



Executive Summary

Country Report Italy 2008 on measures to combat discrimination

by Alessandro Simoni

1. Introduction

Discrimination on the grounds foreseen in the Directives has until recently been a marginal subject in Italian legal and political debate. As a result of the low priority that combating discrimination has had for social and political actors, empirical research on the dimension of the actual problems has been carried out to a limited extent.

Certainly, hostile attitudes can be observed towards different categories of people, mostly part of the recent waves of immigration. Immigration has indeed caused a dramatic increase in the degree of perceived diversity within Italian society, where in a relatively short period distinctions (mostly regional and social) that previously represented important barriers became marginal vis-à-vis racial and ethnic factors. Frequent targets have been “Albanians”, “Muslims”, “Africans”, “Chinese” and persons categorised with these labels often report cases of discrimination, for instance in the private housing market. To this must be added the hostility against the Roma (including those with Italian citizenship) which is increasingly becoming a burning issue, very difficult to handle politically.

At least until the transposition of the Directives, reaction to xenophobia has not taken the form of well-defined policy proposals, as the debate has been mostly focused on immigration law and not on anti-discrimination law strictly speaking. Such an attitude has been until recently common to both political actors and NGOs. When action was taken at the parliamentary level to introduce anti-discrimination rules (e.g. the rules contained in the 1998 Act mentioned below), it was given little visibility, probably in order to avoid political costs. In all fields it is, however, difficult to provide correct estimates of the frequency and magnitude of discrimination, and the media are often very inaccurate sources.

Racial and ethnic discrimination often overlaps with discrimination on the basis of religion and belief, mostly in the form of hostility towards “Arabs” and “Muslims” which occurs without distinction. With regard to religious minorities not linked to immigration (Jews, Waldensians, and others) there are no reports of serious cases of discrimination. However, the absence of a general law on religious freedom (which has been pending in parliament for years) is a cause of practical disadvantage for those groups (the Muslim, but also Jehova’s witnesses) that did not sign agreements with the Italian state.

Sexual orientation is now more rarely the target of openly hostile statements in the public arena. This notwithstanding, problems of discrimination and harassment on this ground are sometimes reported, although rarely with judicial outcomes.

With regard to sexual orientation, the traditional position of the Catholic Church towards gays and lesbians can – at least in theory - cause problems when employment implies some sort of evaluation of religious and moral qualities, and this can in its turn strengthen homophobic attitudes arising in other contexts.

The condition of gays and lesbians is, however, increasingly the object of public debate, specially with regard to the possibility of same sex marriage, and this probably contributed to the strong decrease of homophobic statements by politicians, that in the past were not uncommon.

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

2. Main legislation

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

As in many other legal systems, the absence until recently of specific legislation did not mean, however, that the overall system did not include rules that could have been used as a basis for anti-discrimination litigation. The Italian 1948 constitution includes a general principle of equality requiring equal treatment irrespective of - among other things - race and religion, and in general irrespective of “personal and social conditions”.

While clearly forbidding any discriminatory legislation, it is a matter of legal debate whether this principle has direct effect, i.e. if it is a sufficient ground for an action by a discriminated individual. The potential of the constitutional equality principle to become a real remedy against discrimination has, however, never been clearly tested in court. It can certainly be discussed whether this happened because of the absence of discrimination or because of the difficulties in accessing justice by the discriminated individuals.

The first enactment of advanced anti-discrimination rules took place with the 1998 Immigration Act. This law provides a good set of remedies against racial, ethnic and religious discrimination, and in many respects anticipated the requirements of Directives 2000/43/EC and 2000/78/EC on these grounds. The 1998 Act forbids, through private law rules, direct and indirect discrimination by individuals and public authorities, with definitions roughly corresponding to those of the Directives, but with a list of fields of application which is open-ended. Protection extends to discrimination on ground of nationality.

The same act contains also special procedural rules for anti-discrimination cases, in order to make them especially swift and effective, as well as providing the possibility for compensation of non-pecuniary losses, that in Italian law is otherwise restricted to criminal offences. There are not many reported judicial decisions based on the 1998 Act. However, some of the reported decisions attracted significant interest because of their application to public bodies (for instance, quashing a regulation on public housing of the town of Milan) or because of the sanctioning of discriminatory activities other than those foreseen in the non-exhaustive “black list”.

In order to transpose Directives 2000/43/EC and 2000/78/EC in Italian law, the government (on the basis of the lawmaking power previously delegated for this purpose by the parliament) approved in July 2003 two decrees, decree 215/2003 (transposing directive 43/2000) and decree 216/2003 (transposing directive 78/2000).

No significant consultation with NGOs and social actors took place. However, the final versions of the Decrees take into account some criticisms raised in the parliamentary commissions (which gave a non-binding review) on the first draft of the decrees.

The Decrees reproduce the text of each Directive. Decree 215/2000 is thus applicable, within all fields mentioned in directive 43/2000, to discrimination on ground of race and ethnic origin, while decree 216/2003 applies within the field of employment to discrimination based on religion and belief, sexual orientation, disability and age. Both decrees are basically aimed at transplanting the Directives into the legal system as they are, without attempting to coordinate between them or with other existing Italian legal rules. Some formal mistakes which occurred in the drafting work have been corrected by a later decree, and legislation of early 2008 amended some of the major discrepancies with the directives. One criticism addressed (also in parliament) at this transposition technique concerns the fact that, since it does not abolish the pre-existing anti-discrimination rules nor attempts unification, it adds a further legal regime, creating a complex situation which could lead to litigation involving many legalistic arguments. The coordination in a single text of all rules on equal opportunities (all grounds, included gender) has been discussed, but until now the government did not take action in that sense. Instead, a further act has been approved in march 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.

Italy is party to the major international treaties and conventions against discrimination, like e.g. 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 within domestic law. It has, however, not yet ratified protocol 12 to the European Convention on Human Rights, thus limiting the potential of the Convention as tool for antidiscrimination litigation.

3. Main principles and definitions

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

For all grounds of discrimination, occupational requirements can justify an exception to the prohibition of discrimination, within the limits of “proportionality and reasonableness” along the lines of the relevant provisions of the directives, although leaving out of the scope of application of the Decree provisions concerning “work suitability tests”.

Italy chose to use the possibility of maintaining ad hoc rules for organisations with a special ethos.

The prohibition of discrimination is therefore excluded from those “differences of treatment based on the profession of a particular religion or belief when such differences take place within religious organisations (*enti religiosi*) or other public or private organisations, and the religion or belief, because of the nature of the professional activities or the context in which they are carried out, constitute a genuine and determining requirement for the carrying out of the activities”. A partial exemption from the obligation of non-discrimination for organisations with a specific ethos was developed judicially in Italy before the adoption of the Directive, while on the legislative plan the only provision on the point was a very limited one of 1990 concerning so-called *organizzazioni di tendenza*, (i.e. organisations characterised by a certain “ideology” in a broad sense, as churches, parties, trade unions). In case of unfair dismissal, the employees of these organisations are granted only the remedy of damages, and not the right to reinstatement otherwise available. With arguments partly based on the existence of this limited rule, and partly on constitutional grounds, judges and scholars (in a very intricate debate which cannot be described here in all its nuances) have admitted a discretionary power of religious organisations whether to hire or dismiss, or otherwise discriminate, which goes beyond the purely remedial aspect. This was, however, subject to important limits which are not mentioned in the broad provision of the decree aimed at the transposition of Directive 2000/78/EC. Discrimination was not permitted when the organisation operates on a profit basis, and an actual link between the activity of the individual worker and the ideology of the organisation was required. According to many scholars, the decree gives to employers with an ethos based on religion and belief a power they did not have before the adoption of the Directive.

With regard to religion, a problem which arises is the position of those confessions (like Islam) that did not finalise an “agreement” (*intesa*) with the State, and thus do not enjoy automatic legal recognition of their specific needs (like holidays and ritual obligations).

In the Decree transposing Directive 2000/78/EC there is no mention of the requirement of reasonable accommodation for the disabled, which is neither mentioned in the new 2006 act on discrimination against disabled persons.

The problem of multiple discriminations is not dealt with as such in Italian antidiscrimination legislation.

4. Material scope

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

The exclusion of discrimination on the ground of nationality, although admitted by the Directive, often raises practical problems since in Italy racial discrimination is disguised under the appearance of discrimination against “non-EU citizens”, which can lead to indirect discrimination.

The above mentioned case concerning public housing in Milan was, for instance, decided as a case of direct discrimination on the basis of nationality, although it was clear that in the underlying political decision the crucial factor was the ethnic identity of the foreign citizens involved.

5. Enforcing the law

Because of the legislative technique chosen by the government, the system for the enforcement of rules against discrimination on all grounds foreseen in the Directives is based on the integration of pre-existing procedural tools into the rules introduced in the context of the transposition. The special procedure for anti-discrimination cases provided by the 1998 Immigration Act, which is more swift and effective than the ordinary procedure, is therefore still applicable to discrimination cases.

Should discrimination arise, the victim can apply, even in person (while in ordinary cases assistance by a lawyer is compulsory in Italy) to the judge of the place of his/her residence (an exception to the general principle of suing in the residence of the defendant) to obtain an order of interruption of the discriminatory activity as well as damages (including non-pecuniary losses, ordinarily excluded in civil cases). The hearing takes place “avoiding all unnecessary formality”, with free choice by the judge of the most suitable method to gather evidentiary materials.

In cases of special urgency, the judge can issue an interim order, the violation of which (as that of the order issued in the final decision) is a criminal offence. The Decrees transposing the Directives establish, moreover, that in the field of employment and occupation there is the possibility of making use of pre-trial mediation and that the judge can order - together with the judgment - the production of a plan for the removal of discrimination, as well as the publication of the judgment in a major newspaper.

Concerning standing to litigate, both Decrees contain special rules. With regard to race and ethnic origin, the Department of Rights and Equal Opportunities (*Dipartimento per I Diritti e le Pari Opportunità*, of the Presidency of the Council of Ministers keeps a list, approved by the Ministries of Labour/Welfare and Equal Opportunities, of associations and bodies which have standing to litigate in support of or on behalf of the victims of discrimination, identified on the basis of “their purposes and of the degree of continuity in their action”. It is difficult to say to what extent the standing to litigate of the associations will be used in practice. With regard to standing to litigate in cases concerning the other grounds of discrimination, the Decree transposing Directive 2000/78/EC now foresees standing of relevant organisation with introducing a special register. With regard to discrimination on ground of disability out of employment the new 2006 act introduces a system similar to that in force for race and ethnicity, which is likely to be applied also for cases of discrimination within employment.

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

After recent amendments, a new rule on burden of proof has been approved that introduce reversal once the plaintiff brings factual elements that can precisely and consistently establish the presumption of the existence of discriminatory acts, agreements or behaviours, with statistical data mentioned only for race and ethnicity (reference to statistical data for other grounds has been deleted in parliament).

Situation testing can be used as evidence in civil proceedings. Notwithstanding the absence of legal obstacles to its use, there are no discrimination cases in which evidence gathered with situation testing has been presented as such to a court.

The system is thus still based on the action of the victim in a court of justice. As mentioned before, after the reform of 1998 the cases brought in the courts were few, although representative of an increasing consciousness of the problem of racial discrimination. The new system does not contain anything that could lead to a much higher amount of litigation.

6. Equality bodies

An equality body has been created only with regard to race and ethnic origin, named *Ufficio nazionale antidiscriminazioni razziali (UNAR)*. It is not an autonomous body, since it is established as a branch of the Department for Rights and Equal Opportunities of the Presidency of the Council of Ministers, previously dealing exclusively with gender discrimination. The office makes use also of staff from other public administrations, including judges and state attorneys, as well as external experts and advisers. According to its founding act, the competences of the office include providing independent assistance to victims of discrimination in pursuing their complaints, carrying out independent surveys on discriminations, promoting the adoption of specific measures aimed at eliminating or compensating the disadvantages related to a certain race or ethnic origin, issuing of opinions and proposing legislative reforms concerning racial and ethnic discrimination, issuing recommendations on matters related to racial and ethnic discrimination and diffusion of information concerning the rules on equal treatment between persons irrespective of racial or ethnic origin. The office has two different units, one primarily oriented toward legal assistance and dispute resolution and the other toward study, and research. It reports every year to the parliament and to the executive. The office has been operational since November 2004, and according to the annual reports to the Government it has developed a significant activity of assistance to victims of discrimination, although giving absolute priority to mediation over litigation (no case has been seemingly brought to court on initiative of UNAR). Besides legal assistance, the office interacted with external lawyers submitting amicus curiae briefs in a few cases brought to court, mostly dealing with the status of illegal immigrants. The office has undertaken a relevant activity of dissemination and training for lawyers and NGOs, with seminars and workshops. On its website, a relevant amount of legal information is available (as a handbook for practitioners), although the last year the amount information included has been decreasing.

In the first reports addressed to Parliament, the office made a comprehensive analysis of the shortcomings of the present anti-discrimination legislation, proposing to strengthen its own role in the legal system, with the extension of its competence to other grounds of discrimination, stronger powers of intervention (with for instance the possibility to issue binding orders for the disclosure of documents or the interruption of discriminatory activities) and the introduction of at least some form of standing in judicial proceedings.

The overall political instability that recently characterised Italy, however, caused a certain difficulty of the office in developing a clear policy and to develop the profile outlined in its first years, and the passivity in the recent debates concerning anti-Romani hostility is probably a sign of this uncertainty.