of disabled people ('*disabili*') is especially relevant.⁴⁶ People employed under quotas for the disabled or similar rules enjoy the same anti-discrimination protection as any other worker.

⁴⁶ *Decreto del Presidente del Consiglio dei Ministri, 13 gennaio 2000, Atti di indirizzo e coordinamento in materia di collocamento obbligatorio dei disabili a norma dell'art. 1, comma 4 della legge 12 marzo 1999 n. 68, in Gazzetta Ufficiale, 13 gennaio 2000 n. 43.*



3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

The Decrees – as well as the pre-existing anti-discrimination provisions of immigration law – apply to all persons without citizenship or nationality requirements. Indeed the vast majority of case law over recent years concerns discrimination on the ground of nationality. Although nationality is not covered by the Directive and its implementing law, judges also apply these acts to discrimination on the ground of nationality. UNAR (the Italian equality body created in compliance with Article 13 of Directive 2000/43/EC) also addresses discrimination on the ground of nationality although it is not expressly within its mandate. The basic reason is because according to Article 43 of the 1998 Immigration Decree, discrimination on the ground of national origin is prohibited and interpreted as covering nationality. Judges therefore apply all these different legal sources as a single legal framework.

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

The prohibition of discrimination provided by the Decree and the anti-discriminatory provisions of pre-existing labour law apply to all natural and legal persons, including organisations of workers and employers.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

The Decrees are silent on the scope of liability for discrimination, and since the sanctions provided are civil (primarily the payment of damages), extension of liability to persons other than the individual harasser must be established on the basis of the general principles of liability in contract and tort. In the case of a contractual relationship, such as that between employer and employee, the promisor is liable for



the fault of persons he is relying upon in order to implement his contractual obligations.⁴⁷ This is, for instance, the case in harassment, where one of the obligations of the employer is to ensure protection in the working environment, as mentioned above. Moreover, in the absence of a contractual relationship with the victim of discrimination (even in the form of harassment), the employer will be held liable in tort on the basis of the general principle of liability of the master for the acts of his servant (acts committed performing their duties). Liability is not, however, without limits since it does not extend to acts which are not linked to the work place or the performance of professional duties, and problems can arise when the discrimination (like harassment) takes place partly in the work place and partly outside it.⁴⁸ An individual worker who has harassed somebody can always be held liable as an individual, apart from action against his master.

Liability for acts of third parties is more limited and must be linked to a direct act or omission by the defendant. The individual harasser or other discriminator is jointly liable with his master. If the employer or other principal defendant is liable without personal fault, or on the basis of a slighter degree of fault, he can bring an action against the discriminator to obtain a complete or partial compensation of the amount paid as damages.

There is, in this author's opinion, no ground for holding trade unions and professional associations liable for the actions of their members if they did not contribute actively to the discrimination (for instance, in the case of instructions to discriminate).

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

The Decrees in general apply to all sectors of public and private employment, although some restrictions apply to specific fields, as detailed in the following section. In some cases restrictions can be extensive, as in the case of the armed forces, but these are not technically exclusions from the material scope of application of the new legislation transposing the Directives but specifications that the new act does not prejudice the validity of other legislation presently in force.

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

⁴⁷ Article 1228 of the Civil Code.

⁴⁸ On these problems see S. Mazzamuto, *op. cit.* pp. 57 ff.



3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?

The key provision (Article 3(1)) on the material scope of the Decrees transposing the Directives expressly establishes that the prohibition of discrimination and the related judicial remedies apply to all persons in the public and private sectors with reference to the following fields:

For both Decrees:

- a) access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions;
- b) employment and working conditions, including promotions, dismissals and pay;
- c) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

For the Decree transposing Directive 2000/43, the following must be added:

- a) social protection, including social security;
- b) health care;
- c) education;
- d) access to goods and services, included housing.

No distinctions apply between branches of activity or levels of professional hierarchy. A problematic point concerns the exclusion of the applicability of the Decree to access to employment of third country nationals (see *infra* at 4.4). It must again be stressed that the scope of application of the Decrees partly corresponds to other pre-existing legislation still in force. This is the case primarily for the 1998 Immigration Decree, which offers protection that mostly overlaps with that of the Decrees. Before the development of general anti-discrimination rules, labour law already provided a good level of protection. On the basis of the Workers' Act (*Statuto dei lavoratori*) of 1970⁴⁹ nobody can be dismissed, or discriminated against – even indirectly – in the assignment of qualifications or duties, in transfers, in disciplinary proceedings, or suffer other harm, for political, religious, racial, linguistic reasons or because of gender, a list to which the Decree transposing Directive 2000/78 added the grounds of disability, age, sexual orientation and personal beliefs. A dismissal based on such grounds is explicitly declared to be void,⁵⁰ and in the Italian legal system this entails

⁴⁹ Legge 20 maggio 1970, n. 300, Article 15, par. 2.

⁵⁰ Legge 15 luglio 1966, n. 604, art. 4 (as amended in 1970 and 1990).



both the award of damages and a court order to the employer to reinstate the worker in his/her employment.⁵¹ Collective economic privileges in favour of special groups of workers identified on the grounds of prohibited discrimination are also forbidden and punished with heavy fines.⁵²

The anti-discrimination provisions apply to both private and public sector. In the latter field, the highly formalised rules on recruitment and career make discrimination less likely.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

The area is fully and expressly covered by the Decrees for all the grounds of the two Directives, plus nationality on the basis of the 1998 Immigration Decree. Italian law can be thus considered to be in line with *Maruko* standards. Contractual and non-contractual conditions of employment are both covered by the general principles of labour law.

Occupational pensions are regulated in a highly formalised manner that does not allow factors other than age, gender and type of profession to be taken into account. Indirect discrimination on one of the grounds concerned by Directive 2000/78 could be challenged on the basis of general constitutional equal treatment principles.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning courses?

⁵¹ A reinstatement order following unfair dismissal ordinarily applies only to employers having a minimum number of workers (i.e. in the case of small companies the only remedy is represented by damages), but this limit does not apply to discriminatory dismissals.

⁵² Legge 20 maggio 1970, n. 300, art. 16.



The area is fully and expressly covered by the Decrees for all the grounds of the two Directives. Children with disabilities are placed in mainstream education with support from specialised tutors who assist ordinary teachers, and they cannot by any means be denied access to education at any level including universities. There is no legislation authorising any form of segregation. Act 104/1992 provides at Articles 12 ff. a comprehensive set of rules on integration at all levels of education including professional education, and the same applies to universities and adult education. Implementation problems may arise, but they are not linked to any deficiencies in the legislation.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

The area is fully and expressly covered by the Decrees for all the grounds of the two Directives, plus nationality on the basis of the 1998 Immigration Decree (a first draft of the Decrees did not include membership, but this was included again in the final text).

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

The Decree transposing Directive 2000/43 fully and expressly covers this area, for race and ethnicity. Religion and nationality are covered by the 1998 Immigration Decree. The other Decree expressly establishes (Article 3(2)(b)) that its content shall be without prejudice to the provisions already in force concerning social security and social protection. Disability is in principle also covered by Act 67/2006.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.



The Decree transposing Directive 2000/43 expressly covers this area. Religion and nationality are covered by the 1998 Immigration Decree. In principle the law against disability discrimination (Act 67/2006) is also relevant as it contains a broad equal treatment clause without a clear definition of the scope of application. With regard to race and ethnicity it must be noted, however, that exclusion from social advantages can most easily be linked to requirements as to nationality (see also the section of this report on housing). The Constitutional Court quashed, for instance, a regional law of the Lombardy Region which excluded non-Italian citizens from the free public transport granted to completely disabled people,⁵³ and several decisions of first instance courts have quashed municipal regulations which used various conditions (e.g. length of residence) to make it harder for persons of foreign origin to obtain specific social advantages.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated 'special' education are favoured and supported.

The Decree transposing Directive 2000/43 expressly covers this area. Religion and nationality are covered by the 1998 Immigration Decree. No type of school which wishes to issue State-recognised qualifications is excluded. For disabled children/adults, see section 3.2.4 of this report. Cases of discrimination on the ground of ethnicity have not been central to legal/political debate. Inclusion of Roma children in classes has sometimes caused an overreaction by a majority of parents, and the current anti-Romani hostility can entail further problems, but there is so far no basis to say that structural discriminatory patterns exist since the limited schooling of Roma derives from factors other than obstacles to their admission to schools. One practical problem can be the impact on the school attendance of children of the frequent eviction of illegal settlements. Since some of the children living in these settlements attend school, the eviction of their camp without attention to their situation can disrupt an otherwise relatively successful educational track.

With regard to children with disabilities, the Italian approach is definitely to include them in mainstream education with individualised special support. Children therefore attend the same schools they would attend according to ordinary rules, and will be assisted in that school by *ad hoc* support teachers (*insegnanti di sostegno*), in addition to their ordinary teachers, depending on the nature of their disability. Debate

⁵³ Corte costituzionale, Judgment of 28 November 2005.



normally focuses not on discrimination but on the reduction of funding to pay specialist support teachers.

It must be noted that in 2010 the Italian Constitutional Court found illegal legislative provisions which set limits on the number of teachers employed to support disabled students and which revoked the previous option of hiring new specialist teachers for students with particularly severe disabilities on fixed-term contracts.⁵⁴ This case originated from a decision by a Sicilian school authority which, by applying the new provisions, reduced from 25 to 12 the weekly hours of teaching support provided to a severely disabled child. The parents challenged the decision in the regional administrative court, and the Sicilian special administrative appeal court (*Consiglio di giustizia amministrativa per la Regione siciliana*) referred the case to the Constitutional Court. The Court declared that it was constitutionally illegal to set limits to the provision of specialist support that failed to take account the situation of the individual. The Court's starting point was that 'the disabled ("*disabili*") do not constitute a homogenous group' and that for each form of disability 'it is, therefore, necessary to identify mechanisms to remove obstacles that take into account the type of handicap by which a person is actually affected'. Against this background, removing the possibility to hire extra *ad hoc* support teachers for severe cases was, in the Court's view, 'unreasonable'. According to the Court, disabled people had a 'fundamental right' to education and, although it recognised that the State had a 'discretionary power to identify measures for the protection of disabled persons', it also reaffirmed (as already stated in its previous case law) that 'such discretion is not absolute and is limited by the respect of a minimum core ("*nucleo indefettibile*") of guarantees'. An individualised approach to the needs of disabled people was, according to the Court, constitutionally imposed by Article 24, section 2, c) of the UN Convention on the Rights of Persons with Disabilities, and by the fact that the legislation on educational support to disabled children aims at pursuing an 'evident national interest' implementing Article 38, section 3 of the Italian Constitution (right to education of disabled people).

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

- a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The Decree transposing Directive 2000/43 expressly covers this area with no

⁵⁴ Decision no. 80 of the Constitutional Court of 22 February 2010, published in the *Gazzetta Ufficiale* on 3 March 2010. The decision can be found on the Constitutional Court website www.cortecostituzionale.it.



distinction of the kind mentioned above. Religion and nationality are covered by the 1998 Immigration Decree, while disability is covered by the law against disability discrimination (Act 67/2006).

- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

There is no provision allowing for differences of treatment in the provision of financial services, nor binding standards for the assessment of risks. This could be, in principle, a field to test the application of the law against disability discrimination (Act 67/2006).

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

The Decree transposing Directive 2000/43 expressly covers this area, mentioning 'housing' without further distinctions, thus including both private and public accommodation. Religion and nationality are covered by the 1998 Immigration Decree, while disability is covered through the law on discrimination against disabled people (Act 67/2006). The problem of housing is relevant with regard to rules which are beyond the scope of application of the Directive since limitation to access to public housing for ethnic and religious groups can be a practical effect of discrimination formally based on nationality. See *infra* section 4.4.

The debate on the existence of segregation against the Roma through their rejection into 'camps' is becoming increasingly important, also because of the harsh policies against Roma settlements currently implemented. No-one has, however, yet tried to place the existence of the camps themselves into the framework of anti-discrimination law. Although not as severely as the Roma, non-Western immigrants often suffer difficulties in accessing the housing market, although the situation can vary depending on the part of the country involved and the position of the individual concerned (legal/illegal immigrant, specific ethnic group).

People with disabilities (and, in some cases, older people) can enjoy a variety of priority rights when public housing is assigned since the rankings for allocating available public housing (which are created at municipal level, thus making a general description difficult) are based on a complex system of points which takes into account a number of social factors.



4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

The first part of Article 3(3) of both Decrees establishes that ‘in compliance with the principles of proportionality and reasonableness’ (*‘proporzionalità e ragionevolezza’*), within the employment relationship or the entrepreneurial activity, differences in treatment due to characteristics related to the different grounds foreseen in the Directives are not considered as discriminatory acts where, ‘by reason of the nature of the particular occupational activity concerned or of the context in which it is carried out, such characteristics constitute a genuine and determining occupational requirement for its carrying out’. No definition is given of ‘proportionality’ and ‘reasonableness’. The substitution of the requirement of ‘legitimate objective’ with ‘reasonableness’ has been criticised since it can allow a broader discretion in admitting exceptions to equal treatment, but the courts may not give a significantly different meaning to the provision on the basis of this wording.

In the case of the Decree transposing Directive 2000/78, the same section also establishes that it is not discriminatory to evaluate ‘such characteristics when they are relevant to establish whether a person is suitable to carry out the functions that the armed forces and the police, prison and rescue services can be called on to carry out’, while the following section establishes (without distinguishing between the different grounds of discrimination) that ‘however, the provision remains unaffected that imposes a suitability test for a specific occupation and the provisions allowing different treatment with regard to adolescents and young people linked to the special nature of the occupation and to legitimate objectives of labour policy, labour market and professional education’. The inclusion of all the grounds under this provision on ‘work suitability tests’ provides probably too much discretion in admitting exceptions to equal treatment going beyond genuine and determining occupational requirements.

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

Article 3(5) of the Decree transposing Directive 2000/78 establishes that ‘Differences in treatment based on religion or belief and enacted within churches and other public or private organisations do not constitute discriminatory acts where, by reason of the nature of the particular occupational activity carried out by such entities or organisations or of the context in which they are carried out, such religion or belief



constitutes a genuine, legitimate and justified occupational requirement'. The provision corresponds to Article 4(2) of the Directive with the exception that it makes reference to 'churches and other public or private organisations' without specifying that also the ethos of the latter must be based on religion or belief. This textual difference raises problems because of the risk of its use in order to admit discrimination by public and private organisations the ethos of which is not actually based on religion or belief.

However, even beyond this textual problem (which may be the result of a further drafting mistake), the choice of the Italian legislator is in the author's opinion not compatible with the Directive⁵⁵ since the Directive does not allow the Member States to introduce during transposition exceptions to equal treatment for the needs of churches and similar organisations which are broader than those already existing (in legislative or other form) in the legal system when the Directive was adopted.

b) Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground).

In the Italian legal system, at legislative (statutory) level, the only explicit exception to equal treatment is represented by a section of an act of 1990⁵⁶ concerning among other things '*organizzazioni di tendenza*', defined as 'employers of a non-entrepreneurial character that perform on a non-profit basis political, trade unionist, cultural instruction or religious or cult activities'. This act only limits the remedies available in the case of unfair dismissal. A worker unfairly dismissed by an organisation covered by the 1990 act will be entitled only to damages and not to reinstatement by order of the judge as in ordinary cases.

With arguments partly based on the existence of this limited legislative provision and partly on constitutional grounds, judges and scholars (in a very intricate debate which cannot be described here in all its nuances) have admitted the discretionary power of the employer to hire or dismiss, or otherwise discriminate. Moreover, the exceptions to equal treatment as developed by case law are more limited than those foreseen in the Decree transposing Directive 2000/78.⁵⁷

Any discretion is thus excluded for organisations working on a profit-making basis and when the duties of the individual worker do not have an actual link with the

⁵⁵ For an extensive discussion of this point, see N.Fiorita, 'Le direttive comunitarie in tema di lotta alla discriminazione, la loro tempestiva attuazione e l'eterogenesi dei fini', in *Quaderni di diritto e politica ecclesiastica*, 2004, pp. 361 ff.

⁵⁶ *Legge 11 maggio 1990 n. 108, Disciplina dei licenziamenti individuali*, Article 4 (Regulation of individual dismissals).

⁵⁷ *Cass. 13 luglio 1995, n. 7680 Cass, S, U. 11 aprile 1994, n. 3353 Cass. 12 ottobre 1995, n. 10636.*



organisation's ideology.⁵⁸ The Decree thus grants employers with an ethos based on religion and belief (and potentially all employers, if one makes a literal interpretation) a power they did not enjoy before the adoption of the Directive.

- c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

In Italy, religious institutions clearly have complete discretion in this regard, which can raise problems of compatibility with the Directives. Teachers of religion in State schools must have authorisation from the bishop, which can be denied or withdrawn if the person does not fully comply with the moral standards of a Catholic believer. In a 2003 case⁵⁹ the Court of Cassation recognised the validity of a termination of an employment relationship when an unmarried female teacher became pregnant. The legal ground for such discretionary power lies in the revised Lateran Treaty and its protocols, and now in a law enacted in 2003.⁶⁰

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

The Decree transposing Directive 2000/78/EC establishes (Article 3.2 e) that it does not affect the validity of rules presently in force concerning the armed forces in relation to age and disability.

⁵⁸ In the religious field, the limits of such discretionary power have been discussed primarily with regard to Catholic schools in terms of the tenure of teachers and other staff. In this context, however, the problem was not so much that of discrimination between different religions or beliefs, but internal control of the respect of moral codes (for instance, requiring religious marriage instead of civil marriage). It is worth mentioning that Catholic universities enjoy a discretion to hire or dismiss which has been the subject of long and complex litigation in two famous cases (*Cordero* and *Lombardi Vallauri*) which went before the Constitutional Court and the supreme administrative court which, however, both decided in favour of the discretionary power of the institutions. The *Lombardi Vallauri* case has been the subject of a recent ECHR judgment. The Court found violation of Article 10 of the ECHR: ECHR, 20 Oct. 2009, *Lombardi Vallauri v. Italy*, rec. no. 39128/05.

⁵⁹ *Cassazione* 24.02.2003, no. 2803. This situation is criticised, also in the light of the Directives, in M. Aimò, 'Religione e convinzioni personali' in M. Barbera, *op. cit.*, pp. 70 ff.

⁶⁰ *Legge 18 luglio 2003, n. 186, Norme sullo stato giuridico degli insegnanti di religione cattolica degli istituti e delle scuole di ogni ordine e grado*, in *Gazzetta Ufficiale* 24 luglio 2003, n. 170 (Act no. 186 of 18 July 2003, on the legal status of teachers of Catholicism in institutes and schools of any category and level, in *Gazzetta Ufficiale* no. 170, 24 July 2003). If the authorisation is withdrawn, the Act foresees, however, at Article 4 a system allowing the person – under certain conditions – to move to another job within the educational system.



- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

The new version of the Decree transposing Directive 2000/78 establishes (Article 3.3) that ‘assuming respect of the principles of proportionality and reasonableness, and in the presence of a legitimate aim, those differences in treatment based on characteristics linked to religion, personal beliefs, disability, age or sexual orientation that, because of the nature of the activity or the context in which it takes place, are an essential and determining requirement for undertaking the activity, do not constitute discrimination’.

4.4 Nationality discrimination (Art. 3(2))

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

- a) *How does national law treat nationality discrimination? Does this include stateless status?
What is the relationship between ‘nationality’ and ‘race or ethnic origin’, in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?)*

Discrimination on the ground of nationality (which certainly covers statelessness) is explicitly excluded from the scope of application of the Decrees, as are all legal rules concerning immigration, work, and assistance to citizens of non-EU countries. The exclusion of discrimination on the ground of nationality, although admitted by the Directive, raises problems since in Italy indirect racial and ethnic discrimination is often disguised as discrimination against ‘non-EU citizens’.

The practical importance of the problem is shown by a decision of the Milan court of first instance that applied the anti-discrimination provisions of the 1998 Immigration Decree to declare part of a regulation on public housing enacted by the city council which established that Italian citizens had a certain degree of priority when public housing was assigned. This decision, which is an application of the prohibition of discrimination on the ground of nationality, raised strong political reactions from representatives of *Lega Nord* (which proposed the introduction of the priority for Italian citizens in the first place). The decision, which also granted damages (EUR 2,500 each) to the three plaintiffs, was the first known application of the anti-discrimination provisions of the 1998 Immigration Decree against public bodies.⁶¹

⁶¹ *Tribunale di Milano, sez. I, sentenza 20121 3.2002 n. 3624*, published in *Diritto, Immigrazione e Cittadinanza*, 4. 2002, with a comment by Alessandro Simoni.



Although the case was decided as one of direct discrimination on the basis of nationality, it was clear that the political decision behind it was taken in a context where the ethnic identity of the foreign citizens involved was a crucial factor. It must also be mentioned that proposals for a 'national priority' in public housing are increasingly popular. In the first draft of the recent reform of the immigration law, the Government included a section that established that foreigners could have access to public housing only within the limits of 5% of resources available. The provision has been deleted, but stringent requirements are still included (current employment and length of residence permit) for the access to public housing. It is clear that any restriction of access to public housing for 'foreigners' has had a significantly greater impact on persons with non-Western/non-European racial and ethnic identities (and the groups actually targeted easily appear from the minutes of political meetings). Nationality discrimination is presently still covered by the 1998 Immigration Decree, which offers protection similar to that offered by the Directives and that has been expressly left into force by the Decrees. Concerning discrimination on the ground of nationality, where there is no supranational link the Immigration Decree can of course be derogated by later statutes.

b) Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?

A further doubt concerning the appropriateness of the manner of transposition can be mentioned with regard to access to employment. Both Decrees (at Article 3.2) exclude immigration law from their own scope of application. This exclusion applies not only to the rules on entry and residence of third country nationals (as per the Directives) but also to their 'access to employment' (and assistance and welfare), with regards to which, in the view of the author, they should instead be protected.⁶²

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?

⁶² Article 3(2) of both Directives provides that: 'This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.'



Policies aiming at extending benefits to same-sex partners are still rare.⁶³ As far as collective agreements and the law are concerned, marital status has been used to justify differences in treatment (for unmarried different-sex and same-sex partners), even though the current trend is to extend some rights to *de facto* cohabitants. Indeed, with respect to bereavement and compassionate leave, Act 53/2000⁶⁴ and the resulting regulation adopted by Decree 278/2000 of the Prime Minister⁶⁵ extend this right in cases of the infirmity or death of a '*convivente anagrafico*' (stable cohabitant).⁶⁶ These provisions therefore cover same-sex partners. As a consequence of these rules, many collective agreements extend to cohabitants (without regard to sexual orientation) rights to leave or to take a sabbatical (*aspettativa*) in order to be able to follow their partner.⁶⁷

b) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?*

Many problems for same-sex partners derive from the limitation of several benefits to married couples (Italy does not recognise same-sex marriage or registered partnerships).

A major discriminatory consequence affecting unmarried partners in general concerns the pension system with particular reference to survivors' pensions: according to revised Royal Decree 636/1939,⁶⁸ only the spouse of a worker in the

⁶³ The health insurance fund for journalists extends its benefits to *de facto* cohabitants, expressly including same-sex partners (see www.casagit.it).

⁶⁴ *Legge 8 marzo 2000, n. 53, Disposizioni per il sostegno della maternità e della paternità, per il diritto alla cura e alla formazione e per il coordinamento dei tempi delle città* (Act no. 53 of 8 March 2000, Provisions to support motherhood and fatherhood, on the right to care and training, on the co-ordination of schedules in cities), (*Gazzetta Ufficiale* no. 60 of 13 March 2000).

⁶⁵ *Decreto Presidenza del Consiglio dei Ministri - Dipartimento per gli affari sociali 21 luglio 2000, n.278, Regolamento recante disposizioni di attuazione dell'articolo 4 della legge 8 marzo 2000, n. 53, concernente congedi per eventi e cause particolari* (Decree of the President of the Council of Ministers-Department for Social Affairs no. 278 of 21 July 2000, Regulation concerning provisions for the implementation of Article 4 of Act no. 53 of 8 March 2000 on leave for particular causes and events).

⁶⁶ The Act makes reference to the *famiglia anagrafica* (registered family) as defined by Article 4 of Presidential Decree no. 223 of 30 May 1989: this registration is conceived for residence purposes, has no legal consequences and, despite the grounds on which leave may be granted, cannot be considered as a form of recognition of *de facto* couples. The right to a leave is also provided for non-cohabiting relatives (e.g. brothers/sisters, grandparents, grandsons/granddaughters).

⁶⁷ As an example, see the national collective agreement for postal workers of 11 January 2001. The regulation for the *Confederazione Generale Italiana del Lavoro* employees even grants a substitute marriage-licence for same-sex and different-sex cohabitants. In other cases collective agreements do not yet include rights for cohabitants: for instance, the national collective agreement for workers in the metallurgical and mechanical industry of 8 June 1999 excludes *de facto* partners from compensation for a worker's death or from benefits if the worker has to leave her/his residence.

⁶⁸ *Regio decreto 14 aprile 1939, n. 636, Disposizioni in materia di pensioni* (Royal Decree no. 636 of 14 April 1939, Provisions on pensions) (converted and revised by Act no 1272 of 6 July 1939).



public or private sector is entitled to benefit from the worker's pension. The Constitutional Court has recently upheld this provision.⁶⁹

Considering that Article 3(1)(b) of the Decree has implemented Article 3(1)(c) of the Directive, it is possible to argue that denial to same-sex partners of benefits granted to opposite-sex cohabitants constitutes direct discrimination being, in fact, not a direct consequence of national law but rather a result of a decision by the employer.

Article 3(2)(d) explicitly states that the Decree shall be without prejudice to the provisions already in force concerning marital status and the benefits dependent thereon, as provided by recital 22 of the Directive: however, it could be possible to challenge different treatment based on marital status as provided by a collective agreement or imposed by employers as a form of indirect sexual orientation discrimination.

Finally, the Italian system does not provide specific protection for people who are not the legal parent of a child. Legislative Decree 151/2001⁷⁰ establishes the position of parents with reference to rights and benefits in the work place: according to Article 1, only a legal or adoptive parent or a person who has legal custody of a child⁷¹ is eligible for the benefits provided by the law. Extra benefits (namely, additional leave of absence) are granted to single parents. Only legal or adoptive children may receive a survivor's pension.

4.6 Health and safety (Art. 7(2) Directive 2000/78)

- a) *Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

No specific exception is mentioned in the Decree transposing Directive 2000/78/EC in relation to disability, nor do exceptions in relation to health and safety apply to other grounds. These issues are unexplored in Italian law.

Outside the Decree, the provisions on health/safety and disability are to be found in Act 68/1999 on the integration of the disabled (*'disabili'*) into the labour market. This act applies only to people with severe disabilities for whom it provides different forms of protected employment. Special public commissions establish what the most appropriate measures to adapt working conditions are. Otherwise, a person's suitability for a specific job is always established by a medical screening. The

⁶⁹ Corte Costituzionale, 3 November 2000, no. 461.

⁷⁰ Decreto Legislativo 26 marzo 2001, n. 151, *Testo unico delle disposizioni legislative in materia di tutela e di sostegno della maternità e della paternità a norma dell'articolo 15 della legge 8 marzo 2000, n. 53* (Legislative Decree no. 151 of 26 March 2001, General framework of legislative provisions on the protection of and support to motherhood and fatherhood, in compliance with Article 15 of the Act no. 53 of 8 March 2000), (*Gazzetta Ufficiale* no. 96 of 26 April 2001).

⁷¹ In principle, also the same-sex partner of the parent.



employer cannot exclude a worker considered suitable for the job, nor may the employee run the risk of working without proper medical approval.

- b) *Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc)?*

There are no exceptions of this kind.

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

- a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold?*

The Decree transposing Directive 2000/78 as amended in 2008⁷² makes certain new provisions in Article 3.4, which now has two new sections, 3.4-*bis* and 3.4-*ter*. According to the new text, the law does not affect the rules providing for 'work suitability tests' nor differential treatment based on special conditions for 'access to employment and occupational training' by 'young workers, aged workers and those with caring responsibilities, in order to favour their integration into employment or their protection' (point a). Also excepted are 'the determination of minimal levels of age, professional experience or seniority in employment for access to employment or to certain benefits linked to employment' (point b) and 'the determination of a maximum age for recruitment, based on the training requirements for the specific occupation or on the need for a reasonable period of work before retirement' (point c). The new text of the Decree can be considered generally in line with the standards imposed by Article 6 of Directive 2000/78.

- b) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

It is not possible to provide here a list of all possible cases of differences of treatment

⁷² Legislative Decree no. 59 of 8 April 2008 later converted into ordinary law as Law no. 101 of 6 June 2008 converting into a law, with amendments, the Legislative Decree of 8 April 2008, containing urgent provisions for the implementation of EU obligations and the execution of judgments of the Court of Justice of the European Communities, published in *Gazzetta Ufficiale* no. 132 of 7 June 2008 (*Legge 6 giugno 2008, n. 101, 'Conversione in legge, con modificazioni, del decreto-legge 8 aprile 2008, n. 59, recante disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzione di sentenze della Corte di giustizia delle Comunità europee' pubblicata nella Gazzetta Ufficiale n. 132 del 7 giugno 2008*).



based on age within the material scope of the Directive. For instance, employment under a contract of apprenticeship is, until the regions implement their own rules (this being within their field of competence), limited to people with a maximum age of 24, 26 or 29, depending on various factors.

As far as the public sector is concerned, employment is in principle free from any age limit, but each public body can provide a specific age limit by issuing a special decree.⁷³ Such decrees must state the reasons for the age limit. It is possible to seek judicial review of these decrees although nobody has done this so far.

- c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2)?*

No explicit use of the possibility under Article 6(2) is reported. The reform of pension schemes is the subject of constant political tension, with its development very difficult to predict.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

Labour law provides an extensive number of rules making exceptions to ordinary rules in order to promote the employment and vocational training of young people. It must be noted that not all these rules provide more favourable treatment but instead allow a reduction in salaries or a lower degree of protection as a policy to increase youth employment.

There are also many rules providing protection for people with caring responsibilities in the form of maternity leave and similar.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

The current version of the Decree transposing Directive 2000/78 provides allows exceptions for ‘the determination of minimum levels of age, professional experience or seniority in employment for access to employment or to certain benefits linked to employment’ (point b) and ‘the determination of a maximum age for recruitment,

⁷³Article 3, paragraph 6 of Act no. 127 of 15 May 1997.



based on the training requirements for the specific occupation or on the need of a reasonable period of work before retirement' (point c).

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?*

The pension system was most recently reformed in 2011 under pressure to recover from the economic crisis which has affected Italy as it has several other countries in the Eurogroup. The retirement age for men and women in both the public and private sectors will be gradually equalised: in 2018 men and women in both sectors will retire at 66. They will be able to retire before 66 only if they have worked for 42 years and three months (for men) or 41 years and three months (for women) but with a 2% of cut for each year of early retirement.

A complex system of flexibility will operate between the ages of 62 and 70 years (see below).

- b) *Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?*

The scheme currently in force is such that – as a general principle – the age at which individuals (both men and women) can start collecting their occupational pension (*pensione di anzianità*) is determined by a complex system based on the sum of the age of the person concerned and the number of years for which he/she has paid social security contributions. This system is being introduced gradually, and once it is fully in force in 2018 the minimum age for receiving an occupational pension will be 66. Special rules apply to certain professions. Pensions can be deferred until the compulsory retirement age is reached. Only the self-employed can start collecting their pensions and still work.



- c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

Since retirement assumes that the age for collecting a pension has been reached and vice versa, see above under a) and b).

- d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

An employment contract cannot be terminated on grounds of age before the employee fulfils the conditions (age included) required to receive a pension. Employers are thus bound by rules of national law on pension ages.

- e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?*

Until retirement, the individual worker enjoys all rights, but a worker can be dismissed for having reached the retirement age. The compliance of this situation with the Directive has not been the subject of significant discussion.

4.7.5 Redundancy

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

There is no legislation authorising employers to take into account age or seniority in selecting workers for redundancy. Rules on redundancy procedures differ not only between the private and public sectors but also between the State and local authorities. Age or seniority can become a relevant factor when employers have to negotiate plans for collective redundancies with the trade unions.

- b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

The social security system provides 'mobility compensation' for workers who are made redundant. The system applies to workers who are dismissed after having previously enjoyed the social security benefits granted to workers in enterprises in difficulty (*Cassa Integrazione Guadagni*). The length of the period for which mobility compensation is granted changes depending on the age of the worker (the older the worker, the longer the period during which he/she is eligible for compensation).



4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?

Article 3(2)(c) establishes that the Decree shall be without prejudice to the provisions already in force concerning public security, maintenance of public order, prevention of criminal offences, and protection of health. The actual meaning of this provision cannot be understood – it seems to allow too great a discretion to the legislator since there is no means of verifying its compatibility with the needs of a democratic society.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

Article 3(4) of the Decree transposing Directive 2000/78 establishes that this is without prejudice to the ‘provisions that establish work suitability tests with respect to the necessity of suitability for a specific occupation (...)’.⁷⁴ The provision is unclear. Considering that the second part of Article 3(4) specifically states that differences of treatment are justified with reference to adolescents, young people, older workers and workers with caring responsibilities if they are required by the special character of the occupation and by legitimate employment policy, labour market and vocational training objectives, it seems that the first part makes reference to more general and vague work suitability tests without specifying the nature of the work for which a test is required, a specific ground, or even the purpose or nature of the test. Even assuming that such tests would be lawful only when based on a separate statutory provision and would not justify different treatment, the current version of the Decree is quite suspect since it allows a general appraisal of the worker’s suitability not provided by the Directive itself and not defined in its aims, criteria and limits.

⁷⁴ Article 3(4) of the Decree: ‘Sono, comunque, fatte salve le disposizioni che prevedono accertamenti di idoneità al lavoro per quanto riguarda la necessità di una idoneità ad uno specifico lavoro (...)’.



5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.*

The Decrees did not introduce anything new in terms of positive action. It is in principle legitimate under the Italian Constitution in the light of the principle of substantive equality under Article 3(2). Such measures exist and are applied with regard to gender on the basis of Act 125/1991.

- b) *Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.*

In relation to the grounds covered by the Directives, positive action strictly speaking applies in practice only to persons with disability on the basis of a complex set of rules contained in Act 162/1998. As far as this act is concerned, one has to remark that its aim is to amend and partly fill the gaps of the 'framework act' of 1992 that provides some measures in favour of persons with severe disabilities. In fact it: 1) provides some new concrete interventions and services; 2) allows some experimental projects to be implemented; 3) promotes the use of surveys and the collection of statistical data on disability; 4) provides for a national conference on disability policy to be held every third year. The act targets local authorities, which have specific competences to promote actions in favour of disabled persons, to draft programmes and to perform services relating to disability. During the first phase of its implementation this law was financed directly by the State (Ministry of Labour and Social Policy), which transferred the financial resources to the local authorities (by 2000). Local authorities now provide their own funding.

Interventions include different forms of personal care, personal help, emergency short-term accommodation and partial refund of expenditure on assistance.

In the field of employment, Act 162/1988 establishes a set of policies to be applied only to people with severe disabilities as defined by its opening provisions, which can be summarised as follows:

- the employment of disabled people in work places that have been adapted to their abilities through the use of facilities and specific solutions to problems connected with the environment etc.;
- the placement of disabled people in specific jobs as decided by a medical



commission. This commission has the task of: i) carrying out a functional diagnosis in order to determine the total ability of disabled people, specifying the grade and quality of their impairments and ii) proposing how to facilitate their placement in employment. The commission clarifies the position of disabled persons in his/her environment, their attitudes, and their family relationships, taking into account their educational background and the jobs that they have already done;

- an obligation on public bodies and private enterprises to ensure that disabled people make up 7% of the total workforce (applies to private enterprises with more than 50 employees). Exceptions to this obligation apply to political parties, trade unions, and associations for social development and support. For police and civil protection jobs, disabled persons are employed only for administrative tasks. Moreover, other cases of derogation are set out in Articles 3 and 5. These quotas are generally complied with. Statistics on the enforcement of such quotas are available from the Ministry of Labour; 25,000-30,000 people are hired under this system each year. In certain cases an employer who is not in a position to hire disabled people for a stated reason (e.g. the type of activity) will make a financial contribution to the Regional Employment Fund.

Moreover, the Act provides some services in order to facilitate access to work by the disabled in compliance with Article 7; other rules cover lists of unemployed disabled people, labour relations (Article 10); support for the enterprises which comply with the law (Article 11); the creation of social cooperatives in order to support access to work (Article 12); benefits for employers who employ disabled people (Article 13); and the institution of a Regional Fund for the Employment of Disabled Persons (*Fondo regionale per l'occupazione dei disabili*). Sanctions of different kinds are applied to the employers who do not fulfil their obligations.

As already mentioned, forms of favourable differential treatment exist with regard to religion for denominations which have signed agreements with the State. Such positive action mostly relates to holidays for Jews and Seventh-day Adventists.⁷⁵ The statute transposing the agreement with the Adventists, for instance, establishes the right of those employed by private or public employers to refrain from working on Saturdays, with the limit that this should not affect 'essential public services' and that the right is enjoyed 'within the framework of the organisation of work'; incompatibility with the organisation of work must be proved by the employer. With regard to Adventists, these legislative rules have been usually interpreted by courts in favour of employees through a narrow construction of the limits. Dismissals based on a refusal to work on Saturday have normally been considered illegal, and the court has ordered the reinstatement of the worker in his/her position and payment of damages.⁷⁶ As regards Jews, the relevant act also establishes an obligation to take

⁷⁵ See Article 17 of the 1988 Act for the Adventists and Article 3 of the 1989 Act for the Jews (see the references of the relevant legislation at note 17).

⁷⁶ See for instance *Pretura circondariale Roma 6 novembre 1998*, in *Il diritto ecclesiastico*, II, 2000, p. 95 ff. and the previous case law presented in the comments by Rimoldi and Valsiglio.



into consideration the obligation to rest on Saturday when setting dates of recruitment assessments for public sector employment.

The needs of Muslims are an ongoing problem as, in the absence of an agreement with the State, they do not enjoy a legal right to special measures. Proposals for such an agreement drafted by various Italian Islamic associations include a range of measures, such as the adaptation of working time in order to respect Friday rest, daily prayers, Ramadan, and so on.

As far as this author is aware, no case law as yet exists on the limits within which such characteristics of religious identity can enjoy legal protection on the basis of general principles (such as freedom of expression or religion or good faith in employment relations).⁷⁷ The comparative disadvantage of Islam could constitute an infringement of the Directive.

There is no organised state policy promoting specific measures to prevent disadvantages linked to religion or belief beyond what is already granted in the agreements mentioned above.

Positive action for the Roma does not exist at the national level. Some regional legislation provides for very weak support to the integration of Romani groups, but such measures are currently very marginal in the overall picture, often completely unimplemented, and initiatives in favour of the Roma are most often decisions taken at the municipal level (an Italian national strategy had not been adopted as of 1 January 2012). Some linguistic minorities enjoy special protection in the charters of regions with a special constitutional status, which in the case of the German speaking minority of Trentino Alto Adige (Südtirol) entails an extremely complex system of quotas for public employment and for the enjoyment of certain rights. Much weaker protection is granted at the national level to other linguistic minorities⁷⁸ defined as 'historic' by a law of 1999, i.e. the languages 'of the Albanian, Catalan, Germanic, Greek, Slovenian and Croatian populations and of those speaking French, Franco-Provençal, Friulan, Ladin, Occitan and Sardinian'.

⁷⁷ The absence of clear solutions in the absence of agreements is discussed in G. Dondi, *Immigrazione e lavoro: riflessioni e spunti critici*, Padova, CEDAM, 2001, pp. 129 ff.

⁷⁸ On the main lines of the linguistic quota system in Trentino Alto Adige, see S. Scarponi and E. Stenico, 'Le azioni positive: le disposizioni comunitarie, le luci e le ombre della legislazione italiana', in M. Barbera, *op. cit.*, pp. 452 ff. On minority protection in general, see A. Simoni, 'Minorités-droit public italien', in *Journées mexicaines 2002 de l'Association Henri Capitant des Amis de la Culture Juridique Française*, Universidad Nacional Autónoma de México, 2005, pp. 751-758. The law on the national linguistic minorities is *Legge 15 Dicembre 1999, n. 482, 'Norme in materia di tutela delle minoranze linguistiche storiche'*, in *Gazzetta Ufficiale n. 297 del 20 dicembre, 1999* (law of december 15, 1999, n. 482, Provisions on the protection of historic linguistic minorities, in *Gazzetta Ufficiale* no. 297 of December 20, 1999).



Positive action with regard to race and ethnicity could be based on the Immigration Decree, which envisages actions for the integration of third country nationals, but current political conditions make the use of this possibility very unlikely.⁷⁹

⁷⁹ On potentially relevant provisions, see the article by L. Calafà, *op. cit.*



6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

Anti-discrimination procedures were radically changed in 2011. The special anti-discrimination action, available since 1998 and mentioned expressly by the Decrees implementing the 2000 Directives, has been withdrawn under Article 28 of Legislative Decree 150/2011.⁸⁰ Since 7 October 2011 general provisions on fast track procedures have applied to discrimination litigation instead of the special procedure provided by Article 44, paragraph 3-8 of the Immigration Decree. The relevant article is Article 702-*bis* of the Civil Procedural Code. The new procedure applies to claims lodged after 7 October 2011, while the previous one will continue to be applied to claims already filed.

Under the general fast track procedure, a victim of discrimination can apply, even in person (while in ordinary cases assistance by a lawyer is compulsory), to the judge (the ordinary civil court, *Tribunale*) with jurisdiction over the place of his/her residence (an exception to the general principle of suing in the court with jurisdiction over the place of residence of the defendant). The judge can issue a judgment ordering cessation of the discriminatory activity as well as damages (including for non-pecuniary losses, ordinarily excluded in civil cases). The judge can order an anti-discrimination plan to be drafted. In the case of collective discrimination, the judge decides whether an anti-discrimination plan is needed after hearing the opinion of the association which introduced the complaint. The judgment can be appealed to the Court of Appeal (*Corte di appello*, second instance) within thirty days; the decision on appeal can be challenged before the Court of Cassation (*Corte di Cassazione*, third instance). The main difference between the ordinary and fast track procedures is that a final ruling can be given in the former, while the latter may always be followed by a full trial, the only venue in which a final judgment may be given. It must be recalled

⁸⁰ 'Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'art. 54 della legge 18 giugno 2009, n. 69', in G.U. 21.09.2011, n. 220.



that pre-trial mediation is now also mandatory in anti-discrimination cases.

b) *Are these binding or non-binding?*

Since the procedure is judicial, the decisions are binding.

c) *What is the time limit within which a procedure must be initiated?*

Time limits are the same applicable to ordinary liability in tort.

d) *Can a person bring a case after the employment relationship has ended?*

The alleged victim can bring the action after the employment relationship has ended, subject to the ordinary statute of limitations applicable in labour law (ten years for non-economic rights and five for economic rights).

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

a) *What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).*

With regard to race and ethnicity, the Decree No. 215/2003 establishes (Article 5) that standing to litigate in support or on behalf (no distinction between the two forms) of complainants in anti-discrimination suits is granted to associations and bodies active in the field of opposition to discrimination that are included in a list approved by a joint decree of the Ministries of Labour/Welfare and Equal Opportunities.

With regard to all the grounds of discrimination dealt with in Directive 78/2000, standing to litigate – previously limited by Decree 216/2003 to trade unions – is now extended to other organisations and associations representing the rights or interests affected, with no special register.

Disability Act 67/2006 grants (Article 4) standing to litigate to associations identified by a joint decree of the Ministries of Labour and Equal Opportunities along the lines applied in the case of race and ethnicity.

b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or*



any other requirement (please specify)? If the law requires entities to prove 'legitimate interest', what types of proof are needed? Are there legal presumptions of 'legitimate interest'?

As regards race and ethnicity, associations and organisations that comply with certain requirements as verified by the competent ministries may be included in the list mentioned above.⁸¹ Associations and other bodies must have been officially established for at least one year and continuously operating in the year immediately before registration, as well as having an official charter establishing that they have a democratic structure, do not operate in order to make a profit and that promotion of equal treatment and opposition to discrimination is their only or primary aim. Moreover, they must have a budget and a register of members that fulfils certain legal standards, while their legal representatives must not have been sentenced for crimes related to the activity of the association nor act in any form as entrepreneurs or board members of commercial enterprises operating in the same field. The associations admitted to the list were partly taken from those included in the pre-existing register of associations and organisations operating in favour of immigrants and partly from the register of associations and organisations specifically active in the field of opposition to discrimination established under Decree 215/2003 (all of which applied to obtain standing). The list of the associations and bodies with standing to litigate, drawn up for the first time in 2005, can be found on the UNAR website at <http://www.pariopportunita.gov.it/index.php/registro-unar>. It was updated in 2010. This was the first update as the provision specifying that the list had to be updated on a yearly basis was not observed.

When it comes to the grounds envisaged in Directive 2000/78, standing is accorded on an *ad hoc* basis where the organisations are regarded as having a 'legitimate interest' in the enforcement of the relevant legislation.

With regard to action based on the 2006 Disability Act, a decree of 2007 established a register jointly managed by the Ministries of Labour and Equal Opportunities, along roughly the same model as established for race and ethnicity under the Decree transposing Directive 2000/43.

c) *Where entities act on behalf or in support of victims, what form of authorisation by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorisation is problematic, e.g. of minors or of persons under guardianship?*

Under Article 5 of both Decrees, the entities that have standing to litigate must have a power of attorney provided by the victim in written form (under seal). Moreover,

⁸¹ *Decreto del Presidente della Repubblica, 31 agosto 1999, n. 394, Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286. Gazzetta Ufficiale n. 258 del 3 novembre 1998 (Supplemento Ordinario n. 190).*



under both Decrees, associations having standing to litigate can intervene (obviously without the authorisation of a victim) in the event of collective discrimination when victims cannot be identified in a direct and immediate way.

- d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

There is no duty whatsoever for associations to engage in legal actions.

- e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

The Decrees allow associations to engage in civil and administrative proceedings. Standing to litigate in criminal cases follows the general rules of the Criminal Procedure Code.

- f) *What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.*

Associations can seek the same remedies as individual victims.

- g) *Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

Rules on the burden of proof are not affected by the involvement of associations in the proceedings.

- h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Italian law does not provide a specific statutory basis for *actio popularis* although some exceptions exist, e.g. in the field of environmental litigation. It must be, however, taken into account that (as mentioned above) under both Decrees, associations having standing to litigate can intervene (obviously without the authorisation of a victim) in the case of collective discrimination when victims cannot be identified in a direct and immediate way.

- i) *Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having*



such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.

After heated scholarly and political debate, in December 2007 the Government included a provision⁸² in the finance law introducing a class action for obtaining financial compensation for wrongs perpetrated against groups of consumers. After having been frozen for a while, this new piece of legislation entered into force, in a slightly modified form, on 1 January 2010. While its provisions make no mention of anti-discrimination suits as such, it is not inconceivable that actions relating to discrimination against specific groups of consumers on racial or other grounds could be brought under the new law.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

Article 28 of Legislative Decree 150/2011⁸³ has reformulated the rule on the burden of proof. Under paragraph 4, if the plaintiff establishes facts, including facts of a statistical character, on which a presumption of discrimination can be based, it is up to the defendant to prove that there has been no discrimination. Testing is still not part of current practice.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

Victimisation was mentioned in the first version of the Decrees transposing the Directives, but only as an element to be taken into consideration when assessing the amount of damages.

A new Article 4-*bis* has been introduced into the Decrees (while keeping the old provision) saying that judicial protection is 'also applied against any prejudicial behaviour addressed to a person affected by direct or indirect discrimination or to any

⁸² Legge 24 Dicembre 2007, n. 244, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008), in Gazzetta Ufficiale n. 300, del 28 dicembre 2007, Article 2, commi 445-449.

⁸³ 'Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'Article 54 della legge 18 giugno 2009, n. 69', in G.U. 21.09.2011, n. 220.



other person as a reaction against any activity aimed at obtaining equality of treatment' (the same evidentiary standards apply, including the reversed burden of proof).

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

Under Article 4(5) of the Decree No. 216/2003, the judge orders the termination of the discriminatory behaviour, conduct or act and the removal of its effects, including by means of a plan aiming to rectify discrimination identified. The basic idea of this remedy (also provided by remedies against gender discrimination) is consistent with Article 15 of the Workers' Act, which declares that any discriminatory act or behaviour is unlawful and consequently void. Therefore, the consequences of such acts and behaviour must be rectified and the previous situation restored. According to some authors, even though this sanction may work in cases of dismissal (when the reinstatement must be ordered) or other acts, it might not be an effective remedy for omissions (e.g. denial of access to work); in these cases only compensatory damages. A victim of discrimination may claim for compensation of pecuniary and non-pecuniary losses under Article 4(5). Under Article 44(8) of the Immigration Act, criminal sanctions are applied if the decision of the court is not complied with.

Article 44(11) of the Immigration Decree establishes that, if the discriminatory act or behaviour is performed by enterprises to which public bodies have awarded tenders, supply contracts or public financial assistance, such benefits can be withdrawn; in particular cases these enterprises may be excluded for up to two years from tenders/financial assistance.

Article 4(7) of the Decree establishes that the decision of the judge must be published in a national newspaper if this is explicitly ordered by the judge in the light of the circumstances of the case.

Discriminatory dismissals are governed by Article 3 of Act 108/1990 on individual dismissals (which is in fact a consolidated version of Article 4 of Act 604/1966 and of the amended version of Article 15 of the Workers' Act), according to which they are always considered as void and entail the worker's reinstatement.

- b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

No ceilings to the amount of compensation apply.



- c) *Is there any information available concerning:*
- *the average amount of compensation available to victims?*
 - *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

It is difficult to assess the amount of non-pecuniary damages that can be awarded, which much depends on the circumstances of the individual case. The small number of cases decided makes it impossible to calculate an average. The overall effectiveness of these remedies is very high compared with ordinary Italian civil procedure. It remains to be seen, of course, whether this effectiveness will be sufficient to overcome more general cultural obstacles that make anti-discrimination litigation quite rare, but the procedural requirements of the Directives are certainly met.



7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

The requirement to introduce a body for the promotion of equal treatment is dealt with in Article 7 of Decree No. 215/2003, transposing Directive 2000/43. The Decree establishes that the Government shall provide for the creation of an office charged with the implementation in 'an autonomous and impartial manner' of activities relating to the promotion of equal treatment and the elimination of discrimination based on race or ethnic origin.

- b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

The UNAR (*Ufficio Nazionale Antidiscriminazioni Razziali* – the National Office for Opposition to Racial Discrimination) was set up within the Department for Equal Opportunities (*Dipartimento per le Pari Opportunità*, which previously dealt with gender discrimination alone) of the Presidency of the Council of Ministers, and is directed by a person appointed by the President of the Council of Ministers or by a Minister on his/her behalf. UNAR can also make use of staff from other government departments, including judges and state attorneys, and of experts and advisers (the latter without civil servant status). Its annual budget is established by law at EUR 2,035,000 and it is part of the budget of the Department of Equal Opportunities. Additional funding can be assigned depending on the activities and projects performed and the source can be either another government department or an international organisation.

Italy has thus chosen to set up an office completely within the structure of the State administration.



The decree on the internal organisation of the anti-discrimination office was published in the Italian Official Journal on March 2004.⁸⁴ This is very short and does not add anything substantial to the main decree. It states again at Article 2 that the office shall act 'with full autonomy of judgment and in conditions of impartiality'. However, despite these declarations it is impossible to talk about independence from the Government as UNAR is part of the Government.

Changes of Government lead to changes in key staff, as usually happens in other offices attached to government departments. The opening presentation of the new Office in Rome took place on 16 November 2004. Its official name (different from that contained in the decrees, which was much longer) is the National Office for Opposition to Racial Discrimination (*Ufficio Nazionale Antidiscriminazioni Razziali* – UNAR), and its staff of experts is mostly drawn from other government departments, including the judiciary.

- c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

UNAR's competences include 1) assistance to victims of discrimination in pursuing their complaints in judicial or administrative proceedings; 2) surveys on discrimination, without infringing the prerogatives of the judicial authorities; 3) the promotion of the adoption, by private or public entities, of specific measures – including positive action initiatives – aimed at eliminating or compensating for the disadvantages linked to a certain race or ethnic origin; 4) issuing opinions and proposals for the reform of the laws on racial and ethnic discrimination; 5) issuing recommendations on matters related to racial and ethnic discrimination; 6) drafting an annual report to Parliament on the application of the principle of equal treatment, and of a report to the President of the Council of Ministers on the activities of the previous year; 7) the dissemination of information concerning the rules on equal treatment irrespective of racial or ethnic origin.

UNAR's remit has been extended to cover every sort of discrimination thanks to a wide interpretation of its tasks provided for in Article 7 of Decree No. 215/2003. The proposal to extend UNAR's powers was advanced by UNAR itself in its first report to Parliament, and this was realised in ministerial instructions given to UNAR in 2010. In particular, in 2011 two new UNAR offices were set up dealing with discrimination based on sexual orientation and gender, age, disability, religion and personal belief.⁸⁵

⁸⁴ *Decreto del Presidente del Consiglio dei Ministri, 11 dicembre 2003, Costituzione e organizzazione interna dell'Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni, di cui all'art. 29 della legge comunitaria 1 marzo 2002, n. 39, in Gazzetta Ufficiale, n. 66, 19 marzo 2004.*

⁸⁵ As of September 2012, UNAR's website had not been updated to reflect the extension of its competence.



- d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

UNAR strongly stresses the importance of assistance – including assistance in litigation – to victims of discrimination. This is done through three contact centres with a toll-free number and operators speaking several languages (Italian, English, French, Spanish, Arabic, Russian, Romanian and Chinese). The contact centres' only task is to receive and 'filter' requests for help from victims of discrimination, while decisions on action are taken by UNAR staff. According to the 2011 annual report to the President of the Council of Ministers,⁸⁶ the centres have dealt with around 1,000 calls, mostly in the form of requests for information. All contacts are recorded in a data base, which provides information on levels of racial and ethnic discrimination in the country. This data was analysed in the annual report mentioned above.

- e) *Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).*

When UNAR establishes that a case is relevant, it provides several forms of assistance in the form of providing legal advice, acquiring further information and contacting the alleged discriminator to see whether the discrimination can be stopped without further action. Based on several policy statements in the first annual report, its activity appears to be characterised by a strong focus on mediation in order to reach a satisfactory settlement between the parties without judicial proceedings. In the last year, UNAR submitted some interesting opinions as *amicus curiae* in cases brought to court, mostly concerning the status of illegal immigrants. Besides legal assistance, UNAR has also undertaken dissemination and training activities for lawyers and NGOs in the shape of seminars and workshops. Legal information (as well as a handbook for practitioners) is available on its website. UNAR also sponsors publications and has built up contacts with a few similar foreign institutions, such as the Romanian equality body, something which is explained by the recent ethnic tensions which have involved Romanian citizens (particularly Roma) in Italy. Moreover, in 2011 UNAR signed several protocols with regions and municipalities to set up local observatories and to institute a general framework for cooperation with regional and local authorities in anti-discrimination activities.

UNAR's activities are part of the Department's programme, like any other government office. However, in its capacity of *amicus curiae*, UNAR has been able to

⁸⁶ The report is downloadable at http://2.114.23.93/unar/_image.aspx?id=fddf67ab-5f6d-449c-bc55-1fdbb702b360&sNome=Relazione%20attivita%20C3%A0%20UNAR%202011.pdf.



give opinions on discrimination by local authorities, which are mostly controlled by a centre-right coalition, the same as the central Government.

- f) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

UNAR has no standing to litigate on behalf of victims of discrimination, and can just provide external assistance before and during litigation.

- g) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).*

The body cannot be considered as a quasi-judicial institution, nor can it issue sanctions.

In its annual reports to Parliament, UNAR has comprehensively analysed the shortcomings of the present anti-discrimination legislation, proposing to strengthen its own role in the legal system, with the extension of its competence to other grounds of discrimination, stronger powers of intervention (with for instance the power to issue binding orders for documents to be disclosed or the cessation of discriminatory activities) and the introduction of at least some form of standing in judicial proceedings.

- h) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

In its public statements on the issue, UNAR in general considers Roma issues as a priority. It gave Roma issues considerable space in its last report to Parliament, organised an awareness campaign on prejudice against people of Romani ethnicity, and informally monitored a few critical situations. No clear approach can, however, be traced. The intensity of the conflict around the Roma is indeed so great that UNAR can be considered fairly passive. This raises questions concerning its independence from the executive, particularly when it comes to demonstrations of anti-Romani hostility that have substantial political backing.



8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

- a) *to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

After its institution, UNAR launched a number of initiatives aimed at spreading awareness (seminars and other public relations events), some of which have had an impact. According to its first annual report, the Office achieved a good degree of visibility, and this was accompanied by an increase in the attention paid by legal scholars to anti-discrimination. Awareness-raising of the grounds of discrimination which fall outside the competence of UNAR is more problematic, since the absence of a specialised body leaves the dissemination of information to ordinary authorities, which as yet seem to have been quite passive.

- b) *to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and*

Dialogue with NGOs on race and ethnicity seems to be one of UNAR's priorities. According to its first report, NGOs were involved in joint seminars and discussions on a number of occasions, and members of UNAR staff attend public events in the field of anti-discrimination as a matter of course. UNAR is also implementing an action plan to promote positive action in the field of race and ethnicity by NGOs and other non-profit bodies (the projects selected were still to be put implemented when this report was drafted). Until recently, there was no centralised action with regard to grounds of discrimination other than race and ethnic origin, although the Minister of Equal Opportunities has been always quite active, paying for instance special attention to the empowerment of organisations for disabled people. A relevant improvement in this regard is the extension of UNAR's remit to cover every sort of discrimination. UNAR should therefore start activities to promote the principle of equal treatment in fields other than race and ethnic origin.

- c) *to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

The same applies to social partners (primarily trade unions) as under b).

- d) *to specifically address the situation of Roma and Travellers.*



The question cannot be answered in clear cut terms because of the issue's huge political sensitivity. It is worth mentioning that the widely discussed 'fingerprinting ordinances', perceived by some as products of anti-Romani attitudes, are presented by the Government as protecting the weaker segments (such as children) of the Romani population.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, 'lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

The existence of equal treatment rules predating the Decrees meant that for most grounds, contractual rules that conflicted with the principle of equal treatment were illegal in any case. Although the case law was quite limited with the exception of decisions on gender discrimination, equal treatment was commonly considered as a general principle in the light of Article 3 of the Constitution. This was not the case with regard to sexual orientation, where scholars were divided about whether labour law implied a prohibition of discrimination. On all the grounds concerned by the Directives, no statutory or administrative provision has been abolished because of conflict with the principle of equal treatment.

The Decrees do not contain provisions establishing the invalidity of discriminatory provisions included in contracts, agreements or other rules, but this follows quite easily from the application of Article 15 of the Workers' Act in the field of labour law, and from general principles on the invalidity of contractual clauses contrary to binding statutory rules in other fields.

- b) *Are any laws, regulations or rules that are contrary to the principle of equality still in force?*

Statutory provisions that explicitly discriminate can be found with regard to age, and all provisions containing differences of treatment probably need to be screened. If one looks at the legislative history of the Decrees, one sees clearly that no substantial discussion took place on the compatibility of Italian law and regulations on equal treatment irrespective of age, especially since Italy has decided not to make use of the option to defer implementation.

The absence of provisions that expressly directly discriminate on the basis of the grounds covered by the Directives does not eliminate the problem of their compatibility with Italian law but instead raises the issue of indirect discrimination. This is especially the case of discrimination on the grounds of race and ethnic origin,



and partly religion. In such cases indirect discrimination can take place through differences of treatment formally based on nationality (such as exclusion of non-EU citizens) or through insufficient attention to the needs of specific groups. This is particularly the case where a community of non-EU citizens is primarily composed of groups that are normally targeted by discrimination. An exemplary case was the above-mentioned decision of the Court of Milan on a regulation which limited access to public housing by non-Italian citizens, where clearly the majority of applicants for public housing among non-EU citizens come from groups with a racial and ethnic identity which is usually perceived as 'different'. With regard to discrimination on the ground of nationality, the problem is made even more significant by the still-postponed ratification of Protocol 12 to the ECHR.

A very recent problem is the adoption of formally ethnic-blind rules or policies that in practice mostly affect members of Romani communities and which have developed out of political debates where prejudice against the Roma is evident. This can be observed in several national and local policies, ranging from measures concerning the free movement of EU citizens (in relation to migration flows of Roma from Romania) to a mass of urban policing initiatives established in a number of municipalities.

With regard to religion, the main issue is primarily the absence of an *ad hoc* regulation for Islam, a lack which could open the way to indirect discrimination relating to the specific needs of Islamic believers. As yet, no litigation has taken place but this is increasingly the subject of public debate that has also been fuelled by court cases over crucifixes in schools that have been much inflated by the media.



9 Co-ordination at national level

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

The Ministry of Labour/Welfare and the Ministry of Equal Opportunities divide the responsibility of coordinating equal treatment issues in the fields covered by the Directives.

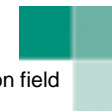
Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

There is no anti-racism or anti-discrimination National Action Plan.



ANNEX

1. Table of key national anti-discrimination legislation
2. Table of international instruments

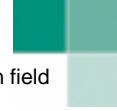


ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Italy

Date: 31 December 2011

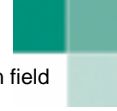
Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
<i>Decreto legislativo 9 luglio 2003, n. 215 Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica</i> ('Implementation of the Directive on equal treatment irrespective of race and ethnic origin', published in <i>Gazzetta Ufficiale</i> no. 186 of 12 August 2003). http://2.114.23.93/unar/ShowPdf.aspx?sld=7e6	9 July 2003	15 August 2003	Race and ethnic origin	Civil law/labour law	Public employment, private employment, access to goods and services (including housing), social protection, social advantages, education	Prohibition of direct and indirect discrimination, procedural remedies, establishment of equality body



<p>2f69b-81cc-4f07-8fd1-0b77d0f8df62&sNome=2003_DL215.pdf</p> <p>Formal mistakes were corrected by:</p> <p><i>Decreto legislativo 2 agosto 2004, n. 256, 'Correzione di errori materiali nei decreti legislativi 9 luglio 2003, n. 215 e n. 216, concernenti disposizioni per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica, nonché in materia di occupazione e condizioni di lavoro', in Gazzetta Ufficiale n. 244 del 16 ottobre 2004. ('Correction of formal mistakes in Decrees 215 and 216</i></p>						
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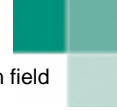
of 2003 concerning provisions on equal treatment irrespective of race and ethnic origin and in the field of employment and working conditions')						
http://www.parlamento.it/parlam/leggi/deleghe/04256dl.htm						
<i>Legge 6 giugno 2008, n. 101, 'Conversione in legge, con modificazioni, del decreto-legge 8 aprile 2008, n. 59, recante disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzione di sentenze della Corte di giustizia delle Comunità europee.'</i> pubblicata nella Gazzetta Ufficiale n. 132 del 7 giugno 2008. (Act 101 of 6 June 2008, converting	6 June 2008	22 June 2008	Race and ethnic origin	Civil law/labour law	Public employment, private employment, access to goods and services (including housing), social protection, social advantages, education	Prohibition of direct and indirect discrimination, procedural remedies, establishment of equality body



into law, with amendments, Decree 59 of 8 April 2008 containing urgent provisions for the implementation of EU obligations and the execution of judgments of the Court of Justice of the European Communities, published in <i>Gazzetta Ufficiale</i> no. 132 of 7 June 2008)						
<i>Decreto legislativo 9 luglio 2003, n. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro</i> ('Implementation of the Directive on equal treatment in the field of employment and working conditions', published in <i>Gazzetta</i>	9 July 2003	15 August 2003	Religion or belief, disability, age, sexual orientation	Labour law	Public employment, private employment	Prohibition of direct and indirect discrimination, procedural remedies



<p>Ufficiale no. 187 of 13 August 2003). http://www.parlamento.it/parlam/leggi/deleghe/03216dl.htm Formal mistakes were corrected by:</p> <p><i>Decreto legislativo 2 agosto 2004, n. 256, 'Correzione di errori materiali nei decreti legislativi 9 luglio 2003, n. 215 e n. 216, concernenti disposizioni per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica, nonché in materia di occupazione e condizioni di lavoro', in Gazzetta Ufficiale n. 244 del 16 ottobre 2004. ('Correction of formal mistakes in</i></p>						
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<p>Decrees 215 and 216 of 2003 concerning provisions on equal treatment irrespective of race and ethnic origin and in the field of employment and working conditions') http://www.parlamento.it/parlam/leggi/deleghe/04256dl.htm</p>						
<p><i>Decreto legislativo 25 luglio 1998, n. 286 Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero</i> ('Consolidated text of provisions on immigration and the status of foreign citizens' published in <i>Gazzetta Ufficiale</i> no. 191 of 18 August 1998 – S.O. n. 139, Articles 43 and 44)</p>	25 July 1998	9 September 1998	Race/colour, religion, national or ethnic origin	Civil law (including labour law)	Public employment, private employment, access to goods and services listed, but potentially general	Prohibition of direct and indirect discrimination, procedural remedies



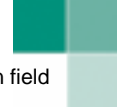
http://www.camera.it/parlam/leggi/deleghe/testi/98286dl.htm						
<i>Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'art. 54 della legge 18 giugno 2009, n. 69, in G.U. 21.09.2011, n. 220 (Additional rules to the Civil procedural code regarding reduction and simplification of the Civil procedures according to Art. 54 of Law 18 June 2009, no. 69</i>	25 July 1998	7 October 2011	Race/colour, religion, national or ethnic origin, religion or belief, disability, age, sexual orientation	Civil law/labour Law	Procedural law	Abolition of the previous special anti-discrimination procedure provided by Article 44 of Legislative Decree 286/1998 and application of the general fast-track procedure to all anti-discrimination complaints
<i>Legge 25 giugno 1993, n. 205, Conversione in legge, con modificazioni, del</i>	1 September 2011	27 June 1993	Race, ethnicity, religion	Criminal law	General	Hate speech, discriminatory acts



<i>decreto legge 26 aprile 1993 n. 122 Misure urgenti in materia di discriminazione razziale, etnica e religiosa. ('Urgent measures on racial, religious and ethnic discrimination')</i>						
<i>Legge-Quadro 5 febbraio 1992 n. 104, per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate</i> ('Framework law on the rights and social integration of handicapped persons' published in <i>Gazzetta Ufficiale</i> , 17 February 1992, no. 39, S.O.) http://www.handylex.org/stato/I050292.shtml/	5 February 1992	18 February 1992	Disability	Administrative law	All fields	Integration of disabled people
<i>Legge 12 marzo 1999, n. 68: Norme per il diritto al lavoro dei disabili, pubblicata nel</i>	12 March 1999	24 March 1999	Disability	Administrative law/ Labour law	Public and private employment	Integration of disabled people



<p><i>Supplemento Ordinario n. 57/L alla Gazzetta Ufficiale 23 marzo 1999</i> ('Provisions on the right to work of disabled persons') http://www.parlamento.it/parlam/leggi/99068l.htm</p>						
<p><i>Legge 20 maggio 1970, n. 300, Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e dell'attività sindacale nei luoghi di lavoro e norme sul collocamento</i> (Provisions on the protection of the freedom and dignity of workers, on freedom of trade unions and their activity in the work place, and on employment' published in <i>Gazzetta Ufficiale</i>, 27 May 1970, n. 31, Article 15)</p>	20 May 1970	11 June 1970	Race, sexual orientation, disability, age, religion or personal belief	Labour law	Private employment	Unfair dismissal and discrimination on the working place



http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1970-05-20;300						
<i>Legge 1° marzo 2006, n. 67, 'Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni'</i> ('Provisions on the judicial protection of persons with disability who are victims of discrimination', published in <i>Gazzetta Ufficiale</i> , n. 54 of 6 March 2006)	1 March 2006	21 March 2006	Disability	Civil law	All fields (the law does not limit its scope of application)	Prohibition of direct or indirect discrimination



ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Italy

Date: 31 December 2011

Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	4 November 1950	26 October 1955	No	Yes	Yes
Protocol 12, ECHR	4 November 2000	No	No		
Revised European Social Charter	3 May 1996	5 July 1999	No	Yes. The collective complaints protocol has been ratified	Yes
International Covenant on Civil and Political Rights	18 January 1967	15 September 1978	No	Yes	Yes
Framework Convention for the Protection of	1 February 1995	3 November 1997	No		Yes



Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
National Minorities					
International Convention on Economic, Social and Cultural Rights	18 January 1967	15 September 1978	No		Yes
Convention on the Elimination of All Forms of Racial Discrimination	13 March 1968	5 January 1976	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	17 July 1980	10 June 1985	No	Yes	Yes
ILO Convention No. 111 on Discrimination	25 June 1958	12 August 1963	No		Yes
Convention on the Rights of the Child	26 January 1990	5 September 1991	No		Yes



Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of Persons with Disabilities	30 March 2007	15 May 2009	No		Yes