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*Religion and Discrimination Law in the European Union*

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***Religion and Discrimination Law in Italy***

**I. Historical, Cultural and Social Background**

(1) How historically has your national law dealt with religious discrimination?

Over the centuries, discrimination, and often persecution, of Jewish communities and non Catholic Christians has shaped the monolithically Catholic religious landscape of the various pre-unification Italian states (including the Pontifical states). Since the unification of Italy 150 years ago, religious discrimination has been an issue tightly linked to the social, political and legal dominance of Roman Catholicism. Under the political ideology of liberalism, which inspired both the struggle for independence and unity ('Risorgimento') and the post-unification policies until the Fascist takeover in 1922, the issue was tackled in two ways. First, the role of the Catholic Church in the public sphere was narrowed in the name of the separatist 'a free church in a free state' principle; thus a modern citizenship regardless of the religious affiliation of the individual was established in the field of family law (eg introduction of the civil marriage in 1865), public education and the welfare system. Second, the legal status of non-Catholic denominations and citizens was improved. A 1848 general act of the Kingdom of Sardinia-Piedmont, the 'legge Sineo', which was enforced in Italy after the unification of 1861, represented the main achievement of the new dispensation. The act stated that 'difference in religious membership does not justify any exception in the enjoyment of political and civil rights and in the admissibility to civil and military offices'<sup>1</sup>. Such measure can be considered the starting point of anti-discrimination law in Italy.

(a) How did your law deal with it prior to entry into the European Community and prior to ratification/incorporation of the ECHR?

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<sup>1</sup> The translation from Italian is the author's.

Article 3 of the 1948 Constitution solemnly proclaimed the principle of equality. Article 3 has been traditionally interpreted as providing for formal equality in the first paragraph ('All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions'<sup>2</sup>) and for substantial equality in the second ('It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the 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 organization of the country'). This interpretation, according with Chiara Favilli, 'has been applied also by the constitutional court which has issued a large number of decisions based upon art. 3, potentially applicable in any case. In particular through art. 3 the Court addresses all the disparate treatments not based upon a reasonable differentiation case by case, in respect of the principles embedded in the Constitution (...) Every law can be subjected to the constitutional court review in order to assess if the choice made by the legislator is reasonable or not'.<sup>3</sup>

The 1948 Constitution included three fundamental rules concerning equality and religion. First, in the attempt to compensate the difference enshrined in the constitution (article 7) between the Catholic Church (a sovereign entity whose relationships with Italy are framed by a concordat)<sup>4</sup> and the other denominations, article 8 para 1 declared that 'all religious denominations are equally free before the law'. Second, article 19 granted protection of individual and collective religious freedom to 'anyone'. Third, article 20 provided for an implicit prohibition to discriminate amongst religious organization: 'No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organization on the ground of its religious nature or its religious or confessional aims'.

- (b) What was the rationale for this approach? Was it 'equality' or 'religious freedom' or both or some other foundation

The constitutional principle of equality, especially of substantial equality, encapsulated the predominantly Catholic and Marxist vision of a socially interventionist state devoted to building a welfare system. This vision prevailed in the Constituent Assembly and in the political experience of the so-called First Republic (1948-1992). Against this background, Italian law has developed a rich domestic doctrine on equality, while direct and indirect discrimination and the very notion of a non-discrimination law are categories

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<sup>2</sup> For all articles of the 1948 constitution, English version established by the Presidency of the Republic of Italy <[www.quirinale.it](http://www.quirinale.it)> accessed 15 June 2011.

<sup>3</sup> Chiara Favilli, *Antidiscrimination Law in Italy* (2010) unpublished working paper. Also see Chiara Favilli, *La Non Discriminazione nell'Unione Europea* (Il Mulino 2009).

<sup>4</sup> Though properly speaking the Holy See and not the Catholic Church is a sovereign entity. See Giovanni Barberini, 'Ancora Qualche Riflessione sull'Art. 7.1 della Costituzione Italiana per Fare un Po' di Chiarezza' <[http://www.statoeinese.it/index.php?option=com\\_content&task=view&id=285&Itemid=41](http://www.statoeinese.it/index.php?option=com_content&task=view&id=285&Itemid=41)> accessed 15 June 2011.

imported from abroad, mainly as the effect of compliance with international law and of the process of European integration. Chiara Favilli to clarify: anti-discrimination law ‘has its origin in the equal opportunity theory originated in the USA through the case-law of the Supreme Court and aiming to fight social exclusion in order to reach a closer society and a more efficient market. Its inclusion in the Italian legal order has taken place through the implementation of international conventions and EU law’.<sup>5</sup>

A fundamental debate on equality in the field of religion has taken place in the late 1800s when the basics of modern *diritto ecclesiastico* were shaped. Two different positions emerged. While Francesco Scaduto pushed for the end of the Catholic privileges in the name of rigorous formal equality and argued for the necessity of a strict same treatment of all denominations,<sup>6</sup> Francesco Ruffini believed that true equality implied the different treatment of different subjects in different contexts.<sup>7</sup> Based on the German doctrine (in particular of Kahl’s elaboration in *Über Parität* of 1895), in 1901 Ruffini famously laid down his theory of a contextual (*relativa*), concrete and legal equality (*giusta parità* or just equality) as opposed to absolute, abstract, arithmetic equality (*falsa parità* or false equality): ‘To regulate in the same way different juridical relations is as unjust as to regulate in a different way identical juridical relations’.<sup>8</sup> Ruffini prevailed and shaped the whole Italian school of *diritto ecclesiastico*, this eventually resulting in the reference of article 8 of the 1948 constitution to ‘equal freedom’ instead of ‘equality’. Constituent fathers did not frame collective religious freedom as implying strict same treatment of all religious denominations. They simply prohibited any different treatment, which would affect equality in the enjoyment of collective freedom. Since then, a fundamental ambiguity has haunted Italian law and religion, with constitutional ‘equal freedom’ representing both the foundation for a true struggle against inequalities and discrimination, but also the pretext for the preservation of Catholic privileges. The adoption of the ECHR confirmed the constitutional framework (with ECHR articles 14 and 9 corresponding to constitutional articles 3 and 19). At that point, the necessity to put equality at the centre of church and state relationships was raised in a seminal essay of 1958 by Francesco Finocchiaro<sup>9</sup> and has never ceased being at the heart of the law and religion and church and state debate in Italy.

- (c) What political debate took place on this? What was the role of religion and/or religions in debate?

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<sup>5</sup> Favilli (n 3).

<sup>6</sup> I.C. Ibán, *En los Orígenes del Derecho Eclesiástico* (Boletín Oficial del Estado 2004). Scaduto famously declared that there was no reason not to treat the Catholic Church the same way as an insurance company.

<sup>7</sup> See Francesco Ruffini, *La Libertà Religiosa. Storia dell’Idea* (ed or Bocca 1901, Feltrinelli 1991 with postfazione by Francesco Margiotta Broglio).

<sup>8</sup> Ibid, 15 (the translation is the author’s). See Diego Quaglioni, ‘Il Problema Storico-Attuale della Neutralità dello Stato Davanti ai Conflitti Religiosi’ in Gian Enrico Rusconi (ed), *Lo Stato Secolarizzato nell’Età Post-secolare* (Il Mulino 2008) 140.

<sup>9</sup> See Francesco Finocchiaro, *Uguaglianza Giuridica e Fattore Religioso* (Giuffrè 1958).

The issue of equality has been at the core of the debate on how to best articulate politics, law and religion in Italy. This has been a debate at the same time on individual and collective rights, mainly focusing on where to draw the line between legitimate and illegitimate distinctive treatment of the various religious denominations and thus on the discrimination of the individual by means of disadvantaged treatment of his or her religious denomination. Three main positions emerged in the so-called first republic (1948-1992). First, Italian Catholic Bishops and the Holy See have defended the principle that same treatment of the Catholic Church and the other religious denominations would amount to an abuse of the principle of equality;<sup>10</sup> after the 1970s, they accepted that Italy was no longer a Catholic state, but never stopped claiming Catholicism could not be considered and treated like any other denomination. Second, a part of the public opinion believed the concordat system represented per se a discriminatory machine, and supported a move towards separation according to the American model or, most often, to the French model of *laïcité*; this front was politically represented by minority parties like the liberals, the republicans and the socialists, with the communist party rather taking the pragmatic view that business with the Catholic Church and bilateral relationships granting the church a privileged position were inevitable. A third option gradually emerged, which pushed for a reform of Italian law, namely a revision of the 1929 concordat, in the direction of reducing the gap between Catholics and other believers.<sup>11</sup> During the 1980s, with an increasingly secularized Italian society, the third approach prevailed. The 1984 concordat between the Holy See and Italy acknowledged Italy was no longer a Catholic state. In 1988, the constitutional court recognized that the sociological fact that the majority of Italians were Catholics could not bear any legal consequence. According to the court, ‘any discrimination based on the fact that a majority or minority of people belong to a given denomination is unacceptable’.<sup>12</sup> In 1989, the constitutional court recognized *laicità* as a supreme principle deduced from the constitution, in particular from the principles of equality, non-discrimination on grounds of religion and independence of the state from the Catholic Church. According to the

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<sup>10</sup> The constitutional court admitted in 1972 that obligations for the state deriving from the concordat could imply ‘exceptions to the principle of equality’, though only in a limited way. C cost 27 January 1972, n 12 in (1972) *Giurisprudenza Costituzionale* 45, 65 [3]. The constitutional court had clarified in 1971 that exceptions were acceptable as far as they did not impinge on supreme principles; see c cost C cost 24 February 1971, n 31 in (1971) *Giurisprudenza Costituzionale* 154, 155. The 1972 case concerned the different treatment between the public collection of funds on behalf of a workers’ association and for the Catholic Church, the former being forbidden and the latter allowed. Same ruling was given in a similar case three years later; see c cost 20 February 1975, n 50 in (1975) *Giurisprudenza Costituzionale* 197. Commenting on this ruling, future Prime Minister Giuliano Amato blamed the court for lack of courage in pushing equality further (ibid. 553). See Giuliano Amato, ‘La Corte, Le Questue e il Dissenso’ in (1975) *Giurisprudenza Costituzionale* 553.

<sup>11</sup> It is worth noticing that Italian Protestants split on whether to opt for the second or for the third approach.

<sup>12</sup> C cost 8 July 1988, 925 in (1989) 1 *Quaderni di Diritto e Politica Ecclesiastica* 637, 640 [10]. (The translation from Italian is the author’s).

court, the ‘supreme principle’ of *laicità* had to be considered as ‘one of the aspects of the form of State outlined by the Constitution’.<sup>13</sup> Such principle was ‘not synonymous of indifference towards the experience of religion’,<sup>14</sup> but represented ‘the state’s guarantee that religious freedom will be safeguarded, in a framework of denominational and cultural pluralism’.<sup>15</sup> *Laicità* was thus framed as a principle synonymous of equality and non-discrimination.<sup>16</sup> In 1997, the constitutional court ruled that *laicità* implied ‘the equidistance and the impartiality of the law with regard to all religious denominations’.<sup>17</sup> In 2000 the constitutional court further refined the tie between *laicità* and equality through the following statement: ‘Under the fundamental principles of equality of all citizens before the law regardless of their religion (art. 3 const.) and equal freedom of all religious denominations before the law (art. 8 const.), the state’s approach to different religious denominations must be equidistant and impartial, with no regard for the quantitative more or less widespread membership of this or that religious denomination (constitutional court decisions 925 of 1988, 440 of 1995 and 329 of 1997) nor for the bigger or smaller social reaction to the violation of the rights of one denomination or the other (again constitutional court decision 329 of 1997), being imperative the protection of the conscience of each faithful regardless of the religious denomination one belongs to (again constitutional court decision 440 of 1995) (...). Such position of equidistance and impartiality reflects the principle of *laicità* that the constitutional court has deduced from the system of the constitutional norms, a principle which enjoys the status of ‘supreme principle’ (constitutional court decisions 203 of 1989, 259 of 1990, 195 of 1993 and 329 of 1997) and which characterizes as pluralist the form of our State within which different faiths, cultures and traditions have to coexist in equality of freedom’.<sup>18</sup> The new dispensation also resulted in the improvement of the legal status of some non-Catholic denominations through *intese* or agreements signed between the government and Protestant and Jewish denominations between 1984 and 1993. With the so-called second republic, after the electoral victory of Berlusconi in 1994, and the traumatic influx of immigrants, which transformed Italy into a multicultural country, debate on religious equality changed. Failure to push further the process of reduction of inequalities materialized when the Parliament stopped approving of further agreements with non-

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<sup>13</sup> C cost 11 April 1989, n 203 in (1990) Quaderni di Diritto e Politica Ecclesiastica 1 193. Translation from Italian by Carlo Panara, ‘In the Name of God: State and Religion in Contemporary Italy’ in (2011) 6 Religion and Human Rights 75, 80.

<sup>14</sup> Ibid. (The translation from Italian is the author’s).

<sup>15</sup> Ibid. (The translation from Italian is the author’s). A different translation is provided in Carlo Panara (n 12): *laicità* (which Panara translates with ‘secularism’ ‘does not imply indifference to religions by the State[.] [O]n the contrary it is a guarantee of protection of religious freedom in a system based on confessional and cultural pluralism’.

<sup>16</sup> See Marco Ventura, ‘The Rise and Contradictions of Italy as a Secular State’ in Peter Cumper and Tom Lewis (eds), *Religion, Human Rights and Secular Society in Europe* (Edward Elgar forthcoming).

<sup>17</sup> C cost 10 November 1997, n 329 in (1997) Quaderni di Diritto e Politica Ecclesiastica 981, 983 [2] (the translation from Italian is the author’s).

<sup>18</sup> C cost 20 November 2000, n 508 in (2000) Quaderni di Diritto e Politica Ecclesiastica 1041, 1041-1042 [3] (the translation from Italian is the author’s).

Catholic denominations (since 2000) and when a general act on religious freedom providing for more equal conditions was dropped in 2007. When heard in Parliament, Catholic bishops stated that they accepted a religious freedom act, but they disapproved of the reference to *laicità* in the act, and they urged Parliament not to alter the unbalance between the privileged Catholic Church and the other denominations.<sup>19</sup> In addition, the perspective of legal measures tailored for Islam (eg ban of burqa, formation of Italian Imams) raised a political debate, which resulted in a major split of the public opinion (in particular, of a deeply divided Catholic opinion). Catholics belonging to the populist Northern League blamed Cardinal Tettamanzi, the Archbishop of Milan, for his allegedly ‘multiculturalist’ views on immigrants and Muslims, and for his reluctance to join in the political exploitation of the crucifix: they ultimately stigmatized the cardinal as being the ‘Imam of Milan’. Racial, ethnic and religious discrimination became increasingly intermingled. Alessandro Simoni to underline: ‘Racial and ethnic discrimination often overlaps with discrimination on the basis of religion and belief, mostly in the form of hostility towards “Arabs” and “Muslims” which occurs without distinction.’<sup>20</sup> After 2001, the new and problematic reference to ‘Christianity’ (ie Roman Catholicism) to define the identity of the Italian state has encapsulated the division between those who believe that the use of religion to define the collective Italian identity is necessary to include the newcomers and those who believe that the transformation of the controversial and complex religious history of the country into a dull civil religion of Christianity is both blasphemous and discriminatory. The struggle over the crucifix in state school classrooms and the Lautsi case pointed at such a dilemma.

- (2) What effect, if any, have UN instruments on religious discrimination and Article 14 ECHR had on you national law both before and after their ratification and/or incorporation? What if any political debate accompanied these developments? What was the contribution of religions to this debate?

For long time supranational instruments against discrimination have been marginal in an Italian debate on religious, racial and ethnic equality, which proved extremely autarchic. Chiara Favilli to explain: ‘The (Italian) legislator has never adopted a specific law forbidding discrimination to implement the Constitutional principle of equality *per se*. Indeed the first acts adopted in this field and applying also within the private sphere were issued to implement international conventions (such as law 13 October 1975 n 654 on racial discrimination) or European laws (such as law 9 December 1977 n 903 on sex discrimination)’<sup>21</sup>

Prior to the development of a legislation deliberately aimed at fighting discrimination, the Italian Parliament took two momentous steps in the direction of a better implementation of the principle of equality. In 1970 labour law was reformed, and the relevant act, at

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<sup>19</sup> See the hearing before the House of Deputies of Mons. Giuseppe Betori, Secretary General to the Catholic Bishop’s Conference, 16 July 2007.

<sup>20</sup> Alessandro Simoni at <<http://www.non-discrimination.net/content/country-context-12>> accessed 15 June 2011.

<sup>21</sup> Favilli (n 3).

article 15, also included measures against ‘religious discrimination’.<sup>22</sup> In 1975 the reform of family law resulted in the enforcement of better protection of gender equality and religious equality as well, since the introduction of divorce admitted no discrimination between those who had married under civil law and those who had married under the concordat (the Holy See struggled in vain for the exclusion of those who had married under the concordat from the application of civil divorce).<sup>23</sup> First genuinely Italian act against racial, ethnic and religious discrimination was approved in 1993.<sup>24</sup> In 1998 another piece of anti-discrimination legislation was passed.<sup>25</sup> This was the first Italian act dealing with general immigration law, and indeed, as Alessandro Simoni put it, ‘lack of visibility of antidiscrimination provisions dispersed in a piece of legislation with another subject matter was indeed a problem’.<sup>26</sup> The Turco Napolitano act took its name from the former members of the Italian Communist party and ministers in the first Prodi cabinet Livia Turco, (the then Minister of Social Solidarity) and Giorgio Napolitano (the then Minister of the Interior); the act was the expression of optimistic centre-left approach to immigration, emphasizing inclusion and equality. Article 43 defined discrimination as “any conduct which, directly or indirectly, entails a distinction, exclusion, restriction or preference based on (...) religious convictions or practices”.<sup>27</sup> Chiara Favilli underlined that articles 43 and 44 for the first time ‘granted a specific civil action against discrimination based on race, colour, descent, national or ethnic origin and religious beliefs, in all instances in which both a private subject or the public administration has caused discrimination (‘the judge can order the interruption of the detrimental behaviour and adopt any other adequate measure’).<sup>28</sup> In 2000 Francesco Margiotta Broglio analysed the latest developments in the context of the European integration and linked them to the history of the Italian understanding of equality in church and state relationships (going back to the 1938 anti-Jewish legislation). Thus he pointed at the crucial intermingling of racial and religious discrimination.<sup>29</sup> Article 14 of the European Convention of Human Rights has had little impact on Italian *diritto ecclesiastico*. It is worth recalling the similarity between article 14 in conjunction with article 9 of the 1950 ECHR on the one hand and article 3 in conjunction with article 19 of the 1948 Italian constitution on the other. Indeed there was a fundamental

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<sup>22</sup> L 20 May 1970, n 300.

<sup>23</sup> L 19 May 1975, n 151.

<sup>24</sup> L 25 June 1993, n 205.

<sup>25</sup> D lg 25 July 1998, n. 286.

<sup>26</sup> Alessandro Simoni, *Report on Measures to Combat Discrimination. Report on Italy 2009* (2010) 4 <<http://www.non-discrimination.net/countries/italy>> accessed 15 June 2011.

<sup>27</sup> The translation from Italian is the author’s.

<sup>28</sup> Chiara Favilli noticed that ‘the wording of art. 43 reflects its international inspiration as discrimination is defined in terms which recall the definition used by the International Convention against discrimination’. Favilli (n 3). Also see Giuseppe Casuscelli, ‘Il Diritto Penale’ in Giuseppe Casuscelli (ed), *Nozioni di Diritto Ecclesiastico* (3rd edn, Giappichelli 2009) 267.

<sup>29</sup> Francesco Margiotta Broglio, ‘Discriminazione Razziale e Discriminazione Religiosa’ in (2000) *Quaderni di Diritto e Politica Ecclesiastica* (2000) 269.

difference: if the European definition of the rights was broader (in particular Italian constitution did not mention freedom of conscience), the Italian constitution was more liberal in framing legitimate grounds for restriction of religious rights, ‘morals’ being the only ground for restriction of religious freedom. But such a difference was not enough for Italian experts, lawyers and judges to interpret article 14 ECHR as implying a departure from the domestic constitutional approach to religious inequalities. In the main Italian religion-related cases brought before the European Court of Human Rights, applicants rather resorted to article 6 (Pellegrini case in 2001), 10 (Lombardi Vallauri case in 2009) and 9 (Lautsi case in 2009 and 2011). One exception could be found in the 2007 case of Spampinato against discrimination in the field of public funding of religions through a percentage of the income tax (*otto per mille*), when the applicant claimed article 14 had been violated in conjunction with article 9. The court declared the application inadmissible by defining legitimate different treatment in line with the traditional Italian understanding of ‘equal freedom’.<sup>30</sup>

- (3) What was your government’s view on the EU Directives 2000/43/EC and 2000/78/EC when they were in draft form? What national debate (including debate in your national legislature) was there prior to implementation of the Directives in your law? What role did religions play in this debate?

The 2000 Directives were transposed through two Decrees enacted by the Berlusconi government in 2003 on the basis of the lawmaking powers delegated by the parliament with the ‘omnibus act’ for implementation of EC law approved in 2002.<sup>31</sup> Major religious issue during the negotiation process has been the protection of religious, namely Catholic, organizations. The Holy See pushed the Italian government to lobby in Bruxelles in order for the directives to safeguard the specificity of the religious, namely Catholic, employment. In general, little if any debate took place amongst politicians and experts. With Alessandro Simoni, ‘The two Decrees simply followed each one the wording of one of the directives, and the discrepancies with these can easily go unnoticed by the layperson. They have been introduced without relevant preparatory work, and in the case of the decree implementing Directive 2000/78 the “omnibus act” did not contain specific guidelines, while those referring to the transposition of Directive 2000/43 were however very poor’. No effort was made to harmonise the Italian law. Again with Alessandro Simoni, ‘The decrees did not abolish the pre-existing anti-discrimination rules contained in the 1998 Immigration Act, nor did unify them, but just add a further legal regime, thus realising a complex situation which could bring into litigation many legalistic arguments

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<sup>30</sup> *Spampinato v Italy* App no 23123/04 (ECtHR, 29 March 2007): ‘Quant à l’article 14 de la Convention, la Cour rappelle que cette disposition n’interdit pas toute distinction de traitement dans l’exercice des droits et libertés reconnus, l’égalité de traitement n’étant violée que si la distinction manque de justification objective et raisonnable, c’est-à-dire en l’absence d’un but légitime et d’un rapport raisonnable de proportionnalité entre les moyens employés et le but visé’ (unreported case, official English text not available).

<sup>31</sup> D Ig 9 July 2003, n 215 and 216. For the religious implications see Stella Cogliervina, ‘Diritto antidiscriminatorio e interessi religiosi nell’Unione europea’ (PhD thesis, Università Cattolica del Sacro Cuore Milano 2007/2008) 100 and bibliography at n 6.

about *jus superveniens*'. It is worth noticing that the year before the adoption of the directives, in 2002, the Berlusconi government had adopted the repressive Bossi Fini immigration act, named after the names of the populist leader of the Northern League Umberto Bossi (the then Minister for institutional reforms and devolution) and the leader of Italian post-fascists Giancarlo Fini (the then Deputy Prime Minister).<sup>32</sup>

## II. The Duty not to Discriminate: The Prohibition against Discrimination

- (1) What discrimination authority (eg an Equality Commission) is charged in your state with oversight of religious discrimination? How is it appointed? What is its membership? What are its functions? What roles if any do religions have in its work?

No such authority as an Equality Commission has been set in Italy. An equality body has been created only with regard to race and ethnic origin, named Ufficio nazionale antidiscriminazioni razziali (UNAR).<sup>33</sup> As underlined by Alessandro Simoni, this 'is not an autonomous body, since it is established as a branch of the Department for Equal Opportunities of the Presidency of the Council of Ministers, previously dealing exclusively with gender discrimination'.<sup>34</sup>

Governmental bodies presiding over religious freedom policies have a general competence, which can be considered as including non-discrimination issues as well. This is the case of the *Direzione centrale degli affari dei culti* at the Ministry of the Interior. This is also the case of the *Commissione consultiva per la libertà religiosa*, created in 1997 at the Presidency of the Consiglio dei Ministri.<sup>35</sup> The case of the *Comitato per l'Islam*, an advisory body of the Ministry of Interior since 2010, is particularly problematic. First, a specific body addressing issues pertaining to one particular religion seems incoherent with a constitutional law, which is usually interpreted as preventing the state from dealing with a specific religion without the agreement and through the cooperation with the relevant representatives (so far, in the exercise of his political discretion, the Minister of the Interior has excluded UCOII, the main organization of Italian Muslims, from the *Comitato per l'Islam*). Second, the *Comitato* serves the Ministry as a legal advisory body. As far as the legal advice is aimed at the adaptation of general norms to Muslim communities, this seems totally compatible with the principle of equality as enshrined in the constitution.<sup>36</sup> But if the activity of the

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<sup>32</sup> L 30 July 2002, n 189. Contrary to the Turco Napolitano Act, the Bossi Fini Act did not include any provision against discrimination of immigrants.

<sup>33</sup> See at <<http://www.unar.it>> accessed 15 June 2011.

<sup>34</sup> Alessandro Simoni at <<http://www.non-discrimination.net/content/equality-bodies-12>> accessed 15 June 2011.

<sup>35</sup> See at <<http://www.governo.it/Presidenza/USRI/confessioni/commissioni.html#2>> accessed 15 June 2011.

<sup>36</sup> This was the case of the 'Parere su Islam e formazione', a *Comitato*'s document addressing the issue of the application to Imams of general norms on religious ministers. See Comitato per l'Islam italiano, *Parere su Islam e formazione*, 31 May 2011.

*Comitato* and the Ministry is aimed at shaping regulation specific to Islam, this contradicts the general constitutional prohibition to dictate norms on a specific religious denomination without a previous agreement with the relevant representatives.

- (2) What are the key instruments or sources of law on religious discrimination in your country? What are the key elements of this law? Are the prohibitions civil or criminal? How is religion defined? Are non-religious beliefs protected?

For the reasons illustrated above, there is no such thing in Italian law as a systematic and comprehensive corpus of anti-discrimination law in the field of religion. Provisions must be found in a wide range of sources, specific or general, national or regional, providing for criminal prohibitions or for administrative or civil prohibitions. Case law of the constitutional court or of other courts can also be relevant.

Key elements are a combination of constitutional principles, first of all *laicità* and equality as enshrined in article 3, and principles coming from the implementation of the 2000 Directives.

No legal definition of religion or religious denomination has been provided in the statutes. Case law and legal doctrine have elaborated some parameters. In particular, in a decision of 1993, the constitutional court has stated that a *confessione religiosa* or religious denomination is defined by two parameters: a) the auto-definition as *confessione religiosa*; b) an agreement with the State. In case an agreement with the state is absent, three additional parameters should be taken into account: a) previous *riconoscimenti pubblici* or public recognitions; b) the charter of the organization; c) *commune considerazione* or common opinion.<sup>37</sup> The constitutional court established such a broad definition of religious denomination in the context of its elaboration on equality in the field of collective religious rights: ‘any discrimination against one religious faith is constitutionally inadmissible insofar as it contradicts the right to freedom and the principle of equality’<sup>38</sup>.

The case of new religious movements has proved particularly problematic. A string of cases dealt with Scientology, which was eventually recognized a religious denomination for purposes of tax law.<sup>39</sup>

As far as atheists are concerned, the debate started in 1948, when the tribunal of Ferrara attributed the custody of a child to the mother, arguing that the father was an atheist and thus less fit to educate a child.<sup>40</sup> After thirty years of discussions, the constitutional court

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<sup>37</sup> C cost 27 April 1993, n 195 in (1993) Quaderni di Diritto e Politica Ecclesiastica 693, 695 [5]. The court confirmed this ruling in 2002: c cost 8 July 2002, n 346 in (2002) Quaderni di Diritto e Politica Ecclesiastica 701. Alessandro Simoni pointed out that ‘such criteria have never been tested in the context of antidiscrimination cases’. Simoni (n 25) 19.

<sup>38</sup> The translation from Italian is the author’s.

<sup>39</sup> See generally Marco Ventura, ‘Les Nouveaux Mouvements Religieux: une Catégorie Invisible dans la Soi-disant Italie Chrétienne’ in Nathalie Luca (ed), *Quelles Régulations pour les Nouveaux Mouvements Religieux et les Dérives Sectaires dans l’Union Européenne* (Presses Universitaires Aix Marseille 2011).

<sup>40</sup> Trib Ferrara 31 August 1948 in (1949) Diritto Ecclesiastico 388.

ruled in 1979 that atheists should not be compelled to take an oath in courts, based on the principle that no difference should exist in the protection of ‘the free deployment of both the religious faith and atheism’.<sup>41</sup>

- (3) What are the fields in which the prohibition is operative (eg employment, the provision of goods and services, education, housing, and public authorities)?

With regard to actual controversies, main fields are employment and education. Prohibition is also operative with regard to xenophobic violence, wherever it occurs. As far as religion is specifically concerned, after the constitutional rulings of 1993 against the Region of Abruzzo and 2002 against the Region of Lombardia, public funding of worship places should also be an area where the prohibition is operative.<sup>42</sup> But the latest controversies on the building of mosques show this is still a big issue. Family conflicts are likely to be a sensitive area in which prohibitions against discriminations are hardly given a serious application. In a controversial 2009 decision, the tribunal of Prato has denied a Jehovah’s Witness the custody of his child not because of his religious affiliation as such, but because the child’s adoption of the Jehovah’s Witnesses life style would have alienated the child from the life he was used to carry on prior to the father’s conversion.<sup>43</sup>

Immigration law and the granting of asylum are also an increasingly sensitive area, with a prohibition of discrimination on religious grounds in measures like expulsions or extraditions clearly existing, but with a problematic enforcement, especially when alleged Muslim threat is at stake.<sup>44</sup>

- (4) What does the prohibition cover (eg direct or indirect discrimination, incitement to discriminate, victimisation, harassment)? What defences or other justifications are available? What remedies are available and how have these been used in practice?

As for prohibited acts and conducts, besides what has been provided for in the decrees implementing the 2000 Directives in the above mentioned statutes, prohibitions depend on the interpretation of the general principles such as equality.

As for justifications, especially in employment, religious employers systematically resort to the argument that discrimination is needed in order to safeguard the religious ethos of the organization.

Affirmative actions are justified because of the disadvantaged condition of the relevant categories; so far this has not applied to religion.

With Italy growing a multi-ethnic society, and the debate exploding on the acceptability of cultural and religious grounds for an exception in the application of criminal law, most relevant case of defences has been represented by cultural defence. In the absence of

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<sup>41</sup> Corte cost 10 October 1979, n 117, in (1979) *Giurisprudenza Costituzionale* 816, 822 [3].

<sup>42</sup> See the 1993 and 2002 cases quoted at n 37.

<sup>43</sup> Trib Prato, 11 February 2009 in (2009) *Quaderni di Diritto e Politica Ecclesiastica* 878.

<sup>44</sup> Casuscelli (n 28) 268.

relevant statutory provisions, cultural defence has been accepted by some judges at first, but courts are now much stricter in not allowing them.<sup>45</sup>

Remedies depend on the legal nature of the prohibition (criminal, administrative, civil) as well as on the relevant field (employment, family, etc.). Sanctions and the nullity of acts (eg discriminatory termination of an employment) are the most common legal remedy to abuses. Compensation for damages, namely for moral damages, is also a crucial issue. In the transposition of 2000 Directives, remedies have not been framed as to be easily accessible.<sup>46</sup> Little assessment has been provided as for the availability and efficacy of remedies, especially in the field of religion.

A special kind of remedy could be considered the application of aggravating circumstances. In cases of convictions for crimes committed with the aim of discriminating against on ethnic, racial or religious grounds, aggravating circumstance applied.

- (5) What case-law has developed on these matters? Giving examples, are the decisions of the discrimination authority binding or otherwise important?

As for cultural defence, in a leading case a Muslim man was convicted for domestic violence against his wife. The *Corte di Cassazione* did not accept the man's claim his religious and cultural world vision had pushed him to apply physical punishment to the woman and therefore he was entitled to an exception or at least to a milder sanction.<sup>47</sup>

As for aggravating circumstances, in 2006 the *Corte di Cassazione* applied the aggravating circumstance to a man who had insulted a Muslim woman and tore her veil off. In this case the court interpreted the dominantly Catholic environment as an element leading to the definition of the act as a racist act against a different religious culture.<sup>48</sup>

The *Corte di Cassazione* gave a similar ruling in 2010, again in a case concerning anti-Islamic hatred.<sup>49</sup>

The tribunal of Brescia decided an interesting case of indirect discrimination in 2010. In order to prevent Muslims from settling in the area, the mayor of a small village in the region of Lombardia had prohibited the use of other languages than Italian in outdoor public gatherings. Judges struck down the administrative measure as discriminatory.<sup>50</sup> Discrimination authority has had an extremely poor impact.

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<sup>45</sup> An overview in Fabio Basile, *Immigrazione e Reati Culturalmente Motivati. Il Diritto Penale nelle Società Multiculturali* (2nd ed, Giuffrè 2010).

<sup>46</sup> Failure in framing a more performing system of remedies in the decrees transposing the 2000 Directives is underlined in Nicola Fiorita, 'Le Direttive Comunitarie in Tema di Lotta alla Discriminazione, la Loro Tempestiva Attuazione e l'Eterogenesi dei Fini' in (2004) *Quaderni di Diritto e Politica Ecclesiastica* 361, 376.

<sup>47</sup> Cass 12 August 2009, n 32824 in (2010) *Quaderni di Diritto e Politica Ecclesiastica* 1033.

<sup>48</sup> Cass 4 April 2006, n 11919 in (2006) *Quaderni di Diritto e Politica Ecclesiastica* 1052.

<sup>49</sup> Cass 8 January 2010, n 286 in (2010) *Quaderni di Diritto e Politica Ecclesiastica* 1033.

<sup>50</sup> Trib Brescia 29 January 2010, at <<http://olir.it/documenti/?documento=5249>> accessed 15 June 2011. With comment by Nicola Fiorita and Lisa Iovane.

### III. The Right to Distinguish or Differentiate: Exceptions to the General Prohibition

- (1) On what grounds does the law permit different treatment (eg religion, gender or sexual orientation)?

The constitutional principle of equal freedom has been interpreted as providing for an extremely large differentiation in the legal status of religious denominations. Constitutional case law has elaborated the parameter of 'reasonable and not arbitrary differentiation',<sup>51</sup> as the rationale for drawing the line between legitimate or illegitimate grounds for different treatment, having regard to the specific context of the case. The application of such parameter has led the constitutional court to deem illegitimate a regional act providing for the public funding of worship places for some religious denominations only<sup>52</sup>. Blasphemy law has also been reformed through several constitutional court decisions based on the application of equality.<sup>53</sup> Momentous application of the 'reasonable and non arbitrary differentiation' parameter was the 2000 ruling of the *Corte di Cassazione* against the display of the crucifix in polling stations. A member of the polling staff claimed that the presence of the crucifix in the polling station violated his freedom of conscience with regard to the principle of equality and refused to perform his duties. He was first convicted for refusing to perform his public officer's duties and then acquitted by the appeal court of Turin. Asked to judge on the appeal against the acquittal, the *Corte di Cassazione* confirmed the acquittal on the grounds that being the crucifix the symbol of Catholicism as the religion of the state, its compulsory display was inconsistent with *laicità*, the secular character of the (no longer Catholic) Italian state and thus discriminated amongst the citizens on the basis of their religious opinions.<sup>54</sup>

Acute problems have emerged with Islam, in particular on the State's interference in the formation of Imams<sup>55</sup> and on the local authorities' refusal for administrative reasons to allow Muslim communities to open adequate worship places.<sup>56</sup>

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<sup>51</sup> In general see C cost 28 March 1996, n 89, in (1996) *Giurisprudenza Costituzionale* 819.

<sup>52</sup> See at n 37.

<sup>53</sup> As for blasphemy the constitutional court ruled unconstitutional several norms of the criminal code of 1930 based on the preference for Catholicism as the state's religion. See C cost 18 October 1995, 440 in (1995) *Quaderni di Diritto e Politica Ecclesiastica* 1047. C cost 10 November 1997, 329 in (1997) *Quaderni di Diritto e Politica Ecclesiastica* 981. C cost 13 November 2000, 508 in (2000) *Quaderni di Diritto e Politica Ecclesiastica* 1041. C cost 9 July 2002, 327 in (2002) *Quaderni di Diritto e Politica Ecclesiastica* 1051. C cost 18 April 2005, 168 in (2005) *Quaderni di Diritto e Politica Ecclesiastica* 1065.

<sup>54</sup> Cass 1 March 2000, n 439 in (2000) *Quaderni di Diritto e Politica Ecclesiastica* 846.

<sup>55</sup> Comitato per l'Islam italiano, *Parere su Islam e formazione*, 31 May 2011.

<sup>56</sup> See Stefano Allievi, *La Guerra delle Moschee. L'Europa e la Sfida del Pluralismo Religioso* (Marsilio 2010).

Different treatment of a religious category as such can be admitted for the sake of religion. This is the case with the specific status of religious ministers, which is problematic only insofar as advantages apply to a specific denomination only. This was the case with the draft law providing for the right of the competent Catholic bishop to be informed in case of judicial tapping of a Catholic priest.<sup>57</sup>

Gender discrimination was dealt with through the acts of 2006 and 2007, which implemented directive 2004/113/CE.<sup>58</sup> In 2010 the constitutional court argued that the principle of equality does not imply the right for a same sex couple to a civil marriage and ruled legitimate the lower courts' interpretation that the civil marriage is exclusively heterosexual in character.<sup>59</sup> It is worth recalling that Italy has not introduced civil partnerships to accommodate the needs of same sex partners. A draft bill under the Prodi government was actively opposed by the Catholic bishops and eventually dropped in 2007.

(2) Who may discriminate (eg religious organizations, individuals)?

Religious employers in general, if their status is recognized through the concordat (or national para-concordat or regional agreements) for Catholics or through the agreements for the other denominations. The state, if the relevant state activity implies the power of a religious authority (eg doctrinal teaching of Catholicism in state schools: teachers are state employees, but the state is bound to move them to the teaching of another subject if the competent bishop is no longer happy with the person for whatever reason).

(3) What conditions must be satisfied (eg to avoid violation of religious doctrine, alienating followers)?

Catholic employers are largely free to discriminate as far as they are allowed to assume that the measure is necessary to safeguard the identity of the organization. No distinction is made between personal/private/subjective and public/objective circumstances. Pregnancy of an unmarried Catholic employee or homosexuality are likely to count as public statements in contrast with the official teaching of the church. With Alessandro Simoni, 'a complete discretion, which can raise problems of compatibility with the Directives, of religious institutions in this sense clearly exists in Italy. Religious teachers in State schools must have a "leave" from the bishop, which can be denied or cancelled if the person does not fully comply with the moral standards of a Catholic believer. In a 2003 case the *Corte di Cassazione* admitted the validity of the termination of the employment relationship following the pregnancy of an unmarried female teacher.<sup>60</sup> The legal ground for such discretionary power lies in the concordat of 1984 and its protocols, and in a law of 2003'. The same does not apply to other denominations.

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<sup>57</sup> Disegno di legge n 1611, approved by the Senate on 10 June 2010, article 25.

<sup>58</sup> D lgs 6 November 2007, n 196.

<sup>59</sup> C cost 15 April 2010, n 138 in (2010) Quaderni di Diritto e Politica Ecclesiastica 899.

<sup>60</sup> Cass 24 February 2003, n 2803 in (2003) Quaderni di Diritto e Politica Ecclesiastica 777.

(4) What case-law has developed in the area of exceptions?

Case-law has developed on the legitimacy of religious motives as grounds for granting an exception to the application of a general prohibition. In 2008 the *Corte di Cassazione* ruled that as far as certain vudu practices implied slavery, criminal law applied regardless of the alleged religious motives of the convicted.<sup>61</sup> Also in 2008, the *Corte di Cassazione* has recognized that a Rastafarian under trial for possession of cannabis was entitled to an exception from the application of the general anti-drug criminal law because of his constitutionally protected religious needs<sup>62</sup>. Two opposite decisions were given on the right of a Sikh man to be exempted from the general prohibition to carry knife-like weapons. In 2009 the tribunal of Cremona ruled it was legitimate to carry a kirpan and thus granted an exception on religious grounds;<sup>63</sup> instead in 2010 the tribunal of Latina convicted a Sikh for carrying the kirpan as the judges did not recognize the conduct was worth an exception for religious reasons<sup>64</sup>.

The constitutional court faced a problem of discrimination in the accommodation of worship needs in 2003, when a member of the Assemblies of God who had been placed under surveillance and assigned to compulsory residence, was denied permission to leave the area and travel to another place where he could join a congregation of his faith. The constitutional court ruled that the absence of a congregation of the relevant faith in the area of the prison could not be deemed as a valid reason to grant an exception to the general penitentiary law, but suggested that compulsory residence be moved to an area where a congregation was available.<sup>65</sup>

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<sup>61</sup> Cass 30 December 2008, n 48350 in (2009) Quaderni di Diritto e Politica Ecclesiastica 1064. See Gennaro Luca Giordano, 'I Riti Vudu fra Diritto di Libertà Religiosa e Reato di Riduzione in Schiavitù' in (2009) Quaderni di Diritto e Politica Ecclesiastica 1055.

<sup>62</sup> Cass 10 July 2008, n 28270, in (2008) Quaderni di Diritto e Politica Ecclesiastica 1051.

<sup>63</sup> Trib Cremona 13 January 2009, in (2009 CHECK YEAR) Quaderni di Diritto e Politica Ecclesiastica 1037.

<sup>64</sup> Trib Latina 29 January 2010, in (2010 CHECK YEAR) Quaderni di Diritto e Politica Ecclesiastica 1038.

<sup>65</sup> C cost. 1 October 2003, n 309, in (2003) Quaderni di Diritto e Politica Ecclesiastica 1041, QUOTE