

Executive Summary on race equality directive
State of play in ITALY
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Introduction

Public awareness of the problem of racial and ethnic discrimination is quite new in Italy. Also recent is the introduction of clear legal remedies for those who are victims of discriminatory acts.

Such a delay has many causes. One, of course, is that – compared to other European countries – Italy has become a country of immigration relatively late, thus postponing the emergence of problems related to contact with racial and ethnic groups perceived as “different”. At the same time, it is also true that even now that the integration of immigrants has become a major problem in Italian society, discrimination is having difficulties in finding its place in the political arena, the only partial exception being extreme cases of “hate speech”.

While some political groups have a clearly hostile attitude toward the presence in Italy of different racial and ethnic groups, the reaction to xenophobia has not taken the form of well-defined policy proposals, and the debate has been mostly focused on immigration law, and not strictly speaking on anti-discrimination law. Such an attitude has until recently been common to both political actors and NGOs. When action was taken at the parliamentary level for introducing anti-discrimination rules (such as those in the 1998 Act mentioned in the following), it was given little visibility, probably in order to avoid political costs.

The low priority that discrimination has had for social and political actors implies also that there is little information and empirical evidence on the dimension of the problems of discrimination. However, there is certainly a diffusion of hostile attitudes against different (often overlapping) categories of persons, mainly components of the recent immigration flows. The targets of hate speech are thus Albanians, Muslims, Africans, and members of these same groups often report cases of discrimination, for instance in finding housing on the private market. To this must be added the traditional hostility against the Roma (including those with Italian citizenship) which is deeply rooted in Italian society, although it has only recently come to the surface after, on the one hand, its political use as a component of broader xenophobic campaigns, and, on the other hand, the publication of reports on Italy by international bodies and NGOs (primarily ECRI and European Roma Rights Center).

The groups who are most likely to suffer discrimination are clearly also those who are affected by the immigration policy. This policy has been the object of important legislative reforms in the last few years, and this may explain why NGOs and social partners have concentrated their action on this issue, without paying sufficient attention to the legal problems linked to discrimination.

At the national level, there are no positive action or specific programmes targeted at racial or ethnic minorities. Some quite weak action, concerning specifically Roma, exists by virtue of laws promulgated by several regions.

1. Main legislation

As mentioned above, specific and detailed legislation against discrimination in respect of racial and ethnic origin was only introduced into the Italian legal system in 1998. Prior to 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 that the overall system did not include rules that could have been used as a basis for anti-discrimination litigation. The Italian constitution of 1948 indeed includes a general principle of equality imposing equal treatment irrespective of, among other things, race. While clearly forbidding any discriminatory legislation, it was a matter of legal debate whether this principle had direct effect, i.e. if it was a sufficient ground for an action by a discriminated individual. The potential of the equality principle of the constitution to build a real remedy against discrimination was, however, never clearly tested in the courts. It can, of course, be discussed whether this was the case because of the absence of discrimination or because of the difficulties of access to justice on the part of the discriminated individuals.

An important step forward took place with the enactment of the anti-discrimination rules contained in the 1998 Immigration Act. Such rules, although little known by the general public and by lawyers, provided a good set of remedies against racial and ethnic discrimination, and in many respects anticipated the requirements of Directive 43/2000. The 1998 Act prohibited, through private law, direct and indirect discrimination by individuals and public authorities with definitions more or less corresponding to those of the Directive, but with a non-exhaustive list of prohibited forms of discrimination. Protection extended also to discrimination on ground of nationality. The same act also contained special procedural rules for anti-discrimination legal action, in order to make them specially swift and effective, and the possibility of being awarded compensation for non-pecuniary losses, a possibility that in Italian law is otherwise restricted to criminal law.

There are not many reported judicial decisions based on the 1998 Act. However, some of the reported decisions were of significant interest because of the application to public bodies (for instance, quashing a regulation on public housing in the town of Milan) or because of the sanctioning of discriminatory activities different from those foreseen in the (non-exhaustive) “black list” contained in the 1998 Act.

In order to transpose Directive 43/2000 into Italian law, the government (on the basis of lawmaking powers previously delegated for this purpose by the parliament) approved on July 2003 a decree containing detailed rules about discrimination in respect of race or ethnic origin. No significant consultation with NGOs and social actors took place. However, the final version takes into account some criticisms raised in the parliamentary commissions (called to a non-binding review) on the first draft of the decree.

The new decree (and this was one of the criticisms expressed in parliament) does not abolish the pre-existing anti-discrimination rules by unifying all anti-discrimination rules in one act, but adds a further legal regime, thus creating a complex situation which could give rise to litigation on the basis of many legalistic arguments.

2. Main principles and definitions

The new decree forbids direct as well as indirect discrimination with wording that is based on that of the Directive. Harassment is also defined and prohibited. Unlike the Directive, the new act says that the unwanted conduct must have the effect of “creating an intimidating, hostile, degrading, humiliating *and* offensive environment” (while the Directive says *or*). If taken seriously, the difference could have some implications for interpretation. The legislative history of the decree (and the comparison with the wording of the decree implementing Directive 78/2000) seems, however, to show that this wording is a mistake due to hasty drafting. Instructions to discriminate are declared equated with ordinary discrimination. Victimisation is included in the decree, but only as an element to be taken into consideration in the assessment of the amount of damages.

Occupational requirements can allow an exception to the prohibition of discrimination, within the limits of legitimate objective and proportionality, when because of the nature of a professional activity or its context, a certain racial or ethnic characteristic represents a determining and crucial requirement.

3. Material scope

The scope of application includes the same fields as those listed in the Directive. 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 immigration, work, and assistance to citizens of non-EU countries. The exclusion of discrimination on ground of nationality, although permitted by the Directive, raises problems, since in Italy racial discrimination is often disguised as legitimate 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 the political decision behind it was taken in a context in which the ethnic identity of the foreign citizens involved was a crucial factor.

4. Equality bodies

According to the recent decree, the equality body will not be an autonomous body, but it will instead be created within the Department for Equal Opportunities (*Dipartimento per le Pari Opportunità* - until now dealing uniquely with gender discrimination) of the Presidency of the Council of Ministers, and will be directed by a person appointed by the President of the Council of Ministers or by a Minister on his behalf. This office will be able to make use of staff from other public administrations, including judges and state attorneys, and of experts and advisers.

The activities of the office shall include providing “independent” assistance to victims of discrimination in pursuing their complaints, conducting “independent” surveys on discrimination, promoting the adoption of specific measures with the aim of eliminating or compensating the disadvantages related to a certain race or ethnic origin, issuing opinions and proposals for legislative reforms concerning racial and ethnic discrimination, issuing recommendations on matters related to racial and ethnic discrimination, and diffusing information concerning the rules on equal treatment between persons irrespective of racial or ethnic origin. The office shall report every year to the parliament and to the executive.

The details of the organisation of the office shall be established in a separate decree. While the present decree establishes that its activities must take place in an “autonomous and impartial way”, until the publication of the further decree it is impossible to say what guarantees there are of actually achieving such autonomy and impartiality. Since the decree on internal organisation has not yet been issued, the office cannot be considered as operating. According to governmental sources, the decree on internal organisation and the actual commencement of the office’s activities is to be expected very soon.

Absent from the decree is any effective provision concerning social dialogue and dialogue with NGOs. Strictly speaking, it could be argued that such activities can be considered as part of the duties of the new office. A final assessment can also here only be given after the publication of the expected decree on the internal organisation and duties of the new office.

5. Enforcing the law

Regarding the procedures to be followed in anti-discrimination cases, the decree refers to the relevant provisions of the 1998 Immigration Act, to which is added the possibility of making use of pre-trial mediation and the possibility for the judge to order - together with the judgment - the production of a plan for the removal of discrimination, as well as the possibility to order the publication of the judgment in a major newspaper. The ordinary sanction remains the payment of damages, including non-pecuniary losses. In the cases brought to court until now (on the basis of the 1998 Act), the damages awarded were of a sufficient amount to have a deterrent effect.

The system is thus still based on the action of the victim in a court of justice. As mentioned, since 1998 the cases brought to the courts have been few, but nevertheless representative of a rising consciousness of the problem of racial discrimination. The new system does not contain anything that could result in a much higher amount of litigation.

The above-mentioned Department of Equal Opportunities will keep (for purposes not stated in the decree) a list of the associations and bodies active in the field of combating discrimination. These associations and bodies must respect certain quite detailed requirements, including at least one year of activity and certain formal guarantees of budgetary and administrative transparency. A separate list, approved by the Ministries of Labour/Welfare and Equal Opportunities, will include associations and bodies with 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”. The associations and bodies included in the first list can be included in the list of those having standing to litigate. It is difficult to say to what extent the standing to litigate of the associations will be used in practice.

The major weakness in the procedural system for implementing the anti-discrimination legislation lies probably in the rule on the burden of proof, with regard to which the legislator continues to be very prudent. According to the decree, if the person who considers himself or herself wronged by discrimination presents elements of fact suitable to establish “serious, exact and consistent elements” about the existence of direct or indirect discrimination, also on the basis of statistical data, the judge can evaluate such elements on the basis of the rule of the civil code allowing a “prudent appreciation” of presumptions. The absence of an explicit shift in the burden of proof was raised in parliament by members of the majority, but without significant impact on the final text.