

*** Discriminations on grounds of race and ethnic origin**

The issue of racial and ethnic origin discriminations is connected with the phenomenon that is under it : the big migrations to Europe of citizens coming from the third Countries, but also the enlargement of European Union to 27 member States from January 2007, that involves the movement of an always more number of people, with different language, history, religion, but more often ethnic origin and also race.

When this kind of discriminations is connected with the issue of the migrations the incidence of the UE legislation must find a balance with national regulations of each Member States.

We can affirm that, especially in Italy, a real coordination between bodies in charge to fight against discriminations and bodies in charge to monitor and to control migratory phenomenon doesn't exist.

We have to consider the two aspects of the legal and illegal immigration, remarking that racism and xenophobia episodes aren't mainly connected to the illegal immigration – to people illegally present in the State – but often addressed to legal immigrants.

In fact even if these citizens have a bigger number of rights, above all they who are *long term residents* in accordance to the directive 2003/ 109 CE, suffer the difficulty of a real integration because of a too slow social inclusion , first of all in the labour market , where they often have less advantaged contracts of employment .

Therefore it is necessary to pay much attention to all behaviours, acts and rules or practices, even neutral, that can hide a racial or ethnic discrimination, being a hindrance to a real integration that respects differences.

- ***The Council directive 2000/43/EC and its transposition into the Italian law***

The directive concerning the implementing of the principle of equal treatment between persons irrespective of racial or ethnic origin has been transposed by Italy with the statute n.215 / 2003 –a legislative decree – issued at the same time with the statute n.216/2003 , executing Council directive 2000/78 / CE , the “Employment equality directive”.

The normative connection between the directive and the transposition decree seems to be respected, but it isn't the real image of the complex judicial reality, much more complex.

We have, indeed, the 1998 immigration law (legislative decree n.268 /1998, modified in a pejorative way in 2002) that regulates third Countries immigration. This law adopts a rather different notion of indirect discrimination and doesn't provide even the virtual comparison for the direct discrimination that assures a higher level of personal features protection, but at the same time considers more factors of discriminations like: colour, ascendance, *national origin*, religious convictions and practices, Nationality is included as possible factor of discrimination, whereas directive and Italian transposition don't include.

This exclusion seems debatable, above all because article 12 of CE Treaty prohibits discrimination on ground of nationality, with the only limits of measures connected with the entry or the residence, not referring to any treatment coming from the juridical condition of citizen of a different Country.

Other problems of coordination between these two Italian legislations concern the procedural rules: different provisions of the subjects and organizations that can represent the victim in the trial and also a rather different system of burden of proof.

B) Omissions in transposition Directive 43/2000 and the problem of the effectiveness

The n.43 Directive's provisions that hadn't have a correct implementation are various, even if the formal transcription seems to respect the European text. They concern:

- 1) the protections of the individuals in case of discriminations (art.9 victimise)
- 2) the dialogue between the State and non governmental organisations (art.12)
- 3) the express abrogation of the contrary of equal treatment legislative rules (art.14)
- 4) the inadequately transposition of the provision that provides the reversal of the burden of proof;
- 5) The individualization of appropriate sanctions (effective, proportionate and dissuasive (art.15). Italian decree n.215 provides only for compensation of damages to the victim, in addition it provides for the possibility for the judge to order the adoption of specific measures to remove discrimination.

*According to art.13, the Italian body for the promotions of equal treatment of all persons without discriminations on the ground of racial or ethnic origin called **UNAR** (No discriminations Racial National Office) has several tasks in four fields of action : *prevention, promotion , removal , monitory (control /verification)*

1) To give help and assistance to victims of discriminations in pursuing their complaints in judicial or administrative proceedings;

2) Receiving and examining directly complaint of victims of discriminations, conducting independent surveys concerning discriminations , without infringing the prerogatives of the judicial authorities;

3) Promoting the adoption, by private or public subject , of positive actions to remove disadvantaged conditions connected to race or ethnic origin,

4) Issuing recommendations on matters related to racial and ethnic discrimination;

5) Monitoring end control of the real application and respect of equal treatment principles.

The office has been created within the Department for Rights Equal Opportunities of the Presidency of the Council of Ministers , directed by a person appointed by the President of Council , because of that there are some doubts on its independency. Unar is integrated in the government and hasn't actually the sufficient resources to assist victims in their *judicial* procedures.

According to art.7 of n.43/2000 Directive, the legislative decree n.215/2003 provides for the legal representation of victims ensured by associations included in a specific register while Unar has the only possibility to be heard in the trial provides assistance in judicial and administrative procedures, giving information or observations, written or oral, during the judicial case.

Indeed the office has no standing to litigate on behalf of discriminated persons and can just provide external assistance before and during litigation.

This means that the Italian law doesn't *entirely* execute the directive 43 disposition under n.2 art13 which provides that the Bodies have to guarantee a *real assistance* of victims of discriminations in pursuing their complaints about discriminations, also outside a judicial procedure. Indeed the critical point of the activity of UNAR is the task connected to the removal of discriminations, above all the individual ones.

In some interesting written comments concerning Italian situation of non governmental organizations ERRC (European Roma rights Centre), COHRE (Centre on housing

right's and evictions) and OsservAzione for the 72° session of CERD (the committee of UN), one of the recommendations addressed to Italy is “ *to provide the UNAR independency from other part of administration , in accordance with Paris principals ,as well as with sanctioning power.*”

Because UNAR isn't an independent Authority, it hasn't the power to carry out an independent investigation finalized not only to remove discrimination but also to sanction the discriminatory behaviour, only inquiring with the aim of confirming the existence of the discriminatory phenomena.

Indeed in the first issue of the separate report addressed to parliament the office makes proposals to strengthen its own role in legal system with stronger powers of intervention as, for instance, the possibility to issue binding orders for the interruption of discriminatory activities.

In alternative to judicial instruments for the victims, Unar has carried out only informal settlements and conciliations to find solutions to irradiate the discriminatory situations.

*In June 2007 the European Commission delivered a *motivated advise* (n.2358/2005) connected with the procedure of infringement under art.226 of the UE Treaty for non correct transposition of the n.43/2000 Directive referring to art.2 , paragraph 3 (concerned the definition of harassment) , art.8 paragraph 1 (burden of proof) and c) art.9 (Victimisation).

Whereas the infringement related to the definition of harassment is not essential (the Italian law says that the unwanted conduct must have the effect of << creating an intimidating ,hostile, degrading , humiliating **and** offensive environment>>,while the Directive says <<humiliating **or** offensive>>) , much more serious is the non compliance of the other two points.

a) The “reversal of burden of proof”.

Art.4 of n.215/2003 legislative decree has an express reference to burden of proof provision contained in the Italian Civil Code (art. 2729) , that is much more stricter than those envisaged in the Directive , because it doesn't provide for this reversal.

It requires the allegation and the demonstration of precise serious and concordant elements and evidences to presume the discrimination, with a mechanism of presumptions of facts whose admission is left “to the prudence of the judge”.

The burden of proof is committed only to the plaintiff.

The Commission observed that in our legislation there isn't a real reversal of burden of proof and, in addition, the judge has the full faculty to decide if accepting or not the importance of the evidences as sufficient proof. This implies more difficulty for the victim of discrimination to bring the case before the Court.

b) victimisation

The Commission observed that art.9 of the Directive requires to Member States to adopt measures to protect not only the victim of the discrimination but also every individual who can be involved in adverse treatment or consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

For these cases of retaliation Italian transposition law provided only for an addition of the compensation of damages that the judge can decide : indeed victimisation is mentioned merely as a parameter to assess the amount of damages.

Always and only in the judicial contest the judge *could* order to the author of the discrimination special measures to remove the discrimination, in theory including measures directed to individuals in any case hit by the retaliation.

The Commission thought these measures insufficient to guarantee the overall protection provided for article 9, because they don't satisfy the criteria of certainty in the law providing for clear sanctions , leaving the possibility of sanctioning illegal behaviour of retaliation only through to judicial decisions .

To implement the Directive the Italian Government definitively chose a *jurisdictional protection* of the victims of discriminations: this option better explain the insertion of UNAR in the government and its lack of more independence and power to remove discriminations even by sanctions.

In conclusion , the compliance with the Directive of present Italian legislation is in many aspects of difficult evaluation. But we could say that the interpretations of the provisions of the Decree does not take place in a formalistic approach , but in conformity with the spirit of the Directive , in a sort of "mainstream " interpretation .

d) Free movement and residence of UE citizen and the problem of discriminatory acts on grounds of racial and ethnic origin

As we know the enlargement of the European Union to 27 Member States unfortunately determined problems of discrimination connected with racial and ethnic origin.

According n.38 /2004 Directive Union citizen and their family members have the right of free movement and residence within the territory of Member States and the limits placed can set out only on grounds of public policy, public security or public health. The Directive facilitates the exercise of the right of residence by simplifying conditions and formalities and increases the protection against the expulsions.

We know that the European Court of Justice recalled that the right to reside in the territory of a member State is conferred directly by art.18 of the Treaty and underlined the need to interpret the right of free movement in the light of fundamental rights, in particular of the right to protection of family life and the principle of proportionality (see case law C-200/02 Chen, C215 /03 Oulane, C-50 /06 Commission v Netherland)

Union citizen have the right of residence on the territory of another Member State for a period of up three months without any condition. Afterward art.7 of the 38 /04 Directive requires some conditions to permit the free residence: to be workers or to have sufficient economic resources not to become a burden on the social assistance system of the host Member State (corresponding to the minimum social security pension), to register with the relevant authorities. After five years of continuous legal residence in the host Member State an unconditional permanent right of residence is assured.

Italy has implemented the Directive with the legislative decree n.30 of February the 6th 2007.

But after it, because of the bigger immigrations to Italy from the new Member State, the national and local governments started to adopt a series of policies which had a disparate impact on ethnic groups like Roma and Sinti citizen living in our Country.

The first measures had been the so called "Pacts for security" adopted in various cities(14) followed to an emergency decree, amending the legislative decree n.30, on the expulsion of EU citizen: DL n.181 /07 (urgent rules in matters of removal from the national territory for reason of public safety).

The parliament did not vote for the approval of the act and the government enacted a new Emergency decree published on December the 29th 2007(urgent measures in matters of

expulsions and removal for terrorism and for imperative reasons of safety) , but also these decree expired without approval by the Parliament.

The Pacts for Security, signed by local government representative – Prefetto- and the Mayor of the cities, provide for measures to combat the nomad phenomena and to avoid the excessive concentration of people, distinguishing between nomads and more resident and permanent ethnic groups.

Using these administrative rules many nomad camps were evacuated.

Not always the evictions carried out respecting people and their fundamental rights: homes were summarily destroyed, as goods, dresses, children toys; people forcibly evicted.

Also in Milan the evacuations from the camps were serious and it was very difficult to protect people from discriminatory abuse. Also the behaviour of media did not help to ban an intolerance campaign, on the contrary it eases the current climate of “anti Romani hysteria”.

In such a climate Roma could have few possibilities to report events of discriminations against them.

Just in these days in Milan a case law has been brought before the Court using the special proceeding provided for art.4 of n.215/03 legislative decree : a group of Roma with the help of lawyers that are involved with OGN associations, summons the Municipality of Milan complaining the illegal form and means with which police and official authorities carried out the forced evictions from a camp , destroying their personal property , pressing them ,violating their dignity and creating an intimidating , hostile and degrading environment that the plaintiffs denounced as harassments , in violation of art.2 of legislative decree n.215 /200 for *direct discriminations on grounds of ethnic origin*. The decision hasn't yet come out .They ask for compensations of damages against The Council of Milan and also for the adoption of every useful measures, chosen by the judge, finalized to remove the anti discriminatory behaviours , like furnishing to the plaintiffs adequate housing solutions.

According to UNAR the analysis of complaints made to this Office has confirmed that the discrimination damaging this community is both racial and collective in nature ; more rarely hits the single individual in his or her daily life, but instead it tends to systematically marginalise this specific group of people.

The censure of Italian policy made by the major international organizations that support human rights drew Unar 's attention to this minority. In 2007 has implemented a regular

contact with the representative of the associations involved in the protection of this minority to examine the cases handled by the office. In addition Unar has issued a call for projects by non profits organizations that analyse the factors , processes and good practices related to tackling discriminations on the basis of race and ethnicity.

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