



## **Executive Summary**

### **Country Report Italy 2011 on measures to combat discrimination**

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#### **1. Introduction**

Discrimination on the grounds specified by the Directives is not a significant subject in Italian legal and political debate. As a result of the low priority attributed to discrimination by social and political actors, limited empirical research on the dimension of the actual problems has been carried out compared to the major European countries.

Certainly, hostile attitudes can be observed towards different categories of people, mostly part of the recent waves of immigration. Immigration has indeed caused a dramatic increase in the degree of perceived diversity within Italian society. Moreover, hostility against the Roma is becoming an increasingly heated issue that is very politically sensitive. The result is that the majority of anti-discrimination claims and judgments concern nationality discrimination.

At least until the transposition of the Directives, reaction to discrimination did not take the form of well-defined policy proposals as the debate mostly focused on immigration law and not on anti-discrimination law strictly speaking. This attitude was until recently common to both political actors and NGOs. In all fields it is, however, difficult to provide correct estimates of the frequency and magnitude of discrimination and media reports are often very inaccurate.

Racial and ethnic discrimination often overlaps with discrimination on the basis of religion and belief, mostly in the form of hostility towards 'Arabs' and 'Muslims' which occurs without distinction. With regard to religious minorities not linked to immigration (Jews, Waldensians and others) there are no reports of serious cases of discrimination. However, the absence of a general law on religious freedom is a cause of practical disadvantage for groups (Muslims as well as Jehovah's Witnesses) that have not signed agreements with the Italian State.

Sexual orientation is still the target of openly hostile statements in the public arena, and acts of homophobic violence are reported in the press causing political reactions. Apart from acts of violence, problems of discrimination and harassment on this ground are also sometimes reported, although rarely with judicial outcomes.

With regard to sexual orientation, the traditional position of the Catholic Church towards gays and lesbians can, at least in theory, cause problems when employment entails some sort of evaluation of religious and moral qualities, and this can in its turn strengthen homophobic attitudes arising in other contexts. The situation of gays and lesbians is, however, increasingly the subject of public debate, especially with regard



to the possibility of same sex marriage, with interesting judgments issued by the Constitutional Court and ordinary judges.

Problems concerning age and disability, quite often discussed in the media although almost never brought to court, are more linked to the structure of the labour market, where difficulties exist in enforcing the Directives especially with regard to age (rules protecting disabled employees do exist).

## **2. Main legislation**

Specific and detailed legislation against discrimination in respect of race, ethnic origin and religion was introduced into the Italian legal system only in 1998. Before that, the only specific legal tool was criminal legislation on 'hate speech' which included references to discriminatory acts of a different nature.

As in many other legal systems, the absence of specific legislation did not mean, however, that the overall system did not include rules that could be used as a basis for anti-discrimination litigation. The 1948 Constitution includes a general principle of equality requiring equal treatment irrespective of – among other things – race and religion, and in general irrespective of 'personal and social conditions'; moreover Act 300/1970, the Workers' Act, has a provision banning discriminatory acts against workers.

While clearly forbidding any discriminatory legislation, it is a matter of legal debate whether the constitutional principle has direct effect, i.e. if it is sufficient ground for an action by an individual who has faced discrimination. This has never been clearly tested in court.

The first enactment of advanced anti-discrimination rules took place with the 1998 Immigration Decree. This law provides a good set of remedies against racial, ethnic and religious discrimination and in many respects anticipated the requirements of Directives 2000/43/EC and 2000/78/EC.

The Immigration Decree uses private law rules to forbid direct and indirect discrimination by individuals and public authorities, with definitions roughly corresponding to those of the Directives but an open-ended list of fields of application. Protection extends to discrimination on the ground of nationality.

The same decree contains special procedural rules for anti-discrimination cases in order to make them especially swift and effective. It also allows compensation of non-pecuniary losses, which in Italian law is otherwise restricted to criminal offences. (This procedure has now been revoked and replaced with the ordinary fast-track procedure; see below under '5 Enforcing the law'.) Not many judicial decisions based on the Immigration Decree have been reported. However, some of the decisions reported have attracted significant interest because of their application to public bodies (for instance, the quashing of a Milanese public housing regulation) or



because they sanctioned discrimination on grounds other than those listed in the non-exhaustive 'black list'.

In order to transpose Directives 2000/43/EC and 2000/78/EC into Italian law, the Government (on the basis of the lawmaking power specially delegated for this purpose by Parliament) approved two decrees in July 2003, Decree 215/2003 (transposing Directive 2000/43) and Decree 216/2003 (transposing Directive 2000/78). No significant consultation with NGOs, trade unions or employers' organisations took place. However, the final versions of the Decrees take into account some criticisms raised by the parliamentary committees (which gave a non-binding review) on their first drafts.

The Decrees reproduce the text of each Directive. Decree 215/2003 is thus applicable within all fields mentioned in Directive 2000/43 to discrimination on the ground of race and ethnic origin, while Decree 216/2003 applies within the field of employment to discrimination based on religion and belief, sexual orientation, disability and age. Both Decrees basically aim to transplant the Directives into the legal system as they are, without attempting to coordinate between them or with other existing Italian legal rules. Some drafting mistakes were corrected by a later decree, and legislation passed in early 2008 amended some of the major discrepancies with the Directives.

A further act was passed in 2006 which extends the prohibition of direct and indirect discrimination on the ground of disability beyond the field of employment, with remedies similar to those foreseen by the Decrees transposing the Directives.

One criticism addressed (by Parliament among others) at this sort of lawmaking concerns the fact that, since it does not abolish pre-existing anti-discrimination rules nor attempt consolidation, it adds further legal regimes, creating a complex legal framework. Consolidation in a single text of all rules on equal opportunities (all grounds, including gender) has been discussed, but the Government has not yet taken action in this direction. A step towards coordination was taken in 2011 by the adoption of Article 28 of Legislative Decree 150 of 1 September 2011.<sup>1</sup> This article cancelled the provisions on the special civil action on anti-discrimination provided by Article 44 of the Immigration Decree and replaced it with the general fast-track procedure provided by Article 702-*bis* of the Civil Procedural Code. This procedure applies expressly to all the grounds covered by the Directives, plus national origin, language and colour.

It must be recalled that Italy is party to the major international treaties and conventions against discrimination, for example the Convention on the Elimination of All Forms of Racial Discrimination, ILO Convention No. 111 on Discrimination and the Convention on the Rights of Persons with Disabilities, which have all been

<sup>1</sup> [http://www.asgi.it/home\\_asgi.php?n=1822&l=it](http://www.asgi.it/home_asgi.php?n=1822&l=it).



transposed into domestic law. It has, however, not yet ratified Protocol 12 to the European Convention on Human Rights, thus limiting the potential of the Convention as a tool for anti-discrimination litigation.

### 3. Main principles and definitions

The 2003 Decrees forbid direct as well as indirect discrimination with a wording that is based on that of the Directives, for all the grounds concerned. Harassment is also defined and prohibited. Instructions to discriminate are explicitly considered as a form of discrimination. Victimisation is provided with the same level of judicial protection as other forms of discrimination, and is an element to be taken into consideration in the assessment of the amount of damages. Discrimination by association (on presumed grounds or characteristics) is not explicitly covered, but the Decrees can be probably interpreted as covering such discrimination, which could also be considered as an infringement of the freedoms of expression and association.

For all grounds of discrimination, occupational requirements can justify an exception to the prohibition of discrimination within the limits of 'proportionality and reasonableness' along the lines of the relevant provisions of the Directives. However, this unfortunately cannot be said of the scope of application of Decree provisions on 'work suitability tests'.

Italy chose to use the possibility of maintaining *ad hoc* rules for organisations with a special ethos. Decree 216/2003 therefore provides that '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'. A partial exemption from the obligation of non-discrimination for organisations with a specific ethos was developed by judges before the adoption of the Directive, while in terms of legislation the only provision on the point was a very limited one enacted in 1990 on so-called '*organizzazioni di tendenza*', (i.e. organisations characterised by a certain 'ideology' in a broad sense, such as churches, political parties, and trade unions). In cases of unfair dismissal, the employees of these organisations are granted only the remedy of damages and not the right to reinstatement, otherwise available.

With arguments partly based on the existence of this limited rule and partly on constitutional grounds, judges and scholars (in a very intricate debate which cannot be described here in all its nuances) have admitted that religious organisations have discretionary power to hire or dismiss or otherwise discriminate which goes beyond the purely disciplinary aspect. This is, however, subject to important limits which are not mentioned in the broad Legislative Decree 216/2003. Discrimination is not permitted when the organisation operates on a profit-making basis, and an actual link between the activity of the individual worker and the ideology of the organisation is required. According to many scholars, the Legislative Decree gives to employers with



an ethos based on religion and belief a power they did not have before the adoption of the Directive (see the pending infringement procedure *Commission v. Italy*, C-312/11).

With regard to religion, a problem exists for denominations (such as Islam) that have not signed an 'agreement' (*intesa*) with the State and thus do not enjoy automatic legal recognition of their specific needs (such as holidays and ritual obligations).

Neither the Decree transposing Directive 2000/78/EC nor the 2006 Disability Act mention reasonable accommodation for persons with disabilities.

The problem of multiple discrimination is not dealt with as such in Italian anti-discrimination legislation.

#### **4. Material scope**

The scope of application includes the same fields as listed in the Directives, and rules apply to both the private and public sectors. Unlike the 1998 Decree, discrimination on the ground of nationality is explicitly excluded from the scope of application of the Decree 215/2003, as are all legal rules concerning the status of third country nationals and stateless persons. In this regard, both Decrees mention not only rules on entry and residence but also on access to employment, assistance and welfare. A 2006 act extends, as mentioned above, protection for discrimination on the ground of disability beyond the field of employment.

The exclusion of discrimination on the ground of nationality has been overcome by judges who apply the same legal framework, consisting of the 1998 Immigration Decree and Legislative Decree 215/2003, to every case of racial or national discrimination. This allows judges to handle cases of discrimination on the ground of nationality as direct discrimination and not as indirect racial discrimination. The above-mentioned case concerning public housing in Milan was, for instance, decided as a case of direct discrimination on the basis of nationality, although it was clear that in the underlying political decision the crucial factor was the ethnic identity of the foreign citizens involved.

Along these lines, the hostility of certain political actors towards ethnic and racial groups perceived as 'different' and for one reason or the other 'strange' or 'dangerous' is increasingly reflected in formally 'ethnic blind' legislation (particularly passed by municipalities) which use various pretexts (requirements as to residence, nationality, etc) 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 different reasons, the route of proving 'indirect discrimination' is seldom used), but with discrimination on the ground of nationality or other legal categories.





## 5. Enforcing the law

In 2011 a procedural change was made, enhancing coordination between the various laws enacted over recent years. Article 28 of Legislative Decree 150/2011 revoked the special procedure for anti-discrimination cases provided by Legislative Decree 286/1998 on Immigration, which has been replaced by the general fast track procedure provided by Article 702-*bis* of the Civil Procedural Code. In especially urgent cases, the judge can issue an interim order, the violation of which (as well as that of the order issued in the final decision) is a criminal offence. The judge can order the production of a plan for the rectification of discrimination. Moreover, the general law on pre-trial mediation now applies to all anti-discrimination claims, thus extending the possibility that Decree 216/2003 previously provided for employment and occupation-related claims alone.

Concerning standing to litigate, both Decrees contain special rules. With regard to race and ethnic origin, the Department for Equal Opportunities (*Dipartimento per le Pari Opportunità*) of the Presidency of the Council of Ministers keeps a list, approved by the Ministries of Labour/Welfare and Equal Opportunities, of associations and bodies which have standing to litigate in support of or on behalf of victims of discrimination, identified on the basis of 'their purposes and of the degree of continuity in their action'. In cases concerning the other grounds of discrimination, the Decree transposing Directive 2000/78/EC now grants standing to relevant organisations without introducing a special register. With regard to discrimination on the ground of disability outside employment, the 2006 Disability Discrimination Act introduced a system similar to that in force for race and ethnicity.

As regards penalties, besides those mentioned above (damages and others), general legislation provides labour law sanctions such as the invalidity of any discriminatory act as well as measures against unlawful dismissal (including compulsory reinstatement in the work place). Especially in the field of employment and occupation, the overall system of sanctions is likely to have a significant deterrent effect.

Article 28 of Legislative Decree 150/2011 provides a new rule on the burden of proof that introduces reversal once the claimant produces evidence (which may include statistical data) that can precisely and consistently establish a presumption of the existence of discriminatory acts, agreements or behaviours. This rule on the burden of proof is now applicable to every ground of discrimination.

Situation testing can be used as evidence in civil proceedings. However, while there are no legal obstacles to its use, neither is there an express provision allowing it, and evidence gathered with situation testing has not been presented as such to a court.

The system is thus still based on a claim filed by the victim to a court. Recently the number of cases of discrimination has risen, although the vast majority concern discrimination on the ground of nationality, which is not covered by the Legislative



Decrees implementing the 2000 Directives but is deemed to be covered by Article 43 of Legislative Decree 286/1998 on Immigration, which bans discrimination on grounds, *inter alia*, of national origin. This expression has been given a wide interpretation that covers nationality.

## 6. Equality bodies

The equality body was originally created only to deal with race and ethnic origin and is named *Ufficio nazionale antidiscriminazioni razziali* (UNAR – the National Office for Opposition to Racial Discrimination). It is not an independent body since it was established as a section of the Department for Equal Opportunities of the Presidency of the Council of Ministers, which previously dealt exclusively with gender discrimination. UNAR makes use of staff from other government departments, including judges and state attorneys, as well as external experts and advisers.

According to its founding legislation, UNAR's competences include providing independent assistance to victims of discrimination in pursuing their complaints, carrying out independent surveys on discrimination, promoting the adoption of specific measures aimed at eliminating or compensating for disadvantages incurred by people of a certain race or ethnic origin, issuing opinions and proposing legislative reforms concerning racial and ethnic discrimination, issuing recommendations on matters relating to racial and ethnic discrimination and disseminating information on the rules on equal treatment irrespective of racial or ethnic origin.

UNAR has two different units, one primarily oriented toward legal assistance and dispute resolution and the other toward study and research. It reports every year to Parliament and the executive. It has been operational since November 2004, and according to its annual reports to the Government it offers significant assistance to victims of discrimination through the free telephone number that can be called by alleged victims of discrimination. After a preliminary check on the relevance of the claim, the operators give preliminary advice and, when necessary, refer the victims to local NGOs that can give them support. Besides legal assistance, UNAR has cooperated with external lawyers to issue several opinions on the status of illegal immigrants. UNAR has run seminars and workshops to disseminate information and provide training to lawyers and NGOs. Its website provides a certain amount of legal information, although in recent years the amount of information included has decreased.

In its reports to Parliament and the Government, UNAR has comprehensively analysed the shortcomings of present anti-discrimination legislation and proposed that its own role in the legal system be strengthened through extending its competences to other grounds of discrimination, stronger powers of intervention (with, for instance, the power to issue binding orders for the disclosure of documents or the cessation of discriminatory activities) and the introduction of at least some form of standing in judicial proceedings. Despite such proposals have not had any practical follow up at the political level, thanks to a wide interpretation of the Decree



setting it up the remit of UNAR has been extended to every ground of discrimination since 2010. Moreover in 2011 two internal offices have been set up dealing with sexual orientation and gender, age, disability, religion and personal belief.

Over the last year UNAR has increased its contacts and enhanced coordination with regional and local authorities, thus creating a network within Italy.