FOREWORD

This is the first Report on the state of rights in Italy, born out of a project of "A Buon Diritto" Association. Protecting and making human rights effective is no far-fetched issue that only concerns remote lands, oppressed peoples and totalitarian regimes. In fact, it concerns us all directly. Thus, it is best to start from ourselves before we go touring the world to preach how valuable and indispensable those rights are. LarticoloTre is both a report and a project that may be termed political in nature. It is the report of a collective work documenting how all rights are protected or fail to be protected or are protected only in part – in our country. The underlying project is political as well, because it is the political project of the Constitution of the Italian Republic and of the equality principle that is a reflection of human dignity.

This work was born out of the observation that no regular reporting is available in Italy on the implementing status of fundamental human rights or on the safeguards aimed at protecting minorities. Sector-specific reports are published to focus on individual institutions – such as the prison system – or groups – sexual orientation minorities, Roma, Caminantes; still, there is no comprehensive record based on the regular observation and analysis of the extent to which those rights are actually afforded to and enforced by the respective holders – that is to say, individuals, social groups, and minority groups (whether on grounds of ethnicity, religious denomination, sexual orientation, social standing, disability status) as well as all those persons that may only exercise such rights in part, or for whom they are temporarily suspended or reduced (prison inmates, hospitalised psychiatric patients, individuals subjected to mandatory medical treatment, and so on). This is the starting point of the project by LarticoloTre, which draws inspiration from the equality principle in the Italian Constitution to evaluate and somehow "gauge" the recognition or non-recognition, the full or flawed implementation of the rights and safeguards that are closely related to the full exercise of

fundamental prerogatives of all individuals: from personal freedom to freedom of movement; from religious freedom to sexual freedom up to the ban on whatever type of discrimination and violence for whatever reasons.

The basic assumption underlying this project is a unified vision of the rights framework along with a full-fledged concept of the individual, i.e. the holder of those rights. In a historical perspective, the sequential affirmation of rights that differed in terms of their scope and nature has resulted into the differential categorization of such rights – which Thomas H. Marshall systematized on the basis of a historical criterion, namely that of succeeding generations of rights.

As recalled by Norberto Bobbio, "human rights, fundamental though they are, are historical rights; that is to say, they have developed under certain circumstances marked by fights to defend new freedoms against old powers, in a stepwise manner, neither all at once nor once and for all." Civil rights, political rights, social rights, third- or fourth-generation rights, and so on: the fact that things do happen allows timescales to be developed continuously, so that time-honored differences are diluted into broader categories, or else what comes up today is separated more thoroughly from what surfaced yesterday or the day before that.

There is little doubt that Marshall's approach was valuable in that it linked social rights to the type of citizenship that was taking shape in the age of the welfare State and in the face of the concept of a socially-oriented State based on the rule of law. Nevertheless, this approach lent itself to misunderstandings and fraudulent interpretations. The link between citizenship and rights resulted actually into "nationalistic", ethnic or even "taxation-oriented" visions of the rights and their beneficiaries. The fact that such rights were categorized according to succeeding generations was at times misinterpreted to rank rights and their enforceability – civil rights first, then political rights and finally, if really necessary and if so permitted in an age of affluence,

social rights. It goes without saying that this was conditional in any case upon the "emergencies" encountered by public authorities. In this manner, the universality and interdependence of human rights were too often downplayed and made subordinate to favourable social, economic and international relationships.

Conversely, a new as well as consistent interpretation of democratic constitutionalism leverages the principle of human dignity to piece together the individual rights exactly by recognizing the all-round features of the individuals those rights are vested in. The 1947 Italian Constitution, the 1948 Universal Declaration of Human Rights, the 1949 Grundgesetz in Germany re-discovered the dignity of individuals as the ultimate rationale of the old and new freedoms that were enshrined in them and/or started existing through them.

The underlying assumption is the reversal of a long-standing distinction, whereby "dignity" was supposedly meant for the "dignitaries" – i.e., those who deserved being afforded superior standing. Conversely, it is every human being as such that is today considered to be worthy of such distinction. Thus, having passed muster according to the universalism that is a feature of modernity, dignity has become a benchmark for all the values such as freedom, equality and solidarity that make up the foundations of our societies and democratic regimes. If there is a lesson to be learnt from the history of the past two centuries, this is that there can be no freedom, no equality, no reciprocity where there is no recognition of the dignity of every human being in his relationships with other fellow beings.

The process leading to the affirmation and full recognition of rights within the social framework is nothing else but the process through which the human community has been evolving. The aspiration to a life that is just, free and lived with dignity is the ontological principle of the individual and collective needs underlying modern society. It can be argued that, starting at least from the end of the 18th century, the attention paid to fostering, disseminating and enjoying fundamental human rights has been expected to be a precondition

– enshrined in statutory instruments – for the political, social and economic practices of any civilized country. Still, like all evolutionary principles, this vision has never been translated fully into reality – whether as a precondition or as an aspiration, whether in its original version or by way of its subsequent developments. This is why it is both appropriate and daunting as a task that one should undertake to observe, evaluate, flag and foster actions and policies that can allow those principles to be made fully real.

DISABILITIES AND THE INDIVIDUAL
By Angela De Giorgio Domenico Massano

Focus on Facts.

UN Convention and action programme

The fourth "National Conference on Disability Policies" - organized by the Ministry for Labour and Social Policies, together with the Municipality of Bologna - took place on 12 and 13 July 2013, four years after the previous one, organized in Turin in 2009. The conference provided a forum for dialogue between institutions, individuals and associations, as well as being the occasion for the presentation of the "Action Programme for the Promotion of Rights and Integration of Persons with Disabilities". The Programme had already been approved in February 2013 by the National Observatory on the Condition of Persons with Disabilities, was then adopted by the Council of Ministers in September, and, following the relevant Decree of implementation issued on 4 October by the President of the Republic, it was published on the Italian Official Journal on 28 December.

The Programme highlights the interventions and measures to be adopted in the next two years to promote the rights and integration of persons with disabilities; said interventions and measures are divided into seven different fields of action: review of the system for recognizing and certifying disabilities; employment; independent life and social inclusion; accessibility and mobility; education and school inclusion; health, right to life, empowerment and rehabilitation; international cooperation.

The fundamental reference and common thread of the Programme is the UN Convention on the Rights of Persons with Disabilities, ratified by Law No. 18 of 3 March 2009. The Convention is the first

binding international instrument on disability, and is the first major treaty on human rights of the new millennium. It was signed by 158 States and ratified by 139.

In its General principles, the Convention recognizes the value of human diversity, reiterates that persons with disabilities are an integral part of society, and commits the Italian State to ensure they can fully enjoy the human rights it enshrines, so as to ensure "their full and effective participation in society on an equal basis with others". In particular, the Convention focuses on the centrality of persons with disabilities, on their dignity and on the barriers hindering their own fulfilment in all contexts of life: "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity" (Article 1).

This inherent dignity - to be intended as the synthesis of freedom and equality, as rightly underlined by Stefano Rodotà - is the prerequisite and the driving force of a process in which persons with disabilities see their rights concretely recognised, " […] including the freedom to make one's own choices, and independence […]" (Article 3) and are, therefore, put in a condition to exercise said rights.

The Convention and the Action programme, therefore, trace a political-legislative path of undeniable relevance and importance, which seems to give us a general picture of progressive advancement of the inclusive perspective of our society, starting from the recognition of rights and the promotion of the opportunities for participation of persons with disabilities.

Suspended rights?

Unfortunately, as is often the case, the commitments undertaken with the Action programme only have a programmatic character and "can only be funded within the limits of the relevant appropriations", as

stated in the Programme's explanatory report presented to the Italian Council of Ministers. The risk, therefore, is that the Programme could become yet another declaration of intents and that it could have the paradoxical effect of guaranteeing the rights and dignity of persons with disabilities only if these are financially sustainable.

The risk becomes even more concrete when taking into account the crisis our economy is going through, which is especially affecting persons with disabilities and their families. According to the data collected for the "Statistics on Income and Living Conditions" (EU-SILC), processed by ISTAT and relating to the years 2004-2011, in Italy, more than 21% of the "families with disabilities" are at risk of poverty, compared to about 18% of families without members with disabilities. There seems to be a close relationship between disability and poverty, caused by a number of factors that are not always adequately taken into account. Not only are pensions and allowances often not enough to cover the human and economic costs of disability, but, at the same time, as the crisis grew, so did the obstacles and difficulties in receiving said allowances.

The relationship between poverty and disability is compounded by the difficulties relating to work integration. According to the survey "Limitations on the discharge of employment tasks in persons with disabilities" (by ISTAT, the Italian National Institute of Statistics), only 16% of persons with disabilities between 15 and 74 years of age are employed, compared to 49% of the total population. The inactivity rate almost doubles: 81.2% compared to 45.4%. The European Court of Justice denounced yet another discrimination for persons with disabilities: with Judgment C-312/11 of 4 July 2013, the Court ruled that the Republic of Italy had not implemented all the necessary measures to ensure a general framework of equal treatment in employment and occupation.

It is possible, therefore, to detect a fracture, a gap between the legislative framework, the rights and programmes that often run the risk of remaining on paper, and the actual situation that persons

with disabilities have to face. In this situation, some rights - and the relevant legislation - are blithely ignored (as is the case with Section 32 of Law 41/86 on the adoption of plans for the elimination of architectural barriers by Competent administrations, or Section 14 of Law 328/00 on the drafting of "Individual projects" by Municipalities in agreement with ASL, the Italian Local Health Authorities); in other cases, said rights are constantly under attack and, more and more often, they are made conditional upon economic evaluations that run the risk of becoming an alibi to justify non-compliance as well as, sometimes, the implementation of ostracizing and stigmatizing measures and policies.

INPS and false certifications of disability.

In this regard, the case of INPS (the Italian National Institute for Social Security) is emblematic. Over the past few years there was the launch of a fight against the so-called "benefit cheats" - people feigning their disability or, rather, people swindling INPS - which resembles more and more a witch hunt. Based on the headlines on TV news and newspapers, and the figures and percentages spreading around, it seems that one of the reasons behind the current crisis is to be found in this area: this fosters doubts and general distrust, and justifies the impressive measures for prevention and control that have been progressively adopted. The latter, in fact, have gradually increased, going from 300,000 controls by INPS in the years 2009-2010 to 500,000 in the years 2011-2012 (pursuant to Article 10 of Law No. 122/10, "Reduction in spending for disability"). However, when analysing the data of the Italian Financial Police on the activities of 2012, it can be seen that only 1047 "benefit cheats" were caught: this amount only represent 0.4% of the controls carried out, and 0.04% of the total of people entitled to disability benefits - considering that, in Italy, there are 2.800.000 individuals with disabilities. The data of the Financial Police on the fight against fraud affecting the social security and welfare system in 2012 show that the 1,047 "benefit

cheats" were overtaken in number by the 3,297 "fake farmhands" and the 1,619 people feigning to be poor: they represent, therefore, less than one fifth of the total of swindlers. It is thus easy to see a disproportion between the measures adopted and the results obtained.

A further analysis needs to be carried out on another element which, otherwise, might be misleading: the data regarding the percentage of pensions revoked by INPS, which, for example, amounted to around 10% for the years 2009-2010. This percentage does not take into account the high number of appeals against INPS' measures - 60% of which are successful - as well as the fact that said revocations are often related to a reduction in the percentage of invalidity determined by the competent committees. These revocations, therefore, involved genuinely disabled individuals, who were forced to appeal so as to re-obtain the benefits they were entitled to receive, and/or who saw their invalidity percentage reduced and were denied the right to receive said benefits. In October, the President of the National Association of Parents of Autistic Persons (*Associazione Nazionale Genitori Soggetti Autistici* - ANGSA) of La Spezia, reported that, in the previous months, three youths of his association, suffering from autistic spectrum disorders, saw their certification reviewed and their invalidity percentage lowered. One of them lost the right to his school attendance benefit, and two of them lost their right to their attendance benefits. In particular, a girl who had just turned of age, who had always been certified as 100% invalid, had her percentage invalidity lowered to 91%, and thus lost all rights to her attendance benefit. These three controls were the only ones carried out by INPS on members of the Association: as a result, its record of reduction of the invalidity percentage following these controls reached 100%, thus giving rise to bitterness and doubts - as shown by the President's considerations: "We would have all been happy if the diagnosis of those three guys with autistic spectrum disorders had been re-written, in the light of actual, concrete, clinically proven improvements. However, we all know that this is not the case." The media uproar caused by these events might result, among other

things, into losing sight of the additional difficulties and, sometimes, humiliations caused by these decisions.

The situation becomes even more complicated and raises many doubts when considering that, in the face of the constant and elevated percentage of appeals granted against INPS' decisions (in 2011, on a total of 349,595 proceedings, INPS won 40% of the appeals, thus losing 60% of them), Section 38 of Law No. 111 of 2011 amended the procedure for disputes on certified invalidity, blindness, handicaps and disability, as well as on inability pensions and invalidity benefits: the Article makes the preventative technical control mandatory, thus rendering the procedure more complex for prospective appellants. Moreover, all resulting judgments are final.

Moreover, as well underlined in the "First National Report on Invalidity and Bureaucracy" by *Cittadinanzattiva* Association, the implementation of control activities and the use of resources to address the appeals against the decisions taken (Determination No. 91/12 of the Italian Court of Auditors mentions 325,926 pending civil cases) caused a slowdown in INPS ordinary activities: according to the 2012 Report by the Italian Court of Auditors, the timing for verifying disability has increased, rising from 120 to 278 days, and to 325 for blindness and 344 for deafness.

The fact that the procedure has become longer and more complicated, together with the alleged "benefit cheats hunt"- with the consequent stigmatization - have resulted in "human costs" for persons with disabilities. This is compounded by the economic costs caused by the intensification of control measures, amounting to €58 million for 2012. The costs for "external" doctors alone went from €3.2 million in 2008 to €25.4 million in 2011, with a 794% increase (Determination No. 91/2012 of the Italian Court of Auditors).

In the face of this situation, the 2013 Stability Law (Law No. 228 of 24 December 2012) surprisingly ordered INPS to carry out 450,000 more verifications in the years 2013-2015 (Article 1, paragraph 109).

Finally, an almost paradoxical feature of this issue should be pointed out: "benefit cheats" do not act alone. They need doctors, officers and, sometimes, politicians to support and certify their disability claims. For every unduly granted benefit there ought to be targeted measures undertaken by the State, INPS and Professional orders, aimed also at these abetters. Nevertheless, little is known about this control activity, whose results cannot be traced easily. In this sense, it is encouraging to know that, in August last year, the Financial Police reported nine politicians and seventy-four doctors and officers, who swindled the State by certifying 114 false disabilities: this is almost a one-to-one ratio, not to mention that a person feigning disability will remain one person, whereas the officers, doctors and politicians acting as abetters can potentially enable false certifications of a much higher number of people.

Home Care vs. Institutional Care

The latest ISTAT Report on social inclusion of persons with limited personal autonomy shows that only one fifth of them benefit from home care. As also underlined by the data presented in 2013 by the *Cresce il welfare, cresce l'Italia* network, persons with functional limitations mostly rely on family help. It is mainly women who take on the needs relating to care and assistance, with all the attending constraints in particular as regards their participation in the labour market. This family support is also made possible by paid leaves for assisting persons with severe disabilities – even though the State is paradoxically looking with disfavour at such situations. In fact, as reported by different associations, the pensions reform of Minister Elsa Fornero (Law No. 14/12, Section 6, paragraph 2-*quater*) excluded these parental leaves for assisting relatives with severe disabilities from the calculation of pensionable service. It is clear that not enough attention is paid to the human and social costs - in addition to the economic ones - entailed by providing care and assistance to a relative with disabilities: partial or total forgoing of

work, isolation, diseases, etc. Moreover, no consideration is given to the fact that the capacities of the family network are not unlimited - if only for chronological reasons - and that the "After us" issue - often addressed via emergency measures - should be fostered and supported in advance with the help of shared projects capable of taking into account the evolution of the different situations.

Moreover, it is pertinent to note that the measures to support home care, indirect assistance and independent life courses would appear to still play a residual role compared to pre-defined interventions, which are binding and directly handled by public bodies such as, for example, institutionalisation. This is happening regardless of the considerable limitations that often affect these measures, especially as regards respect for people's dignity and rights, and for the choices available to them. This is all the more evident if one considers the demonstrations and fights relating to these matters that are waged by many individuals and associations.

Raffaele Pennacchio, 55, died on 23 October, during one of these initiatives: he was a doctor affected by ALS, and a member of the non-profit organization "*Comitato 16 novembre*". He died after participating, with courage and determination, in a sit-in under the Ministry of Economy and Finance, to ask for a reduction in the funding for institutional care and assistance and an increase in the funding of home care for persons with severe or very severe disabilities – so as to enable them to remain at home with dignity and to receive loving care whilst saving 50% on the costs for institutionalisation. These costs, in many cases, end up funding institutions and contexts that turn out to be the set for unjustifiable violence, as is the case of the "*I cedri*" Residence, in Liguria, for which 7 workers were arrested in January, or the case of Meta di Sorrento where, in July, episodes of segregation involving 37 persons with disabilities were reported. Following these events, the Minister of Health, Lorenzin, put in place verifications on the whole National territory, which led to the closure of a number of institutions.

As recalled by M. Foucault, already in the XVIII century - namely at the time of the French revolution - there was a heated debate between those in favour of institutional care and those in favour of home care. "If the system of home care was to prevail - with all its advantages, including that of delivering benefits to the families of the patients, of letting patients be surrounded by what is dear to them, and of consolidating natural bonds and relationships through public assistance - there would be noticeable savings: in fact, less than half of the sum necessary for attending to a patient in the paupers' hospital would be enough to support care for a home-assisted person."

It is clear which side prevailed, but it is just as clear that, now as then, the decision on where and when to allocate the resources is mainly one of a political/institutional nature which, however, impacts directly on the life of persons with disabilities, and in particular on their freedom and on the choices available to them (and their families).

School

The ISTAT report "Integration of students with disabilities in schools", relating to the School year 2012-2013, signals the presence of around 149,000 students with disabilities in Italy (3.2% of the total of students), around one fourth more than the previous year: this confirms the trend towards an increase in registered students, distinctive of the last decade. ISTAT also signals that, albeit with differences between the different geographical areas, less than 30% of school buildings are fully accessible, considering both internal and external passages. Special needs teachers are about 67,000, two thousand more than the previous year.

The same report - after underlining the importance of teaching continuity throughout the school year, as well as throughout the whole course of studies - indicates that 44.2% of students in primary school and 37.9% in lower secondary school no longer have the same

special needs teacher they had the previous year; moreover, for 14.5% and 12.5% of them respectively, the change occurred during the school year. Moreover, it emerges that, often, students with disabilities attend educational activities outside their classrooms, often in dedicated rooms, and that half of them do not take part in extracurricular activities.

The situation is critical and detrimental, and is made worse by the fact that many students with disabilities are not granted enough dedicated support hours and that, when this is done, it is only because of a judgment by the TAR (a Regional Administrative Court), obliging schools and the Ministry of Education to guarantee or reintroduce the necessary hours. In this regard, two judgments are especially important: one by the TAR of Latium (224/13) regarding sixty-six schools, and the other one by the Civil Court of Milan, against the Ministry of Education, following a complaint lodged by LEDHA (the Italian Association for the Rights of Persons with Disabilities) and sixteen families. In some cases, moreover, the subject of the complaint was the exclusion from the possibility of using school transportation services.

These difficulties, discriminations, penalizations, not only demonstrate that the inclusive perspective of our schools is still far from being implemented, but also that the consequences are very often borne by students with disabilities and their families, with the risk of leading to alternative pathways that were deemed outmoded.

In September 2013, some websites published the letter by a father, Claudio, which began with these words: “After four years in a normal school, we decided to register our son Giulio (affected by Down’s syndrome) in a special school… “. The decision was difficult and hard-fought, and it cast light on a situation that is often negated and/or ignored, but that still exists in Italy. In fact, in spite of the inclusive approach set forth by Law No. 517 of 1977 - which eliminated “Dedicated classes” - “special schools” keep operating pursuant to Law No. 118 of 1971, which has never been formally repealed.

A research carried out by ISTAT in 1999 indicated the presence of seventy-one "special schools", while data relating to the year 2005/06 suggested the presence of eighty-three of them attended by 2.302 students; the website of the Ministry of Education still displays the classification lists of teachers assigned to the 22 "special schools for deaf-mute and blind people" for the school year 2011/2012. A more recent research, published in 2012 and carried out in cooperation with the Regional School Bureau of Lombardy, gives us a more detailed and articulated picture: in Lombardy, there are 24 Special schools, of which 5 are Nursery schools, 17 are Primary schools, and 2 are Secondary schools. As many as nineteen of these are State schools, hosting slightly less than a thousand students often within institutions dealing with accommodation, care and rehabilitation of persons with disabilities. They operate thanks to specific agreements between the individual institutions and the Regional School Bureau; most of them have entered agreements with the Italian National Healthcare Service. Most families have chosen these schools following a difficult experience in a "standard" school, and half of the families have been referred to these schools by teachers themselves and/or social workers.

This latter fact is especially significant: in most of the cases, "Special schools" were not the first choice but, rather, a mandatory makeshift because of the inadequacy of the school system to make room for students with disabilities. It is difficult to imagine a society that does not discriminate its citizens and promotes their participation – a truly inclusive society - if school cannot lead the way in this sense.

Discrimination and violence

18/12/2012 **Lavagna (SP). Violence against persons with disabilities.**

Seven nurses were arrested for acts of violence and humiliation

on some of the persons with disabilities housed in the "I Cedri" Residence - operating under an agreement with the ASL - in Reppia, Valgaraveglia. In January, the Residence's management changed, while in May 2013 a new chapter was added to the story, with six more people reported to the Police.

28/12/2012 **Rome. INPS on Disability pensions.**

With Circular No. 149/2012, INPS announced that, as of 2013, the income limit for granting the invalidity pension would take into account the spouse's income as well. The decision was suspended in January and then, in June, a provision by the Government finally clarified the situation: the income limit for those who are granted a disability pension is to be calculated on the basis of the personal income, rather than the family one.

03/01/2013 **Busto Arsizio (VA). Sexual harassment of persons with disabilities.**

A 75-year-old man of Busto Arsizio was arrested on charges of persecuting and sexually harassing a 19-year-old person with disabilities.

11/01/2013 **Ancona. TAR Marche on the lack of school transport.**

Final judgment No. 32/13 of the TAR of Marche, found the Municipality of Cartoceto guilty of not having guaranteed access to school transport to a student with disabilities. The Municipality was ordered to pay damages and to reimburse all costs borne by the family.

15/01/2013 **TAR Latium on the lack of school support**

Following a group appeal lodged by several families, the TAR Latium ordered 66 schools to provide additional special needs teaching hours by its judgment No. 224/13. .

06/03/2013 **Naples. Maltreatments on persons with disabilities.**

Three institutional care centres located at viale della Resistenza, in Calvizzano (Napoli), hosting 150 persons with disabilities and elderly individuals, were seized by NAS (the Italian Department for the Prevention of Food and Beverages Adulteration). The criminal offences at issue were committed in the years 2007-2012, and range from neglect of incapable persons to maltreatment and unauthorised practice of medicine.

09/04/2013 **Barbarano (Rome). Maltreatments on persons with disabilities.**

In a *scuola media* (lower secondary school) in Barbarano, a special needs teacher and a social worker were arrested in the act (*flagrante delicto)* on charges of repeated maltreatment and battery on a 14-year-old autistic student.

The two teachers used to take the student out of the classroom to bring him to a dedicated room, where he suffered the violence, all alone.

17/04/2013 **Rome. Extortion against persons with disabilities.**

In Rome, an INPS officer was arrested on charges of extortion: some persons with disabilities were requested to pay bribes to ensure the successful outcome of the respective proceedings.

10/05/2013 **Rome. Architectural barriers.**

The *Luca Coscioni* Association supports the complaint of a woman with disabilities against *Poste Italiane*, which were found guilty of discriminatory behaviour. The Court's judgment ordered *Poste Italiane* to eliminate all architectural barriers blocking the entrance to post offices, and to pay €3,000 to the complainant as compensation for non-material damage.

10/05/2013 **Zerbolò (PV). Discrimination of students with disabilities.**

Article 9 of the rules of the new municipal nursery school of Zerbolò prevented children with disabilities from entering the building, stating that "Only those children who are self-sufficient in all their physiological functions may attend school." The Councillor and the Mayor justified this choice by affirming that they "had to protect the municipal school section, even against persons with disabilities". The discriminatory article was only cancelled after the intervention of the Prefecture.

04/06/2013 Rome. Citizenship right granted to a person with disability.

By its judgment No. 5568/2013, the TAR of Latium declared a decree by the Ministry of the Interior to be null and void on account of flawed preparatory acts. The decree had failed to grant the Italian citizenship to a mentally disabled person that had been born in Italy by non-Italian parents.

19/06/2013 **Rome. Citizenship right granted to person with disabilities.**

Thanks to the Decree on the granting of citizenship - signed by the President of the Republic - a youth with Down syndrome, Cristian

Ramos, whose mother is Colombian, may take the relevant oath, after a long battle to obtain the recognition of this right, which he had been denied because of his mental disability.

04/07/2013 Italy sentenced by **the European Court of Justice in a case concerning employment and persons with disabilities.**

The European Court of Justice, by its Judgment C-312/11, found the Republic of Italy to be in breach of EU law in relation to employment for persons with disabilities, establishing that not all the necessary measures had been taken to ensure a general framework for equal treatment in employment and working conditions.

06/07/2013 **Milan. Judgment on the reduction of funds to school support.**

On 6 July 2013, following an appeal presented by LEDHA and sixteen families with children with disabilities, an order by the First Section of the Civil Court of Milan established the discriminatory character of the conduct held by th Ministry of Education, who had reduced the number of special needs teachers compared to the requirements applying to students with disabilities.

13/07/2013 **Meta di Sorrento (NA). Maltreatment on persons with disabilities.**

In Meta di Sorrento, the NAS seized a nursing home where people suffered abuses, and were kept in inhuman conditions, with severe health and hygiene shortcomings. The accredited nursing home is worth around €2 million and in 2012 has been granted a Regional funding of around €1.5. After the seizure, the Minister of Health - Beatrice Lorenzin - initiated a series of verifications in the whole National territory.

30/07/2013 **Milan. Maltreatment of persons with disabilities.**

Seven people were convicted by the Judge for the Preliminary Hearing of Milan, on charges of criminal association for the purposes of human trafficking and reduction to slavery - a trafficking of persons with disabilities, which were "bought" from very poor Romanian families and forced to beg on the streets.

06/09/2013 **Casamicciola (NA). Discrimination against persons with disabilities.**

A notice posted in a nursing school in Casamicciola (near Ischia) - run by a religious body - read as follows: "Please be informed that tomorrow the school will be closed, because it is the Day dedicated to disabled persons. They are very ill and, therefore, the children get upset when seeing them. The management." The stigmatizing and discriminatory content of the notice sparked protests, to which the nun responsible for the communication reacted by affirming: "We acted in good faith, with the idea of protecting both the children of the school and the disabled people, who visit us once a year."

23/09/2013 **Mugnano (NA). Parents against the presence of students with disabilities.**

In a primary school in Mugnano, after the headmistress had denied them the authorization to move their children to another class, six families out of twenty obtained the permission to move their children to other schools because of the presence of an autistic child in the class. According to the fleeing families, this was not a case of discrimination but, rather, it was due to their concerns for the possible impact on teaching caused by the presence of the autistic child. A totally different view was held by the Director of the Regional School Bureau: "School means integration, living together."

30/09/2013 **Mileto (VV) Maltreatment of students with disabilities.**

Six teachers of a public nursing school in Mileto were committed for trial on account of maltreatment of a child with disabilities, perpetrated in 2011.

16/10/2013 **Città di Castello (PG). Mother murders her autistic son.**

In Città di Castello, a woman was arrested for having stabbed her 11-year-old autistic son, who was then hospitalized in serious condition. The episode was unanimously condemned but, at the same time, the focus was also on the isolation these families are often left in.

01/11/2013 **Turin and Palermo. Murders and suicides in families with children with disabilities.**

Two family tragedies against a background of solitude and desperation. In Turin a father stabbed his quadriplegic son, who was then hospitalized in serious conditions. In Palermo, a 58-year-old man killed his 62-year old disabled sister, who had begged him to, and then committed suicide.

09/11/2013 **Belluno. Architectural barriers.**

A Swedish tourist on a wheelchair stopped a train in Belluno by clinging to one of the handles: the train was not accessible to disabled persons. The tourist was reported to the police on a charge of causing hindrance to a public service.

20/11/2013 **Italy, inspections in healthcare structures.**

The results of the checks carried out in the previous months by NAS on 1,000 structures - aimed at verifying whether they had the necessary authorizations and were complying with health and hygiene requirements - led to the closure of eighteen nursing homes for persons with disabilities and elderly persons.

Moreover, 102 persons were reported to Judicial authorities and 174 to Health care authorities; 142 criminal violations and 251 administrative violations were found.

Legislation and policies

The UN Convention

The UN Convention on the Rights of Persons with Disabilities was concluded on 13 December 2006, was opened to ratification on 30 March 2007, entered into force on 30 May 2008, and, in Italy, it was ratified and implemented by means of Law No. 18 of 3 March 2009. The Convention represents the first binding International instrument on disabilities, and it is the first major treaty of the new millennium on human rights. The Convention is the final step of a course that began with the adoption of instruments such as the Declaration on the Rights of Mentally Retarded Persons (1971), the Declaration on the Rights of Disabled Persons (1975) and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993).

The UN Convention on the Rights of Persons with Disabilities acknowledges that disability is “an evolving concept” that “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others”.

Persons with disabilities, therefore, are "those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others" (Article 1). This is the legal-cultural framework of reference of the whole legislative system protecting persons with disabilities, and it is the first major treaty on persons with disabilities in the new millennium.

First of all, the terminological change is to be noted, given its significant relevance: the wording "persons with disabilities" focuses on the idea of being a person, in positive terms, thus overcoming the fragmented and stigmatizing terminology often used by society and by the legal system. In particular, the Convention focuses on the centrality of persons with disabilities, as well as on their dignity and the barriers hindering their full participation and realization in all contexts of life: "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity" (Article 1).

This inherent dignity of persons with disabilities is to be intended as a synthesis of freedom and equality, a prerequisite for and the driver of a process in which people see their rights concretely acknowledged and are, therefore, put in a condition to exercise them.[1] Recognising that the condition of disability does not depend on the subjective characteristics of individuals but, rather, on the relationship between their characteristics and the way society ensures their participation and organizes the access to and enjoyment of rights, goods and services entails a radical change of perspective, since it is now society that creates the conditions for discrimination and lack of equal opportunities that penalize persons with disabilities.

The General Principles of the Convention (Article 3), therefore, do not refer to specific conditions but, rather, they stress some universal values: respect for inherent dignity; individual autonomy, including

1 S. Rodotà, *Il diritto di avere diritti*, Bari, Edizioni Laterza, 2012, p.168.

the freedom to make one's own choices; personal independence; non-discrimination; full and effective participation and inclusion in society; respect for diversity and acceptance of persons with disabilities as part of human diversity and humanity itself; equal opportunities; accessibility; equality between men and women; respect for the development of the capacities of children with disabilities; respect for the right of children with disabilities to preserve their identity.

The Convention represents an important result for the international community, since it is the most modern and direct international instrument on this subject, and it is binding on Signatory States. These, by ratifying the Convention, commit themselves to ensuring and protecting, in every institutional field and competence, the human rights of persons with disabilities by means of adequate policies, legislation and resources. In this sense, the concept of "reasonable accommodation" is of particular relevance: it means resorting to the necessary and appropriate modifications and adjustments without imposing a disproportionate or undue burden (with reference to the adequacy of the means in relation to the proposed objective) - where needed in a particular case - to afford persons with disabilities the enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms (Article 2).

Moreover, it is important to note how the focus is on the fact that all general policies need to take care of persons with disabilities, and have to do so by using standard resources and through an approach based on mainstreaming: this confirms the importance of defining political and economic strategies with a universal and inclusive character, by overcoming sectorial logics that are often ghettoizing and by allowing persons with disabilities to exercise and have full access to everyone's rights.

European Disability Strategy 2010-2020

The European Union has dedicated the year 2003 to persons with disabilities, after having passed - the previous year - the Declaration of Madrid, representing the European cultural manifesto of persons with disabilities. This declaration marked a change of perspective, from a mainly medical-scientific point of view to one mainly social and based on rights, thus giving rise to a change in EU strategies, which were to be based on four pillars: non-discrimination, affirmative actions to ensure equal opportunities, accessibility to goods and services, involvement of the organizations of persons with disabilities in the decisions they were part of. The new "European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe" was adopted on 15 November 2010, and it indicates eight main fields of action: accessibility, participation, equality, employment, education and training, social protection, health, external action.

The strategy focuses on the elimination of barriers of different nature that hinder the effective participation and inclusion in society of persons with disabilities, and is based on the adoption of targeted EU measures to complete those adopted at National level, based on the implementation of the following legal premises:

- "Charter of Fundamental Rights of the EU", which was signed in Nice in December 2000 and became legally binding thanks to the Treaty of Lisbon in 2009. It contains, in Article 21, an explicit reference to the prohibition of discrimination against disability, and, in Article 26, it declares the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community.

- "Treaty on the Functioning of the EU (TFEU)", which provides that the Union should combat discrimination based on disability when defining and implementing its policies and activities (Article 10), and

empowers the Union to legislate so as to combat said discrimination (Article 19).

- "United Nations Convention on the Rights of Persons with Disabilities."

National legislative and policy framework

In Italy, Law No. 104 of 5 February 1992, entitled "Framework law for the assistance, social integration and rights of handicapped persons", is the fundamental text for reference and comparison, through coordination, not only of previous, but also of future legislation and any possible review deemed necessary by the National legal order.

More recently, Law No. 67 of 1 March 2006 - entitled "Measures for the judicial protection of persons with disabilities that are the victims of discrimination" - was meant to provide additional tools for protection by envisaging the absolute prohibition of discrimination against persons with disabilities, to encourage as much as possible their full enjoyment of civil, political, economic and social rights, thus implementing the Principle of substantive equality enshrined in Article 3 Paragraph 2 of the Italian Constitution. This same Article was referred to in full by Section 1 of law No. 67/06, as regards both formal and substantive equality, so that any action by the Administration (including inaction) that does not seek to eliminate, wherever reasonably possible, the obstacles encountered by persons with disabilities throughout their lives, is to be necessarily connected to the aforementioned notion of indirect discrimination (that is to say, when an apparently neutral provision, criterion or practice can cause particular disadvantages to a whole category of persons). Moreover, a special procedure is envisaged for the judicial protection against discriminatory actions and behaviours, and the Law in question expressly provides for the right to financial compensation for non-

pecuniary damage deriving from said forms of discrimination.[2]

Law No. 328 of 8 November 2000 (Framework legislation for the implementation of the integrated system of social interventions and services) was enacted in between the two aforementioned fundamental pieces of legislation. Sectorial norms, both at National and at Regional level, are grounded in this Law. Section 14 is especially important, as it describes a services model based on a project of "Global care" for persons with disabilities; this is aimed at a unitary vision of their needs and rights (by means of the so-called "Individual project") so as to implement their full integration in family and society as well as in school, professional training and labour. As provided for by this law, upon request of the person concerned, Municipalities, together with ASL, are entitled to elaborate the Individual project: this is an actual contract between competent public bodies and the beneficiaries, and is signed by both the individuals responsible for the provision of services and the beneficiaries. Said individual project, therefore, codifies a direct relationship, without any conditional obligation, between the applicant (a person with disabilities and/or a representative) and the recipient of the application (that is to say, the Municipality where the person resides). The recipient, in turn, has to activate a complex and multipronged procedure which, when linked to Section 2 of the Prime Minister's Decree of 14 February 2011, becomes a veritable Instrument of guidance and coordination for socio-medical integration, representing the essential element for the adoption of primary levels of protection relating to persons with disabilities.[3]

The State and the Regions are jointly competent to implement the individual enhancement and development policies for the full enjoyment of human rights, in compliance with the partition envisaged by the current Title V of the Italian Constitution. Moreover, the Constitutional Court has recently reiterated that the prohibition against discrimination is to be especially implemented in the fields

2 See TAR Latium, Rome, Section II *Quarter, 4 June 2013, Judgment No. 5568.*

3 See TAR Calabria, Catanzaro, Section II, *12 April 2013, Judgment No. 440.*

relating to social security, healthcare, welfare, and education. Any specific limitation on the enjoyment of the fundamental rights of the individual, or on the services aimed at giving people some "sustenance", is in breach of the principle of non-discrimination enshrined in Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and in Article 1 of the Additional protocol, as interpreted by the European Court of Human Rights.[4] More specifically, the Italian Constitutional Court set aside a Regional law (of a Region with special statute) for breaching the limit of reasonableness imposed by the observance of the principle of equality (Article 3 of the Constitution): that law provided that the access to the integrated Regional system of interventions and services for the promotion and protection of the rights of social citizenship was granted exclusively to EU citizens and, secondly, only to European citizens that had resided in the EU for at least thirty-six months. The Court underlined that the arbitrary elements of distinction - that is to say, based on citizenship or on a specific type of residence - contrast with the function and the legislative *ratio* of the measures forming the welfare system.[5] The methods for removing discrimination are set forth by appropriately reconciling the interests of the parties.[6] The implementation of said principles has thus allowed affording rights and economic benefits to persons with disabilities, and the lack of the relevant legislative provisions was considered as non-compliant with the Constitutional Charter because it resulted in an inadmissible obstacle to effective assistance and integration.[7]

Law No. 18 of 3 March 2009 (Ratification and implementation of the United Nations Convention on the Rights of Persons with Disabilities, and its Optional Protocol, signed in New York on 13 December 2006, and Establishment of the National Observatory on the Condition of Persons with disabilities), together with the

4 See Constitutional Court, 30 July 2008, Judgment No. 306.

5 See Constitutional Court, 9 February 2011, Judgment No. 40.

6 See Constitutional Court, 4 July 2008, Judgment No. 251.

7 See Council of State, Section V, 23 July 2013, Judgment No.3954; id. 3 October 2013, Judgment No.5194.

ratification of the Convention, set up the National Observatory on the Condition of Persons with disabilities, "so as to promote full integration of persons with disabilities, in implementation of the principles enshrined in the Convention […] as well as the principles set out in Law No. 104 of 5 February 1992" (Section 3, Paragraph 1).The Observatory is chaired by the Minister of Labour and Social Policies and has different tasks (Article 3, Paragraph 5), including: promotion of the implementation of the Convention, setting-up of a biannual action programme for fostering and developing the rights and integration of persons with disabilities, drafting of the report on the implementation status of policies on disabilities. Inter-ministerial Decree No. 167/2010, moreover, defined the Observatory as the advisory and technical and scientific support body for the development of National policies for disabilities. In November 2010, the Observatory published and delivered to the United Nations its first report on the implementation of the Convention. On 12-13 July 2013, during the "Fourth National Conference on Disability Policies", the first "Biannual National Action Programme on Disability" was presented: this is the result of the coordinated work carried out by the Observatory and by different associations and federations of persons with disabilities, and it was adopted by means of a Presidential Decree on 4 October, and published on the Official Journal on 28 December. The Programme is the first integrated system of proposals and actions that focus on persons with disabilities and their full and effective participation in society, and it is divided into seven areas of intervention: 1) review of the system of access and recognition/certification of the condition of disability, and model of intervention for the socio-medical system; 2) work and employment; 3) policies, services, and organizational models for independent life and inclusion in society; 4) promotion and implementation of the principles of accessibility and mobility; 5) educational paths and school inclusion; 6) health, right to life, empowerment and rehabilitation; 7) international cooperation. Said actions, however, "may only be funded within the limits of the relevant appropriations."

Employment

EU law punishes any form of discrimination based on religion or personal beliefs, disability, age or sexual preferences, since it could jeopardise the achievement of the objectives of the EC Treaty, namely the achievement of a high level of employment and social protection, the improvement of life standards and quality, social and economic cohesion, solidarity, free movement of individuals. In this regard, it is worth recalling that there are doubts on the compatibility of domestic legislation with the obligations imposed at supranational level; the Italian legislation (which is mainly grounded in Law No. 68/99) shows several shortcomings especially as regards imposing and enforcing the obligation to adopt efficient and practical measures, in relation to different aspects of occupation and working conditions: the latter, in fact, should allow persons with disabilities to access employment, perform their job, get promoted and be trained, on equal terms (said inadequacy was confirmed by Judgment No. C-312/11 of the European Court of Justice, condemning Italy for not having implemented all necessary activities to ensure a general framework for equal treatment in employment and working conditions). The Italian legislation, therefore, does not ensure the correct transposition and complete implementation of Article 5 of Directive No. 78 of 2000, which obliges Member States to pass legislation including efficient and practical measures to allow persons with disabilities to exercise their fundamental rights, as is the case in the most different fields of administrative and legislative activity, at both National and Supranational level. Public measures for promotion and support are not enough: it is up to Member States to oblige all recipients to adopt concrete and adequate provisions for all persons with disabilities, according to the actual needs and situations relating to different aspects of their lives, also by guaranteeing a "reasonable accommodation" (Article 27 of the UN Convention).

Health

Similarly, as regards the right to health, Article 32 Paragraph 2 of the Italian Constitution, Article 3 of the Charter of Fundamental Rights of the EU, and Section 1 of Law No. 180 of 1978, provide that each individual has the right not to be obliged to undergo a specific health treatment (except under the provisions of the law).

The right to refuse health treatments is grounded on the control exercised by the individual concerned over "health" as an asset, so that patients' informed consent is required to a specific health treatment.

Given this premise, patients who are not able to express their wishes regarding the treatments they are - or will be - undergoing must not be discriminated compared with other patients who can do so and therefore, if their wishes can be descried, they must be enabled to prevent specific health treatments from being practised on them.

As a consequence, the verification of whether a health treatment is mandatory, even if it was ascertained that the patient is against it, is related to the respect for human dignity, which has to be protected pursuant to Article 1 of the European Convention on Human Rights.

Indeed, the prescriptive part of the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol provides that "persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability", to "prevent discriminatory denial of health care or health services or food and fluids on the basis of disability." All persons have not only the right to be treated, but also a constitutionally-qualified claim to be treated under their own terms: they are, in fact, the only ones who can decide which treatment to undergo or, when needed, which facilities to confide in for a quick and safe recovery.

After all, time and time again the Italian Constitutional Court has noted, in relation to the rights of persons with disabilities, that the need to protect the weak is met not only with care and rehabilitation, but also by ensuring their full and effective inclusion in the social context they belong to, as well as in the family, school and the workplace.[8]

Education

As well as by the Italian Constitution (Article 28), the right to education is prescribed by Law No.118/71, No.517/77, and No.104/92, which set the premises, the conditions and the instruments for school integration of students with disabilities, and ensure the right of children and youths with disabilities to access standard classes of nursery schools, educational institutions at all levels, and academic institutions.

In Judgment No. 215 of 1987, the Italian Constitutional Court had already affirmed that "the participation of persons with disabilities in the education process together with teachers and able-bodied classmates is a significant socialization factor, and can be decisive in stimulating the potentialities of disadvantaged students": hence the irrationality, that often results in unlawfulness, of the creation of two "separate" paths, and the consequent duty for the State (Article 38 Paragraph 4 of the Constitution) to make the right to education concretely enjoyable, by means of "adequate integration and support measures to guarantee that persons with disabilities can attend educational institutions." Coherently, the provisions of Law No. 244 of 2007 - which strictly limited the number of special needs teachers - were declared unconstitutional by the Constitutional Court via Judgment No. 80 of 26 February 2010: they were, in fact, in conflict with the "international legal framework […], constitutional and other laws, as well as with the consolidated case-law of this Court

8 See Council of State, Section II, 20 December 2000, Judgment No.1178.

for the protection of persons with disabilities."

Presidential Decree No. 81 of 20 March 2009 - entitled "Provisions for the reorganization of the school network, and the rational and efficient use of human resources in schools" - provides pursuant to Section 64 Paragraph 4 of Decree-law No. 112 of 25 June 2008, confirmed, with amendments, by Law No. 133 of 6 August 2008, that first-year classes including students with disabilities will have a maximum of 20 students, whereas Ministerial Circular No. 63 of 2011 recommends that at most one student with disabilities should be present in a class. In order to improve the integration of students with disabilities, on 4 August 2009 the Italian Ministry of Education issued the "Guidelines for school integration of students with disabilities."

Subsequently, Law No. 170 of 8 October 2010 - entitled "New provisions concerning specific learning disabilities in the school environment" (after which the guidelines of 12 July 2011 were issued) - established a new protocol for the different forms of Specific learning disabilities (SLD), namely for dyslexia, dysgraphia, dysorthography, and dyscalculia. The Ministerial Directive on Special Educational Needs (SEN) of 27 December 2012 - entitled "Policy instruments for students with Special Educational Needs and territorial organization for school inclusion" - further increased the number of students who can benefit from customised courses, by extending the right to the customisation of education to all students with difficulties (whereas in the past it was reserved exclusively for those with a certified disability, or with SLD); in doing so, the Directive recalled the principles enshrined in Law No. 53 of 28 March 2003 (entitled "Empowering the Government to define general norms on education and minimum level of services in education and professional training").

Special Educational Needs (SEN) mean: students with disabilities, students with SLD, students with a socio-economic, linguistic, cultural disadvantage. All the compensatory and

dispensatory measures envisaged by the abovementioned Law No. 170 of 2010 are extended to these categories.

Ministerial Circular No.8 of 6 March 2013, aside from further outlining the results and the implementation of the Ministerial Directive, envisaged the implementation of an Annual Inclusiveness Plan (PAI - *Piano Annuale di Inclusività*), which should be prepared by the Working Group on Inclusion (GLI - *Gruppo di Lavoro per l'Inclusione*), approved by the teaching body of each school by June of each year, and become an integral part of the Educational Offer Programme (POF - *Piano dell'Offerta Formativa*). Nevertheless, since the date of the Decree and that of the approval of the first PAIs were very close, a specific note issued by the Ministry (Protocol No. 1551 of 27 June 2013) entrusted Regional School Bureaus with setting the date by which PAIs were to be approved and sent to them.

A specific problem, rarely addressed, is that of the so-called "Non-state schools": Section 1 Paragraph 14 of Law No. 62 of 10 March 2000 ("Provisions for equality between State and Non-state schools, and on the right to study and education") envisages, as from the year 2000, support measures for schools with students with disabilities and generically refers to "school institutions". Administrative case-law, therefore, held that the abovementioned Section refers to both State schools and Non-State schools[9], which are part of the National Education system in their full right. Paragraph 3 of the single Section making up said Law provides as a fundamental rule that, since they are providing a public service, Non-state schools have to accept anyone's application for enrolment along with their educational project, including students with disabilities. Coherently, Paragraph 4 Letter e) of the abovementioned Law provides that one of the essential conditions for the acknowledgment of equality between State and Non-state schools is the fact that the latter have to ensure the application of the provisions in force on the integration of students with disabilities or at a disadvantage. As is well known,

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Section 12 of Law No.104 of 1992 provides that the right to education of persons with disabilities is to be granted in nursery schools, in standard classes of school institutions at all levels, and in academic institutions: it is clear, therefore, that Non-state schools are to be included in the comprehensive notion of "school institutions at all levels", as an integral part of the National system of education. In order to do so, these schools have to commit themselves to implementing current legislation on the integration of students with disabilities, as provided for by Section 3 of Ministerial Decree No. 83 of 10 October 2008, which sets forth the procedures for acknowledging equality between State and Non-state schools. The legal order does not oblige Non-state schools to bear all the economic burden deriving from the implementation of support interventions for students with disabilities. In fact, general and specific regulations provide that the State covers part of the costs in question via specific funding. The poor financial resources the State usually allocates to this end brings about insuperable difficulties in providing an adequate reception and integration of students with disabilities within the school or academic environment.

Access and mobility

Law No.4 of 9 January 2004, "Provisions to promote the access of persons with disabilities to IT tools", was adapted to the EU standards by means of a Decree by Minister Profumo on 20 March 2013. Said Decree updates the requirements for accessibility of the websites of Public Administrations referred to in the Ministerial Decree of 8 July 2005.

Law No. 220 of 11 December 2012 - entitled "Amendments to Regulations for joint tenancy in buildings", which entered into force in June 2013 - provides that, as regards the removal of architectural barriers in jointly owned areas, any deliberation of the tenants'

meeting is to be approved by the majority indicated in Section 1136 Paragraph 2 of the Italian Civil Code: that is, it will be necessary for half of the attending tenants to vote in favour (50% majority), which must also amount to at least one-half of the joint tenancy shares. The quorum was thus raised, as it was 1/3 of both in the past.

Law No. 35 of 4 April 2012 - entitled "Conversion into Law, with amendments, of Decree-Law No. 5 of 9 February 2012, containing urgent measures on simplification and development" and the Draft Presidential Decree approved by the Council of Ministers on 25 May 2012 amended the implementing regulations of the Italian Highway Code, by envisaging the adoption of a single model badge identifying persons with disabilities, consistent with the EU model, so as to adequately ensure the privacy of the persons concerned.

Reccomendations

1. Promoting initiatives in different fields (education, training, society, etc.) to foster the achievement of the cultural, scientific and legal vision introduced by the UN Convention and increase the awareness, in persons with disabilities and their families, of their own rights and choices (empowerment).

2. Subject to compliance with privacy legislation, improving and updating the systems for the collection of data and regular statistics on persons with disabilities, so as to have an actual picture of their situation, in particular as regards obstacles, barriers and discriminations they have to face every day.

3. Overcoming the cultural approach that reduces the rights of persons with disabilities to a mere cost, thus subordinating their respect to the availability of financial resources, also bearing in mind that "the creation of a society that includes all its citizens creates commercial opportunities and boosts innovation."[10]

*4. S*trengthening the efficacy of the instruments for removing architectural barriers in existing public spaces and buildings, such as the Plan for the Elimination of Architectural Barriers (PEBA) and the Integrated Plans for Urban Spaces (PISU). Promoting the drafting of guidelines for "universal planning".

5. Ensuring that persons with disabilities can fully participate in society, in particular by defining common guidelines for the implementation of Article 19 of the UN Convention (Independent life and inclusion in society). Ensuring that persons with disabilities have the chance to choose, on an equal basis, their place of residence.

6. Defining methods for certifying invalidity, so as to simplify the current bureaucratic procedure and ensure a reduction in waiting times. Reviewing and monitoring the overall verification system of

10 "European Disability Strategy 2010-2020: A Renewed Commitment towards a Barrier-Free Europe", Brussels, 15.11.2010, COM(2010)636 final.

INPS, by paying particular attention to the internal verifications of the body itself and the way to collect and disseminate data on false invalidity certifications.

7. Updating the current employment legislation and making it more efficient in offering job opportunities and following workers along their career path, by linking the legislation on affirmative actions for persons with disabilities in the field of employment with the legislation on non-discriminatory protection and equal opportunities, with special regard to women with disabilities.

8. Arranging truly inclusive processes in the fields of education and training, to be planned together with all the stakeholders (families, special needs teachers, other specialised services, etc.), also by way of the collaboration with other specialised services, the drafting of guidelines and quality indicators for school inclusion.

9. Promoting and supporting knowledge and implementation of the rights of persons with disabilities, along with the duty of the socio-medical system to agree upon and jointly draft customised programmes. Acknowledging and defining by law the rights and the role of the "in-family caregiver", and timely developing shared perspectives and solutions for the "After us" issue.

10. Ensuring accessibility and availability of all health services and the relevant structures also by way of the specific training of practitioners.

HOMOSEXUALITY AND RIGHTS

By Ezio Menzione

Focus on Facts

A year of unfulfilled expectations. Small steps that leave us at the same point

Everybody knows that the rights of homosexuals do not enjoy good health in Italy

If it is true that historically and still to date the performance of sexual acts between persons of the same sex was never prosecuted in modern times in Italy, only just through administrative action for some years during fascism, it is equally true that the fundamental lack of recognition of full rights increased in the last decades. This lack of recognition did not mainly concern individual homosexuals and their orientation but homosexuals in their social and affective relationships. What is missing is above all the juridical recognition of homosexual relationships (marriage, or civil union or other, according to regulatory and subjective choices), including all the relevant consequential implications in the life of every homosexual. It is useless to repeat here that Italy – with few other countries – ranks last among Western countries on the subject of the rights of homosexuals.

Neither comforts us what is happening in other non-Western but fully developed countries such as Russia, where Putin has introduced the crime of "instigation" to homosexuality, or India, where the Supreme

Court of India reaffirmed the lawfulness of the penalty of up to 10 years of imprisonment for anyone who performs sexual acts with a person of the same sex.

Next to this issue there is the closely related one of homophobia, which is the taking place of homophobic acts that our judicial system

does not recognize as such and accordingly does not prosecute.

On none of the above issues did the lawgiver make some progress in 2013. With the difference that while on the issue of the rights the possibility to change the regulations has not even been considered, some progress has been made regarding homophobia (but we shall see that this was accompanied by a major setback); vice versa, in terms of judicial rulings, there were openings also in the past year in the wake of important precedents, whereas the opposite is true as regards homophobia ; and it is practically obvious that this takes place considering the criminal frame within which the issue is dealt with and, therefore, the principle of strict legality and the statutory obligations governing such a frame.

Killing oneself for being gay

20/11/12 a 20-year-old committed suicide for being gay;

28/05/13 a 16-year-old tried to commit suicide because he was bullied by his classmates for being gay;

08/08/13 a 14-year-old committed suicide for being gay;

28/10/13 a 15-year-old committed suicide for being gay.

Three suicides and an attempted suicide in Rome within one year: three teenagers and a 21-year-old.

Four episodes related to the discomfort of being gay in the capital of our Country; or, as it seems, at least in one case, related to the fact of being bullied for being gay, without even being one. This happened at an age when, very often, sexual identity is still far from being completely formed. Four episodes behind which one can easily detect the discomfort of feeling an "outsider", "out of the ordinary", "not accepted" and "not as accepted as the others": a gap between what we feel or think to be and our image that is perceived by other people in daily life. Statistics show that suicides among gay teenagers are three times more frequent than those committed by their peers in general. It is difficult to say which is the basis of these

data but it is certain that these four episodes in Rome make us face a tragic reality of discomfort.

The first thing that strikes us is that they are not connected only with the fact of being gay but also with being considered as such. Therefore, this has to do with the way gays are perceived by the others and by themselves.

At least one of these young people also called gay telephone help lines, but it was not enough. To be faced with the enormous implications of the gay image as daily perceived by a (perhaps) gay teenager was clearly too much in terms of personal dismay.

Movies, TV fictions, novels and *graphic novels* may comfort (including in the etymological sense of the term: give strength because we do not feel alone), but it is not enough or, at least, it is not enough for everybody.

Nor is the unchanged and unchangeable love of our parents enough, or the warm confidence with one or more female friends. At that age we ask – and rightly so – for more.

We ask to fully enter into the social life. We ask to take for granted – in the eyes of society – that we are as worth as our friend who already flirts with girls. We ask for equality and widespread awareness of such an equality, and – therefore – equal dignity and equal rights. Neither one nor the other are recognized in our Country as yet, at the end of 2013.

Homophobia: a harsh reality, a difficult fight

2012 had ended with very bad omens: on November 26 a 21-year-old committed suicide because he was gay in Rome. Just the umpteenth suicide but this time he was of age.

However, the first months of 2013 seemed to be better, breaking the tragic chain. It was not so. Always in Rome, on May 28, a 16-year-old tried to kill himself because obsessed and psychologically bullied by his schoolmates because of his being gay.

On 10 August, still in Rome, a 14-year-old committed suicide because of his being gay.

Again in the capital, on 12 November, a 15-year old committed suicide leaving an unequivocal message, for the same reasons (assuming that in these tragedies the reasons for this act may be clear and fully superimposable).

All these episodes have their roots, on the one hand, in the difficult acceptance of one's self, on the other hand in the social non-acceptance that is strongly felt by the victims who are often very fragile due to their age or other reasons; of course, the two reasons intersect and intertwine closely.

Close to these tragedies there are the predicaments – of which we know very rarely – of gays beaten because they kiss in public, teenagers bullied by their classmates, attacks against gay meeting places that are veritable punitive expeditions: a wide range of behaviours and practices marked by homophobic violence. According to the most careful observers, this phenomenon has been constantly increasing for years. It is not difficult to explain why, even if it is an empirical explanation: for as long as the homosexual orientation remained unsaid, homophobic practices had no reason for existing; the social "*coming out*" of gay and lesbians also at a very early age, in the last decades and in the last generations is an incentive for homophobic behaviours, from the simple word of scorn to bullying the most fragile individuals, whichmay lead to suicide.

Is a law enough?

Is a law enough to eradicate a way of thinking, a view that considers homosexuals not to be citizens in their own right and, therefore, legitimates not only discrimination against them but also violence and mockery? Is a law enough for overturning a time-honoured cultural attitude?

The easy answer is “No.” As in many other social phenomena, roots are so deep that it takes more than a law. A painstaking educational and training work is needed. However, a criminal law, although not a harsh law – nobody would want such a law – always implies and represents a deterrent (“general preventive deterrent”, if we want to use a technical term) that may give good results in the long run.

Provided that, as it has already been said, this crime does not become an opinion-related offence, otherwise the *rebound* effect is around the corner.

We should ask ourselves why to attack a synagogue is considered a very serious crime while to attack a completely harmless gay meeting place is tolerated and barely prosecuted. Why is nobody using any longer words such as “nigger” or “dirty Jew”, while “faggot” is used daily? Evidently because, also in our lexically lax Italy , some behaviours have been taken up by the majority as unlawful (and this is where the legal ban comes in), but even more than that as unjustified, improper and unfair (and this is where the cultural dimension kicks in). Between these two extremes – law and culture – the interaction is continuous, both positively and – alas! – in the negative sense. You cannot create a culture if you do not set legal limits by law; the result is poor if you just set those limits without supporting them by cultural growth. The law makes the culture; the culture sets out the path for and supports the law.

However, in the case of homophobia, you cannot reason in regulatory terms by only referring to discriminatory acts or violence. As a matter of fact, discrimination against homosexuals is part of our legal system as a whole, especially if one considers the huge chasm that originated from the non-recognition of same-sex unions . Discriminations, homophobic acts and even the suicides of homosexuals are rooted and find their nourishment in the failure to recognize the full rights enjoyed by homosexual persons. The Governor of Apulia was referring to this during an interview in the

aftermath of the attempted suicide of a young Roman on 28 May 2013. The reasoning – which came to light in that tragic circumstance, but was finally made clear and explicit – obviously points to much more significant regulatory initiatives than the law against homophobia - even if this law is needed.

Against such widespread backwardness, "cultural behaviours" should be seen that, whilst not being homophobic, are certainly such as to fuel and promote homophobic declarations or actions. The case (obviously mainly created by the media) of Barilla's CEO that was widely covered by the press throughout the month of September does not relate to explicitly homophobic declarations.

Mr. Barilla only said that for advertising his pasta he would not use gay couples because the only family is the "traditional one" - a mild statement compared with what Giovanardi and Co. daily fork out.

Still, it caused a sensation (and was poorly patched up) because it came from a member of what is commonly called the "enlightened bourgeoisie", owner of a renowned *brand* the advertising of which is generally focused specifically on the family; in other words, the entrepreneur excluded an entire segment of the population, gay persons, from his cultural and commercial horizon.

It could be argued that the exclusion made by Barilla provides support to and is also the consequence of the much more serious exclusion made by our legal system, which like Barilla cannot make any room available for the recognition of same-sex unions. The Barilla case seems to be the paradigm of the need to take steps on both the cultural and the regulatory level, and by the latter we do not mean only the law against homophobia.

Homophobia: an invention by the gay lobby

Homophobia was allegedly invented by the gay lobby. Gays, more and more organized and aggressive in sticking to their rights, have reportedly invented an enemy for a twofold purpose: on the one hand,

to project their own guilt feelings onto others; on the other hand, to put the muzzle on anyone who expresses views on homosexuality and gay rights other than those held by homosexuals themselves.

This rhetorical argument is nothing new even in Italy and is well-known abroad.

A massive tome organized as an encyclopaedia and structured according to entries in alphabetical order was published in Bologna in 2003. Its title is "Lexicon" and takes into consideration all the issues (especially psychological ones) concerning the family. It is printed by the Pontifical Council for the Family, written by many different "experts", and edited by Cardinal Trujillo Lopez (later on bound for the glory and splendour of the Papal Curia). The "Lexicon" was primarily intended for Catholic psychological operators (but also for simple parish priests, considering the easy structure of the volume). In short, it aims to be considered as the Bible on the family.[1]

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1 At least in a footnote, it seems useful to deal more in detail with the "Lexicon" because it had a judiciary development worthy of attention.
In April 2003, when "Lexicon" was published, some parents of homosexual children, members of AGEDO (Italian Association of Parents of Homosexual Children), immediately pointed out that the content of the entries "Homosexuality' and Homophobia" and "Children" was violently homophobic. A sort of equation was made between pedophiles and homosexuals and – indeed – it was even argued that homosexual couples wanted to marry and become parents in order to have children to abuse - a child adopted by a same-sex couple "*easily becomes a victim of their sexual needs*" (entry "Children"); in fact, it took up and revamped (entry "Homosexuality and Homophobia") the ancient view of homosexuality as a treatable condition that had been taken off the list of psychiatric illnesses allegedly through the pressure of the powerful gay lobby, basing the text on concepts such as "*Homosexuality is in contrast with social bonds*"…"*homosexuality is not the subject of rights because it has no social value"…"(Homosexuality) remains a psychological tangle that society cannot establish socially"*. Lastly, on homophobia*, "(it) is an issue of bad faith and a product of the anxiety of homosexual psychology. In the name of homophobia, militants want above all make heterosexuals feel guilty"*.
AGEDO, through its Chairperson, understanding the potential distorting and aggressive charge of such writings, wanted to file a complaint for defamation with the competent public prosecutor of Bologna the following June, and it also requested the seizure of the book throughout the Country. The public prosecutor got away arguing that AGEDO, not being mentioned in the book (as it is obvious!), was not entitled to consider itself a victim of any crime and to file a charge.
At that point, a group of 32 homosexuals from all over the country filed a complaint because they felt libelled by the very serious allegations in that text. Faced with the reaction of several homosexual citizens, the prosecutor of Bologna and the competent Judge duly ordered the dismissal of the charge arguing that, in the end, it was just an opinion and that, as such, it was outside the realm of criminal law in pursuance of Articles 19 (freedom of religion), 21 (freedom of thought and press freedom) and 33 (freedom of arts and sciences) of the Constitution of the Italian Republic, as

Under the entry "Homosexuality and homophobia" (and it is already strange for these two concepts to be considered jointly in the title), and more precisely in the paragraph titled: "Homophobia and homosexual anguish" (and here too the combination is unusual and interesting), the following can be read alongside an incredible jumble of concepts such as homosexuality as a medical condition, homosexuality opposed to social bonds, the purposeless nature of this "self-representation", and much more: namely, that the inability to make sense of their own condition generates "*an anxious powerlessness that personalities made fragile by their narcissism try to eliminate through social recognition*". This would account for the need to depict a homophobic enemy and the building up of a "*police of ideas in the name of homophobia in order to put the blame on heterosexuals*" (and, please, note the ease shown in appropriating the concept of "police of ideas" created by Foucault for this short title).

The "*strategy of monitoring and denunciation*", if not even "*censorship*", "*developed by the gay lobby*" through the concept of homophobia "*is a question of bad faith and a product of the anxiety of the homosexual psychology. In the name of homophobia, militants want above all to make heterosexuals feel guilty*". Instead, it is homosexuals that are heterophobic*," i.e. (they are) afraid of the other sex*"; homosexuals consider themselves as a veritable "*sect*" requiring "*a political adhesion that produces the dictatorship of the costumes*".

This book of Catholic or rather - more accurately – Vatican inspiration would appear therefore to follow the old adage whereby attack is the best defence. Homophobia was invented and cultivated

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it was a matter of freedom of conscience.
The outcome of the judicial proceedings was almost predictable but the fact remains that a group of a few dozens of homosexuals, having no associative links among them, for the first time did not hesitate to expose themselves personally as homosexuals and claimed the removal of a publication that was seriously detrimental to the dignity and the very existential profile of a great number of citizens.

by heterophobic homosexuals and, please, do not tell us that we are the ones to be homophobes.

At first sight, the position of the "Lexicon" is as rough as it is insubstantial; however, it was taken up repeatedly in manifold versions over the years .

In the aftermath of the judgment by the Supreme Court of the United States (of 26 June 2013) that legitimized gay marriage throughout the U.S.A., Lucetta Scaraffia – a free-lance journalist – wrote a long article on Giuliano Ferrara's newspaper "Il Foglio", with tones far removed from those of the Lexicon, but taking up some stances. She argued that from now on it would have been practically impossible to declare oneself as opposed to same-sex marriages, which would have resulted into a severe limitation not only on people's language but also on everyone's freedom of thought. In short, the view held blithely also by the distinguished Ms. Scaraffia – who writes for every possible newspaper and magazine but mainly for "L'Osservatore Romano" – it is not gays who would be daily limited in their rights and public behaviour, as it is gays who allegedly impose limitations on those who happen to think and behave differently from them. The victims are thus turned into the offenders, according to a sort of global Stockholm syndrome. After all, she already wrote as early as in 2010: "*The world is upside down! Nowadays to be normal is a defect. They want to lynch us because we want the world to go as it has always being going until some decades ago*" (on "Il Riformista" of 18 November 2010).

Discrimination and violence

15/03/12 Rome. Same-sex Unions The Civil Court of Cassation did not recognize the marriage contracted by two Italian gays, but recognized that they were entitled to the same rights as a married couple (Judgment 4184/12 – First Section)

29/03/12 Rome . **Same-sex unions** The Court of Appeal of Milan (Judgment 407/12) granted a gay person in a same-sex couple the same insurance coverage as applied to the other member of the couple

20/11/12 Rome . **Homophobia.** A laughed at and bullied 15-year-old gay boy committed suicide in Rome. He was labelled as gay and became known as "the boy with pink trousers"

11/01/13 – Rome. Same-sex unions. The Civil Court of Cassation stated that the mere fact of being a gay couple did not prevent granting custody to one of the partners

14/03/13 – Rome. Homophobia. A couple of gay doctors was verbally attacked in a bank in Rome: "You are not men but fags"

29/03/13 – San Donà del Piave (VE). Homophobia
Fists and kicks against two gay persons kissing,

13/04/13 Rome. Same-sex unions . The Chairman of the Constitutional Court reiterated: "It is necessary to proceed to the recognition of gay couples"

27/04/13 Rome. Homophobia. A group of bullies attacked and wounded a gay couple with a broken bottle. The attackers were identified and arrested but immediately released

30/04/13 Palermo. Homophobia. A gay was assaulted with a hammer

17/05/13 Homophobia. International Day Against Homophobia. President Napolitano, Ms. Boldrini [Chair of the Chamber of Deputies] and Ms. Idem intervened. According to the EU, one homosexual out of four is the victim of an aggression.

22/05/13. Rome. Homophobia. Amnesty International denounced Italy for the large number of homophobic incidents.

28/05/13. **Rome. Homophobia.** A 16-year-old Roman gay attempted suicide by jumping from the window

02/07/13 Milan. Homophobia. A man was insulted and beaten for being gay in Milan

20/07/13 Genoa. Same-sex unions. A Brazilian man married with an Italian in Portugal was granted the residence permit in Italy

08/08/13 Rome. Homophobia. A 14-year-old boy committed suicide by jumping from a balcony for being gay

19/09/13 Rome. Homophobia. The Chamber of Deputies passed an anti-homophobia bill with a very questionable amendment.

25/09/13 Parma. Same-sex unions. Guido Barilla declared: "No gay families in spots"

28/10/13 Rome. Homophobia. A 20-year-old gay committed suicide in Rome, leaving a letter in which he told about his difficulties; he had asked for help from a gay telephone help line.

04/11/13 Milan. Homophobia. Bottles filled with urine were thrown from a car against the customers of a gay place in Milan

20/11/13. Rome. Same-sex unions. The Conference of the National Notaries Association proposed a "notary's solution" for de facto unions.

30/11/13 Vicenza. Homophobia. They bullied their classmate believing he was gay. The police intervened.

04/12/13 Palermo. Same-sex unions. The Juvenile Court of Palermo granted temporary custody of a child to a gay couple.

19/12/13 Rome. Homophobia. A 20-year-old student was beaten

and insulted for being gay at Porta Maggiore in Rome.

It is believed that aggressions suffered by homosexuals amounted to 50 in Rome in 2013.

FROM ABROAD

22/04/13 France. Same-sex unions. – The law establishing gay marriage was passed in France. It came into force on 18 July.

11/06/13 Russia. Homophobia. Duma unanimously passed (with 1 abstention) Putin's law against the promotion of "non-traditional sexual orientations" in Russia.

26/06/13. USA. Same-sex unions. – The Supreme Court of the United States declared the constitutionality of gay marriage.

Legislation and Policies

Same-sex unions and the silence of the lawgiver: a year was wasted.

The year had started under the continuing influence of an important pronouncement of the Civil Court of Cassation (First Section – judgment 4184/12 of 15 March 2012) denying a gay couple the right to recognition of the marriage contracted abroad, but granting their claim to enjoy the same rights as those resulting from marriage or equivalent unions. This pronouncement was in line with what had already been ruled by the Constitutional Court (judgment 138/10) in 2010; whilst not recognizing the right of same-sex couples to unite

civilly (with or without marriage), the Court had urged the lawgiver to intervene to fill a gap that undermined legality and consequently constitutionality. Otherwise, the Court itself would step in if faced with the persistent legislative silence. On the other hand, the Court clearly said that a series of rights could not be granted to gay couples as well, which rights said gay couples might be awarded in court through a legal action. With the aforementioned judgment, the Court of Cassation had reiterated exactly this conclusion. Therefore, it was a strong, clear and important signal, since, as we shall see, it was promptly picked up by some trial judges in lower courts.

The issue of the recognition of same-sex unions through marriage was marked by two events of paramount importance on the international scene.

This issue almost monopolized the debate in France, where there were the PACS (Patti Civili di Solidarietà – Civil Solidarity Pacts) already, but where Holland had promised the introduction of same-sex marriages and the right to adopt also for gay couples during his election campaign. A promise fulfilled. The law was finally passed on 22 April and entered into force on 18 May, 2013. Controversy and opposition were certainly not lacking but clear political will prevailed. This will prevailed because based on sound legal foundations, since the Constitutional Court, involved in the issue of conscientious objection raised by some mayors opposing gay marriage, established the groundlessness of the right to object through its judgment of 17 October 2013.

On the other side of the Atlantic, the USA were waiting with bated breath to know the decision of the Supreme Court, invested with the question as to the legitimacy of marriage between persons of the same sex, which was recognized in some States and denied in others. On 26 June, 2013, the Supreme Court, with a majority decision (a majority including at least one "conservative" judge), established not only that same-sex marriage was in accordance with the Constitution, but also that opposing such marriage was

unconstitutional, thus paving the way for the recognition also in states that until then had been silent on the subject or were even going to introduce overriding provisions forbidding same-sex marriage. After the judgment, received with appropriate euphoria by the gay community but also without much kicking out by opponents, marriages of homosexual couples have now become daily routine (and those marriages were "legalized" that, for example, had been contracted in California where gay marriage was authorised to be then, three years ago, swept away by a referendum).

Therefore, there was a very favourable climate – among the best - for taking into consideration the need to afford same-sex couples the right to marry to a civil union.

Nobody could realistically imagine that the declining Monti government and the 16th legislature might take into consideration this type of legislation. It seemed more logical, at least during the campaign for the political elections that would lead to the 17th legislature, that the latter legislature would face this issue head on. In fact, already in the first weeks of the legislature old and new Deputies submitted or re-submitted bills aiming to introduce civil unions and/or marriage between persons of the same sex; those bills were multifarious and often differed in terms of the rights being granted especially as for the right to adopt. We would like to point out here the bill signed by Senator Manconi, who submitted it to the Senate on the first day of the legislature; his bill focused on the establishment of civil unions.

This wealth of proposals (note, however, that the 13 bills tabled in the Chamber concerning this issue are in the company of many other bills that specifically aim to limit marriage and the recognition of unions to heterosexual couples) would have let one imagine that the new Parliament would quickly discuss the issue and pass legislation, perhaps in a spirit of compromise but anyhow consistent with the ruling of the Constitutional Court and Court of Cassation – which had set the impassable lower threshold.

On 12 April, 2013, Franco Gallo - the Chairman of the Italian Constitutional Court – had called upon the lawgiver to address the issue of civil unions, gay marriage or, anyhow, the recognition of same-sex unions. The Chairman had authoritatively said "*It is necessary to regulate*". However, even this appeal fell on deaf ears.

Nothing of this happened. The preliminary discussion on gay marriages or unions at the Senate was concluded in the Justice Commission at the end of the year, with a deadline set in the next year for the writing of a new possibly consolidated text, the submission of amendments and so on. A year was wasted.

An even more bitter conclusion can be drawn: in August, the lawgiver enacted the law (preceded by a decree) on the so-called "feminicide". Among the aggravating circumstances for the several offenses already provided for it includes the circumstance whereby the violent partner and the victim are linked by an "affective relationship". The title of the decree, for what it is worth, refers to "gender-based violence" and, therefore, seems to assume a gender difference between the violent offender and the victim. Not so the wording of Section 1 nor in the subsequent sections, which generally refer to "*persons*". We must, therefore, conclude that it is also applicable to the violence between persons of the same sex: they can be linked by an "*affective relationship*" and it actually happens. Therefore, assuming that the aggravating circumstance is rightly applicable to the heterosexual couple, we cannot see why it should not also be applied to the same-sex couple (and, in actual fact, there are many violence acts that can take place in the life of a homosexual couple, even if they are reported less frequently for obvious reasons).

Therefore, we are faced with a tragic inconsistency – namely, for our legal system the fact that two homosexuals are united as a couple has no legal significance and social dignity, but their love, whether existing or past, is an aggravating criminal factor.

"Eppur si muove" (And yet it moves): the judicial decisions

We have already gone back to 2012 to recall the judgment of the Court of Cassation No. 4184 of 15 March 2012.

Let us remain for a moment in 2012 to recall also the judgment of the Court of Appeal of Milan, Labour Division, No. 407/12 of 29 March 2012, which upheld the decision by the lower court by rejecting the appeal submitted by an Italian bank (the "Cassa Banche di Credito Cooperativo") and ordered that said bank should also cover the cohabiting homosexual partner; to that end, it referred quite simply and convincingly not only to the two aforementioned judgments of the Court of Cassation and, even before, to judgment No. 138/10 of the Constitutional Court, but also the judgment of the ECHR (the European Court of Human Rights), First Section of 24 June 2010 *Schyalk and Kopf v. Austria*, where it was stated that the right to the respect of private and family life enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms required considering as families also same-sex unions. Similarly, and fully in line with the said judgment, the Milanese Court ruled as follows: "*The pronouncements thus far mentioned allow, therefore, arguing that in the current political and social reality, the more uxorio cohabitation, understood as a communion of life characterized by stability and mutual support, is not only the one consisting in the union of individuals of different sex, but also includes same-sex unions to which a socially widespread perception recognizes the right to family life in its full sense*".

Exactly in the first days of 2013, on January 11, the Court of Cassation published a pronouncement concerning custody of children to each of the parents in a separated couple, and ruled that the fact that one of the parents was gay was not an impediment to granting custody. A homosexual person can be an excellent parent as well.

Let us still deal with parenting and the like. In July, the Judge supervising guardianship at the Court of Parma entrusted a young girl in temporary custody to a male gay couple. A debate in the media followed. On 19 November the Juvenile Court of Bologna

confirmed the custody, adopting the usual parameters of balance, stability, parental adequacy, best interests of the child which until then had been used only for heterosexual couples (but also for singles, being a case of temporary custody and not an adoption).

It is legitimate to wonder why exactly in the most delicate area, that of gay parenting, one is making steps forward through judicial decisions whereas this is not the case in the areas dealt with by the lawgiver, such as the full-fledged recognition of same-sex unions. Probably, this is due to the fact that parenthood is an ineluctable matter of fact that cannot be eliminated even for homosexual couples or singles and this creates situations that demand to - and can - be recognized and regulated through the intervention of a court. The mere fact of having brought a child into the world raises the issue of whether that child ought to be entrusted to the gay parent or not. And someone has to decide (if there is a dispute). This is where the sometimes "evolutionary" decisions of the courts come from . When, instead, the recognition has ineluctably to go through the law, in this case we are still lagging behind.

We add a case resolved administratively but by having regard to the above mentioned judicial decisions.

In July 2013, the Police Headquarters in Genoa, issued a residence permit to the Brazilian spouse of a Genoese citizen. The couple had married within the EU, exactly in Portugal. It was not the first time that the issue of a residence permit intermingled with homosexuality and already in the past some applications had been granted (with different solutions). What is interesting in this case is that the case found its solution by drawing inspiration from the two aforementioned judgements by the Constitutional Court and the Court of Cassation : Judicial recognition of same-sex marriages celebrated abroad is not permitted, but it is possible to afford a couple linked by family ties the same rights a married couple is entitled to.

Homosexual unions and the solution according to private law

20 November, 2013 - the Notaries' National Congress launched a proposal: on 30 November, the Notaries would receive, for free, unmarried couples– and, therefore, also couples formed by partners of the same sex – that, in the absence of a recognition of their bond corresponding to marriage or something similar to it, wanted to regulate their mutual rights and duties. There was the possibility to regulate, by way of a private deed, issues such as housing and rental agreements, contribution to domestic life and financial support in the event the cohabiting partner was in a situation of need, ownership of assets including the possible joint or separate estates régime. Moreover,, there was the possibility to include legacy clauses in favour of the partner or, in the case of serious debilitating diseases, to appoint the partner as "Amministratore di sostegno" (lit. "supporting manager"). In short, the point was to protect the weaker partner of the couple as it happens with marriage and as it might be the case following the recognition of civil unions.

The intention of the Notarial Association was praiseworthy: while obviously pursuing the goal of expanding their scope of activity and therefore their customers' portfolio, it proved not to be insensitive to the issue of the lack of legal recognition for unmarried couples and, therefore, to the fact that millions of couples, including homosexual ones, are claiming for the same rights as the couples that are allowed to marry.

Of course, the limit of this proposal is clear. Basically, all matters concerning the status of individuals cannot be solved through a notarial deed; and the issues concerning property involved in the above status may not be solved through a notary either – e.g., the reversibility of the partner's pension in the event of death; or the very limited available share in the event of succession as compared with the share the heirs are entitled to, and so on.

It should be noted that the practice of private agreements governing some aspects of the life of a homosexual couple has already been tested within the homosexual community by gay couples, in particular

when they have a child who is formally going to be only the child of one of the two partners but who – however – is entitled to be the subject of rights and duties with regard to both components of the parental couple - and here we would like to point out the issue of the rights of children – whilst both parents must have equal rights and duties towards the child as well. It is not widespread as a practice (but in Italy even making a will is a practice rarely used, given the pervasiveness of the Italian legal system); however, this practice has already been studied and applied by some law firms specializing in gay rights.

We welcome the suggestions and solicitations of the notaries but we cannot fail to acknowledge that contract law (because this is the point whether you go to a notary or not) will never lead – at least in our country – to the full recognition of the gay couple as having the same rights as a heterosexual couple. There is always a need for legislative intervention.

The proposal to regulate the relations within the homosexual couple by a notarial agreement was explicitly made at the time the DICO were being envisaged ("Diritti e doveri delle persone stabilmente conviventi" - Rights and Obligations of Cohabitants) by those (Catholic extremists) to whom even such a weak instrument seemed to imply the dismantling of the traditional family. In line with this proposal, there has always been (and still there is) the one put forward by those who declare themselves willing to recognize the rights of individuals within the couple, but not the couple itself as entitled to its own rights. And there were some endorsing this view even among left-wing MPs, such as Mr. Veltroni.

Not to mention the fact that the recognition of the couple and not just of its individual components has, per se, a definite value of social achievement with its strong symbolic content. Sticking to the sole recognition of the rights of the individuals leaves out all those legal situations that – as mentioned before – have to do with the status of being a component of the couple recognized as such. The symbolic

value that is the foundation of social value is also missing.

10 December, 2013: the National Bar Association through its own circular letter urged lawyers to take an interest in the legal position of unmarried couples, whether heterosexual or homosexual. In practice, the Bar, faced with Parliament's unwillingness to regulate such unions, which left millions of couples deprived of major rights, urged lawyers to take care of the problem by thinking about instruments (private deeds, agreements, testamentary provisions, etc.) that could be proposed to the couples for affording a minimum of rights that are not otherwise recognized by law. The National Bar Association – perhaps encouraged by the position taken by the notaries 20 days before – addressed the problem determinedly and, as we have seen, examined and discussed again the issue of the agreements and instruments the legal science may enable lawyers to suggest to their clients.

However, even the lawyers' stance shows the same limits as those already highlighted for the notaries and, in general, for those who purport to address the lack of legal recognition of same-sex couples by considering it merely as related to individual rights. Some issues may not be addressed by way of private law, whilst others may only be remedied through private law. Resolving the juridical gap by only relying on the rights vested in individuals is a false solution, primarily designed to justify the inaction (or worse) of the lawgiver. In addition to this, there is the traditional distrust of Italian citizens towards acting "on their own" whereas (rightly, we might say) these are issues that need to be tackled in the context of statutory public laws- as is the case with marriage for heterosexuals. Not to mention the very important fact that only the public recognition of the union between persons of the same sex gives those persons a social dignity that is otherwise difficult to achieve on an equal footing with respect to heterosexual couples.

Fight against homophobia

For years now it has been argued that action is needed, even with a

law; but practically nothing was done even in 2013. Indeed, in some respects, there is a risk to move backwards.

There were various bills introduced in both the Chamber of Deputies and the Senate at the beginning of the term, after the previous legislature had undermined any possibility to pass an acceptable law.

The Chamber of Deputies, also under the pressure of serious homophobic incidents, started working on this topic in late spring and just when the approval of the text seemed imminent - in late July – it adjourned the discussion after the summer break. The works actually resumed in September. The bill simply provided for the extension of the aggravating circumstance consisting in motives related to sexual orientation to include homophobia or transphobia as regarded the discriminatory acts and offenses for which an aggravating circumstance had been in place for many years following the so-called Mancino Law (Law of 13 October 1975 No. 654, as amended by Decree-law No. 122 of 26 April 1993), that is the fact of having acted for racial, ethnical, national or religious reasons. The wording of the proposed rule was clear and balanced: no new crime was introduced, but, on the one hand, homophobic or transphobic discrimination was to be punished like the other types of discrimination based on other grounds; on the other hand, an aggravating circumstance was acknowledged: which means that a criminal or unlawful act must have been committed beforehand such as an act of discrimination or violence or harassment, or the criminal incitement to perpetrate them or some other act. Prosecution focuses not so much on those who do not appreciate homosexual or transgender orientation, but on those who actually carry out acts that amount to criminal offences aggravated by homophobia or transphobia motivations. This has nothing to do, then, with opinion-related offences. It is not the opinion that is being prosecuted but the criminal act in the light of the aggravating circumstances prescribed by law.

As in previous legislatures, opposition, especially from Catholic leaders, was immediately intransigent. Their – unfounded – fear was that the provision might also impact the mere expression of contrary or somehow derogative opinions on homosexuality and transsexuality – 99% of the opinions that can be heard on this subject from the pulpit, but not only. Obviously, this was not the purpose of this law.

However, exactly for "shielding out" the law in this sense, the opposition asked for and obtained that the text should be discussed after the summer. Indeed, in September, the following paragraph was included in Article 3: "*Pursuant to this law*, discrimination or incitement to discrimination shall not include *the free expression and manifestation of beliefs and opinions related to the pluralism of ideas, provided that they do not incite to hatred or violence, nor shall they include any conduct in accordance with applicable law also when taking place within organizations engaged in political, trade unions, cultural, health care*[2]*, educational activities or religious or worship activities, regarding the implementation of principles and values of constitutional relevance specific to said organisations*".

On 19 September, 2013, the law was passed with the above amendments. This provision leaves one frankly puzzled: no problem with the initial part (up to the words "*provided that they do not incite to hatred or violence*") because, as already mentioned, the law does not intend to prosecute opinions or ideas. The first concerns arise from the following clause: "any conducts *in accordance with*

2 Many wondered why also "*health care organizations*" had been included when dealing with the issues of homophobia and transphobia. Obviously, this shows that public attention is poor and short-lived. Indeed, until 2001, a ministerial circular forbade homosexuals to donate blood: as such they were considered at risk for HIV+ and possibly AIDS. The ministerial regulation, obviously as well as unjustifiably discriminatory in nature, was revoked by the Health Minister Umberto Veronesi at the request of the then existing and active Commission for Equal Opportunities at the Prime Minister's Office.
However, it is proven that, despite the withdrawal of the circular, in many health facilities, especially private and of Catholic "inspiration", this discrimination has been reintroduced and is still practiced as such.

applicable law": indeed, it is obvious that behaviours and acts "*in accordance with applicable law*" may not be prosecuted either as discriminatory acts or as criminal, possibly aggravated acts.

But one is dismayed by the inclusion of the exemption for those who commit acts – obviously not in accordance with the applicable law - "*within*" (to be read as "*in the name of...on behalf of...et similia*") political, trade union, health care, educational, religious or worship organizations. This opens up a law-free area where any kind of discrimination (and not only discrimination based in homophobia and transphobia) is justified by the fact of belonging to a wide range of organizations. Nor is the reference to "*principles and values of constitutional relevance* " of any help, since those principles are trampled per se by the wording of such a provision.

Conversely, Section 2 of the bill is more interesting and can be supported; it requires the "Istituto Centrale di Statistica" (Italian Central Statistics Institute) to carry out surveys, at least every four years, on the enforcement of this law, on discriminations and violence based on "*xenophobic, anti-Semitic, homophobic or transphobic" grounds*, "*measuring its fundamental characteristics and identifying those most exposed to risk*".

It is good that there is a centre with the task of monitoring, among others, homophobic and transphobic phenomena, and also enquiring who and why one behaves like that. In such a way, the International Convention on the Elimination of All Forms of Racial Discrimination is fully implemented, which was opened for signature in New York on March 7, 1966, and provided for such a monitoring activity; Law No. 654 of 13 October 1975 ratified this Convention. Moreover, if you like to split hairs, one might wonder why the terms "*racial, ethnical, national or religious reasons*" have been substituted in this section (and in this section alone) by the more restrictive "*xenophobic and anti-Semitic*" ones. In addition, could not this monitoring be carried out on a yearly basis so as to increase its dynamicity and incisiveness?

This was the balance point (awful, as far as the former section is concerned) for the Chamber of Deputies to pass bill No. 1052. The fact that the first signatory is one of the very few openly gay MPs is very sad.

The bill was then forwarded to the Senate, where it remained for months and was then taken up by the Justice Committee in December and briefly discussed during a night session (this being generally reserved for extremely urgent issues, under very tight deadlines); the 20th of December was the deadline set for the submission of possible amendments and the discussion of such amendments along with the voting of the consolidated text by the Senate was adjourned to the new year.

It remains to be seen how the law will be released by the Senate; if the disputed paragraph will be crossed out or if, by confirming it, the law will be finally passed. Frankly speaking, one would almost hope that nothing comes out of it all rather than seeing such a vast area of discrimination to become "lawful".

Continuing on the theme of homophobia, there is another suspended matter that does not seem to ever find its solution. It is the introduction of the National Day against homophobia. It is a bit confusing that, on one hand, homophobia is not even considered an aggravating circumstance for criminal actions already carried out while, on the other hand, there is the intention to introduce and celebrate a national day against homophobia.

At least theoretically, the two things can certainly coexist, considering the Day as a time for reflection that should lead to a civil and cultural growth of the country and of its social components in all areas making up the social system.

A bill for the introduction of such a Day was already (commendably) submitted and cared for by Senator Lo Giudice, former historic president of Arcigay.

The inconsistency referred to above can be accounted for by the

fact that the European Parliament established 17 May of every year as the day against homophobia in Europe, through a resolution on homophobia, passed on 26 April, 2007. Since then, also in Italy this date has always provided a useful opportunity to find expressions of condemnation against homophobia: in 2010, President Napolitano gave a speech on it; in 2011, the Chairman of the Chamber of Deputies received the LGBT organizations; in 2012, the Minister of Education sent a circular on this issue to be explained in all Italian schools; in 2013, significant events took place involving a great number of people all over Italy even obtaining the "attention" of the media.

At present, the bill does not seem bound to become a law in a short time. But you never can tell.

…AND THEN, ALL OF A SUDDEN…

It is sometimes the case that a stalemate situation gets unstuck all of a sudden, and rights for whose recognition one has been knocking for years on doors that remained shut are recognised expressly or, in any case, can take a huge leap forward in one day. This happened in the case of same-sex marriages and homosexuals' right to parenthood (and not only in those cases) thanks to judicial decisions that impacted on such issues.

On 9 April 2014, the Constitutional Court ruled that it was illegitimate to ban heterologous fertilization for sterile couples, thus sealing the fate of Law No. 40/2004 on medically assisted reproduction. The bans on trading gametes, surrogate pregnancies, heterologous fertilization for non-heterosexual couples, heterologous fertilization for non-sterile couples affected by genetically transmissible diseases all remain in force along with other prohibitions: still, the pillars of the Law received a deadly blow.

On the same day, it was reported that the Court of Grosseto had recognised the right to have a same-sex marriage celebrated abroad entered into the Register of births, marriages and deaths of a

municipality – if that marriage was permitted abroad. This only applies to registration of marriage, as the ban for homosexuals to get married in our country was left unprejudiced. Thus, the Court of Grosseto departed from the case-law of the Court of Cassation, which had prohibited the municipality of Latina from registering the marriage celebrated in the Netherlands between two homosexuals. Conversely, the Court followed the stance taken by the Constitutional Court and the Court of Cassation, which had both ruled that, being prevented from getting married, homosexual couples were entitled to the recognition of equal rights and had called upon Parliament (repeatedly) to pass legislation to that effect. The public prosecutor's office from Grosseto has already stated that they will appeal the decision.

In the preceding weeks there had been judicial decisions setting out, on the one hand, that it was not a criminal offence to enter as parents - in the Register of births, marriages and deaths – couples that had relied on donated gametes (in countries where this is permitted) and surrogated pregnancies and, on the other hand, that doing so did not give rise to alteration of a person's status as per Section 567 of the Criminal Code (which is punished by imprisonment for 5 to 15 years) as it rather consisted in making untrue statements to a public official on a person's identity, which is punished under Section 495(2) of the Criminal Code by imprisonment for 2 to 6 years – thus making it rather unlikely that the sentence will be enforced.

These judicial decisions impact substantially parent-child relationships, family law, and civil rights in general. For instance, it is untrue that making heterologous fertilization lawful will result into a drop in adoptions. This was not the case in the more advanced countries where heterologous fertilization has been permitted from the start. Conversely, it is a fact that such a decision will make adoption procedures more expeditious, streamlined and straightforward. By the same token, it is untrue that all couples suffering because the female partner is unable to get pregnant or all homosexual couples will scramble frantically to get to those countries where surrogated

pregnancies are permitted and regulated by law. Nor is it true that the right to registration of a marriage celebrated abroad is the same as recognising the right to civil marriage or to civil unions; still, it goes in that direction, and it is accordingly a good thing along with the other judicial decisions that were issued of late. Increased freedom of choice, increased awareness and accountability, civil and moral growth of both individuals and our country as a whole.

But there is one fact to be highlighted: one is faced, in each and every case, with judicial decisions. Once again, whilst politics turns a cold shoulder, it is the judiciary that affords some room to civil liberties under the pressure of reality.

This might be a cause for concern. Politically speaking, this might be so because one can hardly endorse a system where only prohibitions are rife. On the other hand, one might legitimately be afraid of the consequences resulting from letting the judiciary alone fill the gaps left behind by politics, answer the questions that have yet to be tackled. One would expect these judicial decisions to start a virtuous circle of legal and cultural discussions based on scientific evidence and rational considerations, so as to finally introduce legislation to consolidate this subject matter as well as other issues. Still, for the time being one has to make do with the replacement role played by courts and welcome these small steps forward.

In fact, would anyone bet that this Parliament, if it ever were to enact legislation on these issues, would not fall a prey to political blackmail (travestied as ethically motivated) from the Catholic world and the right-wing parties that are subservient to it - as well as to the ambiguities of the left that is an accomplice to that world? One is tempted into concluding that this step-by-step process based on judicial decisions, this stop-and-go approach by courts hitting the target variably is much preferable over the stepping-in of Parliament, which – one can bet – would end up doing away with what the courts have been granting little by little.

Recommendations

1. Providing, by way of suitable legislative measures, for the recognition under public law of the union between same-sex persons.
2. Passing urgent legislation to apply family law safeguards to "de facto" children and parents of homosexual couples.
3. Fostering full-fledged affirmative actions regarding adoption and custody rights for homosexual couples.
4. Finally passing a law against homophobia and transphobia in order to do away with the "exemption" consisting in acting in the name and on behalf of political, trade union, cultural, health care, educational, religious or worship organisations. Obviously, freedom of expression and thought must be safeguarded.
5. Setting up a body consisting of culturally influential members along with members skilled in exploiting both old and new communication and social media, to detect and adequately report not only cases of overt homophobia, but also subtler forms of denial of rights. This body should also work to emphasize positive practices, favourable decisions and regulatory instruments widening the rights of homosexual persons.
6. Addressing issues related to the rights of homosexual persons in the schools of every level and type.
7. Setting up a Central Observatory on the judicial handling of the rights of homosexual persons to also bring legal actions aiming to the recognition of rights that are denied today. Such a body might also be entrusted with the task of encouraging and possibly acting with regard to the relationships with the other EU member states and the ECHR (the European Court of Human Rights) itself.

RELIGIOUS PLURALISM

By Paolo Naso

Our Constitution recognizes and defends the right to freedom of religion and worship, both in private and in public. However, the full application of these constitutional principles and rules has been influenced by the legacy of the legislation on the admitted denominations and a number of subsequent interventions which have not always been linear and consistent, and which have limited the free exercise of religious freedom, especially in recently formed communities that are mainly composed of immigrants. Some serious effects produced by such a situation are illustrated in the period considered in this Report.

Various episodes that occurred in our country have revealed the criticalities affecting some rules and the negative effects of an anachronistic and anti-constitutional interpretation of the relationship between the State and the individual religious denominations, which is sometimes confessional and discriminatory in nature. The main criticalities highlighted by our survey concern the opening of new places of worship , the recognition of and the room of manoeuvring afforded to the ministers of different denominations, and the participation of religious representatives in the public debate – namely, their access to local institutions or to media.

These difficulties are compounded by the strategy of some political forces such as Lega Nord (Northern League), which have organized political campaigns to restrict the freedom of religion of immigrant communities - especially the Islamic one - that are openly in contrast with the principles guaranteeing and protecting religious freedom as enshrined in our Constitution.

Focus.

In following the news reports on the rights related to religious freedom, some issues are recurring: first of all the one concerning places of worship, which impacts every religious community but is particularly important when dealing with mosques; another complex and cross-cutting issue concerns the recognition of ministers of religious denominations; also some practices are a delicate and cross-cutting matter (burials, food precepts), including clothing (headscarf), the carrying of ritual objects (kirpan - the traditional knife with a curved blade - for Sikhs); another issue is related to some cases of explicit intolerance on religious grounds which, although limited, cannot be neglected; they will be illustrated more specifically in another section of the Report. Conversely, no "cases related" to a very controversial issue, also in the recent past, concerning blood transfusion for Jehovah's witnesses, occurred in the period under consideration.

The many criticalities we have detected are largely due to a kind of "original sin", namely the fact that the "legislation on ecclesiastic matters which was elaborated between 1920s and 1930s has been maintained more or less unchanged ... throughout a large part of the life of the Republic"[1]. Therefore, the important constitutional guarantees concerning equality before the law with no distinction of religion (art.3), the equal freedom of religious denominations (art. 8), their right to organise themselves in accordance with their statutes (art.8), the right to private or public worship (art. 19) are influenced and limited by these almost century-old rules which were set forth in a political and cultural period when the trend was to limit rather than recognise freedom of religion. From this standpoint, we fully share the conclusion drawn by a legal scholar such as Sara Domianello, who recently observed that Italian legislators neglect "the adaptation (in compliance with the Constitution) and the

1 Giuseppe Casuscelli, "Il pluralismo il materia religiosa nell'attuazione della Costituzione ad opera del legislatore repubblicano", in Sara Domianello, (ed.), Diritto e religione in Italia, Rapporto sulla salvaguardia della libertà religiosa in regime di pluralismo confessionale e culturale, I Mulino, 2012, p. 23

updating (in the light of social changes) of all the special sources of unilateral legislation on religious freedom.... whether consisting in the revision or the enactment of implementing laws... with a view to executing agreements or MoUs stipulated according to articles 7 and 8 of the Constitution".[2]

The result is an "unfinished path" [3] , which on every turn reveals inconsistencies and criticalities that are generally detected only by the persons who are directly concerned - in this case minority religious communities - and by a small group of experts who, following their civil passion, their professional duty or juridical competences, deal more closely with the difficult dynamics of religious pluralism in Italy. Within this framework, some appropriate judgments, specific legislative actions, even the good practices we have observed during our analysis are just a patch put on a worn-out cloth that must be replaced by a new and resistant fabric, consistent with the cultural and religious changes that occurred in the Italian society in the last years as well as with our Constitution and the guidelines issued by the European Union also in this area.

"Steeplechase" Rights. Facts

In the present chapter, organised into general items, we will report some news[4] which illustrate how these issues are still open and sometimes cause major criticalities in the enjoyment of the rights related to religious freedoms - especially when, as is the case with migrants, they go hand in hand with a legal status that is both fragile and uncertain as indicated in another section of this Report.

According to our interpretation, these rights, even though they are formally guaranteed by the Constitution, are "hindered" by the persistence of a regulatory framework dating back to the fascist period

2 Sara Domianello, Prospetto riassuntivo, p. 250.

3 Alessandro Ferrari, La libertà religiosa. Un percorso incompiuto, Carocci, 2012

4 Except where specified otherwise, news are taken from ANSA archives.

and by new rules that are intentionally aimed at influencing the full exercise of religious freedom especially by immigrant communities that have been established more recently. A further obstacle is represented by a culture of religious pluralism that is still uncertain and limited by a bias in favour of the majority denomination; this is probably due to the history of such denomination and its being peculiarly rooted in the Italian society, yet it is in contrast with the supreme principle of the secular nature of the State that has been repeatedly affirmed by the Constitutional Court[5].

PLACES OF WORSHIP. The criticalities related to the places of worship can be divided into two groups: places of worship "to be opened", encountering the resistance and opposition by some municipal authorities or some sectors of the public opinion; and places of worship that have been "closed" or have been the subject of initiatives or campaigns aimed at their closure.

Although this issue concerns all denominations, the debate is especially widespread and harsh with regard to Islamic centres - commonly defined as mosques even though the term is not always correct.[6]

It is estimated that in Italy there are between 600 and 800 Islamic centres, with some peaks in Veneto (106), Lombardy (92), Emilia Romagna (84), Piedmont (67)[7].

In 2013 the debate focused on the opening of new mosques, some of which in important Italian cities including Milan, Brescia, Genoa, Parma, Florence, Pisa, Cinisello Balsamo, Crema, Lecco, Gallarate, Gardone, Rovereto, Monfalcone, Crema, Forlì: two smaller towns

5 According to the wording used in a well-known decision, various constitutional articles (7, 8 and 20) contribute " to configure the supreme principle of the secular nature of the State, which is one of the aspects of the form of State as outlined by the Constitution of the Republic. The secular nature of the State as defined in arts. 2, 3, 7, 8, 19 and 20 of the Constitution does not imply the indifference of the State vis-à-vis religions, but rather the protection afforded by the State to ensure freedom of religion within a framework of religious and cultural pluralism", Decision of the Constitutional Court No. 203 of 12 April 1989.

6 Besides the one in Rome at "Monte Antenne", only the mosques of Segrate (MI), Catania and Colle Val d'Elsa (SI) - to be inaugurated soon - can be considered as mosques *stricto sensu*. These buildings have a courtyard for ablutions, a large prayer hall and a minaret "which anyway does not seem to represent a fundamental element for European and Italian Muslims.... In Italy, and more in general in Europe, worship places are musallayat (plural of musallah), a term traditionally used to indicate an open space where the prayer takes place during the two most important celebrations [but which] are mostly the result of a long lasting attempt by Muslims to find, along their history of migrants, places and time for salat jama'ia (community prayer)". K. Rhazzali and M. Equizi, I musulmani e i loro luoghi di culto, in E. Pace, Le religioni nell'Italia che cambia. Mappe e bussole, Carocci 2013, p. 57 and 58.

7 Quoted above, p. 62

should also be mentioned here, namely Bondeno (Ferrara) and Lavis (Trento). Whilst in all these cases most municipal authorities gave their green light, the Northern League's approach was one of unconditional opposition - Islam being allegedly "anti-constitutional" by nature. It was often the case that such opposition was accounted for by ideological arguments and went as far as to take initiatives that are fully outside the scope of constitutional principles - for instance, authoritative local representatives of the Northern League proposed a "Register of Muslims". We would also like to mention two cases that were not mainstream, at Albenga and Varallo Sesia, where Northern League Mayors attended the inauguration of an Islamic centre. However, the reason given for their participation was, at least in the latter case, quite revealing: " In this way we won't see them idling about in groups of 10 or 15 in bars".

In a number of other cases, organised groups from the Northern League's political area (but not only) claimed, and sometimes were granted by local authorities, for the shutting down orders: this was the case – to quote just a few examples - of the mosque in Trento, for which the Northern League requested "immediate closure" in 2012, and those of Brescia and Turin.

Systematic and widespread initiatives against mosques have been promoted also in places where the Northern League is definitely a minority political group, and they relied on the same arguments and operational pattern. This clearly shows that one has to do with a carefully thought out political campaign whereby the evocative issue of the "mosque" is flagged as a shattering element of the cultural, social and religious life of local communities, as something "alien" that is liable accordingly to introduce components that might undermine public order and affect citizens' safety and security.

The effects of such a campaign, from the point of view of the right to religious freedom, are evident and three-fold. First of all, they disseminate biased views vis-à-vis Islam, whose internal declinations and articulations are ignored and which is described as

a monolith that cannot be integrated into Italian society. Secondly, this campaign produces a distorted comprehension of fundamental constitutional rights which, in the case of Islam, end up being denied in the name of the alleged social danger represented by Islamic centres: thus, the risk is that an opinion could prevail according to which the freedom of expression of Muslim communities should be considered as a "separate" matter that cannot be ascribed to rules and principles generally applied to other religious groups. Thirdly, such a campaign has had an impact on rules and regulations: its most important result concerns a paragraph of a Regional Law in Lombardy (No. 12, section 52, paragraph 3a): it prevents changing the intended use of buildings for purposes of worship, thus depriving religious communities of the possibility of buying buildings and adapting them to safety rules, applying for their use for religious purposes and dedicating them to whatever use, be they churches, mosques, prayer rooms, meditation and spirituality centres, in full compliance with the law. This is clearly a violation of the right to worship in public and the media have reported the cases of many churches and mosques that have been closed in pursuance of such a rule.

According to the Council of State, " local authorities must allow all religious denominations to freely exercise their activities, also by identifying suitable areas to accommodate their members" and municipal authorities may not fail to "pay attention to any requests to this effect, whose aim is that of enabling the substantive, effective exercise of the right to religious freedom, which is guaranteed by the Constitution, not only in the application phase, but also beforehand, i.e. when planning the allocation of a given area to specific purposes."

RELIGIOUS MINISTERS. The rules for the recognition of non-Catholic ministers contained in the legislation on the "admitted denominations" - which will be described later on in this Report - set out a procedure starting from the application to be lodged with any Prefecture, then going through the assessment of such application by competent bodies, and finally, in case it is accepted, to a Decree

by the Ministry of the Interior.

Since 2012, following an opinion given by the Council of State upon request by the Central Department for Religious Affairs concerning the objective criteria for the recognition of ministers- an issue that will be better illustrated in the chapter on regulations - more restrictive criteria have been applied: in particular the community for whose recognition a minister applies must include a minimum of 500 members. Consequently, dozens of applications have been rejected, especially those coming from Evangelical churches.

A paradox is that of the International Evangelical Church (CEVI), a Pentecostal denomination formed by the merger of the International Evangelical Church and the Missionary Association (CEIMA) founded at the end of the 1950s by the American missionary John McTernan. In 2012, CEVI, some ministers of which had been officially recognised by the Ministry at the time CEIAM was still active, was granted legal recognition as a "religious body" according to the law on the "admitted denominations": an important step forward from a juridical viewpoint. However, since CEVI was "a new denomination", and CEIAM was about to end its activities, all "former CEIAM" ministers had to apply once again for their accreditation. But by that time the opinion of the Council of State had been issued and therefore those religious ministers from CEIAM who had already been recognised as such were denied the passage to CEVI because they led communities of less than 500 members.

As to the Muslim community, given the high number of its members, it is striking that, as stated also by some influential "opinions" asked for by the Ministry of the Interior, there are no 'approved' ministers, neither are there any applications lodged by the community" whereas, as stated in the text, the ministerial approval of some Muslim ministers could, for example, "enhance the transparency of the assistance service in custodial institutions" and "highlight the religious dimension of community activities".

As far as access to hospitals and penitentiaries is concerned, various

news report about the difficulties encountered by religious ministers of denominations for which no agreements are in place; the situation can get actually worse if incorrect or misleading information is reported by the press, perhaps to shed light on this problem, which sometimes ends up aggravating the problem rather than contributing to solve it – for instance, by relying on the provisions that allow for the access of "chaplains" of different denominations.

CLOTHING, OBJECTS AND RITUALS As far as Muslim cemeteries are concerned, the Italian legislation provides for the possibility, in the planning schemes of burial grounds, "to reserve some specific, separate spaces for the burial of corpses of individuals belonging to a religion other than the Catholic one."[8] In the case of Islam, such a possibility represents a ritual prescription, hence Muslim representatives have applied consistently for "Islamic" areas in cemeteries.

As has been the case for mosques, this issue is un-problematic per se since the law allows setting apart areas reserved for specific religious denominations; however, a symbolic dispute has arisen under the strong impulse given by the Northern League. Among the various cases, one can mention those in Bergamo, Bolzano, Pordenone, Rovereto.

Another complex issue concerns the Muslim headscarf - more correctly the hijab - but also the niqab covering the whole face except for a slit over the eyes, the much rarer burqa where a net covers also that slit, and the chador, usually worn by Iranian women. In 2011, the then Minister of the Interior Maroni had requested the opinion of the "Italian Islam Committee". In their document, the Committee's representatives recommended, in case a regulation was issued, to "avoid any references to religion or to Islam[9]". The new piece of legislation was first approved by the Parliamentary Committee

8 Presidential Decree No. 285 of 10 September 1990, art. 100

9 The full text is available at www.interno.it

for Constitutional Affairs on 2 August 2011, but the immediately subsequent collapse of the Berlusconi government and the calling of a general election put an end to the legislative process.

Within the context of the recurring controversies on this issue, news have been reported on abuse and sometimes attacks against women wearing the Islamic headscarf: cases have been reported in Padua and Monterotondo (Rome). There have been episodes of school bullying against veiled girls and vice versa, against women who were accused of not wearing the headscarf.

In 2012, the State's prosecutor's office in Turin temporarily settled the dispute: they dismissed the case of an Egyptian woman living at Chivasso who had been reported to the police because she moved about in town wearing a Burqa. The Court decided that the woman's conduct was legitimate since the cloth "represents a sign of respect, according to a widespread interpretation, for the principles of the Islamic religion", but also stated that for identification purposes, the face must be uncovered.

When dealing with such a complex issue, given that the right to wear the Islamic headscarf is - in terms of rights - on a par with the right not to wear it, trivial observations and comments are useless just like ideological attitudes that, as shown by the ongoing debate in France, do not help find a compromise among different and complex needs.

A similar example to that of the "Islamic headscarf" is the one concerning the Sikh turban, one of the community's five ritual obligations (kalsa): even though this apparel does not involve any identification or safety issues, in the past some "incidents" occurred in the airports, and the Ministry of Foreign Affairs had to deal with them; and a problem exists concerning the impossibility to wear a helmet when riding a motorbike. A Sikh was fined in Treviso because he was wearing a non-homologated helmet - indeed, in order to wear it over the turban, the Sikh had taken off its protective material.

Another ritual article of the Sikh tradition is the kirpan, a ceremonial knife that every Sikh man is supposed to carry in order to express his constant battle for the good and morality against evil forces and injustice, both at personal and social level. The knife is rather small, the curved blade is generally blunt and when given this knife, young Sikh are taught it must not be considered as a weapon to do harm. All over Europe, the Sikh community claims the right to carry the kirpan, by underlining its religious and non-violent character; recently, a Sikh delegation obtained a symbolic success, as they entered the European Parliament carrying this ritual article.

In Italy no violent events or threats linked to the kirpan have been reported, but this issue represents one of the main obstacles for the legal recognition of the Sikh community. So far, the various solutions proposed to replace the real object by a symbolic one - by soldering the blade to the sheath or replacing the metal blade by a plastic or wooden one - have not been accepted by the Sikh community.

Finally, media have reported on some disrespectful attitudes, violence and acts of vandalism that, apart from the sometimes minor effects they concretely produced, impact on the life of communities that feel unaccepted or even rejected.

Within this framework, anti-Semitism is still a cause for concern. The Observatory on anti-Jewish Prejudice, set up within the Jewish Documentation Centre of Milan, reported a 40% increase in 2012 compared to 2011; it is mostly a matter of cyber hate, expressed and amplified by the web, and it has the typical contents of anti-Semitic propaganda: the economic and financial power of the Jewish lobby, "Nazism" towards Palestinians, control over the media, revisionist propaganda. There have been also different cases: among the most serious ones are those brought to light by an investigation carried out in Naples into some far-right organisations including Casa Pound, responsible for attitudes and speeches "full of hatred" against Jews but also against "the Arabs" in general.

On the other hand, there is an interplay between anti-Semitism

and Islamophobia, which end up giving rise to undistinguishable violence - as shown by some sentences issued for crimes related to "incitement to discrimination and violence for racial, ethnic and religious reasons".

Leaders of the Jewish community have often insisted on the need to be alert on anti-Semitism; as to the Muslim community, its representatives have voiced to President Napolitano their deep concern for "(intentional or unintentional) attitudes vis-à-vis those citizens belonging to Islam".

CONCLUSIONS. The main obstacles to a full enjoyment of the rights linked to religious freedom derive from different factors. The first one is the manifest obsolescence of the legislation on the "admitted denominations." Even though the provisions that are most blatantly in contrast with the principles set out in the Constitutional Charter have been amended by the Constitutional Court, the overall legislative framework is geared to limiting the rights to religious freedom rather than guaranteeing them, and to controlling places and modalities for the free exercise of religious freedom rather than providing a clear-cut framework to ensure religious pluralism. This criticality appears very clearly with reference to a number of aspects such as: the appointment of religious ministers recognised by the Ministry of the Interior; the rationale and the procedures for the "legal recognition" of denominations; the discriminatory effects produced by such recognition vis-à-vis the denominations that have not been granted recognition.

A second limiting factor concerns the application of the existing rules: the latter are sometimes unknown to decentralised Prefectures or other institutional agencies, whilst at times they are applied according to restrictive and exclusion-oriented criteria. Hence such rules, instead of representing an instrument to safeguard rights, become less important or have no impact at all on the enjoyment of rights.

The third factor has a political dimension and concerns the action and

strategy of some parties – first and foremost, the Northern League – that have based their electoral marketing on the limitation or even denial of the rights to religious freedom for those communities defined as "immigrant communities". This strategy - implemented through public opinion campaigns and, when the political force is in power, through administrative measures - results into a seriously distorted understanding and interpretation of constitutional rights; therefore, the tendency is to consider as "common sense" that a religion may enjoy more rights than other religions and some religious denominations may even be excluded from the rights that are instead afforded to other denominations - based on an ideological assumption whereby they "may not be integrated" within the democratic system.

The joint action of these three factors - concerning respectively legislation, application and politics – gives rise to a critical situation, which calls for a systematic approach as described in the paragraph on recommendations.

Discrimination and Violence

21 April 2012 Varallo Sesia (VC)

Immigrants: The Mayor, a member of the Northern League, opens an Islamic centre,

23 June 2012. Brescia

Mosque in via Bonardi: The Northern League says "no" with a demonstration, BS news.it, protests are organised also in the province: Northern League: there will be no mosques in Cologne.

11 July 2012. Milan. Places of worship.

Declaration by Lepore, a Northern League representative: Mosques in Milan; the Mayor Pisapia as an Islam Muezzin: "Our Mayor is more Islamic than Muslims themselves

and does all his best to put his flag, pardon, his ideological minaret on Milan's Cathedral. The Northern League is ready to immediately call upon all citizens to ensure the protection of the founding values of our society."

21 May 2012 Brescia

The Council of State overturned the first-instance judgement and allowed re-opening the Islamic centre which had been closed under the Northern League's pressure in 2011 by the municipal authorities of centre-right, who had declared the place unfit for use and seized the premises of the mosque in Viale Piave; the Regional Administrative Court (TAR), seised by the centre's representatives, had confirmed its closure.

27 July 2012. Rome

Neighbourhood of Tor Pignattara, beatings and insults after Ramadan. Some young people from Bangladesh were attacked; stones were thrown against the Islamic centre of via Serbelloni in Rome.

13 September 2012

Bergamo. Islamic cemetery, the Northern League opposes its construction.

14 September 2012 Reggio Emilia

Earthquake. Manfredini (Northern League), Islamic food is an expensive whim.

This was reported to be the reaction by the head of the Northern League at the Region, Mauro Manfredini, following the request for halal food to the victims of the earthquake who had found refuge under the tents mounted by the administration.

15 September 2012. Trento.

Disputes over the building of mosques. Northern League, close them

3 October 2012. **ANSA**

On charges of assault and battery against his wife because of the chador, a Tunisian man was reported to the police.

16 November 2012 Cinisello Balsamo

Torch-light procession organised by the Northern League on November 17th, against the Mosque in Cinisello.

24 January 2013 Naples

Blitz against far-right groups. I must rape that Jew, ANSA

28 January 2013. Milan.

Holocaust Remembrance Day: increasing episodes of swastikas and insults

30 January 2013. European Parliament

Sikhs win and exercise right to wear kirpan in European Parliament

14 April 2013 Treviso

Modified helmet in order to wear the turban, Police fine a Sikh man.

3 May 2013 Rome.

Islam: Islamic community to President Napolitano: we feel hostility

21 May 2013 Crema.

Islam and mosque, the Northern League collects signatures and speaks to Magdi Allam

7 June. Anti-Semitism on the web:

the attempt was made to set up an armed group. In fact, the investigations found violent language towards Jews, immigrants

and Muslims the sentenced defendants wanted to present with" a nice bleeding pork head "

11 June 2013 Turin.

Immigration: Public Prosecutor's Office in Turin, wearing the burka is legitimate

6 July 2013. Turin

The Northern League protested regarding the mosque in via Genova (Lingotto area)," This is not integration. The Northern League says no to the mosque in via Genova".

16 July 2013 Rome.

In reaction to a declaration by the President of the Chamber of Deputies Laura Boldrini on the Miss Italia show, senator Gian Marco Centinaio (Northern League) wonders whether Ms Boldrini preferred Miss Burqa

13 August 2013 Parma.

"A solution... which favours Muslims and is to the detriment of Parma's inhabitants": this can be read in a communication by the regional and municipal Secretaries of the Northern League, Fabio Rainieri and Andrea Zorandi and by the provincial Commissioner Maurizio Campari,

14 August 2013 Avignon, (France)

An architect from Como wrote on a wall in Avignon "Mohamed the Prophet was a pig".

Regulatory Aspects.

As far as the relationship between the State and the different religious denominations is concerned, the Italian legislation is made up of a high number of laws and provisions that are not always consistent and do not manage to protect a religious pluralism which appears to be, also in Italy, increasingly wider in scope and complex.

contains various articles on the right to the freedom of religion and establishes the " inviolable rights of the person, both as an individual and in the social groups where human personality is expressed." (Art. 2) and the equal social dignity of its citizens with no distinction of "religion" (art. 3); it guarantees the same freedom to all religions before the law and their right to " self-organisation according to their own statutes. Their relations with the State are regulated by law, based on agreements with their respective representatives" (art. 8); it affirms the right to " to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private". (art. 19); and specifies that "No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organisation on the ground of its religious nature or its religious or confessional aims". (art. 20)

As is well known, the specific issue of the relationships between the State and the Catholic church is dealt with in a specific article, which recognises that they are both " independent and sovereign, each within its own sphere", and it also officially recognises the Lateran Pacts (art. 7). Therefore, under the Concordat contained in the above mentioned Pacts, article 7 implicitly grants the Catholic church some specific concessions, among which the most important one is the confessional religious teaching in state schools which is paid by the State but carried out by teachers selected by diocesan authorities.

AGREEMENTS. For the religions "other than the Catholic one" - a conventional expression which recalls obsolete notions of privileges applying to Italy's majority religion as opposed to the undifferentiated world of the "other religions" - article 8 has strategic importance since it is the legal tool affording the greatest protection to religious freedom, the recognition of ministers, the enhancement of cultural

heritage; last but not least, it gives access to the distribution of funds from the "Eight per Thousand" scheme (compulsory devolvement of tax revenue)[10]. The practice implemented so far, even though article 8 does not provide anything in this regard, is that a religious denomination must first obtain legal recognition in order to negotiate an agreement with the State. These general principles must be read and interpreted also in the light of some judgements given by the Constitutional Court [11] which provide a framework for the right to religious freedom as part of a notion of secularism that is different from the "monist one which is in competition with other values and with the cultures of other religions, a type of secularism that is ready to accept other principles corresponding to the different identities in our society[12]", an "active", "positive", "layered"[13] type of secularism - to quote the many definitions devised.

LEGISLATION ON THE ADMITTED DENOMINATIONS. Whilst Constitutional articles and principles are available, the general legislative framework on the "admitted denominations" has remained more or less unchanged since 1929-1930. That framework was approved within the context of the consolidation of the fascist regime and only a few rules that were openly anti-constitutional have been repealed so far. Law 1159/1929 and the relevant implementing regulation (Royal Decree 28/2/1930 No. 289) set out the criteria to confer legal personality on religious non-Catholic denominations and to appoint ministers authorized to celebrate religious marriages having civil effects or to provide spiritual assistance in hospitals, penitentiaries and armed forces.

This legislation represents the main reference for those denominations

10 As of today, six Evangelical churches have signed an official agreement with the Italian State: the Waldensian Church (Union of the Methodist and Waldensian Churches), the Union of Seventh-Day Adventist Churches, the Assemblies of God in Italy, the Christian Evangelical Baptist Union of Italy, the Evangelical Lutheran Church and the Apostolic Church in Italy; the Union of Jewish Communities in Italy; the Sacred Orthodox Archdiocese of Italy - Exarchate of Southern Europe, which indeed does not have any jurisdiction over the increasingly numerous Romanian Orthodox believers; and finally the Church of Jesus-Christ of the Latter-Day Saints (Mormons), the Italian Buddhist Union and the Italian Hindu Union. Out of all these entities, only the Church of Jesus-Christ of the Latter-Day Saints (Mormons) has decided not to accede to the distribution of funds derived from the Eight per thousand scheme.

11 Reference can be made in particular to decision 203/1989 which states that "the principle of the secular nature of the State as per arts. 2,3,7,8,18 and 20 of the Constitution does not imply an indifference by the State vis-à-vis religions, but rather the protection afforded by the State to ensure religious freedom within a context of religious and cultural pluralism"; and to decision 334/1996 which affirms that the right to freedom of expression "is vested both in believers and in non-believers, be they atheists or agnostics."

12 N. Colaianni, Diritto pubblico delle religioni. Eguaglianze e differenze nello Stato costituzionale, Il Mulino, Bologna 2012, p. 51

13 P. Naso, Laicità, Emi, Bologna 2005

that have entered into no official agreement with the Italian State as provided for in art. 8 of the Constitution. Therefore, non-Catholic denominations may be recognised as legal entities by a Presidential Decree upon the request by the Ministry of the Interior, and after receiving the opinions by the Council of State and the Council of the Ministries (Law 1159/1929, art. 2). This is a complex and burdensome procedure which, in the past decades, brought about the recognition of less than fifty confessional entities: apart from those long recognised as such (Waldensians, Opera Brethren, various evangelical churches of Swiss or German origins, a number of orthodox churches) and those denominations that have an official agreement with the State, in the post-WWII period the following have officially been recognised according to Law 1159/1929: 15 evangelical institutions, 5 orthodox churches, 4 Buddhist institutions, Jehovah's Witnesses and two more millenarian churches, 2 Christian Science centres, two Hindu centres, one Baha'i; as to Islam, the second religion in Italy in terms of members, the only recognised entity is the cultural Islamic Centre of Italy which manages the "Great Mosque" of Rome.

The Sikh community - numbering approximately 80,000 members, which recently opened important temples - *gurdwara* - especially in Northern Italy[14] - is not yet recognised.

"RECOGNISED" MINISTERS. A further example of the layered approach mentioned above is provided by the denominations that are not legally recognised but have ministers "whose appointment has been approved" by the Ministry of the Interior: such a recognition authorises them to celebrate religious marriages with civil effects and to offer spiritual assistance in protected places such as schools, hospitals, penitentiaries. However, these denominations are merely associations from the State's viewpoint, thus encountering evident difficulties in finding their place in the public space and fully exercising the right to freely profess their religious beliefs and celebrating their rites in public (art. 19).

14 B. Bertolani, I sikh, in E. Pace, Le religioni nell'Italia che cambia. Mappe e bussole, Carocci 2013, p. 31

However, a recent opinion issued by the Council of State (No. 561 of 2/2/2012) imposed a restriction on these appointments by indicating that "the members of the given denomination for which approval of a minister's appointment has been requested should be in the range of 500 persons as distributed into the different age groups". The logic for such threshold is that "the smallest territorial structure of the Catholic church is the parish" whose average population is 500 units, and for smaller groups the "Catholic church keeps the building where public worship is held in use but does not appoint any incumbent". The text of the opinion by the Council of State does not provide data and documents to substantiate the argument regarding this practice; above all, one can hardly grasp why the organisational model - in this case the ecclesiological one - of a particular religion, although it is the majority one in a given country, should be extended to other religious denominations - which are free to organise themselves by adopting different parameters and procedures. This opinion, if endorsed, will also have a discriminatory effect on the religious ministers who have applied for recognition after the publishing of the Council of State's opinion. Finally, this opinion has produced other effects by modifying consolidated practices that, through the recognition of the religious ministers, strengthened the freedom of action and of religion of small denominations that were more vulnerable in terms of legal safeguards.

WITHOUT UMBRELLA. A final piece in this legislative puzzle consists in yet another layer, i.e. that of the communities of believers that not only lack "recognised" religious ministers, but are also composed entirely of immigrants. This is the case of hundreds of evangelical churches of Nigerian, Ghanaian, Philippine, Latin American origin but also of Sikh and other smaller religious groups that are organised in simple associations. Even though their statutory aim is only or mainly of a religious nature, from a juridical point of view they are merely associations and lack the juridical guarantees - the different large and small umbrellas described so far - that are afforded to the "consolidated" religious denominations also by

way of the activity of "recognised" religious ministers. They are certainly protected by the Constitution, but it is clear that the scope of action and public recognition of these communities - within the existing legislative framework - are seriously jeopardised.

Being aware of this loophole, the Minister for International Cooperation and Integration promoted the "Permanent Conference of Religions, Culture and Integration" in 2012 - as a forum open to the participation of representatives from the different religious communities, independently of their legal status. It is worth underlying that the opening of the "Conference" coincided with the conclusion of the works of the "Italian Islam Committee" set up by Minister Maroni in 2012, which had replaced the Council for Islam set up by Minister Pisanu in 2005 and then confirmed by Minister Amato in 2006. In that period, when the "Islamic case" was considered as a separate matter from the more general issue of religious freedom, some "opinions" had been asked by Minister Maroni from a number of experts concerning "burqa, niqab, places of worship, appointment and training for imams, mixed marriages[15]". These opinions were meant to serve as a basis for new laws, which however never came to be due to the evolution of the political framework.

In 2013, Prime Minister Enrico Letta entrusted the Minister for Integration, Cécile Kyenge, with the task of guiding the interreligious dialogue, thus showing his intention to keep a communication channel open with the various religious communities according to the informal and inclusive approach inaugurated by Minister Ricciardi.

Within this context of so-called friendly policies, one should mention a project of the Central Directorate for Religious Affairs - Department for Civil Freedoms and Immigration of the Ministry of the Interior: in 2013 a research/action was conducted and a Vademecum was produced aiming at highlighting and enhancing the social function of religious communities within the context of

15 The texts of the opinions are available at www.interno.it

the integration processes promoted and funded by the EU through the European Integration Fund (IEF)[16].

MUNICIPAL AND REGIONAL RULES. Partly in order to overcome the abovementioned criticalities, some municipalities set up consultative bodies or other bodies to encourage dialogue with the religious communities making up the general framework of religious pluralism in Italy: the first one was Rome, which set up the Council of Religions in 2002[17] as a result of a specific policy which was subsequently abandoned after the election of Mayor Gianni Alemanno in 2008. Other municipalities where similar bodies were set up include Genoa, La Spezia and, more recently, Milan. In the capital town of Lombardy, a Forum of Religions was already active which had been promoted and set up by the main religious communities of the city. In 2012, the municipal administration, under Mayor Pisapia, created a Register of Religions which should pave the way to a permanent conference for the promotion of dialogue and cooperation initiatives among the different "religious souls" of Milan and for addressing complex issues such as the location and availability of places of worship or the respect for the various religious rules within the context of public services [18].

These initiatives fit in well with the policies of social cohesion, integration and dialogue that are strongly supported by the European Union[19]; still, due to their local character and their being the result of the political determination of a single Mayor or local administration, they do not attain a "systemic dimension" and thus their effectiveness is ultimately compromised.

On the other hand, the absence of "strong" statutory rules to protect the public activity of those religious denominations for

16 Central Directorate for Religious Affairs - Department of Civil Freedoms and Immigration of the Ministry of the Interior, Religions, Dialogue, Integration, Com Nuovi Tempi-Idos 2013

17 The Agreement Protocol between the Municipality and the various religions, in Roma delle religioni-The Rome of Religions, EDUP, Roma 2004

18 Decisions No. 1444 of 6th July 2012 and No. 2475 of 30th November 2012, in www.comune.milano.it/albopretorio

19 Reference can be made, inter alia, to the basic common Principles of 2004, the Agenda for Integration adopted by the EU in 2005 and the Handbook for integration approved in 2010; these texts can be found at www.ec.europa.eu

which no agreement is in place as well as the ongoing public debate on religions which often drifts towards disputes on immigration, have set the stage for a number of initiatives that go in the opposite direction compared to the inclusive approach underlying those described above. The most evident case has to do with a paragraph in the Regional Law on territory of Lombardy, according to which:" modifications to the intended use of a building, even when they do not involve building works, with a view to the establishment of places of worship [...] are subject to building permits"[20].

In other words, within the context of a general law on land use, a principle is established which prevents a religious community from buying a building, even if it complies with the safety rules, and using it as a place of worship.

This measure allowed some local authorities to "shut down" places of worship - Islamic centres for prayer but also a number of evangelical churches - thus *ipso facto* preventing freedom of worship as guaranteed by the Constitution both in private and in public (art. 19)[21].

To conclude this summary overview, it can be affirmed that the multi-layered rules and regulations on the right to freedom of religion are fraught with several criticalities, the most important one being, in our opinion, the permanence of the legislation on "admitted denominations": as well as being out-dated, such legislation proved unable to fully protect constitutional rights and is not equal to the needs of a new, more substantial and multifaceted type of religious pluralism that is making its way also in Italy.

20 Regional Law (Lombardy) No. 12 of 11 March 2005 , Section 53, para. 3 a

21 Closed (under the law) 23 churches, Corriere della Sera 25 January 2013

2012: AN "EXCEPTIONAL" YEAR.

Within the above mentioned general framework, one should point out that 2012 was a highly peculiar year since in the space of just a few months a number of laws were finally approved concerning agreements with various religious denominations that had been pending for years before Parliament. If one considers the timeline for the approval of these laws, one will notice that the enactment process was exceptionally shortened.

The longest waiting period was that of the agreement with the Italian Buddhist Union, which started negotiations with the governmental committee on 14 March 1997 and undersigned a draft on 21 October 1999 with the undersecretary to the Prime Minister's Office, Franco Bassanini. The Italian government, led by Massimo D'Alema, collapsed two months later and the draft was not voted. On 22 March of the following year, Prime Minister D'Alema, heading a new cabinet, signed the text of the agreement with the Buddhist Union together with the one concerning the congregation of Jehovah's Witnesses; however, the latter was harshly opposed by high-level politicians in the majority group such as Lamberto Dini, Rosi Bindi, Sergio Mattarella, Ombretta Fumagalli Carulli. This veto placed ultimately on the agreement with Jehovah's Witnesses had an immediate negative impact on the one with the Buddhist Union, so that the relevant measure remained pending until 2007 when President Prodi, this time after gaining full governmental support, signed again the agreement text on 4 April 2007. The collapse of Mr. Prodi's government and the influence of the Northern League in the new government led by Silvio Berlusconi, which was essentially contrary to any agreements with Buddhists, left the agreement in a limbo for the whole legislature.

But in 2012 a new window opened up during the 'technical' government headed by Mario Monti, which also included Andrea Ricciardi as the Minister for International Cooperation and Integration. Thanks to his long-standing experience in the field of

interreligious dialogue promoted by the Sant'Egidio Community, the new Minister was keen to address this issue and, more in general, the issue of religious freedom for the new communities that have joined the national scenario over the years. Furthermore, the bipartisan engagement of some politicians such as Lucio Malan (PDL) and Stefano Ceccanti (PD), and the strong determination of the rapporteur in the Parliamentary Committee for Constitutional Affairs, Roberto Zaccaria, contributed to the positive outcome of a procedure that lasted as many as fifteen years.

The set of agreements approved in 2012 includes also those with the Sacred Orthodox Archdiocese of Italy - Exarchate for Southern Europe, the Church of Jesus-Christ of the Latter-Day Saints (Mormons), the Italian Apostolic Church and the Italian Hindu Union - all of them signed on 4 April 2007.

However, the Agreement with Jehovah's Witnesses is still pending, despite authoritative institutional opinions underlining that it goes hand in hand with the one regarding the Buddhist Union "as a way to respond, in the light of the more general orientation on religious freedom, to the complex issues underlying an Agreement with two religious and spiritual phenomena that gave rise, though in different respects, to new and complex problems"[22].

Another law approved by Parliament in 2012 is the one amending the agreement with the Baptist Evangelical Christian Union of Italy (UCEBI), which was signed in 2010. The amendment concerns the Eight per thousand scheme: in 2008, this denomination changed its previous orientation and decided to accede to the Eight per thousand scheme and also participate in the distribution of the share from unspecified preferences – i.e. the share resulting from the failure to specify beneficiaries among the available competitors (State and other religious denominations) in the annual tax returns.

In 2013 no major regulatory innovations were brought about, nor

22 Francesco Pizzetti, The agreements with other denominations, with particular regard to the experience, as President of the Committee for the Agreements, of the negotiations with the Buddhists and Jehovah's Witnesses, in A. Nardini and G. Di Nucci (eds.), From the 1984 agreement to the Bill on religious freedom. Fifteen years of politics and ecclesiastic legislation, Presidency of the Council of Ministers, Department of institutional Affairs and Relationships with Religious Confessions, Rome 2001, p. 311

are there bills in Parliament concerning religious freedoms or aimed at repealing the legislation on admitted denominations. However, reference should be made, in concluding, to a recent decision of the Court of Cassation[23] which might give rise to some interesting and significant developments in the public debate on this matter. For the sake of simplicity, one might say that the Unione Atei Agnostici e Razionalisti (Atheists', Agnostics' and Rationalists' Union) (UAAR) has the right to appeal TAR (Regional Administrative Court) against the government's refusal to start negotiations for an Agreement. The question behind the legal issue is thus the following: may a non-religious or downright anti-religious organisation be afforded the same legal protection as is guaranteed to religious denominations, including a legal recognition agreement? Francesco Margiotta Broglio made a good point when he affirmed that this decision "raised the question of the status of organised atheism in Italy"[24].

Whilst this may be found a thorny issue in the Italian context, at European level things are different as shown by article 53 of the European constitutional Treaty which, referring to the "status of churches and non-confessional organisations" affirms that the Union "is respectful [...] of the status that, according to national laws, philosophical and non-confessional organisations enjoy" and, as is the case with religious denominations, it has an "open, transparent and regular dialogue" with them. Therefore, the analyses and the public debate on the rights to religious freedom are bound to increasingly take place in the wider as well as more inclusive framework of the principles and rights related to freedom of conscience.

Recommendations

1. Repealing the law on admitted denominations and developing new legislation that should rest on the following essential pillars: the Constitution; the rights acquired by the various denominations; European directives, starting from the recent Guidelines by the Council of Europe for the promotion and

23 Judgement No. 16305 of 28 June 2013

24 F. Margiotta Broglio, Anche gli atei diventano una Chiesa. Stessi diritti delle altre confessioni?, Corriere della Sera, 29June 2013

protection of the right to religion and belief (Luxembourg 24 June 2013).

2. Starting negotiations with the consolidated Islamic representations (UCOII, Centro culturale Islamico and associated centres, COREIS) to explore the possibility of a framework agreement to the benefit of Islam in Italy which, as shown by all the statistics, is the second largest religious community in Italy in terms of its members.

3. Expeditiously approving an Agreement with Jehovah's Witnesses in Parliament.

4. Ensuring access, by the various denominations, to State-owned radio and television, requiring RAI to adopt collaboration protocols with the representatives of the different religious communities in order to ensure an adequate and qualified presence of the various denominations in programmes dealing with religious topics or morally sensitive issues.

5. Testing other mechanisms to allow the presence of religions at school, other than the teaching of the Catholic religion. These projects should be conceived within the schools that intend to carry them out and might be developed in collaboration with Universities, associations and experts of the religious denominations (starting from the model developed by the Interreligious Conference of Rome).

6. Setting up a multi-Ministry permanent structure similar to the permanent forum of religions, cultures and integration, which will have an operational function and will be accordingly provided with the necessary resources to promote policies of multi-religious and multi-cultural integration and cohesion.

7. Setting up local inter-religious conferences at the Prefectures in order to foster multi-religious and multi-cultural cohesion and integration

ROM, SINTI, CAMINANTI

By Ulderico Daniele

Focus
The progress of the National Strategy for the inclusion of Roma, Sinti and Caminanti and present-day unsolved contradictions

The political and legislative framework applying to the decisions and measures concerning Roma was redefined in March 2012, by introducing the National Strategy for the inclusion of Roma, Sinti and Caminanti (hereinafter NS).
This document provides the Italian Government with a national reference framework aiming at including, promoting and guiding all actions undertaken by local bodies – which have been considered so far the main actors in the management of the "Roma[1] issue" – and the initiatives carried out by the individual ministries, which from the 1960's have tackled Roma–related issues sectorally and without a coordinated approach.
According to the schedule set up by the European Strategy 2020, by the end of 2013 the first phase of implementation of the national action plans should be concluded; the phase refers to the completion of resource analyses and ongoing projects along with the identification of new operational guidelines at a national and local level. Accordingly, also in our country the implementation of actions foreseen by the NS did not lead to substantial interventions or changes in Roma people's daily life. The main area in which the effects of the NS can be seen is the institutional one, although this sector also features many diverse situations in terms of involvement and interaction between the individual geographical areas and the central and local[2] administrative bodies.

1 -This term will be used as an all-encompassing word to indicate different groups of Roma, Sinti and Caminanti (hereinafter RSC) living in Italy

2 -The following data were collected through interviews and meetings with UNAR consultants and collaborators, local managers, experts

The National Plan

At a Governmental level, after a long intermission the interviewees accounted for by referring to the political instability and the changes that had happened at the top managerial level of UNAR, the political control room/ interministerial political forum- i.e., the top layer of the new governance system outlined by the NS- resumed his activities only in September 2013.

Below the political control room, the five interministerial committees working on the interventions outlined by the NS have reached -as of today- different activation levels which we cannot analyze in detail; the most active forum is the one examining the legal status of Roma. This forum devoted special attention to the many thousands of Roma that are currently "*de facto* stateless ". This mainly applies to youths born in our country, sons and nephews of migrants from the former Yugoslavia who in turn are not compliant with administrative requirements. Vis-à-vis this complex problem, the participants in the forum outlined - also by monitoring local practices - several proposals, which once endorsed by the political control room will impact the legislative, administrative and diplomatic level. On the other hand difficulties in setting up and starting the committee (or forum) on housing issues must be reported. According to sector operators and observers, the difficulties stem mainly from the potential political consequences of any kind of intervention related to housing policies for Roma at local and National level. Although the presence of Roma encampments, either authorized or spontaneous, represents the main violation imputed to our country by all international counterparts and it is also the main problem for local administrations in managing Roma presence, local and national administrations are forced or often choose to remain inactive. They are afraid that any improvement in their housing predicament might be manipulated by the political debate or simplified by the press.

Besides, difficulties arise also in communicating with representatives

and activists belonging to the volunteering sector – to whom we address our heart-felt thanks. Furthermore we examined the draft Report no.29 of 18/12/2013 of the extraordinary meeting of the Committee for the protection and promotion of Human Rights, which debated the "Follow up of the research on the protection of human rights and the mechanisms in force in Italy and within the International context: public hearing by the Minister for the integration on the national strategy of inclusion of Roma, Sinti and Caminanti." The document is available for reference in the on-line archives of the Senate of the Republic.

of the various Roma groups especially on the housing subject as they have different needs and requests according to their settlement and migration experiences, therefore creating further differences and sometimes tension regarding the distribution of resources between Roma and Gagè.
Remaining at central level, at least one initiative undertaken by UNAR is worth mentioning: in collaboration with ANCI and ISTAT a pilot survey was launched in 5 local administrations aiming at identifying all statistical sources available on Roma presence and regarding the relevant measures. This type of research is important as it should bring about the creation of a system to systematically verify the impact of the measures implemented[3].

Local administrations

The NS implementation process foresaw the definition of a governance model to be applied also at a local level with the creation of Regional Committees/Forums which will support the Municipal and Provincial Authorities in the drafting, implementation and monitoring of local Plans of social inclusion.

In this respect, two significant events occurred between 2012 and 2013: on 5 December 2012 the first National Forum of the Regions convened for the first time, involving all Italian regions along with the State-Regions Conference. Afterwards, on 24 January 2013, the Conference of Regions approved an UNAR document in order to set up - within 28 February 2013 – forums for the implementation of the NS in each Italian region.

The Regions which officially set up the forums through ad hoc decisions are only eight at the moment: Liguria, Emilia Romagna, Marche, Tuscany, Umbria, Latium, Molise and Calabria; Campania and Sicily might join over the first months of 2014.

At the lowest level of local administrations, i.e. Municipalities and

3 -Besides the Unar the organization includes the participation of the Ministry of Employment, of Social Policies with delegation to the Equal Opportunities, the Minister for International Cooperation and Integration, the Minister of Interior, the Minister of Health, the Minister of Education, University and Research and the Minister of Justice..

Provinces, the situation is even more varied. Only few administrations committed themselves by way of specific instruments: among them it is important to mention the memorandum voted by Rome's Municipal Council in December 2013; some other administrations started a direct dialogue with the UNAR based on the Intervention plan prepared previously or regardless of the NS like, for example, the municipalities of Milan and Bologna. Generally speaking there is widespread interest from local administrations in acquiring the competences and in following the indications developed by UNAR with the issuing of the NS.

On this subject a Memorandum of Understanding was signed by UNAR, FORMEZ and ANCI to support, through expert consultancy, the implementation of local inclusion plans in the five regions where a State of Emergency was declared.

It is not possible within the scope of this contribution to carry out an in-depth examination of the situation for each of the regions where a forum was organized or for the Municipalities that prepared Inclusion plans; therefore we will consider only a few relevant cases with regard to the activities implemented and the criticalities encountered.

One of the Regions that have been most committed from the start is Tuscany, where toward the end of 2012 a technical forum was set up following a regional resolution; the technical forum was chaired by the regional Councillor for social policies and all local bodies concerned were convened. Over the following weeks representatives from Roma and welfare services were also invited, thus creating a multilevel and differentiated communication model based on the pivotal role played by the Region.

This local administration certainly endorsed a more advanced legislative approach compared to other regions, taking account of the regional Law approved in 2000 and the motion carried by the Regional Council in 2011 – which was focused on the social inclusion of Roma. Another important element regards the role entrusted to the Fondazione Michelucci, a research center that, following the

setting up of an Observatory on the social and housing situation of Roma and Sinti in Tuscany[4], started collaborating with several local administrations.

The Fondazione acts as a technical consultant and its services are available to the different administrators, but it also plays a crucial role in involving and mediating with Roma and third sector representatives.

Tuscany's situation is particularly significant as certain projects - some of which are under discussion or about to be defined at administrative level – tackle the most politically sensitive and central issue, i.e. housing measures for Roma.

In particular, the technical forum is working on a few projects to be implemented in different local contexts, envisaging –as foreseen by the NS – a wide range of proposals and approaches with a view to solving the issue of Roma encampments - ranging from the inclusion into social housing in Lucca to the self-building initiative of San Giuliano Terme[5] up to the upgrading of a historic settlement near Pistoia. All these projects have not become a reality yet: the stakeholders involved in the Lucca project are still debating if including only the Roma as beneficiaries is appropriate or not. In San Giuliano Terme the issue was solved by implementing a first housing intervention that benefitted the Roma only to then progressively become a resource integrated into the wider territorial system. With regard to the exclusiveness of housing policy interventions, the case of Pistoia represents a more typical solution even if it is in some respects a more problematic one: even if intended for a limited number of beneficiaries and within the framework of an integrated project foreseeing interventions on the legal status, occupation and literacy, the housing intervention envisages basically the enhancement of a pre-existing Roma encampment located far away from residential

4 -Employment, Health, Education and Housing. A fifth multi-ministerial discussion table added up to these four forums in order to address the issue of the legal status of Roma.

5 -Within this document it was deliberately decided not to give relevance to informative or cultural initiatives promoted by local and central administrations although their value is recognised and they are also part of the National Strategy; the rationale is to be found in the limited space of this contribution and in the decision to focus on the prospective or already defined interventions that are meant to shape Roma's lifestyle and the respect for their rights.

areas and territorial services.
Besides the differences and the impossibility of assessing the impact of projects that exist only on paper or in the declarations of intent, Tuscany appears to be the administration that decided to tackle the most central and sensitive issue: Roma's right to housing.
On this subject other municipal and regional bodies put forward proposals and projects that are less in line with the NS; also the political and cultural debate is less advanced.
The cases of Turin, Milan and Rome can be taken as examples, as these are cities that have been the subject of the declaration of the state of Emergency.
Without formally appropriating themselves of the structure and models of governance defined by NS, the municipalities of Milan and Turin have, over the last few months, started consulting with local actors and the UNAR and have drafted general intervention plans and projects – each according to their own models - which are, even explicitly, in line with the NS objectives.
The housing subject has been tackled in Turin as part of a call for tenders for the management of initiatives "in favour of the Roma people" announced following a municipal resolution and awarded last November to a group of local associations.
The unprecedented element is the fact that the tender concerns authorised and unauthorised settlements: special attention is paid to a spontaneous settlement along Lungo Stura Lazio, a shanty town hosting 650 Roma according to the estimates by the municipal administration.
For this settlement and others the tender is aimed mainly at the transfer of Roma from their encampments, pursuant to the principles and methodology outlined by the NS[6], which envisage a range of stepwise interventions and varied solutions according to the capabilities and resources of the residents in the encampments. This project started in the settlement of Lungo Stura Lazio, and in January 2014 a few families left the camp to start an assisted process leading ultimately

6 -Following extensive and in-depth research and monitoring, the Observatory produced a mapping of the settlements in the region along with an on-line database on the features and criticalities of each settlement; see http://www.michelucci.it/pagine/romgis/ .

to housing solutions.
Starting this process is part of the supporting actions to foster social and housing inclusion considered as a key feature of the public administrations' projects. However a few limits or criticalities must be highlighted with regard to the project structure: within the tender the timeline for implementation is not explicitly stated and a clear monitoring mechanism is missing along with a verification of the impact of the proposed actions - while within the NS they are all considered as characterizing elements. Furthermore, as some local associations observed, the prospects for the Roma who are not taking part in those projects are unclear. The tender clarifies that…"the (inclusion) process will be reserved for those who will fully respect the Citizenship Pact" (approved by the Municipal Council) and that it is anyhow estimated "that several individuals will not be able to take part in the aforementioned processes." To that end, assisted repatriation actions in collaboration with associations belonging to the countries of origin were envisaged - but the criticalities linked to this type of intervention already emerged over the past few years in Milan and Rome.
Against this backdrop, the administration decided to invest part of its resources also for the Roma encampments that will remain operational by financing measures to enhance their safety, rearrangement and maintenance.
A twofold modality of interventions then is outlined, on the one hand affirming and testing the overcoming of Roma encampments and on the other hand also investing resources in order to guarantee the safety of the existing settlements by ensuring minimal structural standards - which are in any case very far from the housing standards provided for in the Pistoia upgrading project.
A similar situation can be observed in Milan where the municipal administration presented the Intervention Guidelines for 2012-2015. In Milan, already with the previous administration spearheaded by Letizia Moratti, major projects to overcome the concept of Roma encampments had commenced – producing complex results that have not been systematically assessed yet; the housing issue was

anyhow the focus of action. However also in Milan the measures envisaged follow this binary path including, on the one hand, the beginning of the housing inclusion process supported by employment and financial help and, on the other hand, interventions aimed to the upkeep and management of existing encampments. The balancing among those projects is particularly meaningful if we consider the funds earmarked for the various items of expenditure: 2,3 million euro should be used for the management of existing encampments and the setup of a temporary stay camp and the presence of local Police; 2,2 million euro for enhancing safety of the areas involved, the management of the first reception in social emergency centres and the move from unauthorized encampments; finally 2,1 million euro were allocated to social assistance and induction to educational and employment paths.

The Milan guidelines also attach special importance to countering illegal activities and, like for the large-scale Turin project, foresee monitoring activities in areas liable to the risk of spontaneous settlements and the fight against new unauthorized encampments, which will be carried out, theoretically, along with the start of innovative socially oriented projects such as the creation of low-threshold facilities for the first reception.

Conversely, the regional bill presented by the Fratelli d'Italia political group and endorsed by the former vice-mayor of Milan Mr. Roberto de Corato goes in a basically opposite direction. The bill foresees the adoption of more stringent criteria in the organization and management of Roma encampments in Lombardy and also promotes the holding of civic education and integration courses to the benefit of Roma jointly with the Municipalities where nomadic population is to be found. The bill attracted wide criticism from Italian and Roma associations both because it shows no intent to overcome the encampment-based approach as envisaged conversely by the NS and also because Roma are portrayed as "nomadic" and in need of re-education.

From this standpoint, the situation in Rome looks similar to that in Milan, even though it is fraught with heavier inconsistencies under

certain respects. Also in the Memorandum voted by Rome's city council the taking up of tools and methodology set out in the NS is accompanied by a set of measures with a view to the management of existing encampments.

Currently, regardless of the public statements released by the Councillor for Social Policies, no intervention plan has been devised. The need for overcoming the encampment-based approach certainly recurs as the objective and benchmark shared by all the stakeholders, but it is now considered in terms of downsizing the existing mega-encampments that are a feature of the Roma issue in Rome; conversely, the management of authorized encampments and the "zero-tolerance policy" against the unauthorized ones have been the focus so far of the attention and measures of the municipal authorities. The administration led by the Mayor Mr. Marino decided to move groups and families from one encampment to another or to host them in a temporary reception centre without offering any housing alternative; meanwhile, as also happened in Milan, it has restarted implementing forced evictions regardless of new interventions.

In Rome the "zero-tolerance policy" of Mayor Marino seems to be based upon numerous elements that link it seamlessly to that of the previous administration led by Mr. Alemanno; in comparison to Milan, it is affected by the lack of whatever political debate and the absence of measures devised to tackle the only certain output resulting from the forced evictions: tens of Roma are suffering from a housing emergency situation that is paradoxically even worse than what was the case with the shantytowns.

A similar contradiction between general guidelines and concrete actions can be found in Emilia Romagna. Already prior to the establishment of the regional forum in the summer of 2012, the administration had started an intervention program aimed at improving living conditions in Roma encampments. The earmarked funds, more than 1 million euro, were meant to ensure the safety and improve the life quality of residents through the revamping of facilities and the reduction of overcrowding in the encampments. The

idea stems from the peculiar condition of Roma in this Region, where the encampments gradually turned into micro-areas, often family-run and in some cases owned by the Roma families themselves.
Over the following months the regional administration started the regional forum process- in cooperation with the regional Ombudsman – with the objective of bringing the interventions undertaken into line with the European and National guidelines for the integration of Roma and Sinti. Starting from 2013, overcoming the encampment-based approach to the Roma issue has become part of the agenda through several awareness-raising and research initiatives carried out in collaboration with regional Councillorships, Ombudsman and a few volunteering associations.
However, along with this institutional process, a few Roma and pro-Roma associations drew attention to a problem experienced by families living in the Reggio Emilia area. Those families had bought farming land over the past years and at a later stage they were reported to the authorities on charges of illegal construction of housing and other facilities. The finalization of the proceedings and the enforcement of the punishments jointly imposed, i.e. the pulling down of the facilities and, in some cases, the forced eviction of the Roma from those areas, brought to light –according to activists – a problem that was common knowledge for the administrations concerned even if they never took action in this regard. In this context, the applications filed by families and associations for being granted the tools and resources envisaged in the NS were not taken into account by local administrators – so that some of the public initiatives undertaken by those administrators to publicize the future implementation of the NS appear paradoxical and in some instances represent a source of tensions.

Between innovation and resistance: An initial analysis

In taking stock of the progress status for the NS by having also

regard to the objectives set for the first two years of activity, one can appreciate an initial criticality – i.e., the delay in building up the governance model at both central and local level. The delay concerns the setting up of the political control room, the different working pace of National forums, the high number of regions that have not set up a regional forum yet - therefore failing to support the municipalities that, even if limited in number, are interested in drafting local inclusion plans.
Consequently, as also stated by UNAR representatives, it is extremely difficult to identify concrete results stemming from the implementation of the NS, given that also forward-looking administrations, such as the Tuscan one, are still working on the administrative definition of projects.

The commitment of Italian authorities was considered insufficient by the European Commissioner for Justice, Fundamental Rights and Citizenship, Ms. Viviane Reading, and by the Commissioner for Social Policies, Mr Lazlo Andor. They criticized in detail the state of implementation of the NS during a public hearing held on 26 June 2013: Italy is among the countries which did not earmark the necessary funds to implement the NS within the National budget or the EU funds. Besides, in their view, the Italian plan submitted in Brussels in 2012 could be significantly improved by the introduction of specific quantitative objectives, providing for a sound monitoring system and an evaluation methodology for the implementation of the envisaged measures regarding education, health, employment and housing.
Within this framework the Commission highlighted nevertheless that, albeit exclusively at central and local level, it was possible to detect a meaningful change in orientation and political culture. The issuing of NS and the pressure created by numerous European formal statements had produced – reportedly - a significant transformation in the political structure and language when tackling interventions addressing Roma. Beyond the widespread notion of the obsolescence of the encampments-based approach, this change of scenario was

said to materialize in social inclusion policies devised for peoples no longer considered as “nomadic” or “gypsies”. For instance, a step forward was made by renaming the municipal “Offices for Nomadic Populations” using the categories and the terminology provided by the NS and by way of the instruments and objectives mentioned by the Local Plans – which have left behind emergency-focused wording and tools and support social inclusion paths.

If, on the one hand, this change of scenario and language used by the administrative and political personnel when perceiving or facing the Roma issue represents a meaningful contribution on the long term, on the other hand one can hardly fail to observe a discrepancy between the declarations of intents and the decisions taken in reality - as the forced evictions in Rome and Milan clearly prove. Besides the delay in the implementation of interventions and projects, it is necessary to point out the opportunities and risks linked to a mainly rhetorical impact of the National Strategy - which has been, so far at least, a theoretical framework of terms and approaches that do not always translate successfully into actual planning and political practices.

Finally another criticality is related to the communication modality among administrations, the volunteering sector and Roma groups’ delegates; in some regions such as Lazio, for example, the issue of how to select the counterparts involved in the debate resulted in a delay in starting up the regional conferences and forums. The issue of the Roma involvement has been a long-debated topic, also from a scientific standpoint. Scientific research highlighted the risk that starting consultation mechanisms – with the resulting reallocation of resources and opportunities- may actually encourage the ad hoc appointment of community leaders and representatives or also reinforce power positions previously achieved. Furthermore those types of leadership might put emphasis on solutions marked by an exclusivist approach, in the name of a specific difference characterizing the Roma and the peculiar needs this sort of self-elected élite is voicing – which might paradoxically create a deeper divide vis-à-vis the local communities the Roma live in.

Discrimination and Violence

Bologna, February 2013:
the local group belonging to Lega Nord (the Northern League) organized squads to make rounds in the Ospedale Maggiore with the aim of exposing the consequences of Roma presence within the hospital.

Pisa, 17 March 2013.
The judicial proceedings in relation to the so-called child wife of the Roma settlement of Coltano in the province of Pisa, come to an end. The judicial proceedings started in 2010 when seven Roma were arrested; according to the prosecution they had brought a girl from Kossovo to Italy and submitted her to forced marriage, reducing her to slavery and subjecting her to sexual abuse and rape. The trial had huge resonance on local and national press: in the numerous articles published on this case a consolidated cliché was reiterated suggesting that the Roma "traditions" were in contrast with "modernity"; the same cliché was taken up by the President of the Court, according to whom "(Roma's customs) in our country are deemed as crimes". The judgment of the Court of Cassation did away with all the charges brought against the Roma: the only count remaining was illegal immigration while all other indictments relating to violence and battery were dismissed.
Especially during the initial phases, this case underscored the problem of culturally-oriented practices which are considered legitimate in a certain socio-cultural context and, on the other hand, the way to interpret legislation and identify crimes. Only the accuracy of the investigation allowed keeping these two levels separate by drawing a distinction between social practices that are unquestionably fraught with multifarious interpretations and consequences - like the pre-arranged marriage and the young nuptial age – and enslavement and

rape, which beyond doubt are crimes and, once proved, have to be punished – but should in no way be linked to Roma "culture".

Turin, 28 March 2013.
The judicial proceedings involving several tens of Turin youths on counts of **assault and arson** is postponed; the alleged assault and arson was organized in December 2011 against the Continassa Roma encampment in Turin.
This racist episode was motivated by the allegation, quickly proved false, of attempted rape made by a young girl against a young Roma boy living in the encampment. The following day a march was organized in the neighborhood and regardless of the presence of the Police, it paved the way to the arson of the shacks and make-shift shelters of Roma who were forced to flee without any protection or defence.

Naples, April 2013.
A significant case is that concerning **the Roma of Giugliano, on the outskirts of Naples. A Roma group of around 400 was transferred to Località Masseria del Pozzo** after 2 years of wanderings in the Neapolitan countryside. In this area the municipal administration had built a Roma encampment costing around 400 thousand Euro; the majority of funds were used to separate the settlement from the neighbouring land where for many years all sort of legal and illegal waste had been dumped. Also in this case the dramatic nature of the event was voiced by demonstrations organized by Roma and pro-Roma associations, but to no avail as the administration did not take any action.

Rome, April 2013.
The Minister for Cooperation and Integration Mr. Riccardi openly criticized a few mayors who, in his view, used the forced evictions only to have a return on popularity – i.e. without thinking of practicable and feasible solutions. The Minister referred conversely to the good practices adopted by other local administrations like

that of Lamezia Terme, which used the funds allocated to security polices to start a process aimed at overcoming Roma encampments in that town.

Padoa, 8 April 2013. On the occasion of the Roma International Day, also the mayor of Padoa, appointed as representative of ANCI for immigration, Mr. Zanonato, stressed the responsibility of local administrations vis-à-vis the Roma situation and recalled the discrimination they are still victims of and the urgency of implementing the NS.

Rome, 8 April 2013. Trial for the shutdown of the Italian forum of "Stormfront". Four forum moderators had been convicted of incitement to racial hatred and sentenced to 2 to 3 years' imprisonment. According to the prosecution the four moderators were preparing violent actions against Roma and other immigrants and had also targeted politicians and associations' representatives, among whom the then Minister Ricciardi, who had been threatened following a statement regarding the possibility to include Roma families in the eligibility lists for council housing. The judicial proceedings will resume on 26 January 2014 before the II Court of Appeal of Rome.

Pescara, 16 April 2013.
There started the judicial proceeding against some of those who took part in the spiral of violence that had raged in the city during 2012, following the killing of a criminal, refueling racist and violent actions against the Roma that were long-time residents in town.

The proceedings concerned the homicide of the head of the local soccer fan club, called Domenico Rigante; a few youths coming from Roma families established in Pescara were charged with this murder. The proceedings were postponed on account of incompatibility vested in the public prosecutor but during the hearing held on 9

May 2013 the trial was further postponed to January 2014; in the meantime all five defendants are still detained due to the hazard they pose to society as decided by the GUP (judge for the preliminary hearing).

During the hearing held in May 2013
the counsels of the young Roma boy -Mr. Taormina was also part of the legal team- pledged for a transfer of trial on the grounds of the racist tension in the town of Pescara and the potential repercussions on the counsels and the Court. During the first hearing in May 2013, the relatives of the young victim had almost got into a fight with those of the defendants although the hearing was taking place in chambers.

Mestre, July 2013.
Monsignor Bonini decides to organize a **surveillance service to prevent Roma beggars from entering the Cathedral** during religious celebrations. The vicar's initiative was unheard of and targeted Roma beggars who, according to local press, aggressively demanded alms and were also responsible for "colonizing" entire areas of central Mestre and the tourist areas of Venice. People's reaction was interesting as it was immediately mirrored by the actions undertaken by the municipal administration led by Sandro Simionato (PD); the administration announced the intention to evict one of the tented encampments where those allegedly responsible resided while one regional councillor of the Northern League, Mr. Furlanetto, went as far as to request the army's intervention to counter the beggars' aggressiveness.

Turin, 12 September.
The unauthorised settlement of Continassa is forcibly evicted; the encampment of Continassa was the target of a racist raid in 2012. The eviction concerned around 30 people and it was ordered by the Municipality of Turin in view of the construction of the new Juventus sports center. It must be noted that some of the evicted Roma have

been taken up by the association Terra del Fuoco, in charge of the Il Dado project, which is listed among the good practices for Roma inclusion under the NS.

Rome, September 2013.
Another significant story is the one that came to its conclusion over the same weeks. Two months beforehand, **tens of Roma residents in the large encampment of Castel Romano, located 25 km away from the city center, decided to abandon this encampment** and park their trailers close to the Roma encampment of Via Salviati. The decision was motivated by tensions among the different groups living in the camp; tensions which led to fights among Roma and against the activists of associations working inside the encampments, whilst some trailers were set ablaze. The decision was accompanied by an open letter to the newly elected Mayor Marino; the Roma declared that they did not want "to be ghettoized" any longer. In spite of this statement and several meetings with the local administration, no alternative solution was devised and on the morning of September 12th **the forced eviction of the Roma who remained close to the Salviati encampment started.**

Landiana (Novara), September 2013.
Landiana is the town in Novara province which attracted the attention of the press as **no residents enrolled their children to the local primary school due to the presence of 25 Roma minors.**
Regardless of the outcome, the case spurred reactions and declarations by local politicians; among them one stands out: the regional councilor from Lega Nord (the Northern League) Mr. Mario Carossa said: "It is absurd that our fellow nationals have to withdraw their children from school due to an excessive Roma presence.
This proves beyond doubt that uncontrolled immigration and forced cohabitation with those who do not know how to live and integrate in a community are harmful and impossible."

Rome, 23 September 2013.
The "Antiziganismo 2.0" report by the National Observatory on racial hatred and by the 21 Luglio association was presented officially. The report addresses, inter alia, issues relating to the image of Roma on Italian media. According to the report, every day in Italy 370 cases of incitement to racial hatred and discrimination take place plus 482 cases of misinformation through the declarations of political representatives as reported by newspapers, websites and social networks.

Misinformation cases kept recurring throughout 2013
and related to deeply-rooted themes and clichés. 2013 **was the year of "the gypsies gambling on football results",** an evident example of discriminatory misinformation. Indeed, even if there was no link between Roma and those involved in the illegal gambling, the case reinforced the concept of Roma's inborn criminal nature.

In addition, during 2013, Roma groups were repeatedly associated with minors' abduction in our country.
This happened both in relation to events spanning over a long period, like the case of the kidnapping of **Denise Pipitone, in which the "gypsy trail"** was widely exploited during the judicial proceedings by one of the defendants without any decisive evidence, and with regard to more recent events such as the case of the **Schepp sisters, kidnapped in 2011, which led, by the end of September, to searches being performed in various encampments in Sardinia** without this proving in any way helpful for the investigations.

November 2013. Milan.
The municipal administration evicted the large settlement of Via Montefeltro, where more than 700 people resided.
According to volunteering associations, the forced eviction did not comply with the guidelines provided by the SN or with international law, as the Roma were not afforded any alternative accommodation since the local authority could only

make available 200 places for them.

At the end of January 2014, a joint action by Carabinieri, Police and Municipal police permanently closed the encampment in Via Selvanesco, an area on the outskirts of Milan that had been already evacuated several times, but where the Roma - being also the legal owners- continued to find shelter during the nights.

The Municipality of Rome resumed eviction activities in January 2014, targeting a squatting area in the district of Casal Bertone where several tens of Roma, among others, resided. The evictions focused subsequently on the unauthorized settlements, in particular that of Via Belmonte Castello, on the Eastern outskirts of the city, where about 20 Roma families lived, including 40 children aged between 0 and 12 years. Significantly, in both cases the eviction not only failed to comply with the procedures laid down by international regulations or the NS guidelines, but also cut off the social inclusion process the two Roma groups had undertaken in cooperation with volunteering bodies without the support of any public funding or projects.

Regulatory Framework

The National Strategy for Inclusion of Roma, Sinti and Caminanti

In the first weeks of 2012, the National Bureau against Racial Discrimination (UNAR[7]) presented the *National Strategy for Inclusion of Roma, Sinti and Caminanti*.

It is not a legislative provision, but rather a commitment for a wide range of institutional amendments and legislative provisions on the Roma issue. First and foremost, the document is the result of a long consultation with numerous Roma and non-Roma associations. In

7 7 See Bontempelli S., Le buone pratiche dell'abitare, in Rapporto Nazionale sulle buone pratiche di inclusione sociale e lavorativa dei rom in Italia, by the Fondazione Casa della Carità "Angelo Abriani", Bucarest, Fondazione Soros Romania, p. 82-108.

addition, the NS envisages a range of initiatives and changes whose scope and depth cannot be compared to the existing ones. Indeed, they outline an overall logic that involves Roma-related provisions applicable to the entire national territory.

The text is organised in three sections: the first one deals with Roma presence and describes the regulatory framework within which the NS was drafted; the second section describes the objectives and action plans and specifies the courses of action, allocated tasks and financing; the third section is meant as an executive summary.

The institutional and regulatory framework shaping the NS allows detecting, per se, the innovations compared to previous policies. In the very beginning, articles 2 and 3 of the Italian Constitution are mentioned, setting forth the respect for the fundamental rights of individuals and the implementation of the principle of formal and substantive equality among citizens. These constitutional principles are immediately correlated with international case-law, in particular international human rights Law and the principle of non-discrimination that is one of the pillars of such law. The need to develop Roma inclusion policies is related no longer to specific circumstances or security issues; instead, it stems from constitutional and international regulatory principles our Government is required to fulfil. This is the first new element of the NS.

This first innovation is complemented by a redefinition of institutional actors and responsibilities. UNAR is designated as the National Focal Points (NFP) for Roma integration strategies up to 2020. However, from the very beginning the NS emphasizes the need for building up a multilevel *governance* system involving several central institutions – such as the Minister for International Cooperation and Integration; the Minister of Labour and Social Policies; the Minister of Interior; the Minister of Health; the Minister of Education, University and Research; the Minister of Justice – as well as the regional and local authorities, the third sector and Roma representatives. The NS also

provides for the setting up of Regional Offices, i.e. the actual bodies in charge of some of the suggested provisions.

The re-definition of the regulatory framework and the institutional architecture goes hand in hand with the modifications to the principles and general objectives of Roma policies; NS begins by suggesting a sheer change of course with respect to recent years: "It was noted, on the one hand, that there is a need to provide the European Union with the answers that have not been coming so far. On the other hand, we need a NS to guide concrete inclusion activities for the Roma, Sinti and Caminanti over the coming years, so that we can overcome the emergency that has characterised the various initiatives, especially in large urban areas, over the past years" (UNAR, 2012, p. 6). Further on, it reads "it is necessary to overcome the welfare-oriented and/or emergency-focused approach and implement appropriate and dedicated measures so that equality, equal treatment (Article 3 of the Italian Constitution) and the vesting of fundamental rights and fundamental duties (Article 2 of the Italian Constitution) can be achieved fully" (ibid., p. 8).

Overcoming the emergency and welfare-oriented phases in Roma policies along with the reference to constitutional and international law principles are veritable turning points compared to the past.

Social inclusion objectives are explicitly defined in several passages; a quote of the most significant ones follows: "With this strategy, not only do we intend to achieve effective integration/social inclusion of Roma, Sinti and Caminanti communities, but also their ability to fully exercise their fundamental rights as enshrined in the first part of Art. 2 of the Italian Constitution" (ibid., p. 22). Again: "The overall objective of the National Strategy is to promote equal treatment and the economic and social inclusion of RSC communities in our society; ensure lasting and sustainable improvements of their living conditions; achieve effective and permanent empowerment and participation in their own social development; the exercise and

full enjoyment of citizenship rights as guaranteed by the Italian Constitution and international conventions" (ibid., p. 26).

Thus, social inclusion is framed against the background of legal and constitutional principles; also, it becomes part of a model foreseeing the direct involvement of the Roma people. Compared to this overall purpose, it is interesting to note what the NS states after a long analysis of settlement modalities, the geographical distribution of Roma, and their administrative and legal status : "Scholars observe that the legal status of foreigners, both EU and non-EU citizens, stateless and refugees, features per se elements that depart from the juridical status proper of citizens. But even the possession or acquisition of citizenship does not mean equal rights and duties with respect to the other Italian citizens. In Italy, the core issue is the non-recognition of the Roma, Sinti and Caminanti as minorities via national omnibus legislation. As of today, they only acquire *de jure* rights as individuals but not as a "minority" because no legal provisions exist in this respect" (ibid., p. 20).
The attention devoted to the recognition of the legal status is particularly significant. As a matter of fact, while recognizing the multifariousness of the geographical distribution and situations experienced by Roma in our country, the NS traces them all back to the key concept of minority- and therefore to the recommendations of the European and international organizations which advocate the implementation of provisions to support the inclusion of minorities. It is a significant change of perspective compared to the concepts of identity and difference as applied to Roma groups that have inspired previous legislative initiatives: the reference to ethnic or cultural specificities of Roma is made based on instruments and concepts stemming from the international debate. Such instruments and concepts do not tackle the broad scientific and political debate on the ambiguity of the concept of minority and the consequences of the implementation of policies based on such an instrument (see,

among others, Marta:2005).[8]

The issue of the recognition of the legal status of minority was decisively dealt with in September 2013, during a conference held at the Senate, as Senator Palermo presented his bill. On that occasion, Minister Kyenge reiterated the commitment of her Ministry and the entire Government for the recognition of the legal status of Roma and the implementation of the NS.

Having said that, it is interesting to note that the NS proposed to implement, also in Italy, an intervention model reflecting the European general framework. Reference is made to the implementation of policies that are "explicit but not exclusive." This means finding a compound solution between the identification of the specific needs of these groups – including those stemming from the age-old discrimination they suffered – and the need to overcome the exclusion-focused approach that, especially in our country, had facilitated the implementation of "ethnicity-based" policies and solutions.

Another point that shows the marked change of perspective in the NS is the vexed question of the encampments.

Based on the report by the Special Committee for the Protection and Promotion of Human Rights (2011), the NS states that: "Solving the issue of Roma encampments is something of increasing importance for the local authorities as well, since they create a situation of physical isolation that limits the chances for social and economic inclusion of Roma, Sinti and Caminanti communities" (UNAR, 2012, p. 85). The critical evaluation of this intervention model is based on two

8 8- "The present Notice is consistent with this frame of reference (the National Strategy for the inclusion of Roma people), representing a concrete initiative devised to tackle the need to overcome and resolve the issue of emergency settlements."
9- L'Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull'origine etnica (UNAR- National Office against racial discrimination) was set up by legislative decree no. 215 of 9 July 2003, transposing the EC Directive 2000/43; it works within the Department for Equal Opportunities and the Prime Minister's Office. Additional information can be found on the website www.unar.it.
10- It is useful to highlight that the subject of the minority status recognition is associated to the debate related to the Porrajmos, with the explicit request to include the commemoration of this event in the institutional celebrations.

elements: first, the criticism levelled against using "nomadism" as an identity label for all Roma people, which can be found in the very first few pages of the NS : "the old association between these communities and the sole concept of "nomadism" is now obsolete both in linguistic and cultural terms, for it does not properly depict the current situation" (ibid., p . 8). Second, the NS recognizes that: "as noted by many international organizations, the placement of the Roma, Sinti and Caminanti in so-called encampments fosters segregation and prevents any process of integration/social inclusion" (ibid., p. 82). It is interesting to note that this part of the text contains provisions to facilitate the various housing forms for the Roma people and suggested amendments to the national legislation. Such amendments would also be applicable to a large proportion of Italian citizens experiencing housing difficulties, with special reference to public residential housing , social housing, self-recuperation and self-construction. There is therefore a real change of tune in the housing policies for Roma. The interventions based on a differential and exclusivist logic are abandoned and the issue of housing for Roma is now considered as part of the broader issue of housing-related difficulties experienced by the entire population.

As already mentioned, tackling the housing issue is only one of the interventions outlined in the NS; others relate to education, training, and the promotion of access to employment, health, and welfare services. It is not possible to dwell on each of these issues here. However, it is interesting that, among the actions proposed, one always finds the use and enhancement of the "Roma mediator" whose specific background includes both linguistic and cultural skills. From an operational point of view, the mediator's professional profile seems to have been conceived as an instrument to facilitate access to services by Roma users, and to guide public services operators. However, the text does not take account of the broad scientific debate on the risks related to the institutionalization of these "ethnic mediators". Such risks concern both the non-accountability

and ethnicization of welfare services, and the creation of a sort of élite able to manage the relationships and communication channels between Roma users and public institutions.

In conclusion, one can unquestionably argue that the NS represents a cultural and political breaking point and a significant step forward in the development of the relevant measures and tools. The challenge, as confirmed by many statements of several members from European institutions, concerns the practical arrangements for implementing the measures proposed and the ability of all institutional and non-institutional stakeholders to carry on with this new approach to Roma policies in our country.

4. Recommendations

1. Taking steps with regard to the structural causes of poverty and social exclusion affecting Roma, which prevent them from claiming respect for their fundamental rights.
2 Continuing in the dissemination of the principles and guidelines of the National Strategy for the Inclusion of Roma, Sinti and Caminanti, primarily to increase the activities of national bodies and to seek the wider involvement of local administrations and, secondly, to foster projects and affirmative actions against discrimination by conveying the relevant results effectively to the public.
3 Encouraging opportunities for discussion and public debate, in particular by enhancing dialogue with the world of research and social analysis, concerning strategic issues and the local processes initiated with the implementation of the Strategy.
4 Fostering the adoption of an appropriate linguistic approach to tackle issues related to ethnic and language minorities in the

public debate (both in the political and institutional sphere and as regards the media) by overcoming the existing stereotypes and discriminatory expressions.

5 Promoting full respect for the right to adequate housing for the Roma people while overcoming the encampment-based policy.

6 Overcoming and shutting down encampments via integrated intervention programmes which take into account the specific resources and criticalities of the individual beneficiaries.

7 Terminating forced eviction programmes for unauthorized settlements and reconsidering the measures aimed at relocating and securing settlements in compliance with the international legislation in force.

8 Expediting the resolution of the various issues related to the legal status of Roma, in particular for children and for a vast segment of the population who is de facto stateless.

MIGRANTS' RIGHTS

1. Focus on facts

Cristian is a young man born in Rome from Colombian parents. When he came of age, meeting all the requirements envisaged by Law No. 91/1992, he applied for the Italian citizenship. Nevertheless, his request was rejected in January 2013 as he was considered unable to make an oath and therefore prove his conscious willingness to become an Italian citizen - due to his Down syndrome condition.
As a matter of fact, Cristian is fully entitled to apply for the Italian citizenship, especially because with Law No 18/2009, Italy ratified the UN Convention on the rights of persons with disabilities, which requires the signatory States to afford the right to acquire and change nationality to persons with disabilities. However, as is often the case with non-nationals, due to a lack of coordination between the aforementioned laws, a more restrictive interpretation is given top priority - especially whenever the law affording more substantial safeguards results from the ratification of an international convention or a European directive.
Nonetheless many associations (in particular the Italian Association of Down Persons) with a collection of signatures, questions in Parliament and appeals even to the President of the Republic and the Minister of Home Affairs, mobilized against the measure that had rejected Cristian's application for Italian citizenship.
Therefore, Cristian's became a national case, typical under many respects of the paradoxical provisions and discretionary powers set forth in Law No. 91/1992. However, rather than proceeding with a change in the regulation, Cristian was asked to reapply. His new application was then accepted, just to make people believe that the previous refusal depended upon a simple matter of form.
Finally on June 19th, Cristian took the oath and Italian citizenship was bestowed on him.

However, as of today no procedure has been adopted to prevent this from happening again to other youths affected with Down's syndrome born in Italy from non-national parents - in fact, already in 2009 it was estimated that over 10,500 foreign students affected by intellectual disabilities were attending Italian schools.

There are innumerable reasons behind this story. One thing is for sure, it is also the result of a clear gap between the reality of migration and the rules regulating it, which are all too often ambiguous and inconsistent.

Indeed, in the two- year period taken into consideration (2012-2013), there has been a statistical strengthening of the "migratory" component that may claim additional rights as a result of an almost structural presence in our territory – as is the case for the "second generations", the "EU nationals" and the "long-term residents"; however, the legislation has remained focused on a mainly dual (two-fold) integration model: the integration of "host workers" and the public order approach, which too often have ended up fostering the adoption of discriminatory measures by the institutions themselves.

This strenuous defence of the status quo has prevented up to now making any changes to the citizenship law, thus denying greater flexibility to the children born in Italy (the so called ius soli) - numbering at least five hundred thousand. Only a cross-sectoral campaign ("L'Italia sono anch'io" – I am Italy, too) and some judicial decisions led to including Section 33 in Law No. 98/2013 ("Disposizioni urgenti per il rilancio dell'economia/Urgent measures to relaunch economy"), which envisaged a simplification of the citizenship acquisition process for aliens born in Italy.

In particular, it is recognized that the applicants cannot be considered responsible for their parents' failures to fulfil obligations (e.g. in case of a belated inclusion in the official population registers)

or for shortcomings of public administrative bodies such as to prevent meeting the requirement of uninterrupted lawful residence throughout the underage period – which now may be proved via "whatever suitable documents". Furthermore, the Civil Status Offices are obliged (even though it would have been more adequate to involve the Registry Office) to notify the non-national having recently come of age, at the residence address resulting from their official records, of the possibility to apply for the Italian citizenship by the 19th anniversary if all the relevant preconditions are met. Failing such notification, the application may also be submitted after the 19th birthday.

It will be imperative to assess the enforcement of such a regulation in the next few months.

Conversely, there are many cases where the application for Italian citizenship by non-nationals who have been residing in Italy for more than 10 years has been rejected owing to a set of questionable reasons. To name a few: too long a name, causing the "identification not to be certain[1]"; poor command of the Italian language, insufficient to read the oath formula of loyalty to the Republic and compliance with the Constitution and the laws of the State [2]; participation in protests, interpreted by the Ministry of Home Affairs as activities "aimed at purposes not in line with the safety of the Republic" [3]. In other cases, the new Italian citizen was required to change his surname[4], or to have a single surname in violation of the fundamental right to personal identity [5].

Among other things, even today, well before submitting an application for citizenship, the integration process seems full of hindrances also due to some cases of institutional discrimination - primarily in the three following areas: work, housing and welfare.

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1 Regional Administrative Court Piedmont, January 20th 2013

2 Municipality of Vignovo (Vigevano), January 2013

3 Appeal of May 2nd, 2013 promoted by Melting Pot against the denial of the Italian citizenship to an activist of the No Dal Molin movement, with which she had participated in mobilizations and protests which did neither entail any criminal punishment nor notification of social dangerousness.

4 Court of Reggio Emilia, decree of 29 August, 2012

5 Cassation sect. 1 civil, judgement of 18 July 2013

It is not probably by chance that, according to latest annual report by Censis Foundation (Center for Social Studies and Policies) on Italy's social situation, more than half of the population (55.3%) believe that, in allocating council houses and given the same requirements, Italians should be ranked before immigrants, whereas almost half (48.7%) believe that given the poor working conditions, Italians should have priority when seeking employment. In addition, it should be noted that, according to Censis' Report, only 17.2% of Italians show understanding and a friendly approach towards immigrants; 4 Italians out of 5 instead, are mistrustful (60.1%), indifferent (15.8%) and openly hostile (6.9%), whereas two out of three (65.2%) believe Italy is full of immigrants.

There is no doubt that these concerns are related to the economic crisis that is affecting the country. However, this goes to show how deeply rooted the idea is that a migrant is a B class citizen, for whom solidarity can be expressed, but rights cannot be recognized. It is therefore vital that, given this delicate situation, politics strives to envisage an integration model that is more adherent to the new migratory reality, as clearly indicated by the many judicial decisions and various European directives. With this scenario in mind, we decided to examine the situation of migrants' rights focussing on the three areas identified above (work, housing and welfare) and paying special attention to the so called "institutional discrimination".

2. Episodes of racist violence

According to UNAR's data, 679 discrimination cases for ethnical or "racial" reasons were reported in 2012 alone. It is more difficult to estimate racist violence episodes, some of which are described hereinafter:

27 March 2013. Mantoa. Three Nigerian youngsters, one being minor, while travelling on a bus were attacked by an Italian passenger, who, after heavily insulting them with racist comments, injured the hand of the minor with a scalpel. The aggressor was arrested and charged with threats, bodily injuries, possession of objects intended to offend and racist violence.

3 April 2013. Civitavecchia (RM).
A 17-year-old young man kicked and punched a Bengalese itinerant salesman because he refused to hand him in his proceeds of the day. The victim suffered the fracture of the nasal septum and bruises all over the body. In summer 2012, the same aggressor attacked another Bengalese citizen.

7 April 2013. Palermo. Sar Gar, a young Bengalese itinerant salesman, died as a result of stabbing wounds. In the same place where Sar was attacked, some other Bengalese salesmen were equally attacked. The Bengalese community called a march on April 17th2013.

27 April 2013. Pordenone. Six young men, two of them minors, were attacked by two individuals while strolling because of the presence of a black boy in the group who was subsequently slapped and invited to go home. Then the aggressors equally attacked two other boys in the group, kicking and punching them.
Apparently, the attackers belonged to a far right association: "Veneto Fronte Skinheads" and were investigated for bodily injuries, beating and abuse. One of them was even charged with the aggravating

circumstance of the Mancino Law.

18 May 2013. Rome. A Bengalese young man was sent to hospital with broken lips and eyebrow, after being beaten up by two Roman guys aged 19 and 16 respectively who were arrested as a result.

18 June 2013. Afragola (Naples). A young immigrant coming from Burkina Faso was attacked by two young men, suffering fractures and haematomas all over his body.

19 June 2013. Milan. A musician, actor and Brazilian composer, founder of the Mitoka Samba Cultural Association, while strolling was pointed at by a child, as the person who had beaten him the previous day. Despite this being a case of mistaken identity, the musician was attacked and brutally beaten up by a group of people who only stopped when a police car arrived.

8 July 2013. Mortise (PD). A Sudanese political refugee was brutally attacked while cycling back home by three passengers in a car. They firstly pushed him causing him to fall off the bicycle and then they kicked and punched him.

11 July 2013. Alghero. A Senegalese itinerant salesman living in Sassari was attacked by three people, who injured him on his face and abdomen. The arrival of a carabinieri car stopped the brawl.

14 July 2013. Sant'Antioco (CA). A 60-year-old Senegalese itinerant salesman along the Coecuaddus beaches, in Sant'Antioco, was threatened and insulted by 5 students from Cagliari.

15 July 2013. Genoa. An Ecuadorian woman was verbally attacked on a bus by an Italian passenger who did not find a space to sit and urged her to stand up and give her seat to him.

23 July 2013. Ziano. A minor was sent to hospital as a result of an evening fight during which a group of young people from Ziano commented on his colour of skin.

26 August 2013. Naples. The Antirazzista Interetnica Association 3 Febbraio announced that over the last 10 days two Africans had been attacked with weapons, in Naples.
One of them had been injured and still was at the hospital. Their only fault was to have accidentally bumped into two idiots on a scooter in the centre.

30 August 2013. San Benedetto dei Marsi (AQ).
A Moroccan citizen was attacked by a group of young people only because he had asked them not to make too much noise at night time. Another Moroccan citizen had his car burnt. Among the individuals under investigation, there are a minor and a carabiniere.

9 September 2013. Lasize (Verona). Violence was stopped thanks to the presence of a security guard. Four foreign young men, of as many nationalities, were firstly verbally attacked with racial comments by some Italian young people on a Lake Garda boat, and then two of them were heavily beaten up once on ground.

10 September. Naples. A group of boys and girls, one of them being "black" were playing and singing in Piazza Bellini when the "black" boy was bullied by some youngsters. He was verbally abused with discriminatory and racist comments. At that point the group decided to leave, but unfortunately various glass bottles were thrown at them, one of which hit a 24-year old young woman on the head causing a wound that required 5 stiches at the Emergency Unit.

12 September 2013. Rome A 30-year old Indian-American citizen, while strolling with an Italian friend, was punched by a group of youngsters only because she had stopped in the street to look at them dancing in the street. The victim stated she was insulted with racist comments (“Go away Banglaindia”)

30 September 2013. Rome. While on a bus, a Peruvian 20-year old young man who had been living in Rome for 6 years, was insulted with racist comments (“ You Chilean piece of shit”) and beaten up by at least 30 Italians who managed to escape.

October 2013. Pieve di Cento (Bologna). A Guinean musician while cycling was hit by a car that did not stop when it was supposed to. The driver, after the impact, went out of the car hurling an iron bar on him and verbally attacking him with racist comments.

13 December 2013. Padoa. A 16-year old Moroccan guy finished up in hospital as a result of a violent aggression by three school mates because of an altercation triggered by racist insults.

14 December 2013. Cisterna di Latina (Latina). Some thirty people burst into a Pizza-kebab place called ““La bella Istanbul” in Cisterna, attended and managed by Kurdish immigrants destroying some pieces of furniture, hurling abuse at them and threatening the owner, the workers and the regular customers, warning them that if they reported them to the police, they would burn the place down.
The news was unveiled thanks to the courage of one of the owners, who has been a political refugee for more than 10 years and publicly reported the event with an open letter to the mayor of the town, asking for support so as not to be left on their own.
According to the Senza confine association “that was the third time for the ‘gang’ to burst into the shop and according to some residents, the group is responsible for various attacks against non-nationals in the area. On Saturday [December 14th], just before going to the kebab place, the same group was seen slapping two “black” citizens.

December 2013. The Public prosecutor's office in Rome set up an enquiry into the brawls perpetrated on various foreign citizens by some right wing young people.
The charges to be possibly brought include incitement to crime and serious injuries, with the aggravation of racism. According to a preliminary reconstruction of facts almost 50 Bengalese citizens had been attacked from November 2012 , especially in the areas where the Bengalese community is especially thriving such as: Tor Pignattara, Prenestino, Casilino and Pigneto.
They were real raids defined as "bangla tours" targeting Bengalese people because, as one of the attackers said, they are "quiet, do not react and do not report the attackers to the police".
In fact, most of the victims did not report to the police probably because they did not hold the required stay permits. According to the press, the Bangla Tour is a kind of initiation to be accepted in the group.

In 2012-2013, on the one hand racist violence kept occurring in the so called "traditional ways", on the other hand it took on different forms as was clearly highlighted by the Court of Cassation that issued three judgments on the enforcement of the Mancino Law.
In the first one, the Court reinforced the notion that there is the aggravating circumstance of the racial discrimination objective whenever micro-criminality offences perpetrated against non-nationals reveal a derogatory attitude even without explicit verbal racist attacks[6]
In the second, instead, it reaffirmed that the externalisation of a feeling of repugnance or discrimination, objectively perceivable as such by general consensus, is enough to trigger the aggravating circumstance of racial hatred in the commission of an offence, irrespective of the motive triggering the conduct, which can be of a completely different nature. Therefore, the increase in the sentence is triggered if the illicit conduct, such as in case of bodily injuries, is

6 Court of Cassation, II criminal section, judgement no. 16328 of 3 May 2012

intended for ethnic hatred with no need for further investigations. [7].
In the third judgement, the Court decreed that " by criminal association for the purpose of inducing to violence for racist, ethnic and religious reasons an organisation is also meant (….) that managed the blog to a) keep in contact with members, recruit proselytes, even by the dissemination of racist documents and texts, b) plan protests and violent actions, c) gather money contributions for the forum, and d) record lists of people and episodes".
According to the Court of Cassation, in fact, the crime of propaganda and inducement to discrimination and racial hatred, as per Law No. 205/1993 ("Mancino Law"), is a crime consisting in a type of conduct that arises regardless of whether the addressees of the message take up the propaganda or the inducement.
Therefore, social networks and the Internet are certainly suitable enough to disseminate messages that may affect public opinion's ideas and behaviour, thus the web-based propaganda of ideas advocating hatred and racial discrimination clearly amounts to the statutory offence in question.
Similarly, beyond and apart from the physical contact among members belonging to the "classical" criminal association, an "Internet virtual community" is structurally adequate to act as an association if the requirements of stability and organisation in managing web-based communications are met because there is a person in charge of that and the mens rea element of participation in the association is also to be detected because the group members are informed of and share the group's objectives.
Finally, according to the Cassation the fact that the source website was set up abroad and operated from a foreign server was irrelevant as Section 6 of the Criminal code is applicable.
The latter section sets out the State's interest in punishing those who have performed whatever unlawful activities if at least part of such criminal activities took place in the territory of the State, including those pertaining to their programming, devising and guidance[8].

7 Court of Cassation, judgement n.30525 of 15 July 2013.

8 Court of Cassation, judgement no. 33179, deposited on 31 July 2013

3. Legislation and policies

Labour

Despite the economic crisis, 2012 experienced a stabilisation of the migrants' labour demand, with an ensuing growth of 82 thousand people over 2011 and a drop by 151 thousand in the number of Italians employed . However, this general stabilisation is to be attributed to workers employed in the services sector (+6%), whereas a considerable drop has been registered in those employed in the industrial (-2.6%) and building (-3.1%) sectors . Furthermore, an increase has been experienced in unskilled foreign workers (34%, +5% compared to 2008) employed in those jobs where advancement in career is extremely difficult and there is no certainty as to whether they will move to more added value sectors-with a drop in the number of "skilled" labourers (5.9%, -3.3% compared to 2008). However, this is not enough to account for the circumstance that the average monthly net salary of a non-national is EUR 968 (against EUR 973 in 2008) compared to EUR 1.304 of Italian workers performing the same activity. Such a gap has increased over the last 4 years, shifting from EUR 266 to EUR 336, despite section 8 of Law No. 943/1986. This situation is partly due to the discrimination taking place in the recruitment process and to easiness in job termination. There has been an increase in the setting up of immigrants' enterprises (+5.8%), in 81% of the cases in the form of sole traders. According to Unioncamere, the contribution given by immigrant businessmen to business growth in 2012 "proved fundamental to keep the whole Italian entrepreneurial system above the zero growth threshold – as the number of enterprises rose by only 19,911 units in the year".

Access to employment

According to the 2012 UNAR data, no less than 61.7% of discrimination cases in the employment sector due to "racial" or "ethnic" reasons concerned access to employment.

However, these data are to be interpreted with a dual perspective in mind, depending on whether the access is being stonewalled by a public body or a private entity.
In the latter case, the non-national declares that despite the eligible criteria, he/she is being excluded from the selection process only because he/she is a foreigner [9] or due to his/her skin colour or even because of his/her foreign name and surname (and in some cases Italian citizens were concerned too). In some other cases, access to employment in the private sector is forbidden due to the existence of an unjustified clause requiring Italian or EU nationality.
This is the case of recruitment by urban and extra-urban public transportation companies, which are mostly public limited companies despite being controlled by regional and local administrations and having public capital (hence occupational relations are regulated by private law).
The nationality clause is based on Laws No. 628/1952 and 1054/1960, in line with what is envisaged by the Royal Decree No. 148 dated January 8th, 1931 (concerning railway, tramway and internal navigation lines operated in concession and still in force); it may only be derogated from via sector-specific national agreements (which has never been the case so far).
However, besides UNAR's opinion rendered in October 2007 and a judgement of the Court of Milan on July 20th 2009[10], the discriminatory nature of such a clause (regarding calls for the recruitment of drivers, mechanics, administrative personnel etc..) was reiterated by the recent judgement of the Court of Turin, on October 13th 2013 (which partially upheld the appeal of a Congolese refugee excluded by GTT spa in Turin, a public transportation company) and the complaint addressed by ASGI in November 2013 to the European Commission, regarding the call issued by COTRAL spa in Latium for the recruitment of drivers, which was reserved for Italian and EU citizens.

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9 "Social condition and integration, in a gender perspective, of non-national citizens", ISTAT

10 According to this judgement, the 1931 regulation is to be considered implicitly repealed following the regulatory evolution that occurred in particular with art. 2 of the Consolidation Act on immigration and in pursuance of international and European obligations relating to equal treatment.

Another access-to-work discrimination against non-nationals concerned the resolutions by some municipalities in the Lombardy area, banning or limiting the presence on their territory of economic activities involving the sale of kebabs and the like, international telephone centres and money transfer points, allegedly because of their negative impact on traffic and liveability.

The Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato), better known as the Antitrust Authority, published its opinions on September 17th, 2012 stating the aforesaid deliberations were in breach of the national and European regulations on free competition. Similarly, the Government intervened in April 2012 against Lombardy's Law No. 3/2012 - requiring an official certification to prove the adequate level of knowledge of the Italian language, an educational qualification obtained in Italy or the attendance at a vocational course in trading for all foreigners wishing to start or carry on a commercial activity. The Government found that those regulations were discriminatory in nature and violated the constitutional principles of equality and fairness as well as European regulations (and therefore were in contrast with art. 117 of the Constitution); accordingly, it challenged the said law before the Constitutional Court, claiming that the subject fell within the state's law-making competence. The Constitutional Court equally deemed as discriminatory the requirements of seniority of residence and mandatory registration of an enterprise in the regional territory to obtain the authorisation to conduct a taxi, as envisaged by the Molise Region's Law dated November 13th 2012[11].

Another discrimination area in access to work concerns public employment.

Paradoxically this has been the case of long-term foreign residents, although Directive No. 2003/109/EC, transposed in Italy via Legislative Decree No. 3 of January 8th, 2007 (which also transposed the Charter of Nice, namely art. 34 thereof) had introduced, in art. 11, paragraph 1, the equal treatment principle as regards work as an employed or self-employed person, provided this does not imply,

11 Constitutional Court, judgement n.264/2013, lodged on 13 November 2013

even occasionally, the participation in the exercise of public authority and does not pertain to the national interest (as foreseen by Section. 27-quater of Legislative Decree No. 286/1998). Despite the above, there continued to be a generalised failure to enforce Directive No. 109/2003, which has been mostly interpreted restrictively, so that courts had to step in repeatedly[12] and the European Commission launched preliminary infringement proceedings against Italy; the latter led to the enactment of Law No. 97 dated 6 August, 2013 ("Provisions for the compliance of obligations by Italy as part of the EU - 2013 European Law", entered into force on September 4th) which, in section 7, provides that long-term residents are to be afforded access to public sector employment and also opened up the possibility for those employed in the public administration on a limited-time basis to shift to contracts of an unlimited duration. Conversely, the open competitive examinations in the police forces, in the army or to serve on the bench remain intended for Italians only as they "imply the direct or indirect exercise of public authority or pertain to the national interests".

However, the fact of excluding third-country nationals that are not long-term residents from public service is still an open issue, ridden with contradictions and ambiguity. And this happens despite the ILO Convention No. 143/1957 (which at art.10 reinforces the notion of the "Equal opportunities and treatment in terms of employment and profession", as also referred to in Leg. Decree 286/1998), the ordinance of the Constitutional Court No. 139/2011, the Leg. Decree 215/2003 (forbidding ethnic and racial discrimination in "access to employment and work - whether on an employed or self-employed basis - including recruitment criteria and hiring conditions"), the two UNAR's opinions (July 31st 2010 and June 6th 2011), the various anti-discriminatory civil actions brought by associations and the measures adopted by judicial authorities - which led, in various cases, to rearrange the admission terms for open competitive examinations.

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12 Among the most recent cases: Court of Milan, precautionary order pursuant to art.700 c.p.c. of 29 August 2013, regarding the State exam to be qualified to work as a labour consultant.

Even in this case, in the aforementioned two-year period, there have been various judgements which recognised the discriminatory behaviour adopted during the examinations intended to recruit professional nurses[13], staff for merely technical[14] health care professions and positions, French- and Spanish-speaking legislation experts[15], environmental operators[16], administrative accountants[17], or for the selection of personnel belonging to the "less-advantaged categories"[18]

Another remarkable judgement was issued by the Court of Appeal in Florence, on May 11th 2012, which established that third-country nationals may compete for employment in the public sector where completion of mandatory education periods is required. Despite the expectations, the decree published in the Official Journal of December 12th, 2012 did not envisage any regulation on third-country nationals' access to public service jobs. The topic was taken up subsequently during the debate for the approval of the "2013 European Law". However, the proposal put forward by some MPs was only carried in the form of a commitment by the government to "consider this option".

It will be important to assess the correct enforcement of Directive 2011/98/EU of December 13th 2011 (whose deadline for transposition expired on December 25th 2013) which foresees a single application procedure to issue a single permit for third-country nationals staying and working in the territory of a Member State as well as a set of rights for those third country workers who are legally residing in a Member State, namely in the following areas (Chapter III art. 12): a) Working conditions with compensation and dismissal including health & safety on the workplace; b) Education and vocational training; c) Equivalence of diplomas and professional qualifications; d) Tax benefits; e) Access to goods and services for the public

13 Court of Trieste, 17 March 2012; Court of Perugia, 8 June 2012; Court of Milan, 30 October 2012 concerning the hospital of the province of Lecco and the health care unit of the Marche region; Court of Trieste, 4 July 2013

14 Court of Reggio Emilia, 19 December 2012

15 Court of Rome, 20 December 2012

16 Court of Florence, 26 February, 2013

17 Court of Como, 15 May 2013

18 Court of Florence, 30 January 2012 (concerning a call by the Ministry of Cultural Assets)

including access to housing.
The directive contains, however, some possibilities for Member States to derogate from or limit the scope of the equal treatment principle at the transposition stage.
Limitations still remain as far as the access of foreigners to freelance activities is concerned.

Housing

Public housing

According to Title V of the Constitution, regions have exclusive competence over public housing, therefore they make laws and establish the criteria the municipalities will use in issuing the calls where the assessment criteria for the applications are set out.
In this case, the possible discrimination falls within the "institutional discrimination" category. In this regard, it is worth noting that section 40, paragraph 6 of the Consolidation Act on immigration limits the chances for an immigrant to have access to Popular Residential Housing (ERP), the social renting agencies, and easy-term loans for the purchase and reclaiming of buildings as this is only allowed to long-term residents or the holders of at least two-year stay permits and only if they work legally whether as employees or on a self-employed basis. If these requirements are met, all the other conditions imposed on all the applicants being equal, a non-national is to be treated like an Italian national with the same score.
However, for various years now, some Regions despite the aforementioned requirements have been including further time-related criteria which turn out to be real hindrances for the non-nationals - to mention but a few: the 5 year-residence requirement or having worked for 5 years in the regional territory to participate in the call for tenders or to be granted a council house. This occurred even though some previous judicial decisions had defined this criterion as being "unrelated to the rationale of the ERP legislation" [19] and to the equality and reasonableness principles recalled by the constitutional Court as also related to the social right to housing[20]. Indeed, in some cases the judge seized with an action for lifting the

discriminatory measures went as far as ordering not only that the call should be amended, but that the allocations already made on the basis of the discriminatory measures should be revoked [21].

The European Commission, on May 20th 2012, had actually to start an infringement proceeding against the regional legislation of Veneto on ERP, as the additional requirement imposed on non-EU nationals was considered to violate Directive 109/2003/EC.

Also the Umbria region's Law No. 15 of October 5th, 2012 envisaged, in Sections 24 and 34, as a general requirement having resided or worked in the region for a 5 year period - not only to benefit from contributions but, in particular, for the allocation of ERS (Social Residential Housing) dwellings. The Prime Minister's Office, with deliberation of December 7th, 2012, challenged the law before the Constitutional Court, considering that the regional legislator, in foreseeing the seniority requirement in question, introduced a form of indirect discrimination against the nationals of other EU Member States, Italian nationals residing abroad, and third-country nationals that were long-term residents in Umbria, protected in their access to ERP houses as a result of art. 11 of Directive 109/2003 and art. 40, paragraph 6 of the Consolidation Act on immigration.

There have been cases of discrimination at a municipal level as well. This is the case of the municipality of Ghedi (Brescia) which allocated, by means of a call exclusively intended for Italian citizens, municipal "capped maximum rent" or "fair rent" ("equo canone") houses. The Court of Brescia, on June 12th 2012, reiterated that "the requirement of the Italian citizenship to participate in the aforesaid call is an unreasonable treatment inequality that is applied to individuals who are all equally in need and has therefore a discriminatory nature according to section 43 of the Consolidation Act, as it is totally irrelevant for the above purposes that the houses cannot be qualified as public or subsidized housing" [16].

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16 19 TAR ??? 29 September 2004

20 Constitutional Court, judgments n 10/2011 and 61/2011

21 Court of Brescia, 17 October 2011

22 In this case, the judge rejected even the Municipality's interpretation according to which the houses referred to in the aforementioned tender would not fall within the category of subsidised houses but would belong to the assets to be freely managed; being subject to the fair rent regime, their allocation becomes, broadly speaking, subsidised.

Housing subsidies

A further institutional discrimination within the housing sector concerns the "leasing fund" (or "tenancy funds")[17]. For instance, the Court of Trieste, on November 24th 2012, deemed as discriminatory and contrary to the free movement of individuals the 10-year residence requirement to access the "leasing fund" as envisaged by the regional legislation of Friuli Venezia Giulia (Regional Law 18/2009) and applied by the Municipality of Trieste in the call put out in April 2010 with a view to assigning some subsidies in favour of tenancies. The judge also ordered the payment of damages to the 14 Romanian families who had been excluded from the list, acknowledging that the residence requirement was an indirect or occult discrimination vis-à-vis the EU regulations. Hence, the Region issued a new law (16/2011), replacing the aforementioned ten-year residence requirement by a 2-year one, which applies to Italian nationals, nationals from other EU Member States and non-EU nationals protected by the EU law (long-term residents and refugees), together with a five-year stay requirement in Italy for other non-EU nationals.

The Italian government similarly challenged such a regulation before the Constitutional Court, but the latter, during the hearing of November 6th, 2012, declared the claim inadmissible as it was submitted belatedly. Another case regarded the regulation on the "house subsidy" in force in the province of Bolzano, which excluded the long-term residents. On April 26th 2012, the European Court of Justice deemed that regulation as incompatible with the EU law, thus highlighting the illegitimacy of the national regulations on the "leasing fund".

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17 [23] The leasing fund is a tool providing monetary support to help in the payment of rental fees. Those receiving ERP houses are not entitled to this benefit. The leasing fund was established in 1998, by a State Law (Law No n. 431/98, art. 11) and every year the Region approves a resolution defining the eligibility requirements for the benefit and the opening terms of the calls the Municipalities are to issue on the basis of the needs they establish. Citizens wishing to be afforded such benefits are to address the application to the Municipality they belong to.

Welfare

Section 41 of the C.A. on immigration equates foreigners to Italians as far as welfare benefits and services are concerned.
However, it may also be the case that the non-national is excluded or limited in the fruition of health care, welfare and economic benefits,; as recalled on several occasions by the Constitutional Court, this is not deemed as a discriminatory act only if the exclusion is justified according to reasonableness criteria.
Indeed, the Constitutional Court in the past intervened regarding access by non-nationals to the services guaranteed in case of disabilities, declaring section 80, paragraph 19 of Law No. 388/2000 illegitimate as it makes such access conditional upon holding a stay permit (as from 2007 called EC long-term stay permit); nevertheless, even in this two-year-period, different views were issued by the courts.
Third-country nationals who were not long-term residents and were affected by disabilities were afforded the right to a monthly disability benefit[18], mobility allowance[19] , civil disability pension[20] and attendance allowance[21]. Only after these judicial actions did INPS (the National Social Security Agency) finally acknowledge, on September 4th 2013, with a message addressed to the central Directorate of assistance and civil disability and the Central pensions Directorate, that "in order to comply with what is established by the Constitutional Court, the mobility allowance, the disability pension, the monthly disability benefit and the monthly attendance allowance, subject to verification of compliance with additional legal requirements (health conditions, residence in Italy etc.), will have to be granted to "all foreigners lawfully staying in the country even if they do not hold the EC long-term stay permit, on the sole condition that they hold a stay permit of at least one year duration as

18 [24] Court of Appeal of Perugia, 22 June 2012; Court of Cassation, 27 June 2012, 22 January 2013 (which considered the Calabrian regional law No .40/2011 unlawful, in the specific section where benefits offered to non self-sufficient people were limited to long-term residents) and 19 March 2013.

19 [25] Constitutional Court , judgement n.40/2013. Court of Cassation, order 26830 published on 26 November 2013, rejecting INPS appeal which, despite acknowledging the previous act of the Constitutional Court, kept denying such a right to short term non-EU immigrants.

20 [26] Constitutional Court, judgement n.40/2013

21 [27] Court of Pavia, order of 11 July 2013

per section 4 of the C.A. on immigration"[22]. With the same message, INPS informed that its website had been updated.

Various judicial decisions have addressed cases where there has been a failure in recognizing other welfare benefits to foreigners (not necessarily disabled) such as the welfare allowance[23], the health care allowance[24] or the "former" purchase credit card [25]". In the latter case, as a result of the threat by the European Commission to initiate an infringement procedure before the European Court of Justice, Government issued section 60 of L.D No. 5 of February 9th, 2012, converted into Law No. 35/2012, which introduced a new purchase credit card aptly named "experimental purchase credit card" also intended for EU citizens and their family members, long-term residents, refugees and anyone entitled to subsidiary protection, but limited to municipalities with more than 250,000 inhabitants.

This testing was launched in July 2013. However, the geographical limitation of the new card was considered by the European Commission as insufficient to overcome the discriminatory provisions in breach of the EU law as laid down in Law No 133/2008; therefore the Commission launched a formal procedure of infringement (No. 2013/4009). Following this procedure, Government included, in the 2014 Stability Law, a further extension of this new card to the whole national territory.

Another principle that has given rise to a lot of ambiguity is the one whereby the access to welfare measures is made conditional upon a prolonged residence, usually of at least 5 years. Again, as was the case in the past, the Constitutional Court found that there was no reasonable relationship between the period of residence and the situations of need and distress, affecting directly a person as such, which make up the prerequisites to benefit from the allowances aimed at coping with the aforementioned situations[26]. Furthermore,

22 [28] INPS message n.13983 of 4 September 2013

23 [29] Court of Brindisi, 26 March 2012. A recent judgement by the Court of Bologna (30 September 2013) acknowledged the family allowance to over 65 Moroccan long-term residents, according to what is envisaged by the EC – Kingdom of Morocco Agreement (ratified with Law No. 302/1999).

24 [30] Constitutional Court, judgement n.172/2013 of 11 July 2013, with which an article of Law No 15/2010 of the autonomous province of Trento, on the protection of non self-sufficient people and their families was declared constitutionally unlawful.

25 [31] On the exclusion of nationals from other EU member states regarding the "former" purchase credit card, introduced by Law No 133/2008, see Court of Trieste, 19 September 2012 (in this case the Ministry of Economy, INPS and the Friuli Venezia Giulia Region were involved).

26 [32] Constitutional Court, judgement n.40/2011

the Constitutional Court clarified that, once ascertained the right to reside in the national territory, "foreigners may not be discriminated against by establishing, towards them, particular limitations on enjoying the fundamental rights of individuals that are otherwise afforded to nationals [27]." In line with the above, the Constitutional Court, with judgment No. 2/2013 of January 14, 2013, rejected the law of the autonomous province of Bolzano on the social integration of foreigners, according to which welfare and study subsidies were dependent upon seniority of residence. Conversely, with judgement No. 133/2013 of June 3rd, 2013, the Court held the requirement of "at least five-year" residence in the region to be unlawful as foreseen by Law No. 8/2011 of the Autonomous region of Trentino-Alto Adige/Südtirol in respect of the regional family allowance for children and persons treated as dependent children.

The case of the allowance granted by INPS to long-term residents with large families

There has been a long dispute regarding the INPS allowance granted to low-income large families (households with at least three children)[28]. This is an annual allowance granted by the municipalities to families meeting the abovementioned requirements, which is paid by INPS according to section 65 of Law No. 445/1998 (including subsequent amendments and implementing regulations). Whereas this allowance was considered by many as being part of the allowances afforded to long-term residents according to art. 11, paragraph 4 of the European Directive 109/2003 (transposed via L.D. No 3/2007), INPS kept denying it, maintaining that art. 65 does afford the allowance exclusively to "Italian resident citizens with three or more children under 18".

Various orders and judgements[29] were issued in 2012-2013 to

27 [33] Constitutional Court, judgement n.61/2011

28 [34] Art.5, Law No 448/98

29 [35] Court of Gorizia, 3 May 2012; Court of Milan, 16 July 2012 (INPS lodged an appeal which was rejected by the Milan Court of Appeal, with a judgement of 24 August 2012); Court of Padova, 26 July 2012; Court of Tortona, 22 September 2012; Court of Genoa, 24 September 2012; Court of Verona, 17 October 2012; Court of Venice, 24 January 2013; Court of Bergamo, 24 January 2013; Court of Tortona, 23 February 2013; Court of Bergamo, 15 March 2013; Court of Pescara, 29 March 2013; Court of Alessandria, 11 April 2013; Court of Alessandria, 12 April 2013; Court of Busto Arsizio, 29 April 2013; Court of Alessandria, 2 May 2013 (with three different orders); Court of Tortona, 3 May 2013; Court of Gorizia, 17 May 2013. But see also the judgement of the European Court of Justice, in *Kamberaj case*. *Social Housing Institute of the Autonomous Province of Bolzano/ Bozen*, 24 April 2012 (Case-571/10)

establish a correct interpretation which, besides condemning a score of municipalities that had denied such an allowance, pinpointed INPS' discriminatory stance.

This situation, which is paradoxical and had led the European Commission to start an infringement procedure , came to an end in September 2013, when INPS finally agreed to grant the allowance also to long-term residents. On the other hand, on September 4th, 2013 Law 97/3013 came into force, this being the so-called "2013 European law ", which includes a specific equal treatment clause in favour of long-term residents as regards welfare benefits. However, there are outstanding issues. Firstly, INPS delayed the enactment of a specific circular letter in that regard and has yet to update its website. Secondly, the application to benefit from the allowance regarding the year 2013 may be submitted until January 31st, 2014, so that some municipalities and INPS believe that the allowance should be paid to those eligible for it only for the second semester of 2013 as the financial coverage mentioned in law No. 97/2013 was scheduled to begin as of July 1st. Once again several judicial decisions were required to clarify that the allowance has to be paid for the first semester of 2013[30] as well.

30 [36] Court of Varese, 11 September 2013; Court of Cuneo, 23 September 2013; Court of Verona, 10 October 2013 (with three judgements); Court of Rome, 21 October 2013; Court of Turin, 21 October 2013.

4. Recommendations

Reforming Law No. 91/1992 on nationality by paying increased attention to the jus soli and people with intellectual disabilities.

Amending Section 61 of the Criminal Code so that the racist motivation is included among the "aggravating circumstances".

Adopting a new Consolidated Law on immigration to take account of the new Italian situation and fully transpose the European directives on the rights of migrants, and in particular Directives 2000/43/EC, 2000/78/EC, 2003/109/EC, 2006 /123/EC, 2011/98/EU

Transferring the administrative functions relating to applications for issuance, renewal and transformation of residence permits to the Municipalities

Ensuring access of foreigners to employment in the public sector

Ensuring access of foreigners to the professions

Promoting specific training schemes and a system for the certification of foreign workers' skills

Promoting the recognition of educational and professional qualifications acquired at training institutions in Europe and beyond, in order to facilitate access to the labour market

Fostering the regularisation of undeclared work

Introducing the entry permit "to seek employment"

Repealing the requirement of five- or ten-year residence in a region to be granted access to the national fund for the support of leases

Repealing the ten-year residence requirement to be granted a welfare allowance and restrictions still in force as far as access is concerned

Repealing the restrictions on access to the allowance for large families that exclude all third-country nationals and whoever is not a long-term resident.

Extending the duration of residence permits

Affording all residing non-nationals the right to vote and be elected with regard to the elections in municipalities and metropolitan cities

Using public funding for integration policies rather than for countering illegal migration, where the relevant objectives have not been achieved

REFUGEES, DISPLACED PERSONS AND ASYLUM SEEKERS
By Valentina Brinis

Focus on Facts

North African Emergency

The substantial inflow of individuals from North Africa in the early months of 2011 led the Italian government to declare the state of emergency, which lasted until 31 December 2012. The relevant milestones are described below.

On **5 April 2011**

the Council of Ministers (by way of *Temporary protection measures for aliens coming from North African countries*) determined what "temporary protection measures shall be ensured in the State's territory with regard to citizens from North African countries that entered the national territory from 1 January 2011 to the midnight of 5 April 2011." This order concerned about twenty-five thousand people, mostly of Tunisian nationality.

7 April 2011.

The "serious situation" that arose in the Maghreb area, in particular in the territory of the Republic of Libya, caused the migration of a substantial number of Libyan citizens "thus creating a humanitarian emergency of considerable magnitude."

This was the statement made by the Italian government. "It was found accordingly necessary to implement measures of an extraordinary

and urgent nature in order to set up suitable facilities to provide the necessary humanitarian assistance in North African territories whilst effectively countering, at the same time, illegal immigration into the national territory."

12-13 April 2011.

The so-called *Migrants Reception Plan* was drawn up; this is the official document whereby the national civil protection system set out its operational response as part of the emergency. The plan was to be managed by the Civil Protection Service which had set itself three objectives: affording initial reception; ensuring fair distribution over the Italian territory; and providing assistance. Franco Gabrielli, the then director of Civil Protection, appointed a Commissioner-in-charge to tackle the state of emergency. The latter, in turn, set up a Coordination Committee for the North African Emergency including the Ministry of the Interior, Regions, Provinces and Municipalities. The Committee was joined subsequently by the Ministry of Labour and Welfare Policies, which appointed, on 18 May 2011, Mr. Natale Forlani (Director General of the Ministry of Labour and Welfare Policies) as national manager for unaccompanied children.

Based on the *Reception Plan*, distribution of migrants in Italy would have to be determined according to the relative percentage of resident population in each Region or autonomous Province compared to the total national resident population – this being the "d" factor as per the terminology adopted in Civil Protection documents.

The reception measures for adults were laid down by the Civil Protection Department and coordinated at regional level by the respective managers as nominated by the Regions and appointed by the Commissioner; such managers were in charge of identifying reception facilities, coordinating the influx of individuals and entering into agreements with the managing entities. The innovative feature of this project consists in the fact that, along with typical

sheltering and reception facilities, agreements were also stipulated with hotels, farmhouse accommodations and B&Bs. The per capita cost was set at 46 Euro.

As for the reception of minors, the latter was regulated via the Prime Minister's Office Order 3933 of 13 April; accordingly, "until 31 December 2011, the Minister of Labour and Welfare Policies shall be authorized to provide contributions to the Municipalities that afforded reception to unaccompanied foreign children. The Municipalities shall submit supporting documents as proof of the expenses incurred in order to be granted the said contributions."

By the above order, the Government allocated 30 million Euro to the Civil Protection Fund, as down payment on the sum required in order to overcome the emergency situation, on the basis of the apportionment made available by the Ministry of Economy and Finance; the moneys would be managed in the first place by the Civil Protection Department according to standard accounting rules.

The North African Emergency was extended on 6 October 2011 to 31 December 2012 on account "of the exceptional influx of citizens from North Africa" as per the decree postponing the relevant deadline. By the Prime Minister's Decree of 15 May 2012 the residence permits on humanitarian grounds granted to North African citizens were also extended.

26 October 2012.

The Ministry of the Interior published the *Guidelines for overcoming the North African Emergency.* "The suspended status of the aliens after reception, as well as causing tensions in the areas where they are staying, prevents any initiative from being taken because of the increased time required for sorting out their positions."

Thus, the Ministry determined via the above document that the best way to expedite the procedures for sorting out the legal status in

Italy of individuals coming from those areas was the one outlined by *Vestanet C3*.

This consists in a procedure whereby the alien applies to the competent territorial Committee for reconsideration of its previous decision by re-submitting the C3 form, whilst waiving the right to be heard anew, so as to be granted a residence permit on humanitarian grounds.

On **31 December 2012**

the North African Emergency (ENA) was over; the relevant measures concerned, according to the press release by the Ministry of the Interior issued on 2 January 2013, "both the 28,313 aliens that came from Tunisia in 2011 following the political crisis in that country and the 28,431 aliens that came from Libya following the well-known war events in addition to 6,000 aliens from the Eastern Mediterranean regions." Furthermore, Territorial Committees had to assess over 39,000 asylum applications.

The said press release clarified additionally that "conclusion of the extraordinary interventions, which applies according to Parliament's intention not only to this specific state of emergency but to all the emergency situations existing as of 31 December 2012, will not entail the relinquishment of those individuals that are still in need of protection. This applies especially to those individuals that have yet to finalise the respective proceedings and those that are awaiting the issuance of a humanitarian permit having 1-year duration, which would allow them to work."

As of 31 December 2012, there were less than 18,000 individuals in the centres managed according to the ENA decision; those individuals were expected to leave the centres in the two subsequent months. During the latter period, i.e. in the months of January and February 2013, management was shifted to the *Prefetti* who had undertaken to develop integration programmes by way of the

European funds for those individuals that were still present in the centres (see the circular letter by the Ministry of the Interior dated 28 February 2013). The latter included family groups and vulnerable persons who, in case additional difficulties were encountered, would be handled by way of the SPRAR (Protection System for Asylum Seekers and Refugees). In the circular letter of the Ministry of the Interior dated 18 February 2013 the deadline for migrants to leave the ENA facilities was set at 28 February 2013. That circular letter also provided that to achieve the said objective "granting of an allowance amounting to 500 Euro" was not to be ruled out. Which actually was the case as from 1 March 2013.

"Dublin Regulation" (2000/343)

On 15 February 2013, an asylum seeker from Ivory Coast set fire to himself at Fiumicino Airport in order not to be deported. The man had applied for asylum in Italy and the application had been rejected by the Committee, which rejection he had not challenged. He had then moved to the Netherlands, where he was arrested by the police and, based on the "Dublin Regulation" (2003/343), he had been sent back to the country where he had applied for asylum, i.e. Italy. Indeed, the latter Regulation provides that an asylum seeker should complete the procedure for being granted asylum in the EU country where he had first been identified. In the case of the 19-year-old man from Ivory Coast, the situation was more complex because the procedure in question had not been completed so that he had actually become an alien illegally staying in Italy. This is why the Police Headquarters of Rome urged him to appear before the Border Police Officers in Fiumicino in order to be deported. Unable to stand the anguish of such a deportation, he decided to set fire to himself; luckily he did not die.

This is perhaps the most extreme manifestation of the tragedy experienced by the individuals addressed by the measure at issue. The underlying reason is that there is a conflict between the

subjective status of feeling a refugee and the opposite view held by the Territorial Committee that is competent for evaluating asylum applications. Furthermore, if the appeal lodged against such rejection is also unsuccessful, the applicant is deprived of whatever protection and would not be even entitled – based on the Regulation – to lodge a new asylum application in another country. Many migrants seek protection in Europe and encounter barriers of all kinds: from the impossibility to choose the country where to lodge an asylum application to the difficulties in obtaining adequate reception.

In February 2012, the "Awning of the Afghans" was set up in Rome. This is a reception centre in the Tor Marancia neighbourhood accommodating 150 individuals from Afghanistan who lived beforehand in the square before the Ostiense railway station under very precarious conditions. The project was conceived by the President of the competent Municipal District Council, Andrea Catarci, by the Municipality of Rome and by some of the associations that have been dealing with this issue for several years.

The facility known as the "Awning of the Afghans" hosts also undocumented individuals. The latter include two groups: those "in transit" and "the Dublin people". The former are those who consider themselves in transit, i.e. those who do not intend to remain in Italy as they are crossing Italy to get to Northern European countries. They stop at the "awning" and then leave again committing themselves to human traffickers. The latter group includes both those that have been pushed back to Italy because Italy is competent for evaluating their asylum applications and those that have to be transferred from Italy to another EU country where identification has already taken place and which has been determined by the Dublin Unit to be competent for the relevant asylum application. The awning provides reception for those belonging to the latter group. The process is usually the same: an application is lodged in a EU country; the EU country rejects the application; the appeal against the negative decision is not granted; the applicant is deported. To avoid repatriation, the individual then flees the country. He or she arrives in Italy and lodges

a new asylum application, after which he or she is granted reception until the police realize the applicant has already gone through this process and report his or her presence to the Dublin Unit. In order for Italy's competence to be established, at least twelve months must elapse from the applicant's illegal entrance in the Italian territory. Since the "Dublin people" may not be hosted in a reception centre, they try and find other mechanisms to avoid living on the streets. One of these mechanisms is provided by accommodation under the "awning". On 18 February 2013, the Dublin II Regulation celebrated its 10th anniversary. The huge amount of rules making it up has translated over the past years into a steeplechase that ultimately reduces the freedom of movement in the Schengen area of the individuals coming from non-European countries. Nevertheless, migrants try by all means to get to the European country where they wish to live, fleeing the country where they do not feel protected. In many cases, the choice of the country is dictated by the need to join their families who already live in a European country. The Dublin II Regulation failed to take account of this requirement, so that one's next of kin had to live ultimately in different countries away from their countries of origin. This enhances migrants' feeling of being insecure, as they would prefer to apply for asylum where there is a higher number of fellow nationals, the likelihood of integration is higher, and a family network is already available.

The "point of no return" in a migrant's project is reached unquestionably when he or he is fingerprinted. This is shown by the protestations staged on 20 July 2013 in Lampedusa by about 200 individuals, most of them Eritrean nationals, who marched down the streets in the island shouting "no to fingerprints". That is to say, they did not wish a trace of their passage to be retained, not only in Lampedusa, but more generally in Italy. The demonstrators were requesting not to be subjected to fingerprinting in order to be able to leave Italy and reach other States, where the protection afforded to asylum seekers and refugees is more advanced: the reception provided is not limited, like in Italy, to providing food and shelter, as

health care and legal assistance services are available and support is provided in finding housing and employment. Those States consider providing assistance to individuals fleeing from areas where war or civil war is raging as a duty, because the reason for them to leave their countries is out of the question: they had to leave in order to save their lives.

The protestations by the Eritreans in Lampedusa were successful, because they were not identified. Still, it may not always be possible for them to escape identification procedures in their long journey towards the destinations they aim for.

Domicile and Residence

On 24 October 2012, the European Commission brought infringement proceedings against Italy (No. 2012/2189) because of the alleged violation of obligations imposed by EU law as per the procedure, reception conditions and qualification directives. The violations consist, in particular, in the poor accommodation capability of reception centres for asylum seekers and the difficulties in accessing those centres. But there is more to this. The formal notice of infringement also emphasizes the complex procedural machinery to lodge asylum applications. According to the Commission, some of the procedural steps would affect the recognition of the rights envisaged for the beneficiaries of international protection and asylum seekers, such as public health care, welfare and employment.

Not always is an asylum application accepted immediately by the police headquarters. This may occur because the applicant is faced with bureaucratic, highly discretional procedures that prevent him or her from completing the application. One of these procedures has to do, for instance, with the maximum number of daily applications the police headquarters decide to handle, which causes useless queues and prevents obtaining whatever results in most of the cases. Another obstacle has to do with the lack of a domicile,

which proves indispensable in order to finalise the application even though it is not one of the fundamental preconditions to lodge such applications. This is provided for by Section 2 of Presidential decree No. 303 of 16 September 2004, which reads as follows: "(Handling the application for recognition of refugee status) The Border Police office receiving the asylum application takes note of the personal details communicated by the applicant, invites him or her to choose domicile and, in the absence of any impediments, authorizes him or her to visit the geographically competent police headquarters to which the application is transmitted, also via IT networks, after filling out the ad-hoc forms. Where no border police office is present in the place of entrance into the national territory, the geographically competent police headquarters shall discharge the relevant tasks. The procedure shall be attended, where possible, by an interpreter speaking the applicant's language. If the applicant is a woman, female staff shall be attending."

Thus, the applicant is invited to visit the police headquarters being equipped with a domicile, but this is not indispensable to lodge the application. In yet other cases, it is not enough for the domicile to be taken at a legal counsel, as the Immigration Office of the police headquarters requires also a house renting contract or a declaration of accommodation provided to be submitted. This happened in Florence where an applicant of Syrian nationality lodged the asylum application and was invited to come back in one month holding proof not only of the housing (i.e. that he was the assignee of a house) but also of his income. This was clearly an abuse committed by the competent office, which, having been notified of this, declared they had mistaken the asylum application procedure by that envisaged to issue other types of residence permit. Still, there is little doubt that this mistake had caused considerable inconvenience to all the individuals that had been trying to finalise their applications in that period.

Another obstacle that is often encountered by asylum seekers in police headquarters relates to the lack of mediators. There are

actually mediators from the most frequent nationalities, but they are not enough to handle all the applications. It is still the police headquarters in Florence where the applicant is required not only to fulfil the said housing obligations, but also to appear with a mediator or, at least, with an interpreter if he or she has not sufficient command of the Italian language.

Legislation and Policies

In 2012, 17,350 individuals lodged asylum applications in Italy. Their numbers were halved compared to the preceding year when, in the midst of what had been termed an emergency (the North African Emergency, ENA), 34,000 international protection applications had been lodged. One of the reasons for this drop is certainly related to the poor quality of the reception processes made available in Italy. This would point to the circumstance that other destinations are preferred where it is easier for asylum seekers to complete their migration projects and be afforded the tools required to carry on their lives autonomously.

The Territorial Committees, i.e. the bodes in charge of evaluating asylum applications, had to handle 27,290 cases that were not all of them related to individuals that had applied for asylum in 2012. Many of them dated back to the preceding year. 22,030 applications were granted including 15,485 for humanitarian protection, 4,495 for subsidiary protection, and 2,050 for recognition of refugee status. Of the 1,235 appeals lodged following rejection or because the Committee's evaluation did not correspond to the case made by applicant, 790, i.e. more than half of them, were upheld.

In 2013, 25,838 applications were evaluated, of which 7,043 were rejected and 16,296 granted. More specifically, the latter included

3,144 applications for recognition of refugee status, 5,654 for subsidiary protection, and 7,458 for humanitarian protection.

In the early months of 2014, there were 18,884 applications yet to be evaluated from preceding years. Some of these applications date back to 2008 and are not that recent. The problem is certainly related to the circumstance that Territorial Committees are not enough compared to the number of applications and in spite of the increased number of such Committees. A solution devised consists in asking the applicant whether he or she wishes to be heard individually rather than by the whole panel of Committee members. Under Section 12 of legislative decree No. 25/2008, the personal interview of asylum applicants with the Committee should take place under suitable circumstances so that the applicant can exhaustively describe his or her need for protection. The applicant has the right to be heard in the presence of all the members of the Committee. However, if there is a reasoned request to do so, the Italian legislation allows gender-sensitive interviews to be held as well as individualized interviews in the presence of one single member. This procedure may only be implemented at the applicant's explicit request, who may resort to it if he or she finds it difficult to narrate his or her story before a group of listeners rather than to a single person. One of the circumstances where this is usually the case is when the applicant is a woman that has declared to have been the victim of rape, and therefore prefers to speak to a single person. However, this procedure has actually become a practice the Committee proposes to the applicant because of organizational shortcomings. The risk here is that the minutes of the hearing are drawn up summarily rather than in full, so that some passages in the applicant's story may be left out whilst they might prove fundamental with a view to the final assessment.

As said, the above procedure has turned into a mechanism to cope with the slow processing pace of Territorial Committees. In the 2012 to 2013 period the consequences – all of them negative – of this

approach came to light. Still, one should acknowledge in the first place that the substantial number of protection applications in 2011 and 2012 did slow down the handling of casework by Territorial Committees, who had to tackle a workload they were not ready and organized to deal with. During the North African Emergency period, the best solution would have been to grant collectively a stay permit on humanitarian grounds - which actually was the approach endorsed by the Ministry of the Interior via the "Guidelines for overcoming the North African Emergency" issued in the final stages of the ENA - whilst those who did not accept that kind of protection could have been heard by the Committees. Only in this way could one have managed to handle the many incoming applications expeditiously.

The impact of the above situation is especially to be felt in the reception system for asylum seekers, which is regulated by legislative decree No. 140/2005 transposing Directive 2003/9/EC – laying down minimum standards for the reception of asylum seekers in Member States. Under Article 13(2) of the Directive, "Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence." Under Article 5(2), [NOTE: REFERENCE WOULD APPEAR TO BE WRONG] "If it is found that an asylum seeker who has been granted the stay permit does not have sufficient means to ensure a standard of living adequate for his and his family members' health and subsistence, he shall be entitled to benefit from reception measures together with his family members."

The Italian reception system envisages different centres depending on the stage in the reception process. They are listed here in chronological order following arrival of a displaced person in Italy: CPSA (First aid and reception centres – Centri di primo soccorso e accoglienza); CDA (Reception centres – Centri di accoglienza); CARA (Reception centres for asylum seekers – Centri di accoglienza per richiedenti asilo); SPRAR (Protection system for asylum seekers and refugees – Sistema di protezione per richiedenti asilo e rifugiati). CPSA (First

aid and reception centres) were set up by an Inter-Ministerial decree of 16 February 2006 and are intended for the temporary reception (on average, 48 hours) of asylum seekers.

Reception centres (CDA) were set up by Law No. 563/1995 ("Apulia Law") and afford initial assistance to asylum seekers pending the definition of their legal status in Italy.

SPRAR is the protection and reception system for asylum seekers and refugees that operates throughout Italy in pursuance of Law No. 189/2002. It is made up of the network of local authorities that rely on the National Fund for asylum policies and services, insofar as the latter makes financial resources available. The reception is of an integrated nature, as it is not limited to food and shelter; in fact, the projects developed throughout Italy envisage information, support, assistance and orientation measures by way of customized social and economic integration processes. For the 2014 to 2016 period, SPRAR can accommodate up to 16,000 individual positions as per the decree of 17 September 2013 adopted by the Ministry of the Interior – Department for Civil Liberties and Immigration, implementing the decree by the Minister of the Interior dated 30 July 2013.

The CARA (Reception centres for asylum seekers)[1] were set up by legislative decree No. 25/2008 in order to accommodate international protection seekers in the cases provided for by Section 20 – i.e. whenever it is necessary to check or establish the asylum applicant's nationality or identity, or if the person applied for protection after being arrested in the act of eluding or attempting to elude border controls or immediately thereafter. The third case where reception in CARA is envisaged applies to asylum seekers that lodged their applications after being arrested because of their staying illegally in Italy. The three different situations are matched by three different

1 The following CARAs are currently in operation: Agrigento, Lampedusa – 381 posts (First Aid and Reception Centre); Cagliari, Elmas – 220 posts (First Aid and Reception Centre); Caltanissetta, Contrada Pian del Lago – 360 posts (Reception Centre); Lecce - Otranto (First Reception Centre); Ragusa Pozzallo (First Aid and Reception Centre) – 172 Posts.

reception periods, which range supposedly from 20 days (first case) to 35 days for the applicants in the remaining two situations. Upon expiry of the said deadlines, the applicant is entitled to a three-month stay permit, which may be renewed until a decision is made on the application. However, it may happen that asylum seekers remain in CARA for much longer, i.e. until they are notified of the decision taken by the Territorial Committee. Thus, as was the case with the Bari CARA, asylum seekers may remain there for over 12 months. But this does not allow the applicant to be afforded a type of reception similar to that envisaged in SPRAR projects. In fact, the services made available in CARA include legal, social and health care assistance; for the remainder, including language courses, everything is left to the managing body, but the applicant is not obliged to take part in any further initiatives. Accordingly, having completed the reception process, the applicant is often deprived of the necessary tools to start a social integration process on his or her own. Which is conversely not the case in SPRAR. The latest Report[2] shows that "in 2011, 2,099 individuals left the reception system, of whom 37% continued their integration processes, whilst 30% left the reception system on their own initiative and 28% because of the expiry of reception deadlines; 4% of them had been removed and 1% chose voluntary assisted repatriation." The figures show a drop in the individuals leaving the system with good integration levels compared to the preceding year. This might be due to the difficulties in finding a job despite the monitoring and guidance provided by the managing body.

In spite of the above difficulties, the SPRAR model is as of now the only valid model in Italy for starting a decent integration process by overcoming the reception centres approach. In the SPRAR concept, the individuals are hosted in small groups mostly in flats. In 2011, the latter arrangements had been made available in 74% of the cases; for the remainder, accommodation was provided in "collective centres" (20%) and sheltering communities (6%).

2 http://www.serviziocentrale.it/file/server/file/SPRAR-rapporto%202012defmg.pdf.

Based on the above explanation of the difference between SPRAR network and CARA model, one can easily grasp why longer case-handling periods prove detrimental to the applicants that are hosted in the latter facilities. They have to live for several months with a substantial number of individuals without any privacy and without knowing for how long they will have to remain there. At all events, the length of stay in CARA is an issue that impacts the capability of the reception system as a whole to cope with the actual number of applications.

In a broader perspective, the access to asylum procedures takes place via a complex machinery and is fraught with several obstacles – as pointed out by the European Commission in the **letter of formal notice pursuant to Article 258 of the Treaty on the Functioning of the European Union**, where it finds that Italy fails to comply with the obligations imposed by EU law with regard to the following:[3]

- Limited capacity of reception centres for asylum seekers, and de facto inconsistencies in granting access to reception;
- Asylum application procedures, in particular the lack of effective access in practice to the relevant procedure, both in general and with particular regard to the asylum applicants falling under the scope of Dublin Regulation procedures.

In the Commission's view, the difficulties encountered show that some provisions in the reception conditions Directive fail to be taken into account and implemented by the Ministry of the Interior. One first consequence is the forfeiture of the benefits envisaged for asylum seekers. Only think of the lengthy procedure for granting the asylum application stay permit, which is supposed to be delivered to the applicant shortly after lodging of the relevant application. The lack of this document makes it impossible for an applicant to access health care and makes it difficult for him to access municipal reception centres. According to the 2010 SPRAR Report, which is one of the documents the Commission relied on in drafting its considerations and guidance, the term for granting the asylum

3 This information is taken from http://documenti.camera.it/leg17/dossier/Testi/ID0004.htm.

application stay permit was complied with in only 46% of the cases. This is the main focus of the criticisms levelled by the Commission, which highlighted the incompatibility of our system with Articles 3 (Immediate application of the reception conditions directive as from the time the asylum application is lodged), 13 (Access to material reception conditions such as food, shelter, clothing and daily subsistence allowance as from the lodging of the asylum application along with health care assistance), and 17 (Specific conditions afforded to vulnerable categories also from the medical standpoint) of the reception conditions directive.

Although Article 14 affords Member States some flexibility as for the specific arrangements of the material reception conditions, the Commission's view is that it is necessary in any case to meet asylum seekers' fundamental needs; failure to comply with the aforementioned provisions is said to make the Italian system incompatible with Articles 1 and 4 of the Charter of Fundamental Rights of the EU (Inviolability of human dignity and Prohibition of torture and inhuman or degrading punishments or treatments) as well as with Article 3 of the European Human Rights Convention (Prohibition of torture and inhuman or degrading treatment).

The legislation on reception of international protection seekers is affected by the lack of coordination between the provisions introduced over the years. The enactment of legislative decree No. 25/2008 (so-called Procedures Decree) gave rise to a reception system that is partly other than the one already envisaged in legislative decree No. 140/2005 (so-called Reception Decree). Section 20 of legislative decree 25/2008, regulating reception in CARA centres as set up by the decree itself, is not in line with the provisions on reception of asylum seekers laid down in legislative decree No. 140/2005. It should also be pointed out that there are several gaps in the regulatory provisions on conditions for and maximum length of stay in the individual facilities.

However, it is not just reception the only area fraught with criticalities in the asylum-related system. One feature here concerns exactly the lodging of the asylum application. It appears that some local authorities apply unreasonable requirements in terms of documents and/or impose limitations on registration of stay (in particular, the requirement of a permanent address). An example was quoted in the Focus section, i.e. the case where an address is to be specified for the applicant's domicile to be supported by ad-hoc documentation at the time the application is lodged. Failing this, the police do not handle the application. This practice is justified by alleging the need for the police headquarters to contact the applicant in view of subsequent communications (setting the date for the drawing up of the official report). However, this approach is far from legitimate because it is not in line with the "procedures decree" that only refers to a "dwelling" rather to the applicant's residence or domicile. "Dwelling" means the "place where an individual is to be found also provisionally" as per Section 43(2) of Italy's Civil Code.

Furthermore, the domicile to be taken under Section 2(1) of Presidential decree No. 303/2004 as regards asylum seekers that are granted reception is the centre determined specifically by the U.T.G. of the Prefecture in accordance with legislative decree No. 140/2005. However, the asylum seeker is actually stopped before being able to lodge the application.

Whilst it is understandable that an address for the person's domicile may be requested, this should not be the criterion to finalise the application. The ultimate effect produced by all these circumstances is that the prospective asylum applicant is in many case obliged to pay someone else in exchange for a fictitious accommodation if he or she is not hosted at one of the reception facilities that are authorized to work as domicile for applicants.

The same problem has arisen in respect of the beneficiaries of a different type of protection, as they needed an address of residence to renew the relevant stay permit. In many cases it was exactly the

inability to meet this requirement that delayed the renewal of the respective permits, which produced highly serious consequences – including the inability to be afforded medical care.

EU Regulation No. 604/2013

On 26 June 2013 EU Regulation No. 604/2013 was published in the Official Journal of the EU (so-called "Dublin III" Regulation), which lays down the criteria and mechanisms to determine the Member State responsible for examining an international protection application lodged in one of the Member States by a third-country national or a stateless person.

The Regulation amended some of the provisions applying to the determination of the EU Member State responsible for examining an application for international protection along with the arrangements and timeline for such determination. The main innovations are listed below:

- The definition of "minor's family member" was expanded to include relatives rather than just the closest family members (mother, father, siblings);
- It was provided that the appeal lodged by the applicant entails suspension of the transfer procedure;
- Terms were laid down also for the take back procedure. It is no longer necessary for 18 months to elapse in order for the new Member State to be regarded as competent, since competence as determined on the basis of illegal entry will cease 12 months after the person's crossing the border, or else after 5 months of continued stay in another Member State which will accordingly become responsible for examining the application;
- It is possible for the applicant to be detained in case he is at risk of absconding;
- Provisions were introduced to enable the exchange of medical information between the countries concerned in order to protect

the applicant.

In the letter of formal notice sent in 2012, the European Commission highlighted some criticalities relating to the application of the Dublin Convention in Italy; they concerned, in particular, the reception of individuals falling under the scope of application of the latter instrument, which is never appropriate to meet the needs of those individuals. Two main groups can be distinguished in this connection, as pointed out in the Focus section: those that have to be transferred from Italy to another European country, where identification has already taken place and which has been found by the Dublin Unit to be responsible for examining the asylum application; those that are sent back to Italy by another State that is not responsible for examining the asylum application.

The latter group can be broken down into three sub-sets: the first one includes those that had already applied for asylum in Italy and had then moved elsewhere; the second one includes those that, before leaving Italy, had only been fingerprinted as found subsequently via the Eurodac checks; the third one includes those that had already been afforded protection in Italy and had tried to apply for asylum also in another Member State. It may be the case that the documents are mislaid or are withdrawn by the local authorities. At the time of getting back to Italy, the applicant has to pay considerable sums to retrieve the documents. The same applies to those that have to finalise their asylum applications and, in order to expedite the procedure by the Committee, have to turn to the same police headquarters where they had initially lodged their applications; this entails substantial travelling costs in order to reach the relevant locations – e.g. in the case of an individual that is sent back to Fiumicino and then has to travel to Crotone, in Calabria. In that case the applicant has not only to pay for transportation, but also consider whether he or she will be able to find accommodation with a reception centre. For the remainder of "Dublin cases", no reception arrangements are envisaged – as described in the paragraph concerning the Tor Marancia awning in the Focus section.

European Directive 2011/51/EU

A major innovation regarding asylum in Italy has to do with the approval by the Council of Ministers (18 December 2013) of a legislative decree that transposes EU Directive 2011/51 and enables granting an EU long-term residence permit also to the beneficiaries of international protection (refugees and beneficiaries of subsidiary protection). The draft of the decree had been approved on 9 December 2013, shortly after the shipwreck in Lampedusa, as part of the measures to tackle the "immigration emergency".

The decree facilitates integration of the beneficiaries of international protection because it confers on them the status of long-term residents, which may also be retained if the international protection ceases to be afforded and will facilitate the applicants' mobility throughout the EU.

Discrimination and Violence

- **14 January 2012**: a boat that had left from Libya bound for Malta, with 55 individuals on board, all of them Somalis, capsizes. All the persons are gone missing apart from one, whose corpse was found subsequently.
- **23 February 2012**: Rome, Hirsi judgment.
- **3 May 2012**: Venice. In the hold of a ferry coming from Greece an Afghan boy was found dead by asphyxia in the truck where he had absconded to escape police controls.
- **25 May 2012:** the corpse of a thirty-year-old man, probably from the Sub-Saharan region, was retrieved by the coastguard opposite Lampedusa.
- In the night between **Friday 16 and Saturday 17 August 2012**, about 300 individuals reached Italy and were rescued by the coastguard off the coast of Sicily. They were on board of two boats, of which one carried 95 individuals and the other one about 195; other boats were said to be arriving in Lampedusa,

one of the main terminals of this flow of migrants.

- **31 October 2012**: Lecce. A sailboat with 13 migrants was stopped as it was trying to reach the coast.
- **9 November 2012**: Brindisi. A tent camp hosting 80 immigrants was set up. The mayor, Mr. Consales, declared: "We were left alone."
- **1 January 2013**: Trapani. Among the migrants thrown out to sea by the traffickers, there is a corpse.
- **2 January 2013**: Rome. The North African Emergency is extended by two additional months.
- **7 January 2013**: Padoa. A group of about one hundred individuals from North Africa destroyed a reception facility in Via del Commissario, between the Beata Pellegrina parish church and Salboro, to protest against the lack of whatever jobs.
- **14 January 2013**: Otranto. Disembarkation of migrants.
- **14 January 2013**: Rosarno. Risks may arise anew for public order because of the massive inflow of migrants for the seasonal harvesting of citrus fruit in the Gioia Tauro plane.
- **1 February 2013**: Padoa. Five youths from Ghana, holding humanitarian residence permits, were summoned to the police headquarters to collect the much coveted travelling documents. However, they were handcuffed on coming to the office because of the "rebellion" that had taken place on 7 January.
- **26 April 2013**: Crotone. 18 migrants were disembarked.
- **10 May 2013**: Lampedusa. 181 migrants were rescued from a boat adrift. Two newborns were also on board.
- **20 May 2013**: Rome. The 2013 Programme of the European Integration Fund was approved. Italy was allocated 37 million Euro.
- **28 May 2013**: Mineo. The migrants hosted in the CARA protested against the tardiness of the procedures for granting residence permits and recognizing political refugee status.
- **3 June 2013**: Cosenza. Migrants reported against the managers to the Prosecuting Office because of the way the North African Emergency had been dealt with.

- **4 June 2013**: Malta. A Memorandum of Understanding for the cooperation between Italy and the European Asylum Support Office was signed in Malta.
- **14 June 2013**: Rome. Asylum seekers that cannot be accommodated in reception facilities are on the rise.
- **16 June 2013**: Lampedusa. Seven migrants allegedly drowned in the Canal of Sicily whilst they were holding to a cage for raising tuna fish that was being hauled by a Tunisian fishing motorboat.
- **22 July 2013**: Siracusa. 200 individuals were disembarked, including women and children.
- **29 July 2013**: Crotone. A 17-metre fishing boat having 102 migrants of Syrian nationality on board, including two women, a 4-year-old girl and other children, was intercepted by the Finance Police off the Calabrian coast on the Ionian sea.
- **30 July 2013**: Reggio Calabria. Thirty-six migrants, including 13 children and 4 women, were located on the 106 national highway close to the town of Bianco. They said they had reached the Calabrian coast on board a boat.
- **29 August 2013**: Trapani. Disembarkations of migrants continue ceaselessly. A woman gave birth during the crossing.
- **4 September 2013**: Off Siracusa, a woman from Syria died in attempting to reach the Sicilian coast. The family donated her organs.
- **9 September 2013**: Sweden. The Government offers a residence permit to all Syrian refugees.
- **10 September 2013**: Rome. Pope Francis visited the Astalli reception centre for refugees.
- **17 September 2013**: Pian del Lago, Caltanissetta. 400 asylum seekers hosted in the CARA of Pian del Lago in Caltanissetta protested because of the waiting time prior to being heard by the Committee.
- **23 September 2013**: Lampedusa. A 22-year-old Syrian woman died whilst crossing the Canal of Sicily. Her corpse was found on board a boat carrying 424 migrants.

- **26 September 2013**: Lampedusa. A Syrian woman gave birth to a child immediately after her disembarkation; there is no hospital on the island.
- **27 September 2013:** Canal of Sicily. Over 1,800 migrants were rescued in several operations coordinated in Rome by the Operational Control Room of the Headquarters of Harbour Managers.
- **2 October 2013**: Otranto. Forty-five migrants were disembarked safely on the Apulian coast.
- **3 October 2013**: A boat with over 500 migrants was shipwrecked. The casualties and the missing total 366.
- **8 October 2013**: Lampedusa. The migrants disembarked on the island refused fingerprinting for identification purposes.
- **9 October 2013**: Lampedusa. A rebellion flared up in the reception centre.
- **14 October 2013**: Mediterranean Sea. The "Safe Sea" humanitarian mission started.
- **21 October 2013**: Agrigento. The State funerals of the victims of Lampedusa shipwreck were celebrated.
- **21 October 2013**: Rome. The Chair of the Senate Committee for the protection and promotion of human rights, Luigi Manconi, and the Mayor of Lampedusa, Giusi Nicolini, submitted a "humanitarian admission" plan to the Head of State and the Prime Minister in order to increase the safety of sea-borne migrants.
- **22 October 2013**: Mineo. There were some disturbances among the migrants hosted by the Reception Centre for asylum seekers. Some of them had reportedly left the centre and hurled stones against the patrol car of the Caltagirone police destroying its windshield.
- **25 October 2013**: Canal of Sicily. 800 migrants were rescued thanks to the "Mare Nostrum" operation.
- **30 October 2013**: Lampedusa. 225 migrants were rescued in two separate interventions by the coastguard.
- **14 November 2013**: Rome. Medici per i diritti umani (MEDU

– Physicians for human rights) presented *Porti insicuri, Rapporto sulle riammissioni dai porti italiani alla Grecia e sulle violazioni dei diritti fondamentali dei migranti.* (Insecure harbours – Report on push-backs from Italian harbours to Greece and the violations of migrants' fundamental rights)

- **17 November 2013**: Mineo. Some refugees hosted at the CARA in Mineo took part for the first time in the soccer pro league; they are from different countries: Somalia, Gambia, Mali, Nigeria.
- **28 November 2013**: Lampedusa. An interview to Domenico Colapinto was published in Corriere della Sera; Mr. Colapinto stopped fishing after trying to rescue migrants during the 3 October 2013 shipwreck.
- **1 December 2013**: Rosarno. A thirty-one-year old man from Liberia froze to death during the harvesting of oranges.
- **10 December 2013**: Lampedusa. Over 1,000 migrants were rescued by ships from the Military Navy and the Coastguard as part of the "Mare Nostrum" operation.
- **11 December 2013**: The Ministry of the Interior communicated that in 2013 "About 42 thousand migrants were disembarked on the coasts of our country."
- **16 December 2013**: Lampedusa. 275 migrants mostly from Eritrea, Syria, Ethiopia and Tunisia were rescued by the San Marco ship of the Military Navy.
- **18 December 2013**: Lampedusa. Footage shot in the Reception Centre of Lampedusa was published, showing asylum seekers naked in a queue waiting in the cold to get washed by a jet pump. This was said to be a practice followed for disinfecting migrants.
- **21 December 2013**: Some migrants detained in the Identification and Expulsion Centre of Ponte Galeria sewed their lips to protest against the living conditions inside the centre.

Recommendations

1) Creating a consolidated text of asylum-related legislation that should not be limited to the transposition of European directives as it should also envisage implementation of Article 10(3) of the Constitution.

2) Drafting legislation that can prevent violation of the non-refoulement principle starting from the rescue of sea-borne migrants and the subsequent initial information services on borders.

3) Reconsidering geographical distribution, membership, and the training of the Territorial Committees tasked with granting international protection.

4) Reforming the reception system by including support to refugees in the phases following recognition of refugee status among the essential deliverables and tasks.

5) Devising specific provisions to support, via appropriate measures, the integration of beneficiaries of international protection so as to afford all of them the right to a minimum reception period by way of occupational and housing assistance.

6) Allocating adequate resources to ensure the actual increase in the accommodation capacity of the SPRAR (Protection System for Asylum-Seekers).

7) Modifying the assistance-oriented approach to reception systems and policies applying to displaced persons and asylum seekers and shifting to a method geared towards their recognition as individuals holding rights.

ACCESS TO JUSTICE

By Valeria Ferraris

Focus on Facts

Access to law and justice is the most advanced expression (Cappelletti, 1994b) of the social dimension of justice – a concept arising as the attempt to tackle the crisis experienced by justice when considered as a merely formal type of equality before the law, and developing from the transformation of industrial societies and the new role played by the State in fostering rights. This dimension is closely related to the affirmation of social rights – which were enshrined in the 1948 Constitutional Charter – and has to do with the shift from a theoretical, abstract vision of law and justice to a dimension where what matters is the substantive, actual access to both. Access to law and justice is grounded in the principle of substantive equality that is set forth in Article 3, paragraph 2, of the Constitution as the latter provides that equality must be effective and it is the State's responsibility to remove all obstacles that prevent, at least, opportunities from being equal. Access to law and justice is grounded additionally in Article 24 of the Constitution, which enshrines the right to take legal action (paragraph 1) and the inviolability of the right of defense, so much so that ad-hoc tools are made available to those destitute of means in order to ensure implementation of this right (paragraphs 2 and 3) . Article 111 of the Constitution was added recently to the above historical foundations, after the in-depth reformation brought about by the Constitutional law No. 2/1999. The latter introduced several principles in the Constitutional charter to ensure an effective right to sue and defend an action in court, which are usually referred to as the "due process" principles. As well as providing that this subject matter must be regulated by law (paragraph 1), the said Article sets forth the principle of equality of arms, that is to say, the requirement that every individual should be in a position to appear before the judge, along with the impartiality of judges and the reasonable duration of judicial proceedings (paragraph 2). The final three paragraphs

address the procedural safeguards of defendants in criminal proceedings starting from pre-trial investigations; application of the equality of arms principle to the taking of evidence; and finally, the obligation to provide reasons for judicial decisions as well as the obligation for the Court of Cassation to step in if a case is related to personal freedom.

Several regulatory instruments at European level set forth the access to justice principle as well. In the European Convention of Human Rights the right to a fair trial is laid down in Article 6 along with the right to an effective remedy (Article 13). The Treaty on the Functioning of the EU provides that "The Union facilitates access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters" (Article 67.4), whilst measures aimed to ensure "effective access to justice" must be adopted in the civil law sector (Article 81.2, letter e)). Finally, Article 47 of the Charter of Fundamental Rights of the EU provides for the right to an effective remedy before an impartial judge.

Access to law and justice was aptly considered to be a remedy to the obstacles placed between citizens and justice. This remedy applies, in particular, to the following (Cappelletti, 1994, p. 81):

1) **Economic obstacles**, preventing access to justice for all those who are unable to bear the relevant costs because of their financial conditions and are accordingly in danger of being the holders of "unreal rights";
2) **Organizational obstacles**, making it hard to establish and defend certain collective rights and/or interests;
3) **Procedural obstacles**, consisting in the inappropriateness of some procedures to afford remedies, so that alternative methods prove necessary to solve conflicts and disputes and to enforce citizens' rights and claims.

These three obstacles were highlighted by Mauro Cappelletti over

20 years ago and remain fully applicable today, although they have taken on different features because of the evolution undergone by individuals, institutions and procedures "through which the law takes life, evolves and is enforced" (Cappelletti, 1994, p. 77). Thus, the economic obstacles pinpointed by Cappelletti retain their full force, but the organizational hindrances do not result currently only from the framework of the interests to be protected as they include the territorial distribution of judicial offices – this being a key component to assess the adequacy of access to justice. Finally, procedural obstacles are mirrored not only by the importance attained by alternative dispute resolution methods, but also by the amendments made to procedural rules in order to make justice more efficient without impinging on the rights of the parties concerned.

Legal Aid

The removal of economic obstacles preventing access to justice became increasingly topical in 2012 and 2013 because of the persistent economic crisis and the policies aimed at the containment of public expenditure (the notorious "spending review").

Unfortunately, this issue does not rank among the top ones in the public debate. Despite its constitutional importance, legal aid for those unable to afford it is not receiving the attention that is paid conversely to other issues related to the rise of poverty.

It is an issue that only surfaces on account of cases covered by the media and is prone to turn into discussions on whether legal aid is to be bestowed or not. This happened, for instance, with the **legal aid applications lodged by Mafia bosses**.

In 2012, the granting of legal aid to Vincenzo Virga, a Mafia boss under trial on charges of murdering Mario Rostagno, led Senator Lumia, a member of the Anti-Mafia Committee, to issue a harsh statement to the effect that he emphasized the need for devising legislative solutions whereby account could be taken of the fact that

"Mafia bosses, seemingly destitute of means after their assets have been seized or forfeited, can actually count on moneys and assets of their own by way of straw-men and thanks to the Mafia family they belong to." In line with this approach, a decision by the Court of Cassation denied legal aid to Salvino Madonia, a Mafia boss. Another boss called Giuseppe Graviano fell under the spotlight because he was acquitted in April 2013 of the charges of submitting untrue income reports in order to be afforded legal aid during a criminal proceeding held in 2004.

The decision by the Court of Cassation No. 44121 of 13 November 2012 was also taken up in the media because it ruled that **the income of cohabiting family members** must be computed in assessing the applicant's financial status, so that legal aid may no longer be afforded if the total income is in excess of the relevant threshold.

Except for a few specialized websites, the media have paid little or no attention to the difficult issue of **granting legal aid to aliens**, in particular asylum applicants.

Worthiness is the focus of the arguments concerning the extension of legal aid to **victims of crime.**

Some interest was aroused by the meeting between an MP, Stefano from the SEL (Left and Freedom) Party, and a delegation of the Associazione Italiana Vittime di Malagiustizia (AIVM) (Italian Association of the Victims of Judicial Malpractice) in July 2013, where possible legislative amendments to legal aid rules were discussed in order to enable victims to access it. Access to legal aid was also granted by the recent decree on femicide, derogating from income bracket rules.

In 2013, legal aid was the subject of media interest because of the proposals put forward by the Bar regarding the reduction of the fees due to defense counsel, technical experts or investigators as a result of the amendments made by the Stability Law (Budget Act). An

example is provided by the harsh statement issued by Unione Camere Penali (Criminal Bar Association) (http://www.cittadinanzattiva.it/newsletter/2013_11_21-304/files/delibera-47-patrocinio-spese-stato.pdf) immediately the relevant bill was adopted by the Chamber of Deputies, and by the declaration of Giuristi democratici (Democratic Juridical Scholars) (http://www.giuristidemocratici.it/post/20131218180221/post_html) after the bill was finally passed.

Protecting Collective Interests and the Reformation of the Judicial System

Compared to the 1980's and 1990's, when the issue of **protecting collective interests** first surfaced, a lot has happened. Only in some cases has this issue come under media focus, in spite of its unquestionable importance for safeguarding citizens. In 2012 the media reported about the complaint lodged by Codacons against the order issued by the Court of Grosseto to set the costs for the copies of the records on file in the proceeding for the Costa Concordia shipwreck. Still in 2013, the judges allowed the municipality of Busto Arsizio and Lega Pro to file a claim for damages in the fast-track trial celebrated against the football fans that had staged racist songs especially directed at Boateng during the Pro Patria-Milan FC match. Though not a novelty in terms of case-law, it is of interest that the judge granted Lega Pro locus standi because of the collective interests vested in it – since its Code of Ethics included principles such as the fight against racism and discrimination in all its forms (Ansa, February 2013).

Finally, still in 2013, the Minister of the Environment Orlando proposed introducing the *debat public* tool in Italy, that is to say "procedures for consulting the local population and stakeholders to be supervised by an independent public body and carried out according to pre-defined time schedules, which are part of the decision-making process to implement major public works for which the EIA (Environmental Impact Assessment) or the IEA (Integrated

Environmental Assessment) are required" (Ansa, 9 June 2013). As regards citizens' participation in public decision-making, reference should also be made to the innovations introduced by the so-called simplification decree in terms of civic access rights.

Along with this long-standing issue there is the emerging one related to **the organization of justice**. This is actually considered in many quarters to be exclusively a spending review measure, however we believe it is one of the organizational obstacles to the protection of citizens' rights. Indeed, the right to justice becomes real to the extent access to a knowledgeable and effective judicial system is available. One can hardly tell nowadays whether the restructuring effort made by the Ministry is going in the direction of enhancing the efficiency of justice or is rather based on a one-size-fits-all approach to cutting expenditure that fails to take account of local needs.

Unquestionably this is an issue that has hit the headlines. Before the approval of the legislative decrees on the reorganization of judicial districts, the debate – sometimes quite harsh – involved the Unified Bar Association, the National Bar Council and some national and local politicians. The bodies representing the Bar have criticized, first and foremost, the working method followed by the Ministry and emphasized that expenditure was being cut indiscriminately based on past performance rather than on a spending review approach – which means "starting true management controls, determining standard costs and demand, and calculating also the costs due to the elimination of certain offices in terms of additional investments that may prove necessary and of reduced efficiency." (Ansa, May 2012). Criticisms were also levelled at the overestimation of savings, which allegedly failed to consider the additional costs due to travelling by citizens and staff. The National Bar Council supported their views with the help of a survey carried out on the four peripheral sections of the Court in Trento; compared to the current costs, amounting to Euro 90,000, the travelling expenses borne by citizens and judicial staff rose allegedly to Euro 2,446,920 on top of the environmental impact – which was calculated to total 700,000 Kg of Co2 emissions due to the travelling required in order to reach the provincial

headquarters.
The members of the Bar resorted also to mobilization initiatives by calling a strike (5 July 2013) and supporting the demonstrations waged by local authorities (24 July 2013).
Local authorities and Regions complained on the one hand that no consideration had been given to the important role played by judicial offices in areas where crime is rife (such as Calabria) and emphasized, on the other hand, how inappropriate it was to eliminate judicial offices for which substantial costs had been borne recently both by the Ministry and by local authorities in renovation and restructuration activities – as is the case with the courts of Chiavari, Pinerolo, and Bassano del Grappa.
The Criminal Bar Association has pointed out since July 2012 that the new territorial organization of judicial offices must take account of "citizens' right to the so-called proximity justice, i.e. to encounter no obstacles in their demand for justice because of the inconvenient location of judicial offices."
For her part, the then Minister of Justice, Ms. Severino, reiterated firmly that the judicial offices to be eliminated were selected on the basis of "the criteria mentioned in the delegated legislation: population; area; number of judges and prosecutors per individual office; number of administrative staff; annual workload and productivity; costs; status of the facilities; impact rate of organized crime." (Ansa, July 2012).
As the decree was moving through the parliamentary process, the opinions from the CSM [Italian Judicial Council] and the Justice Committees from both Houses of Parliament were obtained.
The CSM welcomed the reformation and emphasized that keeping the territorial distribution of judicial districts developed in the 19th century was no longer tenable; though pointing out that the decree was fraught with criticalities and limitations, it considered that "this should not be an obstacle or a reason for delaying" a reformation that "was absolutely a priority to make judicial activities at least somewhat more effective."
The Justice Committees of Parliament emphasized the requirements

due to the fight against organized crime; in particular, the Senate Committee reiterated that it was inappropriate to eliminate some courts on account of their geographical location and/or the recent costs incurred to revamp some offices.
On 7 September the two legislative decrees were promulgated that set forth the elimination of all the peripheral branches of courts (220), the merge of 667 justice of the peace offices, and the suppression of 31 courts including the respective prosecuting offices. The initial plan was to suppress 37 courts but it was reconsidered by endorsing the request to keep some courts in areas where organized crime is especially rampant (Caltagirone and Sciacca in Sicily; Castrovillari, Lamezia Terme and Paola in Calabria; Cassino in Latium).
After the decrees were issued, the discussion changed its focus along with its general import. Following some calls made upon the new Minister of Justice, Ms. Cancellieri, to steer away from this new approach, there was on the one hand the recourse to courts and, on the other hand, the reliance on high-impact protestations: roads were blocked (Pinerolo); judicial offices were symbolically occupied (Chiavari); hunger strikes were called (Rossano); electoral certificates were returned (Melfi); finally, some lawyers had themselves symbolically crucified (Salerno). In spite of the unrelenting protestations, the reformation came into force on 13 September 2013.

Procedural Reformations and Alternative Dispute Resolution
As already pointed out, one of the main obstacles to ensuring full-fledged access to law and justice consists in the inadequate procedures as for timeline and mechanisms. The long-standing difficulties experienced by justice in Italy, with particular regard to civil justice, are well-known. This was confirmed also in the 2012-2013 period, when Italy was found to have, for the fifth time in a row, the slowest judicial system in Europe - according to the European Court of Human Rights (ECHR). Italy is the country with the highest number of convictions (over 2,000) and there are over 8,000 claims pending before the ECHR on account of excessive

duration of trials. The Court focused both on the excessive length of civil proceedings and on the delays in paying the indemnification provided for by Law No. 89/2001 – the so-called Pinto Law. Many are the legislative measures issued to cope with this problem and they will be addressed in paragraph 3. The point to be made here is that the statistical figures show some slight improvements, however it is unquestionable that the reforms discussed and approved in 2012-2013 or shortly before will take some additional time to be assessed thoroughly as for their effects. The Table below shows that pending judicial proceedings decreased in number, albeit slightly, which means that the cases handled by courts outnumbered supervening cases.

Table – Pending Civil Proceedings

		Pending as of 31 December 2010	Pending as of 31 December 2011	Pending as of 31 December 2012	Pending as of 30 June 2013
Court of Appeal	% over previous year	5,15	1,19	-2,00	-6,17
	& over 2009	**5,15**	**6,40**	**4,27**	**-2,16**
Courts of Law	% over previous year	-1,52	-0,98	-2,33	-1,29
	% over 2009	**-1,52**	**-2,48**	**-4,75**	**-5,98**
Justices of the Peace	% over previous year	0,20	-11,06	-12,02	-3,51
	% over 2009	**0,20**	**-10,89**	**-21,60**	**-24,35**
Juvenile Courts	% over previous year	-2,60	-5,11	-3,95	-7,16
	% over 2009	**-2,60**	**-7,58**	**-11,23**	**-17,58**
Court of Cassation	% over previous year	1,48	-2,11	4,39	-1,72
	% over 2009	**1,48**	**-0,67**	**3,70**	**1,92**
Total	% over previous years	-0,51	-3,91	-4,88	-2,38
	% over 2009	**-0,51**	**-4,40**	**-9,07**	**-11,23**

Source: Data from the Minister's Report on the Administration of Justice, 2013, reprocessed.

The mean duration of judicial proceedings also decreased slightly, in particular it fell by 2.5% for the proceedings pending before Courts of Appeal (1,025 days in the 1 July 2012 to 30 June 2013 period, compared to 1,051 days in the corresponding 2011 to 2012 period); by 6.4% for the proceedings pending before first-instance courts (437 days in the 30 June 2012 to 30 June 2013 period, compared to 466 days in the corresponding 2011 to 2012 period); and by 2.6% for the proceedings pending before justices of the peace (358 days in the 1 July 2012 to 30 June 2013 period, compared to 367 days in the corresponding 2011 to 2012 period). These figures are clearly far from being reassuring, however they point at least to a trend reversal.

One should not fail to consider, however, that the above figures result from the effects produced jointly by the decreased number of supervening proceedings and the increase of finalized proceedings. Whilst increased productivity is unquestionably to be welcomed, it is actually more difficult to tell whether the decrease in supervening proceedings resulted from a lower litigation rate or from the failure to take legal action exactly because of the mean duration of judicial proceedings.

Along with the above data, the statistics concerning Alternative Dispute Resolution (ADR) highlight an upward trend. The analysis by ISDACI (http://www.isdaci.it/index.php?option=com_content&view=article&id=29) shows that 243,281 ADR applications were filed with Italian Resolution Centres in 2012 (up by 72% compared to 2011); this increase was due mainly to civil and commercial mediation, where the number of applications rose to 154,879, up by 154.7% compared to 2011.

It is actually a medley picture, in particular regarding civil and commercial mediation. The survey carried out by the Ministry of Justice in the period from 2012 to the first half of 2013, involving

60% of accredited mediation bodies, shows that the settlement rate is satisfactory after mediation was initiated (41% in 2012, 49% in the first half of 2013, when only optional mediation was allowed following the judgment rendered by the Constitutional Court). However, along with these non-negative figures, one should also consider the substantial percentage of proceedings that led to no settlements because one of the parties had failed to appear. In particular, in the second half of 2012 insurance companies failed to enter an appearance in 70% of cases – which clearly points to their poor endorsement for this procedure.

The above figures were given by the Ministry of Justice to support the ongoing reformation process. It is clearly too early to draw any conclusion; one can only note, as did the President of the Court of Cassation on the occasion of his opening address for the 2014 judicial year, the perseverance shown by the Ministry of Justice in carrying on highly controversial reformations in the 2012 to 2013 period. This applies to the reorganization of judicial districts as well as to procedural reformations, which were harshly criticized especially by the Bar. The Unified Bar Association reiterated on several occasions that adding filtering mechanisms to appellate proceedings in civil matters is not only useless, but downright harmful because it increases the judges' discretion and is in danger of affecting the rights of weaker parties – whilst making the whole procedure even more chaotic. Similar criticisms had been levelled since 2011 against civil mediation.

Discriminations and Violence

One can hardly pinpoint cases of violence or discrimination in connection with access to law and justice. Since this is a right that is encountering considerable difficulties in being recognized as such – or rather, since it is a plan for the reformation of justice what is being aimed at – the very need for such a plan to be implemented points to the shortcomings of the judicial system. This is why a list is given

below of some recurring issues affecting the Italian judicial system as for the years 2012 and 2013:

1) The length of judicial proceedings, in particular civil proceedings, which results into Italy's being convicted repeatedly because of the unreasonable duration of trials;
2) The ineffective organization of justice as a whole;
3) The failure to grant legal aid to asylum applicants and aliens on account of procedural flaws;
4) The failure to assess the quality of defense for weaker parties.

Legislation and Policies

In spite of the difficulties in recognizing access to law and justice as a right on a par with other fundamental rights, there were several legislative and policy innovations in 2012 and 2013 if one follows the tripartite structure proposed by Cappelletti.

Legal Aid

Legal aid was the subject of judicial decisions, including by the Court of Cassation; although there is a wealth of case-law on this topic, it is hardly debated publicly. Even though this issue is important, one can argue unquestionably that it is an issue reserved for scholars.

No specific innovations were brought about in the case-law of the Court of Cassation. The interpretation was endorsed whereby the income of individuals cohabiting permanently should also be computed in assessing whether the **eligibility threshold** was overstepped or not (Cassation, IV division, 13 November 2012).

Taking up a decision of 2006 where it had considered the income of a person cohabiting *more uxorio* to be relevant, the Court expanded the concept of "family" and "household" to include cohabiting family members – here, the mother of the lady who was cohabiting *more uxorio* – as they contribute economically

to the household irrespective of kinship.

In taking account of the economic and financial status of all the individuals making up the household income based on factual as well as legal relationships, the Court emphasized the economic and social importance attained nowadays by *de facto* families. One cannot but agree on this view, which once again calls upon the lawmaker to take up the issue of *de facto* families as they would appear currently to come into play whenever specific obligations have to be fulfilled (or else in order to limit welfare rights, or anyhow rights entailing costs), whilst they are overlooked whenever one is expected to afford them specific rights.

Illicit proceeds were also considered to be relevant in determining whether legal aid should be granted or not. Via its decision No. 43843 of 12 November 2012, concerning the proceeding against the Mafia boss Madonia, the Court of Cassation ruled that the fact of receiving costly gifts by family members when in prison along with sums of money is proof of an income level such as to allow affording legal costs. This decision concerning the relevance of illicit proceeds is in line with a stance the Court had taken repeatedly (Cass. Div. VI, 17 April 1998, No. 1390; Cass. Div. IV, 4 October 2005, No. 45159; Cass. Div. IV 15 March 2012, No. 10125), to the effect that "illicit proceeds are also relevant in assessing eligibility for legal aid, which proceeds can be established on the basis of evidence including the circumstantial evidence referred to in Section 2729 of the Criminal Code." In a decision rendered in 2013 (No. 18591 of 24 April 2013), the Court (IV Criminal Division) reiterated that illicit proceeds are also to be computed in assessing eligibility; however, the Court found that no mechanical approach should be implemented in assessing income as the factual circumstances of the case must be considered and ruled out that non-final judgments may in any case be taken into account as this would be in breach of the presumption of innocence principle. In the case at issue, legal aid had been applied for by a person convicted of robbery in the first-instance proceeding, and

such robbery had yielded allegedly illicit profits amounting to Euro 27,500. However, the relevant sentence had not become final yet and the Court ruled accordingly that it was illegitimate to deny legal aid on the basis of a non-final sentence allowing the existence of illicit profits to be assumed.

Regarding **legal aid**, one should point out that Section 74(2) of Presidential Decree No. 115/2002 affords legal aid to Italian nationals who are destitute of means. **Aliens** may be afforded legal aid pursuant to specific legislation; in particular, legal aid may be granted to "an alien staying regularly in the national territory at the time the fact or issue that is the subject of the judicial proceeding arises" as well as to stateless persons (Section 119 of Presidential Decree No. 115/2002); to aliens challenging deportation orders before justices of the peace (Section 142 of Presidential Decree No. 115/2002 and Section 13(3) of Legislative Decree No. 286/1998); to aliens when brought before the judge to validate and extend detention at a CIE [Identification and Deportation Centres] (Section 14(4) of Legislative Decree No. 286/1998); to aliens applying for recognition of refugee status before a civil court.

The decision rendered by the Council of State (III division, No. 3917 of 19 July 2013), following the opinion given by the Studies Department of the Council of State, extended legal aid to aliens challenging the rejection of a stay permit application or the rejection of the application for legalization of undeclared work. The rationale for this decision was that if the lawmaker afforded legal aid to aliens challenging deportation orders, legal aid was to be also granted in connection with any disputes concerning the preconditions for deportation – such as the rejection of the legalization application. The Council of State emphasized that "the ban on deporting an alien pending a legalization proceeding is tantamount to conferring a provisionally legal status on such alien, albeit via a *fictio iuris*, which may ultimately become a permanently legal or a permanently illegal status, as the case may be."

As for affording legal aid to illegally staying aliens, there is no consistent application by courts of the legislation that allows income to be certified via a self-executing affidavit (Section 94(2) of Presidential Decree No. 115/2002) if the certification of income produced abroad cannot be obtained from diplomatic or consular authorities (Section 79(2) of Presidential Decree No. 115/2002). Not all courts accept such an affidavit and given the difficulties in obtaining certifications from some diplomatic or consular representations, one is ultimately prevented from obtaining legal aid.
A final consideration to be made on access to legal aid has to do with the certification of income for international protection applicants, whenever the latter challenge, before a civil court, the rejection of their application by the territorial committee competent for deciding on such protection. Under Legislative Decree No. 25/2008, Section 94(2) of Presidential Decree No. 115/2002 (enabling income to be certified via an affidavit) is to be applied "in all cases", as it is clearly impossible for an international protection applicant to turn to the consular authorities of the country he or she is fleeing from. Nevertheless, the approach followed by the Council of the Bar in Rome – which is competent for deciding on the granting of legal aid in such cases – is not in line, as the certification by consular representations is requested in all cases.
This practice was the subject of an opinion rendered by the UNHCR to the Council of the Bar in Rome, and was also reported by Associations working to safeguard aliens' rights (see http://www.asgi.it/home_asgi.php?n=2713&l=it).

This is compounded by the difficulties in enclosing an ID with the application, as asylum applicants often hold no IDs. At end 2013, the Council of the Bar in Milan granted a legal aid application by an international protection applicant holding no IDs as it considered the identification report issued by the police headquarters to be enough. These inconsistencies show the piecemeal approach followed in safeguarding the right to legal aid.

Regarding the **regulatory innovations at European level**, reference should be made to the proposal for a directive "on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings" submitted on 27 November 2013 along with the Recommendations addressed to Member States on "right to legal aid for suspects or accused persons in criminal proceedings."

This instrument that is about to start its legislative process in Europe is considerably important not only because it might lead to changing legal aid systems in Europe, but also because it is part of a larger set of measures aimed to strengthen procedural rights of European citizens. The latter are based, in turn, on the roadmap adopted by the EU Council in November 2009 – the so-called Stockholm Roadmap. The importance of this roadmap consists in the underlying objective to reconcile the measures adopted over the past few years to enhance the fight against crime and transnational terrorism with the enhancement – which is necessary, as should be emphasized – of citizens' rights which were unquestionably affected by the measures enacted following 9/11.

The set of measures in question includes Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings – which Italy is about to transpose even though the relevant deadline was 27 October 2013, see below; Directive 2012/13/EU on the right to information in criminal proceedings, which is due to be transposed by June 2014; and Directive 2013/48/EU "on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty", to be transposed by November 2016.

Apart from the instruments that have yet to be transposed by Italy or are still being debated in Europe, consideration should be given here to Directive 2010/64/EU on the **right to interpretation and translation in criminal proceedings**. There is little doubt that a person unable to understand the language spoken in the country

where he or she is being tried (either because he or she is a national of another EU Member State or because he or she is an alien) must be enabled to understand what is happening in the criminal proceeding concerning him or her; indeed, this is the first precondition for him or her to be afforded access to justice – it is no chance that this is one of the elements mentioned in Article 111 of the Constitution. In this case, procedural and economic obstacles are simultaneously at play. If no interpretation or translation is provided, a person may in no way participate actively in the judicial proceeding – which also applies if that person is unable to afford the relevant costs, so that the right in question is merely fictitious. Focusing on the costs of such services, Article 4 of the directive provides that costs shall be borne by the State regardless of the outcome of the proceedings (therefore also if the person is convicted) and the economic status of the person concerned (therefore irrespective of eligibility for legal aid). Under the legislation in force in Italy, the costs incurred for interpretation must be borne by the defendant in case the latter is convicted, as they are part of the costs relating to "staff supporting judicial authorities". The draft decree adopted by the Government in the early days of December 2013 rules out that such costs may be borne by defendants, which brings the Italian legislation into line with the directive.

In addition to the directives that are part of the European roadmap for the rights of the accused in criminal proceedings, one should also refer to the adoption of Directive 2012/29/EU "establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Directive 2001/220/JHA." Under Article 7 of the latter directive, the right to interpretation and translation is recognized to victims of crime along with the right to legal aid (Article 13); Member States are required to set out the relevant terms and conditions. The Italian legislation is somewhat vague on victims' procedural rights, so that Government will have to take special care in the transposition of the above instrument – which will hopefully be finalized by the set deadline, i.e. by 17 November 2015. Still, one cannot help wondering why the lawmaker

failed to take up the provisions of this directive, at least regarding the right to interpretation, already when discussing the instruments mentioned above.

At national level, a major innovation concerning legal aid and victims of crime came in 2013. This is Law No. 119/2013, the so-called femicide law, which affords legal aid also by derogating from income brackets limitations (as was already the case for female genital mutilation offences) in connection with maltreatment of family members or cohabiting persons and stalking. In this manner, Parliament implemented the Istanbul Convention that commits the signatory countries to affording legal aid to victims of domestic violence.

Two additional **instruments** should be mentioned **at national level**.

In 2012, the Decree of the Minister of Justice of 2 July updated the provisions of Section 76(1) of Presidential Decree No. 115/2002 by raising the income threshold for legal aid eligibility to Euro 10,766.33, i.e. by adjusting the latter to the inflation rate as established by ISTAT for the previous two years.

The 2014 Stability Law (Budget Act) as approved in December 2013 amended the computation mechanisms for legal aid costs. Firstly, the fees due to defence counsel, party-appointed technical experts and private investigators – which are calculated on the basis of mean values and then halved – were reduced by one-third. Secondly, the costs for service of records were trebled, rising from 8 to 27 Euro (Section 1(606) of Law No. 147 of 27 December 2013).

Protecting Collective Interests and the Reformation of the Judicial System

No major regulatory innovations came to light in 2012 and 2013 as for the **protection of collective interests**. Reference should be made to the order issued by the TAR [Regional Administrative Court] of Latium on 25 October 2012, which granted the claim lodged by Codacons against the order issued by the Court of Grosseto whereby photocopying fees were due to obtain, on IT media, the records

of the proceeding pending before the Court following the Costa Concordia shipwreck. The order had been challenged by Codacons, which claimed that the costs - amounting to Euro 30,000 per capita – would undermine the right of defense of the shipwreck victims. The TAR granted the complaint because "unsustainability of the costs due for photocopying fees is liable to negatively affect the full availability of evidence and, accordingly, the full realization of the right of defence". In an age where the costs of defence are increasingly regarded by the State as non-sustainable, the decision by the TAR deserves being emphasized. Furthermore, one should mention that in April 2013 legislative decree No. 33/2013 came into force; the decree regulates disclosure, transparency and dissemination of information by public administrative bodies and is better known as the Transparency Decree. Under Section 5, a "civic access right" entitles every citizen to request documents, information or data the public administration is obliged to disclose – if they failed to be disclosed. The request need not be substantiated, is free of charge and must be filed with the transparency manager of each administrative body.

The **reorganization of the judicial system** was implemented by way of Law No. 148/2011 which empowered Government to reorganize the territorial distribution of first-instance judicial authorities.

Government accordingly enacted two legislative decrees (No. 155 and 156 of September 2012) setting forth the elimination of 31 courts and the attached prosecuting offices, of all peripheral offices of first-instance courts (220) plus 667 justice of the peace offices.

In the period between approval of the legislative decrees and their coming into force on 13 September 2013, many were the debates and protestations, at times quite lively, and they were described in paragraph 1. From a legal and regulatory standpoint, one should perhaps recall that several complaints were lodged with TAR in order to stay the relevant measures; labour courts were also seised in order to prevent staff from being transferred. A petition was also filed with the Constitutional Court by some judges from the courts of Alba,

Montepulciano, Pinerolo, Sala Consilina, Sulmona, Urbino and the Friuli-Venezia Giulia Region. By way of its judgment No. 237/2013 of 3 July 2013, the Court only granted the petition lodged by the judge from Urbino, because Section 1(2), letter a), of the enabling law No. 148/2011 left untouched the courts sitting in municipalities that were provincial capitals. Since Urbino is one of the two provincial capitals in the Pesaro-Urbino province, its elimination was not in line with the provisions of the said enabling statute. Thus, the number of courts and attached prosecuting offices to be eliminated was downsized to 30. All the other complaints were found to be inadmissible (as is the case with the one by Friuli-Venezia Giulia) or unsubstantiated. Regarding the issues addressed here, the Court found that "as for the alleged violation of Article 24 of the Constitution because of the failure to provide remedies and the difficulties in accessing justice, it is unquestionable that there is no unavailability and/or limitation imposed on remedies and that the solutions devised by Government can reconcile several values that are protected by the Constitution according to a reasonable approach so as to ultimately enhance the effectiveness of the judicial system as a whole." Thus, the reformation passed muster with the Constitutional Court. This reformation required a major organizational effort by the Ministry of Justice in order to outline the allocation of staff, both judicial and administrative; decide on the use of buildings and offices; amend the IT systems in the offices to be merged; etc. .

Finally, the reformation passed the final hurdle between end 2013 and the early months of 2014. By its decision of 15 January 2014, the Constitutional Court declared the petition for a referendum filed by several Italian Regions in 2013 as inadmissible; the relevant reasons have yet to be disclosed.

Procedural Reformations and Alternative Dispute Resolution

Major procedural reformations were brought about in 2012 and 2013 in order to enhance the efficiency of Italy's civil judicial proceedings. The process started – and is actually far from being finalized – when Law No. 69/2009 was enacted; the latter enabled Government

to adopt legislation in two key areas : a) **reducing and simplifying civil judicial proceedings**; b) regulating mediation and conciliation in civil and commercial disputes. As to the former, legislative decree No. 150/2011 amended civil procedure mechanisms by limiting them to three procedures: standard procedures; summary inquiry procedures; labour law procedures.

The same rationale underlies the more recent measures to **reform appeal proceedings in civil matters** (Law No. 134/2012, converting decree-law No. 83 of 22 June 2012, known as Development Decree, as adopted by the Monti Government).

This reformation was modelled after the English and German systems and introduced filtering mechanisms based on the reasonable likelihood for the appeal to be granted.

The provisions on **mediation** had to go over many more hurdles. They were introduced pursuant to Directive 2008/52/EC via legislative decree No. 28/2010, but their implementation required major organizational efforts – due to the need to register mediation and training bodies after verifying the respective eligibility qualifications – along with regulatory finetuning. Civil and commercial mediation is aimed at enabling the settlement of disputes that concern negotiable rights vested in the parties by way of a third party either acting as a facilitator of the amicable settlement or else putting forward a proposal for resolving the dispute. This is meant ultimately to expedite a satisfactory solution, though based on a compromise, and to reduce the number of supervening proceedings in civil matters.

There are three types of mediation: on an optional basis, if the parties are free to resort to it; on a recommended basis, if the judge calls for the parties to rely on it; on a mandatory basis, with regard to specific subject-matters such as "condominiums (joint tenancy), rights in rem, sharing of assets, succession, family agreements, renting, loan for use, lease of companies, payment of damages following the circulation of vehicles or craft, medical malpractice and defamation via press or any other media, and insurance, banking and financial contracts" (Section 5 of legislative decree No. 28/2010).

The mandatory nature of mediation in the above cases was ruled

to be unconstitutional by the Constitutional Court (judgment No. 271/2012) because it was found to be *ultra vires* – since the European directive did not envisage such mandatory provisions.
Government remedied this situation by a decree No. 69/2013 (so-called "Action Decree"), converted into Law No. 98/2013, which re-introduced the mandatory recourse to mediation in the areas where such an obligation had been envisaged. Additional amendments were also made to enhance the enforcement of mediation agreements and prevent further costs for citizens. In particular, only the initial preliminary meeting held for planning purposes is a precondition for the case to be actionable if the subject-matter is one of those for which mediation is mandatory (except for the payment of damages due to the circulation of vehicles or craft); such meeting is to take place by 30 days from the filing of the relevant application. If no agreement is reached between the parties, no charge will be levied. This is meant to prevent creating obstacles to the whole mediation procedure if the conflict between the parties is past remedy; at the same time, it can work as a stimulus for mediation bodies to achieve an agreement. Finally, the 2013 reformation provided that lawyers are mediators of their own right; this sounds rather unimportant, but it might actually prove fundamental to ensure the full implementation of mediation mechanisms given the harsh opposition shown by the Bar.
The aforementioned "Action Decree" also includes several organizational measures, the most important among them being the appointment of deputy judges for Appellate Courts in order to facilitate the finalization of proceedings and thereby reduce the backlog.
The reformation of civil proceedings led most recently to the **bill enabling the Government to regulate civil proceedings**, which was approved by the Council of Ministers on 17 December 2013.
The bill includes several measures that are aimed to re-determine the cases where it is mandatory to provide reasons, empower judges to order a shift to the summary proceedings of inquiry, expand the

competence of single-judge courts as compared to panel courts, and so on. The delegated powers have to be exercised within 9 months, which means that these new measures will have to be issued in 2014 so as to streamline and enhance the effectiveness of civil proceedings.

The other major issue addressed by Parliament had to do with the **slow pace of judicial decisions**, in particular as for the payment of the indemnification due following conviction for excessive duration of a judicial proceeding.

Law No. 134/2012 also amended the Pinto law in order to contain costs and afford easier, more effective access to fair compensation proceedings so as to expedite the payment of damages. In the first place, it was provided that the decision would be up to a single judge, not to the Court of Appeal, via a proceeding modelled after the one applying to injunction orders. Secondly, a specific threshold was set beyond which the duration of a proceeding would be considered to become "unreasonable" and entitle a party accordingly to fair compensation (three years for first-instance proceedings, two years for second-instance proceedings, and one year as for the proceedings before the Court of Cassation). The amount of the indemnification was also set forth, i.e. Euro 1,500 per year or fraction thereof – including at least six months - in excess of the reasonable duration threshold. Finally, the relevant petition may be filed, under penalty of forfeiture, within six months from the final judgment rendered in the proceeding whose duration exceeded the "reasonable" threshold. In addition to these procedural amendments, budgetary changes were also made to increase apportionments and proceed accordingly with the payment of damages.

Our Recommendations

1. Fully reconsidering legal aid mechanisms in order to ensure better remedies and prevent miscarriages of justice, also by

testing a public legal aid system.

2. Implementing the reorganization of judicial districts by increasing staff and facilities in the offices with higher workloads.

3. Implementing the reformation of civil and commercial mediation without increased costs for citizens and by pursuing effective mediation practices.

4. Monitoring the results achieved via the reformations in civil proceedings (appeals and mediation) with the help of independent bodies.

5. Overcoming the long-standing practice of delayed and/or partial transposition of the EU directives concerning justice.

6. Implementing administrative transparency principles so as to make administrative practice truly transparent rather than merely an exercise in bureaucracy.

7. Expediting the payment of indemnification for the excessive duration of judicial proceedings and monitoring the results achieved via the reformation of the Pinto law.

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HABEAS CORPUS AND SAFEGUARDS
By Federica Resta

Focus on facts.

a. Personal freedom, rule of law and dignity

"The prime matrix of all other constitutionally protected rights of the person". This was how the Constitutional Court (Judgement 238/1996) defined personal freedom – an "unfailing and essential core of the individual" – in its interpretation of the function and significance of one of the cardinal rules of the entire constitutional system: Section 13 of the Constitution. In its first and quintessential meaning, the rule specifically protects individual freedom in its historically accepted sense and in its indispensable essence: "freedom from arrest", asserted as far back as in 1215 in the Magna Charta and later in the Habeas Corpus Act of 1679. In this "basic" meaning, the rule protects, first and foremost, the freedom of the "body" from any form of coercion. Most notably, it guarantees the individual from arrest by the police and from the enforcement of measures restricting personal freedom by judicial authorities, in criminal proceedings.
As the Constitutional Court clarified, the regulation has a broader meaning. Not only does it protect physical freedom from arbitrary coercive measures, it also protects moral freedom, from measures that would be prejudicial to the dignity of the individual and reduce its judicial status.
While not codifying an autonomous right to moral freedom, the Constitution certainly assumes such a right as the foundation and pre-condition of dignity. It also views this right as a specific component of personal freedom, protected by Section 13 from any coercive power and any form of subjection of the person to the power of others. It prohibits, inter alia, "moral" violence against persons subjected to measures restricting their freedom (Constitutional Court,

judgements 11/1956; 68/1964; 144/1970; 30/1962; and 210/1995.) The protection offered by Section 13 of the Constitution includes moral freedom, as freedom of self-determination, according to the Court of Cassation, Division 4, of 11 July 2001, including with respect to medical treatment: Court of Cassation, Division 3, no. 5444 of 14 March 2006, and no. 14638 of 30 July 2004.

Moreover, as a fundamental right of the person (and not just of the citizen), the right to personal freedom cannot be qualified in the case of foreign nationals, simply by reason of their citizenship. The inviolable rights apply "to individuals – not as members of a given political community, but as human beings" (Constitutional Court, judgements 105/2001; 249/2010; and 245/2011).

The wide-ranging scope of the notion of personal freedom corresponds, moreover, to the degree of protection afforded. Section 13 envisages a double protection for the inviolable status of personal freedom from undue restrictions by the administrative authorities: namely, the principle of legality and the right to judicial redress.

It thus envisages that the prerequisites for and modes of application of measures restricting freedom and the authorisation of the use of coercion shall be determined by, respectively, Parliament as the direct representative of popular sovereignty and judicial authorities. These are prime guarantees, on the other hand, to be systematically interpreted, in order to point out the general principle underlying our constitution, i.e. the favor libertatis [literally, priority given to freedom].

As to the principle of legality, more notably, this principle does not solely rule out any room for administrative discretion in implementing legal provisions, but it also imposes a strict reasonableness test in assessing legitimacy and proportionality of the measures restricting personal freedom, however allowed for by the legislator, according to the minimisation principle (see for instance the case law on assessing adequacy of pre-trial detention or remand in custody under Section 275, paragraph 3, criminal code; Constitutional Court, judgement 265/2010; 164/2011231/2011; 110/2012; 57 and 213/2013). In other words, restriction of personal freedom of the person under

investigation or accused is to be maintained within certain limits, thus meeting the precautionary requirements typical of the specific case.

Restrictions placed on personal freedom, in short, cannot be allowed solely by reason of the provisions of the law. They must, rather, pass the test of strict proportionality, where the restriction of such a fundamental right is justified by the need to protect a legal asset deserving special protection and measures entailing a lesser restriction of freedom would be ineffective in achieving this objective. This accords with the parameter of "less restrictive means" used by Anglo-Saxon case law and to which, for example, judgement 309/2003 of the Constitutional Court has recourse, with reference to precautionary measures.

The principle of effective judicial control, on the other hand, provides a means for the judicial authorities to evaluate and ensure that the measure is in fact legitimate and applicable, on the basis that the conditions envisaged by law (and for which grounds must be given) do indeed exist. At the same time, measures restricting freedom which the public prosecutor – a judicial authority but discharging non-jurisdictional functions – may not just propose but also adopt directly, are necessarily provisional in nature. They require judicial validation, in the context of a proceeding that ensures equality of arms in order to protect the right of defence and ensure an adequate system of appeal, including direct recourse to the Court of Cassation (Constitutional Court, judgement 419/1994).

These two guarantees (the principles of legality and effective judicial control) must be observed even in exceptional circumstances of necessity and urgency. In such circumstances, Section 13(3) of the Constitution envisages the adoption by the police of provisional measures that shall be revoked and considered null and void if not validated by the Judiciary within 48 hours of their notice. Notice of such measures must be given no later than 48 hours after their adoption.

Such is the degree of protection afforded to personal freedom that, even with respect to the measures limiting personal freedom as

required for a criminal proceeding, the Constitution imposes specific guarantees. The last paragraph of Section 13, which contains a specially enhanced version of the principle of legality, states that the legislator shall establish the maximum duration of pre-trial custody. It thus clarifies the difference between pre-trial custody (in terms of its function, conditions and requirements for legitimacy) and custodial measures imposed as punishments. It implicitly requires reasonable terms to be established that are in keeping with the principles of adequacy (with respect to precautionary measures, which are also designed to protect the community from the danger posed by the accused) and proportionality (between duration of custody, progress of the judicial proceeding and seriousness of the charges). Such terms should be such, in effect, as not to turn pre-trial custody into a punishment. (Constitutional Court, judgement. 15/1982; 29271998; 529/2000; 243/2003; 299/2005; EHRC, judgement 5.4.2005, Nevmerzhitsky vs. Ukraine and 10.7.2001, Marshall vs. United Kingdom).

Similarly, paragraph 3 of Section 25 of the Constitution requires compliance with the principle of legality as regards security measures, some of which may entail significant restrictions on the liberty of the perpetrators of crimes (or quasi-crimes) deemed to be socially dangerous, even if charges cannot be brought.

But paragraph 4, in particular, of Section 13 requires the legislator to ensure that any measures limiting personal freedom, even if legitimately applied, are enforced with due respect for the dignity of the person. It envisages a specific obligation of indictment (the only one in the Constitution!) for "any act of physical and moral violence against a person subjected to restrictions to their personal liberty". It is significant than the authors of the Constitution ruled out the imposition of any sanctions less severe than criminal ones to protect the individual from violent acts perpetrated through abuse of a power that should be exercised in the name of the state and which, if wrongly used, betrays the essential principles of that State insofar as it may be called a democratic one. The ban on torture is in fact the strongest intrinsic limit to the state's monopoly on

legitimate violence. Punitive power is exercised legitimately only if and insofar as it does not become an abuse of the condition of deprivation of liberty experienced by the citizen in his relations with the public authorities. Torture is the limit neither a penalty nor the interrogation by public officials may come close to – otherwise they are transformed into pure violence, thus turning a measure restricting freedom – albeit one legitimately laid down – into the most substantial injury to personal dignity.

b. Restrictions on personal freedom in the criminal system

Compared with the primacy afforded in the Constitution to personal freedom, the legislator – especially in recent times – has significantly increased the use of measures restricting personal freedom (in both qualitative and quantitative terms), starting with those of a criminal nature or in any case relating to criminal trials.

First, there has been a significant expansion of the criminal system (it is estimated that there are as many as 35,000 criminal offences defined in the law), so that criminal sanctions (notably custodial ones) have become the first rather than the last resort measures; this has resulted into imprisonment measures being applied on a large scale, partly due to the ban - applied from time to time to the offences perceived as generating most social alarm – introduced on measures mitigating imprisonment and/or on alternative measures for some perpetrators of crimes, and has in turn prevented judges in charge of enforcement measures from applying penalties other than imprisonment.

Second, there has been an expansion of the measures restricting personal freedom that are closely instrumental to procedural requirements (such as precautionary and pre-trial measures) in terms of their scope and the possible addressees. As was the case of the so called obligatory pre-trial custody, they have even been "imposed"- for specific perpetrators of crime qualified as "foes"- on the basis of a rationale intended to deprive the judge of whatever discretion in assessing the need for such measures in the case at hand.

However, the application sphere of both precautionary measures and the statutory obstacles to non-custodial measures was limited via recent legislation, most notably Legislative Decrees 211/2011 and 78/2013. Such cases, however, are rare and limited in terms of their scope. Significantly, the steps in question were taken on an emergency basis, via decrees, resulting from the need to limit prison overcrowding (as also urged by the European Court of Human Rights: see the Sulejmanovic and Torreggiani judgements in 2009 and 2013) rather than – it would appear – from the endorsement of a totally different criminal policy.

Anyhow, a drastic reduction in the sphere of application of custodial measures (whether as punishments or as precautionary measures) is bound to be achieved also in view of the warning addressed by the Constitutional court to the legislator in its order No. 279/2013 – namely, to "prevent a custodial treatment that is contrary to humanity from being applied." Furthermore, the order states that "the lawmaker's inaction in respect of this serious issue could not be tolerated for much longer."

Similarly, on 9 October 2013 the President of the Republic, in a message to Parliament, warned that the "stringent need for deeply changing the conditions of prisons in Italy" is not only a juridical and political must, but actually it is imperative from an ethical standpoint. He pointed out that this objective pertains to the protection "of those levels of civilization and dignity that should not be undermined in our country by unjustifiable distortions and omissions of political decision-makers."

To this effect, the Head of State had indicated some essential lines of reform of the sanctioning system that were functionally related to prison overcrowding and concerned some of the main criticalities of criminal law policies for the past few years.

The need for substantial decriminalisation measures; the introduction of probation as a mechanism to prevent imprisonment from being applied to those who deserve access to social rehabilitation programmes; the introduction of non-custodial penalties however limiting one's personal freedom; the reduction of the scope of

application of pre-trial custody and the mitigation of the impact produced by recidivism as an obstacle to the adoption of alternative non-custodial measures are, in fact, key actions not only to reduce prison overcrowding but also to bring our criminal system in line with the constitutional principles that are vital for any State grounded in the rule of law - from *favor libertatis* to the residual nature of the criminal sanction, from the principles of assessing the prejudicial effects produced by a crime to the focus on the rehabilitative purpose of any punishment.

c. Restrictions on personal freedom outside the criminal system

From another perspective, the recent tendency in the law has been to extend measures restricting personal freedom that are (only) formally administrative in nature so as to avoid application of the safeguards envisaged for criminal trials (and criminal law) and thus resort to such measures even without proof that an offence has been committed.

A significant example is provided in this respect by the measures entailing personal disqualifications or other restrictions: in spite of the many doubts raised by their legitimacy in constitutional terms – exactly because they are such as to entail restrictions on personal freedom, even substantial ones, when there is no proof that an offence has been committed – they were reiterated even by the latest legislative instrument in this area (anti-mafia code: Legislative Decree 159/2011). However, immigration is the legislative sector where restrictions on personal freedom outside the criminal system are most cherished. Highly peculiar measures are envisaged for both security and preventive purposes depending on the applicable preconditions - such as expulsion – along with a veritable form of administrative "detention" that is utterly unrelated to the commission of criminal offences and is only subject to validation by the judge (in fact, a non-professional judge) whilst it is liable to last for as many as 18 months.

Discrimination and violence

To be effective, the right to personal freedom therefore requires, above all, that the legislator recognises and abides by the principle that measures restricting freedom must be marginal in nature. Such measures should be envisaged only to punish offences against legal interests that deserve an equal degree of protection.
Similarly, in the absence of a final verification of criminal liability, it should not be possible, *a fortiori*, to allow restrictions of freedom that are not strictly necessary to address risks that could not otherwise be averted.

2012- 2013 Data on prison population

- However, the current regulatory framework points out that the legislator often infringes the duty of limiting the use of restrictive measures on freedom, with a growing tendency to apply custodial sanctions even for offences not causing harm to third parties, with the ensuing result of a skyrocketing increase in the number of prison inmates. According to the estimates of the Ministry, they shifted from 35,469 in June 1991 (with 15.13% being non-nationals) to 55,275 in 2001 (with 29,5 % being non-nationals), to 65,886 in May 2013 (with 31.4% of non-nationals); their number was slightly reduced on August 31st (64,835), probably due to the deflationary measures contained in Legislative Decree 78/2013, which had meanwhile entered into force.
- The only significant reductions in terms of presence occur (rarely) when clemency provisions are issued (following the "partial pardon" as per Law No 207/2003 there was a 2.57% drop, whereas as a result of the pardon granted via Law No 241/2006 a 34.5% slashing was registered) – or else on account of regulations intended to limit the recourse to pre-trial custody (with the enforcement of the so-called Biondi law, Law No 332/95, an 8.3% reduction was experienced. Surely less

important but equally remarkable was the deflationary impact of regulations intended to extend the scope of application of house arrest and non-custodial measures as per Law No 190/2010 and decree 201/2011, which triggered a cutback of 1.57% and 1.79% in terms of the number of prison inmates.) In this regard, it will be interesting to observe, most notably, the variation in the number of inmates that the enforcement of Legislative Decree 78/2013 will be able to determine, in particular as the latter reduced , albeit to a minimal extent, the sphere of application of custodial measures.

- An analysis of the current data shows that out of 64,835 prison inmates, only 39,571 are serving final sentences; 12,226 are not serving final sentences, i.e. they are presumably innocent, and 11,785 actually are awaiting trial, whereas 1,204 are inmates of non-prison institutions and 22,878 are non-nationals. It should be noted that prison facilities should not accommodate more than 47,040 inmates.
  The ratio between inmates awaiting trial and inmates serving final sentences is 37% - among the highest ones in Europe, where it is on average 25%. This ratio dwindled substantially in the period at issue due to provisions introduced by Legislative Decree 211/2011 to limit the "revolving doors" phenomenon - in other words the 3/5- day transit in prison of individuals awaiting trial- which fell from 27% in 2009 to 13% on 31 October 2012.

2012–2013 House arrest, permits for good behaviour and alternative measures

- In addition to the aforementioned figures, one should take account of those who, on the same date, were under house arrest, that is 10,670 individuals, out of whom almost one third (2,894) were placed under house arrest following Law No 199/2010 which extended from 12 to 18 months the time to be still served as allowing the alternative measure to be

enforced. The scope of application of probation is worthy of note. In the first half of 2013 it concerned 11,212 individuals convicted of crimes, out of whom 59 affected by HIV and 3,334 drug- and alcohol-addicted. Conversely, the application scope of the "open prison" regime [semilibertà] is more limited. It concerned only 912 individuals in the identified period, most of them (853) being prison inmates whilst only in 59 cases was the "open prison" regime the primary enforcement mechanism of a sentence. There is no doubt that one should enhance the resort to such alternative measures, some of which should be transformed into primary sanctions susceptible of being imposed directly by the trial court - as envisaged by the bill on out-of-prison custodial penalties (AS 925) that is currently under examination by Parliament.

- Furthermore, there are very few permissions for good behaviour granted to prisoners: in 2012 they were barely 25,275, whereas these benefits qualify as the "first step back into society" and therefore not only as veritable prerequisite for legitimacy of punishments, but also as the necessary precondition to prevent recidivism.
- The same goes for those sanctions replacing brief custodial penalties: only 10 applications for "semidetenzione" [custodial sentence entailing the obligation to spend at least 10 hours daily in prison] were recorded and 191 for parole (respectively 17 and 314 in the first semester of 2013 and 8 and 164 in 2012). There is a wider recourse to socially useful work, consisting in the performance of unpaid work for the community, replacing detention (or house arrest inflicted by the justice of the peace) or pecuniary penalties; the latter option is limited however to driving under the influence of alcohol. Application of this regime following breaches of the road traffic legislation accounts for the overwhelming majority of cases: 4,052 compared to only 284 for the remainder (offences under the jurisdiction of the Justice of Peace or infringements of the consolidated Statute on drugs).

2013 Imprisonment per category of offence

- If we then examine the statistics for the prison population by category of offence, we see that most prison sentences concern offences that do not entail any real harm to third parties. They relate to offences giving rise to danger (as in the case of crimes of association) or to non-compliance offences as related to the status of perpetrators (most notably, aliens staying in Italy illegally). This demonstrates the "imprisonment-generating" potential of certain provisions, most notably those concerning immigration and drugs, the violation of which is the main cause of imprisonment in our country. (On this point, the mitigation of the penalties envisaged for lesser drug-related offences envisaged by Legislative Decree 164/2013 is to be welcomed).

2103 Unlawful application of measures restricting freedom

- Contrary to the above and as can be evidenced from the chapter on the rights of persons deprived of their personal liberty, practices and enforcement rules regulating the adoption of measures restricting freedom have often proved to be illegal. There have been various physical and moral abuses perpetrated against prisoners (and inmates of non-prison facilities), which on various occasions have been lethal (more or less directly). An improvement, albeit slight, in the enforcement mechanisms of punishments can be noted thanks to the adoption of the so-called "dynamic surveillance", being a particular management system of living conditions in prisons able to "guarantee order inside the facilities without hampering the enforcement of custodial measures". This system is based on the customisation of security requirements and a wider use of direct surveillance so as to make it easier for prisoners to leave their cells and embrace the concept of "open prison" enshrined in section 6 of Law No 354/1975 (see, the circular letter of the Prison Administration Department dated 18.7.13).
- According to the guidelines of the 2006 Recommendation by

the Council of Ministers of the Council of Europe, "security measures applied to individual prisoners shall be" in fact " the minimum necessary to achieve their secure custody." "The security which is provided by physical barriers and other technical means shall be complemented by the dynamic security provided by an alert staff who know the prisoners who are under their control." Hence, the recalled need for "knowledge of the prisoner to be considered as the base for any kind of adequate management or security action." Therefore, it will be useful to assess whether the implementation of these principles will allow for a diminished use of coercive security measures, able to effectively promote the educational content of the punishment.

- As to the illegal nature of imprisonment (i.e. as to the *an* rather than to the *quomodo* of imprisonment), a survey by Eurispes and the Criminal Bar Association reported a yearly average of about 2,500 claims for damages due to unjustified imprisonment, out of which almost one third (800) on average are granted. However there are no specific data regarding compensation as a result of illegal detention.

2013 Administrative security measures

- As for restrictions on personal freedom applied as "administrative security measures" (pursuant to the definition to be found in our criminal code), apart from the 1,204 inmates of non-prison facilities, the only non-custodial security measure applied would appear to be parole (in other words the most restrictive one: 3,786 cases in the first semester of 2013, almost 1,000 more than in the previous year), which is not infrequently applied at the end of imprisonment as if it were a continuation of the latter.

- As the Report by the Senate's Commission of Enquiry into the National Health Service shows, the inmates of non-prison facilities are often restrained without justification. This occurs,

moreover, in the absence of specific provisions governing the relevant prerequisites, limits, conditions for admissibility and guarantees (including judicial review).

2013 Measures restricting freedom of movement

- Of particular significance is the sphere of application of the measures restricting freedom of movement of individuals, which were enforced in as many as 394 cases in the first six months of 2012 alone (according to the latest figures available). Of these, 367 took the form of special surveillance with mandatory residence and only 27 that of simple special surveillance. However, these data do not take into consideration the peculiar measure restricting freedom of movement solely of foreign or EU citizens (in the form of expulsion or removal from the State's territory, respectively, as adopted where circumstances point to an individual's being socially dangerous) which is enforced all but infrequently.

  Of particular significance are the data related to 2008-2012. A general increase in the adoption of measures restricting freedom of movement was observed - from 781 in 2008 to 859 in 2009, to 871 in 2011 up to the 394 cases in the first semester of 2012 alone.

Legislation and policies

a. Background

Section 13 of the Constitution, therefore, does enshrine the main guarantee of the citizen against unlawful restrictions on personal freedom by public authorities - in other words, the core of the Habeas Corpus which has ever been the foundation of any other freedom right. Its function of guarantee – grounded in the principles of legality and effective judicial control as well as in the minimisation of the measures restricting personal freedom - runs the risk of being

weakened by a law-making approach that is aimed, on the one hand, at expanding the sphere of application of the measures restricting personal freedom that are "typical" or anyhow conventionally received in criminal law and, on the other hand, at enlarging the mechanisms and procedures limiting freedom – which in some cases are turned into administrative measures and placed outside the scope of judicial procedures.

As to the former issue, reference should be made to the expansion of the concept of "*flagrante delicto*", the so-called mandatory pre-trial custody (remand in custody), and the qualification of punishment as "segregation-oriented" (rather than rehabilitation-oriented).

The latter issue refers in particular to measures restricting personal freedoms that are only instrumentally qualified as administrative - such as detention in identification and expulsion centres and the coercive deportation of aliens as well as the significant expansion of security measures and preventive measures limiting freedom of movement.

b. Pre-trial precautionary measures and police powers

Turning to pre-trial precautionary measures, the recent trend in law-making is characterised by a significant expansion in the scope of obligatory arrest and, most notably, of persons not caught "in the act"; this points to a significant extension of the powers vested in the police, who apply said measures. First, reference should be made to the expansion of the category of offences for which arrest is obligatory (with particular regard to offences committed for the purposes of terrorism or subversion of the constitutional order, as referred to in Legislative Decree 144/2005) or optional.

This stepwise increase in the cases where obligatory arrest is envisaged (often connected with summary proceedings, which have greater symbolic impact) has actually resulted, quite frequently, in losing sight of the linkage between this pre-trial precautionary measure and custody, since obligatory arrest has been envisaged

even for offences for which no remand in custody is permitted. This criminal policy trend was criticised by the Constitutional Court, most notably in judgement no. 223 of 2004. The Court declared that obligatory arrest was not legitimate in respect of an offence – such as that of failing to comply with an expulsion order – for which precautionary measures may not be applied, as one would otherwise break the link between urgent measures restricting personal freedom and precautionary measures - unless the intention is to turn obligatory arrest of a person caught in the act into an "exemplary measure" only to be applied as an end in itself.

Second, the category of offences for which arrest is allowed in cases where the alleged perpetrator is not caught in the act has gradually been extended. This was originally envisaged (albeit as an option, therefore subject to evaluation of the appropriateness of the measure in the case concerned) for offences involving failure to comply with special surveillance measures including an obligation to stay (or not to stay) in a given place or else following escape from prison. Obligatory arrest, by contrast, even outside *flagrante delicto* cases, is now envisaged for the offences of exploiting or abetting illegal immigration, thus dodging the safeguards arising from the necessary link between police's power to restrict personal freedom and exceptional circumstances of necessity and urgency.

The concept of "deferred *flagrante delicto* cases" was also introduced for "stadium-related" offences. This term refers to offences entailing violence against persons or property occurring during or as a result of sports events, and offences involving the throwing of dangerous or other objects in places where sporting events take place. It also refers to failure to comply with the DASPO ban imposed by the Questore (the Italian acronym D.A.SPO. stands for Divieto di Accedere alle manifestazioni sportive, i.e. the ban to take part in any sports events as a spectator).

Accordingly any individual who, "on the basis of video-photographic documents or other objective evidence showing the fact unambiguously is found to be the perpetrator, as long as the arrest takes place by no later than what is necessary for him to be identified and, in any case, no later than 36 hours" (later increased to 48) is considered to be caught in the act.

Here, the discrepancy with respect to the concepts of *flagrante delicto* or *quasi flagrante delicto* envisaged by the Code of Criminal Procedure does not only stem from the different timescale, as it also concerns the different role played by the criminal investigation police in enforcing a measure restricting personal freedom not at the time the facts take place, but following an investigation, essential as this may be, to trace the persons to be questioned.

c. *Periculum libertatis and presumption of innocence in the provisions governing coercive precautionary measures*

The trend in law-making pertaining to pre-trial custody is equally worthy of note. This, probably more than any other, is a token of the relationship between individual freedom and collective security; accordingly, it is liable to be relied upon also in breach of the principles of strict procedural necessity, gradualness, adequacy and proportionality that ought to underlie the relevant regulations – which should also set forth the maximum duration of such custody (section 13, last paragraph, of the Constitution) [1].

As the Constitutional Court affirmed in its judgement No. 64/1970, which concerned the procedural rules previously in force but sets out principles that remain fully applicable, "pre-trial custody (…) should be regulated in such a way as not to clash with one of the fundamental guarantees of citizens' freedom: namely, that the defendant is presumed to be not guilty until the contrary is proven", so that it is only to be permitted "to meet precautionary requirements or those strictly related to the trial".

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1 As to the relationship between personal freedom and coercive powers by the State, see GIUL. AMATO, *Individuo e autorità nella disciplina della libertà personale,* Milan, 1967, 200 et seq..

In view of the above, *a fortiori,* the recent expansion of the category of offences this measure may be applied to has caused some perplexity, because such measure has now taken on, factually, the substantive features of a sentencing measure. This has been achieved either by adjusting the statutory requirements so as to permit its enforcement or, conversely, by explicitly excluding the offences considered to be socially most dangerous from the list of those for which house arrest is contemplated. In this regard, it is quite significant to note what happened when decree 78/2013 was converted into a Law - namely, the scope of application of pre-trial custody was reduced by adjusting the sentencing-related thresholds , but, in order to enable application of pre-trial custody to stalking and unlawful funding of political parties, the Law increased, on the one hand, the statutory maximum penalty provided for regarding the former and, on the other hand, it excluded the latter from the sphere of application of house arrest. This sort of mechanical assumption almost excludes the factual appreciation of the specific circumstances and the actual existence of *periculum libertatis,* i.e. of those strictly procedural requirements that, alone, justify such a decisive restriction on freedom of an individual, who is ultimately presumed to be innocent.

c.1. Obligatory pre-trial custody

Recent criminal justice policy has also significantly extended the sphere of application of the criminal procedure measure that, perhaps more than any other, clashes with the principle of minimising restrictions on personal freedom. Reference is made here to the presumption that pre-trial custodial measures are adequate, based solely on the statutory offence at issue and – as was the case under the Valpreda law – on the equation basically made between being a defendant and being guilty.

With Decree 11/2009 (known as Maroni Decree), the so called

obligatory pre-trial custody, initially intended only for mafia-type crimes, was even extended so as to include crimes perpetrated by a single individual, which- however serious they may be- lack an essential feature- i.e. the existence of a criminal organisation, which enabled both the Constitutional Court and the EHRC (Pantano case in 2003) to rule out that such a measure was unlawful. In fact, the new regulatory framework was basically dismantled by the Constitutional Court via a set of judgements -from 265/2010 to 213/2013- that found it to be illegitimate. This concerns most notably the provisions whereby pre-trial custody in prison is to be applied when substantial circumstantial evidence points to the guiltiness of the defendant with regard to the offences considered from time to time, except for those cases where no precautionary requirements exist, insofar as such provisions fail to leave unprejudiced the cases where specific elements are available showing that the precautionary requirements may be met via other measures. Therefore the Court has found that as far as the new category of offences is concerned, there are no exceptional requirements such as those related to mafia-type organised crimes that allow derogating from the principle of the lesser necessary evil underlying the pre-trial custody regulations. In fact, a mechanical assumption is made which ends up excluding the necessary factual appreciation of those strictly procedural requirements that - unlike what is the case with the sentencing system – underlie the recourse to pre-trial custody .

The trend to expand the scope of pre-trial custody (be it obligatory or not) is however partly mitigated as of now, due to the need to limit prison overcrowding rather than to the endorsement of a different approach to punishments. However, it is worth noting that starting from Decree 211/2011 up to decree 78/2013, a gradual containment of the cases of eligibility to pre-trial custody in prison took place. In particular, the former decree provided for the residual nature of this measure (except for especially socially dangerous crimes) by giving preference to house arrest or detention in security areas – which is also in line with the circular letter issued by the Public Prosecutor

at the Court of Milan in 2013, urging the recourse to non-custodial measures both in the pre-trial and in the sentence enforcement phase. The latter decree, instead, introduced a more structural change by extending the statutory maximum penalty for the offences in whose respect pre-trial custody may be ordered from 4 to 5 years.

d. "Non-liable to rehabilitation"

From another perspective, recent criminal legislation has seen a progressive expansion of the categories of offence for which the granting of prison benefits and the suspension of the order of enforcement of the penalty are not envisaged. This reduces the penalty solely to a means for defending society (or a means for segregation) and deprives it of its legitimising function of social rehabilitation. Most notably, the political need to show "zero tolerance" towards whichever offences are being portrayed as the cause of greatest social alarm has often led the legislator to rule out access to alternative measures for the perpetrators of such offences. This is in contrast to the fundamental principle whereby, for the social rehabilitation of the offender to be achieved, the penalty must be enforced in an individualised manner defined on a case-by-case basis, in accordance with the offender's conduct and the way it evolves. It thus requires the discretionary evaluation of the judge, without the impediment of abstract legislative assumptions based merely on the type of offence committed or on the "type of perpetrator", as in the case of repeat offenders. Furthermore, even if one follows a merely practical approach, the rigid enforcement of the penalty served in a cell does not reduce, but paradoxically increases the risk of recidivism compared to the granting of alternative measures – which goes to show how prison is "an unjustifiable reality in the name of security, which is being undermined rather than guaranteed" to refer to the words uttered by President Giorgio Napolitano.

The legislator, aware of this conflicting purposes, or probably driven by the need to limit prison overcrowding as urged also by the ECHR, recently softened, albeit in part, the rigidity of these regulations by reducing the scope of application both of the ban on suspending enforcement of the penalty and of the conditions preventing mitigation of prison regimes - while maintaining repeat offenders in the category of those "non-liable to rehabilitation" (Legislative Decree 78/2013) and extending the sphere of application of house arrest via decrees 199/2010, 211/2011 and 146/2013; the latter, in particular, introduces house arrest as a standard measure to serve the final portion of one's sentence, expands the scope of application of referrals to welfare services to include convicts serving residual sentences of four years' duration and enhances the recourse to "special" early release besides softening sanctions for drug-related minor offences.

It is then especially significant that the offences for which no ban on enforcement of sentences and no mitigation of the prison regime are envisaged are basically superimposable with those for which, regarding precautionary and pre-trial measures, mandatory pre-trial custody (and arrest) are envisaged[2]. Such a synergy of preclusions and assumptions results into placing certain offenders qualified as "public foes" into a special subset of criminal law (the so-called enemy's criminal law), characterised by important derogations from guarantees that are generally applicable to the defendant - here seen as a "un-person", a source of danger to be neutralised rather than a citizen to be socially reintegrated via an adequate customised program.

e. Treatment or sanction? Functions and limits of measures

2 [2]

This circumstance has a partial impact on the possibility, for the accused that have perpetrated the same types of offence as per Section 4-bis, paragraph 1, first period, of Law No. 354/1975, to be subjected to the Article 41-bis prison regime, as further exacerbated by Law No 94/2009.

[3]

However implementation has to be monitored to avoid that the individuals concerned suffer from two-fold institutionalisation, both as perpetrators of crime and as individuals affected by mental disorders.

limiting freedom of movement

Obviously, this form of neutralization of the aforementioned "public foes", considered as being most dangerous from a social viewpoint, is not limited to criminal punishments and proceedings, as it is also achieved by way of measures restricting personal freedom subject to less stringent safeguards.

In this regard, measures limiting freedom of movement, in particular custodial measures of this type, are especially significant. Indeed, given the envisaged and needed abolition of judicial psychiatric hospitals[3], a restrictive approach can be observed vis-à-vis the individuals considered to be criminally chargeable, who are qualified as socially dangerous sometimes based on abstract preconditions. In these cases, in fact, they are increasingly paroled after serving most of the respective sentences, which entails the continuation of the restrictions placed on their personal freedom following conviction - for an indefinite period, except where social danger is no longer an issue - merely to meet social protection requirements. Conversely, the restriction on personal freedom resulting from such measures should be traced back to the scope and purposes of the relevant punishment, especially regarding the individuals qualified as criminally chargeable, who otherwise are subjected coercively to a custodial measure that is useless as it is unable to educate them. Furthermore, they are subjected to measures restricting their freedom of movement that risk extending over time, exactly due to the basic ineffectiveness of the punishment imposed on them in terms of their rehabilitation.

f. Freedom, body and dignity. Obligatory medical treatment and physical restraint

In envisaging the – admittedly necessary – closure of "psychiatric judicial hospitals" and their replacement with more markedly treatment-oriented facilities, the legislator should have reviewed

the regulations on obligatory medical treatment as introduced by the "Basaglia Law" (Law No. 180/1978). The framework for such a review should have been a broader re-thinking of the provisions on measures to restrict personal freedom as applied to persons suffering from psychological conditions. The obligatory medical treatment was introduced to make it possible to administer, coercively, tests and treatment to persons with particularly serious mental diseases "with due respect for the dignity of the person and his civil and political rights, including as far as possible the right to freely choose his doctor and place of treatment." Such tests and treatments must be accompanied by "initiatives to ensure the consent and participation of those obliged to submit to them." The treatments in question are solely aimed at protecting the patient's health, unlike what was provided for in the previous legislation (Law No. 36/1904, on "lunatic asylums and on mentally unsound persons") regarding "coercive admission" to lunatic asylums as applying to individuals deemed dangerous "to themselves and others" or otherwise likely to cause "public scandal". The obligatory medical treatment is ordered by the Mayor of the municipality in which the patient is to be found, based on a reasoned proposal by a doctor and validated by a physician belonging to a public facility where hospitalisation is envisaged. The hospitalisation-based obligatory medical treatment should also be approved by the guardianship judge, on whom the order shall be notified within 48 hours from hospitalisation. The approval must be granted within the subsequent 48 hours.

Today it would be especially appropriate to attribute a more incisive role to the guardianship judge than the one specified under Law No. 180 when validating the in-hospital obligatory medical treatment, by extending judicial scrutiny to include out-of-hospital obligatory treatments that are nevertheless such as to restrict personal freedom. In this respect, it would also be appropriate to initiate a major overhaul of the regulations (currently incomplete) of the physical restraint applicable to psychiatric patients (whether inmates of ad-

hoc facilities, subject to in-hospital medical treatment or otherwise), considering in the first place whether to ban it outright or possibly limit it to cases of marked aggressive individuals that cannot otherwise be contained or where there is a risk of suicide.[3] The only regulations that apply today with regard to the use of physical force are in fact the ones under Law No. 354/1975 and its implementing regulations but only limited to prisoners and inmates of non-prison institutions - pursuant to a framework which follows that of the Mental Health Act of 1904 and the related regulations, whose implicit repeal by Law No. 180 is still controversial. Therefore, if one accepts the implied repeal hypothesis, any form of physical restraint in respect of non-inmates would be illegal today because it would be applied in the absence of an adequate legal basis. If, therefore, the use of restraint is considered inevitable - which today is anything but uncommon, as shown by the inspection activity carried out by the Senate Commission of Inquiry into the National Health Service in the last parliament - it should be properly regulated in accordance with the principle of legality set forth in Sections 13 and 32 of the Constitution and with the judicial review requirement provided for in Section 13 thereof. At all events, it should be provided that such types of restraint may only be applied as a last resort measure in cases of proven serious risk to the safety of the patient and others, and where other less invasive measures are ineffective. In any case, being a restriction placed on personal freedom, the use of physical restraints should only be allowed after judicial approval and in accordance with a procedure that envisages a judicial review addressing the substance of the case at hand along with effective guarantees of the right of defence. The opportunity might be also be seized to achieve the effective implementation of Decree 201/2011, in the part ordering the shutting down of judicial psychiatric hospitals.

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3 [4] The belief in the inevitability of physical restraint, at least in some cases, appears, for example, from the Recommendation on preventing acts of violence against health-care practitioners issued by the Ministry of Health (2007) and by having regard to medical and nursing codes of conduct.

g. *Before the offence. Preventive measures and "appropriate enemies"*

Like security measures, preventive measures aim to neutralise the social danger posed by individuals. In this case, however, they apply – following the principle of *ne peccetur* (and not *quia peccatum est*) [not because a sin has been committed but that it might not be committed] – to individuals only suspected of having the potential to offend in the future. Or, alternatively, to individuals implicated by insufficient evidence to stand as proof that offences have been committed and, therefore, leaving aside any investigation into criminal liability. Furthermore, unlike security measures, preventive measures are more markedly administrative in nature. This is because they are issued by administrative authorities and merely validated by the judge or, where they have an impact on personal freedom proper, by the court, on the basis of a special proceeding that inevitably reduces the guarantees available to the defence.

The recent legislative trend has contributed to extending the 'suspicious circumstances' that justify the application of these measures, which have actually been expanded in scope, invoking from time to time the need for early protection of legal assets deemed to have priority over the mere possibility of their harm, according to a legal policy perspective also permitted by the Constitutional Court since judgement no. 27/1958 - and yet interpreted extensively for reasons of social control or repression of political dissent (as in the case of the Reale Law) to encompass truants and vagabonds, foreigners and hooligans.

With Legislative Decree 159/2011 (anti-mafia Code), which systematised the matter, we missed the chance for a thorough review of the rules governing measures restricting freedom of movement of individuals so as to limit their scope to only those cases really needed for the a priori protection of primary legal interests and

anyhow in the presence of circumstances such as to point to the factual risk of harm being caused to such interests - by reason of the confirmed dangerousness of the individual that could not be reduced otherwise. Parliament has instead chosen to retain the traditional personal qualifications pointing to the existence of danger (individuals suspected of belonging to mafia associations, persons involved in criminal activities, etc.) alongside those introduced more recently by way of legislation (individuals suspected of having assisted persons involved in violence at sporting events). The procedure for the application of preventive measures restricting personal freedom was regulated in such a way as to ensure greater 'judicial scrutiny'-with the court being given powers to issue rulings and not just to validate administrative measures - and, therefore, more effective guarantees of the right of defence. It was actually a change dictated by the Constitutional Court, which has repeatedly held the regulations on preventive measures restricting personal freedom to be illegitimate to the extent they impacted excessively on the right of defence (see, in particular, judgement 144/1997).

However, Parliament lacked the courage to strike them out or even just to impose any effective limitation on such measures by having regard to those cases in which this a priori protection of legal assets is considered to be really essential.

Such a choice would actually be a must in a legal system like ours, where the primary protection afforded to personal freedom admits of limitations only after establishing the commission of an offence and culpability for the offence committed (and not for one's life-style: see sections 25 and 27 of the Constitution) or else, for limited periods, in the context of criminal proceedings (Section 13, last paragraph, of the Constitution), or to counter the social dangerousness posed by an individual that has committed a criminal offence (or a quasi-crime) (pursuant to section 25(3) of the Constitution, affirming compliance with the principle of legality as a prerequisite for regulating security measures) .

The absence of any link with the commission of an offence (these are actually measures taken *sine* (without) or *praeter* (irrespective of) the commission of an offence, rather than *ante delictum*) is then reflected in the nature of the procedure for their application, which is characterized by the almost total absence of predetermined forms and therefore run largely in a discretionary manner.

There are no specific rules on the taking and evaluation of evidence and the procedure is based on the submission of purely circumstantial elements that are not only well below the standard required in a criminal trial for sentencing, but also below the standards for adopting precautionary measures – with the attending consequences in terms of limitations placed on the right of defence.

The structurally circumstantial nature of the preconditions for applying preventive measures, however, is amplified because of the virtually evanescent features of the 'suspect' as defined by law, which acts as the substitute for criminal offences that are difficult to prove.

To the extent evidence is missing for the predicate offence, preventive measures are therefore more properly measures taken *praeter probationem delicti* (irrespective of proof of the commission of a crime) rather than *praeter delictum* (irrespective of the commission of a crime); they are penalties imposed on a suspect on the ground of mere clues that are not liable to be investigated further, and as such they are appropriate to circumvent the guarantees underlying criminal procedure – which is even less acceptable when one considers the number of limitations, direct and indirect, they place on the freedoms and fundamental rights of the person involved.

Indeed, apart from the content of the individual measure (which is particularly high-impact in the case of special supervision with a prohibition or obligation of residence from one to five years, as recognized by the ECHR itself in the Labita vs. Italy case of 2000), they produce effects (some of them also concerning cohabiting persons!) limiting constitutionally protected civil or political rights

such as the prohibition to obtain licenses, permits, authorizations; the revocation of driving licenses or the prohibition to perform any electoral canvassing. Subjection to such measures also allows - if necessary for reasons of prevention, in fact - the police to carry out, upon the mere authorisation granted by the Public Prosecutor, 'preventive' interceptions whose results cannot be used in court. Furthermore, the application of these measures entails "indirect incarceration" effects - with imprisonment being provided for following any violation of the instructions given to the person (also those of a very general nature, to live honestly and abide by the law) – along with further tightening of the penalties envisaged, as the fact of being the subject of preventive measures is regarded as a special aggravating circumstance for certain offences.

Regarding the offences committed at sports events and in violation of DASPO (prohibition of accessing places where sporting events take place), admissibility of pre-trial custody has additionally been provided for, albeit on a temporary basis, by derogating from the punishment threshold set out in the Code of Procedure.

According to a trend that has been confirmed throughout legislatures, whenever the principles of exclusivity, legality, legal scrutiny in criminal matters have been depicted as obstacles rather than as guarantees, in order to circumvent the procedural safeguards applying to defendant, recourse has been had to measures restricting freedom of movement of individuals - whose history dates back to the combating of vagrants in sixteenth century England or to the preventive measures against 'bandits' and political dissidents issued by Crispi's government at the end of the 19th century in Italy.

h. Freedom of borders. The special sub-system of non-citizens

h.1. Expulsion as a preventive measure

Immigration is a prime area for preventive measures limiting

freedom of movement. Such measures feature the recourse to the expulsion (or deportation) of individuals deemed to be dangerous on the basis of mere circumstantial evidence or suspicions. Only consider, for example, expulsion by the Prefect as referred to in Section 13, paragraphs 1 and 2(c) of Legislative Decree 286/1998. This provision applies to migrants belonging to "some of the categories" cited in Laws No. 1423/1956 and 575/1965 (persons engaged in illegal trafficking; persons living on the proceeds of crime; and persons habitually committing certain crimes). These provisions refer to cases where, in the absence of proof of their guilt, a suspect (generally by reason of lifestyle or status) is punished (with varying degrees of severity).

Moreover, Section 3 of Decree 144/2005 extended the scope of application of the administrative expulsion to migrants *suspected of facilitating, in any way,* activities or organisations for purposes of terrorism, including international terrorism (regarding the expulsion of EU citizens for "mandatory reasons of public security", see Section 20 of Legislative Decree 30/2007).

For the purpose of adopting an administrative measure of removal, it is not necessary for the individual to have been convicted of prior offences or to demonstrate that the individual poses a danger to society ; in fact, these requirements (as well the fact that the individual in question belongs to the categories pursuant to Section 1 of Laws No. 1423/1956 and 575/1965) are mere indicators the administrative authority may take into account as part of its discretionary assessment. Regardless of the traditional remedies provided by appeals, the intervention of the judge (justice of the peace, who is certainly not the "judge pre-determined by law" as for personal freedom) is limited to validating immediately enforceable expulsion orders only. This, as we know, is a summary judgment that merely examines the legitimacy of the provision.

Judicial review was, however, excluded - albeit temporarily - for the deportation applied - as a preventive measure - by the Minister of the Interior or, when acting on his behalf, the prefect, against foreigners

who have committed acts preparatory to terrorism-related offences or that are suspected may assist terrorist organizations or activities. The vagueness and wide-ranging nature of the preconditions for applying this measure, together with the fact that it may be enforced (again, only on a temporary basis) even though the information underlying the adoption of the measure is not immediately to be disclosed, for confidentiality reasons (procedural or informative), and coupled with the exclusion of judicial validation (contrary to the nature of the measure, which is restrictive of personal freedom as recognized by the Constitutional Court via judgement 222/2004 regarding coercive deportation) show the differential and derogatory nature of the provisions adopted also in this case in the field of immigration.

Equally unjustifiable is expulsion (or deportation) enforced as a security measure, which is envisaged for foreigners on the sole ground that they have been *convicted* of offences of a medium-low gravity (such as offences carrying imprisonment for a period in excess of *two years*) and in the absence of any express requirement for ascertaining the social danger posed by the person in question.

And if it is true that the need for such an ascertainment may be inferred from an interpretation of the law that is mindful of constitutional principles (the Constitutional Court having upheld the illegitimacy of any presumption of social dangerousness), it is also true that the lawmaker's intention (*voluntas legis*), at least for the past, would appear to be different, as is clear from the preparatory work that led to the amendments.

h.2. Administrative "detention"? Detention in identification and expulsion centres

The immigration-related legislation also includes a measure depriving of personal freedom that is formally defined as administrative in

nature – because it is uncoupled from the commission of offences or the opening of a criminal proceeding – but is no less punitive than a criminal penalty. This measure has been applied, most notably, since Decree Law 89/2011 [4] increased the maximum period of detention in identification and expulsion centres to the limit of 18 months allowed by Directive 2008/115/EC. This period is thus even longer, in other words, than the one envisaged for serious offences. And it is being applied for the sole fact (which does not always depend on the intentions of the person concerned) that it is not possible to proceed with the repatriation.

The contrast between Section 13 of the Constitution and a form of detention – supported by a judicial validation that is little more than formal in nature – that is completely unrelated to the commission of offences, or to an evaluation of those requirements of investigation, prevention or social protection on which precautionary measures are based, is therefore all the more evident. After all, Section 13 also applies to foreign nationals as it is intended to uphold the fundamental and inviolable freedom of habeas corpus: see, for example, judgements 105/2001; 222 and 223/2004.It seems, in short, that detention measures "exploit the non-criminal dimension only to neutralise the substantive and procedural guarantees of the criminal system, since they are based, in reality, on coercive measures restricting personal freedom which in the criminal system are absolutely exceptional in nature" (A. Caputo).

It is true that the Constitutional Court considered the questions raised over the constitutional legitimacy of the provisions governing detention in (at that time) temporary stay centres, under Section 13 of the Constitution, to be unfounded. In the Court's view, the fact that the validation concerns an administrative provision issued by the public security authorities and at the same time represents the prerequisite for further detention up to the limit envisaged by law, does not violate the judicial control condition referred to in Section

4 [5] Which, however, introduced – as required by the Directive – alternative measures to detention in identification and expulsion centres to ensure that the foreign national is removed from the country.

13, since the detention would in any case be based on (and legitimised by) a judicial provision. It is, however, equally true that this is still debatable (and therefore legislative clarification is needed on) how one may attribute to a decision issued in a judicial proceeding the decision to extend the detention period until the deadline provided for by law. However, the Court will soon decide on a further request for assessing constitutional legitimacy of the detention in question, lodged in relation to Section 13 of the Constitution by a justice of the peace in Rome via the order dated 6 October 2013. Similarly, it would also seem necessary - partly in the light of the factual reality of these centres – to introduce procedures and mechanisms in order to monitor the conditions of detention, as a sort of parallel approach to what is stipulated by Law 354/1975 for prisons.

In should also be recalled, in general terms, that the Court of Justice, in its El Dridi judgement, stated that the use of the detention measure - or the "the measure most restrictive of personal freedom that the directive allows in a case of coercive removal " - is regulated expressly by Directive 2008/115/EC, "particularly in order to ensure respect for the fundamental rights of the third country citizens concerned,"; in fact, the Court noted that the fixing of a binding maximum period of detention has "the purpose of limiting the deprivation of liberty of citizens from third countries in a situation of coercive removal", and on the basis of ECHR case law, that the detention of foreigners during the administrative procedure of expulsion must be for the shortest period possible, and may never extend beyond the time necessary to achieve the purpose of removal. Any restriction of personal freedom and any coercive treatment at centres other than the identification and expulsion ones (such as initial reception centres) should be expressly excluded whenever the law does not expressly provide for coercive detention. On the other hand, the whole system of penalties provided for by the consolidated text would require a complex revision in the light of the subsidiarity

principle of criminal law, so that the restriction of personal freedom of *illegal* aliens really represents a last resort (and not the rule, as is currently the case) and the coercive intervention of the police does not represent the rule but is instead - as stated in the third paragraph of Section 13 of the Constitution - limited to "exceptional cases of necessity and urgency."

Recommendations

1. Fostering in-depth decriminalization with particular regard to drug- and immigration-related activities, which are the main reasons for the increase in prison population.
2. Limiting custodial punishments to the most serious crimes that are prejudicial to primary legal assets as per the hierarchy outlined by the Constitution and only with regard to those individuals for whom it can be shown that there is a substantial dangerousness potential.
3. Expanding the type and scope of alternatives to imprisonment, with provision also being made for their transformation (at least partially) into principal penalties (which may thus be imposed directly by the trial court), whilst also extending the scope of application of prohibition measures so as to turn them into principal sanctions as well.
4. Reducing the recourse to remand in custody and eliminating arrest under "deferred flagrante delicto" conditions, by limiting mandatory arrest to especially serious statutory offences.
5. Ruling out imprisonment for mothers (and fathers, if the mother is unable to assist children) with (at least) pre-school age children and allowing deprivation of their liberty in locations other than their homes exclusively under exceptional circumstances; such locations should consist in any case in structures such as ICAM or sheltered homes and be outside correctional facilities, and they should be managed by welfare bodies. Further, the applicable security measures should preferably be non-recognisable as

such by children.

6. Excluding persons (partly) liable to be indicted from the scope of application of the measures limiting freedom of movement, so as to ascribe the special preventive functions of such measures back to the scope of the enforcement of sentences, thereby enhancing their effectiveness with a view to rehabilitation.
7. Extending judicial validation to non-hospital obligatory medical treatment that impacts personal freedom, following attribution to the judge of enhanced powers of assessment; limiting and providing for the stepwise elimination of resort to physical restraint regarding the mentally ill.
8. Markedly reducing preventive measures limiting freedom of movement by eliminating, or at least limiting, their indirect consequences (bans, sanctions etc.).
9. Limiting the recourse to deportation as a preventive measure and subjecting it in any case to more in-depth judicial review. Against this backdrop, the use of deportation as a security measure should be limited to cases where the person has been convicted of particularly serious crimes and has been shown to be a danger to society.
10. Pending the overhauling of the system based on Identification and Expulsion Centres (IECs), reducing the maximum permissible duration of detention for aliens to 40 days with a possible 20-day extension if no transportation means is provisionally available. At all events, judicial review of the relevant measures should not be limited to the assessment of formal compliance with the law and provisions should be made to ensure that detention is allowed as a last resort measure. Procedures and mechanisms should also be introduced in order to monitor the conditions of detention.

PRISONERS
By Valentina Calderone

Focus On Facts

Article 3. Prohibition of torture

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Torreggiani Case

2013 started with a Sword of Damocles hanging over Italy, and it remained so for the whole year and beyond. In fact, on 8 January the European Court of Human Rights (ECtHR) issued the so-called "Torreggiani Judgment", condemning Italy for having violated Article 3 of the European Convention on Human Rights (ECHR) in the light of the conditions of its prisons. The judgment is named after Mino Torreggiani, a man who applied to ECtHR, together with six more people.

The seven applicants - Torreggiani, Bamba, Biondi, Sela, Ghisoni, El Haili, and Hajjoubi - had been detained in the prisons of Busto Arsizio and Piacenza for a period ranging from 14 to 54 months, and were complaining of shortage of space (9-sq. metre cells, to be shared with two more prisoners), lack of hot water and consequent limited access to showers, and reduced lighting of the cells due to the metal bars on the windows.

Only one of the prisoners in question had applied to the Italian *magistrato di sorveglianza* (the judge responsible for the execution of sentence), who upheld the complaint and forwarded it to the director of the prison of Piacenza, the Ministry of Justice, and the Prison Administration, "so that each one of them could urgently take the necessary measures within their own scope of competence." Nevertheless, it was only after six months that the prisoner was transferred to another cell, which he shared with one person, instead of two. In its defence, the Italian State did not question the accusations of the applicants (except when declaring that the cells were of 11 sq. metres and not 9, albeit this was not supported by evidence); rather, it focused on the fact that the applicants had not exhausted all domestic remedies.

In evaluating this objection, the ECtHR noted that the possibility of applying to the *magistrato di sorveglianza* is not "effective in practice", since said instrument cannot put an end to the reported violations, as these are a structural problem of almost all Italian prisons, particularly in the case of overcrowding; because of this, all seven applications were declared admissible.

The European Committee for the Prevention of Torture (CPT) stated that 4 sq. metres is the minimum desirable living space for shared cells, and that, in cases of serious prison overcrowding, having less than 3 sq. metres at one's disposal represents a violation of Article 3 of the ECHR. The ECtHR stated that the applicants had been subject "to hardship of an intensity exceeding the unavoidable level of suffering inherent in detention." The judgment, however, goes a step beyond: the ECtHR, in fact, chose to adopt the so-called "Pilot judgment" procedure, envisaged by Article 46 of the Convention. The Pilot judgment is adopted by the Court when it holds that the violation reported does not derive from a specific situation but, rather, from a general or structural condition that generates said violation. After a careful analysis of the facts - confirmed by the declaration of a National state of emergency as regards prisons, issued by the Council of Ministers in 2010 - the ECtHR affirmed that the issue of

overcrowding in prisons has a "structural and systemic nature" which reveals a "chronic dysfunction" of the Italian prison system. This was also confirmed by the numerous applications pending before the ECtHR for the same reason: this proves that the situation has involved and might involve numerous individuals. As compensation for non-pecuniary damage, caused by the poor conditions of detention, the ECtHR ordered Italy to pay almost €100,000.

The ECtHR's judgment became final on 27 May 2013 and, as of then, Italy was given one year to adjust the conditions of its prisons to the standards deemed respectful of human dignity, and to put in place an effective domestic remedy or a combination of such remedies capable of affording an adequate and sufficient redress in cases of overcrowding in prisons. Once this term expires, all applications still pending before the ECtHR relating to overcrowding and "frozen" while waiting for the Italian Government to act, will be considered. Should the situation be unchanged, those applications are likely to be declared admissible, thus resulting in an enormous expenditure for the Italian State, which would have to pay compensation for the damage suffered by the applicants.

"State deaths"

Francesco Mastrogiovanni and death "by restraint"

Francesco Mastogiovanni was a 58-year-old teacher at a Primary school. On 31 July 2009 he was camping in San Mauro del Cilento, where he usually spent the summer. With an enormous deployment of forces (*Carabinieri*, Traffic wardens, Coast guard), he was picked up from the sea and subjected to a TSO (*Trattamento Sanitario Obbligatorio* – coercive medical treatment) because the previous night he had allegedly driven at high speed through the pedestrian

area of the city of Pollica. TSO was introduced in the Italian system by Law No.180 of 1978, the so-called "Basaglia Law", reforming the Italian system of psychiatric hospitals. TSOs are performed on patients who refuse to be treated and/or are not aware of their illness. This type of treatment is to be performed using adequate, extra-hospital health measures, and exclusively in cases of "such psychiatric alterations that require an urgent therapeutic intervention." TSOs can also be performed in hospitals and, in this case, there are a number of safeguards to protect the patient: the treatment is to be ordered by the Mayor of the City where the patient resides, upon a physician's proposal; it is to be then countersigned by a second physician belonging to a public health care structure; finally, the competent *Giudice tutelare* (the judge supervising over guardianship) has to validate the treatment within 24 hours.

Mastrogiovanni was admitted to the psychiatric unit of the San Luca hospital (in Vallo della Lucania) at 12.30 p.m., with a diagnosis of "schizoaffective disorder." At 2.30 p.m. Mastrogiovanni was tied by the hands and feet to the iron sides of the bed, and remained this way for more than 80 hours. During his hospitalization, Mastrogiovanni was not given food nor water, and was only intravenously infused a saline and a sugar solution. Following a long agony of four days and three nights, Mastrogiovanni died because of the treatment he underwent. The video monitoring system, installed in all rooms of the hospital, recorded the torture. After his death, a trial was opened, to discover the causes that led to Mastrogiovanni's death and, before it was destroyed, the attentive Public Prosecutor ordered the seizure of said footage.

On 30 October 2012, the Court of First Instance of Vallo della Lucania delivered its judgment, sentencing the head physician of the unit, Michele Di Genio, to imprisonment for 3 years and 6 months on charges of kidnapping, death as a consequence of another crime, and forgery of public documents. Five more physicians were convicted of the same offences: Raffaele Basso and Rocco Barone were sentenced to 4 years' imprisonment, and Americo Mazza and Anna Ruberto

to 3 years, whilst Michele Della Pepa was sentenced to 2 years' imprisonment for kidnapping and forgery of public documents. All doctors - except for Della Pepa - were disqualified from practicing medicine for 5 years. Twelve male nurses were acquitted because their conduct did not amount to a criminal offence. In the reasons for the judgment, which was registered on 27 April 2013, the judge states that restraint cannot be deemed illicit in itself, but it becomes illicit when there are no justifications for it, or when the criteria for its application are not respected. The judge underlines that restraint is a medical procedure, since only a medical doctor can order and cancel it; moreover, it was proved that the nurses were unprepared (from a scientific and therapeutic point of view) as regarded the measures to be adopted with the patients under restraint. The judge mentions "alterations affecting the will-forming process of the nurses" because of the frequent resort to restraint in the Psychiatric Service of Diagnosis and Treatment unit of the San Luca hospital along with the absence of the mandatory Register of restraints and nursing charts. According to the judge, the order to restrain Mastrogiovanni was unlawful, as he was not being aggressive (as seen in the images shown during trial). The judgment relating to Mastrogiovanni's death was the first in Italy under which doctors were convicted of kidnapping after having resorted to restraint.

Even though there are no specific researches and studies, the recourse to restraint is still widespread as a practice in many Italian health care facilities (Geriatric units, Intensive care, nursing homes, psychiatric wards and judicial psychiatric hospitals) and at different levels (Regions, Local health authorities, hospitals). Given the lack of uniformity at national level, guidelines have been drafted and adopted supposedly to regulate this practice.

The death of Stefano Cucchi and the judgment of the Court of First Instance

Stefano Cucchi, a 31-year-old from Rome, was arrested by the Police on 15 October 2009 as he was handing a sachet containing hashish to a friend. On the following day, the fast track trial confirmed the arrest and denied remand to a therapeutic community. As of that day and until his death, on 22 October, Stefano Cucchi went through a number of institutional places: two *Carabinieri* barracks, a security prison cell, the courtroom and the clinic of the Court of Rome, the infirmary and a cell in the prison of Regina Coeli, the Emergency Room of the Fatebenefratelli hospital, and the detention unit of the Sandro Pertini hospital. It was a painful process, which made Cucchi's story paradigmatic. On 5 June 2013 the Court of First Instance delivered its judgment, following a long trial based on experts' reports. The investigation on the death of Stefano Cucchi led to an initial charge of manslaughter for three doctors of Pertini hospital, and involuntary manslaughter for the three police agents who were with him in the cells of the Court of Rome before the hearing for the confirmation of the arrest. The investigation was concluded in April 2010, with a radical change of the charges, which became aiding and abetting, neglect of incapable persons, abuse of official powers, and untrue attestations for the physicians and the nurses, and assault and misuse of power for the Penitentiary police officers.

The Public Prosecutors never deemed it necessary to investigate the responsibilities of the *Carabinieri* of the barracks, and the Prosecution held that clearly they were absolutely not liable. As we will see, the judgment questioned this first - and, perhaps, hasty - evaluation. Since the beginning, the trial was characterized by a strong discrepancy between the technical reports presented by the Prosecution and those presented by the parties claiming damages.

Their views were in conflict: on the one hand, the Prosecution claimed that, in establishing the cause of Stefano Cucchi's death, the lesions on his body were negligible. On the other hand, the experts

for the parties claiming damages stated what might have sounded obvious: if the lesions had not been there, Stefano Cucchi would not have died. The trial revolves on causality: while the Prosecution was trying, in any possible way, to minimize the lesions on Cucchi's body, his family's lawyers were trying to prove that, from the start, everything that happened was connected and, therefore, nothing could be left out. On 5 June 2013, in the *Aula bunker* (a high-security courtroom) of the prison of Rebibbia in Rome, the Court of First Instance delivered its judgment. The Prison officers were acquitted because of the lack of conclusive evidence: in fact, the evidence relating to their guilt was insufficient or controversial (Section 530(2) of the Italian Code of Criminal Procedure). The six medical doctors were found guilty of manslaughter, while the nurses were acquitted for not having committed the crime. The grounds of the judgment were published at the beginning of September and depicted the following scenario: the main accuser of the prison officers, Samura Yaya, is deemed unreliable, as he had only heard - and not seen - the facts reported, and also because "it must be taken into account that there might be a chance that he was influenced, although in an imponderable way and unconsciously, by the intention of becoming part of an event that had gone beyond the boundaries of the prison and overflowed into the media." By acquitting the policemen and deeming Samura Yaya unreliable, the judges admitted that it was difficult to assess what the conditions of Stefano Cucchi were when he was being held in the two barracks.

However, they emphasized something else: "the more one leaves behind the statements of the *Carabinieri* of the Roma-Appia barrack, the more precise the descriptions on Cucchi's conditions become ."

The statements of the *Carabinieri*, moreover, substantially differ from one another, so much so that the judges write: "it is legitimate to suspect that Cucchi, who, at the time of his arrest, presented with bruised eyes […] and was complaining of pain, had already been beaten up by the *Carabinieri*.

Of course, it is not up to the Court to identify which one of the many *Carabinieri* Cucchi entered into contact with had beaten him up.

However, the statements of the *Carabinieri* themselves do not exclude the possibility that the reconstruction of the events might be different from that of Samura Yaya." As regards the position of the medical doctors, one should first consider which one of the experts' reports was deemed valid by the judges when taking their decision. The Court chose to share the conclusions of the panel of experts drafting the so-called "Super report", in particular because the cause of death therein indicated "namely the 'starving syndrome', is the only one capable of accounting for the most striking and peculiar element of the case in question: Cucchi's astounding weight loss during his hospitalization." Even though the technical experts had pointed out the lesions to the sacrum and to the head, they did not relate them to Cucchi's death, therefore excluding any "causation of a biological nature." In other words, Stefano Cucchi was starved to death, and the hospital unit director, Aldo Ferro, along with the medical doctors Silvia Di Carlo, Flaminia Bruno, Stefania Corbi, Luigi De Marchis Preite, were all convicted of manslaughter. The director was sentenced to 2 years' imprisonment, whereas the doctors were sentenced to 1 year and 4 months. Rosita Caponnetti was convicted of untrue attestations and sentenced to 8 months' imprisonment. All defendants were acquitted in relation to the charges of abuse of official powers, aiding and abetting, and omission of medical reports. All nurses were acquitted. Aside from having underlined the shortcomings and superficiality of the investigation carried out by the Prosecution, the judgment found that the starving syndrome was a credible cause of death - which is hard to accept. The Prosecuting Office of Rome, Stefano Cucchi's relatives and even the General Prosecuting Office appealed against this judgment, which would appear to be still a long way from the truth.

CIEs and the acquittal of three migrants for self-defence

Between 9-15 October 2012, a group of aliens not holding the required stay permits and, therefore, detained at the Sant'Anna CIE (*Centro di Identificazione ed Espulsione* - Identification and Deportation Centre) of Isola Capo Rizzuto organized a demonstration against the difficult living conditions in the centre. On 9 October, at 3 p.m., the men climbed onto the roof of the "B2 module" housing facility, removed gratings, window frames, railings, taps and fillings, lamps and ceiling lights, and used them as blunt objects, throwing them at the personnel of the CIE and at the policemen present. The demonstration originated from a "reclaiming" operation (a "quasi-search", as defined by the Director of the centre) carried out by the Police a couple of hours earlier in the rooms of the centre. One of the detainees had recently been denied the permit to go visit his mother, who was seriously ill and had entered into a coma. After spending six days guarding the roof of the building in turns, and on hunger strike, the demonstrators gave in and surrendered to the police, who arrested them in the act. The three men were committed to trial, with charges of criminal damage, violence or threat against a public official, and personal injury. The Public Prosecutor requested a sentence of imprisonment for 1 year and 8 months, whereas the defence counsel requested the acquittal of the three men because of the existence of a state of necessity. Moreover, an inspection was carried out in the places where the events had happened.

At the time of the revolt, Aarrassi Hamza had been detained for about a month, after having been arrested in Gioia Tauro, where he worked as an artisan and lived with his family, for not holding the required permit. Ababsa Abdelghani had been detained for a month and had been arrested for the same reason in Viareggio, where he worked as a waiter. Dhifalli Ali had been detained for a week and had been arrested near Cosenza, where he lived with his three-month-pregnant partner, for not holding the required permit. The

three men described the living conditions in the Centre in these terms: precarious sanitary conditions, shortage of food and outdoors spaces, lack of a canteen with tables or of an area where to eat, filthy sheets and towels which had never been changed during their one-month stay. During the questioning, all of them declared that they would have preferred to be remanded in custody rather than be restrained in the CIE. When deciding, the judge firstly verified whether the detention in the CIE and the living conditions were justified and subsequently whether the accused had acted to protect their fundamental rights. Immigration – in particular the stay and removal of aliens illegally staying in a country - is regulated by EU Law. Directive 2008/115 provides that: "(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient."

Moreover, detention is to be ordered in writing, and reasons in fact and in law must be given. Having examined the detention order of the three accused, the judge found that there was no indication of the concrete and specific reasons for not ordering a less coercive measure than the CIE and, therefore, deemed said orders unlawful, since no specific reasons were given. As regards domestic legislation, the judgment quotes Article 2 of the Italian Constitution, which "recognises and guarantees the inviolable rights of the person", and section 14(2) of the consolidated text on immigration, providing that "aliens are detained in CIEs in such a way as to ensure the necessary assistance and full respect for their dignity." On the basis of the results of the inspection of the Sant'Anna CIE in Isola Capo Rizzuto, the judge established that its conditions were "barely decent" - that is, not "suitable for its purpose: hosting human beings." According to the judge, the indecency of the place is demonstrated by a number of facts: the manner in which the accused were forced to rest, on filthy mattresses without any sheets and with extremely dirty blankets; the

conditions under which they were forced to care for their personal hygiene - filthy towels and dirty washbasins and squat toilets; and the conditions under which they were forced to eat - no chairs or tables and food of poor quality. These conditions, according to the judge, are doubtlessly in breach of human dignity, especially "when taking into account that these people were not being deprived of their personal liberty because they had committed a crime; and that they were forced to leave their countries of origin to improve their condition." At this point, it was to be assessed whether the three men's behaviour could be justified by the unjust violation of their fundamental rights: the right to their human dignity and the right to their personal liberty. According to the judge drafting the judgment, the answer was "yes." The prerequisites for self-defence include an unjust assault and a legitimate reaction: in this case, the former was proven to exist by having regard to the detention in breach of the relevant legislation; the latter was also proven by the topicality and inevitability of the danger (the facts were committed within the CIE, and during a detention that should have guaranteed the three men's rights), and by the proportionality between the protection of the right and the offense caused - since the value of the interest being breached (the life or safety of a person) is "enormously higher" than that of the interest to be defended, i.e. the tangible assets owned by the State.

Finally, could the defendants have resorted to different tools, other than the one they used, to protect their rights? Had they acted in a less detrimental way, would they have managed to reach their objective - that is, being released? According to the judge, their behaviour was only aimed at protesting against a detention deemed unfair because of the conditions they were exposed to; their protest "was implemented in the only possible way that could have been effective under those circumstances: blocking the regular operational activities of the Centre." The other forms of protest previously implemented by the accused - such as writing to competent authorities - did not produce any effect. They were like water in the sand, to quote a passage in

the judgment relating to one of the three inmates.

The three men were acquitted on grounds of self-defence, because there was no case to answer.

Discrimination And Violence

8 January - Italy is condemned by the European Court of Human Rights for the conditions of its prisons.

7 February - The Antigone Association, lead manager of the European Prison Observatory, publishes the first data on the Italian anomaly: poor application of alternative measures, ten times less than in Spain or France; and misuse of pre-trial detention (more than 40% of detainees).

16 February - In 2012, prison psychologists and criminologists only managed to dedicate an average of 28 minutes to each inmate. The professionals of this sector wrote a letter to President Napolitano, asking for an adequate amount of hours, a new stable contract, and the structuring of a Psychology and Criminology Service within prisons.

19 February - The Court of Review of Padua asked the judges of the Constitutional Court to consider whether setting a threshold for the number of prison inmates might be “the only instrument to bring the execution of the sentence back into line with Constitutional principles.”

12 April - According to the data published during the Meeting of Young Psychiatrists, one third of detainees is at high risk of mental disorders. Each year, on a total of about 70,000 people detained in Italian prisons, 20,000 cases (a number rounded down) of disorders such as psychosis, depression and bipolar disorder are reported.

4 May - The mother of Marcello Lonzi, a detainee who died in 2003 in his cell in Le Sughere prison in Leghorn, brings an action against two physicians of the prison and the forensic medicine expert who had conducted the autopsy, accusing them of not having "adequately performed their duty" and asking for the investigation on the youth's death to be re-opened.

9 May - The Sant'Anna school of Pisa publishes a research on CIEs: they cost Italy 55 million Euro per year, and they violate "Article 13 of the Italian Constitution, because detention in CIEs, which is similar to that in prisons, is not regulated by law."

9 May - A cardiologist had been arrested for having drafted a false medical report in order to prevent an offender from being detained: but it was thanks to his diagnosis that the man was cured and thus escaped death. The cardiologist was then acquitted.

13 June - With its judgment No. 135 of 2013, the Italian Constitutional Court establishes the obligation for Prison administrations to implement the measures ordered by the *Magistrato di sorveglianza* to protect detainees' rights.

14 June - The Court of Appeal of Milan confirms the acquittal of Carlo Fraticelli, one of the doctors of the hospital of Varese that

had treated Giuseppe Uva, the man who died on 14 June 2008 after spending the night in the *Carabinieri* barrack of Varese. According to his relatives, Uva was the victim of the violence perpetrated in the barrack by the *Carabinieri* and the policemen.

20 June - With its judgment No. 143 of 2013, the Italian Constitutional Court holds Article 41-bis of the Prison Administration Act illegitimate, in particular where it limits talks between prison inmates and their counsel.

21 June - The Permanent Observatory on Deaths in Prisons publishes the first data relating to 2013: 26 people committed suicide, 57 died, and investigations were opened on 13 cases.

5 July - Six Prison officers are committed to trial with charges of manslaughter and abuse of authority, after a 28-year-old man hung himself in the Santa Maria Maggiore prison in Venice. According to the Prosecution, the man killed himself after having been kept in solitary confinement without water, lighting or heating, and without a bed, a chair or a mattress.

2 August - The CIE of Modena, which had been the focus of much controversy and harshly criticised because of poor living conditions and management, is closed down for renovation. After the closure of the CIE of Bologna, Emilia Romagna is left with no more centres for the detention of undocumented aliens.

28 September - After 7 years of activity, the National Committee for Bioethics held its last plenary meeting , adopting an opinion on the issue of health in prison. In the document, the Committee

recommends - among other things - to use group homes for the custody of detainees with children under six years of age.

29 November - A "rigorous internal administrative investigation" on the death of Federico Perna is ordered by the Minister of Justice - Annamaria Cancellieri - through the head of the Prison Administration Department - Giovanni Tamburino. Perna had died on 8 November in the prison of Poggioreale (Naples).

2 December - The Guarantor for Detainees of Campania, Adriana Tocco, mentions cases of battery reported by the detainees of Poggioreale prison: "Often, these are oral reports, because detainees are too scared to put their signature on an actual report. But we do receive many oral reports." In July, the Guarantor for detainees had filed a report with the Public Prosecutor's Office, signed by 50 detainees: "They reported mistreatments, as well as the presence of rats and dirt."

19 December - Antigone Association reports that, in 2013, 99 detainees had died in prison, the latest of which on 13 December in Bergamo for a heart attack. 47 detainees committed suicide (23 of which were aliens), while the cause of death of 28 people was still to be established.

11 March 2014 - The Judge for Pre-Trial Investigations of Varese was to rule on a request to dismiss the case of the two *Carabinieri* and the six policemen that detained Giuseppe Uva on the night of 14 June 2008: the Judge issued charges against the eight men on counts of illegal arrest, abuse of authority on arrested persons, neglect of incapable persons, and manslaughter.

Legislation and policies

Interventions to reduce prison overcrowding.

A special commissioner and the declaration of the state of emergency for prisons.

Before addressing the current situation, and before understanding how our country is doing and acting in the light of the judgment of the European Court of Human Rights for the Torreggiani case, it is necessary to take a few steps back.

Law No. 241 on the granting of pardon was adopted on 31 July 2006. At the end of 2005, there were 59,523 inmates in Italian prisons, whereas at the end of the following year - after the clemency provision was adopted - the number went down to 39,005[1]. At the end of 2013, there were 62,536 people detained in Italian prisons [2]. According to the Ministry of Justice, in Italian prisons there are 47,649 available places, but Antigone Association, in its 2013 Report, states that this number is overestimated as the available places are alleged to be around 37,000. Going back to the situation after the 2006 pardon, it can be said that the relief of pressure on prisons did not last long, so much so that in 2008 the Minister of Justice, Angelino Alfano, launched the so-called "Prison plan". By means of Legislative Decree No. 207 of 2008[3] the then-chief of the Prison Administration Department, Franco Ionta, was appointed Special Commissioner, with the task of drafting a plan of measures to build new prisons

1 Inmates in Italian prisons. Report by Istat and Ministry of Justice, year 2011. Available at http://www.istat.it/it/files/2012/12/I-Detenuti-nelle-carceri-Italiane-anno2011.pdf

2 One of the main reasons behind this substantial increase lies in the introduction of certain provisions in the Italian legal system. Of these, the most "imprisonment-generating" one is certainly the so-called "Fini-Giovanardi Law" on drugs: as of 31 December 2012, 38.46% of prison inmates were being detained for having violated Section 73 of Presidential Decree No. 309 of 1990 (4th White Paper on the Fini-Giovanardi Law, dossier by Fuoriluogo.it - 2013). On 12 February 2014 the Fini-Giovanardi Law was held unconstitutional because of a procedural flaw.

3 Enacted, with amendments, by Law No. 14 of 2009.

and increase the capacity of the existing ones. The Prison Plan was meant to create 18,000 new places by 2012: to this purpose, it was also decided to resort to the *Cassa delle ammende* (a public body with a special fund whose money comes from payment of fees relating to judgments) whose funds had been previously allocated to reintegration and assistance programmes for detainees and their families[4]. The Government adopted the Prison Plan on 13 December 2010, and simultaneously confirmed the extraordinary powers attributed to the chief of the Prison Administration Department and declared the state of emergency for prisons[5].

It was decided to set four main levels of action for the Prison Plan: the first two related to prison facilities, intended both as the building of new structures, and the building of new wings within existing prisons; the third pillar aimed at modifying the relevant legislation; finally, the last point envisaged the hiring of 2,000 prison police agents. Given a reduction of the funds and a considerable delay in the working timeline, this is the current implementing status of the Prison Plan at 31 December 2013, as reported by Prefect Sinesio: "With 468 million Euro allocated to the Prison Plan, facilities are being created, or the relevant calls for tenders are being finalised, to accommodate 12,024 inmates. They are divided as follows: 413 new prisons, for a total of 3,100 places; 1,314 new wings, for a total 3,000 places; 1,615 completions of new wards, already started by the Police Administration Department, for a total of 3,347 places; 916 interventions to recover already-existing prisons, for a total of 1,212

4 Section 7 of Law No. 14 of 2009 amended Section 4(2) of Law of 6 May 1932 establishing the *Cassa delle ammende*, as follows: "The *Cassa delle ammende* funds reintegration programmes for detainees and internees, assistance programmes for them and for their families, as well as prison building projects aimed at improving custodial establishments."

5 Prime Minister's Decree of 13 January 2010, "Declaration of the state of emergency consequent to the overcrowding of the prisons present on the National territory." The state of emergency was meant to last until 31 December 2010, but it was extended twice, up to 31 December 2013. As of 2011, the *Dipartimento della Protezione Civile* (the Civil Protection) has been in charge of managing the prison emergency and, by means of the Order of the Prime Minister of 13 January 2012, Prefect Angelo Sinesio was appointed Delegated Commissioner for the prison emergency and empowered to derogate from several pieces of legislation. Thanks to Presidential Decree of 3 December 2012, as of 1 January 2013 Prefect Sinesio became Special Commissioner for the prison emergency, although he was no longer empowered to issue orders by derogating from the relevant legislative requirements.

places; 317 interventions on new prisons, for a total of 1,665 places, already started by the Ministry of Infrastructures."

The so-called "laws for emptying out prisons"

Together with the interventions relating to prison buildings, actions were undertaken to reduce prison overcrowding by means of legislative instruments. The first law to be adopted was Law No. 199 of 2010, which entered into force on 16 December 2010, envisaging the possibility to serve the last 12 months of the sentence at one's domicile[6]. This was amended by Legislative Decree No. 211 of 2011, which brought to 18 months the remaining period to be served before having access to home detention. Both laws, however, were temporary in nature, as they were closely connected to the prison emergency and their application could not be extended beyond 31 December 2013. Moreover, none of them provided for an automatic mechanism regarding home detention: the prison inmates wishing to benefit from this norm had to apply for home detention, and their application had to be evaluated by the competent *Magistrato di sorveglianza*. According to the data of the Ministry of Justice, as of 31 December 2013, 13,044 inmates had left prison thanks to this law[7].

On 23 December 2013, Decree-Law No. 146 "containing urgent measures for the protection of the fundamental rights of prison inmates and the controlled reduction of prison population[8]" was enacted. This Decree was strongly supported by then-Minister of Justice, Anna Maria Cancellieri, and envisaged two lines of intervention: measures aimed at fighting prison overcrowding, and interventions to protect inmates' rights. As regards the former

6 This norm did not apply to perpetrators of certain especially serious crimes; moreover, it envisaged an increase in the terms of imprisonment in case of escape, as well as some amendments to Prison Police laws.

7 http://www.giustizia.it/giustizia/it/mg_1_14_1.wp?previsiousPage=mg_1_14&contentId=SST977633

8 http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0014900.pdf

interventions, the Decree is organized as follows:

1. Amendments were made to the Consolidated Text on drugs (Presidential Decree No. 309 of 1990). Section 73(5) - Unlawful production, trafficking and possession of narcotic drugs or psychotropic substances - was amended, so as to provide for a specific type of offence and a sanctions system independent of the cases contemplated in the four preceding paragraphs of this section: therefore, minor offences will carry lighter punishments (e.g., the illegal trading of small amounts of drugs). Moreover, the section forbidding more than two referrals to welfare services for treatment purposes was repealed.

2. Amendments were made to the prison system (Law No. 354 of 26 July 1975) and indirect measures were taken to strengthen the supervision of sentenced persons who have been granted home detention. The judge was empowered to order persons placed under house arrest or detention to wear an "electronic bracelet"; the remaining period to be served before being placed on probation was raised from 3 to 4 years, and the *Magistrato di sorveglianza* was given greater powers.

   A special early release was introduced[9], by raising the number of days that may be deducted from the period remaining to be served, as already envisaged for any sentenced person that can prove to have profited from re-educational initiatives, from 45 to 75 per semester (for the period between 1 January 2010 and 24 December 2015).

3. Changes were introduced regarding the possibility to serve time at one's domicile by virtue of Law No. 199 of 26 November 2010 (section 5). The provision that allows serving sentences

9 Special early release does not apply to the periods when the sentenced person is on probation and in home detention; to sentenced persons who had been allowed to serve time at home or that were placed under house arrest pursuant to Section 656(10) of the Italian Code of Criminal Procedure; to those convicted of crimes causing particular social concern as listed in section 4-bis of the Law on Prison Administration.

of no more than 18 months at one's domicile - even if this is the residual time to be served for a longer sentence - was made permanent by lifting the deadline of 31 December 2013.

4. Amendments were made to the Consolidated Text on Immigration, pursuant to Legislative Decree No. 286 of 1998, on the expulsion of foreign nationals as an alternative measure to imprisonment (section 6).

As regards the measures for protecting inmates, the following was envisaged:

1. The wording of Section 35 on the so-called "generic" complaint was amended (see Section 3(1a)). The list of the entities prison inmates may file a complaint with was extended, and a terminological adjustment was made.

2. Judicial complaint procedure - Section 3(1b). Stronger safeguards were introduced for prison inmates in the Complaints procedure, including a proceeding to ensure that the Prison administration complies with judicial orders.

3. Creation of a National Authority for the rights of persons imprisoned or deprived of liberty. This will not entail any additional cost for the State, and the Authority will be in charge of monitoring the conditions of prisons by virtue of powers of inspection, making requests to the prison administration and addressing recommendations. The Authority will also have to submit a yearly report to the Italian Parliament.

4. Measures for streamlining the management of specific questions falling within the competence of the *Magistrato di sorveglianza*.

5. Postponement of the deadline for adopting regulations on the specific benefits relating to taxation and social contributions afforded to companies and social cooperatives hiring prison inmates.

Protection of parenting in prison

With Law No. 62 of 21 April 2011, Parliament adopted new measures regarding mothers with underage children serving time in prison. This new law includes provisions regulating the application of remand in custody and imprisonment. As regards remand in custody, the Law raised the child's age threshold (from 3 to 6 years) below which no remand in custody order may be issued or validated in respect of the mother, except where major precautionary requirements have to be met. In any case, mothers with children under 6 have to be remanded to an ICAM (*Istituto a custodia attenuata per madri,* a special custodial facility for mothers) or, when existing, to a protected group home[10]. The deadline for the implementation of the provisions on "mitigated custodial measures" is 1 January 2014, unless it is possible to use places already available - under the current legislation - in existing ICAMs. As regards serving a custodial sentence, home detention - including in a protected group home - may be granted to pregnant women or to women with children under 10 living with them, provided they have to serve a sentence of no more than 4 years' imprisonment and even if this is the residual time to be served for a longer sentence.

Currently, there are two ICAMs in Italy, one in Milan and one in Venice, and a third one will be opened in Sassari. Finally, Law No. 62 provides for the right of mothers to visit their underage children when sick - even if they do not live with them - and to assist children that visit a specialist for a serious health problem. The latter provisions may also be applied to the child's father , when the same conditions obtain and the mother cannot assist her child or has passed away.

As of 31 December 2013, there were 40 children under 3 detained

10 Section 4 of Law No. 62 delegated the Ministry of Justice - together with the State's, Cities' and Local Authorities' Conference – to set out, by way of a decree, the features of protected group homes (which are provided for in Section 284 of the Italian Code of Criminal Procedure, and Sections 47-*ter* and 47-*quinquies* of Law No. 345 of 1975). As there is no specific funding for protected group homes, Regional *Provveditorati* (Superintendencies) and Local bodies have to identify the most suitable structures, as well as the necessary funds.

with their mothers in Italian prisons.

The crime of torture

As of 31 December 2013, the crime of torture is not part of the Italian legal order[11]. Both the Universal Declaration of Human Rights of 1948 and the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950refer to torture or to cruel, inhuman and degrading treatment and punishment. However, the first internationally acknowledged definition of Torture is to be found in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 1984[12].

The Convention, among other things, requires States to adopt domestic laws to acknowledge and sanction any act of torture. Parliament has repeatedly tried to introduce this type of offence, but the debate has ever come to a standstill because of the conflict between two opposite views: should the crime of torture be intended as a *reato proprio* (that is to say, a crime ascribable to a specific class of offenders, in this case those who apply coercive measures legitimately), or as a *reato comune* (that is to say, ascribable to any citizen)?

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11 On 5 March 2014, the Italian Senate adopted a bill on the introduction of the crime of torture. This is the link of the adopted text that is to be discussed by the Chamber of Deputies: http://goo.gl/lSwRcE

12 Article 1(1) of the UN Convention reads: "For the purposes of this Convention, the term 'Torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

The definition of torture in the UN Convention leaves no room for doubts, as it explicitly quotes "public official or other person acting in an official capacity." The only step forward was the ratification of the Optional Protocol to the Convention against Torture (OPCAT), which was adopted on 13 April 2013 and entered into force on 3 May of that year.

The Protocol was adopted by the UN General Assembly on 18 December 2002, and entered into force on 22 June 2006. Italy signed it on 20 August 2003. The Protocol has a two-fold purpose: on the one hand, it establishes the UN Subcommittee on Prevention of Torture, at International level; on the other hand, it obliges Acceding states to provide for the establishment of an inspection and monitoring system for prisons, the so-called "National Mechanism of Prevention", aimed at preventing torture and other cruel, inhuman or degrading treatment. With the entry into force of Legislative Decree No. 146 of 2013 (the so-called "Cancellieri Decree"), creating the National authority for the rights of persons imprisoned or deprived of liberty, Italy finally introduced this important preventative instrument. OPCAT lists the criteria for National Mechanisms of Prevention to be defined as such[13], and, as regards the newly-established Italian authority, doubts arise in relation to at least one of the points listed in the Protocol, namely the one on the availability of resources for its funding[14].

The CIE[15] of Bari is brought to Court

13 In particular, see Articles No. 17-23. http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx

14 Article 18(3) of OPCAT reads: "The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms."

15 Identification and Expulsion Centres were established by Law No. 40 of 6 March 1998, and provided for in the Consolidated text on immigration (Legislative Decree No. 286 of 25 July 1998). CIEs are facilities for detaining aliens staying unlawfully in Italy prior to their deportation. Section 14 of Legislative Decree No. 286, as amended by Law No. 189 of 30 July 2002 (the so-called "Bossi-Fini Law") provides that "if it is not possible to immediately proceed with the removal by means of deportation", the Chief of Police "provides for the foreign nationals to be detained for as long as is strictly necessary " at the CIE. The maximum period of stay in said Centres went from 60 days to 18 months in total. According to Police data, 6,016 migrants (5,431 men and 585 women) were detained in Italian CIEs in 2013, and less than half of them (2,749) were actually repatriated. The total

In May 2010, Luigi Paccione and Alessio Carlucci, attorneys-at-law, "replaced" the Municipality and the Province of Bari and initiated proceedings against the Prime Minister's Office, the Ministry of the Interior and the local Prefecture, petitioning the Court to immediately close down the CIE of Bari for violation of universal human rights[16]. The petition was granted and a technical inspection was ordered: it confirmed the reported conditions of the "guests" of the CIE, as well as the structural and medical shortcomings of the Centre. After this verdict, the CIE of Bari was renovated and the Court ordered another technical assessment on the conditions of the new Centre and its compliance with legal requirements. The Class Action Procedimentale association together with the abovementioned lawyers has been following this case for years and scored an important result: the Court of Bari ordered the Ministry of the Interior and the local Prefecture to carry out the necessary adjustments to the structure, so as to prevent it from being shut down. A significant part of the procedure was aimed at assessing whether its "guests" were being detained or not. In the judgment, justice Francesco Caso says: "On the other hand, using a specific terminology, which is not, so to say, "prison-oriented", is not decisive;

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amount of migrants repatriated through CIEs in 2013 is 0.9% of the total migrants allegedly staying unlawfully on the Italian territory (294,000, according to the data of ISMU - the Institute for the Study of Multi-ethnicity, as of 1 January 2013). Currently, there are 11 CIEs in Italy (in Bari, Bologna, Brindisi, Caltanissetta, Crotone, Gorizia, Milan, Rome, Turin, Trapani, and Trapani Milo), but only 5 of them are operating (namely, those of Bari, Caltanissetta, Rome, Turin, and Trapani). The CIE of Trapani (Serraino Vulpitta) and that of Brindisi have been closed for more than a year, while the Centre of Lamezia was closed down in November 2012. The CIEs of Emilia-Romagna were closed down in February (Bologna) and August (Modena) for renovation: in fact, in the light of the living conditions of the inmates and the disastrous outcomes of the management, the Prefecture revoked the contracts relating to the CIE, which had been awarded to the relevant company after a race to the bottom type of tendering. The CIE of Crotone was shut down in August, following the death of a young migrant and the subsequent revolt of the other inmates. The CIE of Gradisca d'Isonzo was emptied at the beginning of November, after months of protests and revolts of the migrants against the inhuman treatment they were subject to. The CIE of Milan is closed for renovation. As things stand, all these closures should be temporary, even though the date of reopening is unknown. Most of the CIEs are working at a reduced scale because of security reasons or because many parts of the buildings are unfit for use or damaged. According to the data of the Ministry of the Interior, as of 4 February 2014, on a total capacity of 1,791 places, the available places were actually 842. As of 13 February 2014, there were 460 inmates in CIEs, which means that CIEs operate well below 50% of their capacity.

16 All documents and information can be found at www.classactionprocedimentale.it

in fact, it may sound hypocritical to the extent what is not referred to as a "prison" or "imprisonment" is actually even more mortifying than what is correctly termed in this manner because of the way it is regulated." The individuals held in CIEs are deprived of their liberty but, indeed, they are not as protected as those who are in prison, which is spelled out by the judge in another passage of his judgment: "It would not be hasty to conclude that, if the aliens held in CIEs while waiting to be deported had been subjected to the current discipline of prisons, their condition would have been better and, in any case, they would be much more 'protected', at least from a formal point of view." Both the lawyers of Class Action Procedimentale, and the Ministry of the Interior appealed against this decision. The former noticed some inconsistencies in the judgment, as the judge pointed out the unlawfulness of the detention in the CIE but did not order its immediate closure, which he should have done according to the appellants. Conversely, the Ministry of the Interior claimed that it should not be obliged to carry out the works listed in the judgment. The parties will meet at the hearing of 8 April 2014.

In any case, this judgment - the first of its kind in Europe - strongly underlines the inconsistencies of Italy's approach to the detention of undocumented aliens.

Recommendations

1. Countering the overcrowding of prisons by reducing the number of inmates to the accommodation capacity envisaged by the regulations applicable to the individual correctional institutions, also by way of amnesty and pardon measures whether of a general nature or limited to certain types of crime (e.g. holding of drugs). Introducing a "grandfather's clause" (*numerus clausus* for prisons) to prevent overcrowding by way of a waiting list that should include non-socially dangerous

individuals sentenced to custodial penalties.

2. Passing a law to introduce the crime of torture into the legal system pursuant to the obligations undertaken internationally as well as to fulfil the consolidated obligation to afford protection against crime that is enshrined in our Constitution (Article 13, paragraph 4).

3. Significantly reducing the scope of special prison regimes, particularly the ”tough prison regime” under section 41-bis of the Criminal Procedure Code, by strengthening the judicial guarantees for the parties concerned, limiting the duration of the measures and of the individual extensions that may be ordered, and reducing the scope of prisoners' rights liable to be affected on account of such measures. Thus, application of a special regime must be traced back to its rationale, which consists in its being a temporary measure aimed at breaking whatever links between the prison inmate and the relevant criminal organization.

4. Ensuring financial, management and organisational autonomy of the (newly established) national Guarantor of the rights of persons subject to measures restricting personal freedom, with cognisance also being extended to identification and expulsion centres as well as to persons subject to mandatory hospital treatment.

5. Overcoming the framework of limitations on access to measures mitigating the prison regime as based on the relevant statutory offence and developing tools and programmes that can foster the application of such measures – especially with regard to prison inmates that are drug addicts.

6. Promoting the offer of cultural, educational and vocational

training activities in prisons so as to meet the Constitutional requirement of enabling the best possible social reintegration of a convict that has served his or her time.

7. Ensuring effectiveness of the right to health, and the presence of Regional Health Authorities in each prison and in CIEs.

8. Ensuring application of the guidelines on dynamic surveillance whereby cells should be opened and job training and socialization activities carried out during most of the day.

9. Ensuring prison inmates can keep up their relationships with family members and relatives, also via the effective implementation of the principle of territoriality of punishment.

FREEDOM OF EXPRESSION AND FREEDOM OF THE PRESS

BY Giovanna Pistorio

Focus on Facts

a) Freedom of Expression by way of the Access to the Internet

Many and multifarious were the events that contributed in 2012 and 2013 to showing the impact produced by the "constitutionalisation of the Net" on freedom of expression and freedom of the press as per Article 21 of the Constitution.

On the other hand, that the Internet has taken on constitutional importance is out of the question. Only think of the many rights that have been spread or re-defined by way of the Internet, or of the interplay on the Net between the traditional constitutional freedoms and new rights. Against this backdrop, freedom of expression, which is safeguarded at constitutional level irrespective of the means of such expression – be it speech, writings or any other dissemination tool – could not but be impacted (in fact, overwhelmed) by the communication media of today's digital society. This is why the right to impart and receive information is taking on a new dimension in the virtual sphere of the Net.

Given this background, it is indispensable to start from the cases that have refueled, in the past few years, the discussion on the features of a *constitutional* right to access the Internet.

From a regulatory standpoint, several countries including Finland, Greece, Estonia, Peru have enshrined access to the Internet as a fundamental right of individuals by relying on different constitutional or legislative instruments.

As for case-law, the judgment No. 14 of 24 January 2013 by the German Federal Court - which followed the precedents of the US Supreme Court in 1997 and the French Conseil Constitutionnel in 2009 – granted a citizen the right to compensation for the harm suffered on account of the illegitimate disconnection from the Internet.

b) Freedom of Expression vs. Privacy

In February 2012, several media reported, once again, on Wikileaks. This time they had allegedly disclosed several emails by Stratfor staff. It is no mere leaking of confidential information; in fact, this case mirrors the new dimension of the relationship between right to impart information and right to receive information in the digital society.

It is unquestionable that the opportunities to meet several needs of the most diverse nature are rife in the virtual space of the Net – from research to knowledge, from interpersonal communication to the circulation of ideas, from exchange to information; however, it is exactly in the dimension where there appears to be no room left for privacy that the right to privacy must be protected better and more effectively.

A significant example in this regard is provided at regulatory level by the Proposal for a Regulation on the protection of personal data that was submitted by the European Commission on 25 January 2012; the proposal was amended repeatedly in the course of 2013 and is meant to come into force during 2014. Many and indispensable are the innovations brought about by this instrument, given that the legislation in force (Directive 95/46/EC) has become obsolete by now; special importance should be attached in this respect to the introduction of a right to be forgotten in order to strike a reasonable, though difficult, balance between freedom of expression and protection of privacy, honour and reputation in electronic publications. Under Article 17 of the proposed Regulation, a data

subject has the right to request the manager of a website, after a given period, to remove personal data or information that, taken out of their context and having remained frozen at the time they were first published, belong to the past and do not correspond any longer to reality.

Judicial decisions on the balancing between freedom of expression and right to be forgotten are quite divergent and sometimes mutually in conflict.

At domestic level, the Court of Cassation stepped in with its judgment No. 5525 of 2012; this judgment adjusted the principles of the right to privacy to ensure that everyone is provided with tools to safeguard their own digital identity and, at the same time, that information is placed in the right context and is truthful. The case at issue concerned publication by online media of the news concerning the charges of corruption brought against a well-known politician. The trial had ultimately resulted into the acquittal of the accused, but the news of the charges remained stored in the media archives and, surprisingly enough, no reference could be found to the acquittal.

The lower court and the appellate court had ruled out that this might have to do with the right to be forgotten because the news in question had not been published again; however, the Court of Cassation found that "a piece of information that was originally *thorough* and *truthful* becomes *obsolete* and is accordingly *partial* and *inaccurate*, i.e. it becomes ultimately *untrue*."

Accordingly, the Court ordered the website owner to place the news in context, that is to update it.

A different view was held at European level by the Advocate General Niilo Jääskinen, who, in his conclusions of 25 June 2013, stated that "the *right to delete and block data* provided for in Article 12, letter b) and the right to object provided for in Article 14, letter d), of directive 95/46 *do not allow the data subject* to apply directly to a provider of search engine

services *to prevent indexing of information that concerns him or her directly*, published lawfully on third party web pages, by establishing his or her wish that such information should not be disclosed to Internet users, where the data subject believes that the information in question might be prejudicial to him or her or wishes such information to be forgotten."

According to this argument, it would not be lawful to modify the contents of information previously published in digital format not only because this "would be tantamount to historical falsification" and entail a veritable "censorship of published contents by a private entity", but also because it would result into the excessive as well as unjustified sacrifice of "primary rights such as freedom of expression and freedom of the press."

A different stance, which is actually closer to that taken by the Court of Cassation, is the one by the Strasbourg Court; in its judgment of 16 July 2013, the Court considered it disproportionate and in breach of freedom of expression to order the deletion of an article from the website of an online daily. The case had to do with the publication of several articles where two journalists working for a Polish daily alleged that two lawyers had gained unlawful profits from various connections with politicians. The two journalists had been convicted of libel, and the lawyers had accordingly requested the articles to be removed from the website. However, these requests were rejected both by domestic courts and by the Strasbourg Court; in striking the balance between right to respect for private and family life under Article 8 of the ECHR and the freedom of expression set forth in Article 10 of the Convention, the Court found the latter to prevail. Since freedom of expression is the harbinger of democracy, special care must be taken in introducing derogations from or limitations on such freedom. Having established that taking down the news was disproportionate, the Court ordered a notice to be added to the article in order to report on the judicial decision concerning the defamatory nature of the news as originally published.

c) Freedom of Expression vs Cyberbullying

The data by Eurispes and Telefono Azzurro [A helpline meant for children] are a source of concern: in 2012, one child out of four was the victim of online cyberbullying in Italy. In most cases, the cyber-bullies rely on the dissemination of images and pictures to make fun of the victim's bodily features or sexual orientation.

Faced with these data, the European Council of June 2013 launched a campaign against web-based hatred, intolerance and violence targeted to children.

In January 2014, during a technical meeting chaired by the Deputy Minister for Economic Development, the first draft Code of Conduct against cyberbullying was adopted – in agreement with representatives from institutions such as Agcom [Italian Communications Supervisory Authority], the Childhood Guarantor, Italian sector-specific associations such as Confindustria Digitale and web giants including Google and Microsoft. Mechanisms and systems were envisaged to report and stop, as quickly as possible, situations that may be dangerous or harmful for children.

As for regulatory approaches, a significant step forward was made in Italy thanks to Law No. 172/2012, which ratified Council of Europe's Convention for the protection of children against exploitation and sexual abuse, as undersigned in Lanzarote in 2007.

Regarding case-law, reference should be made to the sentence imposed on 16 November 2013 on a nineteen-year-old youth from Monza (imprisonment for two years and eight months plus payment of a fine amounting to eleven thousand Euro); after asking a fourteen-year-old girl who had a crush on him to give him "a token of her love", he published the videos and pictures she had sent him on Facebook and YouTube and circulated them among his friends and the circles of uptown Monza.

Inducing the underage girl from Monza to produce pornographic

materials and disseminating such materials are but one of the many, destabilizing forms of violence that are perpetrated in today's digital society.

Only consider the equally embarrassing case – known as "Google-Vivi Down case" – concerning the online posting of a video showing young bullies that were harassing a disabled youth. The first-instance proceeding had led to the conviction of the three managers from Google Italy on account of unlawful processing of data under Section 167 of the Privacy Code; however, the Court of Appeal acquitted them in full by a judgment that was filed on 27 February 2013: the Court held that there was no case to answer because the host and the ISP "are not empowered or required to carry out preventive checks."

As well as privacy per se, other legal assets have to be protected and safeguarded in these cases including the right to honour, the right to image, safety of children and, above all, human dignity.

d) Freedom of Expression vs Holocaust Denial

May or should freedom of expression be limited with regard to the dissemination of Holocaust denial views? Should the pluralism of ideas and democratic systems safeguard the development and dissemination of whatever opinions and beliefs, including subversive and inimical ones, or may such opinions be banned from one's legal system, albeit via anti-democratic tools, in order to safeguard – paradoxically enough – the very democratic essence of such a legal system?

This highly sensitive as well as controversial issue (a veritable *vexata quaestio*) came once again under the limelight after the demise of Erich Priebke – the German military officer serving a life sentence because of the contribution given to the massacre at the Fosse Ardeatine in Rome, who had never repented. On 8 October 2012 a bill was tabled to introduce holocaust denial as a criminal

offence in our legal system. Based on the said proposal, Section 414 of the Criminal Code should be amended to introduce, on top of an aggravating circumstance of the activities consisting in inducement and endorsement, a separate statutory offence to punish "whoever denies the existence of war crimes, genocides or crimes against mankind."

In fact, this was not the first attempt to introduce holocaust denial as a criminal offence. Only think of the bill submitted by Mastella [former Minister of Justice] in 2007, which failed because of the end of the legislature period.

On the other hand, many European countries such as Spain, Switzerland, Germany, Belgium, Poland and Hungary do punish holocaust denial or any conduct that may be related to the latter.

This is hardly a simple issue, partly in the light of the doubts and questions raised quite frequently by historians and Holocaust denial supporters. According to the Criminal Bar Association, the Shoah is so deeply rooted in Italy's history and culture that it is in no danger of being downsized or jeopardized by a bunch of scholars (or would-be scholars) denying its existence or playing down its importance. On the other hand, settling a cultural issue by stemming the flow of ideas and threatening imprisonment is not only in conflict with freedom of expression as a pillar of democracy, but also utterly misleading.

On 27 January 2014 the European Commission's Report on implementation of framework decision 2008/913/JHA was published – concerning the fight against certain forms and expressions of racism and xenophobia by criminal law. The decision requires Member States to criminalise several types of conduct including the adoption of the necessary measures to ensure that "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin" is punishable under criminal law; adoption of the necessary measures to ensure that "publicly

condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group" are punishable under criminal law; adoption of the necessary measure to ensure that "publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group" are punishable under criminal law.

As for case-law, reference should be made regarding the two years taken into consideration to the decision rendered on 28 February 2012 by the Conseil Constitutionnel and the judgment of 17 December 2013 (case of *Perinçek vs. Switzerland*) by the European Court of Human Rights.

In the former decision, the French Conseil declared Law No. 674/2012 - "*visant à réprimer la contestation de l'existence des genocides reconnus par la loi*" - to be unconstitutional. Whilst several questions had been raised in terms of possible conflicts with constitutional principles, the reasons provided by the Conseil are worded very concisely: the relevant provisions are illegitimate because they are in breach of freedom of expression as enshrined in Article 11 of the 1789 Declaration of Human and Citizens' Rights.

In the latter judgment, the Strasbourg Court also found that a sentence imposed for having contested the existence of the Armenian genocide was in breach of freedom of expression as per Article 10 of the EHRC – which is actually a significant innovation in terms of

the benchmark applied, since the Court had dealt with denial issues up to then by relying on Article 17 of the Convention. The facts of the case dated back to the summer of 2005, when the President of Turkey's Workers' Party, Mr. Perinçek, stated that referring to the massacre perpetrated by the Ottoman empire against the Armenian people in 1915 was an international lie. Having been sentenced on charges of racial discrimination, he applied to the European Court claiming the violation of Articles 10, 6, 7, 17 and 18 as applied jointly with Article 10 of the Convention. The Court found the sentence to be disproportionate and stated that freedom of expression should be afforded "not only with regard to favourable information or ideas, considered to be inoffensive or indifferent, but also in respect of such information or ideas as are offensive or disturbing or cannot be shared, so as to guarantee the need for pluralism, tolerance and open-mindedness without which no democratic society can exist."

Discriminations and Violence

5 April 2012. **Rome.** The Court of Cassation (judgment No. 5525) ruled that a politician accused of corruption and then acquitted at trial was entitled to having the online news updated.

14 October 2012. Ferrara. Marcella Ravenna, 61, professor of social psychology at the Faculty of Humanities of Ferrara University, of Jewish descent, a member of a well-known family in 20th century Ferrara that had experienced the Holocaust tragedy directly, was the subject of heavily insulting and defaming posts of anti-Semitic import on the Web.

22 October 2012. Rome. Another very serious case of anti-Semitic violence concerned the municipal councillor for cultural and juvenile policies and affirmative actions of the XI municipal district, Ms. Carla Di Veroli, who was dubbed as "the umpteenth case saved from Holocaust" and posted to be recognized as a

person to be blacklisted: “Here is the specimen at issue”, read the legends to the pictures showing her.

November 2012. Rome. The Court of Rome sentenced the four managers of the Italian section of the *Stormfront* neo-nazi website to up to three years’ imprisonment “for disseminating ideas, both online and via pamphlets, grounded in the superiority of the white race, racial and ethnic hatred, and inciting to the commission of acts of discrimination and violence on racial grounds”; for the first time, it was acknowledged that criminal association may be of a “virtual” type, i.e. may take shape on the Web.

20 November 2012. Rome. The “pink trousers” boy committed suicide because he could no longer stand the derisive comments posted against him on the Web.

December 2012. Bologna. This is when the passion of Flora started – a 17-year-old girl, “guilty” of having won a competition awarding a free ticket for the One Direction concert in New York. The other fans developed a grudge against her for this reason and sent her all possible threats via social networks.

January 2013. Novara. Carolina, a 14-year-old girl, committed suicide following the unrelenting violence she was exposed to on the Web. The abuse against her continued coming even after her demise.

26 April 2013. Milan. The Court of Milan ordered the taking down of an article, which had been published legitimately but did no longer mirror the current situation, from a daily’s IT archive and found that

the publisher was liable for the payment of non-pecuniary damages.

6 June 2013. Rome. The Civil Court of Rome rejected the claim for damages amounting to Euro 50,000 as lodged by Claudio Moffa, a University Professor, who had been dubbed as "anti-Semitic" and "Holocaust denial supporter" in the report drafted by Milan's Jewish and Contemporary Documentation Centre that had taken into consideration the professor's activities on the web – in particular his personal blog.

25 June 2013. Venice. A professor who was a well-known supporter of Holocaust denial theories was removed from his office as President of the State exams committee at Liceo Curiel in Padua following the criticisms levelled by him on the Web against the methods implemented by the said high school, rather than on account of the dissemination of his beliefs; however, there remain several doubts on the appropriateness of this decision.

1 August 2013. Rome. By its judgment No. 18443, the Court of Cassation ruled out that an employer could rely on sensitive personal data relating to an employee's religious or political beliefs or sex life as part of a procedure for firing the said employee.

13 November 2013. Rome. A arts history professor that had been reported to judicial authorities in 2008 by the father of a student at an Arts School in Via di Ripetta was acquitted in full of the charges on grounds of "no case to answer". The professor had stated that "in his view, the stories about the Holocaust and concentration camps were not true and the footage on deportations was forged as it had been created several years afterwards rather than in those days"; further, he had questioned "the number of deaths, and affirmed that

there was no certainty about the six million figure, it was a wrong estimate. And during the war everybody was lean, not only those in concentration camps."

December 2013. Genoa. An investigation was initiated concerning Beppe Grillo on charges of "inducement to disobedience" as he had allegedly invited police agents to stop protecting politicians during the protestations staged by the "Forconi" movement [a movement so dubbed from the "forks" used in farming].

Legislation and Policies

a) The Legal Qualification of the Right to Access the Internet

The freedom of expression principle enshrined in Article 21 of the Constitution would appear to mirror and take up the notion whereby "truth is not a given, as it happens continuously; it is no thing, as it is rather a thought, in fact it is thinking itself" [1]. Accordingly, any obstacles to the free movement of ideas may sometimes prove harmful both to the opponents and to the supporters of a given idea[2]. In the light of this risk and in order to ensure that this right, a veritable cornerstone of the democratic regime as safeguarded by the Constitution[3], be not overridden, any limitations on freedom of expression may only be legitimate to the extent they are "grounded in specific provisions of the Constitution that account for their imposition."[4]

Assuming that the limitations in question may apply both to

1 Quoted from B. Croce, *Liberismo e Liberalismo (1927)*, in *Etica e Politica*, Bari, 1981, 283.

2 On this view, see A. Pace, *Problematica delle libertà costituzionali*, Padua, 1992, 283.

3 Out of the first judgments by the Court of Cassation, see Nos. 9 and 25 of 1965, 84 of 1969, 105 of 1972, 1 of 1981.

4 This is the view held by C. Esposito, *La libertà di manifestazione del pensiero nell ordinamento italiano*, 1958, 10.

the contents and to the means used to express one's ideas, and since the drafters of our Constitution were clearly unable to forecast the coming of the Internet, one has to consider the dramatic impact produced by this communication medium on freedom of expression.

A precondition to address the peculiarities and, above all, the limitations encountered by the movement of ideas on the Net consists unquestionably in understanding whether and to what an extent a right to access the Internet does exist. Thus, before assessing the risks and benefits arising out of the use of the Internet, one should dwell, albeit cursorily, on what might be termed the configuration of this right.

This is actually rather daunting an issue.

There is little doubt that the Net should be regarded as "an artificial, borderless space", a "non-place, where will (…) manifests itself beyond States and States' laws" [5] – as a territory without any physical barriers, geographical links, "one of paradigms of globalized society." [6]

Access to the Internet mirrors the unprecedented shift from the *nomos* of the land to the *nomos* of the sea[7], and thereby outlines a new dimension of existence. [8]

Conversely, doubts and questions arise as for the legal qualification of access to the Internet.

From a regulatory standpoint, the many, often inconsistent legislative measures[9] were supplemented in 2012 by Law no. 2012,

5 See N. Irti, *Il diritto nell'età della tecnica*, Naples, 2007, 27.

6 C. Caruso, *L'individuo nella rete: i diritti della persona al tempo di internet*, in www.forumcostituzionale.it.

7 C. Schmitt, *Il nomos della Terra*, 1991.

8 On this view, see L. Nannipieri, *Costituzione e nuove tecnologie: profili costituzionali dell'accesso ad internet*, Report at the workshop of the "Pisa Group" on *Lo studio delle fonti del diritto e dei diritti fondamentali in alcune ricerche dottorali*, Università Roma Tre, 20 September 2013, p. 2 et seq.

9 Reference can be made, for instance to Law No. 4/2002, whose Section 1(2) provides that "In particular, the right by persons with disabilities to access the IT and computerised services of public administration and public utilities shall be protected and afforded in pursuance of the equal treatment principle set forth in Article 3 of the Constitution"; and to legislative decree No. 82/2005, whose Section 5 provides that the State is tasked with promoting

which introduced measures intended to strengthen broadband access, and in 2013 by the so-called Action Decree ("Decreto del fare"); the latter was converted into Law No. 98/2013 and amended the legislation on publicly available Internet connection services by doing away with the need for the user's prior authorization and introducing important innovations as for the electronic health record and the so-called digital domicile.

The above measures show the attention paid by the lawmaker to a situation that is changing continuously and substantially; however, they are not such as to meet the demand for a consistent, unified approach that is a must in this sector.

Regarding case-law, nothing changed compared to the stance taken by the Constitutional Court back in 2004, when the Court did not provide any clear-cut views on the constitutional foundations of access to the Net (Decision No. 307). The Court did not take up the argument submitted by the defendant, the Revenue Agency, to the effect that this was a right instrumental to the exercise of other fundamental rights; it merely recognized that a constitutional value was at issue, namely that of IT culture the Republic is tasked with safeguarding in pursuance of Article 9 of the Constitution.

There is a wealth of jurisprudence on this issue, with several different views that are sometimes difficult to reconcile.

Some scholars argue that one has to do merely with a type of *freedom*, others consider conversely that one is faced with a *constitutional right* by relying on the arguments brought by yet other scholars, who refer to a *personal right* or a *primary collective right*.

In the 1980's, access to the Internet was believed to be a token of the so-called computer freedom as enshrined in Articles 15 and 21 of the Constitution[10]. However, this analysis was heavily criticized and was subsequently relinquished in the light of the nature

"initiatives aimed at fostering citizens' computer literacy with particular regard to the categories at risk of being excluded, also in order to enhance the use of computerized service by public administrative bodies."

10 See, in this connection, V. Frosini, *L'orizzonte giuridico dell'Internet*, in *Il diritto dell'informazione e dell'informatica*, 2000, 271.

of computerized tools – which allow one to be not just a passive terminal, but an active participant[11].

That access to the Internet has taken on by now "the features of a full-fledged personal right" may be inferred, according to some scholars, by its being intended as a tool to benefit less-favoured individuals – as is the case of Law No. 4/2004 – or else, more specifically, by the need for some services to be delivered exclusively via computerized networks[12] as per the Digital Administration Code. Other scholars harbor some doubts and questions on the possibility to consider access to the Internet as a personal right, and they point in this connection to the structure and substance of personal rights – which could hardly be tailored to the cases at issue.[13]

A view that is related to the foregoing one, but is actually different and much more controversial, is the one whereby access to the Internet is a social right – or rather, whereby individuals may claim such access as a public service. [14] Since Internet is no longer a tool to only exercise freedom of expression, but also to implement other rights such as education, health, or the payment of taxation[15], access to the Net has become indispensable to enable "inclusion of individuals in social and political processes." [16] If the relationship between citizens and administrative bodies is construed as a type of digital citizenship, it is up to the Republic to afford every user access to the Net. [17] Unlike other social rights, the right to be connected is "a

11 This is the view held by L. Nannipieri, *Costituzione e nuove tecnologie: profili costituzionali dell'accesso ad internet*, quoted, 4.

12 See P. Costanzo, *Miti e realtà dell'accesso ad internet (una prospettiva costituzionalistica)*, in www.giurcost.org, 2012.

13 This is the view expounded by C. Caruso, *L'individuo nella rete: i diritti della persona al tempo di internet*, quoted, 9.

14 Out of the many contributions on this point, see T. E. Frosini, *Il diritto di accesso ad internet*, in www.confronticostituzionali.it, 18 November 2013; G. De Minico, *Uguaglianza e accesso a Internet*, in www.forumcostituzionale.it, 6 March 2013; P. Tanzarella, *Accesso a Internet: verso un nuovo diritto sociale?*, in Proceedings of the annual conference of the "Pisa Group" Association: "*I diritti sociali: dal riconoscimento alla garanzia. Il ruolo della giurisprudenza*", Trapani, 8-9 June 2012, in www.gruppodipisa.it.

15 See F. Donati, *Democrazia, pluralismo delle fonti di informazione e rivoluzione digitale*, in www.federalismi.it, 20 novembre 2013, 3.

16 Quoted from G. De Minico, *Uguaglianza e accesso a Internet*, 1.

17 T. E. Frosini, *Il diritto di accesso ad internet*, quoted, 1.

social right entailing multiple different benefits" because "it does not meet, per se, any need: satisfaction of one's interests is conditional upon the acquisition of the final assets, as made available from time to time by browsing." [18] There are several doubts raised regarding this analysis in the light of the ambiguities the very definition of "social rights" [19] is fraught with as well as on account of the economic difficulties resulting from the costs of such rights. [20]

Finally, the view whereby the right to access the Internet is a fundamental right of the individual grounded in Constitutional principles[21] would appear to be received more favourably. The debate on the constitutional foundations of this right refueled the *querelle* on the interpretation of the provision contained in Article 2 of the Constitution. Some scholars argue it leaves room for the recognition of new rights[22], so that the right to access the Internet could become part of our legal system; other scholars construe this provision conversely to only list the rights set forth in the constitutional charter[23] and accordingly to prevent recognition of the right at issue. At all events, if the Net can also foster individuals' social dimension, Internet might find its constitutional foundations exactly in Article 2 to the extent it is a social formation; one could thus interpret the traditional safeguards enshrined in the Constitution in this perspective, without the need to refer to new rights[24]. One cannot then but acknowledge that Article 2 is to be read jointly with

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18 This view is discussed by G. De Minico, *Uguaglianza e accesso a Internet*, quoted, 1.

19 See, in this regard, E. Rossi, *Prestazioni sociali con corrispettivo? Considerazioni giuridico-costituzionalistiche sulla proposta di collegare l'erogazione di prestazioni sociali allo svolgimento di attività di utilità sociale*, in www.gruppodipisa.it, 2012, 1.

20 L. Nannipieri, *Costituzione e nuove tecnologie: profili costituzionali dell'accesso ad internet*, quoted, 5.

21 See, out of the many contributions on this point, V. Zeno Zencovich, *Access to network as a fundamental right*, Presentation held at the Conference on "*Human Rights and new technologies*", Florence, 2008. F. Borgia, *Riflessioni sull'accesso ad internet come diritto umano*, in *La comunità internazionale*, 2010, 395; S. Rodotà, *Il diritto di avere diritti*, Rome-Bari, 2013, 130 et seq., G. Azzariti, *Internet e Costituzione*, in www.costituzionalismo.it, 6 October 2011, 5.

22 See, out of the many contributions in this regard, A. Barbera, Art. 2, in Branca (edited by), *Commentario della Costituzione. Artt. 1-12. Principi fondamentali*, Bologna, 1975, 50 et seq.; F. Modugno, *I "nuovi diritti" nella giurisprudenza costituzionale*, Turin, 1995, 5.

23 P. Barile, *Diritti dell uomo e libertà fondamentali*, Bologna, 1984, 54.

24 See S. Rodotà, *Una Costituzione per internet?*, in *Pol dir.*, 2010, 348 et seq. .

Article 3(2) of the Constitution, so that the Net should be regarded as "a virtual lever producing real effects, essential to do away with the initial inequalities that hamper the full development of individuals."[25]

Finally, one should not fail to consider the view whereby the right to access the Internet is a subset of the broader right to freedom of expression. A significant proposal was put forward in this regard – but remained dead letter – by Stefano Rodotà in 2010 – namely, adding Article 21-a to the Constitution in order to ensure that "Everyone has the right to access the Internet, under equality terms, in accordance with technologically adequate arrangements that can remove any obstacles of an economic or social nature."

b) Protecting Digital Identity: From the Right to Be Forgotten to the Safety of Children

Having considered the "upstream" qualification – peculiar, at times contradictory – of the right to access the Net, one should now see how the Net is used "downstream". On the other hand, it is unquestionable that Internet, as well as being the most effective communication tool, is an unprecedented means to expand and express one's own personality[26]. This cannot but entail the need to balance freedom of expression as practiced on the Net with other constitutional values; thus, one should investigate whether and to what an extent freedom of expression may be implemented on the Web without jeopardizing the protection of other rights set forth in the Constitution.

Suffice it here to mention the rights relating to privacy, confidentiality, personal identity. These rights are mostly grounded in what is traditionally termed the "right to be let alone" as developed by US scholars at the end of the 19th century[27] – when it was defined at

25 See G. De Minico, *Uguaglianza e accesso a Internet*, quoted, 3.

26 In this connection, see P. Passaglia, Internet *nella Costituzione italiana: considerazioni introduttive*, in www.giurcost.org, 18.

27 A well-known contribution on this point is the one by S. D. Warren- L. D. Brandeis, *The*

the right to defend one's personal sphere against possible interferences by the public opinion regarding strictly private circumstances that, if disclosed publicly, might cause embarrassment and scandal to the individuals concerned. [28]

The impact produced by the Internet on the protection afforded to these rights is unquestionably disruptive. The Net is changing not only the amount, but the very nature of communication: on the Web, "past and present merge into an undifferentiated set of information that makes up a sort of everlasting present." [29] In Internet's global memory there is retained information, often unfiltered, relating to past or present events that often does not correspond any longer to reality – regardless of whether such information is true, likely to be true or false - and may be prejudicial, accordingly, to identity, confidentiality and privacy of individuals.

This is the backdrop to the right to be forgotten. This right exists in a sort of limbo between the individuals' right to respect for their privacy and dignity and freedom of expression and the press.

Whilst one may not allow, in the name of the latter, the dissemination of whatever piece of information, especially if it is untrue, unsubstantiated, or defamatory in nature, without affording adequate remedies to the data subject – albeit ex post – , it would appear on the other hand that respect for personal identity should not be carried to the extreme by making the free movement of ideas conditional upon unrelenting, continuous checks over truthfulness, topicality and accuracy of the information that is posted on the Web.

Freedom of expression and the press, on the one hand; respect for personal data on the other hand: there is permanently a tension between these rights, a permanent state of confrontation.

True, the digital society is increasingly taking on the features of

Right To Privacy, in *Harward Law Review*, 1890.

28 See L. Ferola, *Riservatezza, oblio, contestualizzazione: come è mutata l'identità personale nell'era di Internet*, in F. Pizzetti (edited by), *Il caso del diritto all'oblio*, quoted, 173.

29 See L. Ferola, *Riservatezza, oblio, contestualizzazione: come è mutata l'identità personale nell'era di Internet*, quoted, 175.

a new Eden, where "the impulse to partake of the apple of knowledge is stronger than any resistances or impediments"; however, it is increasingly difficult to strike painstakingly the balance between "the temptation to know and understand all and one's wish to be protected from knowledge" if the latter proves harmful and prejudicial[30]. In balancing these rights one can find the source and the driving force of the right to be forgotten – as a means to limit further dissemination of news that were legitimately posted on the Net "if the rationale underlying knowledge of such news does not justify any longer the limitation imposed on a person's right to protect her privacy and dignity." [31] Accordingly, this right is "a means to re-construct an individual's social dimension by preventing the past from hampering the present." [32]

Indeed, as is often the case, the permanence on the Web of information that had been published legitimately and mostly related to a person's involvement in judicial proceedings may undermine that person's digital identity and produce destabilizing effects with immediate real-life consequences.

Where the current identity does not match with the virtual identity because the former changed on account of various events, the data subject's claim must be granted "to take back control over one's personal history", to be empowered, once again, to manage his or her own personal circumstances[33] – indeed, the world of the Internet is unquestionably *immaterial*, but this is not enough to make it *less real*. [34]

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30 See F. Pizzetti, *Le ragioni di questa collana*, in Id. (edited by), *Il caso del diritto all'oblio*, quoted, X.

31 This quote is taken from F. Pizzetti, *Il prisma del diritto all'oblio*, in Id. (edited by), *Il caso del diritto all'oblio*, Turin, 2013, 32.

32 See M. Mezzanotte, *Il diritto all'oblio. Contributo allo studio della privacy storica*, Naples, 2009, 121.

33 See C. Chiola, *Appunti sul c.d. diritto all'oblio e la tutela dei dati personali*, in *Percorsi cost*., 2010, I, 39.

34 See, in this regard, L. Ferola, *Riservatezza, oblio, contestualizzazione: come è mutata l'identità personale nell'era di Internet*, quoted, 184.

Several remedies have been devised to ensure the protection of this right.

The Italian data protection authority has repeatedly ruled out that data subjects may have news removed or put in context, that is to say that the data may be updated. For the sake of historical records and the free movement of ideas, such measures would not be admissible. Indeed, the Italian DPA's view is that updating or deleting the data would entail veritable changes in the contents of a news article and thereby not only give rise to a conflict with the historical purposes underlying the continued publication of such article, but also violate freedom of expression as already manifested. The balance between historical truth and freedom of expression, on the one hand, and right to be forgotten, on the other hand, was struck by requiring the publisher, i.e. the website manager, to no longer allow indexing of the web pages where the relevant pieces of news were located, whilst the archives of the newspaper as a whole remained untouched. [35] This solution produced the expected effects, as shown by the several recent decisions of "no case to answer" the Italian DPA rendered having established, in the course of complaint proceedings, that the individual website managers had implemented the technical measures required to prevent indexing of the relevant contents from their online archives. [36]

As already pointed out, the solutions devised by the highest Courts in Europe diverged over the past few years.

Whilst the Strasbourg Court, and the Italian Court of Cassation, have found that the difficult balance between digital identity and freedom of expression could be struck by putting the news in context and – only in extreme cases – taking down such news, the Advocate General of the European Court of Justice (case C-131/12) would appear to basically deny the existence of a right to be forgotten in the

35 See, in this regard, the decisions adopted by the Italian DPA on 19 December 2008 (web doc. No. 1583152), 15 July 2010 (web doc. No. 1746654).

36 See, in this regard, the decisions adopted by the Italian DPA on 22 July 2011 (web doc. No. 1748818), 16 February 2012 (web doc. No. 1882081), 21 March 2012 (web doc. No. 1892254).

EU's legal system; indeed, his view is that nothing might justify the request to modify the contents of information in digital publications without bringing about the falsification of history. [37]

Taking down data, putting news in context, implementing technical measures to prevent the indexing of certain contents in online archives: there are as of today many diverse, at times contradictory, remedies to safeguard the right to be forgotten, all of them being the outcome of the difficult balancing between freedom of expression and digital – actually, personal – identity.

If the right to be forgotten is closely related to the dissemination of news that, albeit no longer mirroring current reality, had been legitimately published on the Internet and were not defaming in nature, striking the balance between the values at stake – i.e. between freedom of expression and protection of personal identity – becomes all the more difficult when one is faced with abuse, persecutions and threats posted on the Net against children.

The frequency, fierceness and cruelty, often unprecedented, of the harassment perpetrated in this area over the past few years make it necessary to consider how important the legal asset is one is striving to protect. It has to do not only, and not so much, with honour, image, privacy, as with the definitely more valuable asset consisting in human dignity – which is increasingly trampled upon through destabilizing forms of violence that take place in the virtual world and produce their disruptive effects in the real one.

Online bullying is by now closely related to conventional bullying – in fact, it is sometimes more prevalent.

On the other hand, today's children are the so-called digital natives: for them, the Net is not "a feature of technological evolution to be used for recreational or occupational purposes, as it is rather part of the environment they were born into". It is the habitat where

37 See L. De Grazia, *La libertà di stampa e il diritto all'oblio nei casi di diffusione di articoli attraverso internet: argomenti comparativi*, in www.associazionedeicostituzionalisti.it, 29 October 2013.

their individual personalities take shape and develop. [38]

Given this background, "digital" bullying comes on top of "real" bullying and becomes, at times, even more dangerous. In conventional bullying the aggressor can restrain himself or herself or stop harassing, because of some empathy arising in seeing the suffering of his or her victims; conversely, with digital bullying this is not the case and the violence can be fiercer, more cruel, more unrelenting. The bullying of the virtual world is more invasive than its counterpart in the real world: persecution can be lasting, continuous, unstoppable. There is no safe haven for the victim. Not even one's home can be a castle against the commission of such abuses. [39]

Whilst there are no specific regulations in our legal system to address these issues, the Italian DPA has ever been quite active in dealing with cyberbullying; however, its interventions cannot but consist in calls for awareness-raising to foster the responsible use of social networks in the hope that Parliament steps in timely and effectively. [40]

c) The Blurred Boundaries of Freedom of Expression in Holocaust or Genocide Denial

That a piece of information published on the Net, having become sort of frozen, is no longer topical when taken out of its context, or that it is from the start a misrepresentation of reality, is actually irrelevant in most cases – especially for digital natives. "I found it on the Internet" – that is what one can hear more and more frequently, as if this were tantamount to drawing from the sole, inexhaustible well of truth. Thus, the digital divide is a gap separating not only those having access to the Internet from those having no such access,

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38 See, in this connection, S. Calzolaio, *Internet e minori. Rassegne tematica per una indagine giuridica*, in *La tutela dei minori di fronte ai "media"*, Quaderni del co.re.com. Emilia Romagna, Bologna, 2012, 105 et seq.

39 See L. Califano, *Privacy e sicurezza*, in www.democrazieesicurezza, 2013, 47.

40 See the decision by the Italian DPA of 22 March 2013 (web doc. No. 2332205).

as it also separates two generations: one that grew up using books and encyclopaedias and another one that is growing up using almost exclusively the Net but is often totally unaware of the "knowledge pitfalls" that pave the way of the Internet. [41]

The peculiarities of web-based publication include the ease of dissemination, the possible equivalence of opinions and rebuttals, facts and stories, assumptions and evidence; all of this is often grounded in considerable skills to persuade and be intellectually appealing. This has refueled the debate on holocaust or genocide denial and freedom of expression. On the other hand, there is little doubt that historical narration on the web "feels like the repetition of an everlasting present, where the redundancy of certain opinions is more important than any investigations into the substance and truthfulness of the information provided." [42]

This is why holocaust or genocide denial theories are taking on new life from the Internet; they can penetrate pervasively everywhere and reach a large audience of indeterminate traits.

In the two years taken into consideration, the proposal put forward in October 2012 to introduce holocaust or genocide denial as a statutory offence in our legal system sparked anew the discussion on the tension between freedom of expression and denial theories.

If holocaust or genocide denial means an ideological process aimed at denying the truthfulness of certain historical events relating to acts of genocide, ethnic cleansing, crimes against mankind, then one has to question the very essence of freedom of expression in order to better understand the scope of such freedom.

It is unquestionable that holocaust or genocide denial is rooted in racism and the ideologies derived from racism[43]; it is "the tip of a millennium-old iceberg made up of layers of hatred-oriented

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41 See S. Luzzatto, *La neo-ignoranza è un digital divide*, in *Il Sole 24 ore*, 31 October 2010.

42 See C. Vercelli, *Il negazionismo. Storia di una menzogna*, Rome-Bari, 2013, 184 s.

43 See F.R. Recchia Luciani-L. Patruno, *Premessa*, in Id (edited by), *Opporsi al negazionismo. Un dibattito necessario tra filosofi, giuristi e storici*, Genoa, 2013, 6.

language" [44]; it is grounded in the "creation of historical falsehood by way of the reversal of factual truth" [45] in order to cancel the events "and deny their disruptive substance, bringing about the negation of negativity, the destruction of destructivity"; in short, it is merely a political lie, albeit a highly dangerous one[46]. Given the above premises, it is unquestionable that several legal systems punish holocaust or genocide denial in order to safeguard and protect historical truth as consisting both in "a collective right, based on which society may access information that is key for the development of democratic systems, and in a personal right vested in victims' relatives" [47] – as well as in order to react to the discrimination such a denial entails and protect the dignity of victims, and to protect public order and peace to the extent they can be disrupted and jeopardized by the dangerousness lurking behind this lie.

Still, freedom of expression as the cornerstone of every democratic society, the harbinger of institutional pluralism, is inherently dangerous[48]. There would be no point in recognizing the existence of this right, if one were then to require it to be exercised "to express our own opinions or those opinions that are commonly received." [49] To be truly free, the expression of ideas "may, in fact must also be disturbing, dissonant, divergent compared to the prevailing truth and even to historical truth." [50]It has to be safeguarded even with regard to unpleasant, shocking or offensive opinions as last recalled by the European Court of Human Rights. [51]

This does not mean that punishing holocaust or genocide

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44 D. Bifulco, *Che cos'è la verità?. Il silenzio di Gesù, l'eloquenza del diritto e le soluzioni delle democrazie contemporanee in tema di negazionismo*, in F.R. Recchia Luciani-L. Patruno (edited by), *Opporsi al negazionismo*, quoted, 19.

45 This quote is taken from F.R. Recchia Luciani-L. Patruno, *Premessa*, quoted, 5.

46 C. Vercelli, *Il negazionismo. Storia di una menzogna*, quoted, IX.

47 See, in this regard, the annual report by the European Commission for 1998.

48 See E. Fronza, *Il negazionismo come reato*, Milan, 2012, 144.

49 In this regard, see A. Di Mario, *Eguaglianza tra le opinioni politiche: le tendenze antidemocratiche nei regimi liberali*, in A. Celotto (edited by), *Le declinazioni dell'eguaglianza*, Naples, 2011, 135.

50 E. Fronza, *Il negazionismo come reato*, quoted, 145.

51 ECHR, 17 December 2013, *Perinçek vs. Switzerland*.

denial is bound to be detrimental to democracy and the rule of law; rather, "lawmakers should be recommended to take precautions, to acknowledge the need for balancing and constitutional caution" [52] in order to avoid that the long-standing as well as difficult issue of holocaust or genocide denial be settled by way of the "legal shortcut of prohibition" [53] without an adequate and unrelenting cultural and social confrontation.

Reccomendations

1. Fostering an approach to law-making that is equal to the global dimension of the Internet and can ensure the fair balancing between freedom of expression and its limitations.

2. Ensuring the right to access the Internet under equality terms. Outlining the specific configuration of the right to access the Internet would ensure the effective as well as appropriate exercise of this right and additionally help clarify, once and for all, the judicial remedies to be resorted to in case of illegitimate disconnection from the Net.

3. Ensuring and regulating the right to be forgotten, to be construed as the outcome of the difficult balancing between freedom of expression and digital identity, by way of consolidated as well as consistent regulations.

4. Regulating use of the Net and the management of social networks to protect children and prevent cyberbullying.

5. Promoting effective as well as pervasive governmental measures with regard to administrative bodies in order to ensure that every

52 See J. Luther, *Costituzione, memoria e garanzie di innegabilità*, in F.R. Recchia Luciani-L. Patruno (edited by), *Opporsi al negazionismo*, quoted, 88 et seq.

53 See, in this regard, S. Rodotà, *Il diritto alla verità*, in G. Resta-V. Zeno Zencovich (edited by), *Riparare risarcire ricordare. Un dialogo tra storici e giuristi*, Naples, 2012, 497.

individual may exercise their digital citizenship rights vis-à-vis public bodies.

6. Fostering the balancing exercise judicial authorities should perform by seeking to mediate between the rights at issue pending the adoption of thorough provisions that are equal to the complexity of these questions.

SENSITIVE DATA, PRIVACY AND RIGHT TO BE FORGOTTEN

By Federica Resta

Focus

Habeas Data

In his essay on the "loss of privacy", Umberto Eco entrusts the "authorities supervising over our privacy" with the task not only of "protecting those who want to be protected, but also of protecting those who are no longer capable to protect themselves." – because the attacks on privacy end up getting us all used to its loss. At a time when one increasingly commits important pieces of their own selves to the Net, to companies one purchases products from, the public administration one is using the services of, in short, to third parties, one does run the danger of failing to grasp the meaning and value of blurring the view over one's own private life.

It is unquestionable that new technologies have freed us, in part, from the domination of space and time; however, they also risk subjecting us all to new types of slavery by making the information society a society keen on reporting, surveillance, profiling.

Given these risks, the only veritable safeguard consists in making an informed use of the right to the protection of one's own personal data. This right is enshrined in the Charter of Fundamental Rights of the EU as a separate right from the protection of private life – which is closer to the right to be let alone mentioned by Warren and Brandeis – because of its being a precondition for freely deciding how to expose oneself to the world; it is the hard core of personal identity also in its social projection and is accordingly a prerequisite for human dignity and the unfettered building up of one's own personality.

Thus, *habeas data* is the counterpart of *habeas corpus* as regards the electronic body and digital identity.

Still, in spite of the pivotal role played by this right in today's configuration of citizenship, it is increasingly violated as shown by the activities of the Italian data protection authority. This is especially the case with journalism, an area where striking the balance between privacy and freedom of expression is probably most difficult, in particular in a democratic system like ours that is focused on the individual – that is, in a system that is mindful not to allow limitations on personal rights that run counter their very essence, not even in order to protect collective or social interests, partly in line with Article 52(1) of the Charter of Fundamental Rights of the EU.

Information, Identity Dynamics and Right to Be Forgotten

From this standpoint, legal journalism is especially daunting a sector because this is where the need to afford citizens the required information on facts that are, generally speaking, in the public interest - also to ensure transparency in the operation of justice – must be reconciled with privacy as well as with the presumption of innocence principle. Further, it must be reconciled with the right of a sentenced person to be socially rehabilitated and with the dignity of all the individuals that are involved, on whatever grounds, in a judicial proceeding; above all, one should refrain from pumping up certain phases of investigations when the accused is especially vulnerable, in particular if he or she is the subject of measures limiting personal freedom. It is no chance that the Code of Criminal Procedure bans the publication of images showing handcuffed individuals – the rationale being exactly the need to protect human dignity at a time when the individual is most vulnerable. This is why the Italian data protection authority (the "Garante") prohibited a TV show from further broadcasting pictures of accused persons inside their own homes – also by way of the so-called "close-ups" – at the

time they were being arrested (see decision of 18 May 2012 – web doc. No. 1900914).

Another difficult issue has to do with the need for ensuring that news are as up-to-date as possible, since doing otherwise might be ultimately prejudicial to the data subject's dignity - whose image would not match with reality. In this regard, domestic and international case-law (especially from the ECHR) has emphasized the need for reporting on the evolution of a story that, if not updated, might translate into the provision of inaccurate information. This is the approach followed by the Garante in requiring online publishers to update their articles and news so that the data subjects' right to respect for their identities – in their current dimension – can be reconciled with citizens' right to receive (and journalists' duty to impart) information that is accurate, reliable and complete.

A similar approach – i.e., the updating of obsolete information or the non-application of indexing mechanisms to such information – was actually implemented by both Houses of Parliament, partly upon the Garante's impulse, to address the disclosure of parliamentary proceedings and works where personal data was contained that had become meanwhile out of tune with factual developments. Both the Garante and judicial authorities have been faced with complaints lodged by citizens requesting, among other things, the non-application of indexing mechanisms in respect of parliamentary proceedings that mostly concerned investigational activities by Parliament and contained (mostly) legal journalism information they considered to be in breach of their dignity – since such information failed to take account of the favourable evolution of the respective cases. Apart from the issue of the special regime applying to the Houses of Parliament, which fall outside the scope of the Garante's powers, this case shows that posting, on the Net, documents that are public by definition – being parliamentary proceedings – does raise new criticalities that call for equally new solutions.

Special importance should be attached, in terms of their number and

impact, to the cases where prejudicial information (usually relating to the coverage of judicial proceedings) failed to be updated after being stored in the online archives of dailies – which is a veritable breach of the right to be forgotten, that is the right to a thorough, topical representation of one's own identity that should mirror both its evolution and its dynamics. From this standpoint, reference should be made to the decisions taken by the Italian Garante vis-à-vis several online media in order to have news updated with regard, for instance, to charges or convictions concerning individuals that had been subsequently acquitted; in some cases, the Garante managed to prevent the autocomplete function of some search engines from operating in a way that was in breach of data subjects' dignity. Indeed, if the name of a person acquitted of a charge is paired automatically in Google's search field with words like "mafioso", the representation of that person on the Net as based on the search results cannot but be misleading. This is why it is so important for the information posted and disseminated on the Net to be continuously updated and made accurate – in order to ensure that the information is thorough and truthful and that the data subjects' dignity and identity are respected.

This is ultimately aimed at preventing the complexity of a person's life and image from being crystallized and downsized to a single detail – perhaps of minor importance or, worse still, such as to disrupt the meaning and rationale of that person's whole life (see, in this connection, L. Manconi, *Vita e dettaglio*, Il Foglio, 1.8.2012, p. 2; G. Amato, *Quei dubbi insensati offendono la verità*, Corriere della Sera, 29.7.2012, p. 11).

Thus, the right to be forgotten is supplementary to – rather than in conflict with – the right to receive and impart information; this is actually the rationale underlying the draft EU Regulation on data protection, which explicitly sets forth the right in question. These issues are likely to be addressed, among other things, by the amendments to the Journalists' Code of Practice that are being worked out by representatives from the DPA and the categories concerned; one of the objectives of this drafting exercise consists

in adjusting the Code in force, which dates back to 1998, to the changes that have taken place meanwhile in media mechanisms.

Online Politics

Indeed, the risks arising out of the fact that major pieces of one's life are stored on the Net should be taken into account by having regard to data that are especially in need of enhanced protection because they have to do with a person's most intimate sphere, or because they lend themselves to being misused or may expose the data subject to discrimination. This is the case of the information concerning political opinions, which may be disclosed on the Net albeit with special precautions - as the Garante recalled in addressing cases that had to do with the voting mechanisms implemented for the "primary elections" of the centre-left coalition, in particular with the provisions concerning the need to undersign a "public call" and be enrolled in an ad-hoc "Register". Such provisions entailed the risk of disseminating sensitive data on the voters, as pointed out by some complainants. The Garante ordered the organizing committee to prevent dissemination of such data, especially on the Internet, by taking any and all measures that would be found appropriate for this purpose (decision of 31 October 2012, web doc. No. 2079275).

Identity, Affectivity, Discrimination

The peculiar criticalities brought about by the stepwise transfer to the Net of substantial portions of one's "private and public" life should not lead one to forget about the safeguards to be afforded to the personal data processed according to more conventional mechanisms – in particular whenever information deserving increased protection is at stake, such as the information on health, sex life or specific situations related to non-biological reproduction mechanisms.

Special importance should be attached in this regard to some decisions taken by the Garante in order to ban the disclosure, in certifications issued to unauthorized entities, of sensitive data that were not indispensable for the purposes of the administrative proceeding

concerned; in yet other cases the data at issue should not have been disclosed at all unless on the basis of a judicial authorization. In particular, a decision of 8 November 2012 prohibited a Registrar of Births, Marriages and Deaths from showing the full copy of the birth certificate relating to a person – now adult – containing a reference to that person's adoption.

Enhanced protection is also due to certain sensitive data that have to do with sexual orientation - including the evolution in time of such orientation. A significant example in this connection is provided by the decision whereby the Garante acknowledged an applicant's right to obtain, from the competent university, a new graduation certificate only showing the applicant's new data as taken from the census register after such data had been rectified in terms of the new sex attributed to the applicant – that is, without any reference to the reasons for the reprint of the said certificate (decision of 15 November 2012, web doc. No. 2121695).

Discriminations and Violence

November 2012 - January 2013 : Cyberbullying

November 2012: a fifteen-year-old boy from Rome committed suicide partly because of the sorrow caused by the unrelenting fun made of him because of his sexual orientation, especially on the Internet. In fact, a Facebook profile called "The pink-trousers boy" had been created on purpose.

January 2013 – **Novara**: a fourteen-year-old girl committed suicide after being cyberbullied because she could no longer stand the jokes she had been the subject of over the previous days especially on SNS.

January 2013 – Rome: a sixteen-year-old boy attempted to commit suicide by throwing himself out of the window of the high school

class he attended, allegedly because of the jokes and bullying he was exposed to.

Thus, two suicides and one attempted suicide were reported by the media over barely three months – all of them concerning youths who were cyberbullied. According to a survey by the Italian Paediatrics Society (SIP), 34.2% of Italian teens have experienced cyberbullying or are friends with youths that have gone through such an experience.

January 2013 – Rome. The Italian DPA on the right to have online information updated

The Italian DPA ordered two publishing groups to implement a mechanism in their online archives such as to flag any developments in the news concerning a complainant; this was aimed at ensuring that the complainant's (current) identity would be respected as resulting from the thorough representation of facts involving him whilst enabling readers to receive reliable as well as thorough information – here, the fact that the complainant had been fully acquitted of criminal charges.

October 2013 – Bergamo. Trading in medical data. Some media reported on a sort of "sale" by health care practitioners of medical information concerning the patients admitted to the emergency department of a local hospital. This case was highlighted by the Italian DPA as well because it had to do, apparently, with the commercial exploitation of personal data held by reason of one's official duties; worse still, the data in question deserved special protection exactly because they could disclose the health of individuals and accordingly could expose such individuals to discrimination.

2013. Measures taken by the Italian DPA against municipalities. The Italian DPA issued inhibitory injunctions against about 30 municipalities in the course of 2013 as they had posted the names and diseases relating to individuals subjected to coercive medical treatments – the reason being that they had misinterpreted the

publicity obligations set forth in the current legislation. A similar misinterpretation accounted for the publication on the Internet by several schools of the names relating to the participants in a public competitive examination reserved for persons with disabilities.

2013. Measures taken by the Italian DPA against public and private bodies in connection with the disclosure of biometric information. Several inhibitory injunctions were also issued in 2013 against private and public bodies (including schools) that had relied heavily on biometrics systems to assess employees' attendance at work; such systems mostly collected fingerprints without any legal basis for such a processing, which should only be performed as a last resort measure. In one case the fingerprinting of employees for checking attendance at the workplace might have given rise to discrimination, given that the application lodged with the DPA referred to the use of such a system exclusively with regard to employees serving a sentence outside custodial institutions.

2013. Measures taken by the Italian DPA against employers in connection with video surveillance of employees. In terms of their number and importance, the inhibitory injunctions issued by the Italian DPA against several employers should be mentioned here; the employers in question had applied video surveillance to their employees without complying with the conditions set forth in specific legislation [Law No. 300/1970], i.e. without seeking the prior agreement of trade union representatives or obtaining an authorization from the Labour Inspectorate. These are breaches of provisions that were among the first ones to be introduced in Italy's legal system to protect privacy; indeed, there is such a power imbalance in this context between employer and employee that the data subject's consent is per se not enough as it might be easily coerced exactly on account of the employer's contractual power. This is why trade union representatives have to be involved or, if no agreement can be reached with them, an institutional authority is to be applied to such as the Labour Inspectorate.

The use of video surveillance in the absence of a legal basis is becoming widespread; in many cases no information is provided to data subjects in spite of this being a mandatory requirement. Even more serious are the cases where the cameras are hidden in such a manner as to prevent data subjects from realizing that they are being filmed.

22 May 2013 – Ravenna. Video surveillance in nursery schools. The Italian DPA banned the use of video surveillance in this context. As explicitly acknowledged by the nursery school, it had been introduced to "placate" parents more than on account of security considerations; the risk here was that, by so doing, children would be led to believe that it was "normal" to be under continuous surveillance – which might have also impacted the spontaneity of children's relationship with their teachers.

24 May 2013 – Rome. "Wild" telemarketing. Three injunctions were issued by the Italian DPA to impose fines amounting to Euro 800,000 on three major IT companies specializing in database management plus one telecom operator because of the breach of measures that had been issued against them in the past. It is often the case that personal data is processed unlawfully for telemarketing purposes even in respect of individuals that have signed up to the "opt-out register".

June 2013. NSA interceptions. Reports were published on the massive, indiscriminate collection of personal data and veritable "interceptions" carried out by the US National Security Agency, involving not only American citizens, on the basis of the special rules set forth in the Patriot Act (in particular, the Foreign Intelligence Surveillance Act) for anti-terrorism purposes. It is actually likely that data of European citizens have been acquired by US intelligence agencies, to the extent they had communicated with US citizens or used telecom services provided by US companies. This is due, at least in part, to the double standard that features in the applicable US legislation, which allows for derogations in respect of non-

citizens from the safeguards that are conversely applicable to US citizens vis-à-vis investigational activities. This sort of *ultra vires* operation of US legislation in Europe was the subject, among other things, of a working group set up by the Vice-President of the European Commission, Viviane Reding, as part of a broader review of the EU-US relationships with regard to mutually applicable data protection safeguards. However, the activities of this working group were considerably hampered by the reliance of the US counterparts on secrecy even concerning the interpretation of key concepts such as "foreign intelligence" – which were necessary to fully grasp the impact of Patriot Acts regulations.

November 2013. Action strategy for the protection of European citizens' data. An action strategy was developed by the European Commission and presented on 27 November 2013; the strategy envisaged, in particular, conclusion of the negotiations on an EU-USA "umbrella agreement" on the protection of personal data in the law enforcement sector by the summer of 2014 along with the strengthening of the EU-USA mutual legal assistance agreement of 2010 (including sector-specific agreements). The ultimate objective was to afford judicial remedies to European citizens and lay down an exhaustive list of the cases where European authorities may transfer data to US authorities including the relevant data retention periods and the terms for the use of such data. At all events, data transfers from European to US authorities might only take place in the cases expressly provided for in ad-hoc bilateral agreements. These provisions would be on the whole of the utmost importance because they would touch upon the main criticalities in the US legislation. The Commission's strategy also envisages the review, by the summer of 2014, of the Safe Harbor agreements that regulate the transfer of data to US companies; here the objectives include affording European citizens adequate remedies by way of alternative dispute resolution mechanisms in case of privacy breaches; enhancing the transparency of privacy policies so as to inform users (including non-US users) of the risks their data may be exposed to; strengthening oversight

by the US government on compliance with the agreement by the US companies also by involving the competent EU data protection authorities whenever non-compliance is allegedly at issue.

November 2013 – Italy. Cybersecurity measures. Special importance should be attached to the undersigning on 11 November 2013 of a memorandum of understanding – unprecedented in Europe – with the State's Intelligence and Security Department – allowing, inter alia, access by intelligence services to the databases of telecom providers – which also deals with the powers of intelligence agencies in the cybersecurity sector.

The MoU regulates specific as well as innovative information procedures, which are systematic in nature and regard the processing mechanisms for intelligence purposes in compliance with the precautions set forth in the data protection Code. This application of the powers vested in the data protection authority is better in line with the peculiarities that are currently a feature of the activities by intelligence agencies and their powers to "systematically access" information - which were expanded by Law No. 133/2012, partly further to a world-wide trend that is related to the growing risks from cybersecurity threats.

Legislation and Policies

From Privacy to the Protection of Personal Data

The right to the protection of personal data is not expressly grounded in Italy's constitutional charter. Obviously, the 1947 Constitution could not have included such right as we currently know it, i.e. as the right to informational self-determination.[1] Nevertheless, this right is currently covered by the Constitution, albeit indirectly, by way of the reference made in Article 117(1) to the EU's legal system, which

1 S. Rodotà, *La privacy tra individuo e collettività*, in *Politica del diritto*, 1974, 545.

includes Article 8 of the Charter of Fundamental Rights of the EU where this right is explicitly enshrined and the need is mentioned for independent authorities to enforce it.

The right in question is actually already set forth in the terms described above in Italy's legal system, even though based on statutory (rather than constitutional) provisions that implement Community legislation such as Directive 95/46/EC. Indeed, Law No. 675/1996 introduced a specific set of safeguards for the right to the protection of personal data although that right was not expressly laid down as such; at all events, a separate legal configuration was brought about for this right, other than that applying to the right to privacy which had already been linked to Article 2 of the Constitution by way of judicial decisions[2]. A highly peculiar type of protection was also introduced in this regard, i.e. one that is "relational" in nature.

The right to the protection of personal data was ultimately laid down as such in the data protection Code, which implicitly considered it to be part of fundamental human rights as well as being closely related to human dignity and personal identity – although this was done, once again, by way of a statutory rather than constitutional provision.

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2 Reference can be made, in particular, to the judgments by the Court of Cassation in the Caruso and Petacci cases (Nos. 4887/1956 and 990/1963), where a shift took place in the privacy configuration scheme from a mainly negative dimension – the right not to have one's views altered – to a markedly positive, dynamic one, i.e. the "right to autonomous decision-making in one's relational life" and in the development of one's personality (see judgment No. 990/1963). The latter was traced back to Article 2 of the Constitution by having regard to the "full development of the human person" that is mentioned in Article 3, paragraph 1 of the Constitution. Reference can also be made in this connection to decision No. 139/1990 by the Constitutional Court, concerning the privacy protection rationale and, accordingly, the protection of inviolable human rights underlying the possibility to disclose statistical data exclusively in aggregate format; another decision by the Constitutional Court (No. 366/1991) had ruled that the findings of interceptions ordered in connection with a separate proceeding were not admissible as evidence: here privacy was considered to be a precondition for human dignity. This evolution of the privacy concept from the initial core notion of "false light in public eyes" was also fostered, prior to Directive 95/46/EC, by Convention No. 108/1981 of the Council of Europe; the latter introduced the concept of "data protection" as the right to the protection of private life against the automated processing of personal data, which was developed subsequently by the case-law of the European Court of Human Rights and traced back to Article 8 of the European Human Rights Convention (i.e. to the right to respect for private and family life) as construed in an evolutionary perspective.

This new right as enshrined in the Code was configured in a markedly positive perspective – namely, as a precondition to freely manifest oneself to the outside world, as the hard core of personal identity including its social dimension. In short, the right to the protection of personal data was set out as a prerequisite for human dignity and the free development of one's personality.

Whilst the protection of privacy is basically afforded by way of a static, negative approach as it is focused exclusively on the *jus excludendi alios* (the right to exclude the others), the protection of personal data has a substantially dynamic nature. Being construed as the right to informational self-determination, it empowers every individual to take steps vis-à-vis any entity handling their data and entails the possibility to lay down mechanisms and conditions for the processing of such data and to follow the data throughout their movements.

The features of the protection to be afforded are also different, since an increasingly preventive and case-specific approach is implemented and growing importance is attached to the collective dimension as opposed to an exclusively individual one – only think of the possibility for data subjects to be assisted by associations in exercising the rights set forth in Section 7 of the Code, modelled after the concept of collective protection of individual rights that is already enshrined in Law No. 300/1970 on employer-employee relationships. Furthermore, the protection in question relies on the interplay of procedural mechanisms that are grounded in both private and public law, which is once again modelled after European instruments.

Scope of the Protection

The right to the protection of personal data is vested, under Directive 95/46, in "natural persons" that are identified or identifiable (also indirectly) without prejudice to "the legislation on the protection of

legal persons with regard to the processing of the data concerning them" (see Recital 24). In transposing the directive, the Italian lawmaker decided to expand its scope of application to include legal persons, organisations and associations; this was a feature already of Law No. 675/1996 and was taken up by the 2003 Code. However, Section 40(2) of decree No. 201 of 6 December 2011 (so-called "Rescue Italy" decree) as converted, with amendments, into Law No. 214 of 22 December 2011 amended the text of the Code by excluding legal persons, organisations and associations from the scope of the protection at issue; it was considered that the extensive protection afforded by Italian legislation was an instance of gold plating and the amendments proposed would allow "a reduction in privacy-related costs" for businesses. In fact, this only applies to the processing of personal data concerning organizations, associations or legal persons as performed by companies, whilst it does not obviously regard the processing by such companies of data relating to natural persons. The ultimate effect produced by this reformation consisted actually in depriving legal persons and associations (including, for instance, political parties, NGOs, etc.) of whatever protection, so that the data concerning them may be processed without complying with the principles and procedural safeguards set forth in the Code.

The Italian DPA tried to remedy this *denegatio tutelae* (denial of protection) at least in part, by adopting an interpretive decision on 20 September 2012 whereby the sections in the Code concerning the processing operations related to the provision of electronic communications services may be applied further to the entities in question insofar as they are parties to contracts for the provision of such services – e.g. as for nuisance calls or unsolicited communications.

This interpretation would actually appear to be necessary in order to prevent conflicts with Recital 12 and Article 1(2) of Directive 2002/58/EC, which affords legal persons (to the extent they are subscribers to the services at issue) the protection applying to the processing of personal data in connection with the provision of

electronic communications services.

In spite of this significant reduction in the scope of the protection afforded by the Code, a bill was tabled by Government in the past legislative period whereby the scope of such protection would have been reduced further; in particular, the right in question would not be vested in individuals acting in their capacity as entrepreneurs, traders, handicrafts, or even "professionals" – that is to say, individuals performing whatever type of business activity. The "person" that, according to the Charter of Nice, is entitled to the "fundamental" right to the protection of personal data would have ceased thereby being the "natural person" as such and become the natural person "acting for purposes other than entrepreneurial, commercial, artisanal or professional activities" – i.e., the consumer as per the relevant definition in Legislative decree No. 206/2005.

Not too different is the wording contained in the governmental bill on simplifications (AS 958, Section 17), although the latter refers more appropriately to the data relating to *the performance of entrepreneurial activities.*

The scope of the protection afforded by the Code had been reduced further by Law No. 15/2009 (so-called Brunetta Law), which had amended Section 1 of the Code based on a proposal put forward by the then Junior Minister Ichino to exclude its application to the information concerning the performance and assessment of any person "discharging public duties". The impact of this amendment (which was repealed by way of Law No. 183/2010) was partly reduced by a provision introduced thereafter (via Section 19, paragraph 3a, which is now part of legislative decree No. 33/2013), whereby public administrative bodies are required to disclose the above information except for such items as may allow inferring sensitive data.

The Individual and Marketplace

The aforementioned legislative amendments mirror two trends that

are becoming increasingly significant in the legislative policies applying to this sector.

One of them has to do with the stepwise reduction in the scope of application of data protection legislation as regards business and production activities – starting from decree No. 70/2011, which markedly downsized the protection of personal data in business-to-business relationships. There followed the exclusion of legal persons and – which was perhaps unintended by lawmakers – organisations and associations from the scope of the data protection right, plus the proposal for excluding natural persons exercising commercial, entrepreneurial or professional activities.

This trend towards reducing the scope of privacy for the sake of market requirements is also mirrored by the shift from opt-in to opt-out in telemarketing activities pursuant to decree No. 135/2009 as converted, with amendments, into Law No. 166/2009. This means that whoever does not wish to be contacted for marketing purposes is now required to sign up to an ad-hoc "opt-out register", whilst the opposite rule was applicable beforehand – i.e., the data subjects' prior informed consent was necessary in order to contact them.

In no way different is the rationale underlying the elimination of the so-called security policy document from the minimum security measures to be taken by data controllers, as per decree No. 5/2012. Whilst the drafting of such a document was probably a disproportionate requirement in respect of some processing operations and was in any case poorly helpful in a preventative perspective, it might have been replaced at least by other measures – perhaps less daunting but sufficiently effective.

The concept that is ultimately shared by all the above measures is that privacy means costs for businesses and such costs must be reduced as much as possible – especially at a time when economic crisis is so rife; a passage in the Explanatory Report to the bill for enacting the decree No. 201/2011 is especially significant in this regard. This is obviously a misrepresentation – not only because a fundamental

right, far from being a cost, is actually an asset: as stated by Jean Paul Fitoussi, violating rights is cost-ineffective. But this is so also because the stepwise reduction in the scope of the protection afforded by the Code has ended up harming companies, as shown by the interpretive provision issued by the Italian DPA with regard to decree No. 201/2011 – which was made necessary to prevent legal persons from being deprived of whatever protection against wild telemarketing or nuisance calls unlike all other subscribers to electronic communications services.

In order to prevent these unintended consequences and avoid that the right to the protection of personal data becomes – like so many other fundamental rights – a market-dependent variable, one should on the one hand raise the awareness of the importance of these rights, and in particular of the right to privacy that is as yet overlooked as a fundamental precondition for one's freedom; on the other hand, one should refrain from viewing, regulating and depicting these rights merely as red tape, as corporate costs to be borne in order to comply with complicated, hyper-detailed procedures that are poorly understandable in terms of their import, value and function.

This is especially the case with personal data protection legislation, which is today (as yet) excessively focused on compliance with requirements that are as stringent as they are theoretical in nature – so that they are all too often breached, which accounts for the poor effectiveness of the legislation at issue. This is shown most clearly by the number of sanctions imposed by the Italian DPA on account of violations that consist exclusively in the failure by data controllers to fulfil basic obligations: failure to provide information notices; failure to obtain consent; failure to adopt minimum security measures. A substantial portion of those sanctions result, on the other hand, from the breach of obligations related to the powers vested in the DPA: failure to notify processing operations to the DPA; failure to provide information to the DPA; failure to comply with measures taken by the DPA. The amount of the pecuniary sanctions imposed is also significant, since upper and lower thresholds as set out in the law

are considerable and do not always mirror the detrimental impact of the facts at issue. Moreover, criminal and administrative penalties may be imposed cumulatively, pursuant to a specific provision in the Code; in case of multiple wrongdoings (even of the same type), sanctions are imposed cumulatively rather than by taking account of the highest possible sanction for the most serious wrongdoing; and the violation of certain provisions in the Code is construed to give rise to a separate wrongdoing, of a derivative nature (see, for instance, Section 164a, paragraph 2), for which a sanction is imposed on top of that applying to the "primary" wrongdoing. Indeed, that so many violations of data protection legislation are still committed despite such stringent sanctions cannot but lead one to consider either that the applicable obligations are basically unknown or that such obligations are, if not inapplicable, at least disproportionate - i.e., unreasonable. In either case, there is clearly the need for considering how appropriate the legislation in force is to address an ever-changing reality; this is ultimately aimed at preventing a wider gap than the one currently existing between statutory provisions and compliance. Preference should be given as much as possible to solutions that take due account of the specific features of the case at hand without relying on general, theoretical assumptions.

The DPA is actually endowed with tools that enable it to move in that direction, ranging from the balancing of interests as a tool to exempt from consent to the quasi-regulatory powers (general authorisations, guidelines, prescriptive measures addressed to whole categories of data controller) whereby it can adjust the rules as much as possible to the peculiar features of each processing operations also via simplification measures – which has actually been the case repeatedly. Still, these tools prove effective to a limited extent in the absence of in-depth changes to the system as a whole.

In fact, the widespread use of technologies that entail the processing of data and the multifarious contexts in which an individual may be "tracked" to a more or less considerable extent make it necessary for legislation to be increasingly flexible and practical in order to

become as adjustable as possible to the specific contexts. Provisions are required that enable courts and administrative authorities, and in particular the Italian DPA, to take due account of the peculiarities of each case at hand.

Of course, this does not mean that the right in question should give way even more to conflicting interests such as those coming from the marketplace, businesses, etc.; in fact, it means that requirements that go mostly unmet and are probably of little help should be replaced by other, more reasonable, effective requirements. One could envisage, for instance, ad-hoc regulations for biometric data that do not legitimate the wide-ranging use of this technology, often unjustified, but rather adjust the general assumption on the disproportionate nature of the processing of such data by having regard to the specific type of biometric data and the resulting risks to data subjects. There is little doubt that the risks arising out of fingerprinting or the use of vein pattern or graphometric analysis are quite different from those related to facial images. By the same token, the actual decision-making power and autonomy of an employee giving his or her consent to the taking of fingerprints in order to check attendance at the workplace are definitely different from those vested in the customer of a bank. There is clearly the need to appropriately regulate the preconditions to consider that consent is valid, as consent may never be coerced or conditional; account must be taken of the contractual relationships and/or the context where consent is provided with particular regard to the imbalance in the parties' contractual power – especially in the employer-employee relationship. It is no chance that Law No. 300/1970 was the first piece of legislation that introduced, in our legal system, provisions to protect privacy apart from those laid down in the Criminal Code – exactly to protect employees against undue interference by employers and forms of surveillance at the workplace such as to violate their dignity. This is why trade union representatives were empowered to step in given the excessive weakness of the individual employee.

Transparency in public administration and opacity in private life

The Ichino amendment referred to above provides a very topical example of the trend in the public sector to downsize privacy for the sake of the increased transparency in public administration.

From this standpoint, the evolution of the transparency principle is especially significant, starting from its being set out as a general principle of administrative activity in Law No. 15/2005 up to the provisions made in the Brunetta Laws (Nos. 15 and 69 of 209, and legislative decree No. 150/2009) where transparency is construed as "total accessibility" to several data concerning activity and organization of public administrative bodies; this is instrumental to the "public oversight over compliance with performance and impartiality principles" – i.e., exactly the oversight that is not the ultimate objective of the right of access under Law No. 241/1990 [Italy's Freedom of Information Act].

The non-procedural nature of the civic access right introduced by legislative decree No. 33/2013 is all the more evident; under this right, every citizen is entitled to access such data and information as public administrations failed to disclose even though they were required to do so. This new type of access is not grounded in a vested interest as it results from the need for democratic oversight on the activity of public administrative bodies – which is exactly why no case-by-case balancing is required with the right to privacy of the counterparts, contrary to what is the case with the freedom of information provisions laid down in Law No. 241/1990. This is also the reason why the DPA recalled, in its opinion on the said legislative decree of 2013, that the information to be posted on the Net should be selected appropriately by having regard to its being instrumental to ensuring democratic oversight on public administration, whilst the visibility of personal data should be limited to what is absolutely indispensable - especially if sensitive data are involved. Significantly, the DPA requested in its opinion that any data disclosing information on a person's health or financial or social distress situations should

be exempted from the mandatory disclosure obligations set forth in respect of allowance-related measures – e.g. exempting certain individuals from payment of school canteen fees or health care fees based on the presence of specific diseases or income bracket rules.

The above guidance is far from being redundant. Only think, for instance, of the substantial investigations that led the DPA to issue inhibitory injunctions against several municipalities that had posted, on their websites, orders for coercive medical treatments (*trattamento sanitario obbligatorio, tso)* including the personal data of the relevant addressees and the respective diseases. There is little doubt that publishing this information is not only unlawful, because it is breach of the ban on disseminating health care data under Section 22(8) of the data protection Code, as well as serving no transparency objectives, since it does not shed any light on the exercise of administrative powers; in fact, it is dangerous for the individuals' dignity, because it can disclose data that are liable to expose those individuals to severe forms of discrimination and may remain on the Net without any possible constraints.

Similar measures were taken by the DPA with regard to the publication on the Net of the names of participants in public competitive examinations reserved for persons with disabilities; such a publication was in breach of the data subjects' dignity and was in no way instrumental to public oversight on public administration.

It is no chance that the ban on disseminating health care data, which was breached by the aforementioned publication, is aimed at protecting data subjects exactly against the most diverse forms of discrimination and social stigma that might result from an ill-conceived notion of transparency and "glass-house administration". In short, transparency does not mean posting all the data relating to an administrative proceeding on the Net, since there might be information that is irrelevant to public oversight on the exercise of public powers and may, above all, prove detrimental, at times irreparably so, to individuals' dignity. Transparency should be a

driver of democracy, not a means to violate human dignity.

From this standpoint, focusing unrelentingly on the relevance of the information to be disclosed for the purpose of the democratic oversight on public administration can allow turning privacy and transparency into complementary, rather than conflicting, assets – as both are necessary to ensure the rule of law in a State, like ours, grounded in democracy, pluralism, a presumption in favour of safeguards and the protection of the individual.

Freedom and Security

A similar relevance benchmark should be applied to the processing of personal data for public security purposes, partly on account of the sector-specific features of the relevant legislation. The latter entails a significant reduction in the safeguards afforded to data subjects and was recently expanded in scope following policies that increasingly prioritise security and have considerably enhanced the information-gathering powers of law enforcement bodies (as well as of intelligence agencies). Reference can be made, for instance, to the authorization granted to municipalities by decree No. 11/2009 to rely on video surveillance systems in public or publicly accessible places for the rather vague purposes of "urban security"; to the access by intelligence services to the personal data held by providers of electronic communications services in order to ensure "cybersecurity" as per the Prime Minister's decree of 24 January 2013; to the "preventive" interceptions of telephone, Internet and environmental data that intelligence services and administrative authorities are empowered to carry out upon the public prosecutor's authorization with a view to preventing certain criminal offences under Section 226 of the implementing provisions of the Criminal Procedure Code – which powers were expanded further by Law No. 133/2013; to the exchanges of sensitive, judicial, even genetic data relating to suspects of crime between Italian and US law enforcement authorities pursuant to the Agreement of 28 May 2009

on the strengthening of cooperation in preventing and countering serious forms of crime, which has yet to be ratified; to the envisaged creation of a national DNA database as per the Law ratifying the Treaty of Prüm (Law No. 85/2009), where the genetic profiles acquired in the course of criminal proceedings will be stored along with those of individuals placed under measures limiting personal freedom, to be then accessed by police and judicial authorities for purposes of international law enforcement cooperation; to the so-called freezing, that is the storage of Internet traffic data upon an order issued by the police – to be validated subsequently by a court – for preventive purposes; finally, to the lack of specific regulations on the admissibility at trial of images filmed in private dwellings, which the Constitutional Court could not include under the scope of interception-related legislation because no indications came from Parliament in this regard.

The above processing operations touch upon highly sensitive data including judicial and genetic data; this is why it is all the more important to limit the information-gathering powers of law enforcement authorities to such data as is actually indispensable for preventing or detecting very serious crimes and by implementing procedural mechanisms that must be subject to full judicial review. Similar safeguards should apply to the processing performed by intelligence agencies, partly in the light of the broader intelligence-gathering powers conferred on them by Law No. 124/2007 and in particular following the amendments brought about by Law No. 133/2013. The latter provided actually the foundations for the so-called "Monti directive" of 24 January 2013, whereby intelligence services were empowered to access the databases of the providers of electronic communications services to protect "cybersecurity". One should also consider that, in addition to the review carried out by the Copasir [a parliamentary oversight committee] on the activities of intelligence services (from both a political and a legitimacy standpoint), the Italian DPA is empowered to carry out inspections into the processing of personal data by such services to

establish conformity with the applicable principles – which include relevance, lawfulness, fairness, and legitimacy of the processing. The implementing procedures ought to have been set out in an ad-hoc decree by the Prime Minister's Office (under Section 58(4) of the Code), which however has yet to be issued.

Respect for the relevance principle should serve all the more as a key element in regulating access to personal data by administrative authorities in order to counter non-criminal wrongdoings: this is the case, for instance, of the communication to the Revenue Office of the data concerning the financial operations of all Italian citizens as provided for in decree No. 201/2011 to foster the fight against tax evasion and elusion.

One should also reiterate the need for ensuring that those individuals that are subjected to the State's authority are made aware of and can effectively profit from the right to the protection of their personal data.

This applies in particular to the inmates of prisons or custodial establishments, and to the aliens detained in the Identification and Deportation Centres (*Centri di identificazione ed espulsione*, C.I.E.), since "the fragility of their situations and circumstances might make them truly "naked" vis-à-vis public authority" and lead them to more easily waive even fundamental rights – which may not be overridden, not even *in vinculis* [when one is in chains] (see the DPA's Report to Parliament for the year 2012).

Media and Privacy

An issue that is continuously under the focus of Parliament, to little avail, has to do with the relationship between privacy and media; this issue is usually addressed from the "trial by the media" standpoint, i.e. in terms of the disclosure of investigational records and, in particular, of wiretap transcripts. Given this background, the right to privacy vested in the parties to a judicial proceeding as

well as in any third parties concerned by the relevant investigations is relied upon instrumentally as an excuse to legitimate significant limitations on the use of the above tools for the taking of evidence; this is especially so in the governmental decree that was approved during the past legislative period, albeit not yet finally. As shown by the many cases addressed by the DPA, one should rather introduce more stringent safeguards for those individuals that deserve increased protection – such as children and the victims of crime – as well as in order to ensure full respect for the presumption of innocence principle; to that end, one should make sure that judicial developments are mirrored in the news reported on the media. It is often the case that a defendant depicted as guilty of the most heinous crimes in the headlines is then acquitted of all charges, but this piece of information fails to be given the same emphasis.

As suggested by the DPA, it would also be appropriate to update the Journalists' Code of Practice, which provides the benchmark in assessing whether data is being processed lawfully. Over fifteen years elapsed since it was first adopted, and the current multiplication of information sources makes it increasingly necessary for professional ethics to be careful not to mistake what is in the public interest by what is interesting for the public. By drawing inspiration from the provisions made in the draft data protection Regulation that is being discussed at EU level, one should lay down specific safeguards to protect the data subjects' right to be forgotten; for instance, one might require – as was done by the DPA as well as by judicial authorities and the ECHR – that the information (especially on judicial proceedings) stored in the online archives of media be de-indexed and/or updated, partly on account of the risks for the data subjects' dignity that are made more poignant by search engines and their autocomplete functions.

Recommendations

1. Including organizations and associations into the scope of the data protection right. This reformation might be counterbalanced by a general re-haul and update of the requirements applying to data controllers under the Code.
2. Revising the framework of the sanctions envisaged in the Code as regards both administrative wrongdoings and criminal offences by way of an in-depth reformation along the following lines: derogations should be excluded from the principle whereby administrative wrongdoings can cover criminal offences; proceedings for the offence of unlawful processing of personal data should be instituted on the basis of a complaint lodged by the victim; several wrongdoings consisting in non-compliance should be de-criminalised as they are not prejudicial to third parties; additional non-punishability clauses should be included for both administrative wrongdoings and criminal offences based on the offender's or wrongdoer's remedial actions and compensatory measures.
3. Expressly excluding any data disclosing information on health or specific situations of economic or social distress from the disclosure obligations applying to personal data as grounded in the transparency requirements regarding public administrative bodies.
4. Introducing ad-hoc regulations in respect of the processing of biometric data. Such regulations should in no way legitimate the blanket reliance on such data that is currently a feature, in particular by laying down the necessary preconditions to consider that data subjects' consent is really free.
5. Implementing the provisions contained in Section 53 of the Code; the latter requires a decree by the Minister of the Interior to implement a "census" of the databases set up for public

security purposes so as to enable data subjects to exercise the rights afforded by the Code also in this area in order to protect their own personal data. Furthermore, stringent provisions must be laid down to regulate application of the Code to intelligence activities.

6. Introducing legislation to limit the use of personal data by law enforcement authorities (especially if sensitive, judicial or genetic data are involved) to such data as is absolutely indispensable to pursue the prevention and detection of especially serious crimes and to the extent the use of such personal data can actually ensure effective prevention.

7. Providing in the regulations to be issued with regard to the national DNA database that the retention periods of genetic profiles should be adjusted to the relevance of such genetic information for the specific purposes of the investigations into the individual criminal offences.

8. Introducing, as called for by the Constitutional Court and by the Court of Cassation, specific regulations regarding admissibility at trial of images filmed in private dwellings. To that end, the regime applying to the interception of communications should be extended expressly to such filming if it is such as to enable the "capturing" of conversations. In particular, it would be appropriate: 1) to regulate and limit the recording of conversations unbeknownst to the persons concerned, which is considered lawful so far; 2) to update Journalists' Code of Practice by also laying down additional safeguards for those individuals that deserve enhanced protection, such as children and victims of crime, as well as to ensure full respect for the presumption of innocence principle; 3) to lay down specific measures to afford data subjects the right to be forgotten.

9. Making sure that the right to the protection of personal data is implemented effectively in all places where individuals are deprived of their freedom - by raising the awareness of

this right among prison inmates, persons held in custodial establishments, aliens detained in C.I.E. .

PROTECTION OF MINORS
By Angela Condello

Introduction: defining the term "minor"

Before talking of the rights of minors, it is necessary to decide, at least from a methodological standpoint, who is in such a legal situation and who is a minor according to the law.

Usually, a minor is somebody who, under the law of their country, has not attained the age of majority, to which the law attaches a series of obligations and powers [1].

As for the Italian legal system specifically, Section 2 of the Civil Code, as amended by Section 1 of Law No. 39/1975, states that "the age of majority is set at eighteen years of age. With majority all those acts can be performed for which the law does not require a different age". These rules take effect both for Italian and foreign minors. However, conversely, the eighteen-year olds are no longer to be considered as minors.

On attaining majority an individual is no longer a minor and therefore is fully capable to act, thus losing the right to benefit from the corpus of regulations being aptly set for minors and its related safeguards.

However, majority is not required to autonomously perform certain acts: for instance the capacity to acknowledge a biological child is acquired at 16 (Section 250 of the Civil Code) and the same holds true for the exercise of the rights related to artistic works.

At 14 a minor becomes criminally responsible, at 12 he or she is to be heard in adoption proceedings, whereas according to Law No. 54/2006 concerning parental separation and shared custody, the

1 For the detailed regulatory framework, see L. Pomodoro, Diritto di famiglia e dei minori, UTET (2011),…, who rightly emphasises, inter alia, that the age of majority "is not attained …at the hour corresponding to one's birth as entered in the Register of births, marriages and deaths but at past midnight of the day the birth occurred" p. 256.

court orders the hearing of children aged 12 or less [2].

The criteria adopted to determine the age of an individual and, consequently, his belonging to the category of minors - the subject matter of this contribution - are particularly important (though extremely complex) for foreign minors. This topic involves Italy in a direct way.

In fact, if on the one hand there are precise regulatory references for the classification of an Italian national as a "minor", for non-nationals staying in Italy it is necessary to apply parameters which are not always consistent or in line with domestic law. It would be necessary to assess case by case when a minor comes of age in his or her own country of origin. Clearly, this problem can be easily solved for EU citizens, where domestic legislations are homogeneous, whereas the problem arises when non-EU citizens present on the Italian territory are taken into consideration.

In this regard, under the law that reformed the Italian system of private international law (Law No. 211/1995), a minor is an individual experiencing the conditions envisaged by the Hague Convention (1961), implemented in Italy by Law No. 742/1980: that is, a minor is an individual who is considered as such according to his or her own national law, namely the law of the country of habitual residence.

The Hague Convention does not precisely define the "habitual residence", as it refers to a de facto – i.e. case by case – and not to a de jure assessment.[3]

This assessment has to consider the activity of the minor's family so as to identify the core of his or her life, as well as the ties the minor has in the place where he or she is physically located. The first Hague

2 L. Pomodoro (et al.) equally notes that in general " hearing the minor and the obligation to keep his or her opinions into consideration is then acknowledged by various EU regulations, such as, among others, the one related to the enforcement of measures on the rights of custody and access", p. 257.

3 To an extent that even the State where the minor has been illegally transferred to (against parental will) can be qualified as place of residence.

Convention (1961) was reformed by a new Hague Convention (1996) and the Strasbourg Convention (1996, implemented through Law No. 77/2003), that lay down simplified age assessment criteria.

Focus on facts

From a brief reconstruction of facts occurred in the last two years as far as minors are concerned, a complex and definitely critical picture immediately emerges. It displays a wide range of discriminations and no or poor respect for the rights of a category which naturally experiences weakness and precarious situations[4].

Child Labour

"Child labour" means the set of activities performed by minors aged less than 16 years, hence illegal activities under the Italian law on access to the labour market, as confirmed by the 2007 Budget Law also, that raised the compulsory school leaving age to 16 and brought the years of compulsory schooling up to 10. At present, in Italy child labour has by no means disappeared in economically advanced countries.

Last August (2013) even the Council of Europe warned that the scourge of child labour is on the rise in Italy due to the economic crisis. In fact child labour is as high as 5.2%, a very remarkable percentage that led the Council of Europe's Human Rights Commissioner Nils Muiznieks to declare that in most cases members of governments are fully aware of the issue, but are not really ready to face it earnestly.

Child labour is extremely diversified and encompasses a whole set of issues. For this reason, and for the sake of brevity, it is worth

4 It is worth referring to the last report of the CRC Italia group that constantly monitors issues relating to minors' rights, both for reconstructing facts and for the subsequent remarks on legislation and case law.: http://www.gruppocrc.net/IMG/pdf/6_rapporto_CRC.pdf.

mentioning just some important data relating to these past two years. Firstly, child labour in Italy concerns all regions across the national territory. Furthermore, it also occurs in the least backward areas of the country. Moreover, working experiences are often not in line with the minors' education, and this is why they end up hindering the regular course of individual education.

Minors mostly work in trade and the most involved are males aged under 15. Most of them come from single parent or single income families with various members in the households.

Finally, foreign minor workers often tend to accept heavier jobs than Italians, which turn into very "strong" experiences, hence minor foreign workers would be exposed to marginalisation and social exclusion risks.

Some of the most important data on this issue are provided by the publication of the outcomes resulting from a survey conducted by Save the Children Italia and updated to last summer. Reference is hereby made to this report ("Game Over. Indagine sul lavoro minorile in Italia").[5]

Child prostitution

Child prostitution is not a single phenomenon: it is highly complex and diversified and can only be tackled as such. The most frequent episodes concern males and females indiscriminately, in particular Roma males and Romanian females (the latter being more often victims of trafficking for sexual exploitation and account for 30% of prostitutes). Nigerians are also strongly represented as well as child prostitutes living in Roma camps. It must be acknowledged that minors are victims of prostitution, especially among the most vulnerable social categories.

Surely, the most important case of child prostitution occurred over the last two years is the so-called "baby escorts scandal", in Rome.

5 http://images.savethechildren.it/IT/f/img_pubblicazioni/img211_b.pdf.

Investigations started with two underage girls who were found to receive numerous clients in a bare room of the Parioli district in Rome. Investigations then spread to other cities (including Milan, Florence and Bologna) and from prostitution investigators are now focussing on another line related to drug supply and dealing. At the beginning of 2014, another prostitution ring involving a 15 or 16 year-old girl was discovered in Rome.

Disputed Minors

Data of the Ministry of Foreign Affairs show that if in 1998 only 89 cases of disputed minors were reported, the following year the number reached 242. In October 2013, a criminal organisation was discovered that organised international abductions to extort money and requested 200,000 Euros to release a single child.

There have been many episodes of disputed minors over the last two years and even though, as is always the case, it is impossible to reconstruct a complete picture of the types of "dispute", it can at least be stated that there have been various cases of disputed children in quarrelling couples.

The most recent episode concerns a child disputed between an Italian father and an American mother, who spent most of her life between Los Angeles and Parma. The mother was initially charged with child abduction and the father did not see his child for years.

Then, at the end of January 2014, the father disappeared with his son and for various days there was no information about them and their movements. Only in mid-January did he bring the child back to his mother, with whom he has joint custody over him.

There are so many desperate stories: in Lodi, in November 2013, a man beat up his former partner in the middle of the street, taking the child away from school straight after that. In October 2013, in Ventimiglia, a father was stopped while fleeing to France with his

two children: he was therefore charged with child abduction and kidnapping.

In the same period, in Terni a man drove off taking his two children with him after a violent fight with his wife.

On this specific theme, brief reference should be made to a recent ruling of the European Court of Human Rights, that in December 2013, for the second time in a year, ruled against Italy "as it failed to commit in an adequate and sufficient way to have a father's right of access respected, thus breaching his right to respect for private and family life sanctioned by Article 8 of the European Convention on Human Rights".

Unaccompanied foreign minors[6]

Facts concerning foreign minors are far too many to be listed in such a short space[7].
However, in order to understand the serious emergency situation affecting this category of minors an appeal to "politics" in general by Save the Children of July 2013 is reported: "Ours is a unanimous grieved appeal: let's have a single procedure to restore order and not squander money. In submitting this draft we offer our commitment to move forward."
With these words Valerio Neri, general director of Save the Children Italia addressed the following MPs: Cesaro (SC), Carfagna (PDL), Zampa (PD), Fratoianni (SEL), Dall'Osso (M5S), Mantero (M5S) and Gozi (PD), submitting the first comprehensive bill for the

6 On the issue of unaccompanied foreign minors, see the various data and statistics on the regions of origin present on Save the Children website (updated as of 2013, http://risorse.savethechildren.it/files/comunicazione/Ufficio%20Stampa/DDL%20MNA_DATI%20E%20STORIE_25lug2013.pdf) and ANCI (http://www.anci.it/index.cfm?layout=sezione&IdSez=808833). In particular, domestic and international laws and Italian case law can be found at the following link: http://www.anci.it/index.cfm?layout=dettaglio&IdSez=808843&IdDett=18038.

7 For key information on the status of unaccompanied foreign minors see: http://www.meltingpot.org/Vademecum-sui-diritti-dei-minori-stranieri-non-accompagnati.html#.Uu--cLSOdtE.

protection of unaccompanied foreign minors in Italy (Government bill on unaccompanied foreign minors).
In 2012 alone, 13,267 migrants arrived in Italy, of whom 1,999 were unaccompanied minors. The number of adults considerably dwindled (by five times) compared to the previous year, whereas that of unaccompanied foreign minors was halved.

At present, in Italy there is a National Programme for the Protection of Unaccompanied foreign minors funded by the Fund for the Social inclusion of immigrants. Promoted by the Ministry of Labour, Health and Social Policies, it was implemented by ANCI (National Association of Italian Municipalities).

The aim was to create a national care and integration system for unaccompanied foreign minors.
Starting from the needs of local authorities to host and protect minors in a more efficient way, the programme is based on the sharing of responsibilities and burdens between central government and local authorities, according to a collaboration model already successfully tested in other sectors of social policies.
By means of this Programme, innovative tools will be tested and disseminated. They will contribute to improve the identification of minors' needs. In November 2013, ANCI denounced the lack of sufficient funds for unaccompanied foreign minors. Although more resources were requested for the Fund for unaccompanied foreign minors, the outlook is not positive and it seems that this financing will not be granted to local institutions in charge of the care of these minors.

Despite the existence and effective implementation of a programme for the protection and integration of unaccompanied foreign minors, according to ANSA, in December 2013, the communities hosting unaccompanied foreign minors were nearly "collapsing": this is due, inter alia, to the fact that many operators have not been receiving their wages for months.

They threatened the competent prefectures to dismiss the children and adolescents they host to the "competent prefectures" should the Government fail to call a meeting to listen to their voices.

There have been many protests voiced by local authorities responsible for the management of the emergency of unaccompanied foreign minors: in December 2013, a national committee encompassing 53 communities hosting 727 foreign minors staged a sit-in in front of the Italian Parliament.

Furthermore, even the Regions, during the discussion on the Stability Law had their voices heard at the end of 2013: 50 million Euros have been requested for minor immigrants. In particular, to fuel the fund for unaccompanied foreign minors, restore the Family Fund, allocate at least 500 million Euros for the Self-sufficiency and Social Policies' Fund: requests have been made in the form of amendments and recommendations by the Conference of Regions, in Parliament, in view of the approval of the Stability Law.

As they live in very precarious conditions, unaccompanied foreign minors are often faced with serious health problems that cannot often be solved swiftly with the help of a paediatrician.

According to the data of the Italian Society of Paediatricians (Sip), at the end of 2013 in Italy there were more than 3 thousand minor migrants living in severe emergency conditions.

Italian paediatricians call for "timely and effective actions", firstly through the setting up of a multi-professional task force with paediatricians and specialists to provide migrant children-friendly support.

The conditions of minors in immigration detention facilities (C.I.E and C.A.R.A) are very difficult.

One case in particular deserves to be emphasised; the Human Rights Committee of the Senate heard Marilina Intrieri, Commissioner for Children and Adolescents of the Calabria Region, during a hearing

on the reception conditions of asylum seekers in the facility of Isola Capo Rizzuto.

The Commissioner denounced serious deficiencies for the unaccompanied minors hosted in the centre, especially in terms of health care and, more in general, housing conditions. In addition, emphasis was put on the need, shared by the members of the Committee, to ensure free and permanent access to the immigration facilities for Ombudspersons for Children all over the country, particularly where minors and pregnant women are hosted.

The most alarming element pertaining to unaccompanied minors, both from a factual and regulatory viewpoint, is the lack of a common approach to the emergency, in all its dimensions.

What concerns the most, is the lack of clarity about the competence and responsibility vis-à-vis individual minors and the management of communities that should take care of them.

Minors living in poverty[8]

The crisis affects all the most vulnerable social categories and, therefore, minors. On the one hand, there is the great discomfort of the impoverished families, who are often forced to reduce their consumption, especially when there are children in the household, on the other the economic difficulties prevailing in Italy - including the crisis of the welfare state, cuts in children funds, and projects failing to commence.

Stuck between these two already incredibly complex phenomena, there are more than one million children living in conditions of absolute poverty, with clear housing difficulties, together with and dependent on unemployed adults: in places where school dropout rates are high child labour thrives and inequalities prosper.

8 Save the Children has recently published a very detailed survey on minors and crisis: http://images.savethechildren.it/IT/f/img_pubblicazioni/img222_b.pdf.

On top of that, there are: adults' "educational" poverty - parents' low education and skill levels that provide the background to economic poverty, deprivations, precarious health conditions and risk of obesity.

The most widespread phenomena, according to the data collected by Save the Children and confirmed by a survey carried out by the Bicameral Committee on Childhood, regard the downgrading of food expenditure, cuts in education (as well as nurseries and services for children and adolescents), and precarious housing conditions often exacerbated by eviction orders for not paying the rent. On the other hand, the growing poverty conditions worsen chronic backwardness, such as the absence of a national network of services for early childhood.

Here are some figures: in 2012, out of more than 4.8 million people in conditions of absolute poverty, almost 1.1 million were minors, as against 723,000 minors out of 3.4 million absolute poor in 2011. If the total number of people in 'absolute' poverty rose by 41% compared to 2011, the number of absolutely poor children increased to a greater extent, that is by 46%.
From 2007 to 2012, minors in absolute poverty more than doubled, from less than 500,000 to more than a million. In addition, 17% of children do not have access to proper meals on a daily basis, and in this regard the school does not contribute to bridge the social gap either. According to ANSA, food expenditure remained stable between 2007 and 2012 among families with minors, but due to a 13% increase in food prices since 2007 there has been a restriction on the quality and the amount of food purchased. Among families with children in absolute poverty, reductions relate to meat, vegetables and fruit: in fact higher costs for housing, fuel and healthcare have to be catered for.
Moreover, UNICEF Italia reported some episodes in which children have been excluded from the canteen service as their parents failed to pay the fees. One of the most striking cases concerned the Municipality of Vigevano, which decided to solve the problem

of unpaid canteen fees not only, as it would be normal, through enforcement actions against defaulting households, but also through the exclusion of their children from the service, and even through the elimination of exemptions that were previously granted to yearly incomes of less than € 22,000 through the ISEE (Equivalent Financial Situation Index) system.
In the 2012-13 school year this decision led to the exclusion from canteen services of about 150 children, almost the half of which (84) had been entitled to a free lunch up to the previous school year. This emergency situation was likewise highlighted at the end of 2013 by the Deputy Minister of Labour and Social Affairs Maria Cecilia Guerra – in a hearing before the Committee on Childhood.

Minors and international adoptions

Over the past two years, much fewer Italian couples have been adopting children as procedures have become lengthier and more cumbersome, at times even obscure. The most sensational case concerned children and families involved in international adoptions in Congo, a case exploded at the end of 2013 but dating back to years ago.

Numerous Italian families, after going through the whole international adoption process, visited Congo to spend the usual time in the country of their adoptive children aimed at integration, and were meant to go back to Italy just before Christmas.

As a result of various red-tape problems and after visiting Congo several times without ever being allowed to go back to Italy with their children, in November 2013 the Congolese General Directorate for Migration blocked the exit of all children from Congo, due to irregularities found in some (non-Italian) adoption documents.

In 2013 alone, the Directorate interrupted the process as many as 3 times due to irregularities found in (non-Italian) adoption documents. At the end of November, 28 Italian couples were stuck in Congo,

although they were issued a visa and all the necessary documents by the Italian Embassy. In January, families went back to Italy without their children.

Discriminations and violence

June 2013. CRC Report. On line paedophilia and child pornography.

According to the CRC[9] research and monitoring group, child pornography takes place in two main ways: on the one hand, producing, distributing, downloading, and viewing child pornography material, which entails a "passive" role of child victims.

On the other, inducing children and adolescents online or through cell phones to produce material, have sex-based chat sessions, grooming minors on line to obtain sex-based offline encounters.

Only to mention but just a few remarkable cases, one of the last on line paedophilia episodes occurred in L'Aquila: the accused, a 40-year old man from Avezzano, used to groom minors on line and, after gaining their trust, asked them to show themselves naked in front of the webcam - thus recording photos and videos.

Grooming used to occur by means of false accounts on instant messaging systems: in some cases he pretended to be a boy, in others a girl, depending on the gender of the person he was talking to. He had a collection of almost 82,000 files with child pornography pictures and videos, all stored on encrypted hard drives and protected by passwords, some of which were distributed via the Internet.

In Perugia, a businessman used to collect pictures of naked girls from Facebook, pretending to be a woman. By so doing, he managed to receive naked pictures from 28 girls, most of whom were aged 14. In the Marche region, another man with no previous convictions used to record child pornography videos by threatening minors to

9 http://www.gruppocrc.net/.

disseminate images portraying them naked should they fail to accept and show themselves in video calls via web-cams.

June 2013. Rome Cyberbullying and "sexting"

Inquiry of "La Repubblica" daily newspaper on Cyberbullying

Cyberbullying has been on the rise over the last two years. It has thrived thanks to the Internet and social networks, thus experiencing a constant and imperceptible development. However, this phenomenon exists and often represents a source of anxiety, depression and in general exclusion of those who - among adolescents - are somehow "different".

For 72% of Italian adolescents it is the most dangerous social issue: most victims are gay, immigrants and those who do not fall into a defined category[10]. According to research studies carried out by Telefono Azzurro, the highest percentage of bullies is to be found among adolescents with family problems. There is no real distinction between victims and persecutors and the crisis, that suffocates us all, increases the anger expressed even by younger children.

The symbolic case of this undeniable degeneration of social networks has been the suicide of Andrea Spezzacatena, the 15-year old boy mocked as "the young man with pink trousers".

The phrase stemmed from the colour of a pair of his jeans as a result of a laundry problem.

Rather than getting angry with his mum, Andrea was amused and started wearing those trousers without imagining that they would be mocked for months and become the object of cyberbullying and derision.

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10 For further information and data see the survey on the topic at Repubblica.it: http://inchieste.repubblica.it/it/repubblica/rep-it/2013/06/06/news/la_nuova_guerra_del_cyberbullismo_per_noi_ragazzi_un_vero_incubo-60488506/.

Pointed at as "gay" even on a Facebook profile dedicated to the "the young man with pink trousers", Andrea took his life with a scarf around his neck on 20 November 2012.

The Human Rights Committee of the Senate, chaired by Prof. Luigi Manconi, has been conducting a survey on cyberbullying since June 2013 that included the hearings of the National Ombudsperon for children and adolescents, Mr Vincenzo Spadafora, and of Mr Marco Rossi Doria, under-secretary for education, between October and December 2013[11].

Another phenomenon to be taken into consideration is "sexting". According to ANSA, one adolescent out of 4 (25.9%) states to be victim of sexting, i.e. to have received sex text messages/mms/videos; the percentage of adolescents who declares to have sent pornographic material is on the increase (12.3%) and 2.3% admits doing it for money or a cell phone top up or because they were being victim of threats. Among other episodes related to this topic, in December 2013, in Rome some adolescents sent a video with pornographic images to another adolescent via WhazzApp (an app for sending information, text messages, and images via smart phones).

October 2013. Rome. Statistics on minors in prison

In October 2013 there were 456 minors in youth prisons. This figure has been provided by the former Minister of Justice Annamaria Cancellieri during a hearing before the Human Rights Committee of the Senate on the topic of minors in prison. She also reminded that "the territorial administration consists of 12 centres for juvenile justice, 19 youth prisons, 25 first reception centres, 12 ministerial communities and 29 offices of social services for minors".

11 For additional information see the webpage of the Committee: http://www.senato.it/notizia?comunicato=46431.

Ms Cancellieri reviewed the projects under way on this specific subject with a view to protecting minors and detained mothers. She equally announced that the Department of Juvenile Justice was assessing the need to draft specific bills to protect the children of underage or young women prisoners that can combine the state of detention with the protection of children living in jail.

There is still a lot of confusion regarding the distinction between ICAM (low-security establishments) in Milan and Venice and protected shelters. ICAMs are indeed prison establishments as the prisons regulation is applied even though with some resulting limitations to relationships with the outside (interviews, visits etc.) and outside world.

For minors who live in prisons with their mothers there are baby doctors and specialised staff together with operators and volunteers who also take children on a daily basis to the municipal nurseries. In all women's prisons or women's sections of prisons educational services for young children are provided, as well as - given the high percentage of foreign women prisoners with children - education, training, access to labour market and linguistic-cultural mediation projects.

In various regions similar facilities are being studied, but they should already be operational since many minors aged between 0 and 6 (almost 50) are currently obliged to live in cells with their own mothers.

October 2013. Rome. Paedophilia.

In October 2013 updated data on sexual abuse against minors in Italy were published.
According to the Terres des Hommes dossier, in one single year there has been a threefold increase: 78% of victims are female. In

fact, even from the ‘’Indifesa’’ dossier, recently presented in Rome together with a campaign with the same name, it emerged that out of 689 sexually abused children (882 in 2011) in 2012, 85% of the victims were female.
There have been many paedophilia episodes over the last two years: just to mention but a few, a foster father of a Chernobyl little girl, within the “respite care holidays”, repeatedly forced her to endure sexual assault and, furthermore, collected child pornography images by filming the little girl. Another Belarus young girl who also came from the city of the nuclear disaster was assaulted by her foster parents.
Another upsetting case of sexual abuse concerned the Forteto care home where children placed in the care of the shelter in Vicchio del Mugello (Florence) were repeatedly sexually assaulted: as of today, 23 persons are charged with child abuse, including the “guru” and founder of the community. In Piacenza, an Ivorian young girl was assaulted for three years (from 12 to 15) by her 39-year-old uncle and 21-year-old brother. In Bologna, a 63-year-old employee was investigated for and charged with continuing and aggravated sexual assault perpetrated to detriment of a brother and a sister, aged 8 and 9 respectively.

13 December 2013. Turin. General Convention on Child Abuse in Italy

According to Dario Merlino, CISMAI (Italian Coordination and private services against child abuse) President, “in Italy considerable progress has been made over the last twenty years in the social, cultural, scientific, and legislative spheres. However, if we consider the proposals put forward by our Coordinating Committee in the first General Convention in 2010, we must acknowledge that in Italy the indications coming from the most important international and national organisations on prevention and care of abused children

have been disregarded."

According to CISMAI data, from 2005 to 2012 the number of child abuses increased by 23.6%.

Furthermore, child abuse and violence are extremely costly for the government: according to ANSA, they account for 13 billion Euros, with even higher indirect costs, such as ad hoc education, youth delinquency and healthcare in adulthood. In fact, most of the times an abused child becomes a problematic adult. Abused children taken care of by social services are 100,231, i.e. 0.98% of the global youth population.

Rules and policies

Law No. 219/2012 on status equalization and children's right to know their origin (Constitutional Court and European Court of Human Rights)

With Law No. 219/2012, Parliament eliminated, at least from a regulatory standpoint, whatever form of discrimination between legitimate and biological children, i.e. children born out of wedlock. The non-discrimination between these two « kinds » of children is the main objective pursued by the new rules on acknowledgement of biological children.

In particular, this law has amended the Civil Code as well as its enforcement and transitional provisions in the following items: child acknowledgement, children born of parental relations, legal capacity to be a defendant, and legal status of children (the former section 315 of the Civil Code is now being replaced by «Section 315 (Legal status of filiation).- All children are granted the same legal status»), names of children.[12]

12 For a detailed analysis on the topic see R. Cippitani, S.Stefanelli (eds.), La parificazione degli *status* di filiazione, Atti del Convegno di Assisi (2013), Università degli studi di Perugia. Studi tematici di diritto e processo a cura di Antonio Palazzo.

With a recent judgement, the Constitutional Court (278/2013) revisited the right of an adopted child to know his or her own origins - thus balancing this right with the right of the mother to remain anonymous - following a question of constitutional legitimacy raised by the Juvenile Court in Catanzaro[13].

In any case, this judgement is in line with the decisions of the European Court of Human Rights. The latter, in the case Godelli v. Italy (application no. 33783/09), had ruled against Italy for breaching Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The Court considered, among other things, that Italy did not try to strike a balance in a proportionate way thus exceeding the State's margin of appreciation.

The Constitutional Court, with its recent judgement No. 278/2013, has identified Article 2 of the Constitution as the basis of the right to personal identity, intended as right to a correct self-representation, as well as a child' right to know about his or her origins and the mother's right not to disclose her identity; this latter right should not be intended as an unchangeable "simulacrum", but rather as a flexible notion and therefore subject to interpretation.

As already mentioned, with the Godelli v. Italy judgment the Court has tackled the delicate issues of acknowledging the right of the adopted person to have information about the identity of his or her biological mother, and the margin of appreciation that a national system has in striking a balance between the right of the biological mother not to disclose her identity and the claim of the adopted child to know the identity of his or her biological parent.

13 On this point too, see E. Frontoni, Il diritto del figlio a conoscere le proprie origini tra Corte EDU e Corte Costituzionale. Nota a prima lettura sul mancato ricorso all'art. 117, primo comma, Cost., nella sentenza della Corte Costituzionale n. 278/2013, in AIC, osservatorio, December 2013.

The case originated from an appeal to the European Court lodged by a woman who, after being abandoned by her biological mother, had initiated administrative and court proceedings to obtain information on the identity of her biological mother.

The European Court found a breach of Article 8 ECHR due to a failure to strike a balance between the right of an adopted child and the mother's right. In the light of the complete absence of such a right for adopted children Italy could not invoke a national margin of appreciation.

Finally, on 7 January 2014, the European Court of Human Rights (Strasbourg) ruled against Italy for breaching the right of two spouses, as it denied them the possibility to pass on her mother's surname instead of her father's to their daughter. In the ruling , which will become final in three months' time, the court calls on Italy to "adopt reforms" in its legislation and in other field to remedy the breach. The request was promptly accepted by the former Prime Minister Letta. The appeal was lodged in 1999 by a couple from Milan.

Years ago (2006, 2008), the Court of Cassation had already voiced its concerns about the legal system under which Italian mothers' are not entitled to pass on their surname to their children. According to the Supreme Court, as a result of the approval of the Lisbon Treaty even Italy, as is the case for the other 28 Member States, has the duty to comply with the fundamental principles of the EU Charter of Rights, including the prohibition "of any discrimination based on sex". In 2012 there had been a further change in that the mother's surname could be added to the father's though it could not replace it. The Strasbourg signal should then represent a milestone in this regard.

Paedophilia and child pornography

In November 2013 a legislative decree strengthening the fight against child pornography was approved, with the ensuing introduction of a new criminal offence and the extension of the use of telephone tapping.

Furthermore, new aggravating circumstances were introduced and telephone tapping and bugging were extended to the offence of grooming of minors, coupled with the possibility of extending to the same crime the administrative responsibility of legal entities.

These are the novelties as regards abuse and sexual exploitation of minors and child pornography that were introduced into the legislative decree approved by the Council of Ministers in November 2013. A press release by the Ministry of Justice was issued in this regard.

In 2012 Italy ratified the Lanzarote Convention[14], the first international instrument that criminalizes sexual abuse against children. Beside the most common criminal offences in this field (sexual abuse, child prostitution, child pornography, forced participation of children in pornographic performances), the Convention regulates likewise grooming and sexual tourism.

Domestic violence. It is worth noting that Italy has been urged from many sides to introduce adequate rules to protect minors from all kinds of corporal punishment and domestic violence.

In this regard, in July 2013 the Association for the Protection of All Children (APPROACH), filed a complaint with the European Committee of Social Rights,- which was immediately declared as admissible - concerning an alleged violation of Article 17 of the European Social Charter by Italy.

The question raised by the Association active in the promotion and protection of the rights of minors concerns the lack of an explicit prohibition, in the Italian system, of physical punishment at home. As a result of this there is a need to adapt the Italian rules, which is

14 http://nuovo.camera.it/561?appro=517&Legge+172%2F2012+-+Ratifica+della+Convenzione+di+Lanzarote.

fully in line with what has already been acknowledged by the Court of Cassation in its case law.

Even Save the Children Italia launched a campaign on the topic, considering it necessary to adopt a legislative reform aimed at introducing an explicit ban on corporal violence at home together with awareness campaigns to support positive parenting to help parents understand how important the adoption of positive educational methods is.[15]

Introducing these rules is of paramount importance if account is taken of the fact that the use of humiliating physical punishment is against the principles enshrined in the Convention on the Rights of the Child. The Committee on the Rights of the Child, responsible for the implementation of the Convention, defined in 2008 humiliating corporal punishment as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children"….. Corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment which are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child". In the Italian legal system (hence both in legislation and case law) corporal punishment is usually banned in schools and jails. However, there is no explicit prohibition in domestic settings. Nonetheless, since 1996 the Court of Cassation (judgment. Cambria) has acknowledged the unlawfulness of the use of domestic and psychological violence for educational purposes. Later on, in 2009, the Supreme Court stated that "the abuse of correction means (….) can occur when going too far in the use of a legal means, in the form of a physical force exerted in a single punitive gesture and in the reiteration of the same gesture ".

15 " www.savethechildren.it/amaniferme.

Finally, in 2012 the Criminal Division of the Court of Cassation pinpointed that "similar types of behaviour, whenever they occur…(..) as reiterated violence causing bodily harm, are unrelated to a correction aim that, as already mentioned by this Court, insofar as justified in its educational dimension, sees violence as incompatible with both the protection of the minor's dignity and the need for a balanced development of his or her personality ". Hence, given this situation, Italy lags considerably behind: a survey conducted by IPSOS in 2012, as well as other surveys conducted by paediatricians, revealed how in Italy the use of physical violence against minors is considered as an <<educational>> method and is quite tolerated and common.

Problems of the National Childhood Plan

The National Action Plan designed to protect the rights and the development of young people (National Childhood Plan) is the guiding instrument with which Italy fulfils its commitments to implement the contents of the CRC and its Optional Protocols[16].

In its report on the state of implementation of the New York Convention, the Committee for the Rights of the Child pinpointed that the implementation of the National Childhood Plan in Italy still lags behind and there are gaps.

Although the project for the implementation of this plan is still ongoing and praiseworthy, there are manifold criticalities.

Firstly, since the setting up of the plan the necessary funds for its implementation have not been allocated so far. The Plan was approved by the President of the Republic, but has not been fully concluded.

There is a Plan monitoring system, which in turn has experienced manifold difficulties in the collection and exchange of data: a recurrent problem is, for instance, the lack of structured connection and therefore of coordination between the Observatory and the other institutional figures responsible for monitoring the implementation

16 www.gruppocrc.net/PIANO-NA- ZIONALE-D-AZIONE-PER-L-INFANZIA.

state of the rights of children and adolescents (National Ombudsperson, regional Ombudspersons).

The CRC report highlights that, despite the adoption of a national action plan to protect the rights and development of young people (in 2010-2011), there is however a big gap as the plan itself has not been implemented. Indeed, resources have not been allocated and the funds allocation process at regional level can further delay its implementation.

The key problems related to the National Childhood Plan can be summarised as follows: lack or insufficient resources destined to the Plan organisation and implementation, lack or insufficient homogeneous data - which somehow remain incoherent in terms of quantity and type of source they originate from. Furthermore, childhood plans, projects and programmes require greater coordination: conversely, there are quite a few non-integrated plans, protocols and guidelines.

Likewise, there is no single forum where the topics of the rights of children and adolescents can be discussed among the various levels of government (local, national).

Bicameral Committee for Childhood and Adolescence

It is worth noting that, in 2013, there has been a clear delay in the appointment of the bicameral Committee on Childhood. Still, in September, a few months after the Government had taken office, the Ombudsperson for Childhood and Adolescence, Mr Spadafora, declared: “I deplore that after all these months, there still is no Bicameral Committee on Childhood. There are single members of Parliament, however there is no agreement on the president. Therefore we do not have an interlocutor.”

As for the fact-finding surveys conducted by the Bicameral

Committee, in line with what has been reported so far, it is worth mentioning;

- the survey ended in October 2011 on the protection of minors in the media, carried out according to two different approaches to the protection of minors in the media from a subjective viewpoint, to favour their psychological growth, and from an objective viewpoint, to address the protection actions towards adults and other minors;
- the survey, ended in January 2012, on the implementation of the laws on adoption and foster care, with a special focus on the drop in adoption applications which has been experienced in Italy over the last few years and the crisis of international adoptions;
- the survey on unaccompanied foreign minors, aimed at examining how reception is organized for unaccompanied foreign minors;
- the survey on child prostitution ended in July 2012, which underscored some possible tools to counter the phenomenon.

Safeguards to protect children and adolescents

In 2011 the law setting up the National Ombudsperson for Children and Adolescents was passed, and subsequently the first Ombudsman was appointed.

Therefore, 2012 was the first year Italy had such a figure, even if the regulation that made the Authority operational was enacted only in September 2012.

The 2013/2015 Stability Law, however, confirmed for 2013 a 1 million Euro fund for the operation of the Office of the National Ombudsperson for Children and Adolescents. As of today, its

activity cannot be assessed yet, as Mr Spadafora has been in office for a short time and the activities being developed are not that many.

Nevertheless, it is possible to trace some guiding principles emerging from the statements of the incumbent Ombudsperson.

During the General Convention on Child Abuse, organised by CISMAI, Mr Spadafora declared : “I do realise I am often talking about childhood with interlocutors who are not competent in the subject matter. The crisis is given the blame for the lack of investments in the childhood sector, but the truth is that the interest for such a delicate and important sector has never been there, not even when economic investments were possible”. The issue of funds and financing allocated for childhood and adolescence can no longer be postponed. Furthermore, Mr Spadafora added that “Unfortunately, in our country there is a strong speculation on the topic of juvenile justice. Media are those to be blamed first”.

Recommendations

1. Introducing and strengthening adequate monitoring systems and fostering programmes to counter child labour.
2. Monitoring and supporting the activities of the Observatory against paedophilia and child pornography, so as to ensure that it can become operational and effective as soon as possible.
3. Strengthening the actions countering trafficking for prostitution purposes - taking into consideration the transnational nature of this crime, and the « informal » features of the phenomenon.
4. Appointing the new national Observatory as soon as possible and providing it with the necessary resources to draw up the IV Action Plan with no further delays. Ensuring that every action of the new Plan has the necessary economic coverage.
5. Creating a conference of Regional Ombudspersons to work in synergy with the National Ombudsperson. Regions that have not been compliant so far are called upon to appoint them without delay.
6. Introducing harmonised age assessment procedures at national level for unaccompanied foreign minors by improving the coordination system of reception facilities in municipalities and regions; where necessary, setting up a task force for the timely identification of unaccompanied foreign minors as of their first reception.
7. Promoting the adoption of new rules for international adoptions aimed at simplifying adoption procedures but at the same ensuring effective monitoring during the various stages of the adoption procedure.
8. Enhancing the role of the qualified no-profit sector and family associations in custody proceedings, through the involvement of public institutions.

EDUCATION AND SOCIAL MOBILITY

By Caterina Mazza

Focus on Facts

Importance of the right to education for individuals and society

The right to education is a prerequisite as well as a consequence of a country's development and wealth; further, it is a key component to ensure full enjoyment of other rights. Civil, political, economic and social rights may not be exercised in full without a minimum level of education. Education plays a fundamental role to enable individuals' effective participation in social life and mitigate, or eliminate, different types of exclusion.

Significantly, the right to education is set forth in the main international instruments – starting from the *Universal Declaration of Human Rights* (New York, 1948), article 26; the *Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Rights* (Paris, 1952), article 2; *UNESCO's Convention against Discriminations in Education* (Paris, 1960), article 1; the *European Social Charter* (Turin, 1961), article 3; up to the *Convention on the Elimination of All Forms of Discrimination against Women* (New York, 1979), articles 5 and 10, and the *Convention on the Rights of the Child* (New York, 1989), article 28.

It is no chance that the second goal among the *Millennium Development Goals* set out by the UNO in the 2000 Millennium Declaration refers to providing universal primary education by 2015. All the instruments quoted above regard education not only as the acquisition of a set of skills and know-hows, but also as a means to build up individual personality, which must be afforded its full development and grounded in understanding others and respecting

human rights and fundamental freedoms. Thus, education is an individual right that, if provided, allows individuals to grow into entities that are morally accountable both to themselves and to society at large. This is why at least primary education must be afforded and available to all, and it must be *free* and *compulsory*.

These features can also be found in the Italian legal system. Under Article 34 of the Constitutional Charter, which enshrines this right along with Article 33 thereof, it is provided (paragraphs 1 and 2) that "schooling is open to all, [and that] primary education, provided for at least eight years, is compulsory and free." One can immediately appreciate the peculiarity of this *right*, which is simultaneously a *duty*. Education is both a "personal asset" belonging to the individual and a "public asset" belonging to State and society. Several scholars – including S. Lariccia and M.R. Ricci – have argued that the right to education is a means to contribute to the full implementation of Article 3 of the Constitutional Charter as it supports the "Republic [in] eliminating the hindrances of a financial and social nature that bring about de facto constraints on citizens' freedom and equality and accordingly prevent full individual development and the effective participation of all workers in the country's political, economic and social organization."

Since primary education is mandatory for individuals vis-à-vis society and the State, public authorities must take steps to turn this right/duty into reality. From this standpoint, it is fundamental for primary education to be *free*.

The support to be provided by the State also applies to higher education. Under Article 34, paragraphs 3 and 4, of the Constitutional Charter, the Republic undertakes to support those who prove gifted and worthy of help by way of scholarships, allowances to families and other types of funding in order to attain the highest levels of education even if deprived of financial means.

Thus, the Italian State is called upon to ensure the right to education even after compulsory schooling and in spite of hindrances of a social or financial nature. However, the Italian State has actually

failed to always provide adequate financial support to students and education in general.

The mean per student expenditure in primary and secondary education remained basically unchanged between 1995 and 2010 as it only rose by 0.5% compared to an average increase of 62% in OECD countries. In 2010, Italy only invested 4.5% of its GDP compared to a mean 5.7% of investments in other OECD countries (OECD, 2012; OECD, 2013).

The poor funding provided to education produced several negative effects on schools and universities – such as the increase in the student/teacher ratio that took place over the years 2005 to 2011 (OECD, 2013), the very limited recruitment of young teachers via fixed-time employment contracts and the resulting ageing of the teaching staff, wages that are among the lowest ones in Europe (even though the gap is smaller at the start of one's teaching career), the low graduation rate, the increase in the so-called NEETs (Neither in Education or Employment or Training) – i.e. youths that are jobless, do not attend schools or training courses and are not in search of employment.

The Table below shows data from the OECD 2013 Report concerning year 2011:

Indicator	Italy	OECD Average
Education Rate (25 to 64 years)		
Primary Education	44%	26%
Secondary Education	41%	44%
Tertiary Education	15%	32%
NEETs (15 to 29 years)	23,2%	15,8%
Mean Age of Teachers in All Levels of Education		
Over 50	57%	35%
40 to 49	29%	30%
30 to 39	8%	25%
Less than 30	4,7%	10%
Average Wages before Taxes, USD		
At start	29.418	31.348
After 15 years' teaching	36.928	41.665
Wage increase per year from 2005	4-5%	15-22%

(OECD data on Italy can be found here: http://www.gildavenezia.it/docs/Archivio/2013/giu2013/ocse_italy_eag2013.pdf).

A High Student-to-Teacher Ratio

Since 2008 the number of enrolments in all schools has been increasing by 0.8%. In the 2013-2014 school year, the number of students rose by 27,000 over 2012 and almost 80% of them are new enrolments in the primary school. On the other hand, enrolments in lower secondary schools dropped by over 7,000.

Along with the reduced recruitment of teaching staff, this gave rise to overcrowded classes with a student-to-teachers ratio that was usually above legal thresholds. In 2012 there were cases where over 40 pupils were enrolled per class, like in some schools in the provinces of Rome and Florence. It is expected that 1% of Italian classes will include over 30 pupils in the 2013-2014 school year.

Judgments by the Italian Council of State (No. 402 of 2010) and the Regional Administrative Court of Molise (Nos. 144 and 145 of 2012) have required classes to be set together by Headmasters in compliance with both school accommodation standards and the legislation on fire prevention in schools so as to fulfil safety and health criteria; nevertheless, overcrowding is still the rule. In order to reduce the student/teacher ratio, the Italian Ministry of Education decided for the past five years to slightly raise teaching time for teachers and simultaneously reduce students' instruction time (OECD 2013). It appears that no additional posts will be available for the coming year, so that no additional classes will be set up. The solution devised by the Ministry, which is aimed to enable savings, raises several questions as to the level of the education being afforded.

Beyond the far from irrelevant issues related to health and safety, one cannot but wonder whether "overcrowded" classes allow ensuring the right to education adequately so as to meet students' educational requirements –in particular regarding disabled or disadvantaged students.

It should be recalled that disabled students increased between 2012 and 2013 in non-statutory schools, their incidence being higher in lower secondary schools. Such students make up for 1.2% of the enrolments in private non-statutory schools compared to 2.7% in public (statutory) schools. In this connection, associations such

as Agesc (Association of Catholic Schools Parents) and Fidae (Federation of Educational Institutions) complained that they had to grant all the requests for enrolment of disabled students and afford the same level of support as State schools without any increase in public funding for these purposes; such funding covers as of today about 10% of the costs for students certified to be disabled attending non-statutory schools.

Increased Enrolments thanks to Immigrants

The increase in enrolments for the 2013-2014 school year can be accounted for by immigration.

The largest increase in non-Italian enrolments occurred in primary and second-level secondary schools. Overall, foreign students rose by about 20% over the past ten years. Conversely, the number of Roma, Sinti, and Caminanti students dropped over the past five years (- 5.7%); this was the case especially in Lombardy, Veneto, Emilia-Romagna, Latium and Piedmont (MIUR/Fondazione ISMU 2013; MIUR, 2012; MIUR, 2013).

The presence of foreign students has become by now a fixed feature of schools in Italy; at the same time, changes are in progress. Whilst the increase in foreign students was due initially to new enrolments, today this results mostly from the increased numbers of so-called "second-generation migrants", i.e. children born in Italy from non-Italian parents. In 2013, students born in Italy from non-Italians made up for 47.2% of the total number of foreign students in all schools, and for 79.9% of the children in pre-primary schools.

Such a substantial increase raised several issues as for the mechanisms and tools to ensure integration along with the need to set up literacy courses for those who are enrolled with poor knowledge of the Italian language. To cope with these difficulties, a circular letter of the Ministry dated 8 January 2010 introduced a ceiling to the number of non-Italian students per class – which should not be in excess of 30% of the whole. This ceiling is purely indicative and may vary with the specific circumstances – e.g. based on language skills.

It is currently being disputed whether foreign students born in Italy should be computed in the 30% threshold. According to Minister Carrozza, the students with a perfect command of Italian at start of schooling should not be computed in the said threshold – in fact, they should be regarded as Italians. Conversely, the Northern League party argues that the mechanisms allowing access to schools should be reconsidered as for *all* foreign students, who should be enrolled only after passing an Italian language test plus several evaluation tests, whilst literacy classes including only foreign students should also be set up.

In order to tackle these difficulties, one should focus on the students that moved to Italy recently and have no command of Italian; they are in need of inclusion and facilitation measures which may prove a daunting task. Only consider the "Besta" lower secondary school in Bologna, where a class including only foreign pupils was set up in the 2013/2014 school year; the class is composed of 20 pupils from 10 different countries, and all of them came to Italy during the previous summer. This decision sparked several debates. How can one learn a language and become part of a social community if one is confined in a room where there is no opportunity to get in touch daily and continuously with the people born and bred in the country? The Headmaster stated that the aliens-only class was of an "open" and "provisional" type as it was meant to be instrumental to teach Italian to the newcomers, who would then be moved to other classes. In the Headmaster's view, this class is neither a ghetto nor a model but a mere experiment to tackle a complex situation. The Minister of Education declared her opposition to "bridging" classes and was in favour of starting Italian language classes. The parents of the Italian pupils attending the school protested as well and complained that this might become a dangerous precedent and hamper the development of all the children in that class.

The Bologna case points to a basic issue, namely the lack of available resources to initiate adequate literacy courses. This is compounded by serious problems such as the resistance shown by some Italians against the very presence of migrants in schools. Reference can be

made in this regard to the cases that occurred in various areas of Italy (e.g. in the province of Novara and Bergamo, or in the Chianti area) during 2013, where parents withdrew their children from schools because of the presence of foreign pupils. This hostility is said to be grounded in the concerns harboured by parents for the level of education to be afforded to their children; in fact, it is grounded in deep-rooted biases and racist views. A survey carried out by the Ministry for the 2011-2012 school year showed the continuous, significant improvement of performance by foreign students with a drop by over 1% in the gap compared to the preceding year (MIUR, 2012, p. 6). This survey shows that the work done by schools to foster integration produces benefits, but such benefits may only become lasting and genuine with time and a long-term commitment.

The Drop-Out Rate Is among the Top Ones in Europe

The drop-out rate in Italy is 18.8% compared to a mean 13.4% rate in Europe; the Europe 2020 Programme set itself the objective of reducing this rate to 10%.

It has become a cause for concern as every year about 700,000 children aged from 10 to 16 drop out of schools. According to a survey carried out by Intervita Onlus, about 2 students out of 10 drop out of all schooling or attend classes intermittently so that their educational development is undermined.

To tackle this problem, a project called *Frequenza200* was started in 2012 in three regions (Lombardy, Campania, and Sicily); the project leverages the links between schools and the respective neighbourhoods to highlight good practices that can support education and schooling. This project gave rise to the idea of carrying out a nationwide survey whose findings were presented to the Italian Senate on 1 October 2013.

Homeschooling

The so-called homeschooling approach of Anglo-Saxon origin has become widespread in Italy over the past few years like in the rest of Europe.

Although it is difficult to gather accurate information in this respect, one can argue that the number of parents deciding to educate their children on their own and/or with the help of tutors, at home, increased during 2013 as well.
In Italy, homeschooling is regulated by legislative decree No. 76/2005, which lays down some conditions to make sure that mandatory educational levels are attained in all cases. Every year parents must provide evidence of their technical and financial capabilities to fulfil the "family school" projects and must train their children to pass a test at statutory schools.

Reliance on homeschooling is usually accounted for on two grounds - namely, the existence of *specific problems* (bullying, religious grounds, poor performance) or else as a matter of *principle* (hostility towards statutory schools, lack of freedom in schools).

There are several questions that can be raised in connection with this educational approach as for its affording a genuine right to education, appropriate educational, socialization and developmental levels for children, and adequate citizenship standards.

Universities: Financial Cuts and Fewer Enrolments
The situation applying to Italian universities is largely related to the unrelenting, substantial cuts made to funds for university research and teaching. The so-called "Standard Financing Fund" (Fondo di finanziamento ordinario, Ffo) has been dropping yearly by 5% for the past several years. The funds allocated to teaching are expected to drop by 22% in 2013. It is no chance that 84 three-year courses and 28 postgraduate courses were cancelled in the past year.
In a document submitted to the new government, the Italian Board of University Deans (Conferenza dei Rettori, Crui) complained that the level of Ffo for the current academic year was inacceptable and that financial measures were indispensable such as to raise the State's financing to at least 150 million Euro for the subsequent three years – for a total of 450 million Euro of nationwide contributions;

this would make it unnecessary to increase enrolment fees further – such fees having already increased by 17% since 2008. The Deans urged financial measures to foster research and post-doc courses; the total funds for scholarships dropped by 24% in the past five years as for the latter courses. This is compounded by the fact that several Italian universities introduced post-doc fees and such fees have become considerably heftier in some cases.

The issues relating to turnover should also be addressed, as the ban on staff turnover resulted into the considerable increase in the mean age of university teachers whilst younger academicians are routinely recruited on a time-limited basis.

In September 2013, the then Minister Carrozza said she was in favour of a national research plan that should allow investing in researchers, overcoming the ban on staff turnover, and reducing enrolment fees. The Minister declared that the 2014-2016 National Research Plan would focus (see paragraph 3) on actions aimed at "moralizing public competitive examinations". Several irregularities in public examinations made it necessary to hold national competitive examinations with national examining committees acting under the members' direct responsibility.

The above issues are the subject of analysis and discussions within Universities. Additional food for thought was provided by the European Commission, which stated recently that Member States should get ready to increase financial contributions to education by 70% and those allocated to research by 5% - in spite of the current economic crisis.

The need to increase public support to universities is also shown by the decreased enrolments, due mostly to the higher fees charged and the increased costs for students away from home. At the start of the 2013-2014 academic year, enrolments fell by 17% compared to the preceding year.

The situation would appear to be different in the case of the so-called online universities. According to a survey by Rome's Niccolò Cusano online university, registrations for their online courses have been increasing by 16% yearly from 2003 onwards.

The reduced enrolments mirror the change in youths' aspirations and ideals. According to a survey carried out as part of the PISA programme, i.e. OECD's Programme for International Student Assessment, the percentage of Italian 15-year-olds intending to get a University degree is among the lowest ones in Europe and fell by 11% from 2003 to 2009 (OECD, 2013).
Additionally, it should be recalled that the rate of Italian Erasmus students is, again, among the lowest ones in Europe. Based on a Report published by Fondazione Migrantes in fall 2013, the poor participation of Italian students in the programme is due mainly to the limited investments into mobility and cooperation among Universities.
To enhance the gamut of educational opportunities so as to attract more students, self-assessment practices were introduced as of 30 January 2013 in Italian universities. Students participate by filling out an online questionnaire to evaluate the performance of the individual teachers as well as the courses as a whole.
Quality of university teaching will be also gauged by way of the evaluation of graduating students through the so-called Cla Plus tests, which correspond to the Invalsi tests used in primary and secondary schools.

Protests by University Students
The occupation by students of Cagliari university starting on 6 February 2013 marked the revamping of a mobilization throughout Italy against the right to education approach envisaged by the then Minister of Education, Mr. Profumo – in particular against the Minister's plan to amend scholarship grants rules. Students complained that these amendments were meant to cover up substantial cuts to University funding in order to foster a meritocratic approach. According to various student associations, the decree in question would reshape performance and income thresholds (so-called Essential Performance Levels) so as to exclude a substantial number of students from scholarship eligibility – up to 45% based on some allegations.

The Ministry of Education replied that the new standards would only apply from 2015 onwards to new enrolments.
The student associations highlight that the apportionments planned by the early 2013 decree will result into a 92% reduction in the national Supplementary Funding for scholarships of 2015 compared to 2013, whilst Italian university fees rank among the top ones in Europe.
The so-called Profumo decree (Ministerial decree No. 334 of 24 April 2013) was replaced by another instrument issued by the new Government, i.e. decree No. 449 of 12 June 2013 as approved by the Council of Ministers on 9 September 2013 – which made available 100 million Euro as from 2014 to finance University scholarships on a permanent basis. Nevertheless, students' demonstrations have not ceased as students are afraid that no more than 65.53% of the funds will be ultimately available – and such funds are already considered as insufficient.
To tackle the effects caused by economic crisis, some universities are considering possible solutions. The Turin University hired under-resourced top-performance students for different positions in order to enable them to continue attending their courses. The region of Tuscany declared its intention, in mid-July 2013, to increase the apportionment made for scholarships and services by over 4 million Euro.

Discriminations and Violence

JANUARY

29 January – Admission Tests - Bari University – The pre-trial hearing judge of the Bari Court, M. Guida, found that the admission tests for the former Medicine and Dentistry Faculties of Bari, Foggia, Ancona and Chieti Universities held in 2007 had been trumped but without any "criminal association" being involved. The prosecutor's charge was that 7 teachers plus 82

persons, including parents and students, had set up two operating centres for those admission tests in order to text the replies to the Ministerial questions. Indictments were made for the offence of fraud.

FEBRUARY

20 February – Competitive examinations – University of Messina – The dean of the University of Messina was sentenced to imprisonment for three years and six months at the end of the first-instance criminal proceeding that had been instituted on charges of trumping a competitive examination at the former Veterinarian Medicine Faculty as well as in connection with management of the Lipin fund. The Dean was charged with attempted extortion. He was alleged to have put pressure to make sure that the son of the then Chair of the Veterinarian Medicine Faculty would come out the winner of the competitive examination. Ten more people were convicted as part of the same investigations including teachers and officials at the University.

14 February – University Researchers – Rome – The Association of time-limited researchers sent a letter to the President of the Republic to urge his attention to the precariousness and lack of opportunities affecting over 2.200 researchers in Italian universities. The Association pointed out that a whole generation of trained, highly experienced researchers would be left outside academic circles because of the changes made to the legal status of university researchers and the new recruitment rules introduced by the "Gelmini reformation".

APRIL

5 April – Racism at school – Rome – A Jewish pupil at the Caravillani "liceo artistico" in Rome was hailed by a teacher using anti-Jewish sentences. The Minister of Education requested the Headmaster to immediately submit a written report of the case. The Chair of Agesc

(Catholic Schools Parents' Association) also voiced his support to the student.

4 April – School is meant for all – Turin – A visually impaired 11-year old girl was denied attendance of the junior secondary school in Borgone di Susa (Turin) because of the shortage of available room following a number of applications the school could not accommodate.

Applications were filtered based on the pupils' places of residence. Apri (Piedmontese Association of Individuals Affected by Retinal Diseases or Visual Impairment) dealt with this case and alleged that the technical and logistics issues could not justify the rejection of a disabled pupil. The School Department of Turin and Piedmont stepped in along with the Ministry of Education, so that now the little girl can attend school like all her peers.

(A similar case occurred in Campania and was the subject of an order by the Regional Administrative Court (TAR) of 2 October 2013 whereupon the disabled student had to be readmitted).

24 April – High school diplomas – Nola (Naples) – The pre-trial investigation judge at the Prosecuting Office of Torre Annunziata issued an order for the Financial Police (Guardia di Finanza) to start investigations into the alleged sale of high-school diplomas at some high schools in Nola. Based on witness statements, youths from all over Italy that had never attended those schools and, in some cases, had not been admitted to the final examinations were granted diplomas in exchange for a substantial consideration. In the judge's view, this was a "criminal-type school organization".
The investigations have resulted so far into applying pre-trial custody measures to about fifteen people and into seizure of two schools.

20 May – University exams – Catanzaro – The University of Calabria filed a petition for appearing as a party claiming damages in the pre-trial hearing held in connection with the criminal investigation called "Centodieci e lode" [Cum laude] that had been initiated against 61 people on charges of having forged examination results at the former Faculty of Humanities. According to the Prosecuting Office, 71 graduation diplomas had been achieved by forging examination results and will have to be considered as null and void.

20 May – Homophobic bullying - Nuoro – Names of gay students were published in a high school in Nuoro as a way to humiliate and poke fun to them. This homophobic bullying case is actually related to rather frequent occurrences in Italian schools. According to a survey performed by the Gay Center Association over a sample of 1,000 students, school is where homosexuals most perceive discriminations: 49% of respondents stated they had been the subject of discrimination at school compared to rates of 42% in families, 33% in public places, and 30% on media or the Internet.

On 3 July 2013, Senator Lo Giudice from the Democratic Party submitted a question to Minister Carrozza and called for jointly devising measures to prevent and counter these phenomena.
(As for additional homophobic bullying episodes at school, please see the *Freedom of Sexual Orientation* chapter in this Report).

31 May – Violence at school – Vicenza – The public prosecutor at the Vicenza Prosecuting Office requested committal for immediate trial in respect of two teachers of a junior secondary school who had been charged with battery against an autistic child and arrested on 8 April. The facts were documented by videos and recordings performed by Carabinieri following the reports lodged by the child's parents.

31 May – Violence at school – Rome – The review court at Rome's Prosecuting Office rejected the appeal that had been lodged by a teacher and the headmaster of San Romano nursery school against the remand in custody order. Both women were being investigated by the Office on account of alleged maltreatment of children aged from 2 to 6 years. The teacher was charged with the maltreatment and the headmaster with having abetted the teacher's conduct.

JUNE

13 June – Competitive examinations – University of Rome – An email sent to *La Repubblica*'s editorial office disclosed the names of the winners of the competition to be held at the cardiology post-doc school of "Umberto I" Hospital in Rome – one month in advance. The forecast proved true when the outcome of the examinations was posted. *La Repubblica* awaited this evidence prior to reporting the event.

JULY

15 July – Support to disabled pupils – Milan – Following the complaint lodged by Ledha (League for the rights of persons with disabilities) and 16 families on account of the reduced public funding to support disabled pupils at school and the resulting negative effects, the Court of Milan convicted the Ministry of Education on account of discrimination against disabled students. (See, in this regard, *BES and other innovations on support to pupils with disabilities* in paragraph 3 below)

AUGUST

21 August – Rape at school – Saluzzo (Cuneo) – V. Giordano, a teacher of Italian, was arrested on account of rape committed on two students who were underage at the time the offence had been committed.

The interceptions showed that there was a "blood covenant" between the teacher and the two students, who had committed to keep silent.

According to the report by the psychiatrist expert, the teacher was aware of the serious implications of his conduct.

SEPTEMBER

3 September – Competitive examinations – University of Perugia – The former Governor of the region Umbria, Ms. M.R. Lorenzetti, called Prof. G. Grossi, full professor at the University of Perugia, to recommend a student at the Dentistry Faculty. The request was made via several phone calls that were being intercepted by the Carabinieri of the Special Operational Unit (ROS) in Florence; the dean, M. Bisoni, and Prof. L. Romani were also involved. On 27 September the student passed the medical pathology examination with full honours.

10 September – Exclusion from classes – Novara – The parents of 12 pupils in Landiona (Novara) took away their children from school because of the substantial presence of foreign pupils: "There are too many gypsies", said the parents. Similar cases occurred in the subsequent week close to Bergamo and in the Chianti area in Tuscany.

16 September – An aliens-only class – Bologna – A class only including foreign pupils was set up in the *Besta* junior secondary school of Bologna for the 2013/2014 school year. This case and the relevant criticalities are described in paragraph 1 above.

23 September – Exclusion from classes – Naples – The parents of six children attending the *Gennaro Sequino* primary school in Mugnano (Naples) applied for moving their children to other schools because of the presence of a pupil affected by Kanner's syndrome. The applications were initially rejected by the headmaster and were granted at a later stage because of the pressure exerted by "influential persons".

23 September – Admission fees – Rome – A new admission fee was introduced at the Arts School of Rome that was targeted exclusively to non-Eu students. Along with regional and university fees calculated on the basis of the ISEE standard, non-Eu students would be required to pay an additional fee of 1,000 Euro regardless of their income and performance. This yearly fee was considered to be discriminatory and unlawful in nature and might undermine validity of the students' residence permits on educational grounds if it failed to be paid.

OCTOBER

1 October – Competitive examinations – University of Messina – The Financial Police (Guardia di Finanza) arrested two teachers of the Medicine faculty at the University of Messina on account of irregularities found in a competitive examination held for the post of researcher; they were allegedly helping the son of one of them.

5 October – Rape at school – Sondrio – The Court of Sondrio sentenced a gym teacher to imprisonment for 1 year and 2 months plus a 10-thousand Euro fine on account of rape against one of his pupils, who was 16 at the time of the events. Currently, that teacher works at another higher secondary school.

6 October – School canteen – Rome – The mother of a disabled pupil attending the *De André* lower secondary school reported that her son was prevented from accessing the canteen because of architectural barriers. This is no isolated occurrence, as in Italy 17% of school buildings do not include disabled-friendly canteen facilities.

Architectural barriers can also be found in other areas of school buildings. According to the *11th Safety at School Report* (2013) by Cittadinanzattiva, hindrances can be found at the entrance of schools (27%), in laboratories (19%), gyms (18%), courtyards (15%) and in many other areas (13%).

8 October – Catholic religion classes – Rome – Based on a survey by Skuola.net, one student out of four considers Catholic religion classes to be useless. 25% of the respondents stated that no educational activities were carried out during those classes. Furthermore, attendance of such classes provides teaching credits to participants and this discriminates those students who decide not to attend them.

16 October – University competitive examinations – Rome/Bari – The Prosecuting Office of Bari notified that the former dean of the Università europea in Rome and Christ's Legionnaires' Academy were being investigated as part of a major inquiry into trumped university competitive examinations. Telephone tapping showed that part of the teaching staff along with political representatives were involved in setting up an illegal recruitment system for university teachers.

29 October – School canteen – Naples – New fees were introduced for the canteen at the primary school in Villaricca (Naples) whereby non-residents were charged more than twice the standard fee.

NOVEMBER

11 November – Maltreatment at school – Savona – The judge, Mr. F. Giorgi, issued an injunction against the teacher of a primary school in Savona that had been charged with maltreatment by some parents. The maltreatment was evidenced by interceptions and videos shot during the investigations by the Prosecuting Office.

This is no isolated occurrence. Based on a survey performed by Save the Children in 2013, 94% of the respondent parents were afraid that their children would be maltreated in "protected" locations. The locations causing the greatest concerns were sports centres (43%), parochial community centres (39%) and schools (38%).

13 November – School buildings – Italy – ANCI (National association of Italian municipalities) requested the Education Committee of the Chamber of Deputies to work out a plan jointly with local authorities in order to enhance the safety of school buildings throughout Italy; to that end, adequate resources should be allocated on a continued basis. A significant example of the poor status of school buildings in Italy is provided by the collapse of part of the building hosting the Liceo Darwin in Rivoli (Turin), which caused the decease of one student and led to sentencing six persons (three officers of the municipality of Turin and the teachers tasked with ensuring safety at school) to several years' imprisonment.

DECEMBER

23 December – Racism at school – Rome – The Jewish community in Rome voiced their indignation following the acquittal of an Arts Teacher that had supported Holocaust-denial theories before three students on 30 October 2008. According to the Jewish community in Rome, this case showed the need for ad-hoc legislation to counter Holocaust denial – beyond and apart from the reasons underlying the specific judgment.

Legislation and Policies

Enrolment Cap (Numerus Clausus)

One of the issues that has been debated for many years concerns the enrolment cap (or limited access) applying to several schools and some university courses. The capping of enrolment is not grounded in our Constitution, since it would make an individual right conditional upon general policy considerations (Pototschnig U., 1973, p. 112 ff.). According to the Italian Constitution, the State may provide for "an exam for admission to the different types and levels of school…" (Article 33(5)) in order to select best-performers who are allowed to

attend a specific school or course; however, the State may not pre-determine a threshold for enrolment to educational courses.
Nevertheless, enrolment caps can be found currently in several university courses and are the source of litigations. Between December 2012 and January 2013 several decisions were rendered by Regional Administrative Courts (TAR) concerning enrolment caps for university courses in medical sciences. In particular, the TAR of Latium granted the complaint lodged by tens of students who had sat for the tests in various cities and had been excluded because their score was too low for the respective universities – even though they would have been admitted if they had sat for the tests held at Rome's La Sapienza university. The lack of a single, nation-wide ranking and clearly defined parameters for Italian universities led the TAR to issue negative decisions (decisions No. 4736, 4744, 4751). In this connection, special significance should be attached to another decision by the TAR of Salerno (No. 389 of 27 February 2012), whereby it was found illegitimate for the dean to reject the enrolment application lodged by a non-EU student who, in spite of having passed the admission tests for medical sciences, had been excluded because there were no available posts. The student had applied for being admitted via one of the posts reserved for non-EU nationals, which had not been allocated. The TAR granted the complaint lodged by the student because the Ministry of Education had set the posts available for enrolment at national level without drawing any distinction between EU and non-EU students.
The Council of State had questioned the lawfulness of enrolment caps when it had issued its order No. 3541 of 18 June 2012 to request a ruling by the Constitutional Court on Law No. 264/1999; in particular, Section 4(1) thereof had set forth enrolment caps for the former courses of medical sciences, veterinarian medicine, dentistry, architecture and the so-called health care professions. In the Council of State's view, the lack of a single, nation-wide ranking and the availability of separate lists for the individual universities are in breach of Articles 3, 34, 97 and 117 of the Constitution. Additionally, "admission to a graduation course does not depend on the applicant's

skills as it is related actually to casual, utterly coincidental factors that have to do with the number of available posts at each university and the number of applicants." (order No. 3541/2012, Division VI). Accordingly, this selection mechanism is in breach of the applicants' equality and right to education as enshrined, inter alia, in Article 2 of the Additional Protocol to the ECHR.

Further to the said order, the Ministry of Education issued Decree No. 196 of 28 June 2012 to create 12 territorial lists based on the merge of several universities. However, several Italian TARs found this solution to be unsuitable for remedying the inequality of treatment affecting applicants.

The establishment of a nation-wide list was recently provided for by Minister Carrozza via the so-called "School Decree" that was adopted by the Council of Ministers on 9 September 2013 and transformed into a Law on 7 November 2013; however, this decree only applies to the selection of candidates to medical postgraduate schools.

The issue of limited access (*numerus clausus*) to study at Universities was recently the subject of a judgment by the European Court of Human Rights in the *Tarantino and Others v. Italy* case.

In its judgment of 2 April 2013, the Court found that every contracting State was entitled to exercise its power to regulate access to education, in particular to Universities, on the basis of two criteria – namely, the capacity and resources of the individual universities, and societal requirements vis-à-vis a given profession (with regard to the medical profession). In the Court's view, this regulation must be subject to supervision (by the Court itself) to establish that such criteria are met in order to make the limited access approach legitimate.

As for the criteria relied upon to set a student enrolment cap at Universities, the Council of State also issued a non-final decision on application No. 2725/2010 of 5 April 2013; according to such decision, the enrolment cap must be set by having regard to the requirements of the EU, not the national health care system.

The threshold to be set as regards the number of physicians has also to do with the selection procedure to access postgraduate schools. In this connection, the forecast made by ENPAM (National Social Security and Welfare Agency for Medical Doctors and Dentists) is especially significant – that is to say, in 2016 there will be a gap of 600 medical doctors in Italy compared to the needs of the population. This gap will be due to the retirements expected in the next few years as they will not be covered by newly recruited staff; moreover, the reduced funding available for scholarships prevents holding competitive examinations for the required posts in medical postgraduate schools.
Finally, reference should be made to a decision by the TAR of Tuscany (19 December 2012), which considered it illegitimate for Pisa University to introduce limited access requirements for the Engineering course. The latter is not mentioned in the university courses listed in Law No. 264/1999, whose compliance with constitutional principles is actually being questioned.
There are additional specific issues relating to the mechanisms for holding the admission tests that would appear to be questionable. In this connection, a major class action was initiated on 6 September 2013 before the TAR of Latium against the whole admission tests system as well as against the so-called "high-school diploma bonus", which action may be joined by all the students that had already sat for the 2013/2014 academic year exams.

By way of decree No. 449 of 12 June 2013, Minister Carrozza introduced new mechanisms for the admission tests to graduation courses as planned for the 2013/2014 academic year, replacing the provisions set forth in Ministerial Decree No. 334 of 24 April 2013. The key feature of the new decree relates to the new criteria laid down in order to evaluate school performance. The so-called "high-school diploma bonus" was eliminated with regard to the applicants that had obtained a pass mark in excess of 80/100 in their high school diplomas. This measure was extended to all applicants by the Ministry of Education in September 2013, when the admission

tests for several university courses had already started. According to Minister Carrozza, the "bonus" was a measure that had only brought about inequalities and failed to take due account of educational curricula.

Public vs. Private Educational Institutions

The relationship between public and private education continues to be a source of discussions in spite of its being grounded in the Constitution (Article 33) and regulated by law (Law No. 62/2000). As well as establishing to what extent the freedom of teaching set forth in Article 33(1) of the Constitution is ensured within educational institutions that endorse specific ideological stances, a thorny issue consists in the prohibition of State funding for private institutions. Under Article 33 of the Constitution, "The Republic lays down general rules for education and establishes state schools of all branches and grades. Entities and private persons have the right to establish schools and institutions of education, *at no cost to the State*." (paragraphs 2 and 3). Factually speaking, the latter principle was not complied with, which has given rise to considerable criticisms.

The latest instance of such discussions was the setting up of a Committee of parents and teachers ("Articolo 33") in the early months of 2013 in Bologna, to protest against the substantial funding provided by the municipality to the 27 private nursery schools existing in the city. The public-private integrated system of nursery schools started in 1994 and is seemingly difficult to replace as of today; indeed, the State-owned schools would appear to be insufficient to meet the needs of populations. Several families are accordingly obliged to apply to private institutions and pay hefty monthly fees. On 26 May 2013, a referendum was held in Bologna which saw a turnout rate of 28.71% and endorsed the initiative waged by "Articolo 33", requesting the public education system to be implemented in full (Monti L., 2013; Truzzi S., 2013).

It can be easily appreciated that the Bologna referendum is grounded in issues that are far from local in nature as it raises several questions in terms both of facts and of principles.

Textbooks and Implementing the Right to Education for All

The 5-year and 6-year ban on adopting new textbooks in primary and secondary schools, respectively, as set forth in the so-called "Gelmini reformation[1]" to contain the relevant expenditure was lifted recently. A circular by the Ministry of Education of 25 January 2013 implementing Section 11 of Law 211/2012 on measures for the economic growth of Italy allowed teachers to select new textbooks yearly as from the 2013/2014 school year. This sparked several discussions on account of the increased costs for families and the resulting questions on the actual implementation of the right to education. The reply given by the Ministry was that the circular envisaged adoption of textbooks in a new digital or mixed (i.e.

1 The so-called "Gelmini reformation" (the reformation introduced by Minister of Education Ms. Gelmini) included several measures that brought about changes into schools and universities. The first measure to be issued was decree No. 112 of 25 June 2008, including *Urgent measures for economic development, simplification, competitiveness, stabilization of public finance and better allocation of taxes*, Chapter V (as transformed into Law No. 133/2008). Additional legal instruments enacted as part of the reformation include the decree No. 137 of 1 September 2008 (*Urgent measures concerning education and Universities*), transformed into Law No. 169/2009; Presidential decree No. 81/2009 consolidating the provisions on evaluation of pupils; decree No. 180 of 10 November 2008, concerning *Urgent measures on right to education, enhancement of performance evaluation and quality of university and research systems* as transformed into Law No. 1/2009; a bill on *organization and quality of the university system, academic staff and right to education* introduced on 23 October 2009; Law No. 240/2010 including *Measures on organization of universities, academic staff and recruitment and to enable Government to enhance quality and effectiveness of the university system;* Ministerial decree No. 17 of 22 September 2010 containing *Requirements of educational curricula*; Law No. 170/2010 on *New provisions concerning specific learning disabilities in the educational context* along with the respective Ministerial decree of 21 July 2011.

The main innovations introduced regarding school education can be summed up as follows: a single teacher available as a rule in primary school classes; decimal grading system for all pupils including those in primary schools; grades for behavior at all levels; introduction of a new class on "Citizenship and Constitution" at all levels; start of a project called "Digital School" based on the use of IT and e-books for teaching purposes; introduction of a national INVALSI test for lower secondary school exams; creation of new higher secondary school courses including six types of "liceo", two types of sector-specific technical schools and two types of professional training schools; introduction of a specific category called "specific learning disorders" (SLD) in order to select customized educational curricula for students affected by such disorders; the obligation for all schools to contain textbook expenditure by banning new adoptions as per Section 5 of Law No. 169/2008.

Additional details on higher secondary schools can be found in the booklet published by the Ministry titled *Guida alla nuova scuola secondaria superiore*, September 2010, www.istruzione.it.

The organizational innovations brought about by the Reformation as regards Universities will be described in the relevant sections of this Chapter.

paper and CD-ROM-based) version, which was meant to achieve cost containment rates of 20 to 30%. Publishers seemed to disagree, however. It appears that they are required to destroy thousands of paper-based books to implement Ministerial Decree No. 129 of 16 March 2013, setting out the relevant technical specifications. In May 2013, the Italian Publishers' Association (Aie) lodged a complaint with TAR against the above decree by claiming that the shift to digital textbooks would not be conducive to reduced production costs, which actually would be increased because of supervening expenses and the increase of the applicable VAT by 17 percent compared to paper-based books. According to Aie, the shift to digitalization should take place much more gradually.

This issue was addressed partly via the *School Decree* (decreto scuola) of September 2013, whereby the obligation to adopt new textbooks was lifted for the 2013/2014 school year providing teachers replace them by different teaching materials. Conversely, headmasters will be required to make sure that the expenditure caps provided for with regard to new textbooks are complied with.

The decree also envisages 8 million Euro funding for the purchase by secondary schools of books and e-books that can be leased for temporary use free of charge by economically disadvantaged students.

BES and Other Innovations Concerning Assistance to Disabled Students

The DSA (or SLD) category, including dyslexia, dysgraphia, dysorthography and dyscalculia as specific learning disorders that require customized teaching curricula but no assistance by specialized teachers, was introduced by the "Gelmini reformation" and was recently supplemented by an additional category. The latter includes students that are "socially and culturally disadvantaged, are affected by specific learning and/or growth disorders, or by difficulties due to their poor knowledge of Italian language and

culture because they belong to different cultural milieus."[2] The various instances of disadvantage are grouped together and termed "Bisogni Educativi Speciali" (BES, i.e. Special Educational Needs). By way of an implementing circular of 6 March 2013 (No. 8), the Ministry of Education provided the operational guidance for handling such BES; it was stated that it was up to "Consigli di classe" (boards made of parents' and students' representatives for each class plus the respective teachers) to identify those specific cases where customized teaching was required along with such "compensatory or derogatory" measures as might be necessary for ensuring full, effective inclusion of those students. At all events, the Ministry drew a distinction between BES and other types of disability requiring the assistance of specialized teachers and a customized or individual educational plan[3], as well as between BES and SDA cases. In all such cases a medical certification is to be produced.

Introducing the BES category is meant in the Ministry's view to enable teaching teams to help the given students; however, no specific tools are made available to plan adequate measures. This shortcoming already featured in the referrals of DSA cases.

The issue of how to adequately handle students with learning disorders and/or with disabilities was compounded further by the stepwise drop in State financing to welfare initiatives for schools. The provisions issued by the Ministry of Education in the 2010 to 2012 period reduced the number of specialized teachers considerably in spite of the continued increase in the number of students with disabilities in all schools. This produced markedly negative effects, so much so that the Ledha association along with 16 families lodged a complaint with the court of Milan; the latter convicted the Ministry

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2 Ministerial circular letter No. 8 of 6 March 2013 relating to the Ministerial Directive of 27 December 2012 on *Measures applying to students with special educational requirements and territorial organization for school inclusion,* p. 2. See Ministerial circular letter of 22 November 2013, Protocol No. 2563, *Measures for students with special educational requirements. 2013/2014 school year. Clarifications.*

3 The right to education of disabled students is regulated in Italy by Law No. 104/92 (in particular by sections 12 and 13 thereof) and by the relevant implementing decree of 24 February 1994. See also the UN Convention on the Rights of Persons with Disabilities of 13 December 2006 as signed by Italy on 30 March 2007 (Articles 7, 19, 24, 27).

of discrimination on 15 July 2013 because of the serious situation and the substantial difficulties encountered by disabled students.
In order to enhance the continued support and assistance provided to over 52,000 students with certified disabilities, the Ministry of Education requested that over 26,000 specialised teachers be recruited on a time-unlimited basis over the next three years. This request was granted via the *School Decree* of September 2013. However, Anief (the National Teachers' and Trainers' Association) complained in this regard that the teachers to be recruited would continue to receive their wages under fixed-term employment contracts without any seniority accruing to them for an 8-year period.

Fixed-Term Employment in the School Sector

The scanty funds available for education also result in the increasingly precarious employment status of an ever larger amount of teachers. Fixed-term employment contracts have become the rule rather than the exception in this area, so much so that workers' rights are being trampled upon and the quality of educational performance is being affected. To appreciate the import of this phenomenon, one should consider that some judicial decisions were rendered in this regard during 2013. One of leading issues has to do with the transformation of fixed-term employment contracts into employment contracts of unlimited duration; an order by the Court of Naples of 15 January 2013 requested a ruling from the European Court of Human Rights. The Court division dealing with occupational matters submitted the complaint lodged by a fixed-term teacher against Law No. 106/2011, which prevents school staff from being employed via contracts of unlimited duration after working for 36 months on the basis of fixed-term contracts – allegedly in breach of Directive 1999/70/EC. The latter directive was transposed by way of Section 5 of legislative decree No. 368/2001, which is considered not to apply to public employment as the latter is regulated by Section 36(2) of legislative decree No. 165/2001. The differential treatment of private vs. public employees is grounded in Article 51 of the Italian Constitution, whereby a competitive examination is required to access public

employment. The point is that the salary conditions applying to teachers jeopardize workers' rights as per Articles 1, 4 and 35 of the Constitution. Another decision by the Court of Trapani (occupational matters division) of 22 February 2013 required the Ministry of Education to pay damages to three fixed-term teachers on account of "misuse of fixed-term employment contracts, failure to provide seniority benefits and pay the wages for summer months (July and August)." Additionally, the salary paid to teachers under fixed-term employment contracts is lower than that of teachers working under unlimited duration contracts, and there is no bonus attached.

In order to enhance the stability of educational services, the Government set out a three-year plan by way of the September 2013 decree to recruit teaching and clerical staff on the basis of unlimited duration contracts. About 69,000 teachers and 16,000 clerical staff are expected to be recruited between 2014 and 2016 along with 57 headmasters. The plan envisages a new recruitment procedure for headmasters, who should be selected via a training course to be held at the National School of the Public Administration.

The ministerial plan is meant to fill out a gap of about 80% in the numbers of school personnel.

At the end of September 2013, the Ministry of Education disclosed the figures on the public competitive examination held on 24 September 2012 for permanent teaching positions, which marked the beginning of the so-called *Transparency Operation*; the Ministry tried to lay out clear-cut recruitment procedures to allow both the winners of that competition and the teachers currently eligible for employment based on specific Lists ("Graduatorie a esaurimento", Gae) to be recruited via unlimited duration contracts.

Digital School: Problems Caused by Online Registration Mechanisms

The ministerial document of 25 January 2013 remedied some problems caused by the online registration mechanisms that had been introduced for compulsory education classes at the beginning of that year. The new registration system envisages a single digital form where students are identified by way of their Tax IDs. This

gave rise to several problems for the children of illegal migrants as they do not hold any Tax IDs although they are entitled to attend schools. The said circular states that, if a foreign student is not yet holding a residence permit or if an international adoption case has yet to be finalized, it will be up to schools to directly take care of the registration procedure.

Latest News on Financing to Schools

On 14 January 2013, the Ministry of Education stated that the "convergence objective" Regions (Calabria, Campania, Apulia and Sicily) could avail themselves of European Structural Funds (ESF) to supplement their POFs (Programmi di Offerta Formativa, Educational Activity Plans) by starting training and awareness-raising programmes for school staff. Additionally, on 9 April 2013 a circular was published on the National Supplementary Collective Agreement to allocate extra resources to the schools in at-risk areas, where a considerable number of recent migrants can be found along with high school drop-out rates.

By way of the September 2013 Decree, the Ministry also apportioned 15 million Euro for the 2013/2014 school year in order to start a supplementary teaching programme to counter dropping-out with particular regard to primary schools.

Furthermore, funds were allocated to secondary schools in 2014 – e.g., to cover transportation and meal costs, implement wireless connections, grant scholarships in Advanced Arts Schools – as well as to run training courses aimed at enhancing teachers' skills.

The Ministry also allocated 100 million Euro starting from 2014 to consolidate the Fund for university scholarships so as to make it a permanent rather than a temporary feature.

The apportionments envisaged for the next year were nevertheless criticized because they were considered insufficient to even simply tackle the economically most difficult situations.

Studying Abroad

The Ministry of Education decided to support student mobility in secondary schools by way of the *Lifelong Learning* programme as

described in the circular of 10 April 2013; this is aimed at fostering the international dimension of schooling. The document envisages international cooperation and mobility initiatives for students.

Right to University Education, Freedom of Scientific Research and Evaluation

The current status of the right to university education and freedom of scientific research can be appreciated via some recent decisions by a few TARs and the Constitutional Court regarding several issues, some of which have surfaced following the changes brought about in Universities by the "Gelmini reformation". The latter reformation impacted the organization of universities as it did away with university faculties, terminated the separation between teaching and research (both being now committed to Departments) and modified the whole architecture according to a highly centralized model. The law imposed detailed constraints on minor activities and introduced a single organizational model for universities, thereby reducing their autonomy considerably and raising an issue of possible conflict with Article 33 of the Constitution. The reformation was described as a measure capable to enhance performance and quality, but it also changed the rules for the recruitment of university professors – a nationwide eligibility certification is now necessary based on personal qualifications and publications – as well as the rules to increase the funding of cost-containing universities where high quality levels are attained in terms of teaching and research. All of the above raised the issue of how to evaluate the performance both of individual researchers and professors and of universities as a whole. Universities are currently evaluated by ANVUR (National Agency for the Evaluation of University and Research) on the basis of legislative decree No. 19 of 27 January 2012, which implemented Section 5(3) of Law No. 240/2010, as well as in accordance with the criteria laid down in Ministerial decree No. 47 of 30 January 2011; the evaluation concerns the initial and regular accreditation of teaching courses and university premises as well as quality, efficiency, and the results of teaching and research activities. Doubts are raised

regarding the tasks ANVUR is being overloaded with, which sometimes overlap with the task committed to another evaluation agency, i.e. the Cngr; above all, it is questionable that the criteria applied to evaluate academic work are defined by ministerial decrees, which may undergo several amendments as they are not primary legislation. This prevents universities from relying on standards laid down in laws so as to achieve pre-defined targets.

The criteria for evaluating individual scholars are also set forth in ministerial decrees. Currently Ministerial Decree No. 76/2012 sets out the bibliometric markers, the number of publications and the median values to determine the relevance of one's scientific production. On top of these criteria, academic research journals are grouped into three classes (A = excellent; B = good; C = acceptable), so that the value of a publication changes with the journal it is printed in. This classification was introduced by ANVUR in cooperation with experts in Research Quality Assessment (VQR) and national scientific societies. It was exactly the latter feature that caused the greatest concerns: several decisions by the TAR of Latium in 2013 addressed the mechanisms for classification and evaluation of scientific journals by ANVUR. For instance, a decision by the TAR of 15 February 2013 (case No. 8143/2012) and two decisions of 8 February 2013 (case No. 10569/2012) and 22 February 2013 (case No. 246/2013) quashed or requested a review of decisions by ANVUR concerning exclusion of some scientific journals from the Class A list. ANVUR has to take into account the opinion given by the relevant scientific society.

The TAR of Emilia-Romagna also granted the complaint lodged by a candidate in the competition for researchers held at the University of Parma, since his publication had been evaluated in a shallow manner without analyzing each paper as per Ministerial decree No. 89/2009 and without applying the criteria set forth in Section 4(2) of Presidential decree No. 117/2000 and in Law No. 9/2009.

Reference can also be made to the Order No. 99 issued by the Constitutional Court on 23 May 2013, whereby it was determined that the salary paid to foreign mother-tongue language teachers in

Universities ("Lettori di scambio universitari") was to be 70% of that paid to full-time university researchers; further, decision No. 78 of 24 April 2013 by the Constitutional Court found that Section 1(10) of Law No. 230/2005 was unconstitutional as it prevented technical and administrative staff in universities from performing teaching assignments also without any remuneration.

A New Government Taking Office: A New Vision for Educational and Research Policies?

On 6 June 2013, Minister Carrozza presented the policy lines on education, universities and research the Government considered to be of strategic importance. In particular, the Minister declared that all necessary efforts would be made to prevent and counter dropping-out, which currently affects 18% of youths, also by relying on European funds for the 2014-2020 period.

As part of system-level measures, school autonomy will be fostered by envisaging two separate recruitment channels (school- and network-focused, respectively) to increase the stability of funding for educational institutions and reduce the number of fixed-term contracts substantially.

Regarding universities, the key objective consists in "de-bureaucratizing" management and providing economic support to their activities. The 300-million Euro apportionment made for the FFO (Fondo di finanziamento ordinario – Standard Financing Fund) of state-run universities will be reintroduced and a *Nationwide Extraordinary Plan for the Recruitment of Researchers* will be implemented pursuant to Section 24(3), letter b), of Law No. 240/2010 via a national call – which basically is an extension of the *Rita Levi Montalcini Programme*, currently reserved for scholars working abroad. Minister Carrozza also mentioned the need for funding the second strand of the *Extraordinary Plan for the Recruitment of Associate Professors*, lasting six years.

As for university research, the measures envisaged by the Ministry of Education focus on the setting up of a *nationwide research system* to allow taking full advantage of the individual sources of financing, implementing a new National Research Plan (PNR) for the 2014-2016 period, better coordinating the existing research bodies, enhancing ANVUR's effectiveness in evaluating the performance of research bodies, and creating a national environment that can foster the activities of researchers and scholars.

The specific steps to implement the intentions and plans voiced by the Minister of Education concerning schools and universities were laid down in the *School Decree* that was adopted on 9 September 2013 (see foregoing paragraphs).
These ministerial guidelines were received favourably and taken up by several MPs in motions that were tabled between 11 and 12 June 2013 – e.g. that by MPs E. Cimbro and M. Fabbri from the Democratic Party, who put forward proposals to find financial means and remedy the dilapidated status that is currently a feature of almost one half of school buildings (see the 2012 Report by Legambiente). The new School Building Plan envisages several meetings with the Territorial Cohesion Department in order to allocate part of the 2014-2020 cohesion funds to maintenance activities in schools; thirty-eight million Euro are expected to be apportioned additionally for this purpose to local authorities and Regions.

Recommendations

1. Ensuring long-term sustainability of the planned interventions for school buildings - including standard and extraordinary maintenance activities for the restructuring of some buildings - by relying on bio-building criteria and sustainable and renewable sources. The introduction of a nationwide training

curriculum for teaching and clerical staff regarding safety and risk prevention in educational facilities is also called for.

2. Fostering inclusiveness in the educational system to support those most in need in their educational processes and counter school drop-out.
3. Planning school inclusion policies for aliens with a limited command of Italian, by relying on integration and inclusion processes. Introducing legislation to the effect that children born in Italy from foreign parents must not be calculated in the 30% per-class ratio of non-Italian children.
4. Affording more permanent care to students with disabilities and pupils with DSA [Specific Learning Disorders] and/or BES [Special Educational Needs] such as to meet their actual needs, by ensuring that an appropriate number of specialized teachers is available for as long as necessary in the individual cases and supporting families in handling the relevant certification procedures.
5. Stabilising teaching and clerical staff by setting up a recruitment system that can allow transforming fixed-time contracts into contracts of unlimited duration and thereafter facilitate the recruitment of young graduates.
6. Reconsidering the evaluation and recruitment mechanisms for universities by doing away with the ban on staff turnover and setting forth nationwide criteria to take due account of performance. Such criteria should be laid down by law rather than by ministerial decrees, which are liable to more frequent changes.
7. Stabilising the university scholarship fund by doing away with the scholarships awarded to “eligible non-beneficiaries”.
8. With a view to re-allocating the available resources, increasing the FFOs for universities so as to support teaching, research and internationalization activities.

WOMEN'S FREEDOM AND SELF-DETERMINATION

By Valeria Casciello

Focus

Individual self-determination is one of the main cultural and political achievements of modern times. It is strictly connected with the freedom of the individual and is enshrined today in all the Charters of Rights of constitutional states as well as in the supranational Charters setting out the fundamental rights of individuals. The main implication of individual self-determination is accountability, which entails – not only legally speaking - that individuals are accountable for the consequences of their own choices and actions.

Focusing on facts and the juridical framework necessarily influencing them, one can appreciate that freedom, self-determination and accountability are not features that always apply to the same degree to all individuals. In particular, to be a woman seems to be a circumstance that greatly influences – by limiting it - the right to self-determine one's own choices.

The innumerable facts of violence involving women as victims stress one of the most important differences between man and woman: physical force. However, it is not the only one. There is also the maternal role, the generating power characteristic of the female gender. These aspects significantly affect woman's status, in the sense that, more than any other individual and precisely by virtue of her unique characteristics, she is subject to protective rules and not only. In short, women's freedom and self-determination are influenced and limited, under certain respects, by a multifarious framework of domestic and international legislation: on the one hand, there is the legislation that regulates woman's body by including it in the public sphere; on the other hand, there is the legislation that

deals with woman as an actual or potential victim of various forms of violence.

The Female Body and the Law

Historically, habeas corpus has represented an important instrument for ensuring individual freedom. Essentially, it consists in the prohibition against any arbitrary interferences by the State with the personal sphere of individuals. Therefore, it also refers to the sovereign right of any individual on their own body. This principle is the basis of Articles 13 and 32 of our Constitution, which guarantee personal freedom and the prohibition against mandatory health treatment except as provided for by law, respectively – with the additional caveat that «The law may not under any circumstances violate the limits imposed by respect for the human person».

However, not all bodies are the same. Law 194/1978, regulating abortion, and Law 40/2004, concerning medically assisted reproduction, would appear to imply that woman's body, unlike the male body, is no longer part of one's private and personal sphere as it becomes a feature of the public sphere – of the law.

The lively debate resumed in recent months on abortion and the criticalities in the implementation of the relevant legislation, i.e. the high number of physicians who are conscientious objectors in public hospitals and the limited possibility of resorting to pharmacological abortion, highlight the delicate relationship between the law and self-determination in the choices concerning the most intimate sphere of a woman and her body - i.e. that of motherhood.

Similarly, the attention paid by the most recent national and supranational judicial decisions to Law 40/2004 – insofar as it does not permit access to medically assisted reproduction techniques by fertile couples suffering from genetically transmissible diseases and prohibits heterologous fertilization - highlighted the limitations and inconsistencies of that Law

precisely in relation to the principles making up the right of habeas corpus .

Violence against women

In the past year, the tragic events reported in the news prominently put woman at the centre of the public debate as a victim of violence. Often the perpetrator was the woman's husband, partner or, anyhow, a family member. Probably never before as in recent months was public opinion confronted with violence against women and terms as "femicide" have become part of everyone's vocabulary partly thanks to the attention paid by the media to the phenomenon.

The ratification of Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (better known as Istanbul Convention) and Decree-law 93/2013, converted into Law 119 of 15 October 2013, which introduced new measures for combating the phenomenon, are just the last steps in a journey that lasted about 20 years, during which ad hoc rules against gender violence have been promulgated and in particular against rape and the so-called stalking.

All these measures are certainly major achievements, however they should get us to reflect on the risk that women and their freedom are taken into account only to the extent they are, all too often, victims.

Discriminations and violence

28 August 2012 Strasbourg. Artificial insemination: the European Court of the Human Rights, seized directly by a couple of Italian citizens, established that Italy had violated Article 8 of the European Convention on Human Rights because Law 40/2004 does not authorise the use of medically assisted procreation techniques, finalised to preimplantation genetic diagnosis, by fertile couples;

23 October 2012 Rome. Abortion: the "Associazione Luca Coscioni" and AIED – Italian Association for Demographic Education – filed a complaint with the Prosecutor's Office in Rome concerning the alleged violation of Law 194/78 in Latium , because in said region 12 hospitals out of 31 do not provide abortion services because 91% of the gynaecologists are conscientious objectors, according to the data collected by LAIGA (Free Italian Association of Gynaecologists for the Enforcement of Law 194).

25 January 2013 Rome. Abortion: It is reported (by Ansa) that Cgil (Italian General Confederation of Labour) filed a complaint with the Council of Europe's European Committee for Social Rights against the difference of treatment as to wages and career of gynaecologists who are not conscientious objectors; in its complaint, CGIL also illustrated its opinion on Law 194. CGIL pointed out that the law – as formulated – cannot ensure that women are afforded access to abortion facilities also due to the high number of physicians who are conscientious objectors.

4 March 2013 Rome Violence against women: the "Telefono Rosa" (women's helpline) disclosed data concerning violence against women as reported to the voluntaries working for the association in 2012 and processed by Swg. Data confirm that violence almost always breaks out at home, within a sentimental or emotional relationship (84%). The perpetrator is the husband (48%), the cohabitant partner (12%) or the former husband or partner (23%); it is a man between 35 and 54 years (61%), employed (21%), educated (46% hold a higher secondary school diploma and 19% a university degree), who is neither a drug addict nor an alcoholic. (63%). The victims are women aged between 35 and 54 years, holding higher secondary school certificates (53%) or university degree (22%); they are employed (20%), unemployed (19%) or housewives (16%), with children (82%). The violent act is never isolated but constant and continuous (81%) and does not end when the relationship is over but continues also afterwards, often with a persecutory intent (stalking). Physical violence increases from 18% to 22%, but is always accompanied

by psychological violence, threats and economic violence. The percentage of women admitting their weakness has made them endure the situation for years increases from 13% to 18%, while a smaller percentage of women are convinced that they could tolerate violence for the sake of l11% love (from 14 to 11%). Eighty-two per cent of the victims said to have children who witnessed the violence, a rise by 7% compared to the previous year. It is ‘’witnessed violence’’ and, the association warns that it is a widely underestimated phenomenon: without appropriate help, minors may enter adulthood with a load of behavioural and psychological problems possibly resulting into the development of dissociative and personality disorders.

29 March 2013 Milan. Medically assisted reproduction: the Court of Milan (order filed on 9 April) and the Court of Florence raised an issue of constitutional legitimacy concerning the ban on heterologous fertilization imposed by law 40/2004;

2 April 2013 Rome. Abortion: The Court of Cassation upheld the conviction to one year’s imprisonment and disqualification from medical practice on account of failure to discharge one’s official tasks as issued with regard to a physician of a hospital in Pordenone who had refused to provide care to a patient who had undergone an abortion.

3 April 2013 Cagliari. Genital mutilations: the Court of Cagliari considered that to have suffered genital mutilations, considering the severity of the violence implied, is a prerequisite for the granting of refugee status pursuant to Article 2, section e) of Legislative decree 251/07;

13 April 2013 Catania. Medically assisted reproduction: the Court of Catania raised an issue of constitutional legitimacy on account of the absolute ban on heterologous fertilization provided for in Law 40 of 2004, alleging the violation of Articles 2, 3, 31 and 32 (paragraphs 1 and 2) of the Constitution;

16 April 2013. Pesaro. Violence against women: Lucia Annibali, a lawyer from Pesaro, had sulphuric acid thrown on her face by two individuals; their instigator was her former boyfriend; earlier, the man had entered in the woman's home for damaging the gas system in order to cause an explosion. Lucia Annibali became the symbol of the fight against violence on women when, 7 months later, on 25 November 2013, on the occasion of the International Day for the Elimination of Violence against Women, President Giorgio Napolitano appointed her as Knight of the Order of Merit of the Italian Republic. The honour was conferred "for her courage, determination and dignity with which she reacted to the serious physical consequences of the vile attack suffered».

12 May 2013 Rome. Abortion: the "Marcia Pro-Vita" (March for life) and against abortion took place in Rome.

18 June 2013 Rome. Medically assisted reproduction: A study carried out by ESHRE (European Society of Human Reproduction and Embryology) and Sismer (Società Italiana di studi di Medicina della Riproduzione – Italian Society of Reproductive Medicine Studies) shows that every year at least ten thousand Italian couples go to other European countries to undergo assisted reproduction interventions spending an average of 8,700 Euro. Their number that has increased exponentially since 2004. Of these prospective parents, 40% could be followed by public or private Italian structures; nevertheless, they prefer to go abroad relying on laws considered more open-minded.

The population consists of heterosexual married couples (82%) or couples living together permanently (18%); women's average age is 37 years and 68% are less than 41;

20 June 2013 Violence against women: the World Health Organization (WHO) denounced that violence against women is a health global problem of epidemic proportions. Bodily violence or rape affect more than one-third of women in the world (35%) and domestic violence inflicted by the partner is the most common form, so much so that when a woman is killed, in one case out of three the killer is a cohabitant partner. The study evaluates that in Africa the prevalence rate is 45.6%, in the Americas 36.1% , in the Eastern Mediterranean area 36.4% , in Europe (Russia and Central Asia included) 27.2%, in South-East Asia 40.2%, in the Western Pacific are 27.9%. In high-income countries it is 32.7%.

13 July 2013 Rome. Abortion: a 17-year-old Roma girl risked her life in Rome due to an illegal pharmacological abortion: a Roma couple were arrested because they practiced illegal abortions including by administering a drug commonly used to treat ulcers.

22 July 2013 Female Genital Mutilations: Unicef (United Nations Children's Fund) published its latest report on female genital mutilations, according to which there are more than 125 million girls and women that are victims of female genital mutilations in the world; it is expected that 30 million little girls may be exposed to this practice in the next ten years. The report was based on the surveys carried out over a period of twenty years in 29 countries across Africa and the Middle East.

11 September 2013. Padua. Abortion: The association "Pensiero

Celeste" of Padua, supported by the "Moderati in Rivoluzione", filed with the Court of Cassation a citizens' initiative bill calling for the establishment of a registry for stillborn foetuses that achieved a weight of at least 500 grams. The aim was to get to the legal recognition of the foetus, excluded by the Italian legal system and by the decisions of the courts, so as to protect, among other things, women's right to rely on abortion in the specific cases and under the conditions provided for by law.

13 September 2013 Rome. Abortion: the Ministry of Health forwarded to Parliament the annual report on the implementation of Law 194/1978 on the voluntary interruption of pregnancy showing the preliminary data for 2012 and the final ones for 2011. Concerning conscientious objection medical staff, it shows that «at National level we went from 58.7% conscientious objector gynaecologists of 2005, to 69.2% in 2006, 70.5% in 2007, 71.5% in 2008, 70.7% in 2009 and 69.3% in 2010 and 2011. Among anaesthesiologists the situation is more stable with a shift from 45.7% in 2005 to 50.8% in 2010 and 47.5% in 2011. For the non-medical personnel there was a further increase, the relevant rates rising from 38.6% in 2005 to 43.1% in 2011. There are marked variations between regions. Rates in excess of 80% can be found among gynaecologists mainly in the south, in the autonomous province of Bolzano/Bozen and in Latium.

22 September 2013. Rome. Medically assisted reproduction: The Court of Rome ordered the Local Health Unit A (ASL A) of Rome to perform a pre-implantation genetic diagnosis on a fertile couple suffering from a genetically transmissible disease;

2 October 2013. Florence. Abortion: the Regional Council of Tuscany rejected a motion calling for greater safeguards with a view to the implementation of Law 194 on the voluntary interruption of pregnancy in Tuscany. The motion committed the Regional Council

of Tuscany to issue legally binding measures regarding all facilities where the voluntary interruption of pregnancy is practiced to ensure full implementation of Law 194 to establish registers of objecting and non-objecting physicians.

25 November 2013. Rome Femicide: according to a note by ANSA, the number of women murdered by a man in 2013 was 128.

15 January 2014 Rome. Medically assisted reproduction: the Court of Rome filed a request for preliminary ruling with the Constitutional Court to assess compatibility of Law 40/2004 with the Constitution in so far as it does not allow fertile couples suffering from genetically transmissible diseases to access medically assisted reproduction.

Legislation and Policies

Abortion

On 11 June 2013 six motions and one resolution submitted by different political parties committed the Government to guaranteeing and monitoring the full implementation of Law 194/1978 regulating voluntary interruption of pregnancy (IVG) in Italy.

The documents approved by the Chamber of Deputies highlight, in different ways, the main criticalities related to the implementation of Law 194/1978, i.e. those of conscientious objection (provided for by Section 9 of the law) and the recourse to pharmacological abortion (via the RSU486 pill). These criticalities seriously jeopardize women's self-determination, i.e. the self-management of their own body and the awareness of their generation power; in this respect, Law 194 of 1978 represented an important step forward since it afforded the opportunity of living sexuality separately from its merely reproductive function in addition to "the right to informed and responsible reproduction" (Section 1 of Law 194/1978).

The high number of health care practitioners that are conscientious objectors in public hospitals results mainly into making the implementation of Law 194 of 1978 increasingly difficult, with negative effects on the running of the various hospitals and, consequently, of the national health system and for the women who resort to abortion (IVG).

Indeed, the state of implementation of the law entails the lengthening of the waiting time, with serious dangers for women's health and increased professional risks for the few non objectors, who often are forced, against their will, to follow a poor clinical practice. Faced with this «state of emergency», women are often obliged to migrate from one region to another or even abroad if they wish to terminate their pregnancy; thus, especially among poorer immigrants, the recourse to illegal abortion is frequent.

These data, in brief, beg the question whether conscientious objection to abortion is not a veritable «sabotage of the law»[1], preventing the provision of a service, especially in some areas of the country – whereas this service must be ensured «in any event», as provided for by Section 9, paragraph 9 of Law 194/1978[2].

Besides, it is necessary to stress that often conscientious objection is badly exercised by the medical staff since they may refuse to perform the specific and necessary activities directed at causing the voluntary interruption of pregnancy, whilst they cannot abstain from providing the assistance before and after the intervention nor may they fail to step in in cases of imminent danger for the woman's life (Section 9, paragraphs 3 and 5 of Law 194/1978). Recently, the Court of Cassation reiterated this point in its judgment of 2 April 2013 according to which «the right to abortion has been recognized as woman's right to self-determination and if conscientious objectors may legitimately refuse to take part in making such right factual, however they may not refuse to intervene for safeguarding the right to health of the woman, not only following termination of pregnancy but, as seen, whenever there is an imminent danger of life»[3].

Another weak point in implementing the national law on IVG consists, as already pointed out, in the infrequent recourse to pharmacological abortion through mifepristone and prostaglandins, i.e. the RSU486 abortion pill. In theory, this drug has been available to Italian hospitals since 2010, after AIFA (Italian Drugs Agency) authorised its marketing under the following conditions: the use of the drug must comply with the provisions of Law 194/1978; hospitalization must be guaranteed in one of the health care facilities pursuant to Section 8 of Law 194/1978 from the time of administration to the

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1 P. Veronesi, 'Il corpo e la Costituzione. Concretezza dei casi e astrattezza della norma, Giuffrè, Milan, 2007, page 141.

2 Section 9, paragraph 4, Law 194/1978: «Hospitals and licensed health facilities must in any case ensure the carrying out of the procedures provided for by Section 7 and the carrying out of the operations required for the termination of pregnancy in the manner prescribed by Sections 5, 7 and 8. The region controls and ensures said performance also through the mobility of staff.»

3 Court of Cassation, Criminal Section, judgment No. 14979 of 2.04.2013.

verification that the product of conception has been expelled; all the different steps involved in an abortion must be supervised by a physician. In addition, unlike other European Countries in which pharmacological abortion may be performed up to the 63rd day of amenorrhea, AIFA allowed the pill to be used only up to the 49th day of amenorrhea. The way the RSU486 pill is administered in Italy departs from what is the case in the rest of Europe, not only as for the duration of pregnancy but also regarding the need for hospitalization. France, for example, has authorised since 2004 the RSU486 pill to be taken outside of the hospital – i.e. at home. Therefore, the Italian concern seems to be that abortion is handled in private, without any social control, thus mistaking confidentiality by loneliness[4]. In fact, it is exactly the need for hospitalization that has, de facto, hindered the recourse to pharmacological abortion in Italy, not to mention that heath care facilities do not always have the drug available[5]. This is in contrast with the recommendations of the World Health Organization concerning the issue of safe abortion, whereby pharmacological abortion is the method to be preferred within the first 9 weeks of pregnancy[6].

Medically assisted reproduction

Since its enactment, Law 40/2004 has provoked a fierce debate and even today, nine years after its entry into force and after the failure of the 2005 referendum, this debate goes on - partly as a result of the many different judicial decisions at national and supranational level. Such decisions have partly corrected the ideological framework of

4 G. Brunelli, *L'interruzione volontaria della gravidanza: come si ostacola l'applicazione di una legge (a contenuto costituzionalmente vincolato*), in *Il Diritto Costituzionale come regola and limite al potere*, vol. III, *Dei Diritti e dell'Eguaglianza*, Jovene, Naples, 2009, page 855.

5 (Italian) Ministry of health, *Interruzione volontaria di gravidanza con mifepristone e prostaglandine. Anni 2010-2011*, in www.salute.gov.it

6 World Health Organization, *Safe abortion: Technical and Policy Guidance for Health System. Second edition*, Geneve, 2012, page 31

a law that can be easily appreciated to be based on a network of prohibitions and obligations and, in its original layout, is devoid of any reference to woman's personal dimension, her dignity and rights.

In the first place, it is necessary to point out that in regulating MAR the Italian lawgiver defines it as a therapeutic method, a treatment for sterility and infertility. In this way, MAR techniques are included in the right to health pursuant to Article 32 of the Constitution, but at the same time their use is restricted to certain categories of citizens, i.e., those provided for by Section 5: heterosexual couples of age, married or cohabiting, of childbearing age. Therefore, an ideal family model is being imposed: that of a bi-parental family based on stable heterosexual couple. This choice is fully in line with the prohibition against heterologous fertilization, the only one viable in case of homosexual couples or single women, who are thus prevented from having recourse to MAR, and raises compatibility problems not only with the right to health but also with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms - which sets forth the right to respect for private and family life and limits any interference with the exercise of that right by a public authority to the measures that, in a democratic society, are needed «in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. ». In this regard, it may be useful to recall that the above Convention becomes part of our Constitutional order indirectly, i.e. by way of the reference to compliance with international obligations made in Article 117 of the Constitution.[7]

Secondly, in Law 40/2004 the lawgiver safeguards the fertilized cell, which is termed generically as "the conceived entity", so much so that its status is considered in some cases to take priority over that of the other individuals involved in the MAR – and in particular the

7 About the role of ECHR in our legal system, see the judgments of the Constitutional Court Nos. 347 and 348 of 2007

mother. This is actually how the provisions should be construed whereby it is prohibited to withdraw the consent to the use of MAR techniques once the egg cell is fertilised – which imposes an incoercible obligation on the woman to undergo implantation at all events; the same applies to the provision made in Section 14, which prohibited, before the intervention of the Constitutional Court[8], creating more than three embryos to be implanted simultaneously (paragraph 1 of that section prohibits cryopreservation and suppression of the embryos). In addition to affecting woman's right to self-determination and health, the latter provision prevented pre-implantation genetic diagnosis in order to implant only the healthy embryo in the womb.

In 2009, the Constitutional Court issued a ruling on Section 14 of Law 40/2004. As well as declaring the said section unconstitutional to the extent it provided for the creation of maximum three embryos, to be implanted simultaneously, it found that pre-implantation genetic diagnosis could be considered an instance of eugenics when aimed to give birth to healthy children, i.e. not suffering from serious diseases and malformations[9]. In fact, the Court found that the above provision served the protection of the right to health of both the woman and the foetus. However, such a pronouncement, although important, is fraught with a limitation – namely, it considers the admissibility of preimplantation genetic diagnosis only and exclusively in relation to sterile or infertile couples, the only ones that may resort to MAR techniques. This means that the recourse to MAR and, therefore, to preimplantation genetic diagnosis is not allowed currently to all those non-sterile or non-infertile persons who suffer from severe genetically transmissible diseases. This is hardly a minor type of discrimination if one focuses on the protection of the right to health that pervades the regulatory interventions on MAR; above all, this is a veritable ban that is in conflict with the Italian legal order as represented by Law 194/1978, which permits abortion within the

8 Constitutional Court, judgment No. 159/2009

9 The Court of Catania expressed its disagreement a few months after the entry into force of Law 40/2004.

third month of pregnancy. It is precisely on that account that the European Court of Human Rights established a violation of Article 8 of the Convention[10] by the Italian State after being seised directly by an Italian non-sterile, non-infertile couple suffering from a severe genetically transmissible disease, who had been denied access to MAR with a view to preimplantation genetic diagnosis by virtue of Law 40/04. Therefore, the Strasbourg Court emphasized the internal inconsistency of the Italian legal order, which on the one hand prevented the couple from relying on preimplantation genetic diagnosis, and on the other hand permits therapeutic abortion (Law 194/1978); accordingly, the Court established the unreasonableness of the prohibition against access to preimplantation diagnosis, which is, in the opinion of the European judges, a disproportioned interference with the applicants' right to private and family life.

However, it should be pointed out that said judgment is not enforceable erga omnes; therefore, the judicial review domestic courts may carry out in respect of the violation of the Convention by domestic legislation and the resulting obligation to not apply such legislation are only limited to the case at hand and can prove poorly effective to ensure an equal protection of the rights of fertile couples.

Indeed, other judges called upon to decide on similar cases cannot but refer to the Italian legislation still in force, which hardly lends itself to being interpreted in a manner consistent with the Convention by going beyond its wording - extremely clear in denying access to MAR techniques by fertile couples. This circumstance was highlighted in the first days of 2014 by the Court of Rome, which filed a request for a ruling to establish the constitutional legitimacy of said law.

Also the ban on heterologous fertilization is under the judicial focus of attention. Recent orders by the Courts of Milan, Florence

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10 Case *Costa and Pavan vs. Italy* [Section X], Appeal No. 54270/10.

and Catania[11] requested the Constitutional Court to evaluate the constitutional legitimacy of Section 4, paragraph 3 of Law 40/2004. In particular, according to the judges, the above provision is against Articles 2, 29 and 31 of the Constitution considering that «the legislative prohibition (…) does not afford the couples who are clinically diagnosed with irreversible infertility or sterility the fundamental right to the thorough fulfilment of the right to private family life and the right to self-determination in relation to the latter»[12].

In this regard it is stressed that, as affirmed also by the Grande Chambre of the European Court of Human Rights[13], the right of a couple to conceive a child is within the scope of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, because these choices are a clear expression of private and family life.

Hence, the right to identity and self-determination of the couple concerning their choices on parenthood is undermined by the prohibition against relying on a fertilization technique, such as the heterologous one, which is actually the only one available allowing a couple to overcome their sterility or infertility problems that cannot be solved otherwise. Besides, and it is important to keep it in mind, the choices in question do not impact other fundamental rights of the individual or any other rights as constitutionally guaranteed [14]. This is the reason for the conflict between the prohibition against heterologous fertilization and Articles 3 and 31 of the Constitution,

11 Reference is made to the order of the Court of Milan of 29.03.2013 (filed on 9 April), to the order of the Court of Catania filed on 13.04.2013 and to the order of the Court of Florence of 23.04. 2013.

12 The words are those of the Court of Milan, but they were not that different from the declarations of the Courts of Florence and Catania in the respective orders for referral to the Constitutional Court

13 ECHR Court, Grande Chambre, 3.11.2011, *S. H. and others vs. Austria*, No. 57813/00.

14 The conception of a child through MAR techniques cannot be considered detrimental to the right of said child to the formal and substantial recognition of its own *status filiationis*, because said right, as the Constitutional Court affirmed through judgment No. 120 of 2001, is «a right that is a constituent element of personal identity, which is protected not only by Articles 7 and 8 of the above mentioned UN Convention on the rights of the child, signed in New York on 20.11.1989, but also by Article 2 of the Constitution».

in terms of the inequality of treatment and of the reasonableness of the legislation itself, since couples with reproductive problems are treated in opposite ways depending exclusively on the type of sterility they suffer from. In addition, the ban on access to medically assisted heterologous reproduction is in stark contrast with the very purposes set out in Section 1 of Law n. 40/2004, which states that the objective of the recourse to MAR is to facilitate the solution of the reproductive problems deriving from a couple's sterility or infertility. Finally, the judges observed that not to allow the donation of gametes conflicts with Articles 3 and 32 of the Constitution, because the prohibition against heterologous fertilization entails the risk of not protecting the physical and mental integrity of the couples. MAR techniques are, in fact, therapeutic remedies aimed at overcoming both the physiological cause and the psychological suffering that always and inevitably goes with the difficulties of the couple in the fulfilment of their desire of parenthood. As to the choice among the different existing therapeutic tools to overcome the problems related to the fertility of a couple, «the decisions of the Constitutional Court have repeatedly emphasized the limits placed on legislative discretion by scientific and experimental achievements, which evolve continuously and on which medical practice is based: so that, in the field of therapeutic practice, the basic rule should consist in the autonomy and responsibility of the doctor who, with the patient's consent, makes the necessary professional choices»[15].

In short, the judges stigmatize the choice made by Parliament – which is actually the only one of its kind in Europe - in prohibiting heterologous fertilization as such; they consider this as a violation of the right to health, unreasonably discriminatory, contrary to medical ethics[16], and above all they acknowledge that the desire to have a child, the interest in being parents, is protected both by the Constitution and by conventional instruments.

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15 See judgment No. 151 of the Constitutional Court of 2009.

16 On this, please, see C. Casonato, *Legge 40 e principio di non contraddizione: una valutazione di impatto normativo* in *La procreazione medicalmente assistita. Ombre e luci*, by E. Camassa, C. Casonato, University of Trento, Trento, 2005, p. 37 and following.

Finally, it should be pointed out that the Italian legal system allows conscientious objection by medical and nursing staff also in respect of medically assisted reproduction – by way of Section 16 in Law 40/2004.

Istanbul Convention

On 19 June 2013 the Senate of the Republic unanimously passed a bill ratifying Council of Europe's Convention on preventing and combating the violence against women and domestic violence, drawn up in Istanbul on 11 May 2011.

In the Preamble of the Convention it is stated that the member States of the Council of Europe and the other future signatories, aspiring to «create a Europe free from violence against women and domestic violence», condemn all forms of violence against women and domestic violence; recognise that the realisation of de jure and de facto equality is a key element in the prevention of violence against women; that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women. In addition, they recognise the structural nature of violence against women as gender-based, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.

On the basis of the above considerations, the purposes of the Convention are to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence, and to contribute to the elimination of all forms

of discrimination against women and promote substantive equality between women and men, including by empowering the autonomy and self-determination of the women.

The signatory States commit themselves to take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention, and to provide a global response to violence against women.

In order to stop what is often defined as a "massacre of women", the Convention determines as primary remedies those of prevention, awareness-raising, education, and training of professionals dealing with the victims or the perpetrators of the acts of violence. The intention is to «promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of inferiority of women or stereotyped roles for women and men» (Article 12.1) – that is, a veritable change of the way of thinking, for the fulfilment of which the co-operation of the private sector and of the mass media is required, which, with due respect for their independence and freedom of expression, shall be encouraged by the States «to participate in the elaboration and implementation of policies and to set guidelines and self-regulatory standards to prevent violence against women and to enhance respect for their dignity» (Article 17.1).

Concerning the issue of the protection and support of the victims of acts of violence, the Convention (Article 18) commits the States to take a wide range of measures based on an integrated approach which takes into account the relationships between victims, perpetrators, children and their wider social environment, in addition to, among others, measures aiming at avoiding secondary victimisation and increasing the autonomy and economic independence of women

victims of violence, because often it is exactly the lack of this element, especially in the domestic sphere, that prevents women from disengaging herself from repeated episodes of violence. It is also specified that the provision of services shall not depend on the victim's willingness to press charges or testify against any perpetrator of the violence.

As to substantive law, the Convention requires States parties to criminally prosecute a number of violent behaviours against women, such as stalking, physical and psychological violence, rape, forced marriage, genital mutilations, forced abortion or sterilization and sexual harassment. Besides, the States shall guarantee to provide the victims with adequate civil remedies against the perpetrator who is obliged to the compensation of damages. Reference should also be made to the provision according to which « Parties shall take the necessary legislative or other measures to provide victims, in accordance with the general principles of international law, with adequate civil remedies against State authorities that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers»: this is veritable liability rule applying to the State and of its authorities.

In addition, the Convention includes provisions on migration and asylum (Chapter VII), requiring States to grant autonomous residence permits to those victims whose residence permits depend on those of their partners in the event of the dissolution of the marriage or the relationship, or in the presence of particularly difficult circumstances. Besides, regarding asylum applications, a gender-sensitive interpretation is required in respect of the Convention on the Status of Refugees of 1951.

In addition, the signatory States shall commit to adopt the necessary measures «to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstance to any Country where their life would be at risk or where they might

be subjected to torture or inhuman or degrading treatment or punishment» (Article 61.2).

Finally, in order to ensure the efficient implementation of its provisions the Convention establishes a specific monitoring mechanism, the GREVIO (Group of experts on action against violence against women and domestic violence), which shall examine the report on the legislative and other measures aiming to the implementation of the mentioned Convention, submitted by the States parties to the Secretary General of the Council of Europe. In this regard it is important to point out that GREVIO may receive information from non-governmental organisations and the civil society, as well as from National institutions for the protection of human rights (Article 68).

Femicide

In Italy there is no ad hoc provision for punishing femicide, i.e. the murder of a woman as such, although the usefulness of such a provision has been discussed for a long time at least in terms of its general preventive function - given the difficulty in proving the mens rea at trial.

Therefore, the killing of a woman, at least until today, falls within the scope of the provisions of Article 575 of the Criminal Code which punishes murder. There are aggravating circumstances in the event the crime is perpetrated during rape, also when committed by a group, sexual acts with minors (Article 576, No. 5) of the Criminal Code), and in case the perpetrator has also who committed acts of persecution against the victim (Article 576, No. 5.1) of the Criminal Code).

Rape

After a 20-year long parliamentary procedure, Law 66 of 15 February 1996 finally included rape among the criminal offences against personal freedom, thus departing from the categorization followed previously whereby it was considered a crime against public morals and decency.

In this way, the dignity of the victim was restored by her being finally considered a "person" and new statutory offences were introduced to safeguard self-determination in sexual matters, i.e. Sections 609 bis to 609 decies of the (Italian) Criminal Code. In addition, the statutory definition of a consolidated criminal offence was introduced termed "sexual acts", which covers also the cases in which there was no physical contact between victim and aggressor. The previous legislation envisaged different punishments for rape and sexual assault, respectively.

The purpose of Law 66/1996 is two-fold: to prevent abuses and violence, and to punish perpetrators; indeed, the penalties for rape are more severe than in the past. It is addressed to all those individuals, be they males or females, of age or minors, that are forced to perform or undergo sexual acts through violence, threats or misuse of power. In actual fact, it is mainly to women and children that the law aims to offer protection, because they are affected by this type of crime to a greater extent on account of their being weaker both physically and, especially in the case of children, psychologically.

In this regard, suffice it to mention here that special protection is afforded to children[17] because of their mental and physical immaturity, their resulting inability to express an automatically free and informed consent, their inexperience and the highly damaging

17 See Sections 609 *ter*, paragraph 1, No. 1) and 5) of the Criminal Code providing for the aggravation of the punishment in case violence was perpetrated against a minor, 609 *quater* Criminal Code punishing sexual acts with minors, 609 *quinques* Criminal Code concerning child abuse.

consequences for their balanced and harmonious growth progress. And it is precisely on consent to the sexual act that all the Italian criminal legislation aimed at the suppression and punishment of sexual abuse is focused.

In fact, Article 609 bis of the (Italian) Criminal Code, which is mainly related to rape, provides for two statutory types of rape – i.e. by coercion, if committed through violence, threats or misuse of power, or by inducement.

To prevent that the rapist remains basically unpunished, a penalty ranging between 5 and 10 years of imprisonment is provided for, so as to make it impossible to plea bargain (which is conversely permitted in case of custodial penalties under two years). The offence may be prosecuted on the non-revocable charge filed by the woman; the time limit for filing the charge was extended to 6 months, whilst it is 3 months for the other offenses punishable on complaint by a party pursuant to the Criminal Code.

There are aggravating circumstances (Section 609 ter of the Criminal Code) entailing an increased punishment of up to 12 years, many of them in consideration of the age of the rape victim (i.e., the fact of being not of age) and of the particular familiarity and degree of kinship with the offender; others are related to the use of weapons or alcohol, narcotics, drugs or other methods and way to inhibit the possibility of providing a free consent to the sexual act by the victim, or to the fact that the perpetrator is in disguise or purports to be a public official or civil servant and to the circumstance that the violence is committed on a person subject in any way to a limitation of personal freedom.

In addition, aggravating circumstances are specified in Law 119/2013 containing «Urgent provisions for safety and for fighting gender violence and concerning civil protection and the placement of the provinces under administration by a commissioner»; in

particular, paragraph 5-ter was added to Section 609 ter, by virtue of which the punishment is increased if the facts provided for in Article 609 bis are committed against a pregnant woman, whilst paragraph 5) quater provides for an increased punishment if the rape is committed against a person of which the offender is the spouse, even separated or divorced, or else a person that is or was linked to the victim by an affective relationship even without cohabitation.

It is worth to point out that one of the most important innovations brought about by Law 66/1996 is the introduction of gang-rape (Section 609 octies of the Criminal Code) consisting in the participation of several persons acting together in acts of rape. In order for the offense to be committed, it is not necessary that all perpetrators materially perform the violence, being sufficient that they are present in the same place and at the same time and have agreed on the acts to be performed even by just one of the members of the group.

Domestic violence

The Criminal Code includes a specific provision for domestic violence, in addition to those protecting the individual in general: this is Section 572 of the Criminal Code, concerning "Maltreatment in the family or toward children", in the Chapter on crimes against the family.

In 2001, Law 154 was passed providing for new civil and criminal measures aimed to counter domestic violence effectively. Specifically, in criminal cases, the law introduced Article 282 bis in the Criminal Procedure Code providing for the precautionary measure of removing the violent offender from the family home. Following commission of a crime involving physical and psychological violence against a family member, the public prosecutor may thus request the judge in charge, during the preliminary investigation or the trial, to take the

above measure in the event necessity and urgency preconditions are met. Regarding civil law, protection orders against family maltreatment were introduced (Sections 342-bis and 342-ter of the Civil Code); they may be applied for by the victim of violence, also without the assistance of a lawyer, by filing a petition with the judge when the applicant suffers serious harm to life, mental health and personal freedom because of the behaviour of a family member.

Besides, still in 2001, Laws 60 and 134 were passed on legal aid for women victims of rape and maltreatment.

In this regard, it is to be pointed out that the issue of the woman's economic independence and subjection to man, at least under this respect, is the focus of the current policies concerning violence on women. This is an issue strictly connected with woman's self-determination. In particular, we would like to stress the general support services provided for by Chapter IV of the Convention concerning protection and support of the victims of violence, where reference is made to measures that "aim at the empowerment and economic independence of women victims of violence" (Article 18.3) which have become binding on Italy as well.

As already mentioned, there are provisions relating to domestic violence in Law 119/2013 on «Urgent provisions for safety and for combating gender violence and in the field of civil protection and placement of the provinces under administration by a commissioner». Firstly, paragraph 11-quinquies is added to Section 61 of the Criminal Code, listing general aggravating circumstances, to the effect that one of such aggravating circumstances consists, for any criminal offences committed with criminal intent against life and integrity or personal freedom, or in the case of the offence provided for in Section 572, in having acted in the presence of or by causing harm to a person aged under 18 years or a pregnant woman.

Section 3 of the law, paragraph 1, in addition provides that in the cases in which the police is notified of a fact that may be related to the crime provided for in Article 582, paragraph 2 of the Criminal

Code (minor bodily injury, punishable on complaint), whether committed or attempted, in the context of domestic violence, the questore (provincial head of police) may,, even if a complaint has not been filed, proceed with the admonition of the perpetrator, after having obtained the necessary information from the investigation teams and hearing the persons informed about the facts of the case. In addition, Section 380 of the Criminal Procedure Code was amended to provide for mandatory arrest in flagrante delicto in case of maltreatment, committed or attempted, in a family context.

Also Section 609 decies of the Criminal Code was amended, because the crime of domestic violence was added to those other criminal offences that, where committed either against a child or by either parent of an underage child, have to be reported by the Public Prosecutor to the Juvenile Court – also with a view to taking the measures provided for in Section 155 (court orders in case of separation or divorce) and subsequent ones and in Sections 330 (disqualification from parental authority) and 333 (parent's conduct being prejudicial to the children) of the Civil Code.

As to precautionary measures, the above new law provides for the urgent removal from home in the event the offender is caught in the act of committing any of the offences mentioned in Section 282 bis of the Criminal Procedure Code - including domestic violence. In these cases, the police are empowered to order the perpetrator to be removed immediately from the family home and prohibited from getting closer to any places that are usually visited by the victim – subject to the public prosecutor's prior authorization, and where there are sound reasons to believe that the criminal conduct may be repeated and expose the victim to serious and factual danger for her life or bodily or mental integrity. In addition, the law provides that any request for revocation of the precautionary measures in a proceeding instituted for a crime committed with violence, where it was not proposed during the initial interview of the defendant, must be served under the applicant's responsibility and under penalty of inadmissibility, on the defence counsel of the victim or, failing this,

directly on the victim . The same applies to the request for revocation of said measures after the closing of the pre-trial investigation.

The same law provides for the protection of foreigners who are victims of domestic violence and who may apply for obtaining an autonomous residence permit where their own depends on the permit of another family member. In addition, the law provides that the residence permit may be revoked and a deportation order may be issued with regard to foreigners sentenced, also on the basis of a non-final judgment and including the sentence imposed further to Section 444 of the Criminal Procedure Code, on account of any of the offences provided for in Sections 572, 582, 583, 583 -bis, 605, 609-bis and 612-bis of the Criminal Code or one of those provided for by Article 380 of the Criminal Procedure Code, where committed on the national territory in a context of domestic violence (pursuant to Section 13 of Legislative decree 286/1998 (Consolidated Text on Immigration)).

Stalking

Stalking, that is performing persecutory acts, is a behaviour that became criminally relevant following decree-law 11/2009 concerning public safety – which was converted into Law 38 of 2009, adding Section 612-bis to Chapter III of the Criminal Code i.e. among the offences against individual freedom, in particular against moral freedom.

Said law was conceived by the lawgiver mainly to protect woman's freedom, considering that the adoption of such a measure was called for by Recommendation 5(2002) of the Council of Europe concerning the protection of women against violence as well as by the Third Summit of Heads of State and Government held in Warsaw on 16 and 17 May 2005; during the said Summit, a Campaign to combat violence against women, including domestic

violence, was launched, whose technical project was approved by the Council of Ministers on 21 June 2006. In actual fact, the Italian statutory definition of the offence is worded in a gender-neutral way, since the victims may be men as well as women.

In this regard, it should be noted that whilst in the context of rape - whose statutory definition is also worded in a gender-neutral way - the relevant provisions were hardly, if ever, applied to situations in which the victim was an adult man, there is a greater number of stalking cases where men are the victims and women the perpetrators.

Actually, Decree-law 11/2009 introduced not only a new statutory definition of a criminal offence and a specific aggravating circumstance in the event the stalker kills the victim (Section576 No. 5.1 of the Criminal Code), but also a more comprehensive regulation of the phenomenon.

As well as providing for an admonition to be issued by the questore and a new precautionary measure (Section 282-ter) consisting in the ban to get close to any places that are patronised by the victim, measures to support victims are envisaged (Sections 11 and 12 of the decree No. 11/2009); further, Section 342-ter of the Civil Code was amended regarding removal from the family home by extending to one year the maximum duration of the relevant order.

Additionally, the police are empowered to order the perpetrator to be removed immediately from the family home if the offender is caught in the act of committing any of the offences referred to in Section 282-bis of the Criminal procedure code (including stalking committed by the spouse, whether separated or not, or by a person linked to the victim by an emotional/loving relationship).

In that case the police may order the offender to be removed immediately from the family home and prohibited from getting closer to any places that are usually visited by the victim – subject

to the public prosecutor's prior authorization granted or confirmed in writing or electronically, and where there are sound reasons to believe that the criminal conduct may be repeated and expose the victim to serious and factual danger for her life or bodily or mental integrity. In addition, the law provides that any request for revocation of the precautionary measures in a proceeding instituted for a crime committed with violence, where it was not proposed during the initial interview of the defendant, must be served, under the applicant's responsibility and under penalty of inadmissibility, on the defence counsel of the victim or, failing this, directly on the victim . The same applies to the request for revocation of said measures after the closing of the pre-trial investigation.

It should also be noted that the maximum punishment of 4 years' imprisonment provided for by the law for the new crime of stalking also allows for the application of the precautionary measure during imprisonment pursuant to Section 280, paragraph 2 of the Criminal Procedure Code.

As to the perpetrators of such kind of violence and, in general, of violence against women, it is worth stressing that the lawgiver in 2013, complying with the provisions of Istanbul Convention, seemed to attach importance to support programs for said perpetrators; indeed, Section 282 quater of the Criminal Procedure Code was amended to provide that if the defendant successfully follows a violence prevention program organized by the geographically competent social services, the service manager informs the public prosecutor and the judge accordingly with a view to evaluating the revocation or change of the measure.

Law 119/2013 also addressed the aggravating circumstances of the offense. In particular, it provides for an increased punishment where the perpetrator is the spouse of the victim and, in the event of separation, regardless of whether the couple are separated de facto and not legally[18]. Besides, in line with the widespread use of IT,

18 The previous text of paragraph 2 of Section 612 bis was as follows: «The punishment shall be extended if the fact is perpetrated by the legally separated or divorced spouse or by a person

especially e-mails and social networks, an increase of the penalty is provided for if the offense is performed through computerised or IT tools.

By virtue of an amendment of Section 380 of the Criminal Procedure Code, Law 119/2013, provides for mandatory arrest in case the offender is caught in the act of committing or attempting stalking . Finally, it is provided that in a proceeding instituted on account of the offence at issue being committed against a child or by a child's parent against the other parent, the Public Prosecutor notifies the Juvenile Court also for the adoption of the measures provided for in Section 155 (court orders in case of separation or divorce) and subsequent ones and in Sections 330 (disqualification from parental authority) and 333 (parent's conduct causing harm to the children) of the Civil Code.

Stalking is punished on complaint by the victim and the deadline for filing such complaint was raised to 6 months; by virtue of the amendments made by the lawgiver in 2013, the withdrawal of the complaint may only take place at trial. However, the complaint may not be withdrawn where the fact was committed by way of repeated threats as provided for in Section 612, paragraph 2.

Section 2 of Law 119/2013, provides for the eligibility to free legal aid for the victims of the above offences and ensures absolute priority as to the setting of the dates for the hearings in the court calendar also to the crime of stalking (Section 132 bis of the implementing, co-ordinating and transitional provisions of the Criminal Procedure Code). Regarding procedural rules, it should be pointed out that this law provides that the extension of time-limit set for pre-trial investigations in the case of stalking (Sections 405 and 406 of the Criminal Procedure Code) may be granted only once; the notice of the conclusion of pre-trial investigations (Section 415 bis of the Criminal Procedure Code.) must also be served on the victim's defence counsel or, failing this, on the victim; additionally, as

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that held an affective relationship with the victim»

regards generally all crimes committed through battery, the public prosecutor has to notify the petition for dismissal of charge to the victim.

Female Genital Mutilation

As we saw, the Istanbul Convention considers different kind of genital mutilation as a serious violation of human rights of women and girls and one of the main obstacles to guarantee gender equality. For these reasons the Convention urged States parties to take the necessary legislative measures to ensure female genital mutilations are prosecuted under criminal law. In addition, the 67th Session of the UN General Assembly, opened on 25 September 2012, upon invitation of the EU Parliament[19], unanimously passed a resolution banning Female Genital Mutilations, encouraging the States to introduce in their national legislative framework laws prohibiting such practices and ensuring respect for such laws.

In fact, the Italian legal system already sanctioned said behaviours through Law 7/2006 introducing in the Criminal Code, among crimes against the individual, in particular the crimes against an individual's life and integrity, Articles 583 ter (Feminine Genital Mutilation practices) and 583 quater (providing the ancillary punishment of disqualification from practising their professional activity from three to ten years for doctors convicted of the crime provided for in the previous Article). The specific aim of said provisions is to punish the spreading of these practices in Italy (as a consequence of migration phenomena).

The above practices are typical of some Countries and they are a violation of the fundamental rights to personal integrity, women's and girls' health (girls are more frequently the victims of such episodes), dignity of the human person and the right to communal life.

The issue of Female Genital Mutilation (FGM) is strictly related

19 The reference is to the resolution of 14.06.2012 in which the EU Parliament in "Recital E." stresses that «Female genital mutilation is an expression of unequal power relations and a form of violence against women, alongside other serious forms of gender-based violence, and whereas it is absolutely necessary to embed the fight against female genital mutilation in a general and coherent approach to combating gender-based violence and violence against women,»

to the application for asylum by the victims of such practices. In this regard reference should be made to what was mentioned before concerning the provisions in Istanbul Convention on asylum and migrants - which require the States parties to apply a gender sensitive interpretation to the Convention concerning the refugee status of 1951. At least the Italian case-law would appear to be moving in this direction. A recent pronouncement of the Court of Cagliari[20], considers that FGM are the pre-requisite for the recognition of refugee status pursuant to Section 2 and subsequent ones of Legislative decree 251 of 19.11.2007, implementing Directive 2004/83/CE, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. In particular, the Court based its conclusions on the seriousness of this form of violence, which is considered a pre-requisite for the qualification of person needing international protection by the decisions of the courts of several Countries and, in particular, by the European Court of Human Rights[21]. Therefore, the Court deemed it possible to interpret the provision defining the qualification of refugee (Section, letter e), Legislative decree 251/07) consistently with the above mentioned judgment of the European Court because, «considering female genital mutilation as a act of persecution on the ground of belonging to a particular social group is clearly compatible with the protection of constitutional interests as provided for in Articles 2 and 3 of the Constitution, with specific regard to the protection of inviolable human rights, the principle of equality and equal social dignity, without distinction of sex, in the same manner as with distinctions based on race, language, religion or political opinion».

20 Order of the Court of Cagliari of 3.04.2013

21 The reference is to the case of Emily Collins and Ashley Akaziebie vs. Sweden, Application No. 23944/05, 8.3.2007, in which the Court declared the application inadmissible only because persecution was not found to be attributable to the applicant personally.

Recommendations

1. Eliminating legal and administrative obstacles for a legal abortion that is safe and respectful of the fundamental rights of the women - starting from the elimination of need for a waiting time between the woman's application and the carrying out of the intervention, from personnel policies such as to ensure the availability of non-objector physicians in health care services, from more stringent provisions such as to require physicians that are conscientious objectors to direct the woman to a non-objector physician and to in any case handle the application received.

2. Issuing calls finalized to the allocation to non-objector physicians of the working hours required for voluntary termination of pregnancy. The administration could legitimately prepare future calls finalized to the publication of the vacant positions for the specific counselling centres, by reserving 50% of the posts for non-objector specialist physicians.

3. Making the RSU486 abortion pill available and, in accordance with the guidelines of the WHO, making this abortion technique the preferred option within the first 9 pregnancy weeks; additionally, it would be appropriate to permit the use of the abortion pill within the 63rd day of pregnancy and allow taking said pill also at home or, at least, in an outpatient clinic by providing for the woman to visit the hospital subsequently for the completion of the procedure.

4. Bringing about legislative interventions to change at least the requirements for accessing medically assisted reproduction techniques. First of all, they should be available also to couples without sterility and infertility problems but suffering from

genetically transmissible diseases.

5. Lifting the ban on heterologous fertilization.

6. Fully implementing the provisions contained in the Istanbul Convention by paying specific attention to prevention and education via policies that can promote a veritable cultural shift – so as to do away with biased views and practices grounded in the alleged inferiority of women and, in particular, to promote women's economic independence.

7. Fostering the creation of and strengthening support services, such as anti-violence centres or the so called "sheltered housing", which must have an appropriate geographical distribution.

8. In agreement with the provisions of the Convention, adopting programmes targeted at the perpetrators of the violence in order to avoid recidivism.

9. Promoting the creation of support and assistance centres for the victims of female genital mutilations such as those created by the association "Nosotras" in Florence, where a dedicated helpline for said victims, the first of its kind in Italy, was also made available.

RIGHT TO HEALTH AND FREEDOM OF CARE

By Silvia Demma

Focus

Stamina. This word has captured the attention of the Italians, more than any other, as to the issue of health 35 years after Law 833/78 establishing the (Italian) National Health System. A complex story whose chapters are outlined here to describe what is the state of the right to health in Italy: *freedom of care; access to care; quality of care*. Those chapters are to be contextualized in a scenario heavily influenced by economic recession, in which excellence and serious deficiencies coexist and where, finally, the deepest feelings - fear, hope, anguish, joy – reach their climax in a relationship with rationality that is not always easy.
Starting from the definitions we want to give here for the three issues, we briefly retrace the story of Stamina, although it is not over yet, as it exemplifies the roles of the individual stakeholders.
Freedom of care: a wide and sensitive issue, in which the law provides the limit of what is allowed with respect to health care. It includes the possibility to refuse treatment and access palliative care to contain the pain, alternative healing methods with respect to those proposed by allopathic medicine or, in extremely severe cases, compassionate care via procedures that are still in the experimental stage.

Access to care: this is based on the constitutional principle which is a cornerstone of the law establishing the (Italian) National Health System, which aims to afford all citizens equal rights to health, to smooth out disparities related to income or place of residence that might otherwise transform the opportunity to be

treated into a kind of lottery for the happy few.

Quality of care: this has to do with the mechanisms to guarantee citizens in their relationships with the healthcare world, given the asymmetry – assumed to be likely – of technical and scientific skills between health care services and patient. Here information and transparency become tools to facilitate trust between the parties, the prerequisites for a therapeutic covenant in which error is left in the sphere of the imponderable.

The whole system underwent a deep strain with the Stamina case because the latter is related to high emotional impact events and involves patients in extreme clinical situations. Even if there is a specific law designed to reconcile the piety due under these circumstances with the protection from profiteers playing with patients' hope, the frantic sequence of events after the treatment was allowed by the NHS proved how difficult it was for the individual branches of the State to follow clear-cut, shared procedures in the approach to care.
The citizen's right to self-determination, a key element of the *freedom of care*, is far from being taken for granted in all its aspects in our legal system: it is enough to think of the so-called biological will to appreciate the reluctance of the lawgiver to step in where this freedom involves one's life. For the children involved in the Stamina case, who by definition cannot express their informed consent to the treatment, freedom of care seems to have prevailed over the attention paid to survival, to the precautionary principle that should protect minors in the first place. To date, in fact, there are no shared assessments on the efficacy of the therapy, let alone on its potential harmfulness. Standardized procedures at international level for which studies, publications, scientific debate and, unfortunately, years are necessary to avoid harmful treatments have been set aside: «It is important to consider that after over a year of administration of the stamina method at the defendant health care agency, no case of unfavourable or partially negative results has been report-

ed»: this can be read, for example, in the judicial order authorising the treatment. The same order limits the intervention of the Ethics Committee, which is another tool that is useful for protecting those who, in a desperate situation, would submit themselves voluntarily to any therapy and that should protect minors – possibly – also from the humanly understandable desperation of their parents: «Having considered (…) that (…) given the very serious conditions applying to the claimant (…) also the Ethics Committee's opinion cannot include a global, detailed evaluation as to the likely effectiveness of the treatment undertaken, requiring studies and trials that are in themselves incompatible with the tight schedule and the urgency of the case»[1].

Another well-trodden path is the judicial one, in Court, to get *access to care* at the "Spedali Civili", the public hospital at the centre of the controversy. Here, according to one of the protagonists, Stamina had arrived in September 2011 allegedly on grounds other than a disinterested scientific curiosity: «A manager of the Lombardy Region suffered from (...) a progressive neurological disease. He thought we could treat him and favoured the entry of our method at the "Spedali" of Brescia. Also local managers had brothers, brothers-in-law or husbands to be treated (…) therefore we decided to treat persons with connections first»[2]. In fact, until that time the costs for the treatment were borne by patients, who reportedly had to pay around €50,000[3].

On the other hand, there is the attempt made by the NHS - obliged to follow effectiveness criteria in providing care and to also ensure the sustainability of the system – to close the door to judicial interpretations on the comprehensive definitions of compassionate care

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1 Court of Mantua, Order, proc. 1740/2013, 2/5/13, http://www.ilcaso.it/giurisprudenza/archivio/9036.pdf

2 Interview of M. Andolina at Presadiretta, rai3, 14/01/14, quoted by national dailies. For the reconstruction of the very first steps of the story see also: Angelini L., *"Staminali, il giallo del primo paziente. I dati anagrafici del primo paziente coincidono con quelli di un alto dirigente regionale of the Sanità",* "Corriere della Sera"/Brescia, 7/12/12

3 Mangili C., "*Stamina gratis? Era tutto a pagamento. Mio marito: ne approfittano. Poi è morto*", "L'Eco di Bergamo", 10/01/14; "*Stamina, inchiesta verso la chiusura. Fonti investigative: "Venti indagati""*, La Stampa, 18/1/14

and technical-scientific subjects. The bombshell exploded in May 2012 when AIFA (Italian Drugs Agency) ordered the treatments to be stopped. In August there came the first judgment which ordered the treatment to be recommenced for a little girl[4]. The appeals against the initial order then multiplied and the Decree of March 2013, converted into law in May, allowed completing the treatments already started - thereby introducing inequality among citizens with respect to access to care. This is no minor issue, so much so that a magistrate requested the opinion of the Constitutional Court[5]. It must be said that the views of the judges on this issue are split and therefore there are several judgments rejecting requests for access to this treatment on the ground of its poor scientific guarantees.
The impact of the appeals fell on the hospital in Brescia: Stamina used its laboratories for producing the mixture then administered in a department of the structure. The 12 patients of the group mentioned in the Decree were joined by other 350 on the waiting list who had lodged their appeals with the judiciary. This waiting list is likely to increase until uncertainty persists. This was a significant impact in many ways, not least on account of the costs: for hospitalizations (around 10.000 €/patient) and legal costs, and to challenge the applications for treatment (little less than €180,000 in 2013[6] and 500,000[7] in 2014).

The opposition by the "Spedali" highlights the *quality of care* issue and the procedures for assessing it, also in the context of compassionate care. Indeed, if current regulations were enough, AIFA's provisions would have cut the discussion on this matter short. Instead, the debate flared up and was also fuelled by the perhaps excessively optimistic tones of the supporters, according to whom the therapy would be a panacea for multitudes without care.

4 Court of Venice, Labour sect., order of 30/8/12

5 Court of Taranto, Labour sect., order 23 of 24/9/13

6 Dusi E., "*Stamina, gli Spedali Civili di Brescia: 'Basta, è un inferno. Situazione impossibile'*", "La Repubblica", 28/09/13

7 Lozito F., "*Stamina, le sentenze del TAR del Lazio e il nodo giuridico*", *Lettera 43*, online daily newspaper, 25/12/13 http://www.lettera43.it/cronaca/stamina-le-sentenze-del-TAR del Lazio-e-il-nodo-giuridico_43675118566.htm

To settle the issue, Parliament in an exceptionally short time ordered the conversion of the Decree into law and the starting of a clinical trial, partially derogating from the provisions of the legislation in force.
A possible *deregulation* in the field of stem cells in Italy is observed with great concern also from abroad, because research is very active in this sector due to the advances in treatment it would appear to enable; however, reckless businessmen are also quite keen on this sector.

The invitation to recognize the importance of controls to protect patients[8] was accepted and therefore compliance was ensured with some key elements of clinical trials pursuant to international regulations. Essentially, at least one of the terms on which the debate is focused was clarified: the method cannot be equated to a transplantation, but – at least in theory – it is a drug, given the type of manipulation the cells undergo. However, the method never reached the clinical trial stage because it did not pass the preliminary assessment by the committee of experts appointed by the Ministry of Health.

Many members of the committee expressed their unfavourable opinion even before examining the study protocol in detail. According to the TAR (Regional Administrative Court) of Latium, this was an indication of unfair assessment; hence the Court ordered the appointment of a new committee «consisting of members, possibly also from abroad, who have not expressed their opinion on this issue or, where impossible, because all experts have already taken a stand, the Committee should include an equal number of experts who have voiced their support for the said method»[9] in order to reach a final opinion.

8 *"ISSCR Emphasizes Importance of Regulatory Oversight for Stem Cell Products for Clinical Use"*, Apr. 22, 2013
9 TAR del Lazio (Regional Administrative Court for Latium), order 8730/2013

Besides, although the allegations of pressure exerted by the pharma industry are in general not unfounded, as the supporters of Stamina vigorously pointed out, the international debate focuses more on increasing the accessibility of the data than on blindly trusting the quality of care – which is apparently the preferred approach for the inventor of the method : «Clinical trials are just window dressing, a gift to the scientific community and transparency, but they are not for patients»[10].

For example, the international petition *All Trial,* goes in the direction of increased oversight and is supported by influential signatories to get transparency on investigational data. Sometimes these data were at least in part not disclosed, as the Tamiflu case highlighted, since the manufacturer – Roche – legally retained part of the data[11]. The same direction is followed by associations such as "Famiglie SMA" and "Luca Coscioni"[12], which more than once intervened also to oppose the exploitation of patients' suffering.
Pending new developments in the case, the story reveals how delicate a role the law plays when applied to reality and how much care the lawgiver should take in writing the laws, especially in this period. Streamlining, cuts to wasteful spending and sustainability have been the buzzwords in health care for the past few years, reinforced by the recession and the appeal to contain the budgetary deficit - which almost led to forgetting Article 32 of the Constitution, where health is defined as " *a fundamental right of the individual and as a collective interest".*

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10 Declaration by D. Vannoni, Rome, ANSA, 1/8/13

11 Maciocco G., "*Il caso Tamiflu*", com.unità, 3/2/13, http://salutepertutti.com.unita.it/sociale/2013/02/03/il-caso-tamiflu/
Godlee F., "*Clinical trial data for all drugs in current use*", 29/10/12, British Medical Journal
Goldacre B., "*It's a scandal drug trial results are still being withheld*", The Guardian, 5/1/14

12 In this regard, see: http://www.famigliesma.org/index.php?option=com_content&view=article&id=400:famiglie-sma-perche-l-atrofia-muscolare-spinale-sma-and-esclusa-dalla-sperimentazione-stamina&catid=118:contenitore-ricerca-staminali&Itemid=654#.Uj78YobIbpU; http://www.associazionelucacoscioni.it/comunicato/smascherata-sul-corriere-la-malafede-di-vannoni

This right justifies the expenditure for medical care provided to individuals by way of the commitment undertaken in Article 3 of the Constitution "*to remove those obstacles of an economic or social nature which constrain freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the Country.*" The organisation of a medical system capable of mitigating the substantial differences between individuals is considered an investment in favour of the community as a whole, as pointed out by the World Health Organization: «*A better medical system is fundamental for human happiness and wellbeing. In addition, it contributes significantly to economic progress, because healthier populations live longer, are more productive and can save more*."

Therefore, it is in the fragile balance between spending for pursuing health and the constraints imposed by the current economic situation that the struggle is being waged to ensure the current and future enjoyment of this right in Italy - a sort of indication of the orientation of relationships within society. Some data may help understand the complexity of the universe that revolves around the right to health and the barriers to its enjoyment.
Who works for health? At the end of 2012, the Italian National Health System had 672,051 employees[13] (in addition to doctors and nurses, administrative staff, technicians, veterinarians – the health of the animals is linked to human health, Bovine Spongiform Encephalopathy "*docet*" - porters, cooks and managers). In addition there are 60,000 chemists[14], pharma industry employees – about 60,000 more – plus as many workers in related industries, without forgetting the several thousand workers in subsidised healthcare facilities (hospitals, laboratories), social cooperatives and voluntary

13 The State's General Accounting Department, Analysis of some data of the annual General Statement of Accounts of the period 2007-2012, 16/12/13
14 Data from: http://www.federfarma.it/Farmaci-and-farmacie/Notizie-and-dati-dall-Europa/Numero-di-farmacisti.aspx

work[15]. It is not just a matter of jobs, even though this is no secondary issue: research and innovation are strategic for economy as well as for health care and have in this field one of their natural locations. The above considerations lead one to shift the gaze to the future: of the little more than 59 million residents, over 12 million are older than 65[16], corresponding to 147.2 every 100 individuals under 15 years[17]. This is yet another challenge to the sustainability of the whole system, together with the exponential growth, for example, of the price of cancer drugs[18], for which sometimes progress is measured via a few weeks' increase in survival rates[19]. The very conformation of Italy's territory – about 20% of the population lives in mountain areas – is a challenge to the universality of the right to care in an age where expensive equipment and up-to-date medical teams are required to achieve excellent results.

A predicament not easy to sort out, given the broad array of byzantine bureaucracy, lengthy negotiations between the different political forces and interventions of the judiciary, overshadowing the results obtained in relation to expenditure, less than elsewhere as shown by data comparing the situation in Italy with that in the U.S.A. – where access to health care depends to a large extent on private insurance - and in two European countries that are often taken as terms of comparison.

Per capita GNP (US $)	32,400	35,910	40,230	48,820
Total per capita health expenditure (US $)	3,435.6	4,952.0	4,875.0	8,607.9
Quota paid by government bodies over the total health expenditure	77.2%	76.7%	75.9%	45.9%
Child mortality rate (under-5 per 1,000 live births)	4	4	4	8
Maternal death rate (per 1,000 live births). Data 2010	4	8	7	21
Life expectancy (years)	82	82	81	79

(Source: World Health Organization, data 2011, unless otherwise explained, http://apps.who.int/gho/data/node.main

15 UniCredit Foundation, "Ricerca sul valore economico del Terzo Settore in Italia", 2012

16 Source: ISTAT, Resident population as of 1 January 2012 for age, gender and marital status in Italy, (my data processing)

17 Istat, Noi Italia

18 http://www.mskcc.org/research/health-policy-outcomes/cost-drugs

19 Hall S. S., *The Cost of Living*, New York, Oct 20, 13

Discriminations and violence

More than just a review of the cases in which the right to health was violated or discrimination occurred, one can provide "clues" about the grey areas that affect prevention and care, with a warning: some victims may not perceive to be such, others – aware of the violence suffered – may not have the strength or the means to denounce, others found the courage to speak up just for "one day" and then seem to fall into oblivion for the rest of the year.

6 January 2013. **Rome. Barriers to health care: language**. A research highlights the embarrassment of British patients to ask for an explanation on diagnosis and treatment. Interviews to Italian physicians confirm: the problem is widespread even among young patients and has consequences on the outcomes of treatments also involving the taking of drugs.

23 January 2013. Rome. Ethics is missing: bribes for treatment. An Italian out of 10 has allegedly paid bribes to access health care services. The figures emerged at the First Italian Meeting on Ethics in National Public Health sponsored by ISPE (Institute for the promotion of ethics in health care). Corruption in health care was said to amount to 10 billion Euro/year in Italy.

1 February 2013. Drugs in Italy: The survey by OsMed (Observatory on the use of medicines) is published. The data for the first nine months in 2012 are as follows: Italians spend out of their own pocket more than € 5.5 billion in drugs, in part (651 million) to purchase the branded product instead of the generic one. Consumption increases: on average, one dose a day per capita, with substantial regional variations. The boom of antidepressants continues and the use of antibiotics decreases for the first time: -6.4%. While AIFA (Italian Medicines Agency) highlights the effect produced by the decrease in the prices of subsidized drugs on the containment of expenditure, Federfarma (Italian National Association of Owners of Pharmacies) stresses the lack of access to new medicines on the

Italian market in 2012, including anticancer drugs and drugs against hepatitis C.

16 March 2013. Brussels. **Pollution:** costs for health. Because of coal power plants Italian health is said to pay € 857 million.

This estimate is shown in the report by *Health and Environment Alliance*, active in 26 European countries. Italy ranks reportedly 10th among EU member states for health care costs related to this cause. 6,000 deaths and over € 10 billion would be saved in Italy if thin dust particles were reduced by 50%.

28 March, 2013 Racale (LE). Freedom of care: the first "Cannabis social club" is discovered. Over 1,000 patients joined for the cultivation of cannabis for therapeutic use. According to the organizers, patients turn to the "black market" because the legal purchase of the substance is very complicated.

A few days later, **on 4 April**, only one drug of this category obtained the marketing authorisation by AIFA (Italian Medicines Agency)[20], with stricter procedures than those for opioids. This is paradoxical when compared with the news on the legalization of cannabis for recreational use coming from the United States.

1 April 2013. Italy. Access to care: illegal migrants penalized. A study on "Lancet" at European level confirms Italian data: migrants' health, basically good on arrival due to the fact that sick migrants rarely leave, tends to worsen after their arrival[21]. Among the causes, in addition to poor living conditions, there are their difficulties in accessing public services of medical care.

9 May, 2013 Bologna. Recession: children care also cut. Some signals were highlighted at the National Congress of Sip (Italian Society of Paediatrics): the early use of cow's milk is on the rise for saving purposes; some infectious diseases are increasing also due to the reduced recourse to paid vaccinations, for instance in

20 O.G. No. 100, 30/4/13

21 Ministry of Health, "Relazione sullo stato sanitario del Paese 2011"

the case of bacterial meningitis that mainly affects children under one year and can be deadly.

The situation of chronic diseases worsens: support services decrease, there may be more problems in the supply of the so-called "orphan" drugs – often very expensive - to treat rare medical conditions. A 20-40% decrease is estimated in visits to outpatient clinics subject to payment of a fee ("ticket"), which is confirmed by the 10% increase of the visits by Italian families to free-of-charge outpatient clinics as recorded by INMP (National Institute for Health, Migration and Poverty – NIHMP).

28 June.2013 Rome Guidelines not implemented: the case of rheumatic diseases (700,000 patients). At the Conference "The suitableness of prescribing biologic drugs as means of saving for the community" experts denounced that only one third of the 150,000 patients suffering from severe chronic disabling rheumatic diseases can access the new treatments indicated by national and international guidelines. These are expensive treatments: about € 10.000/ patient/year, but after a year of therapy they can reduce severe disabilities and, consequently, impact on the quality of life. The cost of sick leaves and lower productivity was estimated to be about €1.7 billion/year. The news are related to another piece of information dating back to 14 January: Apmar (Association of People with Rheumatic Disease) denounced a series of thefts of biological drugs for rheumatoid arthritis, psoriasis and Crohn's disease from in-hospital pharmacies in various areas in Italy.

29 July. 2013. Italy cost-saving strategies: oncological patients. «Linear cuts threaten oncological treatments, which are already inadequate in several regions. Instead, we agree on making a more efficient use of resources». The President of FAVO (Federation of Italian Voluntary Associations in Oncology) declared the above at the hearing of the joint Committees for Budgetary and Social Affairs at the Chamber of Deputies and he recalled that deaths in acute care wards entail much higher costs because there are no home-care fa-

cilities.

24 September. 2013 Perugia. Health care risks: insurance policies. No insurance company entered bids at the call for tenders for the coverage of "catastrophic" risks with damages exceeding € 800,000 (4-6 cases per year). The Region directly pays damages under that threshold.

9 October 2013. Italy. **Access to care: eye diseases**. On the occasion of the World Sight Day, the Soi (Italian Society of Ophthalmology) denounced: the low cost drug that can stop age-related macular degeneration is not available.

22 November. 2013. Italy. Planning of Expenditure: hepatitis. Considering the data, we need a National plan against hepatitis: Italy has the highest mortality rate for hepatocellular carcinoma in Europe; every day there are about 30 deaths from cirrhosis and hepatocellular carcinoma; there are 1.8 million of hepatitis C carriers. For the World Day, Epac (a non-profit association supporting patients with liver diseases) highlighted that only 9 Regions prepared diagnostic and care pathways for gaining access to new drugs.

14 November 2013 Senate; 26 November 2013 Chamber of Deputies. **Discriminations: Neonates.** Bills were submitted to ensure that all Regions should enable neonatal screenings to detect rare metabolic diseases with often disabling symptoms, especially if not recognized so soon. Currently this type of screening is only available in Tuscany, Umbria and Sardinia.

31 December 2013: Drawing the balance. The National Health Plan (Pact for health) and the update of LEA (Basic levels of health care) - expected, among others, by a 1 million and a half people with rare diseases (as estimated by Minister Balduzzi in February) – were postponed. The distorting effect of the regionalization of health care services is confirmed, so much so that the fruition of health care services is a variable depending on a person's residence[22].

22 Ministry of Health, Fulfilment of the "continuity in the provision of LEA (Basic levels of health

The differences are related to the cuts to health care and the payback plans for the Regions in deficit; however, they are also a direct consequence of the multiplication of procedures and the difficult coordination to be achieved via the State – Regions Conference.

While Italians do without treatments or "manage" somehow to get them – with the help of *coupons* for discounted services[23] and aid from the Banco Farmaceutico (a non-profit foundation that collects medicines for indigent people)[24] - one of the causes of the demand for health care is made clear: «Who does defend the doctor from the "blackmail" by the patients, who, if they do not get what they want, apply to be assigned to another doctor? »[25].

This year started with an estimated debt towards suppliers of about € 40 billion. The State Auditors' Court can hardly manage to understand the financial statements: «By virtue of a mistaken notion of autonomy each Region has adopted its own systems»[26], a problem that might be solved in 2014 (Legislative decree No. 118/2011); it seems that «often, regions use resources allocated to health care to face liquidity needs of other sectors»[27].

This is a paradoxical approach when, in fact, maximum rationality would be necessary to know where and how to reduce spending. All this is happening among oranges, azaleas and whatever other thing can be relied upon to fund research and care. [Note: The latter sentence refers to the many initiatives waged by foundations and associations to collect donations in exchange for small gifts like potted plants, bags of fruit, etc.]

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care)" through the indicators of the LEA grid, Methodology and Results for 2010, March 2012

23 Data from the Groupon site: 300,000 in 2012 for dental treatments and physiotherapy, cardiology visits, echographies, psychological counselling and psychotherapy, Ansa, 20/1/13

24 The Foundation collects, every year in February, C-group drugs for the less affluent. In the province of Naples aid requests increased by 146% in 6 years, Ansa, 11/10/13

25 Del Barone, National President of SMI (Italian Medical Doctors' Union), Ansa, 4/10/13

26 State Auditors' Court, Autonomies Section, "Relazione sulla gestione finanziaria delle regioni esercizi 2010 – 2011", page 281

27 State Auditors' Court, Autonomies Section, "Relazione sulla gestione finanziaria delle regioni esercizi 2011 – 2012", page 354

Legislation and policies

Considering the anniversary, here are some historical notes: the Italian National Health System was established by Law 883/1978 that came into force on 1 July 1980. The old system was superseded. The previous system was mainly based on the health care funds of various categories of workers and was fragmented, marked by severe budget deficits and, above all, by wide disparities in access to care, linked to the performance of the different funds[28].

Law 883/78 introduced the financing of the health care through general taxation and during the first phase afforded a totally free service. The State was responsible for the general planning and the Regions for the implementing actions. Later, tickets (fees) were introduced and the role of the Regions became more substantial following fiscal federalism and the constitutional reform[29]. This led to the current scheme, with 21 Regional Services and funding divided between the State and the regions.
There are still differences between regions with a special status and the remainder. In general, the Regions count on revenues determined autonomously, coming from taxation (IRAP, regional corporate income tax; regional surtax on IRPEF personal income tax; quotas on VAT and specific surtax on fuel) and from services (tickets and revenues from fees levied on in-hospital specialist care). Finally, the State intervenes with the help of general taxation to compensate for the differences, through equalization instruments at national level.

With the National Health Plan, a 3-year planning tool, established in agreement with the Regions, the uniform delivery of LEA should be achieved. The criteria[30] to include the services provided in the LEA are *efficacy* (scientific evidence demonstrating a significant

28 Masulli I., "Cittadinanza and stato sociale in Italia: azione sindacale and politiche governative negli anni Sessanta and Settanta"; Ascoli U., "Il modello storico del Welfare State Italiano", by Sorba C., in "Cittadinanza. Individui, diritti sociali, collettività nella storia contemporanea", proceedings of the annual conference of SISSCO, Padua, 2-3 December 1999, Ministry of Cultural Heritage and Activities, DG for Archives, Rome, 2002

29 Law 133/1999; D. Lgs. 56/2000; Const. Law 3/2001

30 Decree-law No. 502 of 30/12/1992

benefit in terms of health, at individual or community level, in comparison with the resources provided), *appropriateness* (for the specific clinical condition the recommended indications are applied), and *efficiency* (where efficacy is the same, the less costly type of care is chosen both in medical protocols and in the organization and provision of services). In addition, each Region may, through its own resources, expand the LEA offered to residents.

Even if lower than in the reference countries, health expenditure went from € 112.889 billion in the 2011 State's balance [31] (1,862 Euro per capita) to about 111 billion in 2013[32]. For 2014 the apportionment is expected to be around 109 billion[33], with a reduction that went unnoticed in the troubled political season of end 2013. This is shown by the approval of the Stabilisation Law[34] consisting of a single Article with 749 paragraphs, among which there is a decrease from 19% to 18% of the deduction allowed for health care costs. These choices were made in the framework of a crisis that began in 2008 and reached its peak (- 3.6%) in the first quarter of 2009[35]. The measures concerning health care in Decree-law 98/11, Decree-law 95/12 and in the Stabilisation law for 2013 are drastic: minus 900 million in 2012, 4,900 in 2013 and 8,000 in 2014[36]. The above amounts have been the subject of constant negotiations, difficult to describe due to their complexity, which does not make it easy to anticipate where and how they will be actually impacting. For example, Decree-law 98/11 provided for increases of € 2 billion in 2014 on health care fees ("tickets"), which could be avoided thanks to the pronouncement 197/2012 by the Constitutional Court.

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31 "Relazione generale sulla situazione economica del Paese", Ministry of Economy, page 179

32 Economic and Financial Document 2013

33 *Budget and Financial Stabilisation Law. Lorenzin: Fondo sanitario 2014 è di oltre 109 miliardi* Daily newspaper Sanità , 27/11/13

34 Law 147/13

35 Istat, "Conti economici trimestrali", 10/09/13, page 5

36 Source: Ministry of Health, Uscire dalla crisi: chiarezza sui numeri della sanità , Health Minister's press conference, 19/12/12

Above all, the new National Health Plan (now called Pact for Health) has not been defined yet although it was supposed to be launched in early 2013.
This time, the Pact should have 5-year duration and the firm intentions seem to be to overcome linear cuts in order to rationalize expenditure: for example, the reduction of hospital beds should be accompanied by a strengthening of local care and the reshaping of LEA. Several reasons may account for the delay, not least the recent political uncertainty that still persists. For example, to identify the three benchmark Regions for the services to be provided in terms of efficiency and appropriateness[37], there was a confrontation among the five Regions selected by the Ministry at the end of July (Umbria, Emilia Romagna, Marche, Lombardy and Veneto) [38]. *"Costi standard. Le Regioni Benchmark 2013 saranno Emilia Romagna, Umbria and Veneto"*, ("Standard costs. The benchmark regions 2013 will be Emilia Romagna, Umbria and Veneto"): this was the headline of a newspaper on 5 December 2013[39].

The delay is reflected in the territories, some of which are heavily affected by plans to cut spending undertaken in ten Regions (since 2007: Abruzzo, Campania, Latium, Liguria, Molise, Sardinia, Sicily; 2009: Calabria; 2010: Piedmont and Apulia). The goal was achieved by Liguria and Sardinia at the end of 2010[40]. For the remainder, five regions have been administered by a governmental commissioner as to health care: Latium since 2008; Campania and Molise since 2009; Calabria since 2010 and Abruzzo since 2012.

The issue is complex given the many interests involved – not always legitimate[41] – that juxtapose in the immense field of action of the Na-

37 Resolution of Prime Minister's Office 11/12/12, Definizione dei criteri di qualità dei servizi erogati, appropriatezza ed efficienza per la scelta delle regioni di riferimento ai fini della determinazione dei costi and dei fabbisogni standard nel settore sanitario. (13A04967)
38 Turno R., "*Sulla sanità derby tra regioni leghiste*", "Il Sole 24 Ore", 31/7/13
39 Quotidiano sanità
40 Health Minister's press conference , quote.
41 Coripe Piemonte, Consorzio per la Ricerca and l'Istruzione Permanente in Economia" (Consortium for Research and Lifelong Training in Economics) and Associations: Libera, Avviso

tional Health System, where the many stakeholders try to steer the decisions in their favour. If, then, the application of Law 190/2012 ("Disposizioni per la prevenzione and la repressione della corruzione e dell'illegalità nella pubblica amministrazione" – "Measures for the prevention and suppression of illegality and corruption in the public administration") is provided for also with regard to health care companies, many issues are still open to negotiation. It is a context in which several rights come into play: the right to health and care, the right to education – as to university training in hospitals - and the right to work, also due to the consequences of Fornero's reform[42].

The debate on reducing costs unfolds just as painstakingly in the Regions (more than 70% of their budgets are related to health care); since each develops its own social and health care plan, there are significant differences between them and this impacts the three areas identified above.

Access to care.

It starts from the Health Card, indispensable to have access to health care, which is issued also to those not in compliance with the residence permit in Italy ("STP" card, i.e. the card issued to Aliens Temporarily in Italy by ASL – Local Health Units) by virtue of the State-Regions Agreement of 20/12/2012[43] reaffirming the universal nature of this right and explicitly forbidding reporting to the police - which settled the doubts raised by the immigration law.

However, not everyone holds a chip card that would, among other things, enable booking visits and exams on-line (Decree-law 78 of

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Pubblico , Gruppo Abele , La Prevenzione e il Contrasto dell illegalità nella tutela della salute . Introductory Report Illuminiamo la salute per non cadere nella ragnatela dell illegalità , Rome, 27/6/13

42 Basic forms for the new Health Care Pact, Reports by the Health National System/University and Health Research, in: ESCLUSIVA Patto per la salute, le ipotesi su cui decidono i governatori. Farmaci, ospedali, medici, università, dispositivi: dove affonda il bisturi , Il Sole 24 Ore Sanità , 30/10/13

43 Proceedings Ref. No. 255/CSR (State-Regions Conference), "Indicazione per la corretta applicazione della normativa per l'assistenza sanitaria alla popolazione straniera da parte delle Regioni and Province autonome"

31/5/10, conversion law No. 122/10). If in Friuli[44] and Lombardy[45], for example, the health card seems to be widespread and used also for other services, in other Regions citizens are likely to wait until 2016: the decree provides for the gradual replacement of expiring cards. Oddly, since the Decree proposed the above cards as a means for saving: «no less than € 600 million on an annual basis that shall remain at the disposal of regional health services» (section 7). Another tool is the "electronic prescription" for the "dematerialization" of medical prescriptions, mentioned in Decree-law 179 of 18/12/12 with the following time schedule for implementation: «60 per cent in 2013, 80 per cent in 2014 and 90 per cent in 2015» (section 13, paragraph 1). As for waiting times, on-line booking procedures, where available, vary from Region to Region[46].

The path of Fascicolo Sanitario Elettronico (FSE) (Electronic Health Record) is rougher. It is only accessible to the concerned party and to those authorised and should file all contact with the NHS – medical records, certificates, prescriptions – and the willingness to donate organs[47]. In theory, diagnostic errors could be reduced as resulting from gaps in the patient's medical history and the data, stripped from references to the specific individual, could allow detecting anomalies in the incidence of diseases or planning the range of services to better meet patients' needs. Costs could be contained by monitoring the appropriateness of treatments. Finally, there would be immediate benefits for both the NHS – less paperwork and counters – and citizens, at least those provided with the card, as waiting times and costs (travel, queues) due to the bureaucratic aspect of the treatment could be basically zeroed. The privacy guidelines date back

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44 http://cartaservizi.region.fvg.it/CrsCentralService/areaPubblica/CrsPublic/CrsHome/?page=FEServiziDisponibili

45 http://www.crs.lombardia.it/ds/Satellite?childpagename=CRS%2FCRSLayout&c=Page&pagename=CRSWrapper&cid=1213350950929

46 The procedures of Latium and Piedmont were tested as a sample. http://www.poslazio.it/opencms7/opencms/sociale/pos/cittadino/Servizi_al_cittadino/Prenotazioni_prestazioni/ https://secure.sistemapiemonte.it/health/prenotazioni/CsiConnectionController

47 The citizen could supplement the "Fascicolo" (Electronic Health Record) also with medical reports by private specialists. Thus, for example, in Emilia Romagna.

to 2009[48] and are accompanied by these words: «In this way, once more, the Authority plays a role of "substitute" pending the enactment of appropriate legislation»[49]. In actual fact, already in 2008, some Regions tested the EHR[50], but the guidelines of the Ministry came in 2010[51] and the project became part of the plan only through the provisions for re-launching economy (Section 12, Decree-law No. 179 of 18/10/12; Section 17, paragraph 1, of Decree-law No. 69 of 21/6/13). In the meantime, several regional systems have been implemented presumably fraught with compatibility issues.
The measures that could allow rational cuts require time, investments and negotiations [52] to be implemented. It was "a urgent priority" and the right – defined by the Constitutional Court "financially conditioned" - became even more insecure (Constitutional Court 248/11); indeed, this interpretation had already surfaced in 2005: «the need to ensure universality and thoroughness of care in our country collided, and is still colliding, with limited financial resources» (Judgment No. 111).

The "clues" provided above describe the effects produced on health by the joint action of the decreased income and the public finance measures; they are confirmed by Istat (Italian National Institute of Statistics) as for the increase of social and territorial inequalities,[53], by Censis[54] (Italian socio-economic research institute) as for the ef-

48 Italian Data Protection Authority, "Linee guida in materia di Fascicolo sanitario elettronico (Fse) e di dossier sanitario" – 16/7/09 (G.U. n. 178 3/8/09), Register of Resolutions No. 25 16/7/09

49 "Fascicolo sanitario elettronico: il Garante approva le Linee guida". Press release, 11/8/09

50 Di Giacinto A., Randazzo M. P., "Il Fascicolo Sanitario Elettronico", Basilicata Region Workshop 2009

51 Ministry of Health, "Il Fascicolo Sanitario Elettronico", National Guidelines, 11/11/10

52 By way of example, three Regions: Latium: "Medici di famiglia: Conclusa la riunione in Regione: raggiunto un accordo", 28/3/12. http://www.smi-lazio.org/modules.php?name=News&file=article&sid=465

Campania: Decree No. 87, 24/07/13, Supplementary Regional Agreement for General Medicine. Approval.

Veneto: Regional Resolution No. 1753, 3/10/13

53 Istat, "La salute e il ricorso ai servizi sanitari attraverso la crisi", Year 2012 (September-December average), provisional data, 24/12/13

54 *"27% of Italians noticed that the ticket (fee) to be paid for a health service was higher than the cost to be incurred in the private sector, i.e. than paying it out of their own pockets (the percentage rises to 37% in Regions with Plans to Cut Spending, where public health has been affected more by cuts).*

fects produced by the increased fees on medical services ("tickets")[55] and by Agenas[56] (Italian National Vocational Training Agency for Regional Health Services) regarding the decrease of the specialist services provided by the NHS which is only partially offset by *intra-moenia* (NdT services provided by Italian doctors outside their working time but in public hospitals) or private services. These outcomes are very different from those of a universal health care system in which the careful application of health care fees [57] helps manage the demand in an equitable manner. Taking into account the general impoverishment of the population[58] and that deductible medical costs (including tickets) require the immediate availability of cash, it is highly likely that the number of citizens obliged to do without care, at least in part, because of their income will be on the rise.
With the crisis, also the waiting time makes the system more unfair because waiting time is another instrument to manage the demand. In theory, it should "convince" wealthier people to use paid services and medical insurance services; in practice, it forces employees on short-term contracts or low-income self-employed people to pay for such services because they need to get well quickly to avoid a work stoppage and, therefore, a further reduction of their revenues.

At the moment, it is a paradox related to low-tech investigations but it should not be underestimated". Censis, Fuga nel privato per curarsi: 12,2 milioni di Italiani hanno aumentato il ricorso alla sanità a pagamento, Press release for the presentation of a RBM Sanità-Censis Research on the role of health insurance schemes, Rome, 4/6/13

55 35% are exempt due to low income or specific conditions (Ministry of Health, Uscire dalla crisi: chiarezza sui numeri della sanità, quote). Exempt due to low income: up to 6 years and over 65, family income under € 36,151.98; unemployed and seniors over 60 years, family income under € 8,263.31, up to € 11,362.05 with spouse (+ € 516.46 for a dependent child).

56 Agenas Report (National Agency for Regional Health Services) illustrated by the President, G. Bissoni, during the hearing of the joint Commissions for Social Affairs and Budget at the Chamber of Deputies (Indagine sulla sostenibilità del Servizio sanitario nazionale), Rome, 10/9/13

57 Rebba, V., "*I ticket sanitari: strumenti di controllo della domanda o artefici di disuguaglianze nell'accesso alle cure?*" In "Politiche sanitarie", vol. 19, No. 4, 2009, pages 221 - 242

58 In 2012, the relative poverty threshold lowered (€ 990.88 for a two-person household, - 2% since 2011). The threshold is parameterized to the general expenditure capacity, in this case it is decreasing: if the threshold had been kept in line with inflation (+ 3%), the number of families in relative poverty would be higher - rising from 3,232 million to 3,592. Data by Istat, La povertà in Italia, Anno 2012 , 17/7/13

The issue is exacerbated in the event they need hospital services: the phenomenon of medical migration from southern regions to those in the north [59] remains substantial and can be only partially justified by the flow towards centres of excellence at national level. In these cases, mobility penalizes poorer citizens more: trips and, sometimes, extended stays often require at least one companion with all the resulting expenses.

As for *hospice care*, if one assumes that the relevant benchmark (1 bed/100 deceased patients) is appropriate, the goal seems to have been achieved: 2,524[60] for 173,000[61] deaths, but 744 of the former are in Lombardy and the deaths occurred all over Italy. So, one third of the patients die in hospitals, in 2011 only 55,242 received home care and even fewer, 40,564, palliative care. We continue to heavily rely on the volunteering sector, also active in fundraising (almost € 20 million in 2011[62]), even though the first law dates back to '99[63]. A tiring and slow pace: the regulations on the qualifications to be held by medical doctors in order to administer palliative care appeared in the Stability Law (paragraph 425).

Freedom of care.

As for the possibility to reject treatment, the reference benchmark can be found in Article 32, paragraph 2, of the Constitution: *"No one may be obliged to undergo any health treatment except under the provisions of the law.*

The law may not under any circumstances violate the limits imposed by respect for the human person." together with Article 13 of the Constitution ("*Personal liberty is inviolable."*) and Article

59 Viaggiare per la salute , La mobilità sanitaria , Proceedings of the Agenas-AIE-AIES Conference, Rome 3-4/5/11, I quaderni Monitor , Supplement to No. 29 of 2012

60 FCP - Federazione Cure Palliative (Palliative Care Federation), - Database January 2014

61 Report to the Parliament on the implementation of Law No. 38 of 15 March 2010, year 2012, Tables 1, 13, 14

62 Data concerning only organizations pertaining to FCP, Report to Parliament, quote, page 79

63 Min. Decree 28/9/99, "Programma nazionale per la realizzazione di strutture per le cure palliative"

33 of Law 833/78 (*medical investigations and health treatments are usually voluntary*). The Court of Cassation confirmed the principle[64]: informed consent is essential, it has to be based on detailed information, explicit (tacit or alleged consent is excluded), specific (for each specific treatment).

In the event of *end of life* treatments there is a legal void: early elections have shelved the controversial bill by Mr. Calabrò, written during the last frantic stage of the Englaro case, strongly limiting individual freedom.
The only reference is to the pronouncement of the Court of Cassation[65], which is however only applicable for suspending hydration and nutrition to those who have expressed unambiguously their will beforehand and are in an irreversible vegetative state. Several local authorities[66] have set up registries and associations have prepared forms available online to collect explicit wills. Without a specific law, however, documents and procedures are heterogeneous and expressions of a person's wishes are automatically enforceable only in the cases provided for by the Court of Cassation. The range of clinical conditions and medical treatments, by contrast, is much wider, as in Mr Welby's case. Mr Welby underwent treatments contrary to his will while he was in a state of temporary unconsciousness and they allowed him to survive for a long time against his will. The doctor who enabled him to die, however, was prosecuted on charges of murder of a consenting victim, although the charge was finally dismissed (Rome, 23/7/2007). In the legal void, the only further guideline is the Medical Code of Ethics (Article 38, Autonomy of the citizen and advance directives), but the procedures for ascertaining a person's wishes (even where an agent/guardian is available) are difficult to reconcile with the need for promptness of some medical procedures in emergency cases, such as after a trauma. Maybe, citizens may file their will with the Fse, when it is active.

64 Court of Cassation, judgment 20894, 27/11/12, Civil sect. III

65 Court of Cassation, judgment 21748, 16/10/07, Civil Sect. I

66 Biological Will, Turin, March 2011; Prior Declaration for Treatment, Province of Pisa, Nov. 2009; Prior Provision for Treatment, Bologna, Nov. 2011

The voter initiative bill *"Refusal of medical treatment and the legality of euthanasia",* signed by more than 65,000 Italian citizens[67] and filed in Parliament on 13/9/2013, is a qualitative leap forward.

The law would be directed only to adults able to express their wishes autonomously or, if unconscious, through a trustee. Said bill, if approved[68], would lead to the legalization of euthanasia, a rather difficult goal to achieve, considering that end of life issues have sparked major confrontations such as to make the political debate rather sterile so far.

Regarding alternative treatments, the regulatory framework shows some novelties concerning homeopathic medicines as used by millions of Italians[69].

The matter was already partially disciplined since 2006[70] by the legislation aimed at regulating all the medical drugs sector. However, there was no procedure for registering homeopathic and anthroposophic drugs with AIFA (Italian Medicines Agency), which only became possible in 2012[71]. Therefore, by the end of 2015, about 25,000 pharmaceutical products [72] should be submitted to a simplified registration[73] procedure certifying only they are not toxic, and comply with quality requirements, to safeguard consumers[74], whilst their efficacy will not be certified as is the case of allopathic specialties. In fact, double-blind vs. placebo or standard therapy trials are not required.

This innovation allows solving the problem of provisional authori-

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67 Data disclosed by the promoting committee, "Eutanasia Legale" http://www.eutanasialegale.it/

68 Proposal for the inapplicability of the provisions of Sections 575, 579, 580 and 593 of the Criminal Code to medical staff

69 Italians using homeopathic remedies are reportedly about 7 million. See *"Omeopatia. Si cambia. Anche in Italia nuove regole"*, in "Quotidiano sanità", 4/12/12 CHECK

70 Legislative Decree No. 219, implementation of directive 2001/83/CE - and subsequent amendments – on an EU Code concerning drugs for human consumption and directive 2003/94/CE

71 Section 13, Decree Law 158 13/9/12, Conversion Law No. 189 of 8/11/12.

72 AIFA, ibidem

73 AIFA, "Calendario per la presentazione delle domande di regolarizzazione dei medicinali omeopatici in commercio", page 27, 10/9/13

74 Section 16 of Legislative Decree 219/06

zations[75], but it aroused very negative reactions in the sector because of the registration rates[76] and the reduced annual fees. Representatives of the sector consider them high, such as to endanger businesses and employment[77]. There are several initiatives – an appeal to the Regional Administrative Court for the Latium[78], a petition[79] - contrary to the procedures by AIFA. Therefore, it is possible that the set deadline is not met.

As regards the right to be treated through non-conventional medicine, one should distinguish the issue of citizens' right to self-determination from the right to receive care from the National Health System. With regard to the former, the limit is not imposed on the citizen-patient, but on the caregiver: medical practice is reserved only for those registered with the relevant Professional Roll and it is not enough that a patient is aware of being treated by a person who is not a medical doctor[80]. For the moment, these practices are regulated by the Code of Medical Ethics[81] and by the decisions of the courts[82]: there is no national framework law on non-conventional drugs, which is mandatory in all EU Member States[83]. In order to safeguard patients, 28 associations and Italian schools signed a

75 AIFA, Medicinali omeopatici - Modalità di presentazione delle domande di registrazione semplificata" – Section 17, paragraph 2 of Legislative Decree 219/06 (final extension: Article 6, paragraph 8-undecies of Law No. 17/2007, for the "Conversione in Legge, con modificazioni, del decreto-legge 28/12/06, n. 300, recante proroga di termini previsti da disposizioni legislative. Disposizioni di delegazione legislativa").

76 AIFA, "Tariffe per la registrazione dei farmaci omeopatici"

77 Calderola B., "*Spunta la tassa sull'omeopatia, i produttori: a rischio migliaia di posti di lavoro*", "Il Giorno" (Milan), 19/9/13

78 Contro il decreto Omeoimprese (l'associazione di categoria) ha già presentato ricorso al TAR del Lazio (sentenza di merito attesa per il prossimo Gennaio) news disclosed by several Internet websites concerning the sector, for example see http://www.pharmaretail.it/articoli/2013-09-02-omeopatia.aspx

79 Omeocom (Homeopathy Defense Committee), Petition: together for Homeopathy, September 2013, http://www.omeocom.it/

80 Court of Cassation, Criminal Section VI, judgment No. 34200 of 6/9/07

81 Federazione Nazionale degli Ordini dei Medici Chirurghi and degli Odontoiatri (National Federation of Physicians and Dentists), Codice di Deontologia Medica (Code of Medical Ethics), 16/12/06, Article 15

82 Constitutional Court: judgments Nos. 300/07, 93/08, 40/06, 424/05; Court of Cassation: Criminal Section VI, No. 34200/07; Sect VI, No. 964/07; Criminal Section VI, No. 16626/05; No. 1735/03; Criminal Section VI, No. 9961/01; IV Criminal Section, No. 30/01; No. 500/82; Sect. VI, No. 2652/99

83 European Parliament's Resolution No. 75, 29/5/97; Council of Europe, No. 1206, 4/11/99

Memorandum of Understanding[84] in 2012 aiming to standardize training.

Regarding the latter aspect, the National Health System expressly excludes non-conventional medical care and services from LEA[85]. Tuscany is the exception: several years ago it included a number of treatments among its LEA[86] and it has a network of complementary medicine spread throughout its territory (108 public clinics)[87]. Its latest health care plan includes homeopathy, acupuncture and herbal medicine. In addition, since 2007 Tuscany has regulated the training of health care professionals (doctors, dentists, veterinarians and pharmacists) who use alternative medicines[88]. Finally, Tuscany regulated the so called bionatural disciplines (9 of them, including yoga, shiatsu and osteopathy), for safeguarding the quality of the services provided; the operators have to be included in a register after appropriate training[89].

The issue of *compassionate treatments/ care*[90] falls within the scope of freedom of care for patients suffering from severe or rare conditions or who are in life-endangering situations whenever no further valid therapeutic alternatives exist according to medical opinion, but the patients might benefit from therapies at an advanced stage of clinical trial (therefore, Stamina is not one of such treatments). In addition to the informed consent of the person concerned, full compliance with procedures and protocols is required along with the Ethics Committee's opinion, *consisting of medical and non-medical professionals tasked with ensuring the protection of the*

84 "Protocollo di intesa sulla definizione epistemologica e sulla formazione primaria della medicina omeopatica", Chianciano, 16/03/12

85 Annex 2 to Prime Minister's Decree of 29/11/01

86 Regional Council Resolution No. 655/05

87 See: http://www.region.toscana.it/cittadini/health/medicine-complementari and Regional Health and Social Integrated Plan 2012 – 2015

88 Regional Law 9/07

89 Regional Council Resolution No. 9/10. A similar approach was attempted by Piedmont (Regional Law 13/2004), Liguria (Regional Law 18/2004; Regional Law 6/2006); Veneto (Regional Law 19/2006), but it was rejected by the Constitutional Court, which considered the legislation to be in breach of the powers of the State, competent for regulating professions.

90 Ministerial Decree of 8/5/03: "Uso terapeutico di medicinale sottoposto a sperimentazione clinica."; Ministerial Decree of 5/12/06, "Terapia genica and terapia cellulare somatica.", Section 1, paragraph 4"

rights, safety and well-being of the probands and affording public guarantees thereof, for example by giving their opinion on the trial protocol, the suitability of the investigators, the adequacy of the facilities, and the methods and documents that will be used to inform patients and obtain their informed consent[91]. In addition, the manufacturer must commit to provide the treatment for free.

Quality of care.

Healthcare quality and "malasanità" (medical malpractice) is an inevitable pairing. Medical malpractice is a buzzword emerging in the news to cover the most disparate cases - from the doctor discovered eating at the pizzeria during working hours[92], to the tragedy of a woman deceased after a caesarean[93]; from misplaced blood units[94] to the time spent waiting to be visited at the Emergency Unit[95]. A proof of the uncertain quality of health services may be the number of complaints lodged in 2012 for damage suffered in public hospitals: they are more than 12,000, however over more than ten million hospitalizations per year and about one billion specialized services [96], whilst the percentage of claims settled without compensation is higher than 50%[97].

Behind the numbers there are citizens that have been awaiting the payment of damages for 10 years; doctors who are prosecuted as part of criminal proceedings; the NHS burdened by compensatory damages and the costs of *''defensive medicine''*; young people fleeing from specialized medicine due to hefty insurance premiums and insurance companies that, despite everything, withdraw from this sector.

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91 Legislative Decree 211, 24/6/03, Section 2, m).

92 *"Medico sorpreso al ristorante durante il suo turno di guardia"*, "La Repubblica" Naples edition, 1/4/13

93 Morta dopo parto cesareo: familiari, non è caso malasanità , Ansa, 2/11/13

94 The case took place in Grosseto on 25/8/13

95 *"Tor Vergata, allarme pronto soccorso mancano i posti letto, attese infinite"*, "La Repubblica", Rome edition, 4/10/13

96 Bissoni, G., Responsabilità professionale e diritti del cittadino , Monitor, year XII, No. 34, 2013

97 ANIA (Italian National Association of Insurance Companies) report 2013," L'assicurazione Italiana 2012 – 2013", page 218 -225, July 2013

Different options have been taken into account in recent years. For example, guidelines directed to medical staff, and recommendations for preventing errors[98] and risk management strategies were worked out, not uniformly[99], in the absence of a specific law on clinical risk which is still under way[100]. In addition, in the name of the respect for regional autonomy, there is a wide gamut of systems for the management of claims and procedure-specific policies whilst different data collection methods and glossaries have been implemented[101].
Although risk may be contained by respecting standardized procedures, developed in accordance with the best medical practices known, there is still the human error medical staff may be liable to as well[102]. The approach to such errors evolved from a highly indulgent orientation by criminal law courts to the opposite extreme due to the widespread application of the indictment for negligence[103]. From this interpretation along with the one followed in civil actions regarding the provisions for establishing and granting damages, there derive the effects gynaecologists[104] and orthopaedists[105] complain about – these two being the categories most exposed to criminal complaints and claims for damages.
Taking this situation into account, the provisions of Section 3 of Law 189/12 introduced the concept of "culpa levis" (minor negligence) which is not punishable by criminal law, to be applied to medical

98 National Guidelines, Sistema nazionale per le linee guida (SNLG - Guidelines National System) worked out by: Istituto superiore di sanità (ISS National Institute of Health), Centro nazionale epidemiologia, sorveglianza and promozione della Salute (CNESPS – National Centre for Epidemiology, Surveillance and Health Promotion)

99 Parliamentary Investigation Committee on Errors in Healthcare and the Reasons for Regional Health Deficit, Final report, 22/1/13, page 180 and following ones.

100 Chamber of Deputies. Bills: No. 1324; No. 259; No. 262; No. 1312; No. 1581. Senate. Bills: No. S. 1134; No. S. 1025; No. S 90

101 Agenas, "Indagine sui modelli regionali di gestione sinistri and polizze", Quaderno di Monitor 2013, Supplement to the quarterly magazine "Monitor"

102 Ministry of Health, Quality Department, Healthcare Risk Management. "Il problema degli errori", March 2004, Rome

103 Court of Cassation, Criminal Section IV, judgment 16237/13

104 *Oggi sciopero ginecologi: 1.100 interventi rinviati. Adesione oltre il 90%. La protesta per la sicurezza delle cure, una nuova legge sulla responsabilità professionale and contro il caro assicurazione*", Quotidiano sanità, 12/2/13

105 *Sciopero ortopedici del 1° luglio. Riconoscimento della responsabilità delle strutture nel risarcimento del danno* , Quotidiano sanità, 27/6/13

practitioners when they have acted in accordance with commonly received guidelines and good practices. The Court of Cassation and the Constitutional Court have already expressed their opinion[106], confirming the validity of the distinction. The issue of compensation has still to be clarified: the deadline for the compulsory stipulation of the policy for professional liability has been postponed to 15 August 2015, as has the establishment of a guarantee fund for harmed patients – initially set at June 2013. In addition, there are still no pre-defined tables for calculating damage that might add some predictability to the overall picture as well as expedite the payment of compensation[107]. In the meanwhile, it is estimated that the cost of *defensive medicine*, including evaluations and prescriptions useful for demonstrating professional zeal in the event of complaints rather than for safeguarding health, amount to €10 billion[108].

Recommendations.

1. Developing tools to strike the right balance between regional autonomy and national coordination so as to prevent re-introducing the substantial differences experienced by citizens as for public health care and the relevant fees ("tickets").
2. Launching the National Health Plan, which was scheduled to be ready by January 2013, including Essential Care Levels (LEAs) that should be adjusted to afford all citizens full-fledged compliance with healthcare guidelines – including citizens affected by rare diseases.
3. Reconsidering the mechanisms underlying payment of fees ("tickets") and waiting times, which are the "regulators" of the health care demand, as they are currently detrimental to those citizens that are close to the poverty threshold. It should be recalled that the latter include minors and even newborns.

106 Court of Cassation, Criminal Section IV, judgment 16237/13; Constitutional Court, order 295/13 CHECK

107 Ania report, quote, page 223

108 Parliamentary Investigation Committee on Errors in Healthcare and the Reasons for Regional Health Deficit, quote, page 55

4. Implementing the palliative care net throughout the national territory on the basis of standardised quality criteria (e.g., 24/7 availability, psychological support to patient and relatives).
5. Regulating the so-called biological will to enable citizens to exercise the right to express their wishes. Expediting the nation-wide implementation of the Electronic Health Record which should include a dedicated section only accessible if urgency procedures prove to be necessary.
6. Providing that AIFA [Italian Drugs Agency] simplifies the procedures for drugs containing cannabis-derived active principles. The relevant measures should also provide for expanding the scope of treatable diseases to include, for instance, treatment of the side effects produced by chemotherapy.
7. Amending, where necessary, pharmacological vigilance procedures. Additionally, effective measures have to be taken regarding distribution of drugs to counter speculation related to price differences across European markets.
8. Developing the tables listing the damages payable based on medical risks, which are needed to enable fair as well as timely compensation. This should include additional measures to contain the costs of "defensive" medicine and foster safety (e.g., by way of investments into health care buildings, vocational training, etc.).
9. Disseminating initiatives to promote the right to health such as the PartecipaSalute project (http://www.partecipasalute.it/cms_2/) which allow spreading information and raising awareness. Informing patients of the costs of individual health care measures.
10. Developing practices aimed at mutually respecting competences - in the light of the rule of law, which can create trust in institutions. In this sense, attention should be paid to the debate within the Roll of Medical Doctors, who are engaged in redefining their ethics code. Also the Roll of Journalists should perhaps initiate a reflection on the role information plays in this framework and whether it might be useful to introduce

rules to reconcile freedom of the press with citizens' right to receive information that has been double-checked and is respectful of suffering.

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SAFEGUARDS FOR LABOUR AND WAGES

By Angela Condello

"*Le travail éloigne de nous trois grands maux: l'ennui, le vice et le besoin*" [1]

(Voltaire, *Candide ou l'optimisme*, 1759)

Focus

In piecing together as thorough and exhaustive a picture as possible of the right to work and wages, one should clarify in the first place that this is a complex, multi-layered and multifarious issue. By "right to work" one may mean both the right vested in each person to work in such a way as to lead a "free and dignified" existence – as set forth in the Constitution (Article 36) – and the set of conditions and legal remedies for employment relationships by having regard to the different shapes such relationships may take (labour contracts, trade union relationships, sick leaves, leaves of absence, welfare benefits, etc.).

This caveat is necessary to place this analysis in the broad context that is typical of work in a historical perspective; however, this chapter will be focused on certain specific features, i.e. those that are considered most significant from a social and cultural standpoint. "Work" is a notion that relates to the life of individuals at different stages of its evolution, so that each feature should be seen in this broader, overarching perspective rather than as a separate component. For exclusively methodological reasons it was found expedient to break down the facts section according to subject matters.

1 "Work keeps three great evils at bay: boredom, vice, and need".

Occupational Fatalities ("White Deaths")

Starting from the most dramatic events, one cannot but point out that about 554 individuals died whilst at work in Italy in 2013; their numbers might actually be different, since it is not always the case that account is taken in this regard of those dying whilst travelling from home to the workplace – in which case the number of such fatalities would be in excess of 1,000 yearly. It should be emphasized at all events that 1,296 work-related fatalities were reported in 2012, of which 790 were certified by INAIL [Italy's National Institute for Occupational Accidents Insurance].

The most tragic accident over the past two years is probably the one that took place in the province of Prato on 1 December 2013, when seven Chinese workers died in a textile factory and several others were seriously injured. This shows that in some industry sectors and some areas in Italy occupational conditions are out of control and, furthermore, the working and housing conditions applying to many workers (mostly migrants) are utterly in breach of the law. The seven fatalities in Prato highlighted the persistence of forms of "new slavery" as the existence led by many individuals is far from being free and dignified – in fact, it is ultimately the subject of ruthless exploitation brought to the very extreme: endless working hours and, after work, living in warehouses looking like prisons since it is as good as impossible to escape. Given these conditions, employees are almost never registered and those individuals are legally non-existent – or rather, they end up existing only if a tragic event like that in Prato happens to take place.

The Alcoa and Pomigliano Cases

Many may still remember the image of the three workmen from Alcoa that climbed on a silos to protest against the shutting down of the plants in Sulcis (Sardinia) when, in the early months of 2012, it was already evident that prospective buyers for those plants were hard to find. Equally well-known are the many cases where mines were occupied by tens of workmen out of desperation for the loss of

their jobs.
The protest by Alcoa workers sparked up again in September 2013 opposite the closed gates of the Portovesme plants: buildings owned by the Region were occupied, helmets were thrown to the floor during the assembly held by the workers. These are signals of a state of necessity, of an emergency. In fact, these needs are well-known and have been repeatedly under the spotlight of Italian politics: along with trade unions, Alcoa workers ask for their redundancy pay. In the past two years, the protests by Alcoa workers have been surfacing repeatedly in Italy's political discussion as one of the main instances of workers' mobilization to protect their rights. In January 2012, Alcoa workers – having been fired without safety nets – occupied the tunnel underneath Serbariu mine; a similar protestation had been staged between August and September 2012 in the "Nuraxi Figus" mine. In fact, similar initiatives have been taking place for about twenty years; however, the difficult interaction between expectations, promises, investments and disappointments would appear to always get stuck at the same time: when a solution for the whole area is to be devised. Following several years of negotiation for purchasing the company, which would mean a new start for the workers, several proposals had been put forward; indeed, the summit between the Region and the company held in September 2013 had pointed to a rosy 2014 outlook including the revamping of Portovesme and the whole Sulcis area. And yet, workers are still protesting and the usual pattern would appear to cyclically set in: meetings and summits between governmental representatives and workers' representatives are going on, with particular regard to the provision of social safety nets and the possible restarting of business.
The case with FIAT's plants in Pomigliano D'Arco started about four years ago, when the company terminated various investments (amounting to about 800 million Euro) into the Pomigliano plants to start producing the new Panda. On account of reasons relating to the need for entering into a new national collective agreement including certain derogations, FIAT decided to set up a new company to manage the Pomigliano plants; such company would employ part

of the workers at those plants, whilst the old company was kept up to provide redundancy pay for the remaining workers. Thus, about 2,200 workers were recruited by the new company, whilst 1,700 were redundancies and were promised recruitment by the new company if market performance so allowed. However, none of the newly recruited workers were members of FIOM – the metal industry workers' trade union that is part of CGIL, Italy's leading trade union association; FIOM had opposed the changes planned by Marchionne and voted "no" during the well-known Pomigliano referendum. The most likely reason for excluding FIOM workers was FIAT's concern that the FIOM workers would give rise to resistances inside the plants by opposing the new contractual and organizational model and thus hampering production and profitability. FIOM brought a legal action against FIAT on account of discrimination and requested, among other things, that FIAT should be obliged to recruit a number of FIOM workers in proportion to the percentage of FIOM members in the old Pomigliano plant. Conversely, FIAT held that the company was free to decide who to employ – and under what conditions – since the shift from the old to the new Pomigliano plant was no "transfer of business", i.e. it was no merger or acquisition operation, which entails specific obligations to comply with past contracts. Regarding recruitment, the judge granted FIOM's claims on 22 June 2012; accordingly, FIAT was obliged to employ as many FIOM members as corresponded to their percentage in the old company, i.e. 9% of the whole (145 workers). An initial batch of nineteen were recruited, and the remaining 126 were supposed to be recruited in the coming months. FIAT's response was to set a threshold to the number of employees "needed" for the Pomigliano Plant. This threshold was set at 2,200 and in order not to overstep it, having been obliged to recruit 145 workers, FIAT decided to terminate its employment relationship with as many workers.

The Pomigliano case was and is part of a larger game where evolving social and business models are facing one another: thus, the complex machinery for achieving an agreement and the conflicts arising in connection with this plant in Campania should come as no surprise.

The workers are afraid that a step backwards will be made, back to the years before 1970 when the so-called "Workers' Charter" was enacted, marking a major achievement in this area. There are indeed causes for concern: there is an attempt to weaken trade unions, do away with the national labour agreement and shift to local or concern-based agreements letting employees go alone, therefore as weaker counterparties – in short, to narrow the scope of rights in breach of the Constitution.

Stories of the Italian Precariat

According to the *Diritti globali 2013* report, there are currently about 3,3 million precarious workers in Italy; the highest percentage of them can be found in the South. More precisely, there are 3,315,580 workers that fit in the following framework: their mean net wages are 836 Euro monthly (927 Euro/month for males, 759 Euro/month for females); they hold high-school diplomas (46%) and work mostly in the South of Italy (35.18%) and in public administrative bodies (34%). Based on the said Report, precarious workers are to be found mostly in the civil service: school and health care account by themselves for 514,814 precarious workers, whilst 477,299 are those employed in public and welfare services.[2]

If one includes the 119,000 precarious workers that are employed directly by public administrative bodies (State, Regions, local authorities, etc.), it appears that one precarious worker out of three works for the public sector. Non-typical employment relationships are also rife in trade (436,842), corporate services (414,672) and the HoReCa sector (337,379). Geographically speaking, the highest incidence of precarious workers over the total number of employed individuals can be found in Calabria (21.2%), Sardinia (20.4%), Sicily (19.9%) and Apulia (19.8%).

Schools are among the sectors that are most affected by the widespread recourse to precarious workers; in December 2013 Italy

2 In September 2013, CGIL CISL and UIL (Italy's main trade unions) asked Government to shed light on the stabilisation of precarious workers in the public administration following the opinion rendered by the Senate's Labour Committee, which imposed several constraints on the governmental decree and actually prevented such stabilisation.

risked an 8-million Euro penalty by the EU because of the failure to turn 130,000 fixed-time employment contracts into as many contracts of unlimited duration for school staff. The judgment by the EU's Court of Justice on compatibility of the Italian legislation with the European 1999 directive is expected by the end of March 2014; the European Union has already addressed several letters to Italy in respect of the latter directive. Of late, a warning to Italy was also sent by the European Commission: replacement teachers must get fair wages and the years of precarious work must be taken into account in calculating length of service.

Precariousness is an issue also in universities, because it slows down work and downgrades the overall outcome of research activities as no long-term investments may be performed – whilst such investments would be necessary to ensure effectiveness both in terms of production and in terms of the "existence" led by the individual researches. Recently, researchers from the University of Bari sent a letter to the Dean because they are still awaiting employment after three years from a competitive examination they had won.

The Case of the "Ousted"

During the past two years the case of the so-called "ousted" has also grown worse; the "ousted" are employees at risk of being out of job and without any retirement benefits because of the increased age of retirement brought about by the recent reformation of social security legislation. Government is supposed to apply the old retirement rules only to the employees that have entered into ad-hoc agreements by 2011, have already quit their jobs by that date and are about to retire. At jeopardy are allegedly those workers that, in spite of their having signed up to the relevant agreements, are still employed (such as the Termini Imerese workers getting redundancy pay) and the workers that have embarked on a 4-year advanced retirement plan. According to the leaders of the main Italian trade unions, those workers that had accepted by 2011 to retire in accordance with the old rules, must be enabled to enjoy their retirement benefits. There is considerable disagreement also on the figures concerning the "ousted": according

to Government, they were 65,000 in 2015, whilst their numbers were in excess of 160,000 according to trade unions.

Discrimination and Violence[3]

Since different types of discrimination occur in Italy – in a widespread manner and across the whole social structure – one should assume that discrimination takes place in the occupational sector as well. Based on this assumption, attention will now focus on providing a concise overview of discrimination against migrants – whilst referring the reader to the ad-hoc section to be found in this report - as well as of gender-based discrimination.

Migrants. In December 2013, Amnesty International urged Italy to reconsider its immigration policies since those currently in force "contribute to the exploitation of migrant workers and violate their right to fair and favourable working conditions and to access to justice."
The opportunity for Amnesty's call on Italy was provided by the publication of a report called *We needed hands, men arrived* addressing the occupational exploitation of farmhands migrating to Italy. These are individuals mostly coming from sub-Saharan Africa, Northern Africa and Asia, although there are also nationals from EU countries such as Bulgaria and Romania and Eastern European countries such as Albania; they work in the provinces of Latina and Caserta although migrants are actually exploited throughout Italy.

Indeed, immigration policies have been fueling anxiety in public opinion over the past ten years because it has been argued that the country's safety is being threatened by the uncontrollable flow of "illegal" migrants; this was meant to justify the implementation of

3 Please see the section on juvenile work in Italy in the chapter addressing children's rights.

strict measures that made migrants' legal status highly precarious and turned them into the subjects of exploitation.
Exploitation is especially rife in farming and building industries in several areas of Southern Italy, where migrants' wages are about 40% lower than those of Italians although they work longer hours.

Women. The "Affirmative Action Code", which came into force by way of legislative decree No. 198/2006, includes a whole Chapter (iii) addressing equal opportunities in the workplace, the ban on any discrimination, safeguards and remedies to foster women's occupational role and bring about equality between men and women at the workplace. However, there is a long stretch of road ahead still to be travelled if one considers that women in top-level positions are as yet very few in Italian companies, Universities and public administrative bodies. The legislative instruments Italy has equipped itself with are not enough by themselves and they should go hand in hand with communication and awareness-raising campaigns focusing on respect for woman. Additionally, to counter violence and discrimination, Unified Guarantees Boards should be set up in workplaces; currently they are only envisaged for the public sector under Law No. 183/2010, but they may be certainly implemented in the public sector as well. Another tool to be relied upon to a greater extent is the Equal Opportunities Charter, whereby employers are required to respect gender-related differences. Furthermore, one should also foster the implementation by companies of working time flexibility, to be agreed upon with trade unions, to as to reconcile work with the care of children and dependents by giving priority to part-time work (including payment of social security contributions); corporate welfare tools should also be relied upon increasingly such as nurseries, vouchers, health care and welfare services, whilst maternity and paternity leaves should be extended and income support measures should be taken into account. With a view to protecting woman as a whole, i.e. both as a mother and as a worker, all optional leaves should entail the continued payment of social security contributions to prevent jeopardizing retirement

benefits. Thus, the road ahead is quite long in Italy also with regard to gender-related discrimination in the employment sector.

Legislation and Policies

ITALIAN LEGAL SYSTEM
Foundations, Promotion, Existence, Freedom and Dignity
The first paragraph of the first Article of Italy's Constitution includes a statement that was construed both literally and as an injunction by the Constituent Assembly, and indeed this is how it has ever been interpreted since: "Italy is a democratic Republic founded on labour (…)." Thus, labour is first and foremost the foundation of the Republic and democracy. This is so because society was and is grounded in labour (literal meaning), as well as because society must be grounded on labour (injunctive meaning) – which entails as a logical consequence that if this fundamental framework (labour) ceased to exist, the Republic would be required to take steps in order to prevent undermining such a basic foundation.
Another of the fundamental principles of the whole legal system in Italy can be found in Article 4 of the Constitution, whereby all citizens have the right to work and the Republic should promote those conditions which render this right effective (paragraph 1). Paragraph 2 of this Article takes up and lays down the typical rationale of modern contractualism: "Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society." The same fundamental values and principles as set out so unambiguously in the first part of the Constitutional Charter are reaffirmed in Title III thereof, which concerns economic relationships between citizens. Article 35 provides that the Republic protects work in all its forms and practices and, among other things, "(…) It promotes and encourages international agreements and organisations which have the aim of establishing and regulating labour rights." (paragraph 3). Additionally, Article 36 outlines the clear-cut connection existing

between the status of being a worker and the quality of life of any individual, as it provides that remuneration should be commensurate to work and in any case such as to afford workers and their families a free and dignified existence. Finally, Article 38 sets forth the principle whereby "Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment."[4]

Italy: The Main Regulatory and Political Developments in 2012 and 2013

Substantially different events have taken place over the past two years as for employment and wage-related policies; this is so especially in the light of two factors that are impacting the current historical and sociological paradigms considerably – i.e. economic crisis and the increased migration flows first from Northern African countries and secondly from the Middle East.

The "Fornero reformation"

In February 2012, there started a process that led to the labour reformation of August 2012, which is known as the "Fornero" reformation. This process was marked by the participation of Minister Fornero in the conference convened by the Prime Minister's Office jointly with trade unions and relevant stakeholders on "Reforming the labour market in a growth perspective." The key targets highlighted by the conference were as follows: countering precarious work, which in the then Minister's view resulted from "bad" flexibility; leveraging "good" flexibility so as to encourage investments and growth by businesses. Additionally, it was found that so-called social safety nets had to be reconsidered by relying on all the safeguards so far envisaged.

In the early days of April 2012, the Monti Government launched

4 Thus, promoting the right to work is meant in the Constitution also as a tool to protect the fundamental rights of individuals in the social communities where individuals act and express themselves. From this standpoint, the foundational value of the right to work (and wages) is also mirrored by the protection of especially vulnerable situations (accidents, sickness, disability, old age, or involuntary employment).

the "Fornero" bill on reforming the labour market; this started the legislative process that came to an end shortly thereafter. The reformation was part of Law No. 92/2012[5]; its main innovations consisted in the apportionments made (1.8 billion Euro) for social safety nets, some changes to traineeship categories and the relevant arrangements, increased flexibility in terminating employment relationships (Section 18 of the so-called "Workers' Charter"), the introduction of a maximum duration for fixed-time contracts (36 months) and the reintroduction of a health care fee ("ticket") applying to unemployed and their families. The focus on traineeship as regulated by Law No. 167/2011 was meant to curb the misuse of this type of employment contract but it has not done away with the many ambiguities the latter is fraught with in terms of protecting workers' fundamental rights. Fixed-time contracts are increasingly instrumental to allowing young workers to enter the labour market, however the difficulties encountered in renewing such contracts (which at times proves downright impossible) result into increasing the time spent working under ultimately precarious conditions. As for project-oriented contracts, the reformation envisaged a more stringent definition of the "project" concept by eliminating – at least on paper – the possibility to consider that a programme or merely a phase of activity was a project and requiring the expected deliverables to be specified in the contract. The reformation also brought about changes to the regulations on ancillary work, silent (trading-limited) partnerships and the so-called "intermittent" work. Regarding Section 18 of the Workers' Charter (Law No. 300/1970), in particular the obligation to reinstate a worker to his or her position following illegitimate termination of employment, the Reformation was rather vague and introduced distinctions that are not always easy to grasp. Additionally, no changes were made to the arrangements for terminating employment, as only the consequences possibly incurred by the employer were addressed.

On 1 January 2013 the reformation of social safety nets came into force as per the amendments introduced by Law No. 228/2012,

5 See www.altalex.com

following Section 2 of the Fornero labour reformation. In particular, the ASPI (Assicurazione Sociale per l'Impiego, Employment-Related Social Insurance) was created in order to provide a safety net against "universal" unemployment and overcome the "dual track" protection system, i.e. the protection afforded whilst the employer-employee relationship still exists – given the increasing inhomogeneity of working conditions and the increasingly non-permanent nature of employer-employee relationships. In fact, the initial objective was relinquished in the course of the law-making process so that the system is as yet grounded in the time-honored redundancy pay model as an unemployment buffering system or clearing room.[6] Following the reformation, redundancy benefits play actually an utterly marginal role unlike what is the case in many other European countries, as they are "squeezed" on the one hand by redundancy pay and, on the other hand, by "indennità di mobilità" [allowance paid to redundant workers from certain industry sectors after being included in a mobility list]. Finally, the increased flexibility in terminating employment relationships is rather questionable as it marks a shift towards a new approach to dismissal of employees. Before the Workers' Charter was passed in 1970, employees could be fired on political or trade union-related grounds; Section 18 of the Charter does not allow for these types of arbitrary termination of employment, which was a major achievement by trade unions. Furthermore, the Italian labour market does not feature job-to-job mobility, unlike e.g. the US one, so that termination of employment has ever been received unfavourably.

Beyond reforming the labour market: Legislation and policies

According to former Minister Elsa Fornero and the Vice-President of the European Commission, Viviane Reding,[7] there are as yet too few women holding executive and managerial positions in large corporations as well as at institutional level – in spite of the fact that as many as 60 out of 100 graduates in 2012 were women. A

6 For additional information, see www.linkiesta.it/riforma-fornero-esperti

7 http://www.ilsole24ore.com/art/notizie/2012-03-07/fornero-reding-165131.shtml

few figures are provided below to show the "crystal barrier" that is keeping women outside top-level positions: in Europe, only 1 director out of 7 in a management board is a woman (amounting to 13.7%) and only in 1 case out of 30 does a woman chair the board of directors (3.2%). In Italy the situation is actually worse, as only 6.1% of positions in boards of directors are held by women; in fact, women's employment rate in Italy is as a whole lower than the average one in the EU (being under 50%).
In July 2012, a legislative decree was issued (No. 109/2012) to foster the legalization of illegal workers pursuant to directive 2009/52/EC, which was aimed at strengthening cooperation among Member States in the fight against illegal immigration. The decree introduced aggravating factors in case illegally staying aliens are employed as well as in additional cases – if over three such workers are employed, if underage individuals below the age of working are employed, if exploitation under Section 603-bis of the Criminal Code can be said to occur.

The Report on Policies against Poverty and Social Exclusion[8]
The Report provides an overview of 2012 and the preceding years; several highly critical situations can be highlighted, which were actually compounded by the financial crisis and the difficulties in regulating the flows of migrants to Italy. The main points have to do with the impact caused by the crisis and the resulting drop in business and production, and with the failure by many youths to leave their families. Additionally, the reduced production enhanced companies' aversion to recruit new staff and caused whole manufacturing sectors to become redundant. Another major criticality has to do with the income of the elderly. Single-parent families also show organizational criticalities as the single parent has to leave home in order to get an income. Conversely, the employment rates of aliens proved the exception compared to the rule applying to the remainder of the Italian population.
In March 2013, a decree by Minister Fornero was issued pursuant to

8 www.lavoro.gov.it/Documents/Resources/Lavoro/CIES/Rapporto2011_2012.pdf.

the commitments undertaken on account of the failure to extend, via a law, the ad-hoc incentives to the recruitment of employees dismissed on justified objective grounds (GMO); the decree envisaged specific benefits in case such employees were recruited. In particular, it was provided that employers recruiting employees in 2013 - whether under fixed-time contracts or via contracts of an unlimited duration, also part-time - would be awarded incentives if such employees had been dismissed in the preceding year. The incentives in question consist in a 190-Euro allowance for the twelve months following recruitment.

In March 2013, two decisions were also adopted to support employment. One of them reduced the obligations concerning social security contributions vis-à-vis employers that had stipulated labour integration contracts up to 31 December 2012; the other one determined who was a "disadvantaged worker" pursuant to the principles set forth in EC Regulation No. 800/2008.[9]

After the new Minister of Labour, Mr. Enrico Giovannini, took office, decree No. 54/2013 was published including urgent measures on the refinancing of social safety nets by derogating from applicable legislation and extending the duration of fixed-time contracts in public administrative bodies. In the early days of 2013, the general policies of the Ministry were discussed with particular regard to social policies in the presence of the former Minister, Enrico Giovannini, and the Junior Minister Ms. Maria Cecilia Guerra before the Labour and Social Security Committee of the Senate and the Social Affairs Committee of the Chamber of Deputies, respectively. The key points were as follows:[10]

- The role of social and employment policies in fostering social inclusion;
- Funding of social policies at local and peripheral level;
- Reforming the "ISEE" system [a mechanism to calculate the

9 The text of the decree is available here: http://www.lavoro.gov.it/Strumenti/normativa/Documents/2013/20130320_DM_lav_svantaggiati.pdf.

10 The full text is available here: http://www.lavoro.gov.it/PrimoPiano/Documents/Linee_programmatiche_politichesociali_04062013.pdf.

eligibility score regarding certain allowances and benefits] by having regard to the "Salva Italia" (Rescue Italy) decree;
- The new social card;
- Setting up of a welfare register, an information system for welfare services, and a database for social benefits;
- Start of a two-year programme for individuals with disabilities;
- Outlining a procedure for legalizing aliens' occupational relationships.

Decree No. 69/2013 contains "Urgent provisions to re-launch economy" (this is the so-called "Action Decree") and envisages simplifications of formal requirements concerning employment as well as measures fostering economic growth and providing facilitations to companies and measures to revamp infrastructure-related activities and simplify administrative requirements.
In September 2013, the process started that is meant to ultimately set up a national agency for the fight against poverty along with an "Active Inclusion Support" plan.
Finally, in November 2013 the decrees allocating resources for social safety nets by derogating from the applicable legislation were enacted. The first of such decrees distributed 500 million Euro among Regions and Autonomous Provinces out of the Social Fund for Occupation and Training. The second decree allocated 287,741,250 Euro out of the funds of the Action and Cohesion Plan with a view to active and passive policy experimental measures in Convergence Objective regions.

Case-Law of the Constitutional Court

Section 19 of the Workers' Charter
By way of its judgment No 231/2013, the Constitutional Court ruled that Section 19 of the Workers' Charter was unconstitutional. This decision followed the request for an incidental ruling lodged in the course of proceedings pending before the courts of Vercelli, Modena

and Turin; it has to do with the violation of the right to the freedom of trade-union associations. Workers from the Ferrari in Modena had been denied the right to set up trade union representations because they had not undersigned the collective labour agreement after actively taking part in the relevant negotiations. Under Section 19, letter b), of Law No. 300/1970 (the so-called Workers' Charter), the rights at issue were only vested in the trade union organisations that undersigned collective agreements. Conversely, the Court stated in its recent decision that it had long questioned compliance of Section 19 with the Constitutional Charter, ever since the 1980's; indeed, the Court had repeatedly stepped in via warnings to invite Parliament to amend the relevant legislation (Judgment No. 1/1994), since only the trade unions meeting the so-called "increased representativeness" standard could enjoy the rights afforded by the Workers' Charter. Thus, the illegitimate nature of the arrangements resulted from excluding a trade union from enjoying the applicable rights, because it had failed to undersign collective agreements and in spite of its representing the views of several workers. In particular, the Court stated that Section 19 was in breach of the fundamental principles of the Constitution as it violated Articles 2, 3 and 39 thereof.

Constitutional Court and European Court of Justice

By way of its order No. 207/2013, the Constitutional Court lodged, for the first time, a request for preliminary ruling with the European Court of Justice in the course of an ancillary proceeding instituted to establish compliance with constitutional principles.[11] The issue arose from the proceedings instituted by the courts of Rome and Lamezia Terme, challenging the constitutional legitimacy of Section 4 of Law No. 14/1999 (Urgent measures concerning school staff) because of the alleged violation of Articles 11 and 117(1) of the Constitution. The latter Articles had been made applicable by a clause contained in the framework agreement on fixed-term work annexed to Council directive No. 1999/70/EC. That clause is aimed at preventing abuse resulting from the use of successive fixed-term

11 See B. Guastaferro, *Quaderni Costituzionali*, 4/2013.

employment contracts or relationships; to that end, it provides that Member States should introduce measures to determine either the maximum total duration of fixed-term employment contracts or the number of renewals or objective reasons justifying the renewal of such contracts. The directive was transposed into Italy's legal system, however the possible incompatibility between domestic laws and the directive arises from the circumstance that the decree implementing the directive excludes school staff from its scope of application – the reason being that "insurmountable requirements" allegedly legitimate the use of successive fixed-term employment contracts with regard to the same employee. Thus, school staff are allegedly outside the scope of application of the legislation on compensation for damages that is conversely applicable to all other civil service sectors.

Section 4 of Law No. 124/1999 was rejected as to its final provisions rather than by having regard to its main import. In the Court's view, "the provision whereby replacement teachers may be employed to cover vacancies that are actually available as of the 31st of December pending the performance of competitive examinations to recruit non-permanent teachers might give rise to the renewal of fixed-term contracts in the absence of any definite timeline for the performance of the said competitive examinations." Hence the need to request a preliminary ruling from the Court of Justice regarding interpretation of the above clause so as to determine whether the latter was in conflict with the domestic law provision being challenged.

Thus, the issue raised by the Constitutional Court concerns the possible conflict between the provision being challenged and the clause contained in the framework agreement, as the former envisages a differential treatment of school staff.

The most significant feature of the order No. 207/2013 is that the Constitutional Court requested a preliminary ruling for the first time on an ancillary issue and justified this decision by having regard to its role as a national judicial authority (see Article 267 of the TFEU) also in proceedings concerning ancillary issues. This window opened vis-à-vis the Luxembourg Court would appear to be especially

interesting because it was not made necessary by or anyhow it did not result from the non-availability of other judicial authorities dealing with the same case. Additionally, if one considers the subject matter of the claim addressed via the order No. 207/2013, one can attach special importance to the approach followed by the Constitutional Court in that the same thorny issue of precarious work in schools – which impacts workers' fundamental rights – was addressed by the Court of Cassation, in spite of its being Italy's supreme i.e. last-instance court, by ruling that the domestic legislation on recruitment of school staff was compatible with directive 1999/70/EC without applying to the European Court of Justice. The peculiarity of this case would point to an attempt being made by the Constitutional Court to strike up a dialogue with the European Court of Justice on major issues such as those relating to workers' rights.

Focus on minimum income: Between European policies and Italy's legislative process

By way of Recommendation 92/441, the then European Economic Community set out common criteria concerning sufficient resources and social assistance in social protection systems.[12] The EEC urged all Member States (including Italy) to introduce guaranteed minimum income schemes. All Member States have taken the necessary measures since – except for Italy and Greece. Guaranteed minimum income is expected to allow those living close to the poverty threshold to lead a dignified existence.

There is actually some confusion around this issue from a semantic standpoint and this is the right place to bring about clarification. Guaranteed minimum income and basic income are not exactly the same. Basic income is a universal, generalized form of income support that is afforded by a State to all citizens that are not underage – whether employed or unemployed, whether they worked in the past or have never worked. Thus, it is a type of income that is provided throughout an individual's life irrespective of that individual's

12 (92/441/EEC) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992H0441:EN:HTML; the text mentions "minimum guaranteed income".

readiness to work. A different rationale applies to guaranteed minimum income, which is afforded to workers that have lost their jobs and is "hitched" to social safety nets. Accordingly, guaranteed minimum income is time-limited and conditional upon the recipient's readiness to accept job offers or participate in training programmes aimed at reintegration into the labour market.

A proposal to introduce a guaranteed minimum income was first tabled before the Chamber of Deputies in April 2013 by the Democratic Party. Although it was titled "Introducing basic income schemes", the bill provided that the recipients of such income would be the unemployed or jobless, and out-of-job precarious workers – on condition they declared "their readiness to work and attend training or reintegration courses." Thus, this is a type of guaranteed minimum income rather than a basic income scheme, pursuant to the distinction drawn above. In April 2013 a bill was also tabled by Sinistra, Ecologia e Libertà (Left, Ecology and Freedom) in connection with the "Minimum Guaranteed Income" campaign[13]; the idea is to introduce a minimum income of 600 Euro per month for all individuals (jobless, unemployed, precarious workers) having a taxable personal income not in excess of 8000 Euro if they have been resident in Italy for at least 24 months and are registered with the job placement lists of Employment Offices. The proposal by the M5S (Movimento 5 Stelle – Five-Star Movement) was introduced shortly thereafter; it is similar under many respects to that by SEL but it was rejected by the Chamber at the end of June. The main issue concerning guaranteed minimum income has still to do with its implementation – or rather, with the feasibility of its implementation.[14]

National Strategy for the Inclusion of Roma, Sinti and Nomadic Communities in the Labour Market

In 2012 and 2013, the national strategy for the inclusion of Roma,

13 http://www.redditogarantito.it/#!/reddito-garantito.

14 In practice it is unclear how to bring it about. There are several proposals: setting up a fund to be financed jointly by State and Regions; enhancing the fight against tax evasion or introducing new taxes; cutting expenditure, e.g. military expenditure.

Sinti and nomadic communities highlighted the need for fostering the integration of these ethnic and social groups in Italy's labour market. The key objectives of the strategy focus on promoting the fair social and economic inclusion of Roma, Sinti and Caminanti (Gens de voyage) communities. In particular, there are four main objectives in the Employment Area (as per the Communication by the European Commission No. 173/2011) : access to education, employment, health, housing. With particular regard to the employment area, the strategy will seek to promote the fair treatment of Roma, Sinti and Caminanti Communities (RSC) in terms of social and economic inclusion – that is, first of all in the employment sector.
The specific objectives (OS – Obiettivi Specifici, in Italian) of the EMPLOYMENT area are as follows:

- OS1: Fostering non-discriminatory training and access to training courses with a view to integration in the labour market and the creation of business;
- OS2: Fostering tools, arrangements and mechanisms to legalise precarious or illegal work and promote entrepreneurial work and self-employment;
- OS3: Devising customized processes to enable Roma women to access the labour market and supporting under-35 RSC in accessing the benefits and facilitations envisaged for young entrepreneurs and youth employment in general.

Over the past few years, many Roma encountered considerable difficulties in terms of occupational integration either because of the inadequate wages or because of the organizational features of their employment. The success of occupational integration is closely related to the cooperation with employment centres and real time exchanges on vacancies available in companies; however, one cannot but leverage the skills, capabilities and aspirations of each individual involved whilst doing away with all sorts of discrimination in the workplace and ensuring the appropriate vocational training.
Regarding the objectives specified above and following the Communication by the European Commission, the Ministry of

Labour tried to ensure (OS1), in 2012 and 2013, full access by Roma and Sinti meeting all the eligibility requirements to the projects and experimental initiatives undertaken by the competent directorates general.
As for OS2, an additional nationwide project was launched in December 2011 called "System action to foster and create innovative operational tools at Occupational Services with a view to self-employment and micro-entrepreneurship". This project is aimed at facilitating occupational integration of individuals at risk for social and occupational exclusion – such as, inter alia, Roma, Sinti and Caminanti communities.
Regarding OS3 implementation, there is currently a Programme that has been modeled after the Spanish one ("Acceder") and focuses especially on the occupational inclusion of RSC women via customized integration processes. Finally, it should be pointed out that in Italy – unlike what is the case in some EU countries – there is as yet no social funding programme aimed at the inclusion of Roma people.

The Supranational Level

Council of Europe

The latest report on Italy by the Human Rights Commissioner at the Council of Europe, Nils Muiznieks, dates back to July 2012.[15] After an overview of the level of integration of refugees and beneficiaries of international protection in Italy, the Commissioner notes (item III in document COMMDH2012-26) that the situation is very serious. The Commissioner urges Italian authorities to take steps by way of measures countering disadvantages in the labour market. In particular, the discrimination to be tackled has to do with the risk of exploitation of refugees and international protection beneficiaries in the employment sector: laws and regulations should be reconsidered in a more inclusive perspective so as to ensure

15 www.coe.int/t/commissioner/Activities/countryreports_en.asp.

integration alongside protection. This process may only be ensured by doing away with the administrative obstacles that slow down the integration of refugees and international protection beneficiaries in the labour market. The Commissioner calls upon Italy to transpose the EU directive extending long-term resident status to refugees and other international protection beneficiaries as for market labour facilitations and the fundamental rights vested in refugees intending to work in Italy.

The directive was transposed recently by way of Law No. 97 of 6 August 2013,[16] i.e. the so-called "2013 European Law"; this law includes, among other things, provisions on aliens' access to employment by the public administration and lays down the rights vested in relatives of EU citizens, long-stayers, refugees and beneficiaries of ancillary protection to access public offices also via sector-specific legislation on civil service – whereby the same limitations and conditions apply as those envisaged for EU citizens. The law in question also settled the issues related to incompatibility of Italian legislation and practices with the European obligations arising out of Directive 2003/109 – as long-stayers were denied access to the INPS allowance granted to large families.

European Commission

In April 2013, the European Commission issued a Communication addressed to the European Parliament and the Council containing the Annual Report on Asylum and Immigration (SWD(2013) 210 final). The Report includes several considerations that also deal with integration via the labour market. The key message is "migration as a tool of growth". This may be achieved by developing tools for the communication between companies and workers and, generally speaking, between demand and offer within the framework of the European labour market; by improving the skills of the current labour fource; creating new positions for the unemployed; and increasing workers' mobility in the EU. The integration of third-

16 Further details on the "2013 European Law" transposing the directive can be found here: http://www.asgi.it/home_asgi.php?n=2866&l=it.

country nationals, who often are migrants, should take place on different levels: social security, training, labour and wages.
The key instrument on labour and wages as regards the Commission is Communication (COM(2013) 83) to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - "Towards social investment for growth and cohesion, including implementing the European Social Fund 2014-2020". The Europe 2020 Strategy for smart, sustainable and inclusive growth sets targets to lift at least 20 million people out of poverty and social exclusion and increase employment of the population aged 20-64 to 75%. The flagship initiatives of the Europe 2020 Strategy, in particular the European Platform against Poverty and Social Exclusion and the Agenda for New Skills and Jobs, support efforts to reach economic, social and geographical cohesion and fight against social exclusion and discrimination in line with the fundamental EU targets as enshrined in the Treaty.
However, the challenges posed by the crisis have led to growing risks of poverty and social and labour market exclusion in many countries. Welfare policies play three functions in this connection: social investments, social protection and stabilization of the economy. To meet the Europe 2020 targets, a new approach is needed, recognising the budget constraints and demographic challenges that Member States face. Social policies need to be both adequate and fiscally sustainable, as these are two sides of the same coin. This means putting greater focus on policies such as childcare, education, training, active labour market policies, housing support, rehabilitation and health services. Social investment plays a particular role for those people that are disproportionally affected by unemployment, poverty, bad housing and poor health conditions and discrimination.
Following up on a recommendation by the European Council, the European Commission drew up several considerations and recommendations for Italy at the end of May 2013 regarding labour, income and social inclusion and concerning the Italian stability programme 2012-2017 (COM(2013)). The Commission observes that Italy is going through major macro-economic imbalances

which require active policies to restore a balanced situation. In particular, this is due to the loss of competitiveness externally and to the considerable public debt against a general backdrop of economic stagnation: these continue to be the main macro-economic imbalances affecting Italy. Furthermore, the Commission observes that while important reforms have been adopted to foster fiscal sustainability and to spur growth, their full implementation remains a challenge and there is scope for further action.
The participation of women in the labour market remains weak as well and the employment gender gap is one of the highest in the EU. The risk of poverty and social exclusion are markedly on the rise, while the social protection system has increasing difficulties to cope with social needs.

European Union
By a decision of April 2013, the European Council reaffirmed the guiding lines for all Member States in the labour sector: elaborating a coordinated development strategy so as to foster the increase in specialized workforce, including individuals trained in specific skills and capable at the same time to adapt to the needs arising from the changed economic paradigms – including the occupational one. The 2020 Strategy as developed by the Commission allows guiding the European economy towards balanced, sustainable, inclusive growth supported by high occupational, productivity and – above all – social cohesion levels.
The evaluation of the national reformation projects as collected in the Joint Employment Report adopted by the Council in February 2013 shows that Member States should continue making all efforts to develop a set of priorities: enhancing participation in the labour market and reducing structural unemployment; developing a workforce having the required skills to easily integrate in the labour market by fostering quality of work and lifelong training – therefore improving, in the first place, the training system and increasing education for the services sector. Only in this manner will it be possible to foster social inclusion and fight poverty.

European Court of the Human Rights

In December 2012, the Strasbourg Court ruled against Italy because of the failure to respect the rights of 38 former employees of the Province of Milan who, having been transferred in 1999 to the Ministry of Education, were not recognized their length of service with the Province of Milan. Although all of them had filed a suit against the State, their interests were not protected because the rules on recognition of length of service were amended with retroactive effects by the 2006 Budget Act whilst the relevant proceedings were still pending. In 2012 the Court ruled that the arguments submitted by the Italian Government to justify the introduction of new rules, allegedly grounded in the need for filling a legal loophole and preventing discrimination between State employees and employees coming from local authorities, were not convincing. In the Court's view, the actual purpose served by the new rules was to preserve the State's economic interest by reducing the backlog of judicial disputes.

International Labour Organisation (ILO)

In December 2012, Italy signed ILO's Convention on domestic workers, thus making a major step forward in protecting this category of workers and recognizing domestic work as a form of professional activity also in legal terms. The then Minister of Foreign Affairs (Terzi) declared that in so doing "Italy meant to be among the first European countries to sign because it is a Convention that fosters social cohesion and the affirmation of rights, in particular women's rights, which is a fundamental standard of civilization." Having signed this Convention is also important because of the high rate of aliens working in the tertiary sector in Italy, especially as domestic workers.

The Convention concerning decent work for domestic workers was adopted in June 2011; it is aimed at ensuring an adequate protection standard for domestic workers in full compliance with gender equality by taking also account of the high number of women working

in this sector. In particular, the Convention lays down domestic workers' right to be informed on employment terms and conditions; it prohibits forced labour and regulates recruitment methods. At the same time, the Convention introduces minimum requirements with regard to housing and privacy of the workers living at the families employing them. The Contracting Parties are also required to set a minimum age for admission to domestic work in compliance with international child protection instruments.

Recommendations

1) Ratifying the International Labour Organisation's Convention on minimum wage fixing and introducing a basic income scheme, that is a universal and generalized instrument to support individual income as applied by the State to all citizens of age – whether they work or are currently jobless, and whether they used to work or have never worked.

2) Introducing more effective legislation to ensure flexibility in working hours so as to reconcile work with care of children and non-self-sufficient individuals, by giving priority to the latter requirements in granting part-time arrangements (including the payment of social security benefits) as well as in connection with corporate welfare tools such as in-house nurseries, vouchers, health care and assistance.

3) Reconsidering the occupational conditions applying to pregnant women as well as pregnancy-related practices of unjustified dismissal. It is furthermore recommended to improve and increase benefits for families including two working parents so as to foster gender equality in the labour market.

4) Reducing segmentation in Italy's labour market. In particular, steps should be taken to enhance the initiatives aimed at developing a full-fledged, productive labour market where workers' operational freedom can be guaranteed and all workers are protected whether at the start or at the end of their careers.

5) Introducing harsher penalties vis-à-vis those employers that fail to respect safety requirements, whilst enhancing controls.

6) Regulating the status of precarious workers [fixed-time contract workers] in public administrative bodies, in particular in schools,

so as to comply with the guidance provided by the Court of Justice of the EU.

7) Adjusting social safety nets to the standards existing in the other EU countries. It is recommended to introduce a mechanism in this respect that focuses on the key role of the worker's dignity.

8) Introducing more effective flexibility mechanisms for retirement so as to protect, in the first place, personal freedom.

9) Immediately affording the right to wages for those "ousted" workers that are currently jobless and without any retirement benefits because of the increase in the retirement age provided for by the recent reformation of social security schemes.

PROTECTION OF THE ENVIRONMENT AND THE GOOD LIFE

By Daniela Buaduin

What growth can be sustainable if the right to live in a healthy environment is not afforded to everybody? Pollutants, uncontrolled building, soil desertification, more and more altered landscape, weak approach vis-à-vis widespread natural risks, and illegality these are only some of the problems affecting our lives, with effects which are even more prejudicial for those who live in a condition of social marginality.

Environmental issues are inseparably linked with a person's dignity and their place within our legal system and the examination of the so-called multi-layer regulatory framework are to be considered in this perspective. This approach is also necessary to assess and comprehend the legislator's lines of policy and law and therefore outline a perspective of reform without concealing the risks inherent the anomaly of using excessively the word "emergency" when dealing with environmental issues.

Focus on Facts

The report *State of the World 2013*[1] by Worldwatch Institute focused on a fundamental issue of human civilization and which is at the centre of current debate on the environment, namely if making our social and economic development models sustainable is still possible. In the introduction chapter, the Institute President, Robert Engelman wrote that the word "sustainable" was abused,

1 Worldwatch Institute, *State of the World 2013. Is sustainability still possible?* Italian edition edited by Gianfranco Bologna, Edizioni Ambiente, Milan, 2013.

which resulted in trivializing the notion, which is actually complex and structured, introduced in the environmental field by the text *Our common future* of 1987 where it is reported that "sustainable development" is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

As is known, environmental degradation affects to a greater extent economically disadvantaged and marginalized persons, who out of their choice or because they are obliged, temporarily or definitely quit the place of their habitual residence owing to sudden or progressive environmental changes which are prejudicial to their lives. Many researches have stated for years that the world community should adopt new definitions of "migrants", because old categories are no longer capable to adequately reflect the complexity of migrations, their causes and procedures .[2]

As to air pollution a study carried out on more than 300,000 persons resident in nine European countries was published in *The Lancet Oncology*, according to which the higher is air pollutants concentration, the greater is the risk of developing lung cancer[3]. The European Community declared 2013 "the air year" and committed itself to strengthening the directive regulating the presence of pollutants in the atmosphere[4] whereas as to noise pollution it established new "anti-noise" objectives by envisaging their reduction by 2017[5].

In the *Ispra (Istituto superiore per la protezione dell'ambiente)* [Superior Institute for Environmental Protection] report, through

2 Worldwatch Institute, *State of the World 2013. Is sustainability still possible?* Quote, 392-392.

3 The Lancet Oncology, Air pollution and lung cancer incidence in 17 European countries: prospective analyses from the European Study of cohorts for Air Pollution Effects (ESCAPE), 10 July 2013, which can be consulted at: http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(13)70279-1/abstract.

4 Legambiente, *Malaria di città 2013. L'inquinamento atmosferico e acustico nelle città italiane*, 17 January 2013, 3 available at http://www.legambiente.it/sites/default/files/docs/malariadicittà2013.pdf

5 Legambiente, *Malaria di città 2013. Linquinamento atmosferico e acustico nelle città italiane*, 14.

the collection of the findings from monitoring pesticides in waters, contamination is said to be considerably widespread although the examination did not cover all the national territory yet[6]. Alarming data emerged also from the study of the Us Navy Headquarters of Naples, carried out in order to understand how dangerous it was for US soldiers and their families to live in Campania, where it is reported that 92% of private wells give rise to an unacceptable risk for health, without omitting the public water network in which the presence of water coming from "unauthorized" wells is alleged.[7]

Besides, our lives are also influenced by the ruthless use of fertile soil mostly located in the few valuable areas of our country - suffice it to think of the so-called land grabbing, which started as the purchase by rich countries of fertile soil the relevant resources[8] for negligible sums and then developed thanks to the uncontrolled spreading of power plants from renewable sources. Regarding the latter, planning and adequate control of the balance between the energy produced and the energy used, between the emissions reduced and those created are missing[9]. The management of the environment can be defined as responsible only if the decisions on the location of these plants are complemented by fair and sustainable policies on the use of the territory, ensuring the protection of ecologically important areas and respecting the rights of those who live in such areas.

In the fight against environmental destruction, the related disrespect for human dignity, indifference, individualism and unaccountability, a more and more decisive role is played by associations and committees set up to safeguard not only environmental interests "strictly speaking", but also – broadly speaking - environmental ones, which include the protection of the quality of life in a given

6 Ispra, *Rapporto nazionale pesticidi nelle acque dati 2009-2010*,n. 175, July 2013, available at http://ww.isprambiente.gov.it/files/pubblicazioni/rapporti/R 175 2013ref.finale.pdf

7 L'Espresso, 21 November 2013, Bevi Napoli e poi muori, 38-45, by G. Di Feo and C. Pappaianni.

8 Corriere.it, 28 January 2013, *Land grabbing: più del neocolonialismo, devastante per l ambiente*, available at http://www.corriere.it/ambiente/13gennaio 29/land-grabbing-devastazione-ambiente273138da-6960-11e2-a497-c004784909.shtml

9 Repubblica, 16 March 2013, *Energie rinnovabili è guerra al Tar contro le centrali*, Turin edition, page 16 A. Bartolomei.

territory[10].

The power and action of EcoMafias

Chair: Having recalled that this is a delegation of the ***bicameral enquiry committee on waste disposal and the related illicit activities****, may I remind our interlocutor that we are here to receive from him all the information he can give us just on this activity: in particular we would like to know* ***when, how and why the Casalesi clan started being interested in waste…***

CARMINE SCHIAVONE: ***The story started in 1988****; … Pino Borsa,* ***lawyer*** *and Pasquale Pirolo, came to me with a proposal on the dumping of toxic barrels and* ***whatever*** *… I said that there were about 240 hectares of land dug at a depth of 15-20 meters and I assured them that I would talk about it with everybody also because I was part of the* ***clan's administrative division*** *and not of the military one. So I went to* ***Casal di Principe*** *where there were Marco Iovine and my cousin; we all talked about the fact that I had received a proposal…I was answered that it would have been* ***good business*** *for the coffers of the clan who would have had money to invest* ***but the place would have been poisoned because wastes would have polluted ground waters*** *…*[11]

These words are the beginning of the flow of statements made in October 1997 by the cooperating witness Carmine Schiavone and published as late as on 31 October 2013 by the Bureau of the Chamber of Deputies[12] as an act of transparency owed to the citizens living

10 Council of State, 4th Division, decision 14 April 2011, n. 2329; Administrative Court Lombardy, Milan, 22 October 2013, no. 2336.

11 Enquiry Parliamentary Committee on the waste disposal and related illicit activities, 13th Parliament, sitting of 7 October 1997, hearing and documents produced by the cooperating witness Carmine Schiavone that can be consulted on: http://leg.13.camera.it/bicamerali/rifiuti/resoconti/Documentounificato.pdf.

12 Decision of the Bureau no. 50 of 31 October 2013 and Decision of the President of the Chamber of Deputies no. 383 of 31 October 2013.

and working in those areas violated by environmental illegality[13].

During his hearing, Mr. Schiavone reconstructed the origin of EcoMafias in Caserta; he talked about toxic waste buried along the Domitian coast and poured into the Lake of Lucrino too, about lorries carrying nuclear sludge from Germany to landfills; and he said that professionals, entrepreneurs and politicians were involved.

Since then the market of EcoMafias has never gone through a crisis, as it clearly appears from the report submitted in June 2013 by *Legambiente*[14] which at its twentieth edition reported the data of an incessantly growing illegal economy, with a turnover amounting to 16,7 billion Euro in 2012.

In the annual report of the National Anti-Mafia Prosecutor and Directorate, in December 2012 it is reported that since organized waste trafficking meets the needs of low-cost disposal, it is not local, but it is widespread all over the State and concerns all types of business, whatever their size and the economic sector, although the industrial sector is predominant.[15]

The report also analysed the connection between waste disposal and recycling, which actually risks turning into a criminal distortion of the so-called green economy, with the consequent "con(fusion) of illicit waste trafficking with the criminal activities related to alternative energy sources; indeed, national and EU public funding intended for a noble purpose is actually fuelling organized crime's coffers in addition to enriching corrupted public administrators.[16]

Mafia seeps into the public administration through bilateral

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13 Press release no. 477 of 31 October 2013 "Boldrini: grande soddisfazione per la declassificazione degli atti sulle dichiarazioni di Carmine Schiavone" [Great satisfaction for declassifying the statements of Carmine Schiavone]

14 Legambiente, Osservatorio Nazionale Ambiente e Legalità, *Ecomafia 2013. Le storie e i numeri della criminalità ambientale*, Edizioni Ambiente, Milan, 2013.

15 Annual Report on the activities carried out by the National Anti-Mafia Prosecutors and by the National Anti-Mafia Directorate as well as on the dynamics and strategies of organised crime of mafia-type from 1 July 2011 to 30 June 2012, submitted in December 2012, 330.

16 Annual Report on the activities carried out by the National Anti-Mafia Prosecutor and by the National Anti-Mafia Directorate, quote, 317-318.

agreements with politicians, managers of local authorities, public officials and persons in charge of public services. It may take the form of the granting of authorizations and licences, town planning changes, failure to carry out controls, ad-hoc recruitments, planning assignments, contracts, entrusting of works and maintenance activities.[17]

The mixing up of organised crime and politics is also confirmed in the report[18] unanimously adopted on 5 February 2013 by the Parliamentary Enquiry Committee on the illicit activities connected with waste disposal in Campania. The foreword reported the distortive effect produced by emergency approaches in the waste sector whenever such approaches exceed a period consistent with the word "emergency", which evokes a limited time in which contingent situations are to be faced through exceptional regulations and exceptional powers.[19]

The report confirmed Campania's negative supremacy with regard to environmental violations and mentioned the technical in-depth analysis carried out by an eminent geologist on behalf of the Prosecutor's Office of Naples. The analysis showed that all the area north of the city, which is still used for farming, is affected by pollution levels that will reach their peak in 2064 , with the precipitation to ground waters of leachate and other toxic substances resulting from the thousands of tons of special, solid urban and special hazardous waste poured, at least since the eighties, by various concerns of this sector controlled by Camorra criminal organizations.[20]

The enquiry carried out by the Committee reported the thirty-year practice of toxic and hazardous waste burned in the streets or the countryside and the serious consequences for health possibly

17 Annual Report on the activities carried out by the National Anti-Mafia Prosecutor and by the National Anti-Mafia Directorate, quote, 786.

18 Territorial report on the illicit activities connected with waste disposal in Campania Region (Doc. XXIII, n. 19).

19 Territorial report on the illicit activities connected with waste disposal in Campania Region, quote, 15.

20 Territorial report on the illicit activities connected with waste disposal in Campania Region, quote, 113.

resulting from this practice; indeed, the area at issue is also called "*Terra dei fuochi*" [Land of fires] and includes in particular the area across the provinces of Naples and Caserta.[21]

With a decree adopting urgent measures, the Government introduced into the Environment Code a provision (Section 256-*bis*) introducing the statutory offence of illicitly burning waste, which was punishable as a mere misdemeanour beforehand. The decree also provided that judicial authorities finding, during an investigation, that poisonous substances were dumped or illegally poured must inform central and local institutions so that they can take the prescribed actions.

The town of Giugliano, province of Naples is a typical example of abuse of the territory with devastating effects especially for the weakest persons. Here there is the story of the Roma community which was placed, after various transfers, in the area of Masseria del Pozzo, known to be at high environmental risk owing to the toxic waste present there. The unhealthy smell perceived in that area, the rashes on the children's skin, the inadequate sanitation are the cost of a political and administrative choice based allegedly on public order requirements.

This inequality status with respect to environmental disasters involves all those workers who have to face the false dilemma between health and employment: "*hemmed in the grip of the factory both physically and psychologically because the plant uses the blackmail of bread and claims the right to pollute*".[22]

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21 Territorial report on the illicit activities connected with waste disposal in Campania Region, quote, 144-151; Legambiente, Osservatorio Nazionale Ambiente e Legalità, *Ecomafia 2013*, quote, 135-137.

22 A. Prunetti, *Amianto. Una storia operaia*, Agenzia X, Milano, 2012, 78.

On 29 October 2013 the Office of the Prosecutor of the Republic attached to the Court of Taranto ordered that 53 persons be served the notice that preliminary investigations were concluded in the enquiry called "*Ambiente svenduto*" [Sold off environment] [23].

The alleged offences included: criminal association aimed at perpetrating several offences against public safety, in particular failure to adopt precautions to prevent industrial accidents, poisoning of waters and foodstuff, intentional environmental disaster; offences against public administration and public confidence, such as corruption, extortion, falsity and abuse of office; as well as manslaughter consisting in infringing the rules to prevent industrial accidents with regard to the death of Claudio Marsella (the 29-yearold who deceased on 30 October 2012), engine driver of the *Movimento Ferroviario* unit, and Francesco Zaccaria (deceased at 29 on 28 November 2012), working as a crane operator.[24]

23 Office of the Prosecutor attached to the Court of Taranto, notice of the end of investigations, 29 October 2013 (crim.proc. no. 938/2010).

24 The crane operators described by Adriano Sofri: Operai Ilva: "*Non risaliamo su quelle gru*", 31 dicembre 2012, which can be consulted on: http://www.repubblica.it/cronaca/2012/12/03/news/ilvaoperaigru-47962430.

Discriminations and significant events

- **June 2012**
  - Rio de Janeiro, United Nations Conference on sustainable development, stressing the leading role of green economy within sustainable development and reduction of poverty and the institutional framework to reach such a development.
  - Beginning of the operation to demolish the unfinished building which, in view of the Italian Football World Cup 1990, was supposed to become a 7-storeyed hotel with more than three hundred rooms and overall size of almost one-hundred and eighty thousand cubic meters of cement in the park south of Milan.

- **July 2012**
  - The Judge for Preliminary Investigations attached to the Court of Taranto ordered the precautionary seizure, without the permission to use them, of *Ilva* hot working area plants and appointed four administrators.
  - The European Court of Justice established, with regard to the infringement procedure initiated by the Commission in 2009, that Italy infringed EU rules on the collection, treatment and discharging of urban sewage in that it did not comply with their implementation timeline.

- **August 2012**
  - The Government enacted a decree-law containing urgent provisions in view of the reclamation and requalification of the territory of the town of Taranto.

- **September 2012**
  - A ridge of rock fell on Via dell'Amore, a trail between Riomaggiore and Manarola, while some persons were passing by.

- **October 2012**
  - The Minister of the Environment declared the procedure aimed at granting the integrated environmental authorization (*AIA*) to the Ilva plant of Taranto concluded.
  - The Court of L'Aquila established that some members of the "National Committee for assessing and preventing major risks" were guilty of the deaths and injuries of several persons on account of bad communication of the risk related to the destructive earthquake of 2009.
  - The Italian Court of Auditors ordered some public managers to pay damages to Campania for the prejudice caused to the touristic image of the Region because of the waste-related emergency.

- **November 2012**
  - The Judge for Preliminary Investigations of Taranto ordered that the steel produced by Ilva be seized in that despite the order to stop production issued by the Prosecutor's Office, the company had continued its activity.

- **December 2012**
  - The Government passed the so-called "*Salva Ilva*" decree-law, turned into law with amendments, authorizing the continuation of production provided that the requirements of the authorization order were met, notwithstanding the seizure orders on the property of the firm owning the plant.
  - The Judge for preliminary investigations of Taranto rejected the request for release from seizure; the goods on the quays

could not be handled.

- The Prosecutor's Office at Taranto filed a petition with the Constitutional Court on account of conflict of competences with the Government regarding first the so-called "*Salva Ilva*" decree-law and afterwards the confirming law.

- **January 2013**
  - The Court first and the Judge for Preliminary Investigations of Taranto afterwards raised doubts on the constitutionality of the so-called "*Salva Ilva*" law and in particular on the rule allowing the plant to market the finished and semi-finished products under seizure.
  - The European Commission sent a letter to the Italian Government requesting compliance with European rules on air quality and excessive concentration of thin dusts.
  - The Government passed the decree-law to overcome critical situations in the management of waste and some environmental pollution cases, which in particular dealt with the waste emergencies in Latium and Campania and postponed, to end 2013, the state of emergency for the shipwreck of Costa Concordia at the Giglio Island.
  - The Minister of the Environment appointed an administrator to overcome the alarming critical situation of urban waste management in the territory of the province of Rome, under the provisions of the Stability Law of 2013.

- **February 2013**
  - The Constitutional Court declared the two petitions on the conflict of competences submitted by the Office of the Prosecutor of the Republic of Taranto inadmissible in that they had been overridden by the question of constitutional legitimacy raised on the law first by the Court and subsequently by the Judge for preliminary investigations.
  - Italy signed the Convention of the Council of Europe on

the value of cultural heritage for society, also known as Faro Convention (the name of the Portuguese city where the text was opened to the States' signature in 2005), which enlarges the notion of cultural heritage to include, in addition to traditional heritage, other elements such as the environment and folk traditions.

- **March 2013**
  - The European Commission deferred Italy to the Court of Justice because of the situation of the management of waste in Latium.

- **April 2013**
  - The referendum on the partial or total closure of Ilva of Taranto did not reach the quorum (50% plus one of those entitled to vote).

- **May 2013**
  - The Judge for preliminary investigations of Taranto signed the seizure order of equivalent value amounting to 8.1 billion Euro, this being the total estimated cost of the interventions necessary to the functional restoration of the hot working area plants in view of possible environmental reclamation.
  - The Constitutional Court filed the reasons for the decision in which it declared the questions of constitutional legitimacy on Sections 1 and 3 of the "*Salva-Ilva*" law raised by the Court of Taranto and by the Judge for Preliminary Investigations partly inadmissible and partly ungrounded.

• **June 2013**

- The Italian Government passed the decree-law, then turned into law with amendments. named "*Salva-Ilva bis*" with regard to the industrial plants of strategic national significance whose production activities involve serious and considerable dangers for the environment and health owing to non-observance of provisions made in integrated environmental authorizations (*AIA*) - such as Ilva S.p.A.. The decree ordered that the company be put under the administration of an external commissioner for 36 months, and entrusted Mr. Bondi and a pool of sub-commissioners with the management of the business and the environmental reclamation process.
- The European Union deferred Italy to the Court of Justice for the management of waste in Campania and proposed a fine of 256,819 Euro per day of delay after the second judgment until compliance by Italy.

• **July 2013**

- In the case of the so-called MUOS to be installed in the US Navy Headquarters of Niscemi (Caltanissetta) after acquiring the study of *Istituto Superiore di Sanità* [Superior Institute of Health] which excluded predictable risks due to the "known effects of electromagnetic fields", the Region of Sicily ordered "that the annulment of the authorization be annulled".

• **August 2013**

- The Government passed the decree-law modifying the so-called Code of the Environment and introduced measures aimed at simplifying and rationalizing the waste traceability control system and in the energy field.

• **September 2013**

- The Court of Appeal of Turin filed the judgment in the "Eternit" trial, which sentenced the surviving defendant for the periods in which he actually managed the production centres, to the penalty of imprisonment for eighteen years on account of environmental disaster.
- The European Commission sent a letter of notice to Italy for having failed so far to ensure observance by the Ilva steelworks of Taranto of the directive on supplemented prevention and reduction of pollution and the directive on environmental damage liability establishing "the polluter pays" principle.
- The wreck of Costa Concordia ship underwent a complex rotation operation which made the sunken part resurface after the shipwreck of 13 January 2012 near Giglio Island.

• **October 2013**

- The Office of the Prosecutor of the Republic attached to the Court of Taranto ordered service of the notice that preliminary investigations were concluded on fifty-three persons in the enquiry "*Ambiente svenduto*" on Ilva.
- A decision of the Bureau of the Chamber of Deputies declassified the hearing of the cooperating witness Carmine Schiavone as held in the session of 7 October 1997 at the Parliamentary enquiry committee on waste disposal and related illicit activities.

- **November 2013**
  - A cyclone which caused death, terror and destruction knocked down Sardinia with the resulting state of emergency in the island declared by the Council of Ministers.
  - The Chamber of Deputies passed the decree-law ratifying and enforcing the agreement between the Governments of the Republic of Italy and the Republic of France to carry out and operate a new railway line (Turin-Lyon), signed in Rome on 30 January 2012.
  - The European Commission sent a letter of notice to Italy for non-compliance with the obligations resulting from the 2011/70 Euratom Council Directive of 19 July 2011 setting up a new community framework for responsible and secure management of exhausted nuclear fuel and radioactive waste.

- **December 2013**
  - Via a decree-law containing urgent provisions aimed at facing environmental and industrial emergencies and promoting the development of concerned areas, the Government introduced, in the Code of Environment, a rule on the offence of illicit waste burning.
  - The Court of Cassation declared null and void the precautionary seizure of 8.1 billion Euro against Riva Fire, the holding company controlling Ilva SpA, as ordered by the Judge for preliminary investigations of Taranto on 24 May and confirmed on 15 May 2013 by the *Tribunale del Riesame* [Translator's note: It is a court which is called upon by the accused to review an order issued by the Preliminary Investigation Judge against such person. This court has jurisdiction over precautionary measures such as orders for pre-trial custody or pre-trial seizure].
  - The Constitutional Court declared the anti-regasifier rule of Val d'Aosta [Aosta Valley, a Region] illegitimate, in that the

region could not impose an absolute ban to carry out waste recovery and disposal all over the regional territory since this decision interfered with the State's competence over environmental protection as set forth in the Constitution.

- The Administrative Court (TAR) of Latium granted the appeal lodged by the Municipality of Colfelice against the actions undertaken by the Commissioner to overcome the urban waste management crisis on the territory of the province of Rome, and as a result annulled the relevant appointment decree by the Ministry - which extended the Commissioner's powers without complying with the limitations arising from the purpose of the law conferring extraordinary powers on him, from the relevant prerequisites, the EU law's principles of self-sufficiency and proximity in waste management, as well as from subsidiarity as a rule for the allocation of powers among the different levels of government.

Legislation and policies

The environment and dignity

In the ordinary discourse, the meaning of "environment" is manifold.

Legally speaking, since the seventies the Court of Cassation[25] has defined the right to health as right to healthy environment (Articles 2, 32 and 9, paragraph 2, Cost.) and the Constitutional Court[26] referred to a primary, absolute value, necessary to the community and citizens, impacting the quality of life and reflecting the need for a natural habitat where human beings live and act.

The notion of environment is a dynamic one and is shaped by many different conceptual sets; however, even if it does not lend itself to the fixed definitions typical of law[27], it is clearly related to the dignity of human beings which finds its factual expression exactly in the environment.

The Constituent Assembly placed dignity at the basis of the rights recognised in our Constitution as a sort of common thread going through all its texture, starting from Article 1 which founds the Republic on labour. Dignity is owed to everybody without distinction of sex, nationality, language, personal, social, or financial conditions and is inviolable also pursuant to the Charter of fundamental rights of the European Union. Notwithstanding that, the States who undersigned that Charter are still reluctant to afford effective protection to the environment – which is markedly in conflict with the commitments undertaken as confirmed by the numerous environmental disasters described in the following paragraphs.

When speaking of dignity violated the first case to be mentioned cannot be but Taranto, the emission of toxic and dangerous substances,

25 Court of Cassation Joint Divisions, 6 October 1979, n. 5172.

26 Constitutional Court, decision 30 December 1987, no. 641; Constitutional Court, decision 28 May 1987, n. 210.

27 D. Amirante, *Profili di diritto costituzionale dell'ambiente*, in P. Dell'anno, E. Picozza, Trattato di diritto dell'ambiente, vol. I, Cedam, Padoa, 2012, 234.

the leakage of pollutants in the sea and in the ground, excessive death and illness rates in the districts of Tamburi, Borgo, Paolo VI and the municipality of Statte[28].

The environmental disaster caused by Ilva required the intervention of judges and caused a conflict between the powers of the State with regard to the decree-law called "*Salva Ilva*"[29] and its confirming law[30] containing urgent measures "to protect health, the environment and employment levels in the case of plants having national strategic significance".

According to the Prosecutor's Office that appealed to the Constitutional Court, these regulatory instruments made ineffective[31] the order by which the Judge for Preliminary Investigations of the Court of Taranto had submitted Ilva's property to precautionary seizure[32]. Those laws supposedly legitimated, via the authorisation to continue the pollution-causing production, the perpetration of further offences of the same kind - prejudicial to health and the environment.

It is useful to recall that according to the aforementioned decree-law the Minister of the Environment may allow, through the integrated environmental authorization (so-called *AIA*)[33], continuation of the

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28 Ministry of Health, Istituto Superiore della Sanità, *Ambiente e salute a Taranto: evidenze disponibili e indicazioni di sanità pubblica, periodi considerati 1995-2002, 2003-2009*

29 Judgment for conflict of competences between the State's powers raised in connection with the decree-law 3 December 2012, no. 207, initiated by the Prosecutor of the Republic attached to the Court of Taranto with an appeal filed with the Clerk's Office on 31 December 2012.

30 Judgment for conflict of competences between the State's powers raised in connection with the decree-law 3 December 2012, no. 207, initiated by the Prosecutor of the Republic attached to the Court of Taranto with an appeal filed with the Clerk's Office on 28 January 2013.

31 The Judge for Preliminary Investigations of Taranto, order of 25 July 2012 for pre-trial custody to be imposed on some of the persons under investigation and ordering precautionary seizure of all the hot working power plant of the steelworks and appointing administrators with the task of initiating the safety technical procedures to block specific production and the quenching of the plants.

32 Precautionary seizure is the tool whereby, following a request by the Public Prosecutor, the Judge can prevent that the free availability of offence-related property may compound the consequences of the offence itself or even facilitate the perpetration of other offences.

33 The supplemented environmental authorization is an administrative measure authorizing the operation of a plant subject to given conditions aiming at ensuring that it complies with the requirements provided for by Title III bis of Legislative Decree no. 152/2006 to prevent and reduce

production activity for a period not longer than thirty-six months, provided that the requirements of the authorization order are complied with, if there is the absolute need to safeguard work and production (Section 1, paragraph 1); furthermore it provides that this shall also apply when the judicial authority imposed seizure measures on the property of the company owning the plant (Section 1, paragraph 4).

The Prosecutor's Office alleged that this abnormal use of legislative powers gave rise to a sort of "annulment by law" of the judicial seizure order and infringed the principles according to which prosecution is compulsory and the public prosecutor is independent.

The clash between the Government and the judiciary was considered as inadmissible by the Constitutional Court[34] because of the possibility to rely, in the course of a standard trial, on the different remedy consisting in challenging legitimacy of the relevant provisions. The latter option, set out also by the applicant, was actually resorted to when the Court was seised both by the Judge for Preliminary Investigations[35] and by the Court of Taranto acting as appeal court[36] with an action to establish compliance with the Constitution of the "Salva Ilva" decree-law in the text resulting from the confirming law.

It should be recalled here that according to the judges from Taranto, a public authority may not waive its function to ensure healthy environmental conditions – not even for particularly significant reasons of public interest[37].

pollution and guarantee a high level of protection of the environment.

34 Constitutional Court, decision dated 13 February 2013, no. 16; Constitutional Court, decision 13 February 2013 no. 17.

35 Court of Taranto, Office of the Judge for Preliminary Investigations, order 22 January 2013 (reg. ord. n. 19 of 2013).

36 Court of Taranto (acting as appeal judge under Article 322-bis of the code of criminal procedure, lodged by Ilva's legal representative against the order of the Judge for Preliminary Investigations who, on 11 December 2012 rejected the request to revoke preventive seizure imposed on the finished or semi-finished products kept in the company's plants), order 15 January 2013 (reg. ord n. 20 of 2013).

37 Court of Taranto, Office of the Judge for Preliminary Investigations, order 22 January 2013 (published on the Official Journal n. 6, first special series of the year 2013), with which the questions of constitutional legitimacy were raised on the provisions of the "*Salva Ilva*" decree-law, in the text resulting from its conversion into a law.

The provisions under scrutiny were ultimately considered legitimate in that they do not encourage entrepreneurial practices such as to cause harm to personal safety and dignity. According to the Court[38], all the fundamental rights safeguarded by the Constitution, expressing as a whole human dignity, are mutually complementary without any of them totally prevailing over the others. According to the Constitutional Court, use of the adjective "fundamental" in Article 32 of the Constitution does not point to the predominance of the right to health over all the other personal rights, in that there is no strict hierarchy among fundamental rights: balancing of these rights, exactly because it is a dynamic exercise and not established in advance, must be performed based on such rules of proportionality and reasonableness as can allow preserving their essential core.

The tragedy of Taranto, the city of the two seas but also the steel city, put a question to everybody: if public power had acted in time, should the judicial power have been exercised to protect health and the environment? Such a question cannot be left unanswered, on the contrary it urges us all to consider what development is, the seeming dilemma between health and work, but also the State's unavoidable task to provide the preconditions for actually exercising the rights safeguarding persons and for fully respecting their dignity.

Beyond the State: for a layered approach to protection

In the European integration process where the individual took a central role and public power has a wider structure, which is partly undefined yet, rights are recognized and safeguarded not only by the State but also by way of multifarious sources that go "beyond the State" and give rise to the so-called "layered" protection framework[39].

38 Constitutional Court, decision 9 May 2013, no. 85.

39 E. Lupo; *Pluralità delle fonti ed unitarietà dell'ordinamento,* in E. Falletti e V. Piccone (edited by), *Il nodo gordiano tra diritto nazionale e diritto europeo*, Cacucci Editore, Bari, 2012,5.

The regulatory framework set up by the European Union in the environmental field is so large and includes so many branches that the Commission was led to affirm that the priority is not so much adding new rules, but rather making sure that the various measures agreed upon by Member States are correctly applied by national, regional and local authorities, by economic stakeholders and the public in general[40].

The Charter of fundamental rights of the European Union[41] emphasizes the need for a high protection level and for integrating environmental policy into the other community policies through the principle of sustainable development (Article 37). It was only with the Lisbon Treaty, entered into force on 1 December 2009, that the Nice Charter acquired the status of primary law of the Union (Article 6 paragraph 1) and the procedure for the EU's accession to the European Convention for the protection of human rights and fundamental freedoms (Article 6, paragraph 2) was initiated. On 5 April 2013 the representatives of the Member States of the Council of Europe and the European Union reached the agreement on the text of accession[42], which will be hopefully adopted as soon as possible to foster the protection of the right to healthy environment as considered by the Court of Strasbourg to be part of the Convention.

In the Italian Constitutional Charter, the word "environment" was introduced as late as in 2001 following the reformation of Title V[43], when a new subject matter was added to the competences allocated to the State and Regions, respectively: the State has exclusive competence over "safeguarding the environment, ecosystem and

40 European Commission – Directorate General for the Environment *Editorial Information* in *The Environment for Europeans*, Luxembourg, May 2012, no. 47, 2.

41 On this subject: S. Rodotà, *La Carta come atto politico e documento giuridico*, in A. Manzella, P. Melograni, E. Paciotti, S. Rodotà, *Riscrivere i diritti in Europa*, Il Mulino, Bologna, 2001, 55, ss.

42 Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on human rights. http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Workingdocuments/471(2013)007EN.pdf

43 Constitutional Law 18 October 2001, no. 3 "Amendments to Title V of the second part of the Constitution".

cultural heritage" (Article 117, paragraph 2, subparagraph s) of the Const.) whereas "upgrading cultural heritage and the environment" is incumbent on concurring legislation enacted by State and Regions (Article 117, paragraph 3, of the Const.).

Without going into the merits of the plentiful case-law which strengthened the role of the environment in the Constitution, currently considered as a fundamental right of the individual[44], it is appropriate to specify that in the field of "environmental protection" specific interventions by Regions are allowed only in those cases when, though impacting environmental interests, they are the expression of a competence typically pertaining to Regions, and provided that they do not jeopardize the balance between conflicting requirements as struck by way of the legislation enacted at State level.[45]

A similar concurrence of competences between State and Region was present in the Ilva of Taranto case, where Region Apulia passed a law[46] in 2012 on the assessment of health damage in the procedures for environmental authorization of industrial plants. It is a monitoring system applied to heavy industries, according to which when critical elements are present it must be held that there is a health damage linked to the emissions of the given plant and the relevant mitigating, supervising and controlling measures provided for by regional laws must ensue[47].

When considering the different layers of environmental regulations, one should refer to the use increasingly made by the Italian Government of the so-called "decree-law" [a governmental

44 P. Maddalena, *La tutela dell'ambiente nella giurisprudenza costituzionale*, in *Giornale di Diritto Amministrativo*, 3/2010, 308.

45 Constitutional Court, decision 4 July 2013, n. 178; Constitutional Court, decision 20 June 2013, n. 145.

46 Regional law 20 July 2012, n. 21 Norme a tutela della salute, dell'ambiente e del territorio sulle emissioni industriali inquinanti per le aree pugliesi già dichiarate ad elevato rischio ambientale [Provisions to safeguard health, the environment and territory on polluting industrial emissions for the areas of Apulia already declared at high environmental risk].

47 See the Report "*Valutazione del Danno Sanitario Stabilimento ILVA di Taranto ai sensi della LR 21/2012 Scenari emissivi pre-AIA (anno 2010) e post-AIA (anno 2016)*" [Evaluation of health damage ILVA of Taranto plant under RL 2/2012 pre-AIA emissions scenarios] submitted on 29 May 2013 by the director general of ARPA Puglia.

decree equated to a law in terms of enforceability and effects, to be confirmed by a legislative act by a set deadline].

The recourse to decree-laws adopting urgent measures outside the requirements provided for by the law as specified by the Constitutional Court[48] reduced Parliament's margin of discretion and risks altering our form of democratic-parliamentary government, which is connected to the protection of fundamental values and rights. Excessive use of decree-laws strengthens the role of Government to face an emergency that is qualified as such by the same entity that makes use of this extraordinary power.

One cannot help wonder if the notion of "emergency" was broadened to include situations that do not feature the typical elements of necessity and unpredictability as they actually stem from the presence of institutions unable to tackle problems via standard means, as in the case of waste disposal in the Campania region[49] and the decree-law[50] that was issued to cope with twenty-year-old criticalities that had actually become run-of-the-mill issues[51].

Risk and precaution

The history of environmental disasters which tragically affected our country, not only in the last century but also more recently, shows

48 Constitutional Court, decision 24 October 1996 n. 360; Constitutional Court, decision 23 May 2007, n. 171;

49 When ruling that our country was guilty of violating the applicants' fundamental rights, the Court excluded that the long-lasting state of emergency, in force since 11 February 1994 to 31 December 2009, was one cause of "force majeure", that is an irresistible force or unpredictable event, out of the State's control, preventing actions in compliance with its obligations.

50 Decree-law 25 January 2012, no. 2 "Misure straordinarie e urgenti in materia ambientale" [Extraordinary and urgent measures on the environment] turned with amendments into Law 24 March 2012, n. 28.

51 See: the *Relazione territoriale sulle attività illecite connesse al ciclo dei rifiuti nella Regione Campania*, adopted in the sitting of 5 February 2'13 by the Parliamentary Enquiry Committee on the illicit activities connected with waste disposal, available at http://www.camera.it/dati/leg16/lavori/documentiparlamentari/indiceetesti/023/019/INTERO.pdf; Legambiente Osservatorio Ambiente e Legalità, Ecomafia 2013, cit., 119 ss.

the existence of a risk that, apart from its source, raises analysis and management issues. Only think, in terms of dramatic events, of the cyclone that in November 2013 spread death, terror and destruction in Sardinia and the resulting state of emergency declared in the island by the Council of Ministers.

Generally speaking, risk is the likelihood that a given event causing harm to individuals, animals or objects takes place in a definite time span, whereas environmental risk is the likelihood that an activity or a production process impact directly on the environment causing damage also to human beings.[52]

In political and regulatory decisions on the management of scientific uncertainty with regard to the probability that in the long term some risky events actually take place, a useful benchmark for the protection of health and the environment consists in the precautionary principle (Section 3-ter[53] and 301 of the Code of the Environment).

During the UN conference held in Rio de Janeiro in 1992 it was indicated as applicable principle by the contracting States: Principle 15 of the Rio Declaration actually states that lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The precautionary principle was applied in the clash between the State and Sicily region on the so-called MUOS [54] to be set up in the US navy headquarters[55] near Niscemi (Caltanissetta) and the Sughereta natural reserve. In the procedure annulling the regional instrument that, by virtue of the aforesaid principle, had revoked the building permit, the regional administrative court of Palermo[56] rejected the petition for stay of the revocation as filed by the Ministry

52 Term "risk" in *Le garzantine. Scienze, Garzanti*, Milan, 2005, 1279.

53 Provision included by legislative decree 16 January 2008, no. 4 " *Ulteriori disposizioni correttive ed integrative del decreto legislativo 3 aprile 2006, n. 152, recante norme in materia ambientale*". [Further corrective and supplementary provisions to legislative decree 3 April 2006, no. 152 containing rules on the environment]

54 Muos is the acronym for "*Mobile user objective system*" that is the communication system for mobile users composed of three satellite dishes and two helical transmitters.

55 The Naval Radio Transmitter Facility (NRTF).

56 Regional Administrative Court Sicily, 1st Division, judgment 9 July 2013, 469.

of Defence. The Court found that the precautionary principle and the right to health of the local community took priority, and that the rights at issue could not be subjected to prejudicial measures until it was absolutely certain that the satellite communication system in question was not harmful.

After acquiring the study by *Istituto Superiore di Sanità* excluding predictable risks due to the "known effects of electromagnetic fields", on 25 July 2013 the Region ordered the "revocation to be revoked[57]" and this was followed by the letter of the Ministry of Defence[58] notifying waiver of the appeals pending before the Sicilian administrative courts.

The decision of the Sicilian Regional Assembly did not put an end to the population's fear to suffer environmental and health damage as a result of the electromagnetic waves coming from the military base - especially after reading the report of the verifier appointed by the Court of Palermo[59] in another proceeding for the annulment of the authorization to carry out the works to install Muos.

It should be clarified that the verification is a non-judgemental fact-finding activity ordered by the court to complete knowledge of facts that cannot be inferred from documents, and that the verifier is a public body unrelated to the parties in the trial having specific technical expertise.

In the case at issue, the University professor appointed to verify the possible electromagnetic effects of Muos and of the radio broadcasting facilities already installed at the radio station of Niscemi stated that "*the electromagnetic field relayed by Muos can produce biological effects on the exposed persons, electromagnetic interferences in electronic appliances, airport facilities and aircraft, effects on biocoenoses and fauna in the Sughereta di Niscemi, a site of Community importance*".

57 No. 32513, 24 July 2013 "Revocation of the revocation orders no. 15513 and 15532 of 29 March 2013".

58 No. M_D GUDC/2/27890 of 23 July 2013.

59 Administrative Court, Palermo, 1st Division, order 21 December 2012, n. 2713.

It should be specified that electromagnetic pollution is something which was realized only recently and that its effects on human health are partially known based on studies which led to conflicting results. Regulation of this matter therefore follows the aforesaid precautionary principle; this means that even if unambiguous scientific findings are missing on the damage caused by exposure to electromagnetic fields, appropriate measures are to be adopted to reduce such exposure.

What has been said so far offers a good opportunity to reflect on disclosing environmental risk. On 31 October 2012 the Court of L'Aquila[60] declared some members of the "National Committee for forecasting and preventing major risks" (a technical and scientific consultancy body of the Civil Protection Department) guilty of the deaths and injuries of several persons owing to miscommunication of the risk related to the destructive seismic quake of 6 April 2009 – which caused many casualties in Abruzzo.

It must be specified that it was not "science" that was tried because it did not manage to forecast the earthquake; rather, it was the violation of specific obligations with regard to the assessment, forecasting and prevention of seismic risk and the provision of clear, correct and exhaustive information.

As we know, current scientific knowledge does not allow accurate forecasts of the year, the month, the day and the hour, the magnitude and depth of an earthquake; there is a very high level of uncertainty, therefore the most effective way to prevent or mitigate seismic risk is compliance with anti-seismic rules along with the use of appropriate techniques and materials in buildings.

The preliminary investigation established that there were serious criminal negligence and violation of the precautionary rule applicable to this matter in the defendants' conduct, since the risk assessment was carried out in a superficial, imprecise and generic

60 Court of L'Aquila, Criminal Division, judgment 22 October 2012 – filed on 19 January 2013, n. 380.

way and apodictic and self-referential statements were made that proved quite ineffective with regard to the duties imposed by the law and resulted unambiguously into providing reassurances to the population.

The tragic effect produced by the decision to eliminate the filter between the National Committee for forecasting and preventing major risks and the population of L'Aquila as represented by the Department of Civil Protection, which could have evaluated the formats, mechanisms and contents of the message to be disseminated, could be appreciated at the end of the witness' examination carried out to reconstruct the motivational process that led individual victims to stay at home in the night between 5th and 6th April 2009.

A correct communication implements the right of each individual to be informed on environmental problems, which furthermore can be tackled in the best possible way with the participation of all the citizens concerned.

The Aarhus Convention on 25 June 1998, ratified by our country[61] and adopted by the European Union[62], provides that wider access to information and greater participation in decision-making processes improve decisions' quality and transparency, strengthen their efficiency, contribute to making the public aware of the environmental issues and obtaining its support to the decisions taken.

In 2008, the Italian Parliament introduced an ad-hoc provision in the Code of the environment (Section 3-sexies) on the right of access to environmental information and collaborative participation to promote adequate levels of life quality through the protection and improvement of the environmental conditions as well as the farsighted and rational use of natural resources.

61 Law 16 May 2001, no. 108.

62 Council Decision 2005/370/EC of 17 February 2005.

Environmental damage, prejudice to society

Environmental illegality in Italy has a long-lasting and well-established tradition even if recently it reached such an invasive size as to cause irreparable damage, which can be clearly perceived also by the most inattentive and indifferent observers.

The law (Section 311 of Legislative Decree no. 152/2006) defines environmental damage as "*any direct and indirect significant and measurable deterioration of a natural resource or the utility provided by it*" and provides that pecuniary damages play an ancillary role vis-à-vis specific compensatory measures – i.e., if supplementary and compensatory measures have not been taken or cannot be taken by the entity required to take them.

It is incumbent on the Ministry of the environment to claim for damages by virtue of its obligations to preserve and restore natural resources, which nonetheless does not justify the lack of provisions explicitly allowing environmentalist associations and other local public bodies to claim damages. However, judicial decisions[63], starting from 2007, have reiterated that regions, provinces, municipalities, environmental protection associations and individuals are generally entitled to initiate a civil action in the criminal proceedings for offences against the environment if the illicit conduct gave rise to refundable damage based on tort liability rules as set out in the Code (Sections 2043 and 2059 of the Civil Code).

The legal instruments for environmental defence envisage the right to take part in the authorization procedures and the proceedings for claiming damages, to have recourse to administrative justice against detrimental actions, but also criminal penalties consisting mostly in fines for not complying with the authorizations issued by public administrative bodies.

63 Court of Cassation 3rd Criminal Division, 6 March 2007, no. 16575; Court of Cassation Crim., 28 October 2009, no. 755, Court of Cassation Crim. 22 February 2010, no. 14828; Court of Cassation, 25 May 2011, no. 25039.

Reference is made to the so-called "administrativisation" of environmental protection through public bodies entrusted with preventing degradation, carrying out surveillance and punishing deviant behaviour[64]; as a result, administrative malfunctioning did not spare the environmental field, where very little was done to prevent and repress illicit and prejudicial activities, which could therefore spread owing to the connivance of the few and the inexperience and indifference of the many.

Among the numerous examples of environmental damage provided by national cases, the choice went to one that is probably best suited for grasping what level can be reached by environmental illegality: the Eternit case[65], that is the most serious declaration of guilt in the Italian judicial history with regard to damage to health and to the environment connected with asbestos processing[66].

In 2012 the Court of Turin[67] had sentenced the heads of the multinational to a term of imprisonment of sixteen years for causing, through disreputable management of eternit product, thousands of diseases (asbestosis, mesothelioma, pleural plaques, lung carcinomas) and deaths among workers and the population residing near the plants of Casale Monferrato, Bagnoli and Rubiera, as well as an environmental disaster which is partly continuing.

As pointed out by the judgment, an important aspect which led to the indictment concerned the massive presence of asbestos outside the workplace due to the transport of the raw material on uncovered trucks which drove along the town's streets, the practice of having the workers' families wash their overalls and mend torn bags

64 G. Schiesaro, *Il reato ambientale: verso una più adeguata tecnica di tutela penale dell'ambiente*, in L. Pepino (edited), *La riforma del diritto penale. Garanzie ed effettività delle tecniche di tutela*, Franco Angeli, Milan, 1993, 467.

65 The word "eternit" comes from Latin aeternitas which means eternity, and was used to indicate a brand name of fibro-cement based on asbestos owing to its high resistance.

66 M. Floccia, G. Gisotti, Mauro Sanna, Dizionario dell'inquinamento, La Nuova Italia Scientifica, Rome, 1989, 2: the term "asbestos" is referred to a group of minerals made of magnesium silicate which have first-rate endurance to fire, heat and chemical aggression, whose microscopic fibres easily disperse in the air, while asbestos dust poses serious risks to health and the environment.

67 Court of Turin, 1st Criminal Division, 13 February 2012 (filed on 15 May 2012).

but also to the dust caused by production activities in all the area adjacent to the industrial plant. Furthermore in the plant of Casale Monferrato there was the habit (approved by the heads of Eternit) to let everybody requesting it take home the so-called "polverino", i.e. thin dust that is the debris of turnings, used to pave streets and courtyards or as insulator in construction or maintenance works of buildings, whereas at Cavagnolo the population re-used discarded materials to pave and smooth out roads, farmyards and courtyards.

The description of what happened and still happens, the number of injured persons – which is unfortunately not final - disclosed a catastrophic disaster caused by the defendants with general wilfulness, in that to achieve their industrial and business objectives they acted being fully aware of the enormous damage that would be caused to the environment and to people's health.

The first instance judgment had declared the two defendants guilty of the offence of unnamed wilful damage, aggravated by proven environmental disaster (Section 434, paragraphs 1 and 2 of the Criminal Code), and wilful neglect of safeguards against industrial accidents aggravated by the occurrence of accidents (Section 437, paragraph 2 of the Criminal Code).

The operative part of the appeal judgment[68] was read at the hearing of 3 June 2013; the appellate court decided that there was no case to answer in respect of one of the defendants in that he had passed away some weeks before and acquitted both defendants because they did not commit the offence during the periods when they did not hold oversight positions in the Italian plants of the multinational. As to the periods when the surviving defendant actually managed the production concerns, the Court found that he was not to be prosecuted for the offence of failing to implement safeguards against industrial accidents because the latter was statute-barred, whereas it sentenced them to a term of imprisonment of eighteen years for environmental disaster.

68 Court of Appeal of Turin, 3 June 2013 (filed on 2 September 2013).

With regard to compensation for damage, the defendant, jointly and severally with the companies belonging to the group Eternit, liable in tort, was sentenced to pay tens of millions of Euro to local authorities,, trade unions, associations and natural persons, even if the number of the latter was reduced (the judgment awarded compensatory damages to 932 persons, whereas the number indicated by the first instance judges was higher than 2,000).

The widespread and manifold environmental illegality mentioned above is also prejudicial to the State's coffers, hence to each tax-payer, especially at a time when the dearth of available resources jeopardizes fundamental public services. It should be recalled that administrative and accounting liability arises each time a public official, because of an illicit behaviour, due to wilful or unintentional non-compliance with his/her duties, causes damage to the administrative authority's property.

One of the preconditions for this kind of liability is the damage suffered by the State's finances, meaning damage caused to the community that, although it cannot be connected directly to the public administration as a public body, is nonetheless prejudicial to fundamental public interests.

The Regional Prosecutor of the Court of Auditors of Campania, at the inauguration ceremony of the 2013 judicial year, highlighted the role played by environmental damage in causing damage to the State's finances as related to waste management: suffice it to think of the conviction[69] of some public administrators to pay damages to Campania because of the detrimental effects caused to the Region's touristic image by the waste-related emergency - given the serious social and economic repercussions produced by the emergency on the region's touristic development.

In his report it is written that overcoming the emergency situations made the criticalities actually worse because the remedies already adopted paved the way to new disasters for which no adequate

69 Court of Accounts, Jurisdictional Division, Campania, judgment 29 October 2012, no. 1645.

solutions would appear to be available yet[70]. More and more often, a sort of state of need is invoked along with the authorisation to go ahead in breach of the law, in the name of a real or alleged emergency, almost as if there were at administrative level justifications for illegitimate actions affecting the conditions of civilized life[71].

Environmental governance: between exercise of power and fundamental rights

As said, governing the environment entails risk management, i.e. possible dangers of a predictable event have to be reduced; at the same time, it is necessary to manage emergencies, that is tackle unexpected situations via ad hoc practices and organisational systems other than the ordinary ones.
The measures to face an exceptional event include the appointment of an extraordinary commissioner as provided for by the decree-law[72] called "*Salva Ilva bis*" – which concerned, in particular, industrial plants of national strategic significance whose production activity involves serious and considerable dangers to the environment and health because of non-compliance with the provisions of the integrated environmental authorization (*AIA*), such as Ilva S.p.A. .

The commissioner is appointed for twelve months (which may be extended up to thirty-six) and has all the powers vested in management bodies; the commissioner is tasked with drafting an industrial plan complying with the environmental one aimed at ensuring observance of the law and *AIA*.

Part of the workers of Ilva of Taranto raised some doubts as to whether

70 Address of the Regional Prosecutor attached to Jurisdictional Division for Campania, Tommaso Cottone, "Inauguration of 2013 judicial year" assembly of 2 March 2013, 57.
71 Address of the Regional Prosecutor Tommaso Cottone "Inauguration of 2013 judicial year", quote, 5 and 6.
72 Decree-law 4 June 2013, no. 61 "New urgent provisions to protect the environment, heath and labour in the operation of firms having national strategic significance", turned with amendments into law 3 August 2013, no. 89.

the commissioner, a former chief executive of the company[73], would be acting as a third party and objectively as well as on the as yet unclear relationship between the environmental and health protection plan, on the one hand, and the *AIA* administrative measure on the other hand.

It is useful to point out that the misuse of the solution consisting in appointing a commissioner, which allows departing from standard rules and competences, may alter decision-making processes of public administrative bodies - whose powers are never completely unfettered and autonomous, as they are always subject to the public purpose established by the legislator and to the respect for fundamental rights.

The *Istituto Superiore per la Protezione e la Ricerca Ambientale* and the *Agenzia Regionale per la Protezione dell'Ambiente della Puglia*, after the inspection of 10 and 11 September 2013, established non-compliance with the authorization as for the third quarter of implementation of the decree reviewing the *AIA* of 26 October 2012; this was followed by the injunction[74] to ILVA S.p.A. not to enforce the requests made by the Supervising Authority.

The European Commission addressed a letter of formal notice to Italy under Article 258 of TFEU on 26 September 2013; the letter represents the first stage of the infringement procedure. In the Commission's view, Italy had not ensured up to then compliance by Ilva of Taranto with the directive on integrated prevention and reduction of pollution[75] and with the directive on the liability for environmental damage[76], which laid down the "polluter pays" principle.

The European Court of Human Rights also decided to deal with the effects on health produced by Ilva's emissions. On 6 October

73 La Repubblica, *L'Iliade di Taranto*, A. Sofri, 5 June 2013, 10.

74 Prot. DVA-2013-0023937 of 21 October 2013.

75 Number of infringement procedure 2013_2177: http://euroinfra.politichecomunitarie.it/ElencoAreaLibperaaspx.

76 Directive 2008/1/EC of the European Parliament and the Council of 21 April 2008.

2013 it actually notified the Italian Government of the application[77], submitted as early as 2009, of a woman who developed leukaemia and then died because of the pollution caused by the Taranto plant - according to what was alleged by the applicant and then by her relatives.

The right to environment needs public power to be recognized and defended, but it is attacked by such power each time administrative authorities are unjustifiably inactive or take extraordinary measures which produce long-term or structural effects such as to require an in-depth political and institutional debate.

It must be stated quite clearly that the stubborn inattention to environmental issues, the marginality and poor effectiveness of ex ante and ex post controls, the gigantic size of corruption as well as a legislation on pollution bristling with interpretative hindrances and multiple exceptions are only some of the elements that point to the need for a governance plan of the environment that is articulated, far-sighted and capable to reconcile the many important interests underpinning the diverging legal positions involved.

77 Application no. 43961/09 Giuseppina Smaltini vs. Italy, 7 August 2009: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127699#{"itemid": ["001-127699"]}

Recommendations

1. Developing tools to strike the right balance between regional autonomy and national coordination so as to prevent re-introducing the substantial differences experienced by citizens as for public health care and the relevant fees ("tickets").
2. Launching the National Health Plan, which was scheduled to be ready by January 2013, including Essential Care Levels (LEAs) that should be adjusted to afford all citizens full-fledged compliance with healthcare guidelines – including citizens affected by rare diseases.
3. Reconsidering the mechanisms underlying payment of fees ("tickets") and waiting times, which are the "regulators" of the health care demand, as they are currently detrimental to those citizens that are close to the poverty threshold. It should be recalled that the latter include minors and even newborns.
4. Implementing the palliative care net throughout the national territory on the basis of standardised quality criteria (e.g., 24/7 availability, psychological support to patient and relatives).
5. Regulating the so-called biological will to enable citizens to exercise the right to express their wishes. Expediting the nation-wide implementation of the Electronic Health Record which should include a dedicated section only accessible if urgency procedures prove to be necessary.
6. Providing that AIFA [Italian Drugs Agency] simplifies the procedures for drugs containing cannabis-derived active principles. The relevant measures should also provide for expanding the scope of treatable diseases to include, for instance, treatment of the side effects produced by chemotherapy.
7. Amending, where necessary, pharmacological vigilance procedures. Additionally, effective measures have to be taken regarding distribution of drugs to counter speculation related to price differences across European markets.
8. Developing the tables listing the damages payable based on

medical risks, which are needed to enable fair as well as timely compensation. This should include additional measures to contain the costs of "defensive" medicine and foster safety (e.g., by way of investments into health care buildings, vocational training, etc.).

9. Disseminating initiatives to promote the right to health such as the PartecipaSalute project (http://www.partecipasalute.it/cms_2/) which allow spreading information and raising awareness. Informing patients of the costs of individual health care measures.
10. Developing practices aimed at mutually respecting competences - in the light of the rule of law, which can create trust in institutions. In this sense, attention should be paid to the debate within the Roll of Medical Doctors, who are engaged in redefining their ethics code. Also the Roll of Journalists should perhaps initiate a reflection on the role information plays in this framework and whether it might be useful to introduce rules to reconcile freedom of the press with citizens' right to receive information that has been double-checked and is respectful of suffering

REGARDING DIGNITY

By Eligio Resta

When dignity enters the regulatory scene, it has already a long story behind itself that has made it a wide semantic field from the very beginning. From ancient philosophy to modern thinking, from epics to ethics, from politics to religion – no analysis has ever done without referring, albeit indirectly, to *dignity*.

Why it has become the great narration of Constitutions, Declarations and supranational Conventions is a daunting question that is impacted by numberless historical and cultural factors. One may argue that the pivotal role taken on by dignity from the second half of the past century onwards has to do directly with other cultural unifiers such as humanity, individuals' fundamental rights and – last but not least – brotherhood. That an unbreakable link exists between dignity and the notion of human community is narrated by the major regulatory instruments that were enacted one after the other in the aftermath of WWII. Dignity also mirrors the self-observation of the human community – a community that is human rather than merely national. It is through dignity that the fundamental shift takes place from being a citizen to being a human person and belonging to a community.

Testimony to this story, which resulted ultimately into replacing 19th century equality, is borne by the deep reflections that underlie major instruments such as the Preamble to the UN Charter and, above all, to the Universal Declaration of Human Rights of December 1948. Having said "never more" to the barbaric violence of war and its holocausts, it mentions the "mindness" of belonging to the human community as "the recognition of the inherent dignity of all members of the human family and of their rights" – which "is the foundation of freedom, justice and peace in the world." An explicit equation is made: it "is" the foundation.[1] Barbarism arises immedi-

1 Translator's note: The Italian wording could not be translated literally into English as the English text of the Declaration does not use the verb "constitute".

ately dignity is violated; it is no chance that Article 1 refers to the inviolability of the dignity of all human beings, which goes hand in hand – on a far from secondary level – with the statement that they "should act towards one another in a spirit of brotherhood." Dignity is the in-depth link between the human community and the negation of the wild powers that give rise to barbarism and aberrations. Dignity does not include any longer only the right not to be subjected to suffering and humiliations, as it also entails "the right to recognition as a person".[2]

The social and cultural, therefore "political", awareness of dignity is grounded in the recognition that "being persons" and "mankind" do not necessarily coincide – exactly like the chasm opening between "being brothers" and "brotherhood". Indeed, it is in mankind that barbarism arises; still, it is only in mankind that remedies can be found. The performative nature of the "right to dignity" conjures up this key assumption: it is everyone's duty to recognize and protect everyone's dignity. It is no chance that the public sphere comes into play, in particular those public powers that may only be legitimated if they pursue the objective of recognizing and protecting the dignity of all human beings – not just "citizens". Article 1 of the 1949 German Constitution lays down the principle that "human dignity is inviolable" and then goes on to add that "respecting and protecting it is the duty of all State's authorities." No less incisive than the German *Grundgesetz* is the provision contained in Article 3 of the Italian Constitution, which refers to the equal *social dignity* of every individual and places an obligation on the Republic to do away with all factual obstacles that impede its development. This is translated into the provision of Article 36, which is meant to ensure a *free and dignified* existence to workers thanks to their wages. The whole framework of fundamental rights in constitutional charters lets one glimpse the overall pattern of the legal and political definition of human dignity – from self-determination to the ban on discrimination, up to liberty and equality. This same pattern can be easily descried

2 Translator's note: The Italian wording is not translatable in English as no reflexive verb is used in the English text of the Declaration.

in the 2009 Treaty of Lisbon, which takes up the legacy of the Charter and defines human dignity as intangible and inviolable. Legal instruments tellingly reveal the huge challenge the law has to take up in order to release individuals from the slavery of need. E. Bloch had recalled this in his work on *Natural law and human dignity*; the same had done H. Arendt with her well-known reference to the right to have rights, and also S. Rodotà.

By the way, the Constitutional juridification of human dignity cuts short with the emptily academic dispute on whether it is "natural law", which remains the province of ethical and political discussions. It is known that, freed from its ideological undercurrents, natural law is made up of the values that are grounded in the experience of communities. This is the case of dignity, which cannot but be recognized as the foundation of itself. Thus, it is neither an intellectual trend, nor an ideology, as it is rather an imperative: the norm does not *mean* anything, because the norm *is* the meaning – to quote Hans Kelsen.

Thus, recognition and protection are the words used in legal texts; it is no chance that protection goes hand in hand with the "declarative" form of recognition. Recognising can be traced back to a dimension that already exists in human nature, in the fact of existing, being part of the human community: of this the law merely takes note as if it were a sort of notarial deed. Conversely, protection postulates violation along with the commitment by those in power to restore the contents of such protection. Ultimately, the legal notions of recognition and protection – which are related to different semantic fields – are the focus of all major dilemmas in the philosophical disputes on dignity. The imperative norm is the synthesis of those notions, to be fleshed up by courts – as is currently the case.

First and foremost, the issue is settled as to whether dignity is grounded in human rights or it is the other way round - whether human rights are grounded in dignity. It is most of all in the concept of a right to dignity that all the semantic variants of dignity can be

summed up. Dignity has been referred to as a virtue to be learned; a gift or a privilege to be acquired; a task or an obligation to be fulfilled; an inherent quality or the legitimation for the holding of rights. Once again, these are frivolous disputes, in which the concept of dignity as the sum of fundamental rights is set against the notion of dignity as a prerequisite. Law is not free to choose one meaning over the remaining ones; the norms where it is set forth would not be such – that is, they would be neither universal nor general. All the dichotomies that have featured in the century-old philosophical discussion of dignity remain fully viable – is it an attribute or an acquisition; a (natural) gift or an objective to be achieved; a statutory or a subjective principle, which only takes shape from the entities it is factually to be recognized in; is it a container or – conversely – a specific content? At all events, human dignity is the vindication of the self-recognition as a human person vis-à-vis the powers that unrelentingly violate it. Its empirical benchmark may change, its factual dimension may vary – still, there remains unchanged the notion of a human community to be designed in such a way that the least privileged have the right to the recognition and protection of equal dignity, and therefore to be part, on an equal footing, of mankind as a "human family" – from time to time, never once and for all. The least privileged are those that happen to be, given the specific historical circumstances, in a situation imposed by the violence and humiliation practiced by the wild powers on the "naked life" of individuals who are living beings rather than simply "citizens".

TARANTO. TALKING ABOUT RIGHTS IN THE "TAMBURI" NEIGHBOURHOOD

By Alessandro Leogrande

Erupted as a media, political and judicial case in the summer of 2012 and yet far from having been settled, the Ilva affair is an extremely interesting case when considering the state of human rights in Italy. Besides being a very important and crucial case concerning industrial processes and our development model, the long-term story of the construction, running and development of one of the largest and most important steelworks in Europe is also the story of major and repeated distortions of and derogations from the proper assessment of priorities concerning respect for fundamental human rights, and not just the right to health and the right to work.

The Ilva affair is clear and tragic evidence of the devastating effects produced by a system of social and economic relations where rules and practices concerning respect for and protection of the fundamental rights of citizens and future generations are considered unessential and superfluous, or even counterproductive.

The results of the "Sentieri" study on the mortality and diseases contracted by the inhabitants of Taranto and the nearby town of Statte, as a result of exposure to industrial pollution were presented in October 2012. The data relating to the 2003-2009 period are alarming: +14% all-cause mortality among men and +8% among women, compared to the mean value in Puglia. Among men, in particular: +14% for all malignancies, +14% for circulatory diseases, +17% for respiratory diseases, +33% for lung cancer and +419% for pleural mesotheliomas. Among women: +13% for all malignancies, +4% for circulatory diseases, +30% for lung cancer and +211% for pleural mesothelioma. In the case of children, there was a 20% rise in mortality in the first year of life compared to the mean rate in Puglia and a 30-50% increase in perinatal diseases occurring beyond the first year of life.

Moreover, the "Sentieri" report also states that: "The steel mill – especially the blast furnace, the coking and the sintering plants – is the chief emitter in the area for over 99% of the total and thus potentially accountable for benzopyrene-related effects".

The stakes

The divide cutting Taranto in two is not the choice between health and work, as the media have been reporting for over a year. This is surely an appealing interpretation which is seemingly clear in its self-evident dichotomy. Yet, putting it in these terms means oversimplifying the matter. It is as if in Taranto (in Italy or in Europe) there were "last-of-the-Mohican" workers willing to develop any form of sarcoma, just to keep on founding cast iron. Or, on the opposite front, it is as if there were anti-industrialist fanatics who fail to take into account the social costs of the possible shutdown of Ilva, the largest steelworks in Europe which is still the largest industrial plant in the country, even larger than what remains of the Mirafiori plant. Now, of course, there are extremist positions on both sides.

However, the city is marked by another "variable-geometry divide" centred on a crucial question: under these conditions, is it possible to revamp *these* facilities? This is the dilemma that divides the public in various positions (and not necessarily two). And it is a dilemma we need to think about, if we want understand something about Taranto.

The Ilva affair is not merely an "environmental" dispute, nor a legal case. But rather an economic, social and political tangle that has its roots in the 20th century industrialization process and its failure and which, as it continues today, has become a test bed for future decisions: which ideas of democracy, participation in decision-making and industry can coexist in this part of Europe in the 21st century? *What* to produce, *how much* to produce, *how* to produce… and above all *who* can and should provide arguments in favour of such decisions?

However in order to discuss all this, we need to once again consider

the question on which everything depends: can those facilities be revamped?
So far, I have always believed they could, for at least two reasons. The first is that from the best tradition of the workers' movement we can recover the idea that the work we do not like should not be rejected from a Luddite viewpoint, but rather changed (and therefore liberated), by modifying labour relations and places. The woes of Taranto have been determined mostly by the uncritical acceptance not of steel, but rather of *that way* of producing steel, especially during the fifteen years under the management of the Riva family. In Germany, Austria, and South Korea steel is produced in a very different way, for example… The second - and I firmly believe it - is that if the Ilva plant were shut down today, the most likely ensuing scenario – aside from the job crisis that would open up as a chasm – is not clean-up, but rather the spectre of Bagnoli: a vast post-industrial wasteland, without clean-up, without jobs, without alternatives.
So, since this status quo is unacceptable, the question cannot be avoided: is it possible to convert the Ilva plant? Will the necessary works to modernise the plant be carried out? Will the ore stockyards and conveyor belts be covered? Will the batteries of the coking plant, the blast furnaces and steelworks be redone? Will this process (as called for in the Ilva decrees converted into law and the industrial-environmental plan which is gradually being drawn up) be put in place?
This is the actual test bed. If change proves to be impossible, then the city will be torn by its contrasts again, the argument that the plant cannot be revamped will prove to be true and everything will be caught up in a huge maelstrom. It is not said that this scenario is unrealistic. On the contrary: the economic crisis and the uncertainty on the steel market, the lack of a local and national ruling class worthy of the name and the strange limbo created by the political stalemate are all powerful indicators of a possible catastrophic scenario.
The city and its workers keep on living within the realm of the key question (is it possible to change the plant?). Paradoxically, they are the ones we talk about the least, i.e. the largest concentration

of workers in an increasingly deindustrialized Italy. This exclusion explains a great deal about our inability to look at ourselves in the mirror. Not just in Taranto, but throughout Italy: the exclusion of the workers' issue is a far-reaching process that has taken place over the past twenty years in Italy – a period as long as the Berlusconi era.

Yet, if we observe the "Ilva workshop", many things can be understood. The devastating pollution has been the product of devastating labour relations. Those, who like me, started to talk about the new workers hired by the privatized giant towards the end of the nineties, while concomitantly in the notorious Laf building the scandal of the setting up of a "forced confinement" department for the more reluctant among "senior" workers was brought to light (involving: on-the-job training contracts, impact with the facilities, excessive overtime, virulent de-unionization, repeated accidents, an astonishing number of deaths due to accidents, even higher than cancer deaths…) found themselves describing a plant on the verge of chaos, amid fumes and failure to perform maintenance, with a profoundly different generation of workers compared to the previous ones, regimented in a ultra-modern disciplinary "cage".

Who are the young workers at Ilva (average age thirty, hired when they were more or less twenty)? What do they think of politics or trade unions? How do they live? Where do they live: in the city or the towns in the province? What do they dream of? What diseases do they get when they are taken ill? Why do they get pissed off when they get pissed off? Why don't they speak up? Why do they generally think that this job is better than others?

Every time these questions have not been asked, the huge glass bell jar surrounding the entire Ilva affair has fortified its walls. And this is not just a political or union-related issue. In a well-known reportage written in 1979, Walter Tobagi talked about "steelworker-sharecroppers" to describe this group of workers established within Italsider in Taranto: although they had not broken away from their rural backgrounds entirely, these workers had been employed in a production cycle imposed from above. The conditions had therefore been set for their future alienation. Nevertheless, that State-run

plant, despite the squandering, had produced workmen, a culture of work and related rights. It had also produced a very high rate of unionization: approximately 90% of staff.
Today only 40% of workers have a trade union card. Ilva is by and large a non-unionized plant, not only due to the mistakes and delays of trade unions, but above all because this is what the Riva management wanted: massively favouring recruitments in exchange for not joining the Union and therefore building a direct relationship between top management and individual employees. Even the group of "steelworker-sharecroppers" should be reviewed since, given the changed scenario, many steps backwards have been made.
Although it may seem a little *retro*, I would like to once again reiterate that pollution is only the external expression of relations and ways of working inside the plant. And in order to abate pollution, even these ways need to be abated. Will it be possible to do it?

States of exception

I discovered by chance what Alessandro Leccese, a healthcare officer during the years in which Italsider was constructed on the shores of the Ionian sea, wrote in June 1965. Mimmo Nume, chairman of the Association of Physicians of Taranto, gave me some pages from his diary (written in total solitude, in remote times, in the remote South, when the dream of State-run industrialization was dawning). Doctor Leccese passed away years ago, unheeded, but at the time he had understood everything. Not only the tragedy of environmental impact, but also the existence of a thick web shrouding it. This is what he wrote in his private diary: "Following the deterioration of the situation, when I intervened, in my capacity of Healthcare Officer, with an order addressed to the Manager of the Steelworks Centre and the Chairman of the Industrial Development area, there was a bedlam, since the latter, who, among other things, is provincial secretary of the Christian Democratic party, felt that his unquestionable sovereignty had been challenged. He thinks he is so powerful as to be able to influence even the decisions of the Prefect, as was the case at the time of the 'notorious regime', between the

Provincial Party Secretary and the Prefect. For him, protecting the city from severe environmental damage is not as important as protecting personal prestige and the interests of some politicians who believe they can decide the fate of our land at will, as if it were an African colony to be exploited."

The foundations for the environmental disaster (and the concomitant local political devastation) had already been laid at the time. What we are dealing with today are only the long-term effects. And, at any rate, following the privatization of Italsider and the advent of the Riva management, the 'African colony' traits only increased further.

Now, of course, in order to understand the unresolved health-employment issue and the silence throughout all these years, it is necessary to analyze – as many have done in the press over the past weeks – the plot hatched through the relations between politicians, institutions and company top management, to jot down on a piece of paper the names of those who have given in to pressure, blackmail and flattery and those who, instead, remained upright. Yet, I keep on thinking – perhaps bucking the trend – that it is even more useful to examine this new universe of industrial relations created by the Riva family within the plant. In my view, this has been the key mechanism of the state of exception in Taranto: a disciplinary "cage", both archaic and highly modern, that has regimented an entire community of workers, by granting rewards to those who obeyed and inflicting punishments to those who dissented.

Since its privatization in 1995, Ilva, the largest Italian steelworks, was transformed in a regulatory and disciplinary "state of exception". This is what emerges from the more interesting pages of the inquiry of the judiciary that in the past year and a half has scrutinized the Riva-system and has led to the requests for committal for trial.

From what we have learned, over the years, Ilva was not run by the top managers who officially held the top-ranking positions within the company, but rather by the members of a parallel structure, unknown to the majority, placed above them. A sort of pyramid of "trustees", in its own way, efficient and "innervated" in the life of the plant, which had the task of achieving the highest profits, reducing production

costs, regimenting workers, rewarding obedient "middle-ranking managers", burning polluting materials in furnaces, spilling slurry in the sea and failing to comply with the most basic environmental standards.

This sort of "shadow government" or "internal Gladio" as a trade unions official put it, is unprecedented, at least in this form, in the history of industrial relations in this country. And since it does not date back to the past few years, but rather was established as the backbone of the steelworks throughout the privatization process until the decision was taken to resort to the compulsory administration of the company, it deserves serious scrutiny.

The pollution of Taranto, as has been said time and again, is the external expression of the balance of power inside the plant: the disciplinary "cage" to reward "model workers" and punish and exclude the dissidents, the significant drop in trade union membership, the daily non-safety of workers... Today, the features of this disciplinary "cage", aimed at militarizing a large plant in the 21st century, seem to emerge more clearly. The fact that at Ilva there were "trustees" was well known, or at any rate many had understood it, but what was not so obvious was the existence of a full-fledged system.

The parallel structure of "trustees" was a three-tier one: a first, basic one to control work in its utmost detail, its timing and regulation; an intermediate one, acting as a sort of link and a third one placed at the top, even above the plant top management.

Based on what you read in the ordinance, names unknown to the city of Taranto and the vast majority of staff members were – with the approval of the Riva family who had masterminded the system – the actual "viceroys" of the plant: Lanfranco Legnani, "shadow manger" of the plant; Alfredo Ceriani, manager of the entire hot working area, with the task of maximising production; Giovanni Raioli, manager of the ore stockyard area and the maritime facility area; Agostino Pastorino, manager of the cast iron area; and Enrico Bessone, in charge of maintenance.

The Riva family never intended to question its shadow-structure. On the contrary, they lubricated it well over the years, thus favouring

the total overturning of relations inside the plant. Running a huge plant taken over from the State through an occult structure would have made it possible, at least in their intentions, to relieve the actual company top management from responsibility (paid with production bonuses, in addition to their normal salary), attributing the adopted illegal behaviour to others and, above all, creating a hierarchy that was even more top-down, because it was not codified and its boundaries were uncertain. It goes without saying that an occult structure, conceived in this way, would have shirked (and did shirk) discussions with the other side, be it the workers, the unions of the entire city.

In addition to the environmental devastation, what is really disquieting is the setting up of this "shadow government". This reminds me of 1971, when a network of internal espionage was discovered within Fiat. It was discovered that in twenty years, this network had produced over 300,000 "personal records" of workers within the group. This structure too, aimed at scientifically assuring control over staff, was occult and involved, in addition to the company's top management, secret services, police officers and the carabinieri... Although such forms of control were not in place at Ilva, in some respects, something even worse was achieved, since this structure planned plant production entirely, in order to achieve the maximum profits and exploit the facilities without modernizing them.

And so the Ilva bottomless pit spills out once again into the extreme frontier of capitalism, importing in Italy and Europe, "Martian," rules perhaps already in use in similar forms in the neo-colonial offshoots of the large industrial groups of the northern hemisphere in Asia or Africa.

Running an industrial-environmental exception, becoming in turn a disciplinary state of exception: this is the lesson of ultramodern capitalism that we can learn from Ilva. Like the pollution caused, the diseases and tumours, the "internal Gladio" should be studied in its utmost details in order to be better overturned. Ilva can survive, accomplishing the highly intricate task of converting its facilities, only if it expels the "slag" of these working ways and relations,

encysted in the dragon's skin for twenty years.

Politics behind the scenes

A failure and a bankruptcy have tainted the recent history of Taranto, making the city plunge into disruption from which for the time being no way out is in sight. First and foremost, the failure of the privatization of Italsider, the large steelworks, the major "sell-off" of 1994 from which the Riva model originates. Over the past two decades, Ilva has been an extraordinary "workshop" for post-modern employment. However, it is worth recalling (in times in which the ambiguous slogan "right and left are the same thing to me" prevails) that Taranto was one of the main "workshops" of the worst right-wing government in southern Italy during the same years in which the Riva model was put in place. Initially, with the victory by popular acclaim of televangelist-fascist-racist-and-colluded-with-the-mafia Giancarlo Cito; then later with the explosion of the worst financial crash in the history of our local governments (caused by the administration of Berlusconi's party, which followed Cito's administrations): a deficit of 900 million Euros, a bankruptcy from which the city has not recovered fully. These events did not occur seventy or eighty years ago, but rather over the past fifteen years. This political "workshop" of public disaster was hardly an island of folly separated from the rest of the world: on the one hand, it had strong ties with the top-ranking right-wing party officials for protection and exchange of favours, while on the other, its representatives grovelled, without lifting a figure, on the sidelines of the steelworks giant.

A brief digression. As Lorenzo Fanoli pointed out in his recent essay (*"Butter or cannons". A debate on Ilva and the Public Prosecutor's Office in Taranto*, 28 March 2014, published in "Eco della città") it is odd that when the Prosecutor's Office in Taranto decided to carry out investigations on the possible involvement of politicians, it limited itself - besides the top-ranking officials of the Province of Taranto - to the president of the Puglia Region, Nichi Vendola, and the mayor of the city, Ippazio Stefano, that is to say the only ones who

had passed an anti-dioxin law and a decision against the steelworks giant and were then stopped by the Berlusconi government or the Regional Administrative Court, without a single word being said about that government and the softer attitude adopted towards the Riva group, or about the political context which, more generally, had laid the foundations for the disastrous relations with the large plant. For the record, the Prosecutor's Office in Taranto had never conducted investigations to this regard before Vendola became governor and Stefano mayor. Let's just say that judicial activism towards politicians reached its peak only in more recent times...

However, going back to what I mentioned earlier, from a more general point of view, the two sides of the failure/bankruptcy that I was describing (Italian-style privatization on the one hand; political ruins of the Second Republic on the other) are hardly an isolated case, but rather the direct consequence of another failure: the implosion of the first republic and of extraordinary measures in the South. The Riva model and the Cito model are the disjointed and consubstantial response to the concomitant collapse of State-run businesses and the five-party government coalition. More deeply, they are the worst response that could have been given to the crisis of the South in the 20th century and the depletion of related incentive-based measures.

The extraordinary measures in their early stages or the idea of setting up steelworks in a city of the South, such as Taranto, where there were other manufacturing industries too and which at the time – towards the end of the fifties – was faced with massive unemployment, were not at all wrong. Their spread has been fatal (especially given the local apathetic, incapable, lazy, murky and narrow-minded bourgeoisie and entrepreneurial class which surely could not be a valid alternative to State intervention). Their spread beyond any (even State-run) business rationale and the ensuing avalanche of debts has been fatal.

There are therefore two failures behind this environmental disaster and these deteriorated employment relations: the public one of the eighties and the private one of the nineties-noughties. The gloomy transition from one to the other is the 1992-94 two-year period. This

is also why Taranto has been for a long time a deformed mirror of the unresolved Italian crisis.

It will be important to remember this when dealing with the outcomes of the compulsory administration of the large plant. Of course, separating the fate of the plant and plant-city from that of the corporate top management under investigation for very grave offences and incapable, for the time being, of even implementing the preliminary measures included in the AIA (integrated environmental authorization), was absolutely necessary. Yet, from now onwards, it is important to bear in mind a few things.

a) We are walking along a very narrow ridge. On the one hand, we need to overcome the failed privatization. On the other, we need to avoid slipping back into the previous failure. The only way to achieve this is to devise (from a cultural, political and not only technical viewpoint) a new idea of State, of measures and public policy for the 21st century.

b) Compulsory administration will never be effective if it does not fall within the framework of a renewed industrial policy for the South and for Italy. It is not a question of the umpteenth, last-minute bail-out, but rather of reconsidering – in an extreme moment – what for twenty years has been neglected: the economic and industrial planning of an entire country (deindustrialized and in recession) within the framework of an increasingly complex European scenario.

c) Once again we need to break loose from the clutches of this system of mutual accusations. You cannot accuse those raising the dramatic environmental issue of favouring deindustrialization and unemployment. At the same time, you cannot accuse those who want to defend employment of polluting an entire province. We can break loose from this struggle between opposite extremisms (both revolving around the pre-modern myth that factory work cannot be changed) by calling for, demanding and implementing the radical conversion of facilities, a radical change in labour relations inside the plant and a radical change in the relationship between plant and city (not two separate, but rather two closely connected entities). However difficult to achieve this may be, for the time being there is

no other solution.

Taranto and the Land of Fire

The inquiry conducted by "Espresso" and published on 13th November 2013, which quoted the results of an in-depth study commissioned by the U.S. Navy to protect the health of the U.S. military stationed in Campania, caused a stir. The interview granted by the head of the Environmental Protection Agency of the Puglia Region, Giorgio Assennato, to the same weekly and published in the following issue also caused a stir. "Our law would not have allowed us to discover what the Americans did", stated Assennato. "This is unacceptable. And this is not something abstract: look at what is going on in Taranto."

There is an underlying paradox in the whole Campania affair. The results of the U.S. inquiry were known to environmentalist groups monitoring the Land of Fire since 2011. At the cost of US$30 million (a sum that would make any epidemiological research carried out in Italy turn pale) the U.S. navy has cross-checked different reports written by experts and investigated food safety, especially the presence of toxic substances in the water used in the areas where "their boys" live, based on EPA (the U.S. environmental agency) parameters, certainly stricter than ours. The measures devised as a result, such as purifying the water provided by the water supply network for the entire military base using an independent system, have conveyed the image of a contaminated territory comparable to Middle-Eastern provinces. One might criticize the excessive alarmism used to disseminate this inquiry. However, it underscores the gap between the most advanced parameters in the world and health and environmental self-protection capabilities in Italy, especially in the South.

Once again, Assennato stresses that in the new integrated environmental authorization (which should set out the process for the conversion of the steelworks in Taranto), the assessment of the health damage carried out by the Puglia Region has been downplayed. Hence the acknowledgement: we cannot always wait

for the Marines to be sent over. Moreover, one of life's little ironies, when the Sixth Fleet left Gaeta in 2004, there were rumours that it might be transferred to Taranto. Later, those rumours proved to be groundless and the fleet was moved to Naples. However, if things had gone differently, Taranto and Ilva would have received a nice report from the U.S. Navy, and maybe the recent story of the steelworks would have had a different outcome.

In addition to underscoring once again that Naples and Taranto are the epicentre of the new southern issue, on the borderline between industrial crisis and post-industrial devastation, the affair brings to the fore something quite evident. As clarified by Assennato, shutting down Ilva would never, never mean clean-up. On the contrary it would produce a new Bagnoli: polluted, without jobs and without many tertiary-related prospects for the future. However, the environmentalization process needs to be monitored on the basis of health damage parameters, currently contemplated only in part in the decrees concerning Ilva and the Land of Fire. Perhaps, the solution might be to dust off the old Realacci-Bratti bill, which provides for the creation of an independent and third-party national environmental protection system, to avoid also resorting systematically to new decrees. Besides being divided on a regional basis, the present-day Regional environmental protection agencies run the risk of depending too heavily on the same Regions.

Not only is it necessary to put the Regional environmental protection agencies and Ispra (Higher Institute for Environmental Protection and Research) in a condition to perform their monitoring tasks independently, by enhancing their synergy and assessing the effects of the announced plant conversion on the territory, but a more far-reaching plan needs to be devised to involve universities and research centres in an ongoing and non-sporadic study of the consequences of this environmental disaster on men, women and children. As things stand today, the air, water and soil pollution "already" produced implies that the next generations – regardless of what will be done – will be faced with an increased incidence of cancer, with the link between dioxin and infertility (both female

and male) and the increased incidence of diseases that apparently are not related to pollution, but which medical studies claim may be ascribed to it: autism and schizophrenia. And this applies regardless of what is done with the plant.
There was a time, in Italy, when in the field of social medicine and epidemiology thorough analyses were carried out on production cycles, aimed not only at criticizing them but also at changing them under the control of workers who are more exposed to the risks. Giulio Maccacaro and Renzo Tomatis (persons forgotten too soon today) left a storehouse of writings to this regard challenging economic organization. In Taranto, as in Campania, similar initiatives have been hindered, although not all physicians have kept quiet and there were some, like Alessandro Leccese, the healthcare officer stationed in Taranto during the years in which Italsider was being constructed, who had understood early on that it was necessary to shed light.

What sort of State?

In 1920, Gaetano Salvemini wrote in "l'Unità", the weekly he was editor-in-chief of, that the steel industry, owing to its size and complexity, could not be placed under the direct "control of workers" (these were the years of the short-lived season of works committees), could not be allowed to "die" as a result of one of the many crises and nor could it become a bottomless pit for banks and taxpayers. Under the circumstances, in times of steel industry protectionism, and not only of works committees, State intervention would have left the problems to be overcome intact and made the coffers of the privates running the companies swell. The only solution, wrote Salvemini, who was actually against major forms of State intervention, was to "nationalize".
This brings back to my mind the old political controversy raised in the days when the Ilva affair seemed to reach the umpteenth peak, following the completion of investigations and the requests for committal for trial of the top-ranking officials of the Region too. And since the agony of Taranto (of which the Ilva crisis is a key, but not the sole part) is far too important to be left to the mere, albeit

important, action of the Prosecutor's Office, it will be necessary to ponder what Salvemini stated about a century ago.
Gad Lerner wrote in "La Repubblica" that Nichi Vendola's mistake (and here I am clearly talking about political mistakes, the proceedings, yet at a preliminary stage, will have their course) was to believe that the Region had the power to force the Riva family to accept a binding compromise in order to convert the facilities; that is to say, to believe that the Ilva management represented a form of capitalism with which you can negotiate, while all around a more radical protest was rising which by and large created a huge divide with the municipal, regional and national centre-left. To this regard, it is sufficient to acknowledge, among other things, the victory of the Five-star movement in the city at the last elections.
Lerner's observation is acute, yet there is an objection that can be raised. What should a rather isolated regional government have done, before August 2012, before 2011, when the national government had certainly not been hard on and unbending with the Riva Group (and it is quite surprising that the Prosecutor's Office overlooked any ministerial liability in the granting of the first integrated environmental authorization, the extremely soft one of 2011)? Call for the nationalization of the most important industrial plant in Puglia or try and adopt more stringent legislation?
The affair will be subjected to historical and political and not just court judgements (unless, one really believes that the latter should subsume the other two). The analysis should not focus only on the last two years in the city's economic and political life, but rather at least the past thirty years. However, there is yet another observation that can be made. Saying that the type of capitalism that has taken root on the shores of the Ionian sea, following privatization, cannot be reformed is one thing. Saying instead, that the plant overall cannot be converted and therefore needs to be shut down (i.e. quite the opposite of the possible remediation and clean-up process that has just been initiated) is quite another.

The future of the steel industry

Behind the Ilva affair, an intricate match is being played between Italy and Germany concerning the future of the steel industry in Europe.
A treatise by Emiliano Brancaccio and Salvatore Romeo, published in issue no. 3/2014 of "Limes", *Steel plate*, takes stock of the situation.
In the divide between the key manufacturing countries in Europe, the differences between respective steel industries are self-evident. It is not true - the authors write - that in the coming years Europe will be invaded by Chinese low-cost steel manufactured without taking environmental norms into account. Figures suggest that over the past few years, "the Germans have succeeded in strengthening their presence on the domestic and on other EU markets, giving evidence of their extraordinary ability to penetrate markets, to the detriment of non-EU exporters and EU competitors". This basically contradicts the argument that it is no longer cost-effective to produce steel in Europe. The issue is "how" to manufacture it: the German model has succeeded in blending competitiveness criteria, respect for the environment and job retention.
In Italy, instead, we are facing a system-wide crisis of which Ilva is the core. Converting the facilities of the steelworks in Taranto is not enough (in itself all uphill), a strategy is needed for the years following compulsory administration. In other words, what should we do with what remains of the key Italian production site in Europe, while other sites across the country are faced with a ravaging crisis?

The impression is that, given the lack of strategies, the conversion and clean-up processes run the risk of falling through. A plan for the city is surely need, in addition the decrees passed, but a general plan for industry and steel working is necessary in a country, like ours, which has witnessed the collapse of many of its traditional sectors.

The Ilva crisis is the mirror of that part of the entrepreneurial system that has failed to renew itself. This is why the future of the steelworks in Taranto can be organized only on the basis of specific

goals, within the framework of a European market that will keep on being increasingly competitive, if we want to abide by all the necessary environmental parameters.

The litmus test does not only consist in submitting the next industrial plan which should include the environmental plan too, but also its financial coverage. Sub-commissioner Ronchi has stated that 3 billion Euros are needed. The pathway seems uncertain. On the one hand, there is the trial, on the other hand negotiation of loans with banks. In the middle the capital increase request, since it is not entirely certain whether the approximately 2 billion Euros seized by the Prosecutor's office in Milan from the Riva family on charges of tax fraud may be used or not to convert the facilities. And here future prospects open up: who will be able to invest in Ilva under the circumstances, since it is highly unlikely that the Riva family will? The question pins down Italy as a whole, not only its government. Yet it should be recalled that in the heart of Europe, steel continues to be produced by respecting the environment and workers' rights, and that market shares are actually on the rise.
The real question hovering in the background of the Ilva crisis is once again: what form of public planning, public policy or mere governance are we willing to support concretely in the 21st century, without relapsing into the mistakes of 20th century State holdings? It is not just the fate of Taranto, in itself already highly complicated, that is at stake, but rather the possibility of keeping together what should always be guaranteed: the right to health and the right to work, for everyone.

In submitting the future works of the Integrated Environmental Authorization, sub-commissioner Edo Ronchi has announced radical works on the steel production cycle in order to abate pollution: "we will use direct reduced iron pallets and methane instead of carbon coke. Testing has already started at the steelworks and will be extended to the blast furnaces; we intend to manufacture two million tons of steel per year with this system". Two million tons out

of an overall production that should not exceed eight million tons per annum are a considerable share. If this will be assured at least for part of the production (even though, as Fanoli pointed out in his previously mentioned treatise, the gas supply conditions have not yet been established), besides, of course, the coverage of stockyards and other structural changes to the current production cycle, nobody will be able to say that the new Integrated Environmental Authorization is just a bluff: the hot working area would drastically reduce its impact. And the overheated climate in Taranto might be cooled.