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Non-discrimination

Italy

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Country report

Non-discrimination

Italy

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EXECUTIVE SUMMARY

1. Introduction

Italy is a country made up of 20 regions, each with its own traditions and history. The main differences, in terms of working conditions, job opportunities and the quality of public services (education, healthcare and transport) are between the northern and southern regions. The family is at the centre of the structure of society and of social welfare, with extended families still living together, in particular in the South. Organised crime, corruption, the black economy and tax evasion are structural scourges that still hinder the full development of the country, with the complicity of a political class that has never been able to tackle them adequately.

Some relevant data on the Italian population are provided by ISTAT, the Italian National Institute for Statistics. According to the most recent surveys, out of the population of 60 795 612,¹ there are about 2 600 000 people with disabilities, which represents 4.8% of the total population.² One million people identify themselves as homosexual or bisexual.³ There are 5 014 337 foreign nationals, but no data are available on the racial or ethnic origin of the population. With regard to religion, 76.5% of the total population have been baptised into the Catholic Church, although only around 25% declare themselves to be practising Catholics. Muslims represent around 2% of the population, the same percentage as Orthodox Christians. The Jewish community has a historical presence in Italy and numbers about 35 000 members.

Few convictions have been handed down by the courts, in particular in the field of disability, but discrimination on the grounds specified by the directives is still not perceived as illegal behaviour. On the contrary, following a conviction for discrimination, critical comments have been made by politicians and opinion-makers, arguing for freedom of speech or economic choice.⁴ Both on political platforms and in the social sciences, discrimination is a low-priority issue. The result is that the majority of anti-discrimination claims and judgments still concern discrimination on the ground of nationality. However, there were some relevant cases relating to disability and Roma during 2015.⁵

Surveys about perceptions of discrimination are very rare, so it is difficult to provide accurate estimates of the frequency and magnitude of discrimination in all fields – and media reports are often very inaccurate.⁶ Certainly, hostile attitudes can be observed towards different groups of people, mostly in relation to the recent waves of immigration. Moreover, hostility against Roma is becoming an increasingly heated issue, with several politicians openly supporting policies of segregation in housing and education. School drop-out rates among Roma pupils is an issue of serious concern. This may be a direct consequence of housing segregation, with camps based far from schools and sudden transfers of people from one camp to another.⁷

¹ Istat (2015), <http://www.istat.it/it/files/2015/12/ASI-2015-Sintesi.pdf>. Hyperlink accessed 29 March 2016.

² Istat (2010), *La disabilità in Italia* (The Disability in Italy), http://www3.istat.it/dati/catalogo/20100513_00/arg_09_37_la_disabilita_in_Italia.pdf.

³ Istat (2012), *La popolazione omosessuale nella società italiana – 2011* (Homosexual population in the Italian society – 2011), http://www.istat.it/it/files/2012/05/report-omofobia_6giugno.pdf.

⁴ This was even the case regarding UNAR sending a letter to an MP following her hate speech against Muslim migrants; <http://www.giorgiameloni.com/wp-content/uploads/2015/09/Lettera-UNAR.pdf>.

⁵ Supreme Court, 25/11/2014, *X. v. Italian Ministry of Education and the School of X*, <http://dirittocivilecontemporaneo.com/2014/11/per-le-sezioni-unite-la-mancata-attuazione-del-piano-educativo-individualizzato-elaborato-per-il-sostegno-scolastico-dell'alunno-in-situazione-di-handicap-costituisce-una-discriminazione-indiretta/>. Hyperlink last accessed 29 March 2016.

⁶ Survey on discrimination by gender, sexual orientation and ethnic origin (*IST-02258 Indagine sulle discriminazioni in base al genere, all'orientamento sessuale, alla appartenenza etnica*), <http://www.istat.it/it/archivio/30726>. Hyperlink last accessed 29 March 2016.

⁷ The case relating to La Barbuta camp in Rome, decided on 4 June 2015 is a perfect example of this trend of segregation. Two NGOs, ASGI and Articolo 21, filed an action against the municipality of Rome, claiming that the policy of placing Roma in a camp named La Barbuta, a large settlement on the remote outskirts of

Racial and ethnic discrimination often overlaps with discrimination on the ground of religion and belief, mostly in the form of hostility towards 'Arabs' and 'Muslims' which occurs without any distinction being made between the two terms.⁸ Terrorism and the refugee crisis have worsened the general picture still further. With regard to religious minorities not linked to immigration (Jews, Waldensians and others), there are no reports of serious cases of discrimination.

Sexual orientation is still a target for openly hostile statements in the public arena, and acts of homophobic violence and speeches are reported in the press, triggering negative political reactions. Instances of discrimination and harassment on this ground are also sometimes reported, although they rarely lead to the institution of legal proceedings. The traditional position of the Catholic Church towards gay and lesbian people 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 gay and lesbian people is, however, increasingly the subject of public debate, especially with regard to the rights of same-sex couples. The ECtHR condemned Italy for violation of Article 8 ECHR because it lacks a system of recognition of same-sex civil unions.⁹ A draft bill is under debate in the Italian Parliament. It aims to create registers of civil unions and to extend them the same treatment that is afforded to marriages, except for adoption rights.¹⁰ The Catholic Church and Catholic associations played a very active role in the debate, and in the Parliament Catholic MPs were united on the matter regardless of their political affiliation.

Problems concerning age and disability, quite often discussed in the media but only occasionally 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. This has been particularly true since the beginning of the economic crisis and with the intensive use by employers of short-term contracts, linked to tax benefits and limited to younger workers.

2. Main legislation

Article 3 of the Italian Constitution contains a general clause on equality and banning discrimination. While clearly prohibiting any discriminatory legislation, it is a matter of legal debate whether the constitutional principle has a direct effect, i.e. if it is sufficient ground for action by an individual who has faced discrimination. This has never been properly tested in court. In addition, Act 300/1970, the Workers' Act, has a provision banning discriminatory acts against workers and a specific legal tool was provided for by criminal legislation on 'hate speech' which included references to discriminatory acts of a different nature.

The first enactment of advanced anti-discrimination regulations took place with the 1998 Immigration Decree. This Decree prohibits direct and indirect discrimination by individuals and public authorities, with definitions roughly corresponding to those of the directives but with an open-ended list of fields of application. Protection extends to discrimination on the ground of national origin, understood as nationality as in citizenship.

Implementation of the EU anti-discrimination directives has triggered a new era of anti-discrimination law in Italy. In order to transpose Directives 2000/43/EC and 2000/78/EC into Italian law, the Government approved two decrees in July 2003, Legislative Decree 215/2003 (transposing Directive 2000/43) and Legislative Decree 216/2003 (transposing Directive 2000/78).

Rome, and so hindering their effective inclusion in society, was discriminatory, www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf.

⁸ See the extensive and up-to-date press record on hate speeches edited by <http://www.cartadiroma.org/>.

⁹ ECtHR, *Oliari and Others v. Italy*, Application no. 18766/11 and 36030/11, 21 July 2015, <http://hudoc.echr.coe.int/eng?i=001-156265>.

¹⁰ <http://www.senato.it/service/PDF/PDFServer/BGT/00965974.pdf>.

Legislative Decree 215/2003 is thus applicable to discrimination on the grounds of race and ethnic origin in all the fields mentioned in Directive 2000/43/EC, 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 transpose the directives into the legal system as they are, without attempting to coordinate between them or with other existing Italian laws. 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 at this sort of law-making concerns the fact that, since it does not abolish pre-existing anti-discrimination laws nor attempt consolidation, it adds further legal regimes, creating a complex legal framework. A step towards coordination was taken in 2011, with the general fast-track procedure applying expressly to all the grounds covered by the directives, plus national origin, language and colour.

It should 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 transposed into domestic law. However, Protocol 12 to the European Convention on Human Rights has not yet been ratified by Italy, 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 to be awarded. Discrimination by association (on presumed grounds or characteristics) is not explicitly covered, but the Decrees can probably be interpreted as covering such discrimination, which could also be considered as an infringement of freedom of expression and of 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 the Decree provisions on 'work suitability' tests.

Italy chose to use the possibility of maintaining ad hoc rules for organisations with a special ethos. A partial exemption from the non-discrimination obligation for organisations with a specific ethos was developed by judges before the transposition of the directive, while in terms of legislation the only provision on this point was a very limited one enacted in 1990 on organisations characterised by a certain 'ideology' in a broad sense, such as churches, political parties and trade unions. In cases of unfair dismissal, employees of these organisations are granted only the remedy of damages and not the right to reinstatement otherwise available. However, according to many scholars, Legislative Decree 216/2003 gives employers with an ethos based on religion and belief a power they did not have before the transposition of the directive.

With regard to religion, a problem exists for faiths (such as Islam) that have not signed an agreement 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. For this reason, the CJEU ruled that Italy had failed to fulfil its duty to implement Directive 2000/78/EC correctly.¹¹ In order to execute this judgment a new paragraph was added to Article 3 of Legislative Decree 216/2003.¹²

The new provision does not give a definition of reasonable accommodation nor any sort of guidance to employers on how to respect this duty, but simply compels employers to make provision for reasonable accommodation. It should be noted that public bodies must respect this duty even without any additional financial or human resources. This may be highly problematic, and could result in a breach of Article 5 of Directive 2000/78/EC, according to which employers must bear a burden if necessary, unless it is disproportionate. Even before the new provision was enacted, two relevant judgments were issued applying Article 3 of Legislative Decree 216/2003, in line with Directive 2000/78/EC and the UNCRPD: in both judgments the Courts found that the failure to meet reasonable accommodation was counted as discrimination.¹³

Multiple discrimination is not dealt with as such in Italian anti-discrimination legislation, but a reference to this distinctive feature of discrimination phenomena was made in the 2014 activity report of the National Equality Body, the *Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull'origine etnica*, or UNAR (Office for the promotion of equal treatment and prevention of discrimination on the grounds of race or ethnic origin).

4. Material scope

The scope of application includes the same fields as listed in the directives, and the provisions 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 Legislative Decree 215/2003, as are all legal provisions 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 nationality discrimination. This allows judges to handle cases of discrimination on the ground of nationality as direct discrimination and not as indirect racial discrimination.

Along these lines, the hostility of certain political actors towards ethnic and racial groups perceived as 'different' and, for one reason or another, 'strange' or 'dangerous' is increasingly reflected in formally 'ethnically blind' legislation (in particular introduced by municipalities) which uses various pretexts (requirements on residence, nationality, etc.) to exclude members of these groups from becoming full members of society.

¹¹ See Judgment of 4 July 2013, *Commission v. Italy*, C-312/11.

¹² Italy, Law decree converted into Law regarding preliminary urgent measures for the promotion of employment, in particular of young people, of social cohesion and on other urgent financial measures (*Conversione in legge, con modificazioni, del decreto-legge 28 giugno 2013, n. 76, recante primi interventi urgenti per la promozione dell'occupazione, in particolare giovanile, della coesione sociale, nonché in materia di Imposta sul valore aggiunto (IVA) e altre misure finanziarie urgenti*), 9 August 2013 no. 99, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2013-08-09:99!vig>.

¹³ Tribunal of Bologna, Judgment of 17 June 2013, http://www.superabile.it/repository/ContentManagement/information/N534144425/8.1%20Accomod_Ragionevoli_Sentenza_bologna_ord_18062013.pdf.

5. Enforcing the law

Action against discrimination is based on a claim being filed with the courts by the victim. 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 was 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 a plan to be produced 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 solely for employment and occupation-related claims.

Concerning standing to litigate, both Decrees contain special rules. With regard to race and ethnic origin, the Department for Equal Opportunities of the Presidency of the Council of Ministers keeps a list, approved by the Ministries of Labour and Welfare and Equal Opportunities, of associations and bodies selected on the basis of 'their purpose and the degree of continuity in their action' which have standing to litigate in support of or on behalf of victims of discrimination. They can also act through *actio popularis* against discrimination when the victim is not identified. In cases concerning the other grounds of discrimination, the Decree transposing Directive 2000/78/EC now grants similar legal standing to relevant organisations without introducing a special register. For discrimination on the ground of disability outside employment, the 2006 Disability Discrimination Act introduced a system similar to that in force according to the decrees, with a special register held by the Ministry of Labour. Three judgements were issued during 2015 thanks to representative actions brought to the Courts by associations; two regarding Roma¹⁴ and one regarding sexual orientation, involving associations acting in support of the victims through a representative action.¹⁵

Class action in discrimination cases is not expressly allowed in the discrimination field and no such case has been brought, but it is likely that collective actions could be admitted thanks to a broad interpretation of the same rules on *actio popularis* and actions in support of or on behalf of victims of discrimination, or of the rules on class action in the consumer protection field included in the Finance Act of 2007.

As regards penalties, 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 workplace). Judges are allowed to order compensation for non-pecuniary damages as well, and they usually do; in one case, the Court ordered the defendant to pay non-pecuniary damages to the victims, and the total amount was calculated taking into account the dissuasive effect, in accordance with Directive 2000/78/EC.¹⁶ Two relevant judgments were issued during 2015 involving sanctions, including non-pecuniary losses;¹⁷ in one of these cases, damages were calculated taking into account the dissuasive aim as required by the EU Directives.¹⁸

¹⁴ Tribunal of Rome, *ASGI and Associazione 21 Luglio v. Rome Capital and Italian Government*, 4 June 2016, <http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf>; Tribunal of Rome, XX., *ASGI, Associazione 21 Luglio v. YY.*, <http://www.asgi.it/wp-content/uploads/2015/04/Tribunale-di-Roma-I-sez.-Civile-1622015-est.-Pratesi-XXX-ASGI-Associazione-21-luglio-avv.-Fachile-C.-Gruppo-Editoriale-Simone-%E2%80%A6.pdf>.

¹⁵ Tribunal of Bergamo, *Associazione Avvocatura per i Diritti LGBTI Rete Lenford V. Carlo Taormina*, 6 August 2014, <http://www.altalex.com/~media/Altalex/allegati/2014/09/29/68849%20pdf.pdf>.

¹⁶ http://www.europeanrights.eu/public/sentenze/Tribunale_Pisa_ordinanza_16_aprile-2015.pdf.

¹⁷ Tribunal of Livorno, *P.S., C.F. v. Ministero dell'Istruzione and Scuola Secondaria G. Mazzini*, 16 June 2015, http://www.personaedanno.it/attachments/article/48309/9003182_livorno.pdf.

¹⁸ Tribunal of Pisa, *GC v. LI SRL*, 16 April 2015, http://www.europeanrights.eu/public/sentenze/Tribunale_Pisa_ordinanza_16_aprile-2015.pdf.

Article 28 of Legislative Decree 150/2011 provides a rule on the burden of proof, which is applicable to all grounds of discrimination. This rule introduces a reversal of the burden 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.

Situation testing can be used as evidence in civil proceedings. However, while there are no legal obstacles to its use, there is also no express provision allowing it, and evidence gathered through situation testing has not as yet been presented as such to a court.

6. Equality bodies

The equality body was originally created only to deal with race and ethnic origin and is named the National Office Against Racial Discrimination (UNAR). In 2010 a Governmental directive extended UNAR's remit to cover nationality, sex, religion or personal belief, disability, age and sexual orientation. 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 can use 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 who have been victims of discrimination, 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 focused on legal assistance and dispute resolution and the other on 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 those who feel they are victims of discrimination. In addition to legal assistance, UNAR has cooperated with external lawyers to issue a number of opinions on the status of undocumented immigrants. UNAR has run seminars and workshops to disseminate information and provide training to lawyers and NGOs. Its website provides some legal information, although in recent years there has been a decline in the amount of information included.

In 2012, UNAR was appointed the National Contact Point, in accordance with European Commission Communication COM (2011)173, and was charged with the task of coordinating Italy's National Roma Strategy. UNAR was also appointed as National Contact Point for the implementation of Council of Europe Recommendation CM/Rec (2010)5 on discrimination on the ground of sexual orientation, despite the fact that its original remit did not extend beyond discrimination on the grounds of race and ethnic origin. However, the practical implementation of such strategies is extremely limited, and the recent change of director general and of the majority of external experts – without new contracts – risks compromising the execution of what has already been planned.

In addition, a special body called the *Osservatorio per la sicurezza contro gli atti discriminatori*, OSCAD (Observatory for Security against Discrimination) was set up in 2010 as part of the Department of Public Security within the Central Directorate of the Criminal Police. It is not a designated body according to the transposition process. OSCAD is a special body, operated by the Police and the Carabinieri (military police). Its members belongs to the Ministry of the Interior (Police) and to the Ministry of Defence (Carabinieri).

Therefore, it is not an independent body but a governmental one. It has a mandate to act in all fields of discrimination and has the following tasks: it receives reports of discriminatory acts relating to the security sector, from institutions, professional or trade associations and private individuals, in order to monitor discrimination based on race or ethnic origin, nationality, religion, gender, age, language, physical or mental disability, sexual orientation and gender identity. Based on the reports it receives, OSCAD initiates targeted interventions at local level to be carried out by the police or Carabinieri; it follows up the outcome of discrimination complaints lodged with police agencies; it maintains contact with organisations and institutions, both public and private, dedicated to combating discrimination; it prepares modules to train police officers in anti-discrimination activity and participates in training programmes with public and private institutions; and it also puts forward appropriate measures to prevent and fight discrimination.

7. Key issues

The vast majority of discrimination litigation concerns discrimination on the ground of nationality, against migrants, perpetrated by local and regional authorities.

Anti-discrimination seems to have a very marginal role in Government policies and this is illustrated by several facts, including the lack of a Ministry for Integration and the limited powers granted to UNAR. With regard to the National Roma Strategy, for instance, there has still been a lack of effective implementation following its adoption. Moreover, UNAR's lack of independence means it is merely an office operating within the Department for Equal Opportunities, without any significant autonomy. UNAR is clearly and completely linked to the executive and cannot perform any independent activity whatsoever, despite the fact that it has in several cases adopted a critical position in relation to the Government. However, it must be noted that the majority of these cases were initially highlighted by the media or individual lawyers and UNAR was involved only later after significant pressure from different organisations. Evidence of its close connection with the political majority can be seen in the 'spoils system', as applied to the director and experts. The renewal of their tenure is completely at the discretion of the Head of the Department and the Minister; in fact, in 2015 they removed the director from his post after he sent a letter to a member of Parliament exhorting her to use non-discriminatory language.

In 2015, UNAR renewed the contract for the management of the contact centre for a three-year period. The centre covers all the different grounds of discrimination included in the 2000 directives, with the addition of nationality – as in citizenship. Although it is provided for only by ministerial instructions and not by law, the extension of the scope of application has so far been confirmed.

The lack of a clear policy against discrimination is also reflected in the lack of positive actions in favour of vulnerable groups, apart from traditional social inclusion measures for people with disabilities and the linguistic minorities. With regard to anti-discrimination laws, several changes should be made in order to ensure greater effectiveness. First, in relation to the duty of reasonable accommodation, a definition and guidelines on how to respect the duty are needed.

With respect to differences in treatment by organisations with a special ethos, the exception as formulated in Legislative Decree no. 216/2003 also applies to organisations without an ethos actually based on religion or belief, and is likely to go beyond what was admitted in pre-existing national rules in the field.

There has been an interesting development in case law related to sanctions. While compensation for non-pecuniary damages is ensured in every judgment, the amount is calculated also taking into account its dissuasive nature, in accordance with Article 17 of Directive 2000/78/EC.

Finally, the coexistence of different legal texts which are very similar is unnecessary and could create legal uncertainty, but no consolidation is planned.

RÉSUMÉ

1. Introduction

L'Italie est un pays formé de vingt régions ayant chacune ses propres traditions et sa propre histoire. C'est entre les régions du nord et celles du sud que les différences sont les plus marquées en termes de conditions de travail, de possibilités d'emploi et de qualité des services publics (enseignement, soins de santé et transports). La famille est au centre de la structure de la société et du système de protection sociale, et des familles élargies continuent de vivre sous le même toit, dans le sud en particulier. Le crime organisé, la corruption, l'économie souterraine et l'évasion fiscale sont autant de fléaux structurels qui entravent encore le plein développement du pays avec la complicité d'une classe politique qui n'est jamais parvenue à y remédier efficacement.

Des données pertinentes concernant la population italienne sont fournies par l'Institut national de statistique (ISTAT). Selon les enquêtes les plus récentes, le pays compte environ 2 600 000 personnes handicapées parmi ses 60 795 612 habitants¹⁹, soit 4,8 % de l'ensemble de la population.²⁰ Un million de personnes se déclarent homosexuelles ou bisexuelles.²¹ Les ressortissants étrangers vivant sur le territoire sont au nombre de 5 014 337, mais on ne dispose d'aucune donnée quant à l'origine raciale ou ethnique de la population. En ce qui concerne la religion, 76,5 % de l'ensemble des citoyens ont été baptisés dans l'Église catholique, même si seuls 25 % environ se déclarent pratiquants. Les Musulmans représentent 2 % environ de la population, soit un pourcentage égal à celui des Chrétiens Orthodoxes. La communauté juive a une présence historique en Italie et comprend 35 000 membres environ.

Peu de condamnations ont été prononcées par les tribunaux, dans le domaine du handicap en particulier, mais la discrimination fondée sur les motifs visés par les directives n'est toujours pas perçue comme un comportement illégal. Au contraire: au lendemain d'une condamnation pour discrimination, des critiques ont été formulées par des politiciens et des faiseurs d'opinion qui argumentent en faveur de la liberté de parole ou du choix économique.²² La problématique de la discrimination est loin d'être une priorité, que ce soit dans les programmes politiques ou en sciences sociales. Il en découle que la plupart des recours et arrêts en matière de non-discrimination continuent de porter sur la discrimination fondée sur la nationalité. Il y a cependant eu quelques affaires pertinentes en rapport avec le handicap et les Roms en 2015.²³

Très peu d'études ont été consacrées à la perception de la discrimination, de sorte qu'il est difficile de fournir des estimations précises quant à la fréquence et à l'ampleur du phénomène, quel que soit le domaine considéré, d'autant plus que les informations rapportées dans les médias sont souvent très imprécises.²⁴ Une attitude hostile peut assurément être observée vis-à-vis de différentes catégories de personnes, issues pour la

¹⁹ Istat (2015), <http://www.istat.it/it/files/2015/12/ASI-2015-Sintesi.pdf>, consulté le 29 mars 2016.

²⁰ Istat (2010), *La disabilità in Italia* (Le handicap en Italie), http://www3.istat.it/dati/catalogo/20100513_00/arg_09_37_la_disabilita_in_Italia.pdf.

²¹ Istat (2012), *La popolazione omosessuale nella società italiana – 2011* (La population homosexuelle dans la société italienne – 2011), http://www.istat.it/it/files/2012/05/report-omofobia_6giugno.pdf.

²² Tel a même été le cas lorsque le Bureau pour la promotion de l'égalité de traitement et la prévention de la discrimination fondée sur la race et l'origine ethnique (*Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull'origine etnica*, UNAR) a adressé une lettre à une députée suite au discours haineux prononcé par celle-ci à l'encontre des migrants musulmans; <http://www.giorgiameloni.com/wp-content/uploads/2015/09/Lettera-UNAR.pdf>.

²³ Cour suprême, 25 novembre 2014, X. c. *Ministère italien de l'éducation et l'école de X*, <http://dirittocivilecontemporaneo.com/2014/11/per-le-sezioni-unite-la-mancata-attuazione-del-piano-educativo-individualizzato-elaborato-per-il-sostegno-scolastico-dell'alunno-in-situazione-di-handicap-costituisce-una-discriminazione-indiretta/>, consulté en dernier lieu le 29 mars 2016.

²⁴ Enquête sur les discriminations fondées sur le genre, l'orientation sexuelle et l'origine ethnique (IST-02258 *Indagine sulle discriminazioni in base al genere, all'orientamento sessuale, alla appartenenza etnica*), <http://www.istat.it/it/archivio/30726>, consulté en dernier lieu le 29 mars 2016.

plupart des vagues récentes d'immigration. L'hostilité envers les Roms devient par ailleurs un sujet brûlant à l'heure où plusieurs politiciens soutiennent ouvertement des politiques ségrégationnistes en matière de logement et d'enseignement. Le taux de décrochage scolaire parmi les élèves roms est une source de vive préoccupation. Il se pourrait que cette situation soit une conséquence directe de la ségrégation au niveau du logement du fait que les camps sont situés loin des écoles et que des personnes sont soudainement transférées d'un camp à l'autre.²⁵

La discrimination raciale et ethnique et la discrimination fondée sur la religion et les convictions se chevauchent souvent, se traduisant principalement par une hostilité envers «les Arabes» et envers «les Musulmans» sans aucune distinction entre les deux termes.²⁶ Le terrorisme et la crise des réfugiés ont aggravé encore cette situation générale. En ce qui concerne les minorités religieuses sans lien avec l'immigration (Juifs, Vaudois et autres), aucun cas de discrimination grave n'a été signalé.

L'orientation sexuelle reste visée par des déclarations ouvertement hostiles sur la scène publique, et les actes de violence et les discours homophobes rapportés dans la presse ne manquent pas de provoquer des réactions politiques négatives. Des cas de discrimination et de harcèlement fondés sur ce motif sont parfois signalés, mais donnent rarement lieu à des poursuites judiciaires. La position traditionnelle de l'église catholique envers les gays et les lesbiennes peut, en théorie du moins, poser problème lorsque l'embauche s'assortit d'une forme d'évaluation des qualités religieuses et morales – ce qui peut à son tour renforcer des attitudes homophobes dans d'autres contextes. La situation des homosexuels fait toutefois l'objet de débats publics de plus en plus fréquents, dans la perspective plus particulière des droits des couples de même sexe. La CouEDH a condamné l'Italie pour violation de l'article 8 de la CEDH du fait que le pays ne s'est pas doté d'un système de reconnaissance des unions civiles entre personnes de même sexe.²⁷ Un projet de loi est actuellement débattu au parlement italien: il vise à créer des registres d'unions civiles et à leur conférer le même traitement que celui réservé aux mariages, hormis en ce qui concerne les droits d'adoption.²⁸ L'Église catholique et des associations catholiques ont participé très activement au débat et, au sein du Parlement, les députés catholiques se sont montrés unis sur la question indépendamment de leur appartenance politique.

Les problèmes relatifs à l'âge et au handicap, fréquemment évoqués dans les médias mais occasionnellement seulement portés devant les tribunaux, sont davantage liés à la structure du marché de l'emploi, où s'observent certaines difficultés de mise en application des directives, en particulier pour ce qui concerne l'âge. Cet état de fait s'est accentué depuis le début de la crise économique et par suite du recours intensif des employeurs à des contrats de courte durée assortis d'avantages fiscaux mais limités aux jeunes travailleurs.

2. Législation principale

L'article 3 de la Constitution italienne contient une clause générale d'égalité et d'interdiction de discrimination. Un débat juridique porte sur le point de savoir si ce principe constitutionnel, qui interdit manifestement toute législation discriminatoire, a un effet direct – autrement dit, s'il constitue un fondement suffisant pour qu'une personne victime

²⁵ L'arrêt du 4 juin 2015 dans l'affaire concernant le camp de La Barbuta à Rome est la parfaite illustration de cette tendance à la ségrégation. Deux ONG, à savoir ASGI (Association pour les études juridiques sur l'immigration) et Articolo 21, ont intenté une action contre la municipalité de Rome en faisant valoir que la politique consistant à placer des Roms dans le vaste camp La Barbuta situé dans une lointaine banlieue romaine – ce qui entrave leur inclusion effective dans la société – était discriminatoire. www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf

²⁶ Voir le rapport de presse exhaustif et actualisé concernant les discours haineux édité par <http://www.cartadiroma.org/>.

²⁷ CouEDH, *Oliari & autres c. Italie*, requêtes n° 18766/11 et 36030/11, 21 juillet 2015, <http://hudoc.echr.coe.int/eng?i=001-156265>.

²⁸ <http://www.senato.it/service/PDF/PDFServer/BGT/00965974.pdf>.

de discrimination puisse intenter une action en justice. Son invocation dans ce contexte n'a jamais été mise à l'épreuve devant un tribunal. Par ailleurs, la loi n° 300/1970 sur le statut des travailleurs comporte une disposition interdisant les actes discriminatoires contre ceux-ci, et un instrument juridique spécifique prévu par la législation pénale en matière de «discours haineux» fait référence à des actes discriminatoires d'autre nature.

Des règles antidiscrimination avancées ont été promulguées pour la première fois avec le décret-loi sur l'immigration adopté en 1998, qui interdit la discrimination indirecte et directe de la part de particuliers ou d'autorités publiques; les définitions qu'il contient correspondent globalement à celles des directives, mais avec une liste ouverte de domaines d'application. La protection s'étend à la discrimination fondée sur l'origine nationale, entendue comme la nationalité au sens de citoyenneté.

La transposition des directives européennes antidiscrimination a ouvert une ère nouvelle pour la législation italienne en la matière. Le gouvernement a approuvé deux décrets en juillet 2003 en vue de transposer les directives 2000/43/CE et 2000/78/CE en droit italien, à savoir le décret-loi 215/2003 (transposant la directive 2000/43) et le décret-loi 216/2003 (transposant la directive 2000/78).

Le décret-loi 215/2003 s'applique donc à la discrimination fondée sur la race et l'origine ethnique dans tous les domaines visés par la directive 2000/43/CE, tandis que le décret-loi 216/2003 s'applique à la discrimination fondée sur la religion et les convictions, l'orientation sexuelle, le handicap et l'âge dans le domaine de l'emploi. L'un et l'autre visent essentiellement à transposer telles quelles les directives dans l'ordre juridique national, sans tenter de les coordonner entre elles ou avec d'autres règles juridiques italiennes existantes. Un décret ultérieur a corrigé certaines erreurs formelles survenues lors du travail rédactionnel, et la législation adoptée début 2008 est venue corriger certaines disparités majeures par rapport aux directives.

Une loi supplémentaire votée en 2006 étend l'interdiction de la discrimination directe et indirecte fondée sur le handicap au-delà du domaine de l'emploi et prévoit des voies de recours similaires à celles fixées par les décrets transposant les directives.

L'une des critiques exprimées à l'encontre de ce mode d'élaboration de la législation porte sur le fait qu'étant donné qu'il n'abolit pas les règles antidiscrimination préexistantes et ne tente pas de consolidation, il instaure des régimes juridiques supplémentaires et crée partant un cadre légal particulièrement complexe. Une avancée vers davantage de coordination a été accomplie en 2011 avec l'application explicite de la procédure accélérée à tous les motifs protégés par les directives, plus l'origine nationale, la langue et la couleur de peau.

Il convient de rappeler que l'Italie est un État partie aux principaux traités et conventions pour la lutte contre la discrimination; on peut citer à titre d'exemples la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, la Convention n° 111 de l'OIT concernant la discrimination et la Convention relative aux droits des personnes handicapées, qu'elle a transposées en droit interne. Elle n'a cependant pas encore ratifié le protocole 12 à la Convention européenne des droits de l'homme, ce qui limite l'utilité de la Convention en tant qu'outil lors de litiges pour fait de discrimination.

3. Principes généraux et définitions

Les décrets de 2003 interdisent la discrimination directe aussi bien qu'indirecte avec un libellé basé sur celui des directives, pour tous les motifs concernés. Le harcèlement y est également défini et interdit, et l'injonction de discriminer explicitement considérée comme une forme de discrimination. Les rétorsions bénéficient du même degré de protection judiciaire que les autres formes de discrimination et constituent un élément à prendre en compte dans l'évaluation du montant des dommages-intérêts à octroyer. Bien qu'ils ne

couvrent pas explicitement la discrimination par association (fondée sur des motifs ou caractéristiques présumés), sans doute les décrets peuvent-ils être interprétés comme couvrant ce type de discrimination, laquelle pourrait également être considérée comme une violation des libertés d'expression et d'association.

Des exigences professionnelles peuvent justifier une dérogation à l'interdiction de discrimination, quel que soit le motif de discrimination considéré, à condition de respecter le «caractère proportionné et raisonnable» requis par les dispositions pertinentes des directives. Tel n'est cependant pas le cas, hélas, du champ d'application des dispositions des décrets relatives aux «tests d'aptitude au travail».

L'Italie a opté pour la possibilité de maintenir des règles ad hoc pour les organisations à vocation éthique particulière. Une exemption partielle de l'interdiction de discrimination pour les organisations de ce type a été développée par les juges avant la transposition de la directive alors qu'en termes législatifs, la seule disposition portant sur ce point était une disposition à la portée très limitée qui, adoptée en 1990, concernait les organisations caractérisées par une certaine «idéologie» au sens large du terme, telles que les églises, les partis politiques et les syndicats. En cas de licenciement abusif, les travailleurs de ces organisations ne se voient octroyer que le recours en dommages-intérêts et non le droit d'être rétablis dans leur fonction, disponible par ailleurs. Selon de nombreux spécialistes, toutefois, le décret-loi 216/2003 donne aux employeurs ayant une éthique fondée sur la religion ou les convictions un pouvoir qu'ils ne possédaient pas avant la transposition de la directive.

En ce qui concerne la religion, un problème se pose en ce qui concerne les confessions (telle l'Islam) qui n'ont pas signé d'accord avec l'État et ne bénéficient donc pas d'une reconnaissance juridique automatique de leurs besoins spécifiques (jours fériés et obligations rituelles notamment).

Ni le décret-loi transposant la directive 2000/78/CE ni la loi de 2006 relative à la protection des personnes handicapées contre les discriminations ne mentionne l'aménagement raisonnable à l'intention de ces personnes. Aussi la CJUE a-t-elle déclaré et arrêté que l'Italie manquait à son obligation de transposer correctement la directive 2000/78²⁹. Pour exécuter cet arrêt, un nouveau paragraphe a été ajouté à l'article 3 du décret-loi 216/2003.³⁰

La nouvelle disposition ne contient ni définition de l'aménagement raisonnable ni orientation quelconque à l'intention des employeurs quant à la manière de respecter l'obligation en la matière: elle leur impose simplement de prévoir cet aménagement raisonnable. Il convient de préciser que les organismes publics doivent se conformer à cette obligation sans qu'elle entraîne la moindre ressource financière ou humaine supplémentaire – ce qui peut s'avérer extrêmement problématique et donner lieu à un non-respect de l'article 5 de la directive 2000/78/CE en vertu duquel les employeurs doivent si nécessaire assumer une charge, sauf si celle-ci est disproportionnée. Avant même l'adoption de la nouvelle disposition, deux arrêts pertinents ont été prononcés en application de l'article 3 du décret-loi et en conformité avec la directive 2000/78/CE et la Convention des Nations unies relative aux droits des personnes handicapées: dans un cas

²⁹ Voir arrêt C-312/11 du 4 juillet 2013, *Commission c. Italie*, non encore publié

³⁰ Italie, Décret-loi converti en loi relative aux mesures préliminaires urgentes pour la promotion de l'emploi, et de l'emploi des jeunes en particulier, et de la cohésion sociale, et à d'autres mesures financières urgentes (*Conversione in legge, con modificazioni, del decreto-legge 28 giugno 2013, n. 76, recante primi interventi urgenti per la promozione dell'occupazione, in particolare giovanile, della coesione sociale, nonché in materia di Imposta sul valore aggiunto (IVA) e altre misure finanziarie urgenti*), loi n° 99 du 9 août 2013, disponible sur: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2013-08-09;99;vig>.

comme dans l'autre, les juridictions saisies ont assimilé le non-respect de l'obligation de fournir un aménagement raisonnable à une discrimination.³¹

La législation italienne n'aborde pas la discrimination multiple en tant que telle, mais une référence à cet aspect particulier du phénomène discriminatoire est faite dans le rapport d'activité 2014 de l'organisme national en charge de l'égalité, à savoir le Bureau pour la promotion de l'égalité de traitement et la prévention de la discrimination fondée sur la race et l'origine ethnique (*Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull'origine etnica*, UNAR).

4. Champ d'application matériel

Le champ d'application des décrets couvre les mêmes domaines que ceux répertoriés dans les directives, et les dispositions s'appliquent à la fois au secteur public et au secteur privé. Contrairement au décret de 1998, la discrimination fondée sur la nationalité est explicitement exclue du champ d'application du décret-loi 215/2003, tout comme l'ensemble des règles juridiques qui concernent le statut des ressortissants de pays tiers et des apatrides. Les deux décrets contiennent à cet égard non seulement des règles applicables à l'admission dans le pays et au séjour, mais également des règles en matière d'accès à l'emploi, d'assistance et de protection sociale. Comme indiqué plus haut, une loi adoptée en 2006 étend la protection contre la discrimination fondée sur le handicap au-delà du domaine de l'emploi.

Le problème posé par l'exclusion de la discrimination fondée sur la nationalité a été résolu par les juges, qui appliquent le même cadre juridique – à savoir le décret de 1998 sur l'immigration et le décret-loi 215/2003 – à tous les cas de discrimination raciale ou nationale, ce qui leur permet de traiter les affaires de discrimination fondée sur la nationalité comme une discrimination directe et non comme une discrimination indirecte fondée sur la race.

Dans le même ordre d'idée, l'hostilité de certains acteurs politiques à l'égard de groupes ethniques et raciaux perçus comme «différents», voire «étranges» ou «dangereux» pour l'une ou l'autre raison, se traduit de plus en plus par des actes législatifs (adoptés par les municipalités en particulier) qui, tout en étant officiellement «neutres en termes ethniques», recourent à des prétextes divers (exigences en matière de résidence, de nationalité, etc.) pour empêcher les personnes de ces groupes de devenir membres à part entière de la société.

5. Mise en application de la loi

Les poursuites pour discrimination s'appuient sur une plainte déposée en justice par la victime. Un changement de procédures a été effectué en 2011 en vue de mieux coordonner les différents actes législatifs adoptés au fil des dernières années. L'article 28 du décret-loi 150/2011 a ainsi abrogé la procédure spéciale applicable aux recours pour discrimination que prévoyait le décret-loi 286/1996 sur l'immigration, et l'a remplacée par la procédure accélérée générale visée à l'article 702-*bis* du Code de procédure civile. Dans les cas particulièrement urgents, le juge peut prononcer une ordonnance provisoire, dont la violation (comme celle de l'ordonnance prononcée dans la décision finale) constitue une infraction pénale. Le juge peut ordonner la production d'un plan destiné à éliminer la discrimination. De surcroît, la loi générale sur la médiation avant procès s'applique désormais à tous les recours pour discrimination et étend ainsi cette possibilité que le décret 216/2003 réservait antérieurement aux seuls recours liés à l'emploi et au travail.

³¹ Tribunal de Bologne, arrêt du 17 juin 2013, http://www.superabile.it/repository/ContentManagement/information/N534144425/8.1%20Accomod_Ragionevoli_Sentenza_bologna_ord_18062013.pdf.

Les deux décrets contiennent des règles spéciales concernant la capacité d'ester en justice. Pour ce qui est de l'origine ethnique et raciale, le département pour l'égalité des chances de la présidence du Conseil des ministres tient une liste, approuvée par les ministères du Travail/de la Protection sociale et de l'Égalité des chances, des associations et organismes qui, sélectionnés sur la base de «leurs objectifs et du degré de continuité de leur action», sont habilités à ester en justice en soutien ou au nom de victimes de discrimination. Ils peuvent également entamer une *actio popularis* en cas de discrimination collective, autrement dit lorsqu'il n'y a pas de victime identifiée. Pour ce qui est des affaires relatives à d'autres motifs de discrimination, le décret transposant la directive 2000/78/CE octroie dorénavant une habilitation juridique analogue aux organisations pertinentes sans qu'il soit nécessaire d'établir un registre spécial. Pour ce qui est de la discrimination fondée sur un handicap en dehors du domaine de l'emploi, la loi de 2006 sur la protection des personnes handicapées contre les discriminations a introduit un système analogue à celui en vigueur en vertu de ces décrets avec un registre spécial tenu par le ministère du Travail. Trois arrêts ont été prononcés en 2015 grâce à des actions représentatives menées en justice par des associations: deux en rapport avec les Roms³² et une en rapport avec l'orientation sexuelle, impliquant des associations agissant en soutien de victimes via une action représentative.³³

L'action collective n'est pas explicitement autorisée en matière de discrimination et aucun recours de ce type n'a été intenté, mais il est probable qu'une telle action serait admise grâce à la large interprétation des dites règles relatives aux actions collectives et aux actions en soutien ou au nom des victimes de discrimination, ou des règles relatives aux actions collectives dans le domaine de la protection des consommateurs figurant dans la loi de finances de 2007.

En ce qui concerne les pénalités, la législation générale prévoit des sanctions relevant du droit du travail telles que la nullité de tout acte discriminatoire et des mesures à l'encontre d'un licenciement injustifié (y compris la réintégration obligatoire sur le lieu de travail). Les juges sont habilités à ordonner également une réparation pour préjudice moral, et ils le font habituellement; dans un cas, le tribunal a condamné la partie défenderesse à indemniser les victimes pour dommage moral et le calcul du montant total a pris en compte l'effet dissuasif de la sanction, conformément à la directive 2000/78/CE.³⁴ Deux arrêts pertinents ont été prononcés en 2015 en impliquant des sanctions, y compris en réparation d'un préjudice moral;³⁵ dans l'une des deux affaires, l'indemnisation a été calculée en tenant compte de l'objectif dissuasif, comme l'exigent les directives européennes.³⁶

L'article 28 du décret-loi 150/2011 contient une nouvelle règle en matière de charge de la preuve, qui s'applique à tous les motifs de discrimination. Cette règle instaure un renversement de la charge lorsque la partie plaignante apporte des éléments de preuve (y compris éventuellement des données statistiques) susceptibles d'établir de manière précise et constante la présomption de l'existence d'actes, d'ententes ou de comportements discriminatoires.

Le test de situation peut être utilisé comme moyen de preuve dans les procédures civiles. Toutefois, s'il n'existe aucun obstacle légal à son usage, il n'existe pas davantage de

³² Tribunal de Rome, *ASGI & Associazione 21 Luglio c. Roma Capitale & gouvernement italien*, 4 juin 2016, <http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf>; Tribunal de Rome, XX., *ASGI, Associazione 21 Luglio c. YY.*, <http://www.asgi.it/wp-content/uploads/2015/04/Tribunale-di-Roma-I-sez.-Civile-1622015-est.-Pratesi-XXX-ASGI-Associazione-21-luglio-avv.-Fachile-C.-Gruppo-Editoriale-Simone-%E2%80%A6.pdf>.

³³ Tribunal de Bergame, *Associazione Avvocatura per i Diritti LGBTI Rete Lenford c. Carlo Taormina*, 6 août 2014, <http://www.altalex.com/~media/Altalex/allegati/2014/09/29/68849%20pdf.pdf>.

³⁴ http://www.europeanrights.eu/public/sentenze/Tribunale_Pisa_ordinanza_16_aprile-2015.pdf.

³⁵ Tribunal de Livourne, *P.S., C.F. c. Ministero dell'Istruzione and Scuola Secondaria G. Mazzini*, 16 juin 2015, http://www.personaedanno.it/attachments/article/48309/9003182_livorno.pdf.

³⁶ Tribunal de Pise, *GC c. LI SRL*, 16 avril 2015, http://www.europeanrights.eu/public/sentenze/Tribunale_Pisa_ordinanza_16_aprile-2015.pdf.

disposition explicite l'autorisant, et aucune preuve recueillie au moyen d'un test de situation n'a encore été présentée en tant que telle devant un tribunal.

6. Organismes de promotion de l'égalité de traitement

L'organisme de promotion de l'égalité de traitement a été initialement créé pour traiter des motifs de la race et de l'origine ethnique – dénommé Office national pour la lutte contre la discrimination raciale (*Ufficio Nazionale Antidiscriminazione Razziali* - UNAR). En 2010, une directive gouvernementale a élargi le mandat de l'UNAR qui couvre aussi désormais la nationalité, le sexe, la religion ou les convictions personnelles, l'âge et l'orientation sexuelle. Il ne s'agit pas d'un organisme indépendant puisqu'il a été institué en tant que section du Département de l'égalité des chances de la Présidence du Conseil des ministres, lequel traitait exclusivement auparavant de la discrimination liée au genre. L'UNAR peut faire appel à du personnel appartenant à d'autres services de l'administration publique, y compris des juges et procureurs, ainsi qu'à des experts et conseillers externes.

En vertu de législation qui l'institue, l'UNAR a pour compétence d'offrir une assistance indépendante aux victimes de discrimination qui intentent une action en justice; de réaliser des études indépendantes sur les discriminations; de promouvoir l'adoption de mesures spécifiques visant à l'élimination ou l'indemnisation des désavantages subis par les personnes victimes de discrimination; d'émettre des avis et de proposer des réformes législatives en matière de discrimination ethnique et raciale; de formuler des recommandations sur les questions liées à la discrimination ethnique et raciale; et de diffuser des informations concernant les règles relatives à l'égalité de traitement indépendamment de la race ou de l'origine ethnique.

L'UNAR comprend deux unités distinctes, l'une étant principalement axée sur l'assistance juridique et la résolution des litiges et l'autre sur les travaux d'analyse et de recherche. Il fait rapport chaque année au Parlement et au gouvernement. L'UNAR est opérationnel depuis novembre 2004 et, selon ses rapports annuels, il offre un service particulièrement utile en mettant un numéro d'appel gratuit à la disposition de personnes s'estimant victimes de discrimination. Outre son apport d'assistance juridique, l'UNAR a collaboré avec des juristes externes en vue de la formulation de toute une série d'avis sur le statut des migrants sans papiers. L'UNAR a organisé des séminaires et des ateliers dans le but d'informer et de former des juristes et des ONG. Son site Internet propose un certain nombre d'informations juridiques, dont le volume tend cependant à diminuer ces dernières années.

L'UNAR a été désigné en 2012 comme point de contact national, conformément à la communication COM(2011)173 de la Commission européenne, et chargé d'assurer la coordination de la Stratégie nationale pour l'intégration des Roms. L'UNAR a également été désigné comme point de contact national pour l'application de la recommandation CM/Rec(2010)5 du Conseil de l'Europe relative à la discrimination fondée sur l'orientation sexuelle, bien que son mandat initial n'allait pas au-delà de la discrimination fondée sur la race et l'origine ethnique. La mise en œuvre concrète de ces stratégies s'avère extrêmement limitée, et le récent changement de directeur général et de la majorité des experts externes – sans nouveaux contrats – risque bien de compromettre l'exécution de ce qui a déjà été programmé.

Un organe spécial appelé *Osservatorio per la sicurezza contro gli atti discriminatori* – OSCAD (Observatoire pour la sécurité contre les actes discriminatoires) a en outre été institué en 2010 au sein du Département de la sécurité publique, qui fait partie de la Direction centrale de la police criminelle. Il ne s'agit pas d'un organe désigné dans le cadre du processus de transposition. L'OSCAD est un organe spécial géré par la police et la police militaire (*Carabinieri*). Ses membres appartiennent au ministère de l'Intérieur (police) et au ministère de la Défense (*Carabinieri*). Il ne s'agit donc pas d'un organe indépendant, mais d'un organe gouvernemental. Son mandat couvre tous les domaines de discrimination

et comprend les tâches suivantes: recueillir des rapports concernant des actes discriminatoires touchant au domaine de la sécurité et émanant d'institutions, d'associations professionnelles ou de particuliers, afin de surveiller la discrimination fondée sur la race ou l'origine ethnique, la nationalité, la religion, le genre, l'âge, la langue, un handicap physique ou mental, l'orientation sexuelle et l'identité de genre – l'OSCAD initiant, sur la base des rapports qu'il reçoit, des interventions ciblées à l'échelon local, dont l'exécution est confiée à la police ou aux *Carabinieri*; assurer le suivi du bon aboutissement de plaintes pour discrimination déposées auprès de services de police; maintenir le contact avec des organisations et institutions, tant publiques que privées, qui se consacrent à la lutte contre les discriminations; préparer à l'intention des policiers des modules de formation à l'action antidiscrimination; participer à des programmes de formation auprès d'institutions publiques et privées; et proposer des mesures adéquates de prévention et de lutte contre les discriminations.

7. Points essentiels

La grande majorité des litiges en matière de discrimination concernent une discrimination fondée sur la nationalité commise par des autorités locales et régionales à l'encontre de migrants.

La non-discrimination ne semble occuper qu'une place extrêmement marginale dans les politiques gouvernementales, comme en attestent divers éléments parmi lesquels l'absence de ministère en charge de l'immigration et les compétences limitées conférées à l'UNAR. C'est ainsi par exemple que l'on n'assiste encore à aucune mise en œuvre réellement effective de la Stratégie nationale pour l'intégration des Roms depuis son adoption. Son manque d'indépendance fait en outre que l'UNAR est uniquement un bureau fonctionnant au sein du Département de l'égalité des chances, sans réelle autonomie. L'UNAR est clairement et totalement lié à l'exécutif et ne peut mener la moindre activité indépendante, même s'il a adopté dans plusieurs cas une position critique vis-à-vis du gouvernement. Il convient toutefois de faire remarquer que les cas en question avaient été soulevés pour la plupart dans les médias ou par des juristes individuels, et que l'UNAR n'a été impliqué qu'ultérieurement sous la forte pression de différentes organisations. Sa relation étroite avec la majorité politique ressort de manière probante du système des dépouilles tel qu'il est appliqué au directeur et aux experts, dont le renouvellement des mandats est laissé à la totale discrétion du chef de département et du ministre; de fait, ceux-ci ont démis le directeur de son poste en 2015 après qu'il ait adressé une lettre à une députée en l'exhortant à faire usage d'un langage non discriminatoire.

L'UNAR a renouvelé en 2015 le contrat de gestion du centre de contact pour une période de trois ans. Ce centre couvre l'ensemble des motifs de discrimination visés par les directives 2000 en y ajoutant la nationalité – au sens de citoyenneté. Bien qu'il soit uniquement prévu par des instructions ministérielles, et non par la loi, cet élargissement du champ d'application a été confirmé jusqu'ici.

L'absence de politique bien définie en matière de lutte contre la discrimination se traduit également par une absence d'actions positives en faveur de groupes vulnérables, en dehors des mesures classiques d'inclusion sociale axées sur les personnes handicapées et les minorités linguistiques. Plusieurs modifications devraient être apportées aux lois antidiscrimination en vue d'en accroître l'efficacité. Premièrement, une définition de l'obligation d'aménagement raisonnable et des orientations quant à la manière de s'y conformer s'avèrent impératives.

En ce qui concerne les différences de traitement pratiquées par des organisations ayant une éthique particulière, l'exemption telle que formulée dans le décret-loi 216/2003 s'applique également à des organisations n'ayant pas une éthique effectivement basée sur

la religion ou les convictions: elle est dès lors susceptible d'aller au-delà de ce qu'admettaient les règles nationales préexistantes en la matière.

On observe une évolution intéressante de la jurisprudence en matière de sanctions. Si la réparation pour préjudice moral est assurée dans chaque arrêt, le montant en est calculé en tenant compte également de son caractère dissuasif, conformément à l'article 17 de la directive 2000/78/CE.

Enfin, la coexistence de divers textes légaux très similaires est inutile et risque de créer une incertitude juridique, mais aucune consolidation n'est prévue.

ZUSAMMENFASSUNG

1. Einleitung

Italien besteht aus 20 Regionen mit jeweils eigener Tradition und Geschichte. Bei Arbeitsbedingungen, Arbeitsmarktsituation und Qualität der öffentlichen Dienstleistungen (Bildung, Gesundheit und Verkehr) gibt es vor allem zwischen den nördlichen und den südlichen Regionen große Unterschiede. Die Familie bildet das Zentrum der sozialen Ordnung und der sozialen Fürsorge und insbesondere im Süden leben Großfamilien häufig unter einem Dach. Organisierte Kriminalität, Korruption, Schattenwirtschaft und Steuerbetrug sind strukturelle Probleme, die immer noch die volle Entwicklung des Landes verhindern und von einer politischen Klasse geduldet werden, die diese Probleme nie angemessen bekämpfen konnte.

Das Italienische Nationale Statistikinstitut (ISTAT) liefert einige wichtige Daten zur italienischen Bevölkerung. Nach jüngsten Befragungen gibt es unter den 60.795.612 Einwohnern³⁷ rund 2.600.000 Menschen mit Behinderungen, was 4,8 % der Gesamtbevölkerung entspricht.³⁸ Eine Million Menschen bezeichnen sich selbst als homo- oder bisexuell.³⁹ Es gibt 5.014.337 ausländische Staatsbürger, zur Rasse oder ethnischen Zugehörigkeit der Bevölkerung liegen jedoch keine Daten vor. Was die Religion angeht, sind 76,5 % der Bevölkerung römisch-katholisch getauft, wobei nur rund 25 % angeben, dass sie ihren Glauben auch praktizieren. Muslime stellen rund 2 % der Bevölkerung, ungefähr den gleichen Anteil wie orthodoxe Christen. Die jüdische Gemeinde in Italien hat eine lange Geschichte und zählt rund 35.000 Mitglieder.

Nur wenige Verurteilungen sind seitens der Gerichte ergangen, insbesondere im Bereich Behinderung, aber Diskriminierung aus den in den Richtlinien genannten Gründen gilt noch immer nicht als rechtswidrig. Im Gegenteil: eine Verurteilung wegen Diskriminierung wurde von Politikern und Meinungsmachern unter Hinweis auf die Meinungsfreiheit und das Recht auf freie wirtschaftliche Entscheidungen heftig kritisiert.⁴⁰ Sowohl in der Politik, als auch in den Sozialwissenschaften hat das Thema Diskriminierung keine hohe Priorität. Aus diesem Grund betreffen die Mehrheit der Gleichbehandlungsklagen und -urteile weiterhin Diskriminierungen aufgrund der Nationalität. 2015 gab es jedoch einige einschlägige Rechtssachen, die Behinderung und Roma betrafen.⁴¹

Es gibt nur sehr wenige Befragungen zu Wahrnehmungen der Diskriminierung und die Berichterstattung in den Medien ist häufig sehr ungenau;⁴² aus diesem Grund lassen sich Häufigkeit und Schwere von Diskriminierung in allen Bereichen nur schwer abschätzen. Allerdings sind feindselige Einstellungen gegenüber einzelnen sozialen Gruppen zu beobachten, vor allem im Zusammenhang mit den jüngsten Einwanderungswellen. Auch die Ablehnung von Roma ist ein heiß diskutiertes Thema, bei dem mehrere Politiker bereits offen für ein segregierte Unterbringung und Bildung geworben haben. Die hohe Schulabbrecherquote bei jungen Roma ist ein ernstes Problem. Dies ist möglicherweise

³⁷ Istat (2015), <http://www.istat.it/it/files/2015/12/ASI-2015-Sintesi.pdf> (letzter Zugriff am 29. März 2016).

³⁸ Istat (2010), *La disabilità in Italia* (Behinderung in Italien), http://www3.istat.it/dati/catalogo/20100513_00/arg_09_37_la_disabilita_in_Italia.pdf.

³⁹ Istat (2012), *La popolazione omosessuale nella società italiana – 2011* (Homosexuelle in der italienischen Gesellschaft – 2011), http://www.istat.it/it/files/2012/05/report-omofobia_6giugno.pdf.

⁴⁰ Dies war sogar beim UNAR der Fall, als dieses ein Schreiben an eine Abgeordnete richtete, die gegen muslimische Einwanderer gehetzt hatte; <http://www.giorgiameloni.com/wp-content/uploads/2015/09/Lettera-UNAR.pdf>.

⁴¹ Oberster Gerichtshof, 25/11/2014, X. v. *das italienische Bildungsministerium und die Schule von X*, <http://dirittocivilecontemporaneo.com/2014/11/per-le-sezioni-unite-la-mancata-attuazione-del-piano-educativo-individualizzato-elaborato-per-il-sostegno-scolastico-dell'alunno-in-situazione-di-handicap-costituisce-una-discriminazione-indiretta/>.

⁴² Umfrage zur Diskriminierung aufgrund des Geschlechts, der sexuellen Ausrichtung und der ethnischen Herkunft (IST-02258 *Indagine sulle discriminazioni in base al genere, all'orientamento sessuale, alla appartenenza etnica*), <http://www.istat.it/it/archivio/30726> (letzter Zugriff am 29. März 2016).

eine direkte Folge der Wohnsegregation, weil viele Roma-Lager weit von der nächsten Schule entfernt liegen und Roma oft ohne Vorwarnung in andere Lager umziehen.⁴³

Diskriminierung aufgrund der Rasse und ethnischen Herkunft überschneidet sich häufig mit Diskriminierung aufgrund von Religion und Weltanschauung, die vor allem als Ablehnung von „Arabern“ und „Muslimen“ zum Ausdruck kommt, wobei zwischen den beiden Begriffen nicht unterschieden wird.⁴⁴ Der Terrorismus und die Flüchtlingskrise haben das Gesamtbild noch verschlimmert. Bei religiösen Minderheiten, die keinen Bezug zu Einwanderung haben (Juden, Waldenser und andere) sind keine schweren Fälle von Diskriminierung bekannt.

Die sexuelle Ausrichtung ist immer noch Grund für offen ablehnende Aussagen in der Öffentlichkeit und die Presse berichtet über Fälle homophober Gewalt und Kommentare, was wiederum negative politische Reaktionen auslöst. Homophobe Einstellungen führen auch zu Diskriminierung und Belästigung, derartige Fälle werden aber nur selten in Rechtsverfahren geprüft. Die traditionelle Einstellung der katholischen Kirche zu Schwulen und Lesben kann, zumindest theoretisch, zum Problem werden, wenn bei Einstellungsverfahren die religiösen und moralischen Qualitäten von Bewerbern geprüft werden. Dies kann wiederum die Entstehung homophober Reaktionen in anderen Bereichen begünstigen. Die Situation von Schwulen und Lesben wird allerdings immer häufiger öffentlich diskutiert, insbesondere in Bezug auf die Rechte gleichgeschlechtlicher Paare. Der Europäische Gerichtshof für Menschenrechte (EGMR) hat Italien wegen Verstoßes gegen Artikel 8 EMRK verurteilt, weil das Land über kein System zur Anerkennung von gleichgeschlechtlichen eingetragenen Partnerschaften verfügt.⁴⁵ Ein entsprechender Gesetzentwurf wird im italienischen Parlament diskutiert. Ziel ist es, Register für eingetragene Partnerschaften einzurichten und diese wie Ehen zu behandeln, außer im Hinblick auf Adoptionsrechte.⁴⁶ Die Katholische Kirche und katholische Verbände haben in der Debatte eine sehr aktive Rolle gespielt, und im Parlament waren die katholischen Abgeordneten in diesem Thema über alle Parteigrenzen hinweg einer Meinung.

Diskriminierung aufgrund von Alter und Behinderung wird zwar in den Medien viel diskutiert, aber nur selten vor Gericht gebracht. Diese Probleme hängen eher mit der Struktur des Arbeitsmarkts zusammen, auf dem sich die Richtlinien und insbesondere das Verbot von Altersdiskriminierung nur schwer durchsetzen lassen. Das Problem hat sich seit Beginn der Wirtschaftskrise noch verstärkt, weil Arbeitgeber zunehmend befristete Arbeitsverträge nutzen, die steuerlich begünstigt und auf junge Arbeitnehmer beschränkt sind.

2. Wichtigste Gesetze

Artikel 3 der italienischen Verfassung enthält ein allgemeines Gleichbehandlungsgebot und verbietet Diskriminierung. Obwohl die Verfassung diskriminierende Gesetze eindeutig verbietet, wird in Rechtskreisen debattiert, ob dieses Verfassungsprinzip direkt angewendet werden kann, d. h. ob es einer Person, die diskriminiert wurde, eine ausreichende Rechtsgrundlage bietet. Diese Frage wurde noch nie vor Gericht geprüft. Außerdem gibt es im Gesetz 300/1970, dem Arbeitnehmergesetz, eine Bestimmung, die die Diskriminierung von Arbeitnehmern verbietet, und im Strafrecht wurde ein spezielles

⁴³ Der Fall über das Lager La Barbuta in Rom, bei dem am 4. Juni 2015 ein Urteil gesprochen wurde, ist ein perfektes Beispiel für diesen Trend zur Segregation. Zwei NRO, ASGI und Articolo 21, klagten gegen die diskriminierende Politik der Stadt, Roma in einer großen Siedlung am Rande Roms mit dem Namen „La Barbuta“ anzusiedeln und so ihre Eingliederung in die Gesellschaft zu verhindern. www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf.

⁴⁴ Siehe den ausführlichen und aktuellen Pressebericht zum Thema Hasssprache, herausgegeben von <http://www.cartadiroma.org>.

⁴⁵ EGMR, *Oliari and Others v. Italy*, Beschwerden Nr. 18766/11 und 36030/11, 21. Juli 2015, <http://hudoc.echr.coe.int/eng?i=001-156265>.

⁴⁶ <http://www.senato.it/service/PDF/PDFServer/BGT/00965974.pdf>.

Rechtsinstrument gegen „Hassrede“ eingeführt, das auch auf bestimmte diskriminierende Handlungen Bezug nimmt.

Die erste weiterführende Antidiskriminierungsgesetzgebung war die Einwanderungsverordnung von 1998. Diese Verordnung verbietet unmittelbare und mittelbare Diskriminierung durch Personen und öffentliche Stellen, wobei die Definition dieser Begriffe im Wesentlichen den Richtlinien entspricht, jedoch mit einer offenen Liste von Anwendungsbereichen. Verboten wird auch Diskriminierung aufgrund der nationalen Herkunft, im Sinne von Nationalität oder Staatsbürgerschaft.

Die Umsetzung der Antidiskriminierungsrichtlinien der EU hat eine neue Ära der Antidiskriminierungsgesetzgebung in Italien ausgelöst. Zur Umsetzung der Richtlinien 2000/43/EG und 2000/78/EG in italienisches Recht erließ die Regierung im Juli 2003 die Gesetzesverordnung 215/2003 (setzt die Richtlinie 2000/43/EG um) und Gesetzesverordnung 216/2003 (setzt die Richtlinie 2000/78/EG um).

Unter die Gesetzesverordnung 215/2003 fällt Diskriminierung aufgrund der Rasse oder ethnischen Herkunft in allen in der Richtlinie 2000/43/EG genannten Bereichen, die Verordnung 216/2003 dagegen gilt für den Bereich Beschäftigung und verbietet Diskriminierung aufgrund von Religion und Weltanschauung, sexueller Ausrichtung, Behinderung und Alter. Beide Verordnungen dienen vorwiegend der Umsetzung der Richtlinien in italienisches Recht und streben keine Koordination zwischen den Richtlinien oder mit anderen italienischen Gesetzen an. Einige technische Fehler wurden durch eine spätere Verordnung korrigiert und Anfang 2008 wurde eine Gesetzesreform verabschiedet, die größere Abweichungen von den Richtlinien beseitigte.

Im Jahr 2006 wurde ein weiteres Gesetz erlassen, das das Verbot von unmittelbarer und mittelbarer Diskriminierung aufgrund von Behinderung auf andere Bereiche außerhalb des Arbeitslebens ausweitete und ähnliche Rechtsmittel bietet wie die Verordnungen zur Umsetzung der Richtlinien.

Ein Kritikpunkt an dieser Art der Gesetzgebung ist, dass sie ältere Antidiskriminierungsgesetze nicht abschafft oder in die neuen Gesetze integriert, sodass die Rechtsordnung nur erweitert und verkompliziert wird. Ein Schritt zu mehr Koordination war die Einführung eines allgemeinen Schnellverfahrens im Jahr 2011, unter das alle in den Richtlinien genannten Diskriminierungsgründe sowie nationale Herkunft, Sprache und Hautfarbe fallen.

Es muss betont werden, dass Italien die wichtigen internationalen Verträge und Übereinkommen gegen Diskriminierung ratifiziert hat, zum Beispiel das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung, das ILO-Übereinkommen Nr. 111 über die Diskriminierung und das Übereinkommen über die Rechte von Menschen mit Behinderungen, die alle in italienisches Recht überführt wurden. Allerdings hat das Land das 12. Protokoll der Europäischen Menschenrechtskonvention noch nicht ratifiziert, wodurch sich Klagen wegen Diskriminierung nicht auf diese Konvention gründen können.

3. Wichtigste Grundsätze und Begriffe

Die Verordnungen von 2003 verbieten bei allen betroffenen Diskriminierungsgründen sowohl unmittelbare als auch mittelbare Diskriminierung mit einem Wortlaut, der demjenigen der Richtlinien entspricht. Auch Belästigung wird definiert und verboten. Anweisung zur Diskriminierung wird ausdrücklich als eine Form der Diskriminierung aufgezählt. Bei Viktimisierung gilt derselbe Rechtsschutz wie bei anderen Formen der Diskriminierung und sie muss bei der Feststellung von Entschädigungssummen gesondert berücksichtigt werden. Diskriminierung aufgrund von Assoziierung (aufgrund mutmaßlicher Gründe oder Eigenschaften) wird nicht ausdrücklich erwähnt, allerdings lässt

sich aus den Verordnungen ein Verbot dieser Form der Diskriminierung ableiten, die auch als Verletzung der Meinungs- und Vereinigungsfreiheit aufgefasst werden kann.

Bei allen Diskriminierungsgründen können berufliche Anforderungen eine Ausnahme vom Gleichbehandlungsgebot begründen, solange sie entsprechend der Vorgaben der Richtlinien „verhältnismäßig und angemessen“ sind. Leider gilt dies nicht für den Geltungsbereich der Bestimmungen über „Arbeitseignungstests“ in der Verordnung.

Italien hat von der Möglichkeit Gebrauch gemacht, für Organisationen mit einem bestimmten Ethos Ad-Hoc-Regeln festzulegen. Schon vor Umsetzung der Richtlinien hatte sich in der Rechtsprechung eine teilweise Ausnahme vom Diskriminierungsverbot für Organisationen mit einem bestimmten Ethos herausgebildet. Gesetzlich gab es hierzu nur eine äußerst begrenzte Bestimmung aus dem Jahr 1990 für Organisationen, die durch eine bestimmte „Ideologie“ im weitesten Sinne gekennzeichnet sind, z. B. Kirchen, politische Parteien und Gewerkschaften. Bei einer ungerechtfertigten Kündigung haben Angestellte dieser Organisationen nur einen Anspruch auf Schadensersatz und nicht auf eine Weiterbeschäftigung, wie dies bei anderen Arbeitgebern der Fall ist. Nach Ansicht vieler Juristen gibt die Gesetzesverordnung 216/2003 Arbeitgebern mit einem auf Religion oder einer Weltanschauung basierenden Ethos jedoch Rechte, die sie vor Umsetzung der Richtlinie nicht hatten.

Ein Problem haben Glaubensrichtungen (wie der Islam), die keine Vereinbarung mit dem Staat unterzeichnet haben und deren spezielle Bedürfnisse (wie Feiertage und rituelle Verpflichtungen) nicht automatisch rechtlich anerkannt werden.

Weder die Verordnung zur Umsetzung der Richtlinie 2000/78/EG, noch das Behindertengesetz von 2006 fordern angemessene Vorkehrungen für Menschen mit Behinderungen. Aus diesem Grund kam der EuGH zu dem Urteil, dass Italien seine Pflicht zur Umsetzung der Richtlinie 2000/78/EG nicht angemessen erfüllt hat.⁴⁷ Als Reaktion auf dieses Urteil wurde in Artikel 3 der Gesetzesverordnung 216/2003 ein neuer Paragraph eingefügt.⁴⁸

Die neue Bestimmung definiert nicht, was angemessene Vorkehrungen sind und bietet Arbeitgebern keine Richtlinien für die Erfüllung dieser Pflicht, sondern schreibt Arbeitgebern nur vor, dass sie angemessene Vorkehrungen treffen müssen. Dabei ist zu beachten, dass öffentliche Stellen diese Pflicht auch ohne zusätzliche finanzielle oder personelle Mittel erfüllen müssen. Dies könnte höchst problematisch sein und zu einem Verstoß gegen Artikel 5 der Richtlinie 2000/78/EG führen, dem zufolge der Arbeitgeber gegebenenfalls eine Belastung auf sich nehmen muss, sofern diese nicht unverhältnismäßig ist. Noch bevor die neue Regelung in Kraft trat, ergingen zwei wichtige Urteile unter Anwendung von Artikel 3 der Gesetzesverordnung 216/2003, in Übereinstimmung mit der Richtlinie 2000/78/EG und der UN-Behindertenrechtskonvention: In beiden Fällen kamen die Gerichte zu dem Ergebnis, dass das Nichttreffen angemessener Vorkehrungen als Diskriminierung zu werten sei.⁴⁹

Mehrfachdiskriminierung an sich wird in den italienischen Antidiskriminierungsgesetzen nicht behandelt; der Tätigkeitsbericht 2014 der nationalen Gleichbehandlungsstelle, des *Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni*

⁴⁷ Siehe das Urteil vom 4. Juli 2013, *Kommission v. Italien*, C-312/11.

⁴⁸ Italien, In ein Gesetz umgewandeltes Gesetzesdekret über befristete Sofortmaßnahmen zur Förderung der Beschäftigung, insbesondere junger Menschen, des sozialen Zusammenhalts und über dringende finanzielle Maßnahmen (*Conversione in legge, con modificazioni, del decreto-legge 28 giugno 2013, n. 76, recante primi interventi urgenti per la promozione dell'occupazione, in particolare giovanile, della coesione sociale, nonché in materia di Imposta sul valore aggiunto (IVA) e altre misure finanziarie urgenti*), 9. August 2013 Nr. 99, verfügbar unter: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2013-08-09:99!vig>.

⁴⁹ Landgericht Bologna, Urteil vom 17. Juni 2013, http://www.superabile.it/repository/ContentManagement/information/N534144425/8.1%20Accomod_Ragionevoli_Sentenza_bologna_ord_18062013.pdf.

fondate sulla razza o sull'origine etnic, kurz: UNAR (Amt zur Förderung der Gleichbehandlung und zur Bekämpfung von Diskriminierung aufgrund der Rasse oder ethnischen Herkunft) enthielt jedoch einen Verweis auf dieses spezielle Phänomen.

4. Sachlicher Anwendungsbereich

Der Anwendungsbereich entspricht den in den Richtlinien genannten Bereichen und die Bestimmungen gelten sowohl für den öffentlichen als auch für den privaten Sektor. Anders als die Verordnung von 1998 gilt die Gesetzesverordnung 215/2003 ausdrücklich nicht für eine Diskriminierung aufgrund der Nationalität und auch nicht für Rechtsvorschriften, die den Status von fremden Staatsangehörigen und staatenlosen Personen betreffen. In dieser Beziehung erwähnen beide Verordnungen nicht nur Regelungen zu Einreise und Aufenthalt, sondern auch für den Zugang zum Arbeitsmarkt, Sozialsystem und Wohlfahrt. Ein Gesetz von 2006 erweitert, wie oben erwähnt, den Schutz vor Diskriminierung aufgrund einer Behinderung auf weitere Bereiche außerhalb des Arbeitslebens aus.

Der Ausschluss von Diskriminierung aufgrund der Nationalität wurde von Richtern ausgehebelt, die auf alle Fälle von Diskriminierung aufgrund der Rasse oder Nationalität einen einheitlichen Rechtsrahmen, also die Einwanderungsverordnung von 1998 und die Gesetzesverordnung 215/2003, anwenden. Dies bietet den Richtern die Möglichkeit, Diskriminierung aufgrund der Nationalität als unmittelbare Diskriminierung zu behandeln und nicht nur als mittelbare Rassendiskriminierung.

Entsprechend spiegelt sich die Feindseligkeit bestimmter politischer Akteure gegenüber ethnischen Gruppen oder Rassen, die als „anders“ und aus irgendwelchen Gründe „fremd“ oder „gefährlich“ wahrgenommen werden, in formal „ethnisch blinden“ Rechtsvorschriften wider (insbesondere auf kommunaler Ebene), die unterschiedliche Vorwände nutzen (Aufenthaltsdauer, Nationalität usw.), um Mitglieder dieser Gruppen von der gesellschaftlichen Teilhabe auszuschließen.

5. Rechtsdurchsetzung

Um sich gegen Diskriminierung zu wehren, muss das Opfer bei Gericht eine Klage einreichen. Im Jahr 2011 wurden Verfahrensänderungen eingeführt, um die verschiedenen Gesetzen zu koordinieren, die in den vergangenen Jahren verabschiedet wurden. Artikel 28 der Gesetzesverordnung 150/2011 schaffte das Sonderverfahren für Antidiskriminierungsfälle wieder ab, das durch die Gesetzesverordnung 286/1998 über Einwanderung eingeführt worden war, und ersetzte es durch ein allgemeines Schnellverfahren nach Artikel 702 Absatz 2 der Zivilprozessordnung. In besonders dringenden Fällen kann der Richter eine einstweilige Verfügung erlassen, wobei ein Verstoß gegen diese Verfügung (und die im Urteil getroffene endgültige Anordnung) eine Straftat darstellt. Der Richter kann auch verfügen, dass ein Plan erarbeitet werden muss, wie die Diskriminierung aufgehoben werden kann. Außerdem gilt das allgemeine Gesetz über außergerichtliche Mediationsverfahren nun für alle Antidiskriminierungsklagen, eine Möglichkeit, die in Verordnung 216/2003 nur für arbeitsrechtliche Klagen vorgesehen war.

Beide Verordnungen enthalten spezielle Regeln für die Beteiligung an Gerichtsverfahren. Im Hinblick auf Rasse und ethnische Herkunft führt die Abteilung für Chancengleichheit des Präsidiums des Ministerrats führt eine Liste, die vom Arbeitsministerium und vom Ministerium für Soziales und Chancengleichheit genehmigt wird und Vereinigungen und Stellen aufführt, die sich aufgrund ihres „Zwecks und der Dauer ihrer Tätigkeit“ zur Unterstützung oder im Namen von Diskriminierungsopfern an Verfahren beteiligen dürfen. Wenn das Opfer nicht identifiziert wird, dürfen diese Stellen auch eine Popularklage wegen Diskriminierung einreichen. Bei Diskriminierung aus anderen Gründen räumt die Verordnung zur Umsetzung der Richtlinie 2000/78/EG relevanten Organisationen inzwischen eine ähnliche Rechtsstellung ein, jedoch ohne Einführung eines speziellen Registers. Für Diskriminierungsfälle aufgrund von Behinderung außerhalb des

Arbeitslebens hat das Gesetz gegen die Diskriminierung von Behinderten von 2006 ein ähnliches System eingeführt, dabei wird ein Verzeichnis der berechtigten Organisationen vom Arbeitsministerium geführt. 2015 ergingen drei Urteile aufgrund von Klagen, die von Verbänden eingereicht worden waren; zwei davon betrafen Roma,⁵⁰ in einem ging es um sexuelle Ausrichtung. Die Betroffenen wurden von entsprechenden Organisationen mithilfe von Verbandsklagen unterstützt.⁵¹

Verbandsklagen sind bei Diskriminierungsfällen nicht ausdrücklich erlaubt und wurden bisher auch noch nicht eingereicht. Allerdings sind derartige Klagerechte vermutlich zulässig, wenn man die Regeln zur Popularklage und zur Verfahrensbeteiligung zur Unterstützung oder im Namen von Diskriminierungsopfern oder die Regeln zur Verbandsklage im Bereich Verbraucherschutz gemäß dem Finanzgesetz von 2007 großzügig auslegt.

Was die Sanktionen angeht, sieht die allgemeine Gesetzgebung im Arbeitsrecht die Aufhebung der diskriminierenden Handlung sowie Maßnahmen gegen unrechtmäßige Kündigungen (einschließlich der Pflicht zur Wiedereinstellung) vor. Richter können Opfern auch für immaterielle Schäden eine Entschädigung zusprechen und tun dies in der Regel auch. In einem Fall wurde die beklagte Partei dazu verurteilt, die Opfer für den entstandenen immateriellen Schaden zu entschädigen, und wurde bei der Festsetzung der Entschädigungssumme die abschreckende Wirkung im Sinne der Richtlinie 2000/78/EG berücksichtigt.⁵² 2015 wurden zwei wichtige Urteile gefällt, in denen Sanktionen, unter anderem für immaterielle Schäden, verhängt wurden;⁵³ bei der Festsetzung der Entschädigungssumme wurde in einem Fall die in den Unionsrichtlinien vorgeschriebene abschreckende Wirkung berücksichtigt.⁵⁴

Artikel 28 der Gesetzesverordnung 150/2011 enthält eine Vorschrift zur Beweislast, die für alle Diskriminierungsgründe gilt. Nach dieser Vorschrift wird die Beweislast umgekehrt, sobald der Kläger Beweise vorlegt (zu denen auch statistische Daten gehören können), die präzise und folgerichtig die Annahme belegen, dass diskriminierende Handlungen, Vereinbarungen oder Verhaltensweisen vorliegen.

Situationstests sind als Beweise in Zivilprozessen zulässig. Obwohl es für ihre Verwendung keine rechtlichen Hindernisse gibt, werden sie auch nicht ausdrücklich zugelassen und bisher wurden einem Gericht noch nie Beweise vorgelegt, die durch Situationstests ermittelt wurden.

6. Gleichbehandlungsstellen

Die italienische Gleichbehandlungsstelle wurde ursprünglich geschaffen, um Diskriminierung aufgrund der Rasse und ethnischen Herkunft zu bekämpfen, und trägt den Titel Nationales Amt gegen Rassendiskriminierung (UNAR). Im Jahr 2010 weitete eine Regierungsverordnung den Auftrag des UNAR auf die Diskriminierungsgründe Nationalität, Geschlecht, Religion oder Weltanschauung, Behinderung, Alter und sexuelle Ausrichtung aus. Das Amt ist keine unabhängige Stelle, weil sie als Dienststelle der Abteilung für Chancengleichheit des Präsidiums des Ministerrats gegründet wurde, die sich ursprünglich

⁵⁰ Landgericht Rom, *ASGI und Associazione 21 Luglio / Hauptstadt Rom und italienische Regierung*, 4. Juni 2016, <http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf>; Landgericht Rom, XX., *ASGI, Associazione 21 Luglio / YY.*, <http://www.asgi.it/wp-content/uploads/2015/04/Tribunale-di-Roma-I-sez.-Civile-1622015-est.-Pratesi-XXX-ASGI-Associazione-21-luglio-avv.-Fachile-C.-Gruppo-Editoriale-Simone-%E2%80%A6.pdf>.

⁵¹ Landgericht Bergamo, *Associazione Avvocatura per i Diritti LGBTI Rete Lenford / Carlo Taormina*, 6. August 2014, <http://www.altalex.com/~media/Altalex/allegati/2014/09/29/68849%20pdf.pdf>.

⁵² http://www.europeanrights.eu/public/sentenze/Tribunale_Pisa_ordinanza_16_aprile-2015.pdf.

⁵³ Landgericht Livorno, *P.S., C.F. / Ministero dell'Istruzione und Scuola Secondaria G. Mazzini*, 16. Juni 2015, http://www.personaedanno.it/attachments/article/48309/9003182_livorno.pdf.

⁵⁴ Landgericht Pisa, *GC / LI SRL*, 16. April 2015, http://www.europeanrights.eu/public/sentenze/Tribunale_Pisa_ordinanza_16_aprile-2015.pdf.

ausschließlich mit Geschlechterdiskriminierung befasste. Das UNAR kann Mitarbeiter anderer Abteilungen, sogar Richter und Staatsanwälte, sowie externe Experten und Berater hinzuziehen.

Nach seiner Gründungsordnung ist das UNAR unter anderem dafür zuständig, Opfer von Diskriminierung bei ihrer Klage zu unterstützen, unabhängige Befragungen zum Thema Diskriminierung durchzuführen, Maßnahmen zu fördern, mit denen die Nachteile von Diskriminierungsopfern aufgehoben oder kompensiert werden, Stellungnahmen und Vorschläge zu Gesetzesreformen im Bereich der Diskriminierung aufgrund der Rasse und ethnischen Zugehörigkeit zu machen, Empfehlungen auszusprechen und die Öffentlichkeit über das Prinzip der Gleichbehandlung unabhängig von Rasse oder ethnischer Zugehörigkeit zu informieren.

Das UNAR hat zwei Abteilungen, von denen sich die eine auf Rechtshilfe und Streitschlichtung konzentriert und die andere auf Umfragen und Forschung. Das Amt legt dem Parlament und der Regierung einmal jährlich einen Bericht vor. Es ist seit November 2004 tätig und bietet, nach Angaben seines Jahresberichts an die Regierung, Opfern von Diskriminierung wichtige Hilfsangebote über kostenlose Telefonnummern, die jeder anrufen kann, der sich diskriminiert fühlt. Neben der Rechtsberatung hat das UNAR auch mit externen Anwälten zusammengearbeitet, um Stellungnahmen zum Status von Immigranten ohne Papiere abzugeben. Das UNAR veranstaltet Seminare und Workshops, in den Anwälte und NRO informiert und geschult werden. Auf seiner Website bietet das Amt rechtliche Informationen, obwohl diese in den letzten Jahren weniger geworden sind.

Im Jahr 2012 wurde das UNAR zur nationalen Kontaktstelle im Sinne der Mitteilung der Kommission KOM(2011) 173 ernannt und erhielt den Auftrag, die nationale Strategie Italiens zur Integration der Roma zu koordinieren. Das UNAR ist außerdem nationale Kontaktstelle für die Umsetzung der Empfehlung CM/Rec(2010)5 des Europarats zur Bekämpfung von Diskriminierung aufgrund der sexuellen Orientierung, obwohl seine Zuständigkeit ursprünglich nicht über die Diskriminierungsgründe Rasse und ethnische Zugehörigkeit hinausging. Die praktische Implementierung dieser Strategien ist allerdings äußerst begrenzt, und der kürzliche Austausch des Generaldirektors sowie der meisten externen Expertinnen und Experten – ohne Neuverträge – droht, die Umsetzung der bereits geplanten Maßnahmen zu beeinträchtigen.

Zusätzlich wurde 2010 eine Stelle mit der Bezeichnung „*Osservatorio per la sicurezza contro gli atti discriminatori, OSCAD*“ (Beobachtungsstelle zum Schutz vor Diskriminierung) als Teil der Abteilung für öffentliche Sicherheit in der Zentralkommission der Kriminalpolizei eingerichtet. Dies ist allerdings keine designierte Stelle im Umsetzungsverfahren. Die OSCAD ist eine Sonderstelle der Polizei und der Carabinieri (Militärpolizei). Ihre Mitglieder unterstehen dem Innenministerium (Polizei) und dem Verteidigungsministerium (Carabinieri). Daher ist sie keine unabhängige Stelle, sondern eine Regierungsstelle. Sie hat ein Mandat für alle Arten von Diskriminierung und die folgenden Aufgaben: sie erhält von Institutionen, Berufs- oder Branchenverbänden Berichte über sicherheitsrelevante Diskriminierungsfälle und soll die Lage in Bezug auf Diskriminierung aufgrund von Rasse oder ethnischer Zugehörigkeit, Nationalität, Religion, Geschlecht, Alter, Sprache, körperlicher oder geistiger Behinderung, sexueller Ausrichtung und sexueller Identität überwachen. Auf Grundlage der eingehenden Berichte plant die OSCAD zielgerichtete Maßnahmen auf lokaler Ebene, die von der Polizei oder den Carabinieri umgesetzt werden, sie überwacht das Ergebnis von Diskriminierungsbeschwerden, die bei der Polizei angezeigt werden, sie arbeitet mit anderen öffentlichen oder privaten Stellen und Organisationen zusammen, die sich gegen Diskriminierung engagieren, sie erarbeitet Schulungen für Polizisten im Antidiskriminierungsrecht und nimmt an Schulungen öffentlicher und privater Institutionen bei, außerdem schlägt sie Maßnahmen zur Verhinderung und Bekämpfung von Diskriminierung vor.

7. Wichtige Punkte

Die große Mehrzahl der Diskriminierungsklagen betrifft die Diskriminierung von Immigranten aufgrund der Nationalität durch kommunale und regionale Stellen.

Antidiskriminierung spielt in der Regierungspolitik eine sehr untergeordnete Rolle, was sich unter anderem darin zeigt, dass Italien kein Ministerium für Integration hat und das UNAR mit äußerst begrenzten Befugnissen ausgestattet ist. In Bezug auf die nationale Romastrategie bedeutet dies zum Beispiel, dass diese, nachdem sie beschlossen wurde, nicht wirksam umgesetzt wurde. Außerdem ist das UNAR nur ein Büro innerhalb der Abteilung für Chancengleichheit, ohne wirkliche Autonomie und damit auch nicht völlig unabhängig. Das UNAR ist klar und vollständig mit der Exekutive verbunden und kann keinerlei unabhängige Tätigkeit ausüben, obwohl es die Regierung in mehreren Fällen kritisiert hat. Allerdings ist zu beachten, dass die Mehrzahl dieser Fälle zuerst von den Medien oder einzelnen Anwälten aufgegriffen wurden und das UNAR sich erst spät und nach starkem Druck von Interessenverbänden dieser Fälle angenommen hat. Die enge Verbindung zur politischen Mehrheit zeigt sich in der Stellung des Direktors und der Experten als „politische Beamte“. Über die Verlängerung ihrer Verträge entscheiden der Abteilungsleiter und der Minister oder die Ministerin nach freiem Ermessen; tatsächlich wurde der Direktor 2015 seines Amts enthoben, nachdem er ein Schreiben an eine Abgeordnete gerichtet und sie aufgefordert hatte, eine diskriminierungsfreie Sprache zu verwenden.

2015 hat das UNAR den Vertrag für die Leitung der Kontaktstelle um drei Jahre verlängert. Die Kontaktstelle deckt alle in den 2000er-Richtlinien enthaltenen Diskriminierungsgründe und außerdem Nationalität – im Sinne von Staatsangehörigkeit – ab. Die Erweiterung des Geltungsbereichs ist zwar nur durch ministerielle Anweisungen und nicht gesetzlich geregelt, wurde bislang jedoch bestätigt.

Das Fehlen einer klaren Antidiskriminierungspolitik zeigt sich auch daran, dass Italien kaum positive Maßnahmen zugunsten benachteiligter Gruppen kennt, mit Ausnahme traditioneller Maßnahmen zur Eingliederung von Menschen mit Behinderungen und von sprachlichen Minderheiten. Um die Effizienz der Antidiskriminierungsgesetze zu verbessern, wären zahlreiche Reformen erforderlich. Erstens müssen der Begriff der angemessenen Vorkehrungen definiert und Richtlinien eingeführt werden, wie die Pflicht zu angemessenen Vorkehrungen genau aussieht.

Was die unterschiedliche Behandlung von Organisationen mit besonderem Ethos angeht, so gilt die Ausnahme, die in der Gesetzesverordnung Nr. 216/2003 formuliert ist, auch für Organisationen, deren Ethos nicht auf Religion oder Weltanschauung gründet, und geht damit vermutlich über die frühere italienische Regelung hinaus. In der Rechtsprechung hat es in Bezug auf Sanktionen eine interessante Entwicklung gegeben. Alle Urteile gewähren Schadenersatz für immaterielle Schäden, und bei der Festsetzung des entsprechenden Betrags wird – in Einklang mit Art. 17 Richtlinie 2000/78/EG – auch dessen abschreckende Wirkung berücksichtigt.

Schließlich ist das Nebeneinander unterschiedlicher Gesetzestexte mit ähnlichem Inhalt unnötig und kann zu Rechtsunsicherheit führen; eine Konsolidierung ist jedoch nicht geplant.

INTRODUCTION

The national legal system

The Italian legal system is based on a written Constitution which entered into force on 1 January 1948 and is guaranteed by a relatively centralised judicial review of enacted laws adopted by either the national Parliament or regional legislative bodies.

Italian regions have increasingly important law-making powers within the limits of the state's exclusive competences, in accordance with Article 117 of the Italian Constitution. Measures for social integration and the practical organisation of public services (social and health services, for instance) fall within the competence of the regions; however, it is the role of central Government to determine 'the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory' (Article 117(2)(m)). Moreover, according to Article 177(7) of the Italian Constitution, '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 elected office.'

The regions and the autonomous provinces of Trento and Bolzano participate in the EU legislative process and apply and implement international agreements and European Union legal acts. The regions with special constitutional status (Friuli Venezia Giulia, Sardinia, Sicily, Trentino Alto-Adige and Valle d'Aosta) have particularly extensive legislative powers.

The municipalities, provinces and metropolitan cities have regulatory powers in accordance with the system of organisation and mode of operation that has been granted to them.

This division of competences is far from clear and has generated considerable case law from the Constitutional Court. As far as discrimination laws are concerned, in a judgment of 2006 the Constitutional Court quashed the section of a law enacted by the region of Tuscany, 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 an obligation falls under the exclusive competence of the state at national rather than regional level, being an infringement of the individual's freedom of contract.⁵⁵

Any laws, regulations, administrative acts or municipal acts must comply with the Constitution. In addition, provisions derived from international human rights instruments (and the related jurisprudence from international courts) are also employed by Italian courts, either in order to interpret Italian enacted law or to directly decide cases.

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

List of main legislation transposing and implementing the directives

- Legislative Decree 215/2003 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin
Abbreviation: Legislative Decree 215/2003⁵⁶

⁵⁵ Constitutional Court 4 July 2006, no. 253 (other measures contained in the same law introducing actions to combat discrimination in employment were not ruled to be in conflict with the Constitution). On this decision see Maffei D. (2007), *Offerta al pubblico e divieto di discriminazione*, Milan: Giuffrè, p. 139.

⁵⁶ Italy, Legislative Decree 215/2003 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin (*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*

Date of adoption: 9 July 2003.

Entry into force: 27 August 2003

Latest amendments: Article 28 of Legislative Decree 150/2011

Grounds covered: Race and ethnic origin

Material scope: Public employment, private employment, access to goods or services (including housing), social protection, social advantages, education

- Legislative Decree 216/2003 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation

Abbreviation: Legislative Decree 216/2003⁵⁷

Date of adoption: 9 July 2003.

Entry into force: 28 August 2003

Latest amendments: Article 9, paragraph 4-ter, Law decree no. 76/2013, converted into law no. 99/2013

Grounds covered: Religion or belief, disability, age, sexual orientation

Material scope: Private and public employment

etnica), available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;215, accessed 4 September 2015.

⁵⁷ Italy, Legislative Decree 216/2003 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation (*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*), available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;216!vig=.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Italian constitution includes the following articles dealing with non-discrimination.

Article 3: provides a general clause. It 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. The grounds of discrimination listed in Article 3 are more restricted than those mentioned in Article 19; however, the list has been interpreted as non-exhaustive.⁵⁸ 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.

Article 8(1): contains a specific clause regarding freedom and equality of religions.

Article 37(1): contains a specific clause regarding sex discrimination in labour law.

Article 37(3): contains a specific clause providing for equal pay for equal work of minors.

Article 51: contains a specific clause regarding equal access of women and men to elected office.

These provisions apply to all areas covered by the directives and there is no restriction to their material scope. In theory, they are directly applicable and can be enforced against private actors (as opposed to the state); however, there are not many cases of this type, while the majority of the judgments applying constitutional provisions are issued by the Constitutional court with regard to the validity of laws.

⁵⁸ Several judgments have been issued by the Constitutional Court applying Article 3 of the Italian Constitution. One of the most relevant ones in the field of sexual orientation is no. 10 of 21 April 2010, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=138>; one of the few judgments in the field of disability is no. 80 of 22 February 2010, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=80>.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

Discrimination on the following grounds is explicitly prohibited in national law: race and ethnic origin; religion and personal belief; age; disability; sexual orientation; sex; nationality; language; political opinion; personal and social condition.

The protection against discrimination on those grounds is provided for in different pieces of law:

- Italian Constitution, Article 3: sex, race, language, religion, political opinion, personal and social conditions;
- Legislative Decree 215/2003: race and ethnic origin;
- Legislative Decree 216/2003: age, disability, religion and belief, sexual orientation;
- Legislative Decree 286/1998, Article 43(1): race, colour, ancestry, national or ethnic origin, religion or personal belief;
- Act 300/1970, Article 15: political opinion, race, religion, language, sex, disability, age, sexual orientation or personal belief.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

The two legislative decrees transposing the directives do not contain any definition of the grounds of unlawful discrimination.

Disability: regarding disability, a definition is given by Article 3, paragraph 2, of Act 104/1992 (Framework Law on care, social integration and rights of disabled people),⁵⁹ according to which, 'A disabled person 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 and is such as to place the person in a situation of social disadvantage or exclusion'.

Moreover, the guidance on the concept of 'persons with disabilities' provided by Article 1 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), ratified by Italy through Act 18/2009, is now part of the Italian legal order.⁶⁰ Owing to this Convention and in particular to the concept of 'interaction with various barriers', a social model of disability has been formally introduced into national law. This definition is in line with the CJEU judgment in the case of *Ring and Skouboe Werge* but with a wider material scope: in *Ring and Skouboe Werge*, as well in the previous *Chacón Navas* case the definition of disability concerns 'professional life', while both the definitions provided by the UN Convention and Act 104/1992 apply to any kind of 'participation in society'.

Racial and ethnic origin: no definition is provided elsewhere in national law for either of the two elements of this ground. It is worth mentioning that, according to Article 43 of the 1998 Immigration Decree, mainly inspired by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), discrimination on the ground of national origin is prohibited and interpreted as covering nationality (as in citizenship).

No definition is given even in the field of equality data collection. For instance, within the framework of the first survey on discrimination, carried out in 2011-12 by the National

⁵⁹ Italy, Framework Law on the care, social integration and rights of disabled persons (*Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate*), 5 February 1992 no. 104, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1992-02-05;104!vig>.

⁶⁰ No judgment has been delivered concerning the so-called social model of disability according to Art. 1 of the ICRPD.

Office of Statistics,⁶¹ ethnic origin was one of the grounds taken into consideration but without giving any definitions and taking migrants as a proxy.

Religion: 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 case⁶² where 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' 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'. These criteria have been applied and further detailed, especially with regard to Scientology, which, according to the case law of the Supreme Court, meets the criteria for inclusion as a 'religious denomination' protected under the Constitution. However, such criteria have never been tested in the context of anti-discrimination cases.

Belief: an innovative judgment was made by the Court of Rome, later confirmed by the Court of Appeal.⁶³ The notion of belief laid down by Directive 2000/78/EC has been interpreted to include trade union membership. Therefore, discrimination suffered by members of a left-wing union was dealt with according to that directive and its implementing legislation, i.e. Legislative Decree 216/2003, while the traditional case law on similar cases usually applies the Workers Act 1970 (Act no. 30).⁶⁴

Age: age is taken into account in several pieces of legislation, in particular with regard to labour policy, social issues and social security. Despite the fact that the Italian Constitution only provides express protection to young people, (Article 37(2)), scholars believe that there is a general prohibition of discrimination on the ground of age deriving from Article 3 of the Italian Constitution ('personal conditions') and from the interpretation of Article 37(3) afforded by the Constitutional Court, which has also applied the same Article to workers aged between 18 and 21.⁶⁵

Sexual orientation: no definition is given either of this term or of others used in the same context, such as 'gender identity', or 'transsexual and transgender' (see for instance the Tuscan Region Act 63/2004).⁶⁶

A definition of sexual orientation is provided by the Italian strategy to prevent and combat discrimination on the grounds of sexual orientation and gender identity, enacted to implement Council of Europe Recommendation CM/Rec (2010)5, approved in 2013. This is a non-binding document the implementation of which depends on the Government. It may be referred to by national courts or other bodies dealing with equality and non-discrimination issues. The strategy includes a glossary where several definitions are given. In particular, sexual orientation is defined as: 'the direction of affective and sexual attraction towards other people: it can be heterosexual, homosexual or bisexual'.⁶⁷

⁶¹ The survey was promoted and funded by the Department of Equal Opportunity of the Government, within which the National Equality Body, UNAR, is based. 'Survey on discriminations on grounds of gender, sexual orientation and ethnic origin' (IST-02258 *Indagine sulle discriminazioni in base al genere, all'orientamento sessuale, alla appartenenza etnica*), in National Statistical Programme 2011-2013, at 90-91, <http://www.sistan.it/index.php?id=52>.

⁶² Constitutional Court, no. 195 of 27 April 1993, <http://www.cortecostituzionale.it/actionPronuncia.do>.

⁶³ Court of Rome, 19 June 2012, www.dplmodena.it/Fiat-Fiom%20-%20Corte%20Appello%20Roma%209-10-12.pdf.

⁶⁴ Italy, Workers Act, Law no. 30 of 20 May 1970, www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1970-05-20;300!vig=.

⁶⁵ Constitutional Court, no. 749 of 18 December 1983, <http://www.cortecostituzionale.it/actionPronuncia.do>.

⁶⁶ Tuscan Region, Provisions against discrimination on the ground of sexual orientation or gender identity, (Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere), 15 November 2004 no. 63, available at <http://raccoltanormativa.consiglio.regione.toscana.it/articolo?urndoc=urn:nir:regione.toscana:legge:2004-11-15;63>.

⁶⁷ Italy, National strategy to prevent and combat discrimination on the grounds of sexual orientation and gender identity (*Strategia nazionale per la prevenzione e il contrasto delle discriminazioni basate sull'orientamento sessuale e sull'identità di genere 2013-2015*) <http://www.unar.it/unar/portal/?p=1921>.

Moreover, in recent years, case law has started to extend rights expressly afforded to heterosexual couples to same-sex ones, taking into account, despite not defining sexual orientation.⁶⁸

2.1.2 Multiple discrimination

In Italy prohibition of multiple discrimination is not included in the law. A very limited exception is the opening provision (Article 1) of Legislative Decree 216/2003 transposing Directive 2000/78/EC, 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'. Legislative Decree 215/2003 transposing Directive 2000/43/EC contains the same statement but with the addition of the 'existence of forms of racism of a cultural and religious character'.

An explicit reference to multiple discrimination is provided for in the Programme of action for the integration of people with disabilities, approved in 2013.⁶⁹ On page 7 of the Programme, multiple discrimination is taken into account in order to define new criteria to collect data on the integration of people with disabilities so that it will be possible to verify their effective integration and the other factors which ease or hinder integration.

In the 2013 report by the *Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull'origine etnica*, UNAR (Office for the promotion of equal treatment and prevention of discrimination on the grounds of race or ethnic origin), the extension of the grounds of discrimination covered by UNAR is seen as a way to address multiple discrimination.⁷⁰

In Italy there is no significant case law on this point. In a judgment of the Court of Padua of 17 February 2012, for instance, where the victims had been insulted because they were black and trade union activists, the case was handled as one of racial discrimination, without reference to the multiple discrimination at issue.⁷¹

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Italy the following national law (including case law) does not prohibit discrimination based on perception or assumption of a person's characteristics.

Legislative Decree 215/2003 and Legislative Decree 216/003.

The issue of assumed discrimination has not yet led to any relevant legal debate. However, the wording of the decrees and of other existing anti-discrimination rules allows a wide interpretation, including this, among the kinds of discrimination prohibited.

An interesting judgment in this regard concerns a person who was found to be a victim of discrimination because of negative stereotypes about Roma written in a legal handbook.

⁶⁸ Constitutional Court 14 April 2010, n° 138, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=138>; Supreme Court, 9.02.2015, <http://dirittocivilecontemporaneo.com/wp-content/uploads/2015/02/Cass.-matrimonio-omosessuale.pdf>.

⁶⁹ Italy, Biannual programme of action for the integration of people with disabilities (*Adozione del programma di azione biennale per la promozione dei diritti e l'integrazione delle persone con disabilità*), 4 October 2013, available at: www.gazzettaufficiale.it/eli/id/2013/12/28/13A10469/sq.

⁷⁰ From now on the Office will be referred to as UNAR and with the short denomination National Office Against Discrimination. See UNAR (2013), *Relazione al presidente del consiglio dei ministri – Anno 2013* (Report to the President of the Council of Ministers - Year 2013), available at: www.unar.it/unar/portal/wp-content/uploads/2014/01/RELAZIONE-PCM-2013.pdf, see in particular pp. 9 and 48.

⁷¹ http://www.meltingpot.org/IMG/pdf/trib_pd_sent_206_2012_17022012.pdf.

This legal handbook included discriminatory examples about criminal behaviours attributed to Roma. The action against the publisher was brought to court by a woman of Roma origin, with the support of two NGOs, Association 21 Luglio and ASGI. One of the most interesting points about this judgment is the recognition of the woman's legal standing: the act of discrimination was not addressed to her specifically, but she qualified as a victim because she was a person belonging to the Roma Community.⁷²

b) Discrimination by association

In Italy the following national law (including case law) does not prohibit discrimination based on perception or assumption of a person's characteristics:

Legislative Decree 215/2003 and Legislative Decree 216/003.

The issue of associated discrimination has not yet led to any relevant legal debate. However, the wording of the decrees and of other existing anti-discrimination rules allows a wide interpretation, including this, among the kinds of discrimination prohibited.

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

a) Prohibition and definition of direct discrimination

In Italy direct discrimination is prohibited in national law. It is defined in Article 2 of both legislative decrees implementing the two directives, with a faithful transposition of the directives' definition: direct discrimination occurs when 'one person is treated less favourably than another is, has been or would be treated in a comparable situation'. An identical definition is provided for by Article 2 of Act 67/2006 on Measures for the judicial protection of persons with disabilities who are victims of discrimination in fields outside employment.⁷³

b) Justification of direct discrimination

Justification of direct discrimination is not generally admitted.

2.2.1 Situation testing

a) Legal framework

In Italy the law is silent about the admissibility of situation testing. In theory it is permitted, according to the general rules of evidence (Articles 2697-2739 Italian Civil Code). No specific statutory reference is possible.

b) Practice

In Italy situation testing is not used in practice.

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

a) Prohibition and definition of indirect discrimination

In Italy indirect discrimination is prohibited in national law. It is defined in Article 2 of both legislative decrees as a situation, 'where an apparently neutral provision, criterion,

⁷² Court of Rome, *ASGI and Associazione 21 Luglio v. Rome Capital and Italian Government*, 4 June 2016, <http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuto.pdf>.

⁷³ Italy, Measures for the judicial protection of persons with disabilities who are victims of discrimination (*Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*), 1 March 2006 no. 67, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006-03-01;67!vig>.

practice, act, pact or behaviour would put persons [followed by reference to the specific grounds] at a particular disadvantage compared with other persons’.

An analogous definition is given in Article 2, paragraph 3, of Act 67/2006 on discrimination on ground of disability.

b) Justification test for indirect discrimination

Articles 3(4) (race) and 3(6) (other grounds) of the legislative 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 (...).’

The justification test is in line with the directives and it has not raised any particular issues in its application by the courts.

It is interesting to note that Article 3(6) goes on to say 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’. 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 is it apparent which of the grounds of the directives could be relevant in the case of a criminal conviction of the kind described here, at least if one refuses to include paedophilia as a sexual orientation.

No express reference to justification is made by Act 67/2006 on discrimination on the ground of disability.

c) Comparison in relation to age discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In Italy there are national rules permitting data collection within the limit set by the Data Protection Act⁷⁴ and the Workers Act, Act 300/1970.⁷⁵ According to the former, in particular Article 4 (d), sensitive data are those which may reveal racial and ethnic origin, religious, philosophical or other belief, political opinions, membership of a political party, trade union or religious association or organisation and data concerning health status and sexual identity. These data may be handled within the particular limits set out in general terms in Article 22 of the same act. The collection of sensitive data for statistical purposes is an exception to this regime, in accordance with Article 107, which permits wider parameters for collection, but in compliance with the ethical codes of conduct already in force.

Access to these data is therefore extremely restricted and they can only be stored and processed with the authorisation of the individuals concerned and of the State Agency for the Protection of Privacy (*Garante per la protezione dei dati personali*). According to the

⁷⁴ Italy: Personal Data Protection Code (*Codice in materia di protezione dei dati personali*), 30 June 2003 no. 196, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-06-30;196!vig>.

⁷⁵ Italy: 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 - Workers Act of 20 May 1970 (Act no. 300) (*Norme sulla tutela della libert  e dignit  dei lavoratori, della libert  sindacale e dell'attivit  sindacale, nei luoghi di lavoro e norme sul collocamento*), www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1970-05-20;300!vig.

latter, employers are prohibited from collecting information on their employees concerning 'their political, religious, or trade-unionist ideas, or facts which are not relevant to the appraisal of the professional skills of the worker'. Such data can be held on file by the employer for various purposes in the interests of the employee (for instance, special benefits for people with a disability or special menus for religious purposes).

In Italy statistical evidence is permitted by national law in order to establish indirect discrimination. According to Article 28(4) of Legislative Decree 150/2011,⁷⁶ when a claimant 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'.

b) Practice

In Italy the collection and use of statistical evidence in order to establish indirect discrimination has very limited practical application.

The first statistical research into gender, sexual orientation and ethnic origin was conducted by the Italian National Institute of Statistics (*Istituto nazionale di statistica, ISTAT*) during 2011 and was funded by the Government in order to collect data regarding actual discrimination experienced by people on the grounds of sexual orientation and homophobia.⁷⁷ The national strategies adopted by UNAR have taken this research as a basis for developing a number of activities to be promoted. However, none of these activities has been carried out effectively.⁷⁸

The most important case law on this issue is the judgment in the case of *FIOM CGIL v Fiat Fabbrica Italia*, issued on 19 June 2012 by the Court of Rome.⁷⁹ In this case statistics were employed as proof of discrimination against workers on the ground of belief. In particular, the defendant held that workers were recruited in an impartial way and through objective criteria, without any discriminatory intent. However, no worker who was a member of the trade union FIOM was employed by Fiat Fabbrica Italia. Statistics showed that the chances were only one in ten million that this had happened by coincidence and not as a consequence of a deliberate intention to discriminate against the workers who had most strongly contested Fiat's new industrial strategy.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Italy harassment is prohibited in national law. It is defined in Article 2(3) of both legislative decrees implementing the directives, using 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'.

⁷⁶ Italy: Additional Measures to the Civil Procedural Code in order to reduce and simplify civil proceedings, according to Article 54 of Law no. 69 of 19 June 2009, (*Decreto legislativo 1 settembre 2011, n. 150 Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'articolo 54 della legge 18 giugno 2009, n. 69*), 1 September 2011 no. 150, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011-09-01;150!vig>.

⁷⁷ Istat, The Homosexual Population in Italian Society (*La popolazione omosessuale nella società italiana*), available at: <http://www.istat.it/it/archivio/62168>.

⁷⁸ Italy, National strategy to prevent and combat discrimination on the grounds of sexual orientation and gender identity (*Strategia nazionale per la prevenzione e il contrasto delle discriminazioni basate sull'orientamento sessuale e sull'identità di genere 2013-2015*) <http://www.unar.it/unar/portal/?p=1921>; 'National Strategy for the Inclusion of Roma, Sinti and Caminanti Communities', http://ec.europa.eu/justice/discrimination/files/roma_italy_strategy_en.pdf, in particular at 33-34. Hyperlink last accessed 25 March 2016.

⁷⁹ Court of Rome, 19 June 2012, <http://www.dplmodena.it/21-06-12TribRomaSentFiatDiscrimin.pdf>.

In Italy harassment does explicitly constitute a form of discrimination.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Italy the employer and the employee are liable. Since the legislative decrees are silent on the scope of liability for discrimination, the liability of those other than the individual discriminator 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 former is liable for the action of the latter, because there is a duty to ensure protection in the working environment.

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 while performing their duties).

With regard to trade unions and professional associations, there is no ground for holding them 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).

In a case in 2012, the Court of Milan convicted a legal person, a bank, of harassment perpetrated by its managers. According to the judge, the bank was to be held liable because the harassment was perpetrated by managers in top positions in the bank who were thus able to influence the majority of employees; the latter were not individually condemned, but in theory it is possible that both the legal person and the individual harasser or discriminator could be held liable for the same acts of discrimination.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Italy instructions to discriminate are prohibited in national law, Article 2(4) of both legislative decrees implementing the two directives. Instructions are not defined.

In Italy instructions do explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Italy the instructor and the discriminator are liable. Since the decrees are silent on the scope of liability for discrimination, the sanctions provided for persons other than the individual discriminator must be established on the basis of the general principles of liability in contract and tort.

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 their employer. If the employer or other principal defendant is liable without personal fault, or on the basis of a slighter degree of fault, they can bring an action against the discriminator to obtain complete or partial compensation of the amount paid as damages.

With regard to instruction to discriminate, a case from 2013 is relevant. The Court of Catanzaro dismissed an appeal from the parents of a disabled student against an order to discriminate given by the local administrative director to teachers and schoolmates. According to the court, the order to discriminate could not be condemned *per se* since it did not produce any discriminatory effects and the administrative director was sanctioned by the Regional Department of Education.

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

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Italy the duty to provide reasonable accommodation is included in law. It is not defined.

The relevant provision is Article 3(3-bis) of Legislative Decree 216/2003, inserted in order to execute an infringement judgment of the Court of Justice of the European Union (CJEU).⁸⁰ According to the Article: 'in order to apply the principle of equal treatment of persons with disabilities, private and public employers shall provide for reasonable accommodation according to the UN Convention on the Rights of Persons with Disabilities, ratified by Act 18/2009, in workplaces, to guarantee persons with disabilities full equality with other workers. Public employers shall apply this provision without any additional burden and with the human, financial and technical resources already available'. This is a standard formula included in various laws in Italy in order to limit public spending; however, it is likely to breach the duty to provide reasonable accommodation in accordance with Article 5 of Directive 2000/78/EC, which excludes 'disproportionate' burdens, thus entailing that a sort of 'soft' burden may be necessary and may have to be borne by employers.

It is worth mentioning a form of reasonable accommodation measures that are provided for in the field of religion. Forms of favourable differential treatment exist with regard to religion for religious organisations which have signed agreements with the state. Such positive action mostly relates to holidays for Jews and Seventh-Day Adventists.⁸¹ The statute transposing the agreement with the Adventists, for instance, establishes the right of those employed by either private or public employers to refrain from working on Saturdays, with the limitation 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 usually been interpreted by courts in favour of employees through a narrow interpretation of the limitations. Dismissals based on a refusal to work on Saturdays have normally been considered illegal, and the court has ordered the reinstatement of the worker and payment of damages.⁸² With regard to Jewish people, the relevant act also establishes an obligation to take into consideration the obligation to rest on Saturday when setting dates of tests for public sector employment.

The needs of Muslims are an ongoing issue 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.

- b) Practice

⁸⁰ Italy, Law Decree converted into law regarding preliminary urgent measures for the promotion of employment, in particular of young people, of social cohesion and on other urgent financial measures (*Conversione in legge, con modificazioni, del decreto-legge 28 giugno 2013, n. 76, recante primi interventi urgenti per la promozione dell'occupazione, in particolare giovanile, della coesione sociale, nonché in materia di Imposta sul valore aggiunto (IVA) e altre misure finanziarie urgenti*), 9 August 2013 no. 99, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2013-08-09;99!vig>.

⁸¹ See Italy, Agreement with the Adventists faith (*Norme per la regolazione dei rapporti tra lo Stato e l'Unione italiana delle Chiese cristiane avventiste del 7° giorno*), 22 November 1998 no. 516, Article 17; Agreement with the Jewish faith (*Norme per la regolazione dei rapporti tra lo Stato e l'Unione delle Comunità ebraiche italiane*), 8 March 1989 no. 101. Both acts are available at: http://www.governo.it/Presidenza/USRI/confessioni/intese_indice.html.

⁸² See, for instance, the judgment of the Court of Rome of 6 November 1998, in *Il diritto ecclesiastico*, II, 2000, p. 95 ff.

With regard to the practical implementation, problems are associated with the requirement at the end of the provision, addressed to public employers who are bound to respect the duty to provide for reasonable accommodation 'without any additional burden and with the human, financial and technical resources already available'. This is a sort of ritual clause in Italian laws in an era of economic crisis and financial constrictions, but it is hardly likely that an employer, either public or private, will be able to afford to provide reasonable accommodation without any additional financial or human resources. In general there is no practical guidance on how to implement the provision and there could be some difficulty around the interpretation of the exact duty on employers.

In this regard, a new law was introduced in 2015, aiming to simplify the employment of persons with disability by amending Law 1999 no. 68.⁸³ According to new Article 14, the Regional Fund for the Employment of Persons with Disability shall fund regional programmes for the inclusion of workers with disability. This includes the reimbursement of costs incurred by employers to provide for reasonable accommodation for persons with limited working capacity (below 50%).

c) Definition of disability and non-discrimination protection

No specific definition of disability is given in the context of reasonable accommodation.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Italy there is no duty to provide reasonable accommodation for people with disabilities outside the employment field.

Italian law on people with disabilities is not based on the general concept of 'reasonable accommodation' either within or outside the field of employment. This was clarified by the CJEU in its judgment against Italy of 4 July 2013. Indeed the Court rejected the basic argument raised by the Italian Government, according to which Article 5 of Directive 2000/78/EC was implemented not in Legislative Decree no. 216/2003 but in other laws already in force even before the transposition of the anti-discrimination directives. In this regard, the Government referred to Act 104/1992, the Framework Law on the care, social integration and rights of disabled people; Act 68/1999 on the Right of disabled people to work;⁸⁴ Act 381/1991 on Social co-operatives; and Legislative Decree no. 81/2008 on work health and safety. According to the CJEU, while all these laws provide for measures of aid and support, social integration and protection of people with disabilities, none of them provide for a general duty to provide reasonable accommodation, that is to offer effective solutions to eliminate 'the various barriers that hinder the full and effective participation of persons with disabilities in professional life [...]'.⁸⁵

A positive development in this regard could be triggered by the UNCRPD, which was ratified in Italy by Act 18/2009. According to the Convention, the denial of reasonable accommodation amounts to discrimination and specific duties are placed upon Governments in the field of education and in cases of deprivation of personal freedom. A

⁸³ Italy: Legislative Decree of 14 September 2015, no. 151, Simplification of procedures and duties upon citizens and companies (*Disposizioni di razionalizzazione e semplificazione delle procedure e degli adempimenti a carico di cittadini e imprese e altre disposizioni in materia di rapporto di lavoro e pari opportunità, in attuazione della legge 10 dicembre 2014, n. 183*), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-09-14;151!vig>.

⁸⁴ Italy: Law no. 68 of 12 March 1999, Provisions on the right to work of persons with disability (*Norme per il diritto al lavoro dei disabili*), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-03-12;68!vig>.

⁸⁵ Court of Justice of the European Union CJEU, C-335/11, *HK Danmark*, 11 April 2013, point 54.

relevant decision was issued by the Court of Bologna in 2013,⁸⁶ anticipating the CJEU judgment against Italy and applying both the Directive 2000/78/EC and the UNCRPD.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Italy failure to meet the duty of reasonable accommodation does not count as discrimination.

The provisions of Article 3(3-bis) of Legislative Decree 216/2003 on reasonable accommodation are not included in Article 2, regarding definition of discrimination, but in Article 3 on the scope of application. According to Article 3(3-bis), the duty to provide reasonable accommodation is a means to respect the principle of equality of treatment of people with disabilities. There is no other specific link to the prohibition of discrimination nor any specific sanction, other than the general ones provided for discrimination in general.

However, reference to the UNCRPD, thanks to Act 18/2009, leads to consider that a failure to provide reasonable accommodation constitutes discrimination. This is what is stated in a judgment from the Court of Bologna of 18 June 2013: the Court held that the local health service was liable for failure to provide reasonable accommodation for a disabled fixed-term employee and required it to pay compensation of damages amounting to the equivalent of the six months' salary the claimant would have earned had he been hired.⁸⁷ The same stance was taken by the Court of Pisa in its judgment of 16 April 2015: the Court held that an employer should provide reasonable accommodation in order to allow the employee, who was no longer able to perform her tasks on account of her status of person with a disability, to continue working in the same company, and it therefore annulled her dismissal.⁸⁸

Since the failure to provide reasonable accommodation is not defined as discrimination but 'only' as a means to respect the principle of equality, there could be doubts about the application of the shift of the burden of proof that is provided for to show discrimination. There is room for wide and coherent provision but a clarification on this point by the European Commission or the CJEU could be very useful.

f) Duties to provide reasonable accommodation in respect of other grounds

In Italy there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

g) Accessibility of services, buildings and infrastructure

In Italy national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.⁸⁹ Violation of the mandatory requirements contained in these rules could certainly be considered as a form of discrimination, according to Act 18/2009 implementing the UNCRPD. The level of

⁸⁶ Court of Bologna, Judgment of 17 June 2013, http://www.superabile.it/repository/ContentManagement/information/N534144425/8.1%20Accomod_Ragio_nevoli_Sentenza_bologna_ord_18062013.pdf.

⁸⁷ *Ibidem*.

⁸⁸ Court of Pisa, 16 April 2015, <http://www.osservatoriodiscriminazioni.org/index.php/2015/10/19/tribunale-pisa-ordinanza-del-16-aprile-2015/>.

⁸⁹ Italy, Measures to overcome architectural barriers and to remove architectural barriers in private buildings (*Disposizioni per favorire il superamento e l'eliminazione delle barriere architettoniche negli edifici privati*), 9 January 1989, no. 13, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1989-01-09;13!vig>; Italy, Regulation regarding measures to overcome architectural barriers in public buildings, areas and services (*Regolamento recante norme per l'eliminazione delle barriere architettoniche negli edifici, spazi e servizi pubblici*), available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1996-07-24;503!vig>.

compliance is high with regard to public buildings, while for private premises it is affected by the general problem of enforcing construction standards (the situation can vary greatly from place to place).

In Italy national law contains a general duty to provide accessibility by anticipation for people with disabilities, in accordance with the UNCRPD.⁹⁰ In particular, the principle of accessibility is referred to in the 'Programme of action on disability' and linked to the principle of non-discrimination.⁹¹ In this context accessibility is defined in accordance with the Convention as a prerequisite to allow people with disabilities to fully enjoy their human rights and fundamental freedoms in every field. This applies not only to the physical built environment but also to goods, services, communication and the media. In the same Programme several measures are proposed, both reforming the legal order with the formal introduction of the principle and giving practical guidelines to implement it in the following sectors: environment, internal and external infrastructure, mobility and access to information technology, communication and the media.

A specific provision is that of Law 9 January 2004 no. 4 on Measures to promote access by persons with disabilities to information technology.⁹² Several provisions apply to the public administration and to the accessibility via the internet of their resources. Article 4, paragraph 4, of the same law provides for a specific duty upon employers to give employees with disabilities appropriate hardware and software and the necessary technology related to the activities to be performed.

h) Accessibility of public documents

In Italy there is no general requirement for public services to translate their documents into Braille. Specific provisions apply, in particular there is a duty to provide expiry dates of medication in Braille.⁹³

Law 9 January 2004 no. 4 on Measures to promote access by persons with disabilities to information technology,⁹⁴ provides a duty to guarantee that all digital content of the public administration is accessible by people with disabilities. The duty also applies to all schools; in particular, framework contracts between schools and publishers must include the duty to provide school libraries with digital versions of educational materials which are accessible by students with disabilities and support teachers. In the Programme of action on disability, translation into Braille and sign language is taken into account as one of the skills to be acquired by teachers and support staff (p. 37).

With regard to sign language, a debate has arisen about the implementation of the UNCRPD in relation to the recognition of sign language and the identity of deaf culture. Many experts and two organisations have contested the approach behind this recognition, which they

⁹⁰ A general duty comes from the UNCRPD, as ratified and executed under Act 18/2009. Relevant provisions are provided for by the Framework Law on the care, social integration and rights of disabled persons (*Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate*), 5 February 1992 no. 104, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1992-02-05:104!vig>.

⁹¹ Italy, Presidential Decree on the Adoption of the biannual programme of action on the rights and integration of persons with disabilities (*Decreto del presidente della repubblica, 4 ottobre 2013, Adozione del programma di azione biennale per la promozione dei diritti e l'integrazione delle persone con disabilità*), available at www.gazzettaufficiale.it/eli/id/2013/12/28/13A10469/sg, p. 28.

⁹² Italy, Law no. 4 of 9 January 2004, Measures to promote access by persons with disabilities to information technology (*Disposizioni per favorire l'accesso dei soggetti disabili agli strumenti informatici*), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2004-01-09:4!vig>.

⁹³ Italy, Ministerial Decree of 13 April 2007 regarding the publication of expiry dates of medication in Braille (*Modalità di indicazione della data di scadenza in caratteri Braille sulle confezioni dei medicinali. Termine di decorrenza dell'obbligo di riportare ad inchiostro la data di scadenza sulle confezioni di medicinali*), <http://gazzette.comune.iesi.an.it/2007/96/4.htm>.

⁹⁴ Italy, Law no. 4 of 9 January 2004, Measures to promote access by persons with disabilities to information technology (*Disposizioni per favorire l'accesso dei soggetti disabili agli strumenti informatici*), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2004-01-09:4!vig>.

consider to lower the level of integration and support afforded to deaf people, in particular children. The issue is twofold. First of all there is the scientific question of the preferred approach in relation to deaf people (preserving and promoting deaf culture and sign language or promoting early diagnosis and the most appropriate remedy, such as prostheses). If the latter approach is chosen, it is then necessary to resolve a legal question. This is because Act 104/1992 is inspired by the idea of integrating people with disabilities into society, as well as providing all the available therapies to minimise the individual's impairment. This approach could clash with a strong affirmation of sign language as an essential element of 'deaf culture', which in certain cases could contribute to supporting policies which aim to underline differences instead of minimising them. The question then arises of whether the approach, rights and principle enshrined in a national law (such as Act 104/1992) can be changed to implement a human rights convention, such as the UN Convention on the Rights of 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 UNCRPD.

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)

In Italy there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

In Italy the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination. This comes from Article 3(1) of both decrees implementing the two directives which provides for the application of the principle of equal treatment to all persons either in both the public and private sectors.

In Italy the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. This is derived from the general provision in Article 3(1) of both decrees implementing the two directives and from the provision in Article 1 of Act 67/2006 on Discrimination against persons with disability in fields outside employment.⁹⁵ Moreover, two liability provisions are mentioned in Legislative Decree 286/1998 (the Immigration Decree).⁹⁶ Article 43(2)(e), according to which there is discrimination in the case of an act or treatment promoted by an employer which places workers in a situation of particular disadvantage on grounds of their race, ethnic or linguistic origin, religion or citizenship. No specific provision covers other grounds of discrimination. Article 44(10), specifically addresses the liability of employers by giving trade unions the right to legal standing in cases of collective discrimination. Finally, the following paragraph of the same Article concerns sanctions against legal persons, such as the suspension of entitlement to any sort of public financial assistance and, in the most serious cases, disqualification from entitlement to any public financial assistance or tenders for up to two years.

b) Private and public sector including public bodies

In Italy the personal scope of national law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination. This is derived from Article 3(1) of both decrees implementing the two directives, and provides for the application of the principle of equal treatment to all persons in both the public and private sectors, without any further specification or exception regarding liability.

The same wide scope of application is found in Article 1 of Act 67/2006 on disability discrimination and in Articles 43(2)(e) and 44(10) of Legislative Decree 286/1998 (the Immigration Decree).

⁹⁵ Italy, Measures for the judicial protection of persons with disabilities who are victims of discrimination (*Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*), 1 March 2006 no. 67, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006-03-01;67!vig>.

⁹⁶ Italy, Legislative Decree on immigration and the treatment of foreign citizens – Immigration Decree (*Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*), 25 July 1998, no. 286.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Italy national legislation applies to all areas of private and public sector employment, self-employment and occupation, including contract work, self-employment, military service and holding statutory office, for the five grounds. This is derived from the combination of the provisions on the personal scope of application – Article 3(1) of both decrees implementing the two directives – with the provision on the material scope of application, in particular Article 3(1) (a-d).

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))

In Italy national legislation includes conditions for access to employment, self-employment and occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both the private and public sectors as described in the directives.

The key provision - Article 3(1)(a) - on the material scope of the legislative 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 'access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions'.

A similar provision is contained in Articles 43(2)(e) 44(10) of the Immigration Decree.

No distinctions apply between branches of activity or levels of professional hierarchy.

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

In Italy national legislation includes working conditions including pay and dismissals, for all five grounds and for both private and public sector employment.

The key provision - Article 3(1)(b) - on the material scope of the legislative 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 'employment and working conditions, including promotions, dismissals and pay'.

Similarly, Article 43(2) of the Immigration Decree provides for general protection of workers from discrimination.

3.2.3.1 Occupational pensions constituting part of pay

This 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 thus be considered to be in line with *Maruko* standards.⁹⁷ 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

⁹⁷ The CJEU confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78/EC. CJEU, Judgment of 1 April 2008, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, C-267/06, points 59-61.

factors other than age, gender and type of profession to be taken into account. Indirect discrimination on one of the grounds covered by Directive 2000/78/EC 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))

In Italy national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

The key provision - Article 3(1)(c) - on the material scope of the legislative decrees transposing the directives expressly establishes that the prohibition of discrimination and related judicial remedies apply to all persons in the public and private sectors with reference to 'access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience'.

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 Italy national legislation includes membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

The key provision - Article 3(1)(d) - on the material scope of the legislative 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 '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'.

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

In Italy national legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive. The key provision is Article 3(1) (e-f) of Decree 215/2003.

Protection against discrimination on grounds of ancestry, religion, national or ethnic origin, religious beliefs and practices in the field of social protection, including social security and healthcare is also found in Article 43 of the Immigration Decree.

With regard to disability, according to Article 1 of Act 67/2006, this law has a general application and therefore also covers social protection, including social security and healthcare.

In these fields, national anti-discrimination laws do not cover discrimination on grounds of age and sexual orientation.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

National law relies on the exception in Article 3.3 but this point has not yet caused any difficulties.

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

In Italy national legislation includes social advantages as formulated in the Racial Equality Directive. The national provision contains the same wording of the directive ('prestazioni sociali' in Italian) and is included in the provision of Decree 215/2003 concerning the scope of application, that is Article 3(1)(g). The inclusion of social advantages is also derived from Article 43 of Legislative Decree 286/1998 (the Immigration Decree) and Article 1 of the Disability act 67/2006, stating that both are acts with general application.

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

In Italy national legislation includes education, as formulated in the Racial Equality Directive. The relevant provision is Article 3(1)(h) of Legislative Decree 215/2003. Religion and nationality are covered by Article 43 of Legislative Decree 286/1998 (the Immigration Decree), while disability is covered by the law against disability discrimination (Art. 1 of Act 67/2006).

With regard to discrimination on the ground of sexual orientation, national provisions do not apply to sectors outside of employment, but Italy has introduced several initiatives to promote equal treatment and prevent discrimination and homophobia in several fields, including education. In particular, education is one of the four pillars of the Italian strategy to prevent and fight discrimination on the ground of sexual orientation and gender identity, developed by UNAR to implement the Council of Europe Recommendation CM/Rec (2010)5. The first educational activities in this field, such as the publication of educational materials, elicited severe disapproval from catholic and centre-right members of Parliament together with catholic associations, eventually inducing UNAR to cease its activities in this area. This example shows that it is very difficult in Italy to deal with discrimination on the ground of sexual orientation notwithstanding evidence of the existence of discrimination on this ground.

In the field of education, national laws against discrimination do not cover discrimination on grounds of age nor sexual orientation.

a) Pupils with disabilities

In Italy there are no problems with the general approach to education for pupils with disabilities. Problems are raised by the lack of funding that forces local administrators to reduce or only allow minimum hours of input from support teachers in schools.

The Italian approach in this regard is definitely to include children with disabilities in mainstream education, with individualised special support. Children therefore attend the same schools they would attend according to the ordinary admission rules and are assisted in by support teachers, in addition to their ordinary teachers, depending on the nature of their disability.

It should 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 employing new, specialist teachers for students with particularly severe disabilities on fixed-term contracts.⁹⁸ The Court declared that it was constitutionally illegal to set limits to the provision of specialist support that failed to take the situation of the individual into account. The Court's starting point was that 'disabled people 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 [disability] affecting the individual'. Against this background, removing the possibility of employing support teachers for students with significant

⁹⁸ Constitutional Court, Judgment no. 80 of 22 February 2010, available at: www.cortecostituzionale.it.

additional support needs was, in the Court's view, 'unreasonable'. According to the Court, disabled people have 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 of guarantees'. An individualised approach to the needs of disabled people was, according to the Court, constitutionally imposed by Article 24(2)(c) of the UN Convention on the Rights of Persons with Disabilities, and by the fact that the legislation on educational support for disabled children aims to pursue an 'evident national interest' implementing Article 38(3) of the Italian Constitution (right to education of disabled people).

The same principles have been restated by several judgments, the most relevant of which is that issued by the Supreme Court on 5 December 2014.⁹⁹ In this case the parents of a disabled child had challenged the decision of the school to reduce the employment of a support teacher from 25 hours a week to 12, purely on the grounds of cost. Following the judgment, the school was required to grant the total amount of hours and to pay EUR 5 000 Euro as non-pecuniary damages. The Supreme Court notes that the right to education is one of the fundamental rights of persons with disabilities. The Court refers to the relevant international sources, such as the UN CRPD, ratified in Italy and transposed by law 2009 no. 18, and the provisions on equality and non-discrimination in the EU Treaties and in the EU Charter on Fundamental Rights. According to the Supreme Court, the reduction to the support teacher's hours made by the school is indirect discrimination on the ground of disability.

A relevant provision is that of the law of 9 January 2004 no. 4 on Measures to promote access by persons with disabilities to information technology.¹⁰⁰ This duty applies to every school; in particular, framework contracts between schools and publishers must include the duty to provide school libraries with digital versions of educational materials which are accessible by students with disabilities and support teachers.

b) Trends and patterns regarding Roma pupils

In Italy there are no specific patterns, such as segregation, existing in education regarding Roma pupils. Inclusion of Roma children in classes has sometimes caused an overreaction by majority-population parents and the current anti-Roma hostility can entail further problems. However, there is as yet no basis for saying that structural discriminatory patterns exist within the education system. The limited schooling of Roma derives from factors other than obstacles to their admission to schools. One very dramatic problem is the impact of the housing system on children's school attendance. In particular, Roma segregation in camps, often established far from public services, including schools, has an adverse impact on school attendance by Roma pupils. Moreover, the frequent evictions of illegal settlements are devastating. 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 path. No significant improvement was recorded in this regard during 2015, and it appears that forced evictions have actually increased.¹⁰¹

During the 2013/14 academic year there were 11 657 Roma pupils in a state of 'housing emergency'; the school drop-out rate is much higher than the average, with 50 % of Roma children dropping-out between the primary and elementary school levels and 95 %

⁹⁹ <http://dirittocivilecontemporaneo.com/2014/11/per-le-sezioni-unite-la-mancata-attuazione-del-piano-educativo-individualizzato-elaborato-per-il-sostegno-scolastico-dell'alunno-in-situazione-di-handicap-costituisce-una-discriminazione-indiretta/>.

¹⁰⁰ Italy, Law no. 4 of 9 January 2004, Measures to promote access by persons with disabilities to information technology, (*Disposizioni per favorire l'accesso dei soggetti disabili agli strumenti informatici*), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2004-01-09;4!vig>.

¹⁰¹ <http://www.21luglio.org/peccato-capitale>.

dropping out between the elementary and higher levels.¹⁰²

The number of pupils within the education system is around 70 000. The national Roma strategy focuses on school drop-out rates and promotes actions to prevent it, including specific training for teachers within the framework agreement of cooperation agreed with the most representative associations.¹⁰³ Since the main reason for dropping out of school by Roma pupils is their living conditions, these measures are likely to produce minimal results.

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

In Italy national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive. The relevant provision is Article 3(1)(i) of Legislative Decree 215/2003 on racial discrimination. In this field protection against discrimination on grounds of ancestry, religion, national or ethnic origin, religious beliefs and practices is also included in Article 43 of the Immigration Decree.

Disability is covered by Act 67/2006 on Measures for the judicial protection of persons with disabilities who are victims of discrimination. The relevant provision is Article 1, which provides for a general scope of application, so that the act may apply to discrimination in access to and the supply of goods and services. This law is strictly connected to Framework Law 102/1994 on the rights and social integration of persons with disability. Both these provisions are of a general character, and they do not provide for specific duties such as good manufacture or design in order to make goods more suitable for persons with disability.

In these fields, national laws against discrimination do not cover discrimination on grounds of age and sexual orientation.

3.2.9.1 Distinction between goods and services available publicly or privately

In Italy national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants or banks) and those only available privately (e.g. limited to members of a private organisation).

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

In Italy national legislation includes housing as formulated in the Racial Equality Directive. The relevant provision is Article 3(1)(i) of Legislative Decree 215/2003 on race. Protection against discrimination on grounds of ancestry, religion, national or ethnic origin, religious beliefs and practices in the field of housing is also included in Article 43 of the Immigration Decree.

Disability is covered by Act 67/2006 on disability discrimination. The relevant provision is Article 1, which provides a general protection against discrimination, therefore covering housing. There is no positive duty in this law regarding adaptations to housing, nor is such a duty provided for elsewhere, except for the building of new blocks of flats.

In these areas, national laws against discrimination do not cover discrimination on grounds of age or sexual orientation.

¹⁰² Associazione 21 Luglio, Activity Report 2014, pp. 30-32, available at: <http://www.21luglio.org/wp-content/uploads/2015/04/Rapporto-annuale-Associazione-21-luglio.pdf>. The report on 2015 was not available up to January 2016.

¹⁰³ Italy, National Strategy for the inclusion of Roma, Sinti and Travellers 2012-2020 (Strategia nazionale d'inclusione dei Rom, dei Sinti, e dei Caminanti 2012/2020), pp. 52-65, available at: www.unar.it/unar/portal/wp-content/uploads/2014/02/Strategia-Rom-e-Sinti.pdf.

The issue 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 formal discrimination based on nationality, which amounts to indirect discrimination on the ground of racial or ethnic origin.

People with disabilities (and, in some cases, older people) can enjoy a variety of priority rights in the allocation of public housing, since the rankings (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.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Italy there are patterns of housing segregation and discrimination against Roma. There is a growing debate on the segregation of Roma people through their placement in 'camps', together with the harsh policies that are currently implemented against Roma settlements. However, there has not yet been any attempt to place the existence of the camps themselves within the framework of anti-discrimination law, with the exception of a recent case brought to the Court of Rome concerning a large settlement on the outskirts of the city. The case was brought by two NGOs, ASGI and Associazione 21 Luglio, which claimed that the discriminatory treatment of Roma has caused social exclusion, resulting in racial discrimination as prohibited by Directive 2000/43/EC. In a judgment issued on 9 June 2015, the Court of Rome convicted the Municipality of Rome of indirect discrimination, in accordance with Article 2 of Legislative Decree 215/2003 implementing Directive 2000/43/EC.¹⁰⁴ The Municipality of Rome was ordered to stop allocating housing to anyone else in La Barbuta camp and to remove the effects of the allocations already in force; to publish the judgment in the national newspaper, *Corriere della Sera*; and to pay half of the legal costs incurred by the two claimants. However, despite this judgment and the universal condemnation both of the 'camps' policy and of the strictly related forced eviction policy, both practices are continuing and are even increasing.¹⁰⁵ As far as housing policy regarding Roma is concerned, it is worth mentioning the report published by the European Commission against Racism and Intolerance (ECRI) as part of the fourth round of its monitoring work.¹⁰⁶ In setting out its conclusions, ECRI noted that only a few of the recommendations that it issued in 2012 have been followed up. On Roma, ECRI has found that its recommendation on the full application of the UN Basic Principles and Guidelines on Development-based Evictions and Displacement has been only partly implemented, as only small steps have been taken. The process appears very slow and does not ensure that all the Roma who may be evicted enjoy the necessary guarantees. ECRI appreciates the adoption of the National Roma Integration Strategy, but at the same time regrets the lack of concrete implementation and the prosecution of evictions of Roma, Sinti and Travellers.

Public administrations spend a huge amount of money on Roma camps without making significant improvements in the living conditions of the Roma community. On the contrary, they contribute to their segregation.¹⁰⁷ An NGO report highlights how in the Rome area alone, where the majority of the Roma population lives, EUR 100 million was allocated to fund the so-called Nomad Plan (*Piano Nomadi*) during the period 2009 to 2011. It is worth noting that a major police investigation in the city of Rome resulted in the arrest and detention of several civil servants, many of them working in the social services responsible for Roma integration. The investigation, named 'Mondo di mezzo' revealed a complex system of corruption which apparently even included the awarding of contracts for the

¹⁰⁴ Court of Rome, *ASGI, Associazione 21 Luglio v. Rome Capital and Italian Government*, 4 June 2016, <http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf>.

¹⁰⁵ <http://www.21luglio.org/peccato-capitale>.

¹⁰⁶ ECRI, Conclusions on the Implementation of the Recommendations in Respect of Italy Subject to Interim Follow-Up, 9 December 2014, <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Italy/ITA-IFU-IV-2015-004-ENG.pdf>.

¹⁰⁷ Associazione 21 Luglio, *Activity report 2014*, pp. 24-25, available at: <http://www.21luglio.org/wp-content/uploads/2015/04/Rapporto-annuale-Associazione-21-luglio.pdf>.

management of Roma camps. The criminal proceedings are still ongoing but there might be room to explore whether there were also incidences of fraud in relation to EU funding.¹⁰⁸ It is a fact that civil servants with responsibility for policies affecting Roma, Sinti and Travellers are being investigated for aggravated corruption and, in one case, also for Mafia connections.¹⁰⁹

¹⁰⁸ <http://www.avvisopubblico.it/osservatorio/contenuti-dellosservatorio/attivita-dinchiesta/commissione-bicamerale-antimafia/audizioni-della-commissione-antimafia-riguardanti-la-presenza-di-organizzazioni-mafiose-a-roma/>.

¹⁰⁹ Associazione 21 Luglio, *Activity report 2014*, pp. 42-65, available at: <http://www.21luglio.org/wp-content/uploads/2015/04/Rapporto-annuale-Associazione-21-luglio.pdf>. The trial is still pending and will last for at least two years, given that there are more than 200 defendants involved, <http://www.iltempo.it/roma-capitale/2016/04/13/mafia-capitale-imputati-tutti-agli-arresti-1.1528927>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Italy national legislation provides for an exception for genuine and determining occupational requirements.

The first part of Article 3(3) of both decrees establishes that 'in compliance with the principles of proportionality and reasonableness', within the employment relationship or entrepreneurial activity, differences in treatment due to characteristics related to the 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'. No definition is given of 'proportionality' and 'reasonableness'.

The substitution of the requirement of 'legitimate objective' with 'reasonableness' has been criticised since it could 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 Legislative Decree transposing Directive 2000/78/EC, 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, the labour market and professional education'. The inclusion of all the grounds under this provision on 'work suitability tests' probably provides too much discretion in admitting exceptions to equal treatment going beyond genuine and determining occupational requirements.

A reference to genuine and determining occupational requirement as exceptions to the prohibition of discrimination is provided in Article 43(2)(e) of the Immigration Decree. There are no specifications concerning how to apply this exception.

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

In Italy national law provides for an exception for employers with an ethos based on religion or belief, under Article 3(5) of Legislative Decree 216/2003.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Italy there are specific provisions 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.

Article 3(5) of Legislative Decree 216/2003 transposing Directive 2000/78/EC 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 the ethos of the latter must also 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 directive,¹¹⁰ 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 transposed. In particular, before the transposition of Directive 2000/78/EC the only relevant provision was that of Article 4 of Law 108/1990 ruling out the application of protection against discriminatory dismissal in cases of non-profit employers performing religious, cultural, political or trade-unionist activities.¹¹¹ Moreover, there is no transposition of the last sentence of Article 4(2), which says that this exception cannot lead to discrimination on other grounds.

- Religious institutions affecting employment in state funded entities

In Italy religious institutions are permitted to select people (on the basis of their religion) and to hire or to dismiss them from a job if the 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).

In the Italian legal system, at legislative (statutory) level, the only explicit exception to equal treatment is represented by a section of Law 108/1990 concerning among other things ideologically orientated organisations, defined as 'employers of a non-entrepreneurial character which undertake political or trade unionist activities, cultural instruction or religious activities on a non-profit basis'. 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 is 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. In addition, the exceptions to equal treatment as developed by case law are more limited than those foreseen in the Legislative Decree transposing Directive 2000/78/EC.¹¹²

Any discretion is thus excluded for organisations working on a profit-making basis and if the duties of the individual worker do not have an actual link with the organisation's ideology.¹¹³ The decree thus grants employers with an ethos based on religion and belief

¹¹⁰ For an extensive discussion of this point, see N. Fiorita (2004), '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*, p. 361 ff.

¹¹¹ Italy, Law on Provisions on Individual Dismissal (Disciplina dei licenziamenti individuali), 11 May 1990 no. 108, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1990-05-11:108:vig>.

¹¹² Supreme Court 13 July 1995, no. 7680; Supreme Court 11 April 1994, no. 3353; Supreme Court 12 October 1995, no. 10636.

¹¹³ 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*). These cases 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 was the subject of an ECHR

(and potentially all employers, if one makes a literal interpretation) a power they did not enjoy before the adoption of the directive.

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 case¹¹⁴ the Supreme Court recognised the validity of the 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 2003.¹¹⁵

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

In Italy national legislation provides for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78/EC). Legislative Decree 216/2003 establishes in 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.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Italy national law includes exceptions relating to differences in treatment based on nationality. Nationality (as in citizenship) is explicitly mentioned as a protected ground in the Immigration Decree (Article 43).

Discrimination on the ground of nationality (which also covers statelessness) is explicitly excluded from the scope of application of Legislative Decrees 215 and 216 implementing the directives, but is covered by Legislative Decree 286/1998 (the Immigration Decree).

Since 1998 several actions have been brought before the courts contesting discrimination against third-country nationals on the basis of nationality. Most concern discrimination regarding access to social benefits by local authorities (regions or municipalities) and access to public employment. In these cases, the courts have applied 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.

b) Relationship between nationality and 'race or ethnic origin'

With few exceptions as yet, when courts make their decisions they tend to mix up provisions regarding discrimination on the ground of nationality (Legislative Decree 286/1998 – the Immigration Decree) and discrimination on the ground of racial and ethnic origin, without expressly exploring the issue of indirect racial discrimination.

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

a) Benefits for married employees

judgment. The Court found violation of Article 10 of the ECHR: ECHR, 20 October 2009, *Lombardi Vallauri v Italy*, rec. no. 39128/05.

¹¹⁴ Supreme Court 24 February 2003, no. 2803.

¹¹⁵ Italy, Law on the legal status of teachers of Catholicism in institutes and schools of any category and level (*Norme sullo stato giuridico degli insegnanti di religione cattolica degli istituti e delle scuole di ogni ordine e grado*), 18 July 2003, no. 186, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2003-07-18:186!vig>. If the authorisation is withdrawn, however, the act (in Article 4) foresees a system allowing the person to move to another job within the education system under certain conditions.

In Italy it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married, although this is not provided for by law but by judicial interpretation.

However, a major problem is that of recognition of a 'de facto couple' since there is no general system of registration of civil partnerships (only a few cities have introduced such registers). Policies aiming at extending benefits to same-sex cohabitant partners are still rare.¹¹⁶ 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 53/2000¹¹⁷ and the resulting regulation adopted by Prime Ministerial Decree 278/2000¹¹⁸ extend this right in cases of the infirmity or death of a cohabiting partner in a stable relationship.¹¹⁹ 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 in order to be able to follow their partner.¹²⁰

b) Benefits for employees with opposite-sex partners

In Italy it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees with opposite-sex partners. Many problems for same-sex partners derive from the limitation of various benefits to married couples, since Italy does not recognise same-sex marriage or registered partnerships.¹²¹

The lack of recognition of civil unions is the subject of the *Oliari* judgment, which was delivered by the European Court of Human Rights on 21 July 2015.¹²² The ECtHR held unanimously that there had been a violation of Article 8 (right to respect for private and family life) of the ECHR, with formal recognition of same-sex couples lacking. The Court took into account the 'trend among Council of Europe Member States towards legal recognition of same-sex couples – 24 out of the 47 Member States having legislated in favour of such recognition', the case law of the Italian Constitutional Court and, quite surprisingly, even recent surveys, according to which 'a majority of the Italian population supported legal recognition of homosexual couples'.¹²³

¹¹⁶ The health insurance fund for journalists extends its benefits to *de facto* cohabitants, expressly including same-sex partners (see www.casagit.it).

¹¹⁷ Italy, Provisions to support motherhood and fatherhood, on the right to care and training, on the co-ordination of daily times in cities (*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*), 8 March 2000 no. 53, available at <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2000-03-08:53!vig>.

¹¹⁸ Italy, Regulation concerning provisions for the implementation of Article 4 of Act no. 53 of 8 March 2000 on leave for particular reasons and events (*Regolamento recante disposizioni di attuazione dell'articolo 4 della legge 8 marzo 2000, n. 53, concernente congedi per eventi e cause particolari*), 21 July 2000 no. 278, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:presidenza.consiglio.ministri.ministro.solidarieta.sociale:decreto:2000-07-21:278!vig=2015-09-03>.

¹¹⁹ The act makes reference to the registered family as defined by Article 4 of Presidential Decree 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 leave is also provided for non-cohabiting relatives (e.g. brothers/sisters, grandparents, grandsons/granddaughters).

¹²⁰ As an example, see the collective agreement for a company working in the field of communication <http://www.slc-cgil.it/2013/08/tlc-accordo-congedi-matrimoniali-callcall/>. 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 their place of residence.

¹²¹ This has been confirmed by the Supreme Court, 09.02.2015, <http://dirittocivilecontemporaneo.com/wp-content/uploads/2015/02/Cass.-matrimonio-omosessuale.pdf>.

¹²² ECtHR, *Oliari and Others v. Italy*, Application no. 18766/11 and 36030/11, 21 July 2015, <http://hudoc.echr.coe.int/eng?i=001-156265>.

¹²³ Press release ECHR 254 (2015) of 21 July 2015, available at www.hudoc.echr.coe.int

A draft national law is currently being discussed in the Italian Chamber of Deputies, after being adopted at first reading by the Senate of the Republic.¹²⁴ The draft law concerns same-sex partnerships, so-called civil unions and simple cohabitations. It extends the rights of married couples to civil partnerships, which are listed in special registers managed by the municipalities. The extension of rights covers all the economic rights, including benefits, pensions and succession law. No exception is established, therefore for same-sex civil unions there will be a recognition of the same rights as apply to marriages. For instance, a partner will be entitled to a deceased partner's pension.

A major discriminatory consequence affecting unmarried partners in general concerns the pension system with particular reference to survivors' pensions: according to revised Royal Decree 636/1939,¹²⁵ only the spouse of a worker in the public or private sector is entitled to benefit from the worker's pension. The Constitutional Court upheld this provision in 2000.¹²⁶

Considering that Article 3(1)(b) of the decree 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 might 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 No. 151/2001¹²⁷ establishes the position of parents with reference to rights and benefits in the workplace: according to Article 1, only a legal or adoptive parent or a person who has legal custody of a child¹²⁸ 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. Even the draft bill under discussion at the Chamber of Deputies and already adopted by the Senate of the Republic does not extend the right to adopt stepchildren to those in civil partnerships.¹²⁹

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

a) Exceptions in relation to disability and health/safety

In Italy there are no exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC).

¹²⁴ <http://www.senato.it/service/PDF/PDFServer/BGT/00965974.pdf>.

¹²⁵ Italy, Provisions on pensions (*Modificazioni delle disposizioni sulle assicurazioni obbligatorie per l'invalidità e la vecchiaia, per la tubercolosi e per la disoccupazione involontaria e sostituzione dell'assicurazione per la maternità con l'assicurazione obbligatoria per la nuzialità e la natalità*), 14 April 1939, no. 636 available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto.legge:1939-04-14:636!vig>.

¹²⁶ Constitutional Court, 3 November 2000, no. 461, available at: www.cortecostituzionale.it.

¹²⁷ Italy, General framework of legislative provisions on the protection of and support for motherhood and fatherhood, in compliance with Article 15 of Act no. 53 of 8 March 2000 (*Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità, a norma dell'articolo 15 della legge 8 marzo 2000, n. 53*), 26 March 2001 no. 151, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2001-03-26:151!vig>.

¹²⁸ In principle, also the same-sex partner of the parent.

¹²⁹ <http://www.senato.it/service/PDF/PDFServer/BGT/00965974.pdf>. The previous draft included the so-called stepchild adoption provisions, which would have allowed a partner to be recognised as a parent of their partner's child. This section of the draft has been withdrawn, as it lacked the necessary political majority on this point and so would have hindered the adoption of the entire bill.

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

4.7.1 Direct discrimination

In Italy national law provides an exception for direct discrimination on the ground of age.

a) Justification of direct discrimination on the ground of age

In Italy it is possible in specific circumstances, to justify direct discrimination on the ground of age. This exception is provided for in Article 3(4-bis) and (4-ter) of Legislative Decree 216/2003, which transposes Article 6(1) of Directive 2000/78/EC. According to the new text, the prohibition of discrimination does not affect the rules providing for differential treatment of workers based on age in the following fields: access to and treatment in employment and occupational training, including dismissal and payment, by young workers, older workers and those with caring responsibilities, in order to promote their integration into employment or their protection (point a). Exceptions are also made for 'the determination of minimum age levels, 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 a 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 to be generally in line with the standards imposed by Article 6 of Directive 2000/78/EC. These exceptions are legitimate if they are justified by an objective aim of labour law, the labour market and professional training and are appropriate and necessary.

The new text of the decree can be considered to be generally in line with the standards imposed by Article 6(1) of Directive 2000/78/EC. Practical guidelines could be very useful, in particular regarding the 'objective justification test'.

b) Permitted differences of treatment based on age

In Italy national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78/EC, except for membership of organisations of workers and employers; this is because the fields listed in Article 4(4-bis) (a-c) Decree 216/2003 coincide with the material scope of the directive as set out in Article 3(1)(a-c).

In a case decided by the Court of Appeal of Milan on 15 April 2014 (*Bordonaro v. Abercrombie Fitch Italia S.r.l.*) the Court found that Article 34 of Legislative Decree 273/2003 on fixed-term contracts was in breach of Legislative Decree 216/2003, to be interpreted in line with CJEU case law on discrimination on the ground of age.¹³⁰ A worker had been employed at the age of 20, in accordance with a national law which gave benefits to employers taking on workers under the age of 25 and over 45, and was dismissed in 2014 at the age of 25. The Court of Appeal expressly cited CJEU judgments *Mangold* and *Kücükdeveci* in order to find the unlawfulness of the dismissal. According to the Court, the dismissal of the claimant was based solely on his age and was not proportionate and necessary to pursue a legitimate aim. Moreover, the Court ruled that it was irrelevant that the company had acted according to the law because the subjective intent of the perpetrator when discrimination is involved is not relevant. Finally, the law which allows discriminatory measures on the basis 'only' of age violates the general principle of non-discrimination on the ground of age to which Directive 2000/78/EC gives specific

¹³⁰ Court of Appeal of Milan, *Bordonaro v. Abercrombie Fitch Italia S.r.l.*, 15 April 2014, www.europeanrights.eu/public/sentenze/CdA_Milano.pdf.

expression. The judgment has been appealed to the Supreme Court, which has made a reference for a preliminary ruling to the Court of Justice of the European Union.¹³¹

- c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Italy national law does 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). However, there is no explicit reference in Legislative Decree 216/2003 to Article 6(2), although occupational social security schemes contain several different ages for admission or entitlement to retirement or invalidity benefits.

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

In Italy there are special conditions set by law for older and younger workers in order to promote their vocational integration, and for people with caring responsibilities to ensure their protection.

Labour law provides an extensive number of exceptions to ordinary rules in order to promote the employment and vocational integration of young people. It should 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. A wide reform of labour law was introduced with what is known as the Jobs Act, which was enacted during 2014 but implemented by the Government for the first time in January 2015.¹³²

Of particular note is Act 23/2015, which introduces a new kind of contract – the ‘Contract with increasing degree of protection’.¹³³ This new contract may be applied only to new recruitments and also includes financial benefits for employers. A vigorous debate has developed with, on one side, supporters of this reform, seen as a symbol of the modernisation of Italian labour law, and, on the other side, those instead who read it merely as another means of weakening workers’ rights. In fact, the law does not include any provisions on treatment and pay, but concerns only dismissal. In the debate the key issue was the sanctions applying to illegal dismissals: according to the new law employers may only be required to pay compensation, meaning that reintegration into the job is no longer available as a remedy in cases of illegal dismissals. However, no change was made to discriminatory dismissals where both compensation and reinstatement remedies continue to be available.

There are also many rules providing protection for people with caring responsibilities in the form of maternity leave and similar benefits. Rules regarding people who care for persons with a severe disability are provided in Act 104/1992 (the Framework Law on care, social integration and the rights of disabled people).¹³⁴ According to Article 3, a disability is severe when a person needs permanent and comprehensive assistance. In such cases, ordinary leave of three days a month is granted; additionally, special leave of up to two years may be granted and even split into small periods to be taken throughout the employee’s working life (Art. 33 Act 104/1992). Moreover, in the public sector, a worker caring for persons

¹³¹ CJEU, *Abercrombie & Fitch Italia*, C-43/16, pending.

¹³² Italy, Jobs Act (*Deleghe al Governo in materia di riforma degli ammortizzatori sociali, dei servizi per il lavoro e delle politiche attive, nonché in materia di riordino della disciplina dei rapporti di lavoro e dell'attività ispettiva e di tutela e conciliazione delle esigenze di cura, di vita e di lavoro*), 10 December 2014 no. 183, available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2014-12-10;183!vig.

¹³³ Italy, Contract with increasing degree of protection (*Disposizioni in materia di contratto di lavoro a tempo indeterminato a tutele crescenti, in attuazione della legge 10 dicembre 2014, n. 183*), 4 March 2015 no. 23, available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-03-04;23!vig.

¹³⁴ Italy, Framework Law on the care, social integration and rights of disabled persons (*Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate*), 5 February 1992 no. 104, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1992-02-05;104!vig>.

with a severe disability may be transferred to a different place of work, located nearer to where the person with disability lives. Other fiscal benefits are granted in relation to the costs incurred in taking care of persons with any kind of disability. According to Article 4 of Act 104/1992,¹³⁵ this must in any case be certified by a special commission.

4.7.3 Minimum and maximum age requirements

In Italy there are exceptions permitting minimum and maximum age requirements in relation to access to employment (notably in the public sector) and training. The current version of Legislative Decree 216/2003 transposing Directive 2000/78/EC allows exceptions for 'the determination of minimum age levels, 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 a specific occupation or on the need for a reasonable period of work before retirement' (point c).

As far as the public sector is concerned, employment is in principle free of any age limit, but each public body can provide a specific age limit by issuing a special decree.¹³⁶ Such decrees must state the reasons for the age limit. It is possible to seek judicial review of these decrees.

4.7.4 Retirement

a) State pension age

In Italy there is a state pension age at which individuals must begin to collect their state pensions.

If an individual wishes to work longer, the pension can be deferred up to the age of 70 provided that the employer agrees – the worker wishing to defer their retirement is not sufficient. Beyond the age of 70, the pension may not be deferred further.

An individual can collect a pension and still work in a self-employed capacity.

The retirement age for men and women in both the public and private sectors will gradually be equalised: in 2018 men and women in both sectors will retire at 66 and 7 months. They will be able to retire before 66 and 7 months 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 % cut in their pension for each year of early retirement, that is before the age of 66 and 7 months. This is the only chance to retire earlier than the age of 66 years and 7 months. A complex system of flexibility will operate between the ages of 62 and 70 years. In all these cases the state pension is granted only with a minimum of 20 years of work.

b) Occupational pension schemes

In Italy there is no normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

¹³⁵ Italy, Handbook on Fiscal Benefits for Persons with Disability (*Guida alle agevolazioni fiscali alle persone con disabilità*), <http://www.agenziaentrate.gov.it/wps/file/Nsilib/Nsi/Agenzia/Agenzia+comunica/Prodotti+editoriali/Guide+Fiscali/Agenzia+informa/pdf+guide+agenzia+informa/Guida+Agevolazioni+persone+con+disabilit%C3%A0.pdf>.

¹³⁶ Italy, Measures to simplify administrative activity, procedures to adopt decisions and monitoring activity (*Misure urgenti per lo snellimento dell'attività amministrativa e dei procedimenti di decisione e di controllo*), 15 May 1997 no. 127, Article 3, paragraph 6, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1997-05-15:127!vig>.

If an individual wishes to work longer, payments from such occupational pension schemes cannot be deferred.

An individual can collect a pension and still work.

There are several occupational pension schemes currently in existence, generally based on employer-funded pension arrangements (e.g. for lawyers, notaries and physicians). They each fix minimum and maximum ages for starting to collect pensions, with a mix of age and years of contribution. Pensions can be deferred until the compulsory retirement age is reached, that is around 70 years, but may be longer e.g. for notaries it is 75 years.

c) State imposed mandatory retirement ages

In Italy there are state-imposed mandatory retirement ages. 70 years is the general mandatory retirement age imposed by the state, with adjustment in line with life expectancy. At this age at least five years of contributions are necessary to receive the pension. In 2014 a law was enacted to lower the mandatory retirement age for judges from 75 to 70. This was enshrined in Law Decree 90/2014 of 1 November 2014 (Reform of the Public Administration), with a gradual application up to 31 December 2015.¹³⁷ For other civil servants the mandatory retirement age is 65 – including for doctors.

There is no way that the employee may continue to work past the mandatory retirement age with the same role and contract. It is possible, however, to continue to work on a self-employed basis or as a consultant.

d) Retirement ages imposed by employers

In Italy national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/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 national law on pension ages.

e) Employment rights applicable to all workers irrespective of age

Until retirement, individual workers enjoy all rights, including protection against illegal dismissal, in accordance with Article 24, paragraph 4, of Law 201/2011 which has extended the application of Article 18 of the Workers Act to all workers.¹³⁸

f) Compliance of national law with CJEU case law

In Italy national legislation is in line with CJEU case law on age regarding compulsory retirement.

Rules providing for difference of treatment on the ground of age, in particular in the field of employment, are generally justified by reference to the need to avoid exclusion of older people from the labour market or, on the contrary, to favour the entry of young people (generally up to 29 years old).

¹³⁷ Italy, Urgent measures to promote the simplification, transparency and efficiency of jurisdictional offices (*Misure urgenti per la semplificazione e la trasparenza amministrativa e per l'efficienza degli uffici giudiziari*), 24 June 2014 no. 90, available at <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2014-06-24;90!vig=2015-09-03>.

¹³⁸ Italy, Urgent measures to support economic growth, fair treatment and fiscal consolidation (*Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici*), 6 December 2011 no. 101, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2011-12-06;201!vig>.

As regards different regimes concerning mandatory retirement ages or early retirements ages (for instance for armed forces, police, airlines' employees), the legal framework is in line with CJEU case law, but several limits still exist which should be changed or removed, if they cannot be properly justified.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Italy national law permits age or seniority to be taken into account in selecting workers for redundancy, within the framework of special arrangements made in the case of financial crisis followed by so-called 'solidarity contracts': in this case agreements with trade unions make provision for financial incentives for voluntary retirement, switching to part-time contracts and even the dismissal of only a proportion of the workers, in accordance with Law 223/1991. The selection of workers for the new contracts is based on several criteria, including age. This is clearly discriminatory and judges have ruled this to be the case in several judgments but no significant amendment has been enacted.¹³⁹

The compliance of this situation with the directive has not been the subject of significant discussion.

b) Age taken into account for redundancy compensation

In Italy national law provides provide compensation for redundancy. This is affected by the age of the worker. The system applies to workers who are dismissed after having previously enjoyed the social security benefits granted to workers in enterprises in difficulty (redundancy insurance). The length of the period for which mobility compensation is granted depends on the age of the worker (the older the worker, the longer the period during which they are 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)

In Italy national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive. Article 3(2)(c) establishes that Legislative Decree 216/2003 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. This provision seems to allow too great a discretion to the legislator, since there is no express limit and there is no means of verifying its compatibility with the needs of a democratic society.

4.9 Any other exceptions

In Italy other exceptions to the prohibition of discrimination (on any ground) provided in national law are as follows. Article 3(4) of Legislative Decree 216/2003 establishes that its provisions are without prejudice to the 'provisions that establish work suitability tests with respect to the necessity of suitability for a specific occupation (...)'. This 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 specific nature 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

¹³⁹ The point is clearly explained in UNAR's report for 2012, pp. 40-43; www.unar.it/unar/portal/wp-content/uploads/2013/09/Relazione-2012.pdf.

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.

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

a) Scope for positive action measures

In Italy positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is not provided for in national discrimination law through an express implementation of Articles 5 and 7 of both directives. The only exception is that of Article 7(2)(c) of Legislative Decree 215/2003, according to which the tasks of UNAR, the equality body, include promoting the adoption of positive actions by private parties.

Positive action is in principle legitimate under the Italian Constitution in the light of the principle of substantive equality in Article 3(2). Several laws have been enacted giving a special status to linguistic minorities and to certain religions. Moreover, other laws aim to promote the social inclusion of people with disabilities. Finally, several projects have been funded to promote the social integration of Roma.

Relevant provisions related to disability, in particular those concerning employment, have come into force under Act 68/1999, which was most recently amended in 2015.¹⁴⁰

b) Main positive action measures in place on national level

Disability

In relation to the grounds covered by the directives, strictly speaking positive action applies in practice only to people with disabilities on the basis of a complex set of rules contained in Act 68/1999. It should be noted that the aim of this act is to amend and partly fill the gaps of Act 104/1992, which provides some measures to support people with disability including those with severe disabilities according to Article 3 of Act 104/1992. In fact, the act: 1) provides for 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) makes provision 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 to support disabled people, to draft programmes and to provide services for people with disabilities. 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 assistance, emergency short-term accommodation and partial refunds of expenditure on assistance.

In the field of employment, Act 68/1999 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 persons with disability in workplaces that have been adapted to suit their abilities through the use of equipment and specific solutions to problems connected with the working environment etc.
- The placement of persons with disability in specific jobs as decided by a medical commission. This commission has the task of: i) carrying out a functional diagnosis

¹⁴⁰ Italy, Provisions on the right to work of persons with disability, 12 March 1999 no. 69, (*Norme per il diritto al lavoro dei disabili*), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-03-12:68!vig>, amended by Legislative Decree no. 151 of 14 September 2015, Simplification of procedures and duties upon citizens and companies (*Disposizioni di razionalizzazione e semplificazione delle procedure e degli adempimenti a carico di cittadini e imprese e altre disposizioni in materia di rapporto di lavoro e pari opportunità, in attuazione della legge 10 dicembre 2014, n. 183*), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-09-14:151!vig>.

in order to determine the total capacity of the disabled individual, specifying the grade and quality of their impairments and ii) proposing how to facilitate their placement in employment. The commission clarifies the social environment of persons with disability, their attitudes, and their family relationships, taking into account their educational background and the jobs they have already done.

- An obligation on public bodies and private enterprises with more than 50 workers to ensure that persons with disability make up 7 % of the total workforce. For enterprises with more than 15 workers it is sufficient that one worker with disability is employed, while for those with 30 to 50 workers, two persons with disability have to be employed. An exception to this obligation, which had been granted to political parties, trade unions and organisations for social development and support, was lifted in 2015.¹⁴¹ For police and civil protection jobs, people with disabilities are only employed in administrative roles. Other cases of derogation are set out in Articles 3 and 5. These quotas are generally complied with. Statistics on the enforcement of the 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 people with disabilities for a stated reason (e.g. the type of activity) must make a financial contribution to the Regional Fund for the Employment of Persons with Disability.

In addition, the act provides: some services in order to facilitate access to work by people with disabilities (Article 7); lists of unemployed people with disabilities (Article 8); labour relations (Article 10); support for 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 people with disability (Article 13); and the institution of a Regional Fund for the Employment of Persons with Disability. Sanctions of different kinds are applied to employers who do not fulfil their obligations (Article 15).

As has already been mentioned, amendments to Law No. 68/1999 were introduced in 2015 by Legislative Decree No. 151, with the aim of simplifying the procedures for placing persons with disability in jobs.¹⁴² One controversial issue concerns the extension of employers' options for choosing a worker with disability. This applies only to enterprises with fewer than 15 workers. Larger firms must hire from among people included in the list of unemployed people with disability, but without choosing the individual. A complaint has been submitted to the European Commission, claiming that this provision infringes Article 5 of Directive 2000/78/EC, because leaving the choice of workers to the employers risks excluding persons with more severe disabilities from the labour market.¹⁴³ This is particularly true in a context of high unemployment.

Race and ethnic origin

Specific projects have been funded by UNAR and labelled as positive actions. In particular special events are promoted during the Anti-Racism Week. However, these activities appear to be aimed more at raising awareness rather than the implementation of positive actions. The same applies to projects funded by UNAR to promote the culture of diversity in the workplace.

Disability, national origin, transgender

Since 2013, UNAR has been funding a project entitled Diversity in the Workplace (*Diversità al lavoro*) to promote the recruitment of potentially disadvantaged people, supporting them in attending job interviews.

¹⁴¹ *Ibidem*.

¹⁴² *Ibidem*.

¹⁴³ <http://www.disabili.com/lavoro/articoli-lavoro/assunzioni-disabili-ricorso-alla-commissione-europea-contro-il-jobs-act>.

Roma, Sinti and Travellers

Positive actions for Roma do not exist at the national level. Specific measures aiming to enhance the integration of Roma groups are promoted, generally through the funding of projects of limited duration. Despite the positive results of some of these projects, they still appear to be very marginal in the overall picture of segregation and racism perpetrated against the Roma population. Moreover, they are addressed to 'nomad groups' or people living in the camps, without taking into account the specific characteristics of Roma, Sinti and Traveller minorities who do not live in a camp or who are sedentary.¹⁴⁴ An Italian national strategy was adopted on 28 February 2012, implementing the European Commission Communication COM(2011)173.¹⁴⁵ It is too early to assess the effects of this strategy, in particular on housing, where legislative competence lies mainly with the regions and local authorities. The strategy covers four pillars: housing, healthcare, education and employment. However, the national strategy provides incentives and promotes coordination without setting binding targets to be reached by the regions. At national level the Government could promote a law setting the minimum level of services, including housing, but no such law is on the agenda of any political party.

Linguistic minorities

Some linguistic minorities enjoy special protection in the charters of regions with a special constitutional status. In the case of the German-speaking minority of Trentino Alto Adige (South Tyrol), this 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 minorities¹⁴⁶ 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'.

¹⁴⁴ See, for instance, the enquiry undertaken by the Italian Senate on the situation of Roma, Sinti and Travellers. The final report stresses the lack of reliable data to understand better the situation of the groups considered and the need to provide for data collection and analysis tools.

¹⁴⁵ Italy, National Strategy for the inclusion of Roma, Sinti and Travellers 2012-2020 (Strategia nazionale d'inclusione dei Rom, dei Sinti, e dei Caminanti 2012/2020), available at <http://www.unar.it/unar/portal/?p=1923>.

¹⁴⁶ 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. Law on the national linguistic minorities, Measures on protection of historical and linguistic minorities (*Norme in materia di minoranze linguistiche storiche*), 15 December 1999, no. 482, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-12-15;482!vig>.

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

In Italy the following procedures exist for enforcing the principle of equal treatment. According to Article 28 of Legislative Decree 150/2011,¹⁴⁷ the general provisions on fast-track procedures apply to discrimination litigation. The relevant article is Article 702-bis of the Civil Procedural Code.

Under the general fast-track procedure, a victim of discrimination can apply, even in person (whereas in ordinary cases the assistance of a lawyer is compulsory), to the judge (the ordinary civil court) with jurisdiction over their place of 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 before the Court of Appeal (second instance) within 30 days; the decision on appeal can be challenged before the Supreme Court (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 forum in which a final judgment may be given. It must be recalled that pre-trial mediation is now also mandatory in anti-discrimination cases.

The civil action against discrimination prevails over other special procedures applying in the fields of labour law or administrative law. With regard to administrative law, according to a general principle of Italian law, when public bodies are involved ordinary administrative procedure applies. However the Supreme Court has stated that in discrimination cases, the discrimination decrees apply, including the special procedure provided for in Legislative Decree 150/2011.¹⁴⁸ Therefore, the civil action against discrimination applies and not the ordinary administrative one with the competence of ordinary civil courts.

With regard to the field of employment, the prevalence of civil action against discrimination over labour law and labour procedural law was expressly confirmed by the Milan Court of Appeal in a case held on 15 April 2014.¹⁴⁹

b) Barriers and other deterrents faced by litigants seeking redress

According to Article 28 of Legislative Decree 150/2011, a civil action against discrimination can be brought before the court with jurisdiction over the victim's place of residence. The law is silent about jurisdiction in the instances of collective discrimination and a case is pending before the Supreme Court on this point: the question is whether NGOs may bring proceedings only in courts with jurisdiction for the place where they have their registered office or if they can choose another court. This is particularly relevant in cases where both a collective and an individual action are brought.

¹⁴⁷ Additional Measures to the Civil Procedural Code in order to reduce and simplify civil proceedings, according to Article 54 of Law no. 69 of 19 June 2009, (*Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'articolo 54 della legge 18 giugno 2009, n. 69*), no. 220, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011-09-01;150!vig>.

¹⁴⁸ Supreme Court, no. 25011/2014 of 5.12.2014, http://dirittocivilecontemporaneo.com/wp-content/uploads/2014/11/Cass-sez-un-25011_2014.pdf. See section 12.2.

¹⁴⁹ Court of Appeal of Milan, *Bordonaro v. Abercrombie Fitch Italia S.r.l.*, 15 April 2014, www.europeanrights.eu/public/sentenze/CdA_Milano.pdf.

c) Number of discrimination cases brought to justice

In Italy there are no available statistics on the number of cases related to discrimination brought to justice.

UNAR's remit includes the drafting of an annual report to the President of the Council of Ministers which includes data on its activity and, in particular, of discrimination complaints made through its contact centre. However, UNAR does not conduct surveys or collect more complex data. The most recent report published concerns in 2013, but a separate report on complaints was published in 2015. According to this report, a total of 1,627 complaints were lodged in 2014, of which 930 were based on the grounds of race or ethnic origin, 100 on disability, 99 on sexual orientation, 92 on age, 38 on religion and personal belief, and 8 on gender.¹⁵⁰ It is not clear how many of these complaints were settled thanks to the intervention of UNAR as mediator, or whether legal action was taken and the cases brought to court.

d) Registration of discrimination cases by national courts

In Italy discrimination cases are not registered as such by national courts. When a case is brought to court lawyers must fill in a form where they have to enter the subject of the case and the relevant code.¹⁵¹ The list of subjects and codes is attached to the form and does not include discrimination. Discrimination cases are in fact classed as 'Others – Other fast-track procedures'. Cases are registered on the basis of the type of decision (judgment, decree or order) and not on the basis of their subject.

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

a) Engaging on behalf of victims of discrimination (representing them)

In Italy associations, organisations and trade unions are entitled to act on behalf of victims of discrimination.

Article 5 of Legislative Decree 215/2003 entitles associations and legal persons to act in support of or on behalf of victims of discrimination on grounds of racial and ethnic discrimination. Legal standing is granted to associations and bodies included in a list approved by a joint decree of the Ministries of Labour and Social Policy and that of Equal Opportunities.¹⁵² 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.

¹⁵⁰ <http://www.unar.it/unar/portal/wp-content/uploads/2013/11/All.-4-dati-Unar-2014.pdf>. See also a report from 2012 that classifies cases related to nationality discrimination heard in the last four years in northern Italy: 52 cases were reported, with seven judgments by the Constitutional Court. A. Guariso (ed.), *Quattro anni alle discriminazioni istituzionali nel Nord Italia*, Milan: Terre di Mezzo, 2012.

¹⁵¹ https://www.giustizia.it/giustizia/it/mg_3_7_9.wp?tab=m.

¹⁵² Italy, Regulation implementing Legislative Decree 25 July 1998, no. 286 (*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*), 31 August 1999 no. 394, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:presidenza.repubblica:decreto.del.presidente.della.repubblica:1999-08-31;394!vig>.

The associations included on the list are drawn partly from those included in the pre-existing register of associations and organisations operating in support of immigrants and partly from the register of associations and organisations specifically active in the anti-discrimination field established under Legislative Decree 215/2003 (all of which applied to obtain standing).¹⁵³ Thanks to this provision regarding the legal standing of associations, two NGOs were able to bring an action against the municipality of Rome, citing the discriminatory housing policy of the so called 'nomad camps'.¹⁵⁴

Article 5 of Legislative Decree 216/2003 entitles trade unions, associations and legal persons to act in support of or on behalf of victims of discrimination. Standing to litigate – previously limited to trade unions – is now extended to other organisations and associations representing the rights or interests affected, with no special register. Legal 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.

It is worth mentioning that legal standing according to Legislative Decree 216/2003 is much broader than that under Legislative Decree 215/2003. For instance, in the case *Associazione avvocatura per i diritti LGBT - Rete Lenford v. C. Taormina* the Court of Bergamo accorded legal standing to the claiming association, in accordance with Article 5 of Legislative Decree 216/2003.¹⁵⁵ The association contested a discriminatory statement made by a well-known lawyer to a very popular broadcaster that he would scrutinise thoroughly each application he received, to avoid any recruitment of gay people. No individual victim was identified but 'only' a collective potential discrimination. It is notable that the legal standing of the association was not contested.

The Disability Act 67/2006 (Article 4) grants standing to litigate to associations identified by a joint decree of the Ministries of Labour and Social policy and that of Equal Opportunities along the lines applied in the case of race and ethnicity. A decree of 2007 established a register jointly managed by the above-mentioned Ministries, on roughly the same model as established for race and ethnicity under the decree transposing Directive 2000/43/EC.¹⁵⁶

In addition, in the field of employment trade unions have the right to legal standing on behalf of or in support of victims of discrimination, in accordance with Article 43(10) of Legislative Decree 286/1998 (the Immigration Decree) and Article 18 of Legislative Decree 1970/300 (on discriminatory dismissal).

b) Engaging in support of victims of discrimination

In Italy associations, organisations and trade unions are entitled to act in support of victims of discrimination.

Article 5 of Legislative Decree 215/2003 entitles associations and legal persons to act in support of or on behalf of victims of racial and ethnic discrimination. Legal standing is granted to associations and bodies included in a list approved by a joint decree of the Ministries of Labour and Welfare and Equal Opportunities. 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

¹⁵³ The list of 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>. The list was updated in 2013. This was the second update – the provision specifying that the list must be updated on a yearly basis has not been observed.

¹⁵⁴ Court of Rome, *ASGI and Associazione 21 Luglio v. Rome Capital and Italian Government*, 4 June 2016, <http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf>.
¹⁵⁵ www.altalex.com/index.php?idnot=68849.

¹⁵⁶ <http://www.pariopportunita.gov.it/index.php/archivio-notizie/664-disabilita-elenco-di-associazioni-ed-enti-legittimati-ad-agire>.

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 included on the list are drawn partly from those included in the pre-existing register of associations and organisations operating in support of immigrants and partly from the register of associations and organisations specifically active in the anti-discrimination field established under Legislative Decree 215/2003 (all of which applied to obtain standing).¹⁵⁷ It was updated in 2013. This was the second update – the provision specifying that the list must be updated on a yearly basis has not been observed. Two associations included in the list are particularly active in promoting legal actions supporting victims of discrimination. A relevant case was settled in 2015 thanks to the active role of ASGI and the Associazione 21 Luglio. The judgment was made by the Court of Rome on 6 February 2015, ruling against a publisher for the publication of a legal handbook containing discriminatory examples of criminal conduct perpetrated by Roma people, referred to as 'Gypsies'.¹⁵⁸

The Court found that all the three claimants had legal standing – the woman because she belonged to the Roma community and therefore was a victim who felt personally injured when reading the challenged opinion. The Court noted that, 'as explained, her legal standing (undisputed by the defendant) comes from her belonging to the discriminated ethnic group, and to the following breach of her human dignity'.¹⁵⁹ The legal standing of the woman is allowed as a broad interpretation of the notion of 'victim'. To put it another way, she has not acted to defend her group, but to defend her human dignity as a person belonging to the Roma minority. The Court defines the Roma minority as an ethnic group, but does not explore the link between the woman and her ethnic group, taking for granted her declaration of being Roma. One reason for the lack of reasoning on this point is that the defendants did not contest her legal standing.

As for the two NGOs, their legal standing is a typical example of representative action under Article 5 of Legislative Decree 215/2003, as they have the right to bring a case of collective discrimination to court when the victim is an entire group and not an identified victim. It is worth pointing out that the Court could also have granted the right to legal standing to the two NGOs in acting in support of the victim, the woman, but the judgment was very clear in granting the legal standing of the three claimants on a separate basis and in allowing the NGOs to bring a representative action.

Article 5 of Legislative Decree 216/2003 entitles trade unions, associations and legal persons to act in support of or on behalf of victims of discrimination for the grounds covered by Directive 2000/78/EC. Standing to litigate – previously limited to trade unions – is now extended to other organisations and associations representing the rights or interests affected, with no special register. Legal 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. It is worth mentioning that legal standing according to Legislative Decree 216/2003 is much broader than that under Legislative Decree 215/2003.

The Disability Act 67/2006 (Article 4) grants standing to litigate to associations identified by a joint decree of the Ministries of Labour and Social Policy and that of Equal Opportunities along the lines applied in the case of race and ethnicity. A decree of 2007

¹⁵⁷ The list of 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>.

¹⁵⁸ Court of Rome, XX., ASGI, *Associazione 21 Luglio v. YY.*, <http://www.asgi.it/wp-content/uploads/2015/04/Tribunale-di-Roma-I-sez.-Civile-1622015-est.-Pratesi-XXX-ASGI-Associazione-21-luglio-avv.-Fachile-C.-Gruppo-Editoriale-Simone-%E2%80%A6.pdf>.

¹⁵⁹ Court of Rome, XX., ASGI, *Associazione 21 Luglio v. YY.*, 6 February 2015, p. 6.

established a register jointly managed by the above-mentioned Ministries, on roughly the same model as established for race and ethnicity under the decree transposing Directive 2000/43/EC.¹⁶⁰

In addition, in the field of employment trade unions have the right to legal standing on behalf of or in support of victims of discrimination, in accordance with Article 44(10) of the Immigration decree and to Article 18 of Legislative Decree 1970/300 (the latter on discriminatory dismissal).

c) Actio popularis

In Italy there is not a statutory basis for actio popularis in general, although some exceptions exist, e.g. in the field of environmental litigation.

Specific provisions on actio popularis are provided for by discrimination law, whereby associations, organisations and trade unions may act in the public interest on their own behalf, without a specific victim to support or represent. In accordance with both decrees implementing the two directives of 2000, organisations with legal standing can act (obviously without the authorisation of the victim) in cases of collective discrimination when victims cannot be identified in a direct and immediate way (Legislative Decree 215/2003, Art. 5; Legislative Decree 216/2003, Art. 5; Legislative Decree 67/2006, Art. 4). There is a specific provision under Article 44(10) of Legislative Decree no. 286 of 1998, according to which local sections of the most representative trade unions have legal standing in order to act against collective discrimination when victims are not identifiable.

According to Article 4(2) of Act 67/2006, associations can intervene in civil actions brought by people with disabilities and can institute administrative proceedings to review the legality of the discriminatory acts contested in the civil proceedings while, according to Article 4, paragraph 3, of Act 67/2006, organisations are entitled to act in cases of collective discrimination.

d) Class action

In Italy national law allows associations, organisations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event. After heated scholarly and political debate, in December 2007 the Government included a provision in the Finance Act, introducing a class action for obtaining financial compensation for wrongs perpetrated against groups of consumers or users. After having been frozen for a time, 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.

Discrimination law does not provide a specific statutory basis for class action. One may argue whether the provisions on actio popularis (Article 44 of the Immigration Decree, Article 5(3) of Legislative Decree 215/2003, Article 5(2) of Legislative Decree 216/2003 and Article 4(3) of Act 67/2006) also allow collective actions, representing groups of victims.

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

In Italy national law permits a shift of the burden of proof from the complainant to the respondent.

¹⁶⁰ The list of associations and bodies with standing to litigate can be found at: <http://www.pariopportunita.gov.it/index.php/archivio-notizie/664-disabilita-elenco-di-associazioni-ed-enti-legittimati-ad-agire>.

According to Article 28(4) of Legislative Decree 150/2011, the claimant 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.

The most interesting case applying the shift in the burden of proof was that heard by the Court of Rome in 2012 in the case of *Fiat Fabbrica Italia*.¹⁶¹ The Court held that statistical data are sufficient to shift the burden of proof to the respondent. The Court clarified that discrimination law establishes a 'proof by presumption', according to which it is sufficient for the complainant to provide facts on which the presumption of discrimination is based, in order for the burden of proof to be placed on the employer to demonstrate that no discrimination was involved.

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

In Italy there are legal measures for protection against victimisation.

According to a new Article 4-bis in both legislative decrees implementing the two directives, judicial protection is 'also applied against any prejudicial behaviour towards a person affected by direct or indirect discrimination or towards any other person as a reaction against any activity aimed at obtaining equality of treatment' (the same standards of evidence apply, including the reversal of the burden of proof).

In an interesting judgment issued on 4 December 2014, the Court of Vercelli clearly stated that the protection against victimisation afforded by Article 4-bis of Legislative Decree 215/2003 covers anyone who acts to obtain equality of treatment, notwithstanding the result of the legal action against discrimination.¹⁶² In the case concerned four citizens had brought a case against the mayor of Varallo Municipality, together with his assessor – who is also a Member of the European Parliament – for the dissemination of racist posters around the city. The Court of Turin had dismissed the case, since the municipality had removed the posters before the judgment. However, other posters had subsequently been posted around the city with the names of the citizens who had brought the case to court, ridiculing them for diverting economic resources (to pay legal costs) away from the community.

The Court of Vercelli condemned the Mayor of Varallo (Eraldo Botta), the assessor (Gianluca Buonanno, a Member of the European Parliament) and the Municipality of Varallo for victimisation, in accordance with Article 4-bis of Legislative Decree 215/2003 implementing Directive 2000/43/EC. The Court held that protection against victimisation extends to anyone who acts to combat discrimination notwithstanding the result of the legal action, that is the upholding or rejection of the appeal. Moreover, legal actions against victimisation follow the same pattern of rules as legal action against discrimination, including the shift of the burden of proof. The respondents were ordered to pay EUR 6 000 and EUR 5 500 respectively to the victims, as moral damages, in accordance with Article 15 of the directive which requires that sanctions must be effective, proportionate and dissuasive. In addition, the ruling ordered that the judgment be published in a local newspaper, on the Facebook page of Mr Buonanno and on the website of the Varallo Municipality and that the legal fees must also be paid.

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

¹⁶¹ Court of Appeal of Rome, *Fabrica Italia Pomigliano SPA v. FIOM-CGIL*, 9 October 2012, www.dplmodena.it/Fiat-Fiom%20-%20Corte%20Appello%20Roma%209-10-12.pdf.

¹⁶² Court of Vercelli, *Pantè v. Botta, Buonanno and Municipality of Varallo*, 4 December 2014, www.asgi.it/wp-content/uploads/2014/12/2014_tribunale_Vercelli_rq-1241-del-2014-ord-04-12-2014_Varallo-BOTTA-BUONANNO-trib-vercelli.pdf.

a) Applicable sanctions in cases of discrimination – in law and in practice

According to Article 28(5) of Legislative Decree 150/2011 - which applies to Anti-Discrimination Decrees 215/2003 and 216/2003, the Immigration Decree and disability law – 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 (similar to 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 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 are available. A victim of discrimination may claim for compensation of pecuniary and non-pecuniary losses. Under Article 44(8) of the Immigration Decree, criminal sanctions are applied if the decision of the court is not complied with.

Article 28(7) of Legislative Decree 150/2011 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.

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.

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. This provision is confirmed by what is known as the Jobs Act.¹⁶³

b) Ceiling and amount of compensation

No ceiling to the amount of compensation applies.

c) Assessment of the sanctions

It is difficult to assess the amount of non-pecuniary damages that can be awarded, which largely depends on the circumstances of the individual case. The small number of cases decided to date 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.

In the case of *Associazione avvocatura per i diritti LGBT - Rete Lenford v. C. Taormina* decided by the Court of Bergamo, the defendant was ordered to have the judgment published in a newspaper with nationwide coverage and to pay EUR 10 000 as a 'dissuasive sanction' (in accordance with Article 28 of Legislative Decree 150/2011, interpreted in line with Directive 2000/78/EC and with the *Accept* judgment (C-81/12)), as well as having to pay EUR 5 000 in legal costs.¹⁶⁴

¹⁶³ Italy, Jobs Act (*Deleghe al Governo in materia di riforma degli ammortizzatori sociali, dei servizi per il lavoro e delle politiche attive, nonché in materia di riordino della disciplina dei rapporti di lavoro e dell'attività ispettiva e di tutela e conciliazione delle esigenze di cura, di vita e di lavoro*), 10 December 2014 no. 183, available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2014-12-10;183!vig=.

¹⁶⁴ Court of Bergamo, *Associazione Avvocatura per i Diritti LGBTI Rete Lenford V. Carlo Taormina*, 6 August 2014, <http://www.altalex.com/~media/Altalex/allegati/2014/09/29/68849%20pdf.pdf>.

This judgment is an example of the perfect transposition of the *Feryn – Accept* case law: the facts are similar and the arguments of the court identical. Two points are worth mentioning. First, this is a case of collective potential discrimination contested by an organisation whose legal standing, in line with Article 5, paragraph 2, of Legislative Decree 216/2003, was not contested. Secondly, the Court ordered the defendant to pay EUR 10 000 as a 'dissuasive sanction', in accordance with Article 28 of Legislative Decree 150/2011, interpreted in line with Directive 2000/78/EC and with the *Accept* judgment (C-81/12). This is a private sanction, a sort of punitive damages, since no damage had effectively been suffered by one or more identified victims.

This type of sanction is not common in Italy: doctrine and jurisprudence have always asserted that they are contrary to general principles of civil liability. However, an identical provision to that applied in this judgment is laid down in Article 37, paragraph 3, of the Equal Opportunities Code (Legislative Decree 198/2006): in case of collective discrimination the sanction may include the payment of non-pecuniary damages. These are not defined as punitive damages but are paid to a collective body that has not, in fact, suffered any damage. The issue of (punitive?) damages in cases of collective discrimination is emerging from the case law as a result of a broad interpretation of the written law. This approach has not been challenged so far but it is likely that the higher courts will be called on to give their interpretation in the near future. In another case, the Court of Vercelli ordered the defendants, who had committed acts of victimisation, to pay EUR 6 000 and EUR 5 500 respectively to the victims as moral damages, in accordance with Article 17 of the directive, which requires that sanctions must be effective, proportionate and dissuasive.¹⁶⁵

A similar approach was taken in 2015 by the Court of Pisa, which ordered an employer to reinstate an employee's work and to pay their missing salary. In addition, the Court ordered the employer to pay EUR 10 000 as moral damages, which was arrived at taking into account the pain suffered by the worker and the dissuasive dimension of the sanctions according to Article 17 of Directive 2000/78/EC. No evidence was required to assess this amount of damages, which the Court qualifies as 'European damages', as opposed to other dimensions of non-pecuniary damage. In fact, the additional claim for non-material damages made by the worker was not decided in this judgment, but was left for a separate assessment, to be decided in relation to another damages action.¹⁶⁶

The approach followed by the Court of Livorno was partially different. It found that a support teacher and the director of the school concerned had perpetrated several acts of direct discrimination and harassment by excluding the claimant, a student with a disability, from the collective activities of the group and by creating a humiliating environment, with public statements about the problems raised by his disability. The Court ordered the school and the Education Office to pay EUR 10 000 for the non-pecuniary damages suffered by the student. The amount of the damages was assessed on an equitable basis, taking into account the seriousness of the offences, their number, their duration and the emotional stress produced by those acts for the student, but not the dissuasive aim of the damages as required by the 2000 directives.¹⁶⁷

¹⁶⁵ Court of Vercelli, *Pantè v. Botta, Buonanno and Municipality of Varallo*, 4 December 2014, www.asgi.it/wp-content/uploads/2014/12/2014_tribunale_Vercelli_rq-1241-del-2014-ord-04-12-2014_Varallo-BOTTA-BUONANNO-trib-vercelli.pdf.

¹⁶⁶ Court of Pisa, *GC v. LI SRL*, 16 April 2015, http://www.europeanrights.eu/public/sentenze/Tribunale_Pisa_ordinanza_16_aprile-2015.pdf.

¹⁶⁷ Court of Livorno, *P.S., C.F. v. Ministero dell'Istruzione and Scuola Secondaria G. Mazzini*, 16 June 2015, http://www.personaedanno.it/attachments/article/48309/9003182_livorno.pdf.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The requirement to introduce a body for the promotion of equal treatment is covered in Article 7 of Legislative Decree 215/2003, transposing Directive 2000/43/EC. 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. The Government then created the National Office Against Racial Discrimination (*Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull'origine etnica*, UNAR). The opening event for the new Office in Rome took place on 16 November 2004.

In addition, a special body called the *Osservatorio per la sicurezza contro gli atti discriminatori*, OSCAD (Observatory for Security against Discrimination) was set up in 2010 as part of the Department of Public Security within the Central Directorate of the Criminal Police. It is not a designated body in accordance with the transposition process but it was established to protect the victims of hate crimes, to help individuals who belong to minorities enjoy their right to equality before the law and to guarantee protection against any form of discrimination.

The *Osservatorio nazionale sulla condizione delle persone con disabilità* (Disability Observatory) is also worth mentioning, despite the fact that it is not technically an equality body.¹⁶⁸ It was set up in order to implement the UNCRPD and became operational in 2011. The first relevant action taken by this body was a proposal to the Government for approval of a programme of action on disability. The body is not independent and acts as an observatory on disability issues, collecting data, promoting studies and making proposals to the Government in order to improve disability legislation and policies.

- b) Status of the designated body/bodies – general independence

UNAR was set up within the Department of Equal Opportunities (which previously only dealt with gender discrimination) of the Presidency of the Council of Ministers. The director is appointed by the President of the Council of Ministers or by a Minister on their behalf. UNAR can also request input from staff from other Government departments, including judges and state attorneys, as well as experts and advisers (the latter without civil servant status). Its annual budget is established by law at EUR 2 035 000 and is part of the budget of the Department of Equal Opportunities. Additional funding can be assigned, depending on the body's activities and projects, from 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 body was published in the Italian Official Journal in March 2004.¹⁶⁹ It is very short and does not add anything substantial to the main decree. It states again in 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

¹⁶⁸ <http://www.osservatoriodisabilita.it>.

¹⁶⁹ Italy, Institution and internal organisation of the Office for the promotion of equal treatment and the fight against discrimination (*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*), available at: <http://www.unar.it/unar/portal/wp-content/uploads/2013/11/Decreto-del-Presidente-del-Consiglio-dei-Ministri-11-dicembre-20031.pdf>.

part of the Government. Changes of Government lead to changes in key staff, as usually happens in other offices attached to Government departments. UNAR's staff of experts is mostly drawn from other Government departments, including the judiciary.

A clear example of this lack of independence occurred in March 2014, after the promotion by UNAR of an educational activity aiming to improve knowledge about sexual orientation and related issues through the publication of leaflets. Catholic associations and members of Parliament complained against the Government who declined any responsibility regarding the publications, ascribing the initiative to UNAR's director, who was addressed with a dishonourable mention. Then the Government took the decision to stop the educational campaign.

A similar but more serious event took place in 2015, when UNAR sent a letter, signed by its Director Marco De Giorgi and dated 30 September 2015, to a Member of Parliament, Giorgia Meloni, targeting her exhortations to close the country's borders to aliens from Muslim countries. According to her comments, people from those countries are more violent and linked to acts of terrorism than others. The letter closed with a very gentle invitation to the MP Giorgia Meloni to consider taking the opportunity in her future speeches to send people different messages, not based on stereotypes.¹⁷⁰ Giorgia Meloni reacted very badly to the letter, invoking freedom of speech and the immunity of all Members of Parliament and writing to the Prime Minister and the President of the Chamber of Deputies. A request for clarification was sent by the Prime Minister's Secretary General to the Director of UNAR, Marco De Giorgi, and a vacancy was then published for the role of director, which has now been taken on by another person, an external expert. Moreover, the contracts with the 15 external experts of the Equality Body have not been renewed, resulting in a weakening of the body's capacity to carry on its activities. In particular, no annual report has been produced for 2015, and there is no public record of activities related to the implementation of the two strategies for the Roma and LGBT communities.

A lack of independence is underlined in ECRI's 2015 report regarding Italy. In particular, the report finds that its recommendations have not been fully implemented. This is the case regarding the enhancement of UNAR's activity by formally extending its powers so that the relevant legislation, and not just internal administrative acts, clearly covers discrimination based not only on ethnic origin but also on colour, language, religion, nationality and national origin; by granting it the right to bring legal proceedings rather than just supporting victims; and by ensuring that its full independence is secured both in law and in fact. This has not been implemented. In particular, ECRI finds that the Office is not *de jure* independent, which is in breach of ECRI's general policy recommendations 2 and 7, that the Office be placed 'under the Department for Equal Opportunities of the Presidency of the Council of Ministers, its Director who is a civil servant appointed by the Government and part of its staff seconded to UNAR from various ministries'. Moreover, despite the widening of the grounds of discrimination covered by UNAR, ECRI underlines that 'no legislation has yet been enacted to extend formally UNAR's competence'.¹⁷¹

OSCAD is a specialist body, operated by the state police (*Polizia di Stato*) and the military police (*Carabinieri*), and forms part of the Department of Public Security within the Central Directorate of the Criminal Police. Its members belong to the Ministry of the Interior (police) and the Ministry of Defence (*Carabinieri*). Therefore, it is not an independent body but a governmental one.

c) Grounds covered by the designated body/bodies

¹⁷⁰ <http://www.giorgiameloni.com/wp-content/uploads/2015/09/Lettera-UNAR.pdf>.

¹⁷¹ ECRI, Conclusions on the Implementation of the Recommendations in Respect of Italy Subject to Interim Follow-Up, 9 December 2014, <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Italy/ITA-IFU-IV-2015-004-ENG.pdf>.

Race and ethnic origin, nationality,¹⁷² sex, religion or personal belief, disability, age and sexual orientation; UNAR has consolidated its activity to cover all grounds of discrimination and acts to promote the principle of equal treatment in fields other than race and ethnic origin.

d) Competences of the designated body/bodies – and their independent exercise

UNAR's competences include assistance to victims of discrimination in pursuing their complaints in judicial or administrative proceedings; surveys on discrimination, without infringing the prerogatives of the judicial authorities; promoting 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; issuing opinions and proposals for reform of the laws on racial and ethnic discrimination; issuing recommendations on matters related to racial and ethnic discrimination; drafting an annual report to Parliament on the application of the principle of equal treatment and a report to the President of the Council of Ministers on the activities of the previous year; and the dissemination of information concerning the rules on equal treatment irrespective of racial or ethnic origin.

UNAR's remit has been extended to cover all grounds of discrimination, due to a broad interpretation of its tasks provided for in Article 7 of Legislative Decree 215/2003. The proposal to extend UNAR's powers was advanced by UNAR itself in its first report to Parliament, and this was implemented in a Ministerial directive (an internal act of the Government assessing the specific tasks of each Governmental Department), issued to UNAR in 2010 and renewed in 2012. In particular, in 2011 two new UNAR offices were set up to deal with discrimination based on sexual orientation and gender, age, disability, religion and personal belief. The 2014 report to the Parliament relating to 2013 reflects this extension of competences, with different sections for each area of activities as provided for by the Ministerial directive of 2010 (sexual orientation and gender; age; disability; religion; Roma, Sinti and Travellers; nationality; race and ethnic origin).

OSCAD has the following tasks covering all fields of application. It receives reports of discriminatory acts relating to the activity of the police and other bodies charged with ensuring public security from institutions, professional or trade associations and private individuals, in order to monitor discrimination based on race or ethnic origin, nationality, religion, gender, age, language, physical or mental disability, sexual orientation and gender identity. Based on the reports received, OSCAD initiates targeted interventions at local level to be carried out by the police or the *Carabinieri*; it follows up the outcome of discrimination complaints lodged with the police; it maintains contact with organisations and institutions, both public and private, dedicated to combating discrimination; it prepares modules to train police officers in conducting anti-discrimination activity and participates in training programmes with public and private institutions; and it puts forward appropriate measures to prevent and fight discrimination.

UNAR strongly stresses the importance of assistance – including assistance in litigation – for victims of discrimination. This is provided through a contact centre with a free phone number and operators speaking several languages (Italian, English, French, Spanish, Arabic, Russian, Romanian and Chinese). The contact centre's 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 2014 report,¹⁷³ the centre has dealt with around 1,142

¹⁷² Initially, UNAR's activity only covered the grounds of race and ethnic origin. Provision was made for the extension of the grounds of discrimination covered by UNAR by a Ministerial directive (an internal act of the Government assessing the specific tasks of each Governmental Department) issued to UNAR in 2010 and then renewed in 2012.

¹⁷³ UNAR (2014), Monitoring discrimination. UNAR Strategy for Data Collection (*Il monitoraggio delle discriminazioni. La strategia di raccolta dati UNAR*), <http://www.unar.it/unar/portal/wp-content/uploads/2013/11/All.-4-dati-Unar-2014.pdf>.

calls falling within its mandate. All contacts are recorded in a database, which provides information that has been analysed and published by UNAR. The reports on activities carried out during 2014 and 2015 are not available yet. The only reliable fact is that the contracts to manage the contact centre have been renewed for the next three-year period.

OSCAD was set up in order to deal with reports of discriminatory acts, coordinating the activities of the relevant institutions at local level. It is not independent and there is no commitment to provide independent assistance, to conduct independent surveys or to publish independent reports.

e) Legal standing of the designated body/bodies

In Italy the designated body has no legal standing to bring discrimination complaints (on behalf or not of identified victim(s)) or to intervene in legal cases concerning discrimination. The only activity that UNAR may conduct in this regard is to provide opinions to the victims or, if its intervention is requested by the parties, providing opinions within legal proceedings, in accordance with Article 7(2)(a) of Legislative Decree 215/2003.

f) Quasi-judicial competences

The body is not a quasi-judicial institution.

g) Registration by the body/bodies of complaints and decisions

The body registers the number of complaints (by ground, field, type of discrimination, etc.). These data are available to the public within the general annual report on the body's activities.¹⁷⁴

h) Roma and Travellers

UNAR has always considered Roma issues as a priority. It usually gives Roma issues considerable space in its reports to the Parliament and the President of the Council of Ministers. It organises awareness campaigns on prejudice against people from the Roma community and informally monitors critical situations when they occur. Since its appointment as the National Contact Point in accordance with European Commission Communication COM (2011)173, UNAR has increased its activity in support of Roma, involving NGOs and organisations devoted to the protection of Roma, Sinti and Travellers in order to ensure their contribution to the development of Italy's Roma Strategy. In terms of its approach, UNAR does not have a specific strategy separate from the Government's: indeed UNAR is the body which has the task of coordinating the implementation of the Italian national strategy on Roma, Sinti and Travellers.¹⁷⁵ Some activities, in particular the dissemination of information and awareness-raising, are run directly by UNAR, while the large majority of activities included in the national strategy are intended to be implemented at regional and local level, without any coercive powers given to UNAR to act against omissions.

¹⁷⁴ UNAR, Reports to the Parliament, <http://www.unar.it/unar/portal/?p=1733>; Reports to the Government, <http://www.unar.it/unar/portal/?p=1735>.

¹⁷⁵ Italy, National Strategy for the inclusion of Roma, Sinti and Travellers 2012-2020 (*Strategia nazionale d'inclusione dei Rom, dei Sinti, e dei Caminanti 2012/2020*).

8 IMPLEMENTATION ISSUES

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

After its institution, UNAR launched a number of initiatives aimed at raising awareness (seminars and other PR events), some of which have had an impact. According to its annual reports, UNAR has achieved a good degree of visibility, and this has been accompanied by an increase in the attention paid by legal scholars to anti-discrimination issues.

Beyond UNAR's activities, there are no specific governmental initiatives to disseminate information about legal protection against discrimination. In fact OSCAD has the task of protecting victims rather than disseminating information on anti-discrimination law. Occasional actions have been promoted by the regions and local authorities.

Dialogue with NGOs on race and ethnicity is one of UNAR's priorities and is an integral part of its networking strategy. According to its annual reports, NGOs have been 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. During 2013 the involvement of NGOs aimed, in particular, to draft the National Policy on Racism, which, however, has not been officially adopted at time of writing.

As coordinator of Italy's National Roma Strategy, UNAR continues to promote the application of the strategy at both national and regional levels.¹⁷⁶ So far, however, there have been no visible results, nor have any actions been carried out in application of the strategy. At any rate, no public documents, reports or projects have been disseminated to explain how UNAR is implementing the strategy.

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

a) Mechanisms

From a theoretical point of view, any contract, collective agreement or internal rules of undertaking contrary to the principle of equal treatment is invalid. The decrees do not contain provisions establishing the invalidity of discriminatory provisions included in contracts, agreements or other rules, but this follows 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.

However, there is no mechanism to ensure the enforcement of the principle except for complaints to the equality body or to the courts. No statutory or administrative provision has been abolished because of conflict with the principle of equal treatment in relation to any of the grounds covered by the directives.

b) Rules contrary to the principle of equality

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 true in the case of discrimination on the grounds of race and ethnic origin and to some extent in relation to 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 often subject to

¹⁷⁶ Italy, National Strategy for the inclusion of Roma, Sinti and Travellers 2012-2020 (*Strategia nazionale d'inclusione dei Rom, dei Sinti, e dei Caminanti 2012/2020*), pp. 22-32.

discrimination.

One very serious problem has been the adoption of formally ethnically blind rules or policies that in practice mostly affect members of Roma communities, and which have developed from political debates where prejudice against Roma is evident.

With regard to religion, the main issue is primarily the absence of a special regulation for Islam, a gap which could open the way to indirect discrimination relating to the specific needs of Muslims. As yet, no litigation has been brought, but this is increasingly a subject of public debate, which has been fuelled by court cases over crucifixes in schools which have been much inflated by the media.

The main controversial issue in this regard stems from a regional law adopted by the Lombardy Region in January 2015. The law concerns building new places of worship, and makes an express distinction between religions that have entered into agreements with the state and those that have not. Through a number of procedural and administrative obstacles, the regional law makes building new places of worship for those religions that are not linked to the state by a specific agreement difficult if not impossible. It goes without saying that the majority of people affected by this law belong to the Muslim religion, which does not have an agreement with the state. Indeed, the law is commonly referred to as the 'Anti-Mosques Law'.

This law has been referred by the central Government to the Constitutional Court, claiming an infringement of Article 3 of the Italian Constitution on equality of all persons, Article 8 on equality of religions, and Article 19 on freedom of religion. The judgment is supposed to be delivered in March 2016.

9 COORDINATION AT NATIONAL LEVEL

The Ministry of Labour and Social Policy and the Ministry of Equal Opportunities share responsibility for coordinating equal treatment issues in the fields covered by the directives.

A national anti-racism action plan was presented by the Labour Ministry during the meeting of the Government held on 7 August 2015. Several press releases were made available regarding this presentation, but no further information has been given about it subsequently. The official document of the plan remains unavailable on the UNAR website, and it is not on the Labour Ministry website either. It could not even be found on a search of the Official Journal and legal databases. Up to the time of drafting this report, no official document has been available except for the press release of the Government's meeting at which the strategy was presented.¹⁷⁷ Following a request made directly to UNAR, copies of the plan and of the related decree were forwarded to a mailing list of migration lawyers. However, there is no official record of the plan. Even more seriously, there is no record of its effective implementation. The restructuring of UNAR (change of director and of the majority of its staff) may be one of the reasons for the plan not being implemented and/or for information about it not being disseminated. Another reason might be the absence in the Government of any ministerial office with responsibility for integration affairs whereas, thanks to its previous existence, the National Roma Strategy was adopted and drafting of the Anti-Racism Action Plan has begun. It seems that the Government lacks a minister who is willing and able to act in the field of anti-racism, with the paradoxical situation that the only relevant governmental office is UNAR, the equality body, which is supposed to be independent.

There is a certain uneasiness in commenting on a document whose nature and legal effects are so uncertain, especially in the absence of any practical impact. Therefore, as far as we are concerned, the plan has been formally adopted, yet without having any effectiveness. This is equivalent to non-adoption, at least until significant changes are made in the coming period.

¹⁷⁷ <http://www.governo.it/articolo/consiglio-dei-ministri-n-77/1182>.

10 CURRENT BEST PRACTICES

- Access to justice

During 2014, the National Lawyers' Association (*Consiglio Nazionale Forense*) and the national equality body (UNAR) agreed a Protocol of cooperation aimed at strengthening protection for vulnerable victims. Within this framework they have set up a solidarity fund for access to justice by victims of discrimination for the years 2014-2016 (*Fondo di solidarietà per la tutela giurisdizionale delle vittime di discriminazione*). The Fund was created by UNAR in order to facilitate access to justice by victims of discrimination, anticipating the legal costs of actions brought to courts. In the event of a favourable judgment, the legal aid provided must be refunded to UNAR.

This financial support aims to facilitate access to justice, since the number of legal actions is still low, compared to the high number of complaints made to UNAR.

Applications must be sent to the National Lawyers' Association by individuals or by collective bodies with the right to legal standing (a maximum of three per year). A steering committee made up of lawyers and public officials from UNAR decide on the allocation of aid, which is an alternative to the legal aid provided by the state for those who are eligible on the basis of their incomes.

However, no report has so far been published about the application of this financial support.

As far as sexual orientation is concerned, it is worth mentioning an activity that has been promoted by an NGO, *Parks. Liberi e uguali*,¹⁷⁸ with the cooperation of the National Equality Office – UNAR – and the Italian Association of Human Resources Directors. They have drafted the LGBT Report Index: a Benchmark on policies for employers in Italy. In 2015 the third report was published, listing the companies where the treatment of LGBT employees is particularly good, taking account, for instance, of a diversity policy and granting the extension of benefits to same-sex partners.

On disability, the National Disability Observatory appears to be an active institution that is committed to improving the collection of data on disability. On 14 October 2015, a workshop on 'Monitoring indicators' (*Seminario sugli indicatori di monitoraggio*) was promoted by the scientific committee of the Disability Observatory to enhance the capacity and quality of statistical research in the field of disability.¹⁷⁹ This appears to be the only effective action carried out in Italy in order to address the lack of data collection on equality. Even in the LGBT and Roma strategies, where this is taken to be a priority, no activity has been carried out so far.¹⁸⁰

¹⁷⁸ http://www.parksdiversity.eu/parks/wp-content/uploads/2015/11/Index_risultati_2013.pdf.

¹⁷⁹ <http://www.isfol.it/news/seminario-sugli-indicatori-di-monitoraggio>.

¹⁸⁰ 'National Strategy for the Inclusion of Roma, Sinti and Caminanti Communities', http://ec.europa.eu/justice/discrimination/files/roma_italy_strategy_en.pdf, in particular at 31-33 and 37. National Strategy to prevent and contrast discrimination on grounds of sexual orientation and gender identity (2013-2015), <http://www.pariopportunita.gov.it/images/Strategia%20nazionale%20-%20Vers.%20EN.pdf>.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

The main discrepancies between the decrees and the directives can be considered to be the following:

1. Generally, the key issue is definitely that of the lack of independence of the National Office Against Racial Discrimination (UNAR) operating within the Department of Equal Opportunities of the Presidency of the Council of Ministers. The Office is clearly and completely linked to the executive and cannot perform any independent activity whatsoever, despite the fact that in several cases it has adopted a critical position in relation to the Government. However, it must be noted that the majority of these cases were initially highlighted by the media or individual lawyers and UNAR was involved only later after significant pressure from different organisations.
2. 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'.¹⁸¹ 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.
3. The vast majority of discrimination litigation concerns discrimination on the ground of nationality, against migrants, perpetrated by local and regional authorities. This is a key issue because the public authorities are not supporting the fight against discrimination but, on the contrary, are those perpetrating the discrimination.
4. The new provision of Legislative Decree 216/2003 on reasonable accommodation for people with disabilities, introduced in 2013 to implement Article 5 of Directive 2000/78/EC and the CJEU decision of 4 July 2013, is not perfectly in line with EU law, for two reasons. As regards public bodies, reasonable accommodation is required but without any additional burden, while according to Article 5 of Directive 2000/78/EC, a certain degree of burden is implicit if it is acceptable. Additionally, the national provision risks being ineffective if it is not supported by specific guidelines addressed in particular at employers, in both the private and public sectors. With regard to the latter, it is worth mentioning that the law requires that the public administration respect the duty without any additional burden.
5. A further problem is represented by the status of the Muslim community. In the absence of an agreement with the state, and of a general law on freedom of religion, continuous negotiation takes place with national and local authorities on issues such as places of worship and so on. Hostility against Muslims has become even worse, due to the terrorist attacks that occurred in 2014 and 2015; moreover, the flow of refugees has been viewed as a means of getting to Europe that terrorists could exploit.
6. There is still a serious problem of discrimination against the Roma community. Anti-Roma hostility is becoming an increasingly significant social and political problem. Roma are given disproportionate visibility in local and national debates on urban crime and suffer a high degree of stigmatisation as a result. Removals of Roma settlements and the promulgation of local regulations targeting the Roma has become an important part of ongoing policy in many municipalities. The National Roma Strategy, approved during 2012, is providing an incentive and is improving the coordination of regional and local policies, but does not set binding targets to be

¹⁸¹ '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.'

reached by regions and local authorities. There is a long way to go, however, before it is fully implemented and, year after year, there is a real and increasing risk that the planned activities will not be effectively implemented and that they will remain nothing but words.

7. Finally, it is worth mentioning that the new Government has no special minister dedicated to equal opportunities. This, together with the extreme weakness of the equality body, has resulted in very few activities being undertaken or results being achieved in the field of anti-discrimination. It is worth noting, however, that, owing to the previous existence of a minister responsible for integration affairs, the National Roma Strategy was adopted, and drafting of the Anti-Racism Action Plan was begun. This appears to have been adopted in August 2015, but without the plan being published and without any follow-up activities.

11.2 Other issues of concern

With regard to the text of the transposing decrees, the main remaining issues are:

- unnecessary complications due to the coexistence of different legal texts;
- the lack of provisions on positive action;
- the lack of instructions as regards compensation amounts;
- the non-implementation of the adopted national strategies;
- insufficient data gathering on equality in order to assess properly the situation of vulnerable groups and to choose the most suitable action to address social exclusion and discrimination.

12 LATEST DEVELOPMENTS IN 2015

12.1 Legislative amendments

As far as anti-discrimination law is concerned, no amendments have been made to the main legislation implementing the directives. The Government is currently committed to reforming several sectors of national law, in particular the rules on employment contracts, the treatment of workers and the organisation of the public administration. Within the framework of the so-called Jobs Act, a law was enacted in 2015 aiming to amend and simplify the rules for the employment of persons with disability. Another act has amended the rules on dismissal. In particular, in cases of wrongful dismissal, only pecuniary compensation is applicable, whereas previously the worker had the right to be reinstated in their job. However, no change has been made to discriminatory dismissal, where reinstatement is still applicable.

During 2015, the political debate about the recognition of same-sex partnerships got more lively than in previous years, given the draft bill that was under discussion in the Parliament and the judgment issued by the ECtHR, *Oliari and others v. Italy*, according to which Italy violated Article 8 of the ECHR because of its lack of formal recognition of same-sex unions. The draft bill is likely to be adopted during 2016. The most controversial issue was the so-called 'stepchild adoption' provisions, which were eventually removed from the text.¹⁸² Several municipalities started to recognise marriages of same-sex couples registered abroad but this was opposed by the national Government which annulled these acts of recognition made at local level. However, the debate around recognition of same-sex partnerships is not developed around non-discrimination laws rather on the equality principle based on Article 3 of the Italian Constitution.

12.2 Case law

Name of the court: Court of Pisa

Date of decision: 16 April 2015

Name of the parties: *G C c. L. SRL*

Reference number: N/A

Web address:

<http://www.osservatoriodiscriminazioni.org/index.php/2015/10/19/tribunale-pisa-ordinanza-del-16-aprile-2015/>

Brief summary: An employer was declared disabled after starting to suffer from an incurable illness, which resulted in a physical impairment; in particular, she was unable to perform the activities that she was employed for and, for this reason, she was dismissed. The Court quoted the CJEU case law and held that the notion of disability includes the state of health of a person who suffers from an illness 'which, in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one [...]'.¹⁸³ The Court found the dismissal discriminatory on grounds of disability, because the employer has a duty to provide reasonable accommodation in order to explore the feasibility of accommodations that may allow the employee to continue working in the same company. According to the Court, the employer had made no effort to find alternative arrangements and share the burden between the workers, and therefore annulled the employee's dismissal. The employer was ordered to reintegrate the worker in her job, to pay her the salary not earned and to pay EUR 10 000 as compensation for the non-material damage.

Name of the court: Court of Livorno

Date of decision: 16 June 2015

Name of the parties: *P.S. v C.F.*

¹⁸² <http://www.senato.it/service/PDF/PDFServer/BGT/00965974.pdf>.

¹⁸³ Court of Justice of the European Union CJEU, C-335/11, *HK Danmark*, 11 April 2013, point 41.

Reference number: N/A

Web address:

http://www.personaedanno.it/attachments/article/48309/9003182_livorno.pdf

Brief summary: A student with disability was a victim of several acts of discrimination by his support teacher and by the director of the school. According to the claimant, the support teacher had in several instances excluded the student from collective activities or had shut him alone in a room as an extreme remedial measure to address his supposed violent acts. Moreover, both the support teacher and the director had expressed their views about the difficulties raised by the student's disability in front of him, his parents and all the other students, without taking into account his feelings. The support teacher resigned before the end of the school year, and another one was appointed who was then able to build a good relationship with both the student and his parents.

The Court of Livorno found that the support teacher and the director of the school had perpetrated several acts of direct discrimination and harassment by excluding the claimant from the collective activities of the group and by creating a humiliating environment by making public statements about the problems raised by his disability. The Court ordered the school and the Education Office to pay EUR 10 000 for the non-pecuniary damages suffered by the student. The amount of the damages were calculated taking into account the seriousness of the offences, their number, their duration and the emotional stress suffered by the student because of the acts carried out.

Trends and patterns in 2015 in cases brought by Roma

There is a traditional reluctance in Italy to engage in 'civil rights litigation', and this seems to be particularly true with reference to Roma. The role played by NGOs in this regard is crucial, together with the support from the Open Society Foundation and the European Roma Rights Centre. In fact, these NGOs have recently started to pursue legal actions, with positive results. The case against the La Barbuta camp in Rome, decided on 9 June 2015 is a perfect example of a new trend. Two NGOs, ASGI and Associazione 21 luglio, filed an action against the municipality of Rome, claiming that the policy of placing Roma in a camp named La Barbuta, a large settlement on the remote outskirts of Rome, and so hindering their effective inclusion in society, was discriminatory. The Court of Rome convicted the Municipality of Rome of indirect discrimination, in accordance with Article 2 of Legislative Decree 215/2003 implementing Directive 2000/43/EC.¹⁸⁴ One point stressed by the Court is that the camp was designed for travelling people, whereas a large majority of the inhabitants are permanent residents (97-98 %). The Municipality of Rome was ordered to stop allocating housing in La Barbuta camp and to remove the effects of the allocations already in force; to publish the judgment in the national newspaper, *Corriere della Sera*; and to pay half of the legal costs incurred by the two claimants.

Another interesting case concerning Roma was decided by the Court of Rome on 6 February 2015, thanks to the support of the two NGOs, ASGI and the Associazione 21 Luglio.¹⁸⁵ A bar exam preparatory handbook, published by a very popular legal publisher, consisted of several opinions on criminal law, acting as a model for the bar exam, where lawyers have to write two opinions, one on civil law and one on criminal law. One of these opinions was about the crime of buying goods of doubtful origin. An example of the facts that the buyer should take into account in considering any such 'doubtful origin' was the circumstance of an object of high value being sold by 'a beggar, a gypsy or a well-known convicted felon'.

Firstly, the Court found that all the three claimants had legal standing – the woman because she belonged to the Roma community and therefore felt personally injured reading the challenged opinion, and the two NGOs because they had the right to legal standing under

¹⁸⁴ Court of Rome, *ASGI and Associazione 21 Luglio v. Rome Capital and Italian Government*, 4 June 2016, <http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf>.

¹⁸⁵ <http://www.asgi.it/wp-content/uploads/2015/04/Tribunale-di-Roma-I-sez.-Civile-1622015-est.-Pratesi-XXX-ASGI-Associazione-21-luglio-avv.-Fachile-C.-Gruppo-Editoriale-Simone-%E2%80%A6.pdf>.

Article 5 of Legislative Decree 215/2003 in this case of collective discrimination. The Court found the opinion discriminatory on the ground of ethnic origin. In the example, Gypsies were put next to beggars and convicted felons, two groups identified by an activity (asking for money and committing crimes), whereas Gypsies are a group identified by its ethnic origin. According to the Court, the example in the opinion constitutes clear discrimination against Roma. Moreover, the Court found that the intent of the author was not relevant under Article 2 of Legislative Decree 215/2003, which provides a definition of direct discrimination. Finally, the Court ordered the publisher to withdrawal all copies of the book from the market; to change it for any future publications by deleting the word 'gypsy'; and to pay EUR 1 000 as non-pecuniary damages to the individual victim as a member of the discriminated ethnic group. The fact of this judgment reflects the widespread prejudice against the Roma community in Italy, and the conviction of the legal publisher was very clear in rejecting the formal arguments of the defendant. This could have a positive dissuasive effect with reference to other publishers.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Italy

Date: 31 December 2015

Title of legislation (including amending legislation)	Title of the law: Legislative Decree 215/2003 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin Abbreviation: Legislative Decree 215/2003 Date of adoption: 9 July 2003 Latest amendments: Art. 28 of Legislative Decree 150/2011 Entry into force: 27 August 2003 Web link: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;215 Grounds covered: Race and ethnic origin
	Civil law
	Material scope: Public employment, private employment, access to goods or services (including housing), social protection, social advantages, education
	Principal content: Prohibition of direct and indirect discrimination, harassment, instructions to discriminate, remedies and sanctions, creation of a specialised body
Title of legislation (including amending legislation)	Title of the Law: Legislative Decree 216/2003 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation Abbreviation: Legislative Decree 216/2003 Date of adoption: 09 July 2003 Latest amendments: Art. 9, para. 4-ter, Law decree no. 76/2013, converted into law no. 99/2013 Entry into force: 28 August 2003 Web link: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;216!vig= Grounds covered: Religion or belief, disability, age, sexual orientation
	Civil law
	Material scope: Public and private employment
	Principal content: Prohibition of direct and indirect discrimination, harassment, instructions to discriminate, remedies and sanctions
Title of legislation (including amending legislation)	Title of the law: Act 67/2006, Provisions on the judicial protection of persons with disabilities who are victims of discrimination Abbreviation: Act on the non-discrimination of disabled people Date of adoption: 01 March 2006 Latest amendments: Art. 28 of Legislative Decree 150/2011 Entry into force: 21 March 2006 Web link: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006-03-01;67!vig Grounds covered: disability
	Civil law
	Material scope: All fields (there is no limit to the scope of application)
	Principal content: Implementation of the principle of equal treatment and equal opportunity. Prohibition of direct and indirect discrimination

Title of legislation (including amending legislation)	Title of the Law: Legislative Decree 286/1998, Consolidated text of provisions on the regulation of immigration and the status of foreign citizens, Articles 43 and 44. Abbreviation: Immigration Decree Date of adoption: 25 July 1998 Latest amendments: Art. 28 of Legislative Decree 150/2011 Entry into force: 02 September 1998 Web link: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25;286!vig= Grounds covered: Race, colour, ancestry, religion, national or ethnic origin, religious beliefs and practices
	Civil law
	Material scope: Public employment, private employment, access to goods or services (including housing), social protection, social services, education, economic activity.
	Principal content: Prohibition of direct and indirect discrimination; remedies and sanctions; creation of regional observatories
Title of legislation (including amending legislation)	Title of the law: Act 122/1993, Urgent measures on racial, religious and ethnic discrimination Abbreviation: Mancino Act Date of adoption: 25 June 1993 Latest amendments: Art. 34 of Legislative Decree 150/2011 Entry into force: 27 June 1993 Web link: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:1993-04-26;122!vig= Grounds covered: racial and ethnic origin, religion
	Criminal law
	Material scope: All fields (there is no limit to the scope of application)
	Principal content: Hate speech, discriminatory acts
Title of legislation (including amending legislation)	Title of the law: Framework Act 104/1992 on rights and social integration of persons with disability Abbreviation: Framework act on social assistance Date of adoption: 05 February 1992 Latest amendments: Legislative Decree 119/2011 Entry into force: 18 February 1992 Web link: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1992-02-05;104!vig= Grounds covered: disability
	Administrative law
	Material scope: All fields
	Principal content: Integration of persons with disability
Title of legislation (including amending legislation)	Title of the law: Act 68/1999, Provisions on the right to work of disabled people Abbreviation: Act on the employment of disabled people Date of adoption: 12 March 1999 Latest amendments: Legislative decree 151/2015 Entry into force: 17 January 2000 Web link: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-03-12;68!vig= Grounds covered: disability
	Civil/administrative law
	Material scope: Public and Private employment
	Principal content: Integration of people with disability

Title of legislation (including amending legislation)	Title of the law: Act 300/1970, 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 Abbreviation: Workers' Act Date of adoption: 20 May 1970 Latest amendments: Law 92/2012 Entry into force: 11 June 1970 Web link: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1970-05-20;300!vig= Grounds covered: Race, sexual orientation, disability, age, religion or personal belief
	Civil law
	Material scope: Private employment
	Principal content: Unfair dismissal and discrimination in the work place
Title of legislation (including amending legislation)	Title of the law: Tuscany Regional Act 63/2004, Provisions against discrimination on the ground of sexual orientation and gender identity Abbreviation: Tuscan Regional Act 63/2004 Date of adoption: 15 November 2004 Latest amendments: N/A Entry into force: 10 December 2004 Web link: http://raccoltanormativa.consiglio.regione.toscana.it/articolo?urndoc=urn:nir:regione.toscana:legge:2004-11-15;63 Grounds covered: Sexual orientation and gender identity
	Civil/administrative law
	Material scope: All field
	Principal content: Implementation of the principle of equal treatment and equal opportunity. Measures of social inclusion, vocational training, occupation and healthcare
Title of legislation (including amending legislation)	Title of the law: Liguria Regional Act 52/2009, Provisions against discrimination on the ground of sexual orientation Abbreviation: Liguria Regional Act 52/2009 Date of adoption: 10 November 2009 Latest amendments: N/A Entry into force: 26 November 2009 Web link: https://lrv.regione.liguria.it/liguriass_prod/articolo?urndoc=urn:nir:regione.liguria:legge:2009-11-10;52 Grounds covered: Sexual orientation
	Civil/administrative law
	Material scope: All fields
	Principal content: Implementation of the principle of equal treatment and equal opportunity. Measures of social inclusion, vocational training, occupation and healthcare
Title of legislation (including amending legislation)	Title of the law: Emilia Romagna Regional Act 5/2004, Provisions on the social integration of migrants Abbreviation: Emilia Romagna Regional Act 5/2004 Date of adoption: 24 March 2004 Latest amendments: N/A Entry into force: 9 April 2004 Web link: http://demetra.regione.emilia-romagna.it/al/monitor.php?vi=nor&dl=ae6576a6-66b1-ac84-77fe-

	4e4cc2e7c000&dl t=text/xml&dl a=y&dl id=10&pr=idx,0;artic,1;articparziale,0&ev=1 Grounds covered: Race, ethnicity, nationality and religion Civil/administrative law Material scope: Social integration, healthcare, education, vocational training, occupation and employment, democratic participation Principal content: measures against discrimination, establishment of a regional observatory, measures against social exclusion in the fields of education, healthcare, employment, and occupation.
Title of legislation (including amending legislation)	Title of the law: Regional Lazio Act 10/2008 Promotion of full equality and integration of aliens Abbreviation: Lazio Regional Act 10/2008 Date of adoption: 14 July 2010 Latest amendments: N/A Entry into force: 5 August 2010 Web link: http://www.socialelazio.it/binary/prtl_socialelazio/tbl_normativa/LR_10_2008.pdf Grounds covered: race and ethnic origin, nationality Civil/administrative law Material scope: Social integration, healthcare, education, vocational training, occupation and employment, democratic participation Principal content: measures against discrimination, establishment of a regional observatory, measures against social exclusion in the fields of education, healthcare, employment, and occupation
Title of legislation (including amending legislation)	Title of the law: Tuscany Act 29/2009 on the reception, integration and protection of aliens Abbreviation: Tuscan Regional Migration Act Date of adoption: 9 June 2009 Latest amendments: N/A Entry into force: 30 June 2009 Web link: http://www.immigrazione.regione.toscana.it/lenya/paesi/live/contenuti/norme/legge-29-2009_it.html?datafine=20090618 Grounds covered: Nationality, race or ethnic origin Civil/administrative law Material scope: Social integration, employment and occupation, vocational training, education Principal content: Several measures aiming to foster the integration of aliens: measures against discrimination, measures against social exclusion in the fields of education, healthcare, employment and occupation

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Italy

Date: 31 December 2015

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	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)	04.11.1950	26.10.1955	No	Yes	Yes
Protocol 12, ECHR	04.11.2000	Not ratified	No		
Revised European Social Charter	03.05.1996	05.07.1999	No	Ratified collective complaints protocol? Yes. The collective complaints protocol has been ratified	Yes
International Covenant on Civil and Political Rights	18.01.1967	15.09.1978	No	Yes	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	03.11.1997	No	N/A	Yes
International Covenant on Economic, Social and Cultural Rights	18.01.1967	15.09.1978	No	N/A	Yes
Convention on the Elimination of All Forms of Racial	13.03.1968	05.01.1976	No	Yes	Yes

Instrumen t	Date of signature (if not signed please indicate) Dd/mm/ yyyy	Date of ratificatio n (if not ratified please indicate) Dd/mm/ yyyy	Derogations / reservations relevant to equality and non- discriminatio n	Right of individual petition accepted?	Can this instrume nt be directly relied upon in domestic courts by individua ls?
Discrimina- tion					
Convention on the Elimination of Discrimina- tion Against Women	17.07.1980	05.09.1991	No	Yes	Yes
ILO Convention No. 111 on Discriminati on	25.06.1958	12.08.1963	No	N/A	Yes
Convention on the Rights of the Child	26.01.1990	05.09.1991	No	N/A	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	15.05.2009	No	N/A	Yes

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