

# **Analytical Report on Legislation**

## **RAXEN National Focal Point ITALY**

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# 1. Executive Summary

The **Introduction** gives an overview of the political choices and administrative practices after the coming into force of the Bossi - Fini law. Moreover the risk of an increase of institutional discrimination and of the spreading of a strongly discriminatory “culture” will be pointed out, which - amplified by mass media - multiplies the cases committed by private citizens.

In the **Systematic Considerations** the method of investigation will be examined: the role of definitions and the problem of the statistical data. Other than the previous study, done immediately after the Bossi - Fini law came into force, the present study examines implementation practices which, in certain cases, have been over-ruled by the judiciary, have turned out to be illegitimate and discriminatory. As far as the definitions are concerned, the coming into force of the national norms implementing the anti-discrimination directives 2000/43/CE and 2000/78/CE implemented (even though only partially) by the delegate decrees published in August, allows to establish at least on a legislative level, definitions that are sufficiently certain, even if the scope of the interpretation can vary, especially in reference to those limitations, also present in the EU directives, which seem to give priority to the necessities of security, protection of public order and migration control somehow neglecting the principle of equal treatment. Lastly, the problem of lack of statistical data on racial discrimination will be highlighted.

As far as the descriptions of the **sources of data** are concerned, the new legislative sources are being considered, which have been introduced during 2003, and among these sources the two regulations of implementation, the first regarding the Bossi – Fini law in general, the second referring to the part of the same law, which, in a few clauses, redefines the procedures of access to asylum. It will be pointed out how the regulations, due to be released in the fall after the approval by the Council of State, substantially hinder access to the right to asylum and hamper full enjoyment of social rights, already granted to regular immigrants.

The role of the media in the reproduction of prejudice will be highlighted because, the language used and the opinions expressed, create a negative image of migrants, irrespective of the actual data offered.

Afterwards, the main issue of **equal treatment and the application practices** will be examined, referring to asylum seekers and irregular immigrants, considered to be potential victims of racial discrimination and xenophobia, as well as victims of trafficking in human beings. After having dealt with equal treatment and racial discrimination to the detriment of regular immigrants, we will report on some “good practices” highlighting a first positive response of local administrations and NGOs, aimed at fighting the multiple forms of discrimination and xenophobia in Italy.

Considering the **Implementation of EU directives 2000/43/EC and 2000/78/ EC in Italy** the different EU measures which have not been implemented or have been implemented in a way that does not correspond to what has been foreseen by the EU-norm, will be pointed out, especially the adaptation of the inversion of the burden of proof, which has not been carried out as well as the lack of independent agencies that

monitor and denounce cases of discrimination. In any case the necessity of an interpretation of the delegate decrees will be pointed out – only recently approved by the Government – corresponding to the indications of the directives.

In the **Conclusions** the results of the study will be summarized. Most of all, however, risks will be pointed out that the judiciary after some interesting applications of the civil protection against acts of discrimination, foreseen by art. 43 and 44 of the Consolidated Text on immigration of 1998 (cases that have already been described in the previous study), might assume a particularly restrictive attitude, mainly as far as the assessment of the so-called discriminatory intention is concerned.

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### **3. Glossary/definition of terms and concepts used**

Discrimination is defined in general terms as any “behaviour which directly or indirectly causes distinction, exclusion, restriction or preference based on race, colour, ancestry, national or ethnic origin, religious belief or practice, having the aim or effect of destroying or hindering the recognition or exercise - under equal conditions – of fundamental human rights in the political, economic, social and cultural fields as well as in any other public sector” [Consolidated Act on the status of foreigners, Law nr. 286/1998; article 43.].

Direct discrimination: treating someone less favourably than another is, has been or would be treated in comparable circumstances because of the former’s real or presumed ethnic, racial, national, religious or cultural belonging.

Indirect discrimination: the adoption of regulations, criteria or practice which, irrespective of intentions, put people belonging to a particular group disproportionately at a disadvantage than another is, has been or would be and where such regulations, criteria or practice can not be objectively justified by a legitimate aim and the means of achieving that aim are proportionate and necessary.

National minority: the Italian Constitution recognizes national linguistic minorities who form long-standing components of the Italian population and in some cases such as Alto Adige / South Tyrol and Val d’Aosta such minorities have ample autonomy and protection under the law. Italy has no national minorities that are, as minorities, exposed to the risk of discrimination. Though some Roma populations have enjoyed Italian citizenship for generations, they are not recognized neither as a linguistic nor an ethnic minority group.

Non-EU citizens (extracomunitari in Italian): term used in most official documents to identify citizens of countries that are not member states of the European Union; it still includes those of candidate countries except where specifically indicated.

## 4. Introduction

In order to verify the situation of the fight against racial discrimination and xenophobia in Italy in the first six months of 2003, it is necessary to start with policy choices. These choices have been expressed at the national level, in the implementation regulations of the Bossi-Fini law, and at the international level, they are currently also expressed at the level of EU Presidency.

The most troublesome aspect of the current situation are the declarations and concrete initiatives (such as committees of inquiry) of government members against the judiciary, declared “guilty” of annulling numerous expulsions carried out on the basis of the new Bossi - Fini law, of raising serious issues of constitutionality, of recognizing the right to asylum provided for by art. 10 of the Constitution. Most importantly the judiciary is criticized for applying the “Mancini law” of 1992, by sentencing for incitement to racial hatred also some members of the political parties which compose the government currently in power. A conflict over these issues seems likely to develop between the executive and judicial powers.

The issues regarding immigrants and asylum seekers, reveal, including in their international implications (bilateral accords, the role of Italy in Europe), a clear disregard for the constitutional principles on which the rule of law is based. Within this framework, the risk of an increase of institutional discrimination, as well as the dissemination of a strongly discriminatory political culture, is evident. Such culture, amplified by the media, multiplies the acts of discrimination perpetrated by private citizens. By the government and by government-controlled institutions, principles about guarantees (right to defence, principles of cross-examination and fair trial, presumption of innocence, right to administrative transparency) are differently interpreted.

During 2003, some members of the governing coalition have increasingly opposed the Italian judiciary, trying to interfere in the independence and autonomy of the judiciary. Such intents are linked to attacks against the “Mancino” law. This is the Legislative Decree n.122, enacted on 26/4/1993 and converted into law n. 205 of 25/6/1993 on “urgent measures on the subject of racial, national, ethnic and religious discrimination”, undersigned by then Minister of Interior Affairs Nicola Mancino. Among other things, it provides that any one “who disseminates, in any form, ideas based on racial or ethnic superiority or hatred, or incites to commit or commits acts of racial, ethnic and religious discrimination” can be punished by law. Moreover, it outlaws “any organization, association, movement or group” characterized by or having racial, national, ethnic or religious discrimination among its aims<sup>1</sup>.

Transcriptions of the hearing of the Minister of Justice, before the XIV Commission of the House of Deputies on December 18<sup>th</sup> 2002 concerning EU proposal for a framework

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<sup>1</sup> According to the Northern League Party (one of the parties in the governing coalition) this “law destroys liberty and has damaged or in any case, limited one of the basic rights of the people of *Padania*, the freedom of speech” and they have launched a campaign to remove it from the criminal code. Volunteers of the Party have sponsored a petition to be sent to the Minister of Justice as part of the campaign to abrogate the law. Other extreme right organizations such as *Forza Nuova*, *Fronte Nazionale* or *Fiamma Tricolore* have declared similar intentions.

decision on the fight against racism and xenophobia, show that the position of the Italian government is very clear. The Minister of Justice Mr Castelli, after expressing his concerns that the decisions regarding the European arrest warrant might create a “disturbing interaction” if linked to provisions in the proposal for a framework decision, tried to restrict the area of application, pointing out among other things, that the Italian government is committed “to pursue an approach that is not only different but also the opposite of that followed so far by Brussels; the starting point, which has absolute priority, is to respect the primary constitutional freedoms of citizens, and only afterwards, during a second stage and as a residual element, can we arrive at the definition of racism as a crime”.

At the beginning of 2003 the European Commission proposed a draft agreement, which, in order to be binding for all 15 member states, would have had to be signed by the Ministers of Justice of all of the 15 states (and then to be ratified by the respective Parliaments). This agreement aimed to ban organizations and collective behaviours which discriminate non-EU citizens and religious or ethnic minorities, thus providing a legal basis to prosecute such incidents in court. The agreement has not been signed yet, because one State, Italy, has opposed it. The Italian Minister of Justice – a member of the Northern League Party – opposed this agreement (obviously on behalf of the whole government) saying that the “agreement would be a weapon in the hands of our political rivals”<sup>2</sup>.

The Italian government has neglected art.4 of the International Convention on the Elimination of all forms of Racial Discrimination, ratified by Italy and in force since 1976, which stipulates that “State Parties shall consider as a crime punishable by law: the dissemination of ideas based on racial superiority or hatred, any incitement to racial discrimination as well as any violent acts or incitement to such acts, directed against any race or group of individuals of a different colour or ethnic origin; as well as any assistance to racist activities, including the financing of such acts”.

Using a worthy argument – the abolition of the crimes of opinion -, the Minister of Justice has repeatedly reaffirmed his view that freedom of expression should have priority against the risk that racist and xenophobic behaviours and expressions be sanctioned judicially as crimes. The minister has argued that it is wrong to try to punish racist and xenophobic behaviours in the same way even though both aspects are closely linked in EU and national legislation and in the directive 2000/43/EC.

The concerns of the Minister of Justice could appear to be justified when one considers that a few days after he made the above statement in an European context, six members of Verona branch of his party, the Northern League, including the local party secretary and regional councillor, were charged for violating the law that punishes incitement to racial hatred. The group was accused to have promoted a racist campaign against a Roma camp in the city, by linking the presence of the Roma to “risks of social insecurity and petty crimes”<sup>3</sup>. In the light of the above, the difficulties encountered during the parliamentary sessions on measures aiming at the introduction of penal sanctions against racist acts, as well as the delay in the implementation of EU directives 2000/43 and 20078/EC into the national judicial system, can be better understood.

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<sup>2</sup> Frankfurter Rundschau, February 28, 2003

<sup>3</sup> *L'Unità*; Andrisani Paola (2003): *Inventario dell'intolleranza*, in: Rivera A. (2003): *Estranei e nemici*, Roma: Derive e Approdi, p. 145.



There was also a sharp decline in the number of discriminatory acts denounced in 2003, in spite of the fact that articles 43 and 44 of the Consolidated Text on immigration of 1998, were still in force because modifications made in the above law did not affect these two articles<sup>4</sup>.

In the same period (January-July 2003), there were considerable delays in the regularization procedures, with adverse effects on the maintenance of precarious jobs by immigrants: in many cases a refusal of the regularization application has been automatically translated into an expulsion order, with forced accompaniment to the border and this involved people who were fully integrated with their own accommodation and jobs. In some cases, their families were in Italy; their applications for regularization were turned down in some instances because they had received previous expulsion orders, maybe even five years previously. A specific provision of the law which established the regularization procedure (art. 2 law 222/2002), prohibited the expulsion of foreigners who had undertaken the regularization process, though only at “the end of the procedure”, and many immigrants filed applications for regularization not knowing that a previous expulsion order (even when not implemented), would result in the refusal of their applications. The possibility of judicial control has been seriously reduced, due to the high number of regularization applications turned down and the speed with which the Police, on the basis of the new immigration law, can accompany affected immigrants to the border.

Judges have intervened in numerous cases where appeals have been filed by non-governmental organizations or family members of affected immigrants who, after being refused regularization, are informed that they would be deported with immediate effect. But these appeals have not been effective in protecting those affected. In some cases, judges have ruled as legitimate the refusal of the application and the immediate execution of the deportation decree. On the basis of current legislation, “in such cases, deportation can only be executed after 15 days from date of notification that the application has been refused”, because the foreigner whose application has been rejected should be treated as a person whose application for a stay permit has been rejected and not as an undocumented immigrant who has never applied for a stay permit. This should be the norm, if the right to judicial defence, guaranteed under article 24 of the Constitution, is applied to this category of immigrants<sup>5</sup>.

As far as administrative practices are concerned, the creation of new “Unified Immigration Desk” within Prefectures has not accelerated procedures for obtaining stay permits; many immigrants awaiting for official reply to their applications for regularization are de facto “trapped” in Italy, without being able to visit their countries of origin and thereafter return to Italy legally. In general, there have been long delays in issuing authorization for family reunion or renewing stay permits.

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<sup>4</sup> For more information on provisions of the civil code against discrimination, see also Brocca V. (2001), L'azione civile contro la discriminazione: un nuovo modello per la tutela giurisdizionale dei diritti fondamentali, in: *Diritto pubblico comparato ed europeo*, 2001, p. 1259.

<sup>5</sup> Zorzella, N. (2003), Il diniego di regolarizzazione e l'immediata espulsione dello straniero, in: *Diritto, immigrazione e cittadinanza*, 2003, 1, p.57. On the regularization procedures and the “restrictive” character of all the measures contained in the new immigration Act, but also on aspects the new law has in common with the previous law of 1998, see Nascimbene, B. (2003) *Nuove norme in materia di immigrazione: La legge Bossi-Fini: perplessità e critiche*, in: *Corriere Giuridico*, 2003, p. 532.

Applicants for regularization were entirely dependent on their prospective employers, making the former vulnerable to disadvantageous conditions or outright blackmail (including sexual blackmail in some cases concerning women migrants) by employers. This situation was made possible by the new “stay for work contract”, introduced by the Immigration Act of 2002, which has strictly linked the possibility of legal residency to the existence of a regular work contract. In spite the large number of applications for regularization (just over 700.000), the number of undocumented migrants who could be held in administrative detention or deported within a short period, is again growing.

On the other hand, the government is intensifying efforts to reach bilateral agreements with countries of origin of undocumented migrants on readmission of their deported citizens. This practice has caused numerous violations of fundamental rights, including the right to asylum and, as we shall see, discriminatory practices on grounds of gender, age or religious beliefs.

Meanwhile, Italy remained – as at mid 2003 - the only EU member state without a consolidated law on asylum and an efficient national reception system. Despite receiving one of the smallest numbers of applications for asylum in Europe (less than 1/10 of Great Britain’s), about 90 percent of applications are rejected (average percentage during the last two years).

## 5. Methodological Considerations

### 5.1. RESEARCH METHODOLOGY

The present study will not only look at the state of implementation of existing penal and civil laws against racial discrimination and xenophobia but will also analyse the implementation of EU directives on same subject and review the most recent implementation practices and jurisprudence.

The decrees transposing EU directives 2000/43/EC<sup>6</sup> and 2000/78/EC<sup>7</sup>, confirm the civil character of the protection measures against acts of discrimination on grounds of racial or ethnic origin; similar measures had already been introduced by law 286/1998 (art. 43, 44) on immigration and the legal status of foreigners, but the existing measures left ample room for interpretation and, in the final analysis, for administrative discretion.

Besides the analysis of the legal dimension of the phenomenon in a strict sense, the study will examine the effects of implementation circulars and other administrative provisions which are often highly discretionary and can constitute the basis of a direct or indirect discriminatory act, behaviour or practice.

This choice is necessary because, on the subject of immigration and asylum, the relationship between laws approved by Parliament and other secondary sources of legal norms (such as circulars and regulations) has profoundly changed, as the law tends to provide only general principles and the scope, while administrative measures not approved by Parliament but put in place by the government, shape the implementation regime which determines the effectiveness of the legal provision.

Connected to the above are ever broader discretionary powers granted to administrative authorities (including through restricted circulars not accessible to the general public), in determining the extent of the application of legal provisions on immigration and asylum; this occurs, in spite of the fact that the Constitution provides that “the legal status of the foreigner is regulated by law in accordance with international treaties and norms”<sup>8</sup>.

On account of the foregoing and in view of the non-existence of systematically collected data on the subject, the study will draw not only from the existing legislation, case law

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<sup>6</sup> 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 etnica, Gazzetta Ufficiale N.186 del 12 Agosto 2003 (*Legislative Decree of 9<sup>th</sup> July 2003, nr. 215 – Transposition of EU Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Gazette Nr.186 of 12<sup>th</sup> August 2003*).

<sup>7</sup> 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, Gazzetta Ufficiale N.187 del 13 Agosto 2003 (*Legislative Decree of 9<sup>th</sup> July 2003, nr. 216 – Transposition of EU Directive 2000/43/EC implementing the principle of equal treatment in employment and working conditions, Official Gazette Nr.187 of 13<sup>th</sup> August 2003*).

<sup>8</sup> Costituzione della Repubblica italiana, articolo 10, comma (*Italy, Constitution of the Republic of Italy, article 10 (2)*). See also: Tucci, G., Di Muro, A. (2003) Diritti fondamentali, principio di eguaglianza e riforma della normativa in materia di immigrazione, in: *Rivista critica del diritto privato*, 2003, p. 179. (*Fundamental rights, the principle of equality and reform of the immigration law, in: Rivista critica del diritto privato*, 2003, p. 179.)

and research but also from media reports and non-governmental organization active in the promotion of migrants' and other minorities' rights.

## 5.2. IMPORTANCE AND LIMITS OF DEFINITIONS

Empirical evidence shows that multiple discrimination – based on more than one ground at a time (nationality, skin colour, sex, religion, age or political convictions) – is common and difficult to tackle. While discussions among experts on the definition of and the relationship between the concepts of ethnocentrism, racism and xenophobia remain open, there seems to be a common conviction that it is easy to move from one of these concepts to another and that discriminatory practices are often the result of racism as well as xenophobia.

Recent studies have highlighted different forms of racism and among these, institutional racism, a category that used “to show that racist discrimination ... can manifest itself as a shady and banal mechanism, so much interiorised that those who contribute to reproducing a racist practice may not be aware of it and its stereotypes, negative categorizations and discriminations can be so profoundly incorporated in the legal and administrative system of a state to the point of becoming a habitual and routine way of relating to minorities”<sup>9</sup>. But there are also discriminations that turn out to be perfectly in compliance with the law and, as a result, are not sanctioned by law; such is the case of discriminations in access to certain types of self-employment, based on citizenship.

Italy remains one of the European countries where access to the citizenship is more difficult for immigrants and their children. In order to acquire Italian citizenship<sup>10</sup>, a long period of legal residence (10 years, except in the case of naturalization through marriage with a citizen), and a consistent income (object of a discretionary evaluation) are required. This situation has particularly affected non-Italian Roma and Sinti populations; political events in the former Yugoslavia with many Roma losing their citizenship or the destruction of birth and death registries, have led to a consistent increase in the number of stateless persons in Italy. Many Roma children, born and raised in the numerous camps where these populations live in Italy, never obtained the citizenship of the countries of origin of their parents, and they do not have any good prospects of obtaining Italian citizenship, thereby representing a group of potential victims of discrimination.

The definitions of discrimination used by jurists are instead based on legal texts, which can however be interpreted differently by operators (police, civil servants, volunteers in refugee camps) and jurisprudence. On the contrary, experts in other social sciences use the legal terms, racial discrimination and xenophobia, in the framework of the objectives and methods of their respective fields.

In legal texts, both on an international and national levels, the definition of discrimination is not absolute and has a limited scope, in particular, with reference to citizenship status. As we shall show later in the study, certain institutional practices based on legal norms can have discriminatory effects and could lead to non-recognition of fundamental human rights of a person, even though such practices may not fit the legal definition of discrimination within that legal system. Moreover, in the international legal texts, the

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<sup>9</sup> Rivera, A. (2003), *Estranei e nemici, (Strangers and enemies)*, Roma: Derive approdi, p. 31

<sup>10</sup> Italy, Law nr.91/1992.

notion of racism appears to be very broad, in line with the desired objective of protecting the victims.

In EU directives and acts, the definition of racial discrimination is linked to the notion of discrimination on grounds of ethnic origin. Article 2 of the Directive 2000/43/EC provides a precise notion of discrimination based on racial or ethnic origin and national legislation is bound to follow, incorporating into national law, such a notion. Directive 2000/78/EC does not deal with the notion of racial or ethnic discrimination but is complementary to Directive 2000/43/EC because it covers other grounds of discrimination such as religion or personal convictions, disability, age and sexual orientation.

Both directives exclude from their scope less favourable differential treatment on grounds of nationality of third country citizens, thereby making unequal treatment of immigrants “lawful” and this, together with the broad wordings of the directives, constitute serious limitations of the principle of equal treatment<sup>11</sup>.

The definitions contained in the national implementation instrument and in the EU Directives leave space for a series of exceptions which can justify, on the basis of the principles of proportionality and appropriateness, a series of exemptions with regard to the recognition of the principle of equal treatment. The need for “public order” and “defence” of national borders against the “invasion” of the so-called “clandestines” can thus constitute justifications for legal acts or administrative measures which are directly or indirectly discriminatory. This reinforces the conviction, not only in public opinion, but also among public officials (police officers, health services personnel etc.) that immigrants, especially those without a legal title to stay, do not have the same fundamental rights (right to personal freedom and related guarantees, right to health, right to physical integrity), as citizens.

For the purpose of this study on legislation and implementation practices against racial discrimination, no generalizing definitions will be used. Instead, it seems preferable to stick to the implementation of each legal provision, or to critically evaluate the terminology adopted by politicians and the media, without being influenced by the definitions used by representatives of institutions in administrative practices. We deem it necessary, especially in this field where fundamental rights are concerned, to point out the principle of the hierarchy of legal sources and to outline, for each single case, a definition of discrimination which can be of practical use for the protection of the victims.

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<sup>11</sup> Directive 2000/78/EC states that it “does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

### 5.3. THE PROBLEM OF THE STATISTICAL DATA

As regards statistical data, the situation remains unchanged from what has been pointed out in the previous reports. The latest update on the general profiles of immigration in Italy is still the statistical report by Caritas and in particular the anticipations for 2003<sup>12</sup>.

As regards cases of racial discrimination that occurred in 2003, there are no official reports or statistical data, but a summary of the most serious cases can be found on the website of the Centre for Studies on Immigration (CESTIM) in Verona . This site contains an interesting press review titled “racism and xenophobia in Italy” and “Islamophobia”<sup>13</sup>, based on cases reported by two daily newspapers. Among others, it highlights instances of racial discrimination against Roma, Sinti and Traveller populations in Italy<sup>14</sup>. Some authors have noted that, “not only is the collection of statistical data rare –statistics often does not convey any message regarding discrimination and racism –, equally rare are the field investigations of racist and discriminatory situations, based on empirical cases and on interviews of victims and perpetrators, including institutions<sup>15</sup>.”

Empirical research on racial discrimination has so far focused on reviews of discriminatory acts or behaviours against immigrants, reported by the media. Even where monitoring projects exist, their coverage remains limited to local contexts<sup>16</sup>. Sociological or ethnographic researches have often focused on specific aspects of the phenomena but on a local level<sup>17</sup>.

Comparable and numerous, good quality data are obtainable only from studies on criminal behaviour by and related imprisonment of immigrants (although published with considerable delay), mostly from government sources (Ministry of Justice and Internal Affairs). The use of these very data has however inspired scholars to quite different interpretations: some have emphasized the increase in crimes committed by foreigners on our territory and the fact, that immigrants without residency permit (especially the so-called “clandestines”) are more inclined to criminal behaviour; other scholars have also

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<sup>12</sup> See [www.caritasroma.it/immigrazione](http://www.caritasroma.it/immigrazione); see also: Forti, O., Di Marco, M., Pittau, F. (2003) *Immigrazione e modelli legislativi: dai dati alla antropologia giuridica*, in: *Diritto, Immigrazione e Cittadinanza*, Franco Angeli editore, 2003, no.2.

<sup>13</sup> [www.cestim.it](http://www.cestim.it) (10/09/03).

<sup>14</sup> [www.cestim.it/03zingari.htm](http://www.cestim.it/03zingari.htm) (10/09/03).

<sup>15</sup> Rivera, A., *Estranei e nemici, Discriminazione e violenza razzista in Italia*, cit., p. 11

<sup>16</sup> Among the most interesting websites regarding the monitoring of cases of discrimination see [www.meltingpot.org](http://www.meltingpot.org) (10/09/03) and [www.ildialogo.org/osservatori/razzismo.htm](http://www.ildialogo.org/osservatori/razzismo.htm)(10/09/03) .

On the situation of Muslims in Italy see the website [www.abuondiritto.it/liberta/religiosa/pdf/rapporto\\_osi\\_italia.pdf](http://www.abuondiritto.it/liberta/religiosa/pdf/rapporto_osi_italia.pdf)

<sup>17</sup> With regard to this, see Schmidt di Friedberg, O. (2002) *Musulmani nel lo spazio pubblico: le associazioni islamiche a Torino e a Trieste*, in: Colombo A., Sciortino, G. (2002) (eds) *Assimilati ed esclusi*, Bologna: Il Mulino, 2002, pp. 143; 169; in the same volume, see Riccio, B. (2002) *Etnografia dei migranti transnazionali: l'esperienza Senegalese tra inclusione ed esclusione*, p. 195; Ambrosini, M., Abbatecola, E. (eds.) (2002) *Reti di relazione e percorsi d'inserimento lavorativo degli stranieri: l'imprenditorialità egiziana a Milano*. See also Agustoni, A. (2003) *I vicini di casa. Mutamento sociale, convivenza interetnica e percezioni urbane nei quartieri popolari di Milano*, Milano: Franco Angeli.

emphasized the role of immigrants as victims of crimes, perpetrated by other immigrants, and by Italians, including representatives of the State<sup>18</sup>.

The debates that divide scholars on the evaluation, and the very criteria of collection of statistical data, constitute a further proof, if one was necessary, of the difficulty to use in this subject matter statistical criteria, at least until independent observatories are created with a mandate to collect data throughout the country, and to challenge on them institutions and non-governmental organizations. In other words, it is entirely obvious, that the data collected by the offices of the Police and therefore by the Ministry of Internal Affairs, on discrimination against immigrants without stay, or employed without a regular contract, will be completely different from data collected by non-governmental organizations which support irregular immigrants, or women who have become victims of trafficking.

The official statistics, where available, can hardly be a reliable criterion for the evaluation of the situation in prisons, and administrative detention centres for migrants awaiting deportation, without considering the repeated violations of fundamental rights of detainees occurring in these structures.

The documentation of cases of discrimination and racism, reported in academic journals has decreased partly due to the small number of reports of such cases by victims, who may be afraid of retaliations or additional and more serious discriminatory behaviours, especially when such acts are committed by institutional agents. Moreover, the change in political climate characterized by increasing prejudice against immigrants within public opinion has increased such fears. For these reasons, it is difficult at this point in time to obtain empirical data on racial discrimination and xenophobia that can be compared with those on the same topic from other countries where the collection of such data is not an exclusive prerogative of a small number of specialists or by institutions like the Ministry of Internal Affairs, but is considered a matter of public interest, is based on multiple, clearly pre-defined indicators and the information gathered is accessible to the public, in particular to scholars and operators.

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<sup>18</sup> Regarding deviant behaviour by immigrants, see Palidda, S. (2001) *Devianza e vittimizzazione tra i migranti*, Milano: ISMU, which contains among other things, an interesting review of statistical data on temporary detention centres for deportees as well as the proliferation of regimes of detention.

## 6. Description of the sources of data

### 6.1. LEGAL SOURCES: LEGISLATION AND IMPLEMENTATION REGULATIONS

Nearly a year after a new immigration act<sup>19</sup> has come into force, the legal framework of reference on the condition of immigrants has profoundly changed, and this imposes a continuous update. Firstly, State financial resources aimed at promoting integration and equal opportunities have been reduced, while public resources earmarked for forced repatriation of unauthorized immigrants have exponentially risen. The national budget for 2003 has made available additional funds for building new centres for temporary detention of migrants to be deported, and new “identification centres” for asylum seekers, as well as for the “Fondo Nazionale Asilo - FNA” (National Asylum Fund) and additional personnel – civil and Police – in order to ensure effectiveness of immigration and asylum control measures. As at the end of July of 2003, various Police union representatives stated that they still lacked sufficient staff for the tasks assigned to them in this area. Besides, there was still no information on the actual allocation and use of the resources of the National Asylum Fund and therefore the National Asylum Programme (Programma Nazionale Asilo – PNA ); this plan is supposed to be come fully operational during 2003. Many structures opened by local councils in cooperation with non-governmental organizations, with the financial support of the state, have been forced to close; other structures, which are ready to receive asylum seekers (for instance in Marsala, Sicily), remain closed. As previously observed, implementation regulations reduce the already restricted scope of the legal measures.

In the current implementation regulation of the provisions on asylum, contained in the Bossi - Fini law, the definition of “asylum seeker” does not include “the foreigner seeking other forms of protection” contrary to the provision of the law in force before the above was promulgated. There is a serious risk that the access to the procedure is precluded for this category of refugees, considering the wide discretionary powers of the Police, on the basis of the final versions of the regulation, when evaluating the credibility of the asylum application. Moreover, the asylum seeker has no real possibility to appeal to a court.

In the regulation the most delicate stage, the access to the procedure, is regulated: “The Police authority, having received the application for asylum, which it does not consider to be unacceptable according to art. 1.4 of the law, (...) draws up a report of the declarations of the asylum seeker to which any documentation is attached, presented or acquired by the office.”

For the first time in Italy, administrative detention for nearly all asylum seekers (forced to enter irregularly) is being introduced.

Art. 5 of the new implementing regulation on right to asylum and protection on humanitarian grounds states that: “Seven centres of identification in the provinces identified by decree of the Ministry of the Interior are created, after consultation with the Unified Conference provided for by art. 8 of legislative decree 28/8/1997, n. 281”.

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<sup>19</sup> Italy, law nr. 189/2002 (commonly known as *Bossi - Fini* law, after the two ministers who sponsored it).



Moreover, “when (..) the need arises, the Minister of Internal Affairs, by decree, can establish, even temporarily, the institution of new centres or the closure of existing ones”

In fact limitations of personal freedom are being generalized, and not just the freedom of circulation of the asylum seeker. And indeed art. 9, comma 4 of the new regulations states that, “the provisions of art. 1.ter remaining the same, it is allowed, provided that it is compatible with the normal unfolding of the simplified procedure and after communication to information of the director of the centre, to leave the centre between 10 am and 5 pm. The officer in charge of the prefecture can grant temporary leave permits to asylum seekers for a time period different from or longer than the one indicated, according to the provisions defined in art. 8.3, for relevant personal, health or family motives or motives linked to the examination of the recognition of the refugee status. The leave has to be, however, compatible with the simplified procedure and is not allowed in the cases of detention”, which are the majority of cases including all cases of clandestine entry. “The denial is communicated to the applicant according to the modalities of art. 4.”.

Within this framework, strong limitations are stated for associations that work in defence of asylum seekers and their humanitarian protection. Their possibilities of entry to the new centres of identification are left to the discretion of the Prefect. According to art. 11 of the new regulation of implementation on asylum, “representatives of the associations and the organizations that protect refugees, which have proven experience accrued in Italy for at least three years in the sector, are authorized by the prefect of the province in which the centre is set up, to enter the centres equipped for visits, during visiting times. The prefect gives the authorization, containing the invitation to take into account the protection of privacy and safety of the asylum seekers.”

Art. 17 of the new regulation deprives the asylum seeker, whose claim has been rejected by the territorial commission, of a right to appeal. And indeed according to this measure of the regulation, following the first negative decision of the Territorial Commission “the application for the authorization to stay has to be presented in writing and adequately motivated relating to unexpected facts after the decision of the territorial Commission as well as personal motives (...) or to health motives, which require the permanent stay of the foreigner on the territory of the state. The authorization is granted whenever the interest to stay on the territory of the state subsists and the prefect does not detect the concrete danger that the waiting period for the decision on the appeal can be used by the foreigner to escape the measure to be removed of the national territory”

One can easily foresee that after the denial of the Territorial Commission (“Territorial Commission”), the appeal to the judge, even when asylum seekers succeed in presenting it in the very short time period (five days!) conceded by the regulation, will not have any suspensive effect and thus will not impede the immediate execution of the measure of forced removal to the border. Fortunately these new regulations will not come into force immediately, since they have not been published in the Official Journal (“ Official Journal”) at the end of July 2003, and indeed “the current regulation enters in force 120 days after the publication in the Official Journal. In the 30 days following the publication of the regulation in the Official Journal the members of the Territorial Commissions and the National Commission for the right to asylum will be appointed. In the thirty days after the nomination, the National Commission organizes the first training course for the members of the Territorial Commissions”:

In those regulatory provisions one can thus notice scant respect for the principle of hierarchy of sources and the violation of the right to asylum, which is recognized as a full-fledged subjective right according to art. 10 of our constitution and is regulated by the Geneva Convention and the recent EU Directive no. 9 of 2003, quite differently from what the Italian government has decided now in the above mentioned regulation.

The content of the implementation regulation of the Bossi-Fini law is much more bureaucratic and less damaging for the fundamental rights, already widely reduced by the law no. 189 of 2002, with respect to the devastating “innovative” reach of the new regulation regarding asylum, which destroys the constitutional recognition of the right to asylum and provides cover for all those practices, which openly violate basic rights, already denounced in international courts on immediate expulsion of asylum seekers (see the case of the Syrian engineer repatriated with his family and imprisoned in Syria last year, referred to in chapter 4.1.).

In the new regulation there is no lack of provisions restricting the rights of regular immigrants to social welfare benefits. As Sergio Briguglio observes in his comment on the regulation regarding art. 16 co. 2 letter d), “the possibility to include among the sources of income, which can be useful for the issuing of the residency card, the invalidity pension should be amplified, by including cases in which the foreigners fulfil all the requirements to obtain the card (except the income requirement) and the requirements for the recognition of civil invalidity. With the entry into force of law 388/00, a vicious circle regarding assistance to disable people has been created: the foreigner with a residence permit who becomes invalid ceases to be able to gain income from work; lack of income prevents him from obtaining the residence card, and, therefore to obtain assistance; the foreigner thus loses also the stability of his residency: he is denied eligibility to a permanent residence card and he is not able any longer to renew the residence permit. The vicious circle would be broken if among the eligible sources of income for the issuing of a residence permit financial assistance is included, for which the disable person is eligible, once he has the residence permit.”

Other forms of discrimination can derive from the new procedure of renewal of residence permits, or following the stipulation of a new work contract by immigrants already regularly residing in Italy. And indeed, as observes Sergio Briguglio, on art. 36 bis “For the establishment of a new work relationship a new contract of residency for work has to be signed. Although this provision conforms to common sense application of the norms contained in the law 189/02, by transferring the responsibility for the repatriation and finding accommodation from the old to the new employer, this establishes a disparity between hiring an Italian worker and a foreign worker already regularly residing on state territory. This appears to be in contrast with what has been established by ILO Convention no. 143, ratified by Italy, and therefore, with art. 10 of the Constitution. If the stipulation of the contract of residency for work would instead only be required for the access to the status of being a foreigner residing in Italy in order to work, no violation would emerge.”

## 6.2. THE ROLE OF INFORMATION IN THE MECHANISMS OF REPRODUCTION OF THE PREJUDICE

Racial discrimination can derive also from the use of words and their introduction in everyday common language. Italian mass media offer numerous examples of discriminatory language, and devote (apart from a few exceptions) more space to cases in which immigrants are being portrayed as perpetrators of crimes, as “clandestines”, as sources of insecurity for the population (as in the term “assault of our coastlines” or “mass landings start anew”) way beyond the actual consistence of such phenomena. The cases, in which immigrants require humanitarian protection, are asylum seekers or victims of acts of discrimination, are underestimated. “Adjusting techniques” are used whenever it is not possible to silence news, who might lead the public opinion to a favourable view of the migrants (for instance the regularization campaign of last year), by placing on the same page negative news (such as isolated cases of falsification of the necessary documentation for regularization). In this way an unfavourable image of migratory phenomenon is communicated to the reader.

But the unfavourable attitude is mainly aimed towards the so-called “clandestine migrants”. Media language is an element of discriminatory and racist ideology and practices: such is, for instance, the extremely widespread use of the term “clandestine” - which in legal texts is only used for a limited number of specific cases - or of the definition as reception centres of the centres of temporary stay (temporary detention centres) and assistance, where all individuals, found without a valid entry visa or residence permit, are detained, while waiting for identification by the relevant consular authority and thereafter for accompaniment to the border. This language has an enormous discriminatory effect, because it induces public opinion to view foreigners, irregularly present on our territory, as non-persons, “clandestini”, or to view their treatment in detention centres, where they are locked up in a very different way from how they are treated in reality<sup>20</sup>.

Perhaps, the most important source to understand cases of racial discrimination in our country, is the daily newspaper of the Lega Nord, one of the parties that form the government coalition. This paper does not miss any opportunity to emphasize the negative role which immigrants supposedly play in this country. Its website is [www.lapadania.com](http://www.lapadania.com), and from any part in the world one can verify throughout the paper, but mainly in the section titled “The hatred of those without a country”, what role mass media can play in producing racist and xenophobic attitudes in the population<sup>21</sup>.

Even in the most balanced newspapers and TV-programmes, one can notice the use of such language, which often anticipates choices by the government, and thus obtains a role in informing law-making or subsequent discretionary practices by civil servants. In

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<sup>20</sup> It can be noticed that “statements and discriminatory and racist acts are often made by politicians and government officials, they are increasing and becoming more and more common to such an extent, that racism risks to become a cultural language of the “Bel Paese”. An language constantly reinforced by the role of mass media, powerful amplifiers of the most degraded common sense, which they are legitimizing and incrementing”; Rivera, A., *Estranei e nemici, Discriminazione e violenza razzista in Italia*, cit. p.10.

<sup>21</sup> On the role of the Lega Nord in the areas where it has its roots, see the study by / of Guolo, R. (2002) *Immigrazione, etnicismo, crescita zero*, Bologna: Il Mulino.

reality this language derives from anthropology or from the language of those members of society, who are the main constituents of those political parties which support a policy of exclusion and closure towards immigration.

For example, the expression used by the mayor of Treviso, “to send back home in – leaden wagons-“ the immigrants who have received expulsion papers, is tightly related to the new provisions of the Bossi-Fini law, which allow for repatriation without judicial control, even while applicants are still waiting for the outcome of an appeal. It is also related to administrative practices which prevent humanitarian organizations from freely contacting the “clandestini” after their arrival in Italy, even when they are potential asylum seekers. Such practices permit the transfer of individuals without any status (even the communication of orders is delayed to prevent the exercise of the right to defence) from one detention centre to another with exhausting trips by bus, boat or plane. The statement by the mayor of Treviso is the ideological essence which underpins the most recent Italian proposal on repatriation of irregular immigrants, during the Italian presidency of the European Union (in order to hide from public view repatriation of clandestines it is proposed the use of plain clothes policemen and unmarked means of transportation).

In other cases language is more careful, but the substance of discriminatory behaviour does not change, even in regional assemblies where the parties of the national government coalition, are in opposition<sup>22</sup>.

But not only issues about discriminatory language are at stake. The positions of the Lega Nord have been covering in the past few months more radical groups, which, for some time, have been responsible for racist attacks against immigrants. Recent reports show how the most racist factions of the extreme right and the Lega Nord are forging ever closer alliances. On 17 January 2003 in Verona, Forza Nuova (a group of the extreme right) held the first press conference in a press conference room owned by a public institution, the Municipal Council of Verona. The room was booked by a regional councillor of Lega Nord, currently prosecuted for violations of the Mancino law, the same law, which the Minister of Justice would like to abolish, as it purportedly impedes freedom of expression.

On 20 January 2003 representatives of Forza Nuova and Lega Nord met for a conference in Santa Margherita Ligure, near Genoa, in order to discuss common initiatives against “liberticide and anti-constitutional” norms of the laws Scelba and Mancino (which contain provisions that punish the incitement and encouragement to racial hatred)<sup>23</sup>.

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<sup>22</sup> Exemplary in this context the recent political incident that happened in the region of Friuli, reported by the news agency ANSA: TRIESTE, 6 August 2003– With the decision to extend the financial support for families with newborn babies also to immigrants, “the regional council of Riccardo Illy threatens the values and the social fabric of Friuli-Venezia-Giulia”: this statement was made by A.G. (Lega Nord), candidate for the Presidency of the region Friuli-Venezia-Giulia for the government coalition “Casa delle Libertà” in the elections of past June (omissis) The Lega will fight – concluded G. – for one cannot allow laws to be passed, which shape society’s future, in which the priorities are turned upside down: first everybody else, then the residents”. (ANSA). 6-August-03 17:56

<sup>23</sup> Source: the newspaper L’Unità and the Inventario dell’intolleranza by Paola Andrisani, previously quoted.

## 7. Equal Rights and Implementation Practices

### 7.1. RIGHTS OF ASYLUM SEEKERS

During 2003 administrative practices have anticipated implementation of new provisions on the right to asylum included in the new Bossi-Fini law, (which by September 2003 had not been yet implemented, due to delays in issuing implementation regulations ).

The generalized practice of rejections at the border denies in many cases the exercise of the right to asylum, provided for by art. 10 of the Italian constitution in addition to the international conventions. The right to asylum is denied, because of difficult access to the procedure, and because of a high proportion of negative decisions on the small number of applications presented, (after delays as long as a year and a half). Decisions are taken by the Central Commission, in the first instance, until the implementation regulation of the Bossi-Fini law will enter in force. In the cases in which coercive repatriation appears to be impossible (for instance in the case of Somali, Congolese, Liberians, Iraqis) exceptional leave to remain for humanitarian reasons based on art. 5, comma 6 of the Consolidated Text of 1998 can be granted. This status, however, is quite different from full refugee status. The holder, who has fled wars and persecutions, must remain in a precarious situation, because the document has to be renewed every year, if it is not converted into another residence permit, e.g. for work. This however can be revoked or expire, including because of a period of unemployment (more than six months). The police forces consider the potential asylum seekers to be irregular immigrants, who want to access the asylum procedure in order to stay, or as unsavoury guests, whose right to asylum should rather not be recognized, but who must, notwithstanding, be accepted. Only a temporary residence permit is being granted, always subject to revocation, with the goal (often impossible to realize) of their return to the country of origin.

This perception of asylum seekers is discriminatory, and can be regularly encountered in police practices, especially after boat landings of “irregular immigrants”, even if it is evident that they come from war-ridden countries, such as Liberia, Sudan, Zaire, Somalia, Iraq and other countries plagued by civil wars and tribal strife.

Often no interpreter is provided, nor is access to the asylum procedure being guaranteed. We have personally witnessed during repeated visits in centres of administrative detention, how police officers (mainly inside temporary detention centres, as well as near borders and airport transit zones), refuse to accept applications for asylum presented to them and to open the appropriate procedure, while claiming that the application is “manifestly unfounded”, which often is considered an expedient to avoid expulsion (so-called “instrumental claims”).

It is thus hardly surprising, that, during 2002, there have been only 9.608 claims for asylum in Italy, compared with 17.600 in 2001 and more than 18.000 in the year 2000. If we consider that the Central Commission rejects 90% of the claims for asylum (after interviews that last only a few minutes, and while using standard motivations to explain the decision), one can easily reach the conclusion, that the basic right to be granted asylum has not been respected, forcing thousands of asylum seekers to live in a precarious, if not clandestine situation, thus creating problems also for other European

countries, where more and more potential asylum seekers arrive, which have been expelled or forced to a clandestine existence in Italy.

The immigrants who are deported, without even a possibility to present an asylum claim, despite a clear intention to do so, can end up – in the most serious cases – detained in a prison or killed, as is being feared in the case of a Syrian family that had reached Italy at the end of last year. After detaining them for five days at the airport of Milan, Malpensa, the police denied them the right to have an interpreter and to ask for asylum, and coercively repatriated them immediately as “clandestini”. Due to “security reasons” even the “meeting” with the brother of the wife of the head of the family (who had already received a death sentence in Syria), who had rushed to Italy from London, where he had been granted asylum, was denied.

“It is a scandal, a dishonour for Italy” – commented Giovanni Conso, president of Consiglio Italiano dei Rifugiati and president of the Constitutional Court. Conso also criticized the inertia of the legal councillor appointed by court (tragic reality in thousands of analogous cases), observing that “it would have been enough to ask a decision to temporarily block the expulsion at the court of Strasburg, which, in these cases intervenes very quickly to block the proceeding”. According to Amnesty International the case had a tragic epilogue: after the repatriation in Syria the smallest of the four children of the couple (2 years old) was hospitalized, the wife and the other three children are in prison in the city of Hama, whereas the father is still reported to be “missing”<sup>24</sup>.

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<sup>24</sup> ( ) *From a subsequent press release by CIR of 18 February 2003 it appears that M.L. together with her husband M.S. and their four children, had arrived on 23 November 2003 at the airport of Milano Malpensa. The family came from Baghdad (Iraq) where they had lived in exile for 11 years. During the five days of stay in the transit hall of the airport, they were not allowed to apply for asylum. On 28 November the whole family was deported to Syria. M.S. is now being detained in the prison of Kafar Susa without being able to communicate with the outside world, he is accused to have been a militant in the Muslim brotherhood, an illegal opposition movement in Syria, existing since the 1970s. To belong to this movement is punishable with the death penalty, on the basis of the law 49 of 1980.*

*The brothers confirm, in contradiction with what the Italian government has always sustained, that the family S. wanted and had asked via telephone the brother how to pose the question in English. The two brothers refer that the family had not been informed about the repatriation in Syria. The brother stated “...if they had known, that they have to return to Syria, they would have committed suicide at the airport”. Apparently the police told them, that they were being sent to Sicily. Whereas the husband continues to stay in prison, the wife and the four children are being watched 24 hours a day, with the obligation to appear at the police once a week.*

Christopher Hein (CIR) specified that “..these are mistakes that must not be repeated. This man is risking his life now. We think that the services present at the borders, provided for by the law, have to be –especially in these cases –called to intervene regularly and before the repatriations”. CIR and Amnesty International ask the Italian government to make an effort with the Syrian authorities to ensure the safety of M.S. as well as to give him and his family the possibility to return to Italy with the status of refugee.

What happened to the Syrian family is not an isolated case, but the result of an administrative practice, which impedes access to the asylum procedure, as has occurred also in the past, for instance in the case of a group of Kurds repatriated in 2001 directly to Turkey. This also happens to many Sri Lankan conscripts escaping military service or Tamil, who, when they are in a detention centre in Apulia are identified by the Sri Lankan consul and directly sent back to the country they fled from. In 2002 Italy organised 5 charter flights towards Sri Lanka to repatriate hundreds of persons, many of whom, while detained in detention centres in Apulia, had expressed the will to apply for asylum; they did not succeed in accessing the asylum procedure, due to denial of interpreters or because summary judgements were made by police officers about “the instrumental nature” of the request. Further charter flights have been organised in the first half of 2003. Many individuals coming from Sri Lanka, including some Tamil, who had asked for asylum, after a summary examination by a delegation of the Central Commission, in charge in this case (who travelled from Rome to Apulia for the occasion), and after a summary identification by the Sri Lankan Consul, were flown with an Italian police escort, who handed them over to the Sri Lankan police – as if the simple request for asylum would not expose the immigrants to sure repercussions by the authorities in Sri Lanka.

Many asylum seekers, taken from Sicily to other Italian regions, have already suffered unlawful expulsions, because they were not granted stay of the expulsion order pending an appeal, and have been deported to countries, where they had suffered inhuman or degrading treatment. The last example is that of the Pakistani, asylum seekers, who were repatriated on June 2003 to their country, after travelling from Lampedusa to detention centres in Italy and eventually to the “Corelli” centre in Milan.

The concept of racial discrimination, intended as denial of the basic rights of the person, includes the inhuman conditions in which the “clandestini”, among them many asylum seekers, are forced to live in after their arrival in Italy.

At the end of May 2003, a wide-ranging deregulation of the procedures, necessary for the set-up of temporary detention centres and new “centres of identification” has been introduced by means of decrees and orders issued by the government, without any possibility of control by the Parliament. Even abandoned storage halls are being converted in a few days in administrative detention centres for immigrants, who have just arrived by boat. During the summer of 2003 this has happened in Sicily, in the industrial areas of Porto Empedocle, Gela, Siracusa and in Pozzallo, in the Ragusa province: often potential asylum seekers (including from countries such as Somalia or Liberia, wherefrom they fled to save their lives) who had just landed were held in these structures without hygienic services and temperatures above 40° Celsius in the summer. In August 2003 a young Liberian immigrant, detained in the detention centre of Lampedusa (a small island, closer to Tunisia than Sicily, belonging to the Sicilian province of Agrigento) died officially because of a “heart attack”, the day after his detention had started.

The issue of the Roma living in Italy - some have been here for many years, some have even been born here – without a residence permit remains serious. The current situation in Kosovo and other regions of origin, from the Balkan states to Romania, confirms how this ethnic group is still being discriminated against; in some regions ongoing ethnic persecution is reported. Still, after the entry into force of the Bossi-Fini law and of the new agreements of readmission stipulated with Serbia, Bosnia and Romania, a great

number of Roma, also from Kosovo, has been expelled - interned in centers of detention and eventually repatriated.

In some cases there have been procedures of coercive expulsion, as in the case of the Roma deported from Rome to Bosnia in March 2001; the Italian state had to offer a large amount of money as compensation in order to avoid a harsh condemnation by the European Court for Human Rights, which could have been a dangerous precedent in regard to other widespread practices of collective expulsions (such as the one undertaken recently during police operations titled "High Impact").

More often, it has been enough to apply expulsion orders already existing before the Bossi-Fini-law came into force. Such orders can now be executed even though a judicial appeal is pending, without a possibility to rely on the circumstance of belonging to the Roma ethnic group - which the EU considers to be a national minority - nor to rely on provisions contained in previous laws, which allowed Roma to obtain a residence permit for temporary or humanitarian protection (decree of the Prime Minister of 12 May 1999, valid until 1 September 2000).

In an important decision of 13 December 2002<sup>25</sup>, the Supreme Court excluded, on the basis of the legislation in force, "that there exist a special "nomad" status applicable the ethnic group "Roma" in countries belonging to the European Union, as national norms and recommendations of the EU are aimed at ensuring protection for the living conditions of those non-EU citizens belonging to this ethnic group, who in any case have the right to stay and reside in the state"<sup>26</sup>.

As a consequence of the new regime of expulsions, introduced by the Bossi-Fini law, and also due to recurring press campaigns against this ethnic minority because of their frequent involvement in petty criminality (which only creates a minimal threat for society, e.g. thefts in apartments), many camps where Roma live have been vacated. This is also due to the fact that local councils had to apply the new prohibitions introduced by the Bossi-Fini law, against measures of social integration and assistance in favour of foreigners without residence permit.

Members of this ethnic group, mainly those from Serbia and Montenegro, have again been forced to live irregularly in Italy; social integration processes, initiated long time beforehand, especially in the health and education sectors, have been interrupted. Even Roma born and residing in Italy since birth or for more than a decade, even women without family have been detained in detention centres or repatriated, leaving behind other components of the family also residing in Italy. This has happened in cases of unmarried cohabiting couples and children from them, which are recognized in our legal system as a "de facto union"; they remained without any legal protection against the expulsion of the members without a residence permit. A heavy degeneration of the living conditions of the Roma, which arises also from a growing exclusion from society, due to the negative perception of their way of life and especially of the use of children to beg for money, even when this is the only resource families have to survive.

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<sup>25</sup> Giustizia Civile, 2003, I, p. 31.

<sup>26</sup> In this context see also Castangia (1999) *L'Europa delle persone e i diritti delle minoranze zingare*, in: Jus, 1999, p. 190.



## 7.2. RIGHTS OF IRREGULAR IMMIGRANTS, RACIAL DISCRIMINATION AND XENOPHOBIA

Irregular immigrants (and among these, the so-called clandestines) are on the top of the list of empirical studies on cases of racial discrimination and xenophobia, since they are the most vulnerable and more than other immigrants exposed to suffer discriminatory both by private citizens and by institutions (representatives of state bureaucracy, police forces, health workers). The possibility to act legally in self defence by these individuals is close to zero: their clandestine status, in which immigrants who don't have, or have lost their residency permit are forced to live are a guarantee of full impunity for those who commit acts of discrimination in Italy . In practice, the effects of art. 2 of the Consolidated Text on immigration and asylum, which recognises to immigrants "in any case present" at the border or on state territory, and therefore also to irregular immigrants, the fundamental rights of the human person, including with the right to defence, to asylum, to health, to physical integrity, to judicial control on administrative measures regarding personal freedom, are non existing<sup>27</sup>.

Within detention centres numerous cases of violence against immigrants are reported. It is impossible to list violations of the fundamental rights against detainees of CPTs, given the impossibility to communicate with the detainees. Independent NGOs are forced to visit those structures only on the occasion of visits by members of parliament. Photographers and Journalists are not allowed access at all.

The most egregious case is reported to have happened in the centre "Regina Pacis" in Lecce, where a group of North-Africans is said to have suffered violent beatings after an attempt to escape. Apparently they were also forced to eat raw pork meat during the day, in spite of the fast-period of Ramadan, without having the possibility to meet independent doctors or lawyers. For those incidents 19 persons are still being investigated for "private violence, excess of punishment and bodily injury". Among those investigated is also the Director of the "Don Cesare Loddeserto" centre, members of the military police and employees of the structure.

In July 2003, the prosecutor Carolina Elia of the Office of the Public Prosecutor in Lecce sent the notice of indictment to the 19 persons that are under investigation. By September indicted persons are expected to be officially charged.

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<sup>27</sup> News from an article that appeared in the newspaper "il Manifesto" on 2 February 2003 with the title "Raped and Expelled – Police law – Bologna, expelled by the Questura, even though the judge disagrees." by Sara Menatra.

Inspired by the article MPs Iovena and De Zuluata made an official enquiry at the Minister of Interior: "The denunciation of the violence and a measure of the judge who suspends the expulsion, are not enough: in this way a Romanian girl has been chased away from Italy. Detained and expelled from Italy, in spite of the fact, that the judge had ordered her release. This happened to a Romanian woman, who was stopped at a checkpoint by the police of Bologna, and the episode seems to mark the beginning of a new policy by the immigration office in Bologna following the law Bossi-Fini. A policy that provides for expulsions carried out also in full contrast with decisions of the judge. The egregious case occurred Friday afternoon, when a Romanian girl was repatriated with a flight organized by the Police, even though the judge had annulled the detention order executed the previous day.

Even when institutional representatives denounce cases of discrimination it can happen that, precisely for this reason, they are transferred to another town.

The Head of the Police (“Questore”) in the province of Foggia decided to remove a police officer (provincial representative of a police trade union), allegedly because he reported to the judiciary abuses suffered by 21 immigrants from Sri Lanka on 21 January 2003 in the temporary detention center of Borgo Mezzanone in the province of Foggia. In this centre an order by the “Questore” was in force, to wake up the immigrants every six hours in order to count them – a measure also used in temporary detention centres in Sicily. The police officer, who was later punished by being transferred, had spoken out against this order<sup>28</sup>.

When NGO representatives try and advocate for immigrants, who have become victims of discrimination, they become a target by perpetrators of racial discrimination acts. On 27 December 2002 at Castelvoturno, in the province of Caserta (near Naples), the Municipality Council, led by a mayor belonging to Forza Italia, decided to demolish the greenhouses of the parish of a religious order, who gave work to immigrants from Ghana without residence permit, who however hoped to legalize their position on the basis of the regularization campaign existing at the time.

The municipal government gave as an official reason the necessity to apply planning regulations and to fight illegal building. In reality the same Council questioned in a press release “whether the system of regularization has to mean inviting these desperate people, so that they become beggars in our area, when our own fellow-citizens are continuously looking for work.”<sup>29</sup>

There have been numerous police initiatives against irregular immigrants belonging to the Muslim religion, mainly the ones of Pakistani origin, in the framework of anti-terrorist activities, which often turned out to be scarcely credible, such as the arrest of 15 Pakistani sailors in Gela, Sicily, during 2003. The 15 sailors were completely cleared of all charges, but expelled since they were immigrants without residency permit.

NGOs and isolated groups of lawyers try to follow these cases, by opposing the forced accompaniment to the border of these persons, and trying also to get decisions on their rights in civil courts for the unjust detention they have suffered.

Three Iraqi Kurds, arrested during 2002 in Rome, and accused of being members of Al Qaeda, have been released and cleared of all charges after 8 months of detention. Two circular letters of the Minister of Justice establish detention with high security measures and control of the correspondence for more than 10,000 detainees of Muslim faith<sup>30</sup>.

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<sup>28</sup> Source: “L’Unità”, 11 February 2003

<sup>29</sup> Source: “L’Unità”, 27 December 2002

<sup>30</sup> Source: “Liberazione” and Inventario dell’Intolleranza by Paola Andrisani, p. 128

### 7.3. EQUAL TREATMENT AND DISCRIMINATION AGAINST IRREGULAR IMMIGRANTS

After the Bossi-Fini law entered into force last year, the newly created “contract of residency” has shown all its discriminatory potential, openly violating the ILO Convention, which should safeguard workers’ (the Convention has been introduced in the Italian legal system through law no. 158/1981). Legal immigrants with a residence permit, who have to renew it, have to show that they have the necessary requirements already needed for the first issue of the permit. With the new art. 5 of legislative decree no. 286/1998, the initial employer as well as any subsequent employer has to take responsibility to guarantee accommodation prior to conclusion of the residency contract, and cover expenses for repatriation of the immigrant, if he loses his residency status.

Thus immigrant workers suffer a considerable disadvantage in comparison with Italian workers, for whom those obligations for the employers do not exist. Even if higher burdens may be justifiable in for the conclusion of the first residency contract, their transfer on to future employers, and in all cases a residency contract is entered into, discriminates foreign workers, even when they have lived in Italy for years in a regular condition.

The legislator seems to disregard (with scant respect for Constitutional principles) the principle that was confirmed by the Constitutional Court in 1998, according to which “non-EU workers who are authorized to hold a stable, subordinate work in Italy, when issued with a residence permit released for this same purpose, have the same rights as Italian workers.”<sup>31</sup>.

The politics of annual entry quotas presents considerable discriminatory features, especially in the system of division and management of the annual entry quotas: a strong preference for seasonal workers, limitations on the numbers of workers with permanent contracts (thus undermining any integration logic), selection of immigrants admitted on the basis of “influx decrees”, depending on whether their country of origin has signed EU adhesion treaties, or readmission agreements with Italy regarding the forced repatriation of expelled immigrants. In this case an additional discriminatory factor exists, for the “inflow decree” of 2003, issued by the Prime Minister on 6 June 2003, does not mention all the countries that have stipulated a readmission agreement with Italy (more than 35), but mentions only Tunisia, Albania, Morocco, Nigeria, Moldavia, Sri Lanka and Egypt. For all those, who come from other countries than the ones just mentioned (apart from cases of family reunification), there remains no possibility for legal entry, even if there exists an employer willing to stipulate a lawful contract.

Instead, a more favourable treatment is given to cases, in which an Italian descendant of the immigrant may be established “on the side of one parent, until the third generation. The Government observes that “it has been decided to receive immigrants from certain countries rather than from others, inspired by a kind of political anthropology: agreements, diplomacy, free choices between states”. The true novelty of the Bossi-Fini law is thus the criterion of preference, defined as “national-based on kinship“. If somebody lives in a non-EU country with which there are no bilateral agreements (of

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<sup>31</sup> See Corte cost. 30.12.1998, n. 454 in: *Giurisprudenza costituzionale*, 1998, p.3772 with comments by Bonetti.

readmission of expelled persons), he or she can obtain an entry visa, and a residence permit using reserved quotas on the basis of descent, and thus on the basis of Italian origin<sup>32</sup>.

Beyond these general causes of discrimination, which affect hundreds of thousands of potential immigrants, who hoped to come regularly to Italy, or are already regularly residing in Italy, specific episodes of racism and xenophobia are reported, including violent ones.

Below we provide a list of some cases happened during the past year.

On 9 January 2003 in Naples, “a young man from Ivory Coast gets on a bus and asks the driver to sell him a ticket. The driver starts at first to shout against immigrants in general, then he begins to kick and beat him. Neither the police nor any of the passengers help him. The young man had to be hospitalized with a serious head injury and multiple injuries<sup>33</sup>”.

On 17 January 2003 in Trento two provincial councillors of the political party “Lega Nord” propose a sort of apartheid on trains. Their criticism is aimed at a regional train that runs in the morning between Verona and Bolzano, where “the situation of degradation is determined by the numerous presence of non-EU citizens”. The Lega Nord asks the Province of Trento to negotiate with the train company, so “that they create carriages just for non-EU citizens, separated from “poor” Italians, who respect civilised rules and occupy only one seat at a time; in this way, daily routes of non-EU-citizens may be checked, including in respect of compliance with the Bossi-Fini law<sup>34</sup>”.

On January 28, in Milan, the head of the Lega Nord in the regional council of Lombardy, asks in a motion to move all commercial activities run by Chinese from the centre of the city to the outskirts, accusing them to have “features that are more and more incompatible with the citizens of Milan.”<sup>35</sup>

During the past year two important judicial rulings have been published in a specialized magazine<sup>36</sup> on access to public low rent housing and access to consumer credit.

The Milan Court, with a decision dated 20/21 March 2002, declared that the system of assignment of accommodation in public housing as practiced by the city council of Milan is discriminatory, where five points (necessary for acquiring access to housing) are given only to applicants with the Italian citizenship. The court ordered the discriminatory behaviour to stop and that consequences of such decisions are redressed. Also it sentenced the city council to pay compensation non-patrimonial damage to those immigrants who had filed the case against the council, as they were victims of discrimination, according to art. 44 of Consolidated Text no. 286, 1998.

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<sup>32</sup> See the study by Bettini, M. (2002) Italiani veri, presunti e per metà, riflessioni antropologiche sulla Bossi-Fini, in: Il Mulino, 2002, p.831.

<sup>33</sup> Source: “Il Manifesto” and Inventario dell’intolleranza di Paola Andrisani, op.cit.

<sup>34</sup> Source: “Repubblica”, “Liberazione”, Agenzia Sir, case quoted by Inventario dell’intolleranza, by Paola Andrisani.

<sup>35</sup> Source, Inventario dell’intolleranza, by Paola Andrisani, op.cit.

<sup>36</sup> Diritto, immigrazione e cittadinanza, 2002, 4, p.126 and p.133

The Court confirms to have jurisdiction on the case, contested by the defence of the city administration, and reaffirms the possibility that an ordinary (and not an administrative) judge, decides against public administration, once the discriminatory nature of the system of assignment of housing has been ascertained proved, both to pay compensation and to stop damaging behaviour and to remove its discriminatory effects “in ways the council deems appropriate”. With the entry in force of the new law Bossi-Fini, and its implementing regulations, only persons with a residence permit or at least a two-year permit can access public housing, whereas before it was sufficient to hold any kind of residence permit. It is also necessary that applicants work regularly as employee or self-employed, whereas before the law it was sufficient to be registered in the unemployed lists.

In the second case, the Trent Court sentenced a loan company for racial discrimination (decision of 23 September 2002, also on the basis of art. 43 of Consolidated Text 286 of 1998). The company requested, prior to granting a loan to consumers, items of documentation to non-EU citizens, which Italian citizens did not have to submit. The decision is interesting, for the Trento decision interprets the words “cittadino extracomunitario” (non-EU citizen), apparently neutral, from the point of view of pointing to a specific ethnicity, as if it de facto specifically refers to “non-EU” immigrants, “as it is known”, the judge observes, “that the word “extracomunitario” does not simply mean “non-European citizen”, but only an individual coming from areas in the world with severe problems of economic development”.

The decision specifies moreover that not only intentionally discriminatory acts are discriminatory, but also all those behaviours and practices that lead to discriminatory treatment. Art. 43.1, in defining in general what is a discriminatory behaviour, states that “...by discrimination is indicated any behaviour...that has the aim or the effect to destroy or compromise the recognition, the fruition or the exercise, in conditions of equality, of basic human rights and liberties”. According to the judges, “the use of by the legislator of the word “or” stresses that discriminatory behaviour is also that behaviour, which, although not motivated by a discriminatory aim, produces however objectively an “effect” of unjustified discrimination on racial, ethnic and other grounds”

The risk exists, that faced by dominant attitudes in politics and the media, the judiciary will also tone down its commitment to fight racial discrimination, so far rigorously practiced by applying the law Mancino of 1992. The decision of the Trento Court was overturned by the Appeal Court. Whereas the judges of first instance considered the lack of subjective aims in behaving discriminatorily to be irrelevant in certain cases, the appeal judges accepted the view of accused persons’ lawyers, who denied the will to discriminate. If the burden of proof of the discriminatory intention remains on the victim, in contradiction with EU directive 2000/43/CE, the judicial cases in which racial discrimination and xenophobia will actually be sanctioned, will diminish even more.

An attempt to take into account the will to discriminate, as an essential precondition of a criminal sanction, also is encountered when the Public Prosecutor at the Court of Appeal of Brescia asked for the acquittal of a bus driver, already condemned by the Court in the first instance for a discriminatory behaviour against a child transported with his bus<sup>37</sup>.

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<sup>37</sup> Source: Newspaper “*Il Nuovo*” of Brescia (March 2003).

A very recent case of discrimination signals a situation of economic blackmail many regular immigrants become victim of. Six Moroccan citizens who had worked for four years without contract, after regularization worked with a regular contract, but with a lower salary than Italian workers, ca. 200 Euros per month for 12-13 hours of work per day<sup>38</sup>. The six immigrants, who had joined a union in the meantime, reported the discriminatory behaviour by the employer, who even refused to pay the salaries of the past two months before he fired them. The defence lawyers of the immigrants proposed two distinct aims for a claim, one being the reintegration in the work place, the other obtaining the annulment of dismissal, because it is in contrast with art. 44 of the Consolidated Text on immigration no.286 of 1998, which outlaws laying off employees for reasons of racial discrimination. The trial, due to start on September 15 2003; it is an more and more isolated case of a proceeding activated on the basis of the measures against racial discrimination contained in art. 43 and 44 of the Consolidated Text on immigration of 1998.

## 7.4. GOOD PRACTICES

Despite the Bossi-Fini law, and administrative practices aiming at exclusion rather than integration, NGOs and local government bodies (region, province, city governments) are often proactive in assisting immigrants in their various needs, from job search to housing, to medical assistance, accommodation for asylum seekers and monitoring expulsion procedures<sup>39</sup>.

Equal rights and obligations, easy access to existing services in the region, fight against discrimination are the main features of a new draft law proposed by the regional government of Emilia Romagna. The proposal provides for additional councillors, after the positive experience of the additional councillors in the province of Rimini in 2002, and the city Municipality of Ravenna in May of 2003. The law moreover provides for experimental projects of reception and integration, including housing vocational training and work; this includes the possibility of vocational training directly in the countries of origin. The law entrusts local government with a primary role in fighting racial discrimination, establishing a regional plan of interventions in this matter and giving financial support to those initiatives, which are aimed to fight racial discrimination and xenophobia on a local level.

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“Now we will need to wait to know the outcome of the appeal against the sentence for incitement to racism, pronounced in 1998 by the Court of Mantova. The Court of Appeal in Brescia will decide on the request by the Public Prosecutor Francesco Nuzzo on the case of M.F., 37 years old, of Montichiari (Brescia), sentenced in first instance to two months and 22 days of detention. The detention had been turned into a fine of 6 Million and 150,000 Lire.

The Public prosecutor Francesco Nuzzo asked for acquittal, stating that the behaviour being examined is not a crime, because “these words were only the expression of animosity and vulgarity” and “can not be interpreted as real discrimination”.

<sup>38</sup> Source: “Il manifesto” of 13 August 2003.

<sup>39</sup> See: Colombo, A., Sciortino, G., *Assimilati ed esclusi*, cit., and in this text in particular the studies by Carfagna, M., *I sommersi e i sanati. Le regolarizzazioni degli immigrati in Italia*, p. 53; by Recchi, E., Allam, M., *L’ assimilazione degli immigrati nella societa italiana*, p.119; and by Caponio, T., *Policy Networks e immigrazione: le politiche sociali a Milano e Napoli*, p. 253.

There are still only a few local bodies that have conceded a limited right to vote and participation to immigrants. During the years, however, the trend of local bodies to widen participation in local government vote seems to be gradually increasing, significant examples exist of communities that have granted large participation to the immigrants in decisions of the local bodies.

Most of all the case of Florence shall be mentioned here, where a provincial council of foreigners has been established; President of this consultative body, an additional provincial councillor, participates also in meetings of the provincial council without right to vote. Centre-right political parties, which are in opposition in the Province of Florence, have expressed their dissent.

The municipal council of Torino has deliberated norms in the past few months that give the right to vote to immigrants who are regular residents, on condition that they have lived in the community “for at least six months”.

In order to favour the regularization of the housekeepers and domestic workers taking care of elderly people living alone the city of Venice has decided to intervene economically to support those families, who have decided to regularize the domestic workers who work for them.

The councillor on social policies, declared: “we have decided to support as much as possible the regularizations, facilitating in this way assistance in private homes. We will support families in two ways: by paying a sum of 330 Euros (the regularisation tax), to families below a minimum level of income, which could be the one which is taken as a basis for whether assistance is being granted in an old people’s home. The second instrument is the payment of social security and insurance charges of these workers. Otherwise there is a high risk that only very few accept to regularize their domestic workers, possibly charging them the regularisation costs”<sup>40</sup>.

The Veneto regional government voted a programme of initiatives and interventions in immigration matters, activating a mechanism of regional coordination, which is supported by a regional Council for immigration and in coordination with territorial councils for immigration. The same region has allocated 849,686 Euros in the year 2003 for training (language courses, vocational training, training for compulsory education cycles teachers for compulsory education and NGO workers). It also allocated more than 4 Million Euros for interventions regarding accommodation, and more than 1 Million Euros for the development of projects of the informative network of immigration and the immigration observatory. All this has led to efficient policies aimed at integration and equal opportunities of immigrants; practices in Veneto and other regions of the north, such as Friuli Venezia Giulia, Emilia Romagna, Tuscany, appear still far from those prevailing in regions of the south. The budget of Sicily regional government for 2003 does not include any line for interventions in favour of immigrants, apart from funds transferred from the national budget to the regions to finance such initiatives.

In spite of the negative political position of the centre-right government of the region of Sicily (which even refuses to pass a regional law on immigration), there exist in this

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<sup>40</sup> Leogrande, A., Naletto, G. (2002) *Agire in rete, inventare pratiche alternative*, in: *Bada alla Bossi-Fini, Contenuti, “cultura” e demagogia della nuova legge sull’immigrazione*, a cura di Altreconomia, ASGI, ICS, Lo straniero, Lunaria, Terre di mezzo, Roma 2002, available at website [www.lunaria.org](http://www.lunaria.org)

region network initiatives on a local level that propose coordinated interventions for the integration of immigrants and equal opportunities, for instance the protocol of agreement signed in the province of Syracuse between the body of the regional province and the main associations of volunteers working in this city in favour of immigrants. The case of Syracuse remains however the only example in Sicily, where the signing of the documents was followed by concrete initiatives, such monitoring by representatives of the NGO Doctors without Borders in the centres of administrative detention and identification operating in the province, one of the areas where most refugees arrive. The convention provides for a new advice centre for immigrants in order to offer them the instruments and resources for the integration in the local communities.

NGOs maintain a crucial role in the management, and set up of organizations which offer on a local level efficient instruments of support to immigrants against acts of racial discrimination. An interesting example are anti-discrimination telephone help lines, precisely for helping the victims, who in many cases do not report cases of discrimination to the police. Since 10 June 2003 a telephone hotline is active in the city of Parma, to signal any discriminatory acts and behaviours against migrants. The project has been realized by Ya Basta! and the CIAC, the Centro Immigrazione Asilo e Cooperazione, two associations that have been active for years in the sector of integration and support of the migrants of the city. Through this telephone initiative, acts of discrimination against migrants can be reported and the phenomenon of racism can be monitored.



## 8. The Implementation of EU Directives 43/2000 and 78/2000 in Italy

With the law 10 March 2002, no.39 Parliament had given the Government the mandate to issue two laws to implement directives 2000/43/CE and 2000/78/CE. The laws have been examined only by parliamentary commissions and not the entire assemblies; this way the Parliament has been forced by governing parties to give up procedures which would have allowed to discuss in detail, and the power to decide contents of the decrees in matters of discrimination has remained firmly in the hands of the government<sup>41</sup>.

The legislative decree no. 215 of 9 July 2003, which implements directive 2000/43/CE of 29 June 2000, which activates the principle of equal treatment among persons independently of race and ethnic origin, finally published in the Official Journal of the Republic, no. 186 of 12 August 2003, betrays in numerous points the goals and the wording of the corresponding EU Directive.

**Art. 1** defines the object of the legislative decree, regarding “the implementation of the equal treatment of persons regardless of race and ethnic origin, establishing the necessary measures to ensure that differences of race or ethnic origin do not become the reason for discrimination”...”also in a perspective that takes into account the different impact the same forms of discrimination can have on men and women, as well as the existence of forms of racism with a cultural or religious character.”<sup>42</sup>.

**Art. 2** provides a definition of discrimination, including direct and indirect discrimination. Discrimination takes place when “..... due to race or ethnic origin a person is being treated less favourably as another person would, has been or will be treated in a similar situation”; indirect discrimination “when an apparently neutral measure, a

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<sup>41</sup> *Simoni, A., La discriminazione razziale alla vigilia dell’attuazione della direttiva 43/2000: considerazioni a partire da alcune recente pronunce giurisprudenziali, in: Diritto, Immigrazione, cittadinanza, 2002, 4, p.81. In this study ambiguities already contained in the implementation act are being emphasized, The author emphasizes even the unknown factors regarding the trial and enforcement factors, revealing that “there is a considerable distance from the text of the directive in the EU-law, also as far as the problem of the burden of proof is concerned, where the inversion, which according to the directive should lead to showing “the facts that demonstrate that a discrimination has occurred” is subordinated to producing “evidence of suitable facts on which to ground in serious, precise and coherent manner, the proof of discrimination”, thus making proof more difficult in an environment where difficulties in proving allegations are often the main obstacle for implementing even the most advanced laws”.*

<sup>42</sup> The norm takes into account “assumption” 14 of Directive 2000/43, (14) In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.”

criterion, a practice, an act, a contract or behaviour puts a person of a certain race or ethnic origin in a position of disadvantage in respect to other persons.” The model fact situations appear to be corresponding with the provisions of directive 2000/43/CE. Art. 2 of the delegate decree preserves the provision of art. 43, comma 1 and 2 and the legislative decree no.286 of 1998, commonly understood as Consolidated Text on immigration.

The reference to this norm carries the risk of restrictive interpretations of the concept of discrimination: indeed, for a “discrimination” to take place, it is not enough to have any discriminatory treatment based on religion, race, national or ethnic origin, but it is necessary, that such a treatment has caused prejudices to “human rights or basic freedoms”. In this way, with a restrictive interpretation of the norm, it would be possible to exclude from application of the anti-discriminatory norm those discriminatory acts, which do not cause “prejudice against human rights or freedoms”.

Art. 43 of the Consolidated Text on immigration of 1998, contained a list of typical behaviours, which should facilitate the activity of judges in verifying cases of discrimination, even beyond the cases in which the violation of a basic right can be recognized.

In the new implementing decree of the directive 2000/43/43 it is being moreover specified, that also harassments “i.e. those unwanted behaviours based on motives of race or ethnic origin, aiming at violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating and offensive atmosphere” are considered to constitute discrimination. The norm finally concludes that “the order to discriminate people against for reasons of race or ethnic origin is considered like a discrimination” according to the first comma of the article that is being examined.

**Art. 3** (scope of implementation) limits the area of implementation. Its content does not correspond to what is included in the directive. The principle of equal treatment applies to all persons in the public sectors (it would seem without exception, at least interpreting the decree according to the standard of the corresponding directive 2000/43/CE) and private sector, as far as access to employment, work, training, work conditions, activities in organizations of workers and employers, social security, medical assistance, information and access to goods and services.

The delegate decree provides for some cases of differences in treatment which do not constitute discrimination according to art. 2: “Respecting the principles of proportionality and reasonableness within the work environment or the exercise of a business activity, those differences in treatment due to characteristics linked to race or ethnic origin of a person are not discriminatory acts according to art. 2 if they are features that are an essential requirement for the professional activity”.

According to art. 3 comma 4 of the implementation decree, “those differences in treatment do not constitute however acts of discrimination according to art. 2, which, even though they are indirectly discriminatory, are justified by legitimate goals pursued through appropriate and necessary measures”.

But who establishes the reach of these exceptions? Probably it will be the courts to establish the actual reach of the exceptions; this will only be possible following a legal

case, and the process, precisely due to this measure, may have an uncertain outcome. As foreseeable result, a further decrease in the number of complaints might occur due to the vagueness of the legal norm and the wide room for interpretation.

In work relationships, the actual reach of new measures against racial discrimination, with such a wide possibility of exception will be determined by the power of organization and distribution of work within the company by the employer, and the protection of the victims of racial or ethnic discrimination will be impossible to realize. But, in this respect the contemporary introduction of the legislation implementing directive 78/2000/CE (discrimination in the workplace) has to be taken into account.

In the structure of the legislative decree of implementation all of the current norms regarding entrance, expulsion, access to work, on the basis of art. 3 comma 2 remain valid. This way, considering the wide administrative discretionary powers carried out in this environment, the door is open for de facto immunity of civil servants who become guilty of discriminatory behaviour against immigrants as far as personal freedom and freedom of movement are concerned. It will be indeed enough to invoke a legal norm, for instance, against an immigrant without residence permit, in order to disprove (proof always has to be provided by the victim) a discriminatory behaviour.

Art. 14 of the directive which forced the member states to adopt the necessary measures in order to make sure that all legal provisions contrary to the principle of equal treatment shall be abolished<sup>43</sup> is left out of the implementation decree. Maybe implementing exactly this part of the EU Directive would have had the effect to abrogate a large part of the Bossi-Fini law approved last year, against which dozens of constitutional exceptions have been raised by judges. In autumn 2003 the first decisions of the Constitutional Court were due.

**Art. 4** regulates the judicial protection of rights.

The possibility to use the specific civil action against racial discrimination, already regulated by art. 44 of Consolidated Text no. 286 of 1998 is being confirmed. The burden of proof of the discriminatory act or practice remains on the victim.

In regard to the legislation already in force (Consolidated Text on immigration no. 286 of 1998), **art. 4 comma 3** of the delegate decree does not refer to the fundamental principle of inversion of the burden of proof, but aggravates the burden of proof that had impeded application of the norm already in force (art. 44): as provided for by art. 2729 of the civil code," the petitioner can provide factual evidence, in serious, precise and coherent terms". The burden of proof remains entirely on the victim of the discrimination.

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<sup>43</sup> Article 14 **Compliance** Member States shall take the necessary measures to ensure that:

- a) (a)any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- b) (b)any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations ,are or may be declared, null and void or are amended")

The EU norm establishing the inversion of the burden of proof is contradicted. Art. 8 of Directive 2000/43/CE that assigned the burden of proof onto the person accused of discriminatory behaviour and not the victim is being completely disrespected<sup>44</sup>.

There is no trace in the implementation law of art. 9 of the Directive, which establishes the protection of victims from acts of discrimination, by compelling member states to introduce in their respective jurisdictions “the necessary measures to protect persons from unfavourable treatments or consequences, for instance reaction to a claim or an action aimed at obtaining respect for the principle of equal treatment of the directive”. At this point a possible judge’s order to pay damages, including non-patrimonial, or measures to stop the discriminatory behaviour or adoption of a plan of removal of the effects of discriminatory behaviour (to be taken into account when quantifying damages), has little impact. The judge takes into account “whether the discriminatory act or behaviour constitute a retaliation to a previous judicial act, i.e. an unjust reaction to a previous activity of the subject / person aimed at obtaining the respect of the principle of equal treatment.” The judge can order that the sentence is made public.

The norms on legitimacy to act, **art. 5** and on the registry of associations, **art. 6**, appear to be inspired by concerns about control, rather than by the will to guarantee wider protection by associations of victims of acts of racial discrimination. Only associations registered “in a special list approved by the Minister of Labour and Social Politics and the Minister for Equal Opportunities, identified on the basis of their goals and programmes and the continuity of their activity” can take legal action to report to the judiciary cases of racial discrimination.

On the basis of **art. 5**, the intervention of associations is provided for also in the case of collective discrimination, when the individuals directly or indirectly harmed by discrimination cannot be identified. In the case of individual discrimination associations can act on the basis of a mandate by the victim of discrimination, which, in order to be valid, must be in writing, through a public or private deed; in the case of collective discrimination, associations can act without a mandate, because the persons harmed by the discrimination cannot be directly and immediately identified.

**Art. 6** specifies the requirements for the associations wishing to be listed in the register of anti-discrimination associations; the Office of the Prime Minister – Department for Equal Opportunities, “annually takes care of the update of the registry”.

Art.7 is also in full contrast with Directive 2000/43/CE; according to art.7 “at Office of the Prime Minister – Department for Equal Opportunities, an Office for the promotion of equal treatment and the removal of discrimination on race and ethnic origin grounds” is created, an office which should also provide assistance in judicial or administrative proceedings by victims of discriminatory behaviour.

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<sup>44</sup> L. Scagliotti observes in the first comment to the draft of the delegate decree, to be read / consulted on the website of Sergio Briguglio, April 2003, [www.cestim.it](http://www.cestim.it), how “what is provided for by the directive already exists in the Italian jurisdiction. It would be enough (and thus the different choice of government is not justified) to partly reproduce art. 4.5 of law 125/91 using the following words, f.i. ”When the claimant provides factual elements – also deriving from statistical data –useful to back up in precise and coherent terms the presumed existence of discriminatory acts or behaviours due to race or ethnic origin, the defendant has to disprove the existence of discrimination”.

The same office should “publish an annual report to Parliament on the application of the principle of equal treatment and on the efficiency of mechanisms of protection, as well as an annual report to the Prime Minister about its activities”. The office has “the possibility to ask institutions, individuals and companies, who have them, to provide information and to show the necessary documents” in order to carry out their tasks. It has to be questioned, what the systems of control will be, and if such an office will ever, and in what form, liaise with the regional observers against racial discrimination, which would have had to be established by now on the basis of the Consolidated Text of 1998. But on these issues one has to wait for the customary flow of regulations, directives and circular letters, which maybe in a few years will allow for a first collection of official data on discrimination.

Whereas Directive 2000/43/CE provided for an agency that is independent from the Government, in Italy, the implementation law establishes that this office, which should promote equal treatment is “directed by an officer appointed the Prime Minister, or a Minister delegated by him”, and functions according to organizational rules that are “set up with a future decree by the Prime Minister”. Such an office can also make use of civil servants “as well as experts and external consultants”, all rigorously chosen through co-optation. All in all a true “think-tank” serving the government, that might not be particularly inclined to reveal those indirectly discriminatory behaviours that are a result of discretionary choices by civil servants and security officers. In conclusion the agency thus constituted will be completely divergent from what is foreseen by the EU Directive: an independent body for the promotion of equal treatment (art. 13).

In the implementation law no mention is made of dialogue with non-governmental organizations, provided for by art. 12 of Directive 2000/43/CE: member states are required to “encourage dialogue with relevant non governmental organizations which.....have a legitimate interest in contributing to the fight against discrimination due to racial and ethnic origin”.

Finally an adequate penal framework is missing, which instead is required by art. 15 of the directive; in particular, there is no mention whatsoever of consequences for the perpetrator of discriminatory behaviour, who does not obey the order of the judge to refrain from such behaviour. Thus one cannot see how the sanctions proposed by the government can be “effective, proportionate and dissuasive”.

Now we will examine implementation of Directive **2000/78/CE** that establishes a general framework for equal treatment in employment and work conditions. The office “may ask institutions, individuals and companies to provide information and show the necessary documents” in order to carry out its tasks. The text of legislative decree no. 216 of 9 July 2003 (in the Official Journal of 13 August 2003, no. 187) conforms quite obviously with the decree that implements the directive 2000/43/CE, examined previously, of which it reproduces significant omissions and serious contradictions with the directive it is supposedly implementing.

During June 2003, just before the definitive approval of the decree, some members of the opposition pointed out in the Senate, how much the implementation decree diverges from EU Directive 2000/78/CE<sup>45</sup>.

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<sup>45</sup> ( ) *From the Parliament discussions' minutes :*

The other basic principle contained in assumption n. 29 of the directive (“(29)Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.”) seems to be similarly neglected. The same happens with no. 30, according to which “(30)The effective implementation of the principle of equality requires adequate judicial protection against victimisation.”.

However, where this decree most clearly deviates from the EU Directive is in the rules about the burden of proof. On the basis of “ assumption no.31 “(31)The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation”.

Similarly not pursued so far (as better demonstrated in the analysis of legislative decree approved by government on 3 July 2003), is the dialogue with stakeholders – such as trade unions or NGOs. According to “Assumption 33” of Directive 2000/78/CE “(33)Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination at the work place and to combat them.”

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*The senator De Zulueta preliminarily states that the framework of this decree provides for implementation of the directive in a way that does not entirely conform with the norms there included. She deems particularly inappropriate and problematic the avoidance of norms in art. 14, where member states are requested to take necessary measures to ensure that all measures against the principle of equal treatment are abolished. She points out, how stakeholders can make a judicial claim for the decree’s failure to conform to the EU Directive.*

She raises concerns on art.3.2, of the decree, where the measures currently in force on immigration and different treatment based on nationality are preserved. She criticizes the choice to entrust an office that is set up Office of the Prime Minister – Department for Equal Opportunities, with tasks that, according to art.113 of the directive, should be carried out by one or more independent agencies. She then considers art. 4, dealing with the judicial protection of rights, expressing appreciation for the observations of the speaker, who has revealed the fact, that the inversion of the burden of proof urged by the directive has not been implemented. She refers to observations already expressed in the session of 29 May, when she stressed how it would have been preferable to jointly examine legislative decrees 216 and 217implementing two EU Directives, both dealing with equal treatment. In both Directives, there is an explicit reference to social dialogue as well as a dialogue with non-governmental organizations. Art. 11 and 12 of the directive that is being examined implemented by the proposed decree. Then she asks the Office of the Prime Minister to schedule a hearing of Amnesty International and other organizations before examination of measure no. 217. Finally, referring to implementation of art. 3 of the directive in particular, she reveals how the text drafted by the government does not mention among the interested parties public institutions, specifically mentioned by the directive.

**Art. 1** of the decree defines its aim as “measures on implementation of equal treatment of individuals regardless of religion, personal convictions, disability, age or sexual orientation, in employment and work conditions, establishing the necessary measures so that such factors are not grounds for discrimination, while taking into account the different impact the same forms of discrimination can have on men and women.” In this case the measure is wider than the corresponding art. 1 of the directive, recuperating from the “assumptions” reference to the different impact the various aspects of discrimination can have on men and women.

**Art. 2** of the decree repeats the same wording of art. 2 of the EU Directive 78/2000: thus the “principle of equal treatment” is observed in the absence of any direct or indirect discrimination on grounds of religion, personal convictions, disability, age, or sexual orientation, thus providing a definition of direct and indirect discrimination that corresponds with the one in the EU model. It is very important however, to anticipate a wide scope for exceptions, which is recalled by the insert “except of measures in art. 2.3 to 2.6.”

Such a regime risks to undermine in most cases the reach of the new norm (we will analyse the reasons when we deal specifically with art. 3).

In the meantime it can be stated, that direct discrimination takes place when a person is treated less favourably than another in a similar situation due to religion, personal convictions, disability, age or sexual orientation. Indirect discrimination exists, when a decision, a criterion, a practice, an act or pact or an apparently neutral behaviour might place persons who are of a different religion or belief, disabled people, elderly or with different sexual orientation in a position of particular disadvantage in respect to other persons.

Harassment or unwanted behaviour due on one of the grounds mentioned by art. 1, that aim to or have the effect of violating the dignity of a person and create an intimidating, hostile, degrading, humiliating or offensive environment are considered acts of discrimination. As far as the notion of discrimination is concerned, one can thus notice a substantial correspondence of the EU Directive 78/2000 with the relevant Italian implementing decree.

The field of application of the delegate decrees corresponds to the “area of implementation” of EU Directive 2000/78/CE. The decree establishes that the principle of equal treatment is judicially protected “with the forms of protection of art. 4 of the decree”. Here exists already a potential limit in the efficacy of implementation in comparison with the wider formulation of the directive, according to which this is applied to all persons, both in the public and private sector, including in the Public Administration in:

- all conditions of access to employment and work, both dependent and autonomous, including selection and conditions of hiring regardless of the kind of activity and on all levels of professional hierarchy, as well as promotion;
- access to all types and levels of vocational training, specialisation and re-training;
- employment and all kinds of work, including conditions of dismissal and retribution.

- All affiliations and activities in organizations of workers or employers, or any organization where members belong to a particular kind of profession, as well as any services offered by such organizations.

The limit of the area of application appears even more evident when the measure of art. 3.2 is considered, on the basis of which the measure contained in the decree “does not exclude applicability of all measures currently in force on:

- conditions of entrance, residence and access to employment, assistance and social security of third-country citizens and stateless persons on State territory;
- social protection and insurance;
- civil status and services that are guaranteed on its basis;
- employment in the armed forces (in respect of age and disability only).

**Art. 4** of the EU Directive is reproduced in **art. 3.3** of the implementing decree: “in full respect of principles of proportionality and reasonableness, within work relationships or in private enterprises, those differences in treatment due to religion, personal convictions, disability, age or sexual orientation, when due to the nature of the work or the context in which it is being carried out, they are characteristics that constitute an essential and determining requirement in order to carry out the activity” do not constitute acts of discrimination.

The “exceptions” regime introduced by the Italian legislator appears to be in any case wider and mainly left to the discretion of civil servants or private employers, than is stated by the corresponding measures of the EU Directive. According to art. 3.6 of the implementing decree, those “differences in treatment, which, even though they turn out to be indirectly discriminatory, are justified by legitimate aims pursued by appropriate and necessary means” do not constitute acts of discrimination. The vagueness of this measure risks to eliminate any consequence for all acts of indirect discrimination, even though the latter has been formally included in the Italian implementation decree.

The most incomplete aspect of the implementing decree of Directive 2000/78/CE , is in provisions on judicial procedures and appeals. Art. 9 and 10 of the Directive were indeed essential aspects because they aimed at the effective application of the new law, otherwise bound to remain completely inactive, as has happened in the past to other legislative interventions by national authorities, which, as could be seen in the case of art. 43 and 44 of Consolidated Text no. 286 of 1998, were seldom applied.

The implementing decree of Directive 2000/78/CE contradicts art. 10 of the same Directive, (“**Burden of proof** 1) Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. 2) Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs. 3) Paragraph 1 shall not apply to criminal procedures. 4) Paragraphs 1,2 and 3 shall also apply to any legal proceedings commenced in accordance



with Article 9(2). 5) Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.”.)

The Directive included an “escape clause” which has promptly been used by the Italian legislator, on limitations of the principle of inversion of the burden of proof. Decree no. 216 of 9 July 2003, art. 4 (entitled “judicial protection of rights”), establishes that the burden of proof is on the plaintiff, in other words on the victim of discrimination, with a reference to art. 44.1 to 44.6, 44.8 and 44.11, of Consolidated Text on immigration no. 286 of 1998. Art. 4.4, specifies that “the plaintiff, in order to demonstrate the existence of a discriminatory behaviour against him/her, may present factual elements, also on the basis of statistical data, in serious, precise and coherent terms, that the judge evaluates according to art. 2729.1, of the civil code”.

With the emphasis on seriousness, precision and coherence of evidence the judge evaluates, the “assumption” no. 15 of the directive 2000/78/CE is restricted in its scope (“(15)The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.”)

The decree then adds (in conformity with the EU Directive), that “with the decision upholding the appeal, the judge, in addition to establishing, if requested, a non-patrimonial compensation, orders that the discriminatory behaviour, conduct or act, is stopped, in case it still persists, as well as the removal of its consequences”. The provision of adequate obligatory measures, also of pecuniary character, is missing however, in those cases in which, in spite of the prohibition of the judge, acts of discrimination continue to be perpetrated.

As far as legitimisation to act is concerned, **art. 5** of decree no. 216 of 9 July 2003, states that “local representatives of the main representing organisations on a national level, are legitimised (with a mandatory written mandate, through a public or private deed), to act according to art. 4, in the name of, or supporting the victim of discrimination, against the individual or entity who has committed the discriminatory act or behaviour”. Local representatives are, according to comma 1, also legitimised to act in cases of collective discrimination, when the persons harmed directly or indirectly by discrimination cannot be identified.

Finally **art. 6** of the decree states that “by 2 December 2005 and thereafter every five years the Minister of Labour and Social Politics delivers a report to the European Commission on implementation of this decree”. The long time lapse for the communication of the report to the European Commission expresses irrefutably the scant importance the report will have in the relationship between the Commission and the national government on the difficult issue of work relationships.

It is significant, that in decree no. 216 of 9 July 2003 there is no specific reference to protection of the victims. On the basis of art. 11 of Directive 2000/78/CE, entitled “Protection of the victims”, the member states are required to “introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the

principle of equal treatment..”. This measure has not been transferred in the implementation decree maybe due to the conviction that the Italian legal system already contains adequate instruments of protection of workers

Completely omitted, in decree no. 216, are measures on dissemination of information, as provided by art. 12 of Directive 2000/78/CE (Article 12:

**“Dissemination of information.** Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.”)

The fact that any measure on “social dialogue” and consultation with non governmental organisations other than trade unions is taking into account, belies how the relationship with stakeholders is considered. In other words, there is no guarantee of transparent and democratic relationships with the non-governmental organizations, a guarantee, that was however a main feature of the EU Directive.

## 9. Conclusions

Whereas acts of “racism”, perpetrated by private individuals or groups, appear less and less evident due to the very small number of charges, this research shows how cases of direct and indirect institutional discrimination are increasingly frequent, as a consequence of the application of the new Bossi-Fini law, and of the lack of an organic law on asylum in Italy.

The presence of the Lega Nord in the government coalition, and the crucial role this political group succeeds in playing in the Italian government, shape government decisions which infringe basic human rights, rights that should be granted also to non-citizens whether present at the border or on national territory (art. 2 of Consolidated Text 286 of 1998). Italy does not appear to plan to remove those legal provisions from its legislation, which might produce discriminatory effects or turn out to be directly discriminating – a reform which is prescribed by art. 14 of Directive 2000/43/CE.

As far as the acts of discriminations are concerned, that do not infringe basic human rights, but constitute violations of the principle of equal treatment in contractual relationships (such as work relations, relationships of acquisition or financing of goods, transport etc., or access to non-essential services, such as to cafés or discos), the small number of complaints to the judiciary have led to a substantial reduction in 2003 of judicial cases. Also the small number of judicial decisions turned out to be restrictive interpretations of concepts about racial discrimination, as they give an increasing emphasis on the proof of the personal discriminatory will of the defendant, with the result that judicial decisions of the court of first instance, which ascertained cases of discrimination, have been reversed by the court of appeal: a striking case is the one decided by the Trento court.

It does not appear that the judiciary has sufficiently intervened to defend the basic rights of migrants. Many contrasting judicial decisions exist, mainly on confirmation of expulsion orders and detention orders in detention centres. This shows that the judges have examined such cases only superficially, or that an obvious prejudice exists even among the judiciary, which aims to stopping the flow of migrants even when this infringes basic human rights. Such rights must be recognized to migrants not only on the basis of Italian law, but also of international conventions (such as the Geneva Convention on Refugees and the European Convention on Human Rights).

The omission of implementation of art. 8 of the directive 2000/43/CE , on inversion of the burden of proof, threatens to de facto impede any effective judicial protection for victims of racial discrimination. On penalties for behaviour that can be defined as racist, or directly inciting to racial hatred, the plans of the Minister of Justice to abrogate the Mancino law of 1992, as, in his view, it harms the right to freedom of expression, is a cause of great concern. Those positions are not by now any longer an exclusively Italian problem, after the block on EU level, by the Italian government, of the framework decision against racial discrimination.

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