Brief outlook on provisions concerning disability in Italy and methods to enforce law

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1 The Italian legal system[1]

The legal framework for protection of equal treatment in Italy is mainly based on statute law, in the form of either acts issued by the parliament or acts having the same force and originating in a decision of the national parliament, but issued by different bodies. Case law, on the other hand, has been – at least until now - quite marginal in legal development of such issue in Italy. This was the case already before the transposition in Italy of the European directives issued by European Union legislative bodies (hereinafter referred to as the "Directives"). At that time, in 1998, quite advanced anti-discrimination rules were issued through an act otherwise dealing with general immigration law[2] (hereinafter, the "1998 Act"). The lack of visibility of anti-discrimination

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[1] Information taken from the "*Report on measures to combat discrimination: directives 2000/43/EC and 2000/78/EC - Country Report, Italy*", by Alessandro Simoni, December 2004. Full reports are available on the European Commission's website: http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm

[2] Legislative decree 25 July 1998, No. 286 – "*Consolidated act of provisions regarding immigrtion and the condition of foreign people*". A comparison between the protection provided by the 1998 Act and the Directive is contained in the EUMC report by A.Simoni-G.Boni, *Italian report to the project "Implementing European*

provisions dispersed in a piece of legislation with a different subject matter was indeed a problem. Even for the grounds of discrimination concerned by the Directives case law played a very limited role, also because of the lack of significant litigation in such field.
The fact that the state of the art must be evaluated by looking primarily at statute law does not mean that other sets of legal rules may not be potentially relevant. But such relevance is indeed only *potential*, and certainty of adequate legal protection can be obtained insofar only through reference to positive statutory rules. This applies particularly with regard to the possibility to enforce the equality principles contained in the Italian Constitution. Notwithstanding the theoretical possibility to base a civil action (for instance in tort) on the violation of general equality provision of the Constitution, this has never been clearly accepted by courts.
With regard to sub-national levels of legislation, *i.e.* the possible relevance of rules issued by the regions - that in Italy have increasingly important lawmaking powers -, these have been in the field of equal treatment traditionally quite marginal. It is possible, however, that in a near future such picture changes. Following the recent reform of article 117 of the Constitution, the boundary between the legislative powers of State and the regions as to employment law and discrimination (in
particular with respect to equal treatment between men and women), although far from clear, leaves more space to the regions. If the State has the exclusive competence on the "determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the whole national territory", the new article 117(7) explicitly establishes that "regional laws shall remove all obstacles which prevent the full equality of men and women in social, cultural and economic life, and shall promote equal access of men and women to elective offices". The provision thus recognises a regional legislative power in the implementation of substantive equality, with reference to gender equality.
Although there is no clear reference to the grounds of the Directives in the constitutional provisions on sub-national legislative competences, pioneering experiences can be observed at the regional level. Very recently, the Region of Tuscany (*Regione Toscana*) enacted for instance a law prohibiting discrimination on the grounds of sexual orientation[3], although its key provision on equal treatment in the supply of services seems to be applicable to different forms of discrimination as well.
Also Regione Calabria issued some laws on disability issues and social services:Law issued by the

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Antidiscrimination Law", 2001.

[3] Law issued by the Region of Tuscany (Legge Regionale Toscana) on 15 November 2004, No. 63 (Rules against discrimination on the grounds of sexual orientation and gender identity), published on *Bollettino ufficiale della Regione Toscana* No. 46 of 24 November 2004

Region of Calabria No. 4/03 on accessibility to the shores of the region for people with disabilities[4]. Law issued by the Region of Calabria on Social Services (implementing the national one 328/2000) and the regional law on architectural obstacles Law no 8 of 1998).
The key legislative provisions in order to assess the transposition in Italy of the Directives are, however, those contained in the two Decrees enacted by the government in 2003 (hereinafter referred to as the "Decrees") on the basis of the lawmaking powers delegated to government by the parliament with the "*omnibus* act" for implementation of EU law approved in 2002 (which is currently denominated as "*legge comunitaria 2001*"). The two Decrees simply follow the wording of each 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 78/2000 the "*omnibus* act" did not contain specific guidelines, while those referring to the transposition of directive 43/2000 were however very poor. The decrees did not abolish the pre-existing anti-discrimination rules, nor did they unify them, but just added a further legal regime, thus realising a complex situation which could bring to litigation many legalistic arguments about *jus superveniens*. A straight modification of the relevant articles of the Immigration Act, or their repeal and substitution with a separate text, would probably have been more rational.

2 Italian law concerning disability issues

Disability is often approached in a disjointed way. Therefore the whole picture is likely to be missed. It must be said that, if we want to make it possible for everybody to have an independent experience in everyday life, which should be our goal according to Legislator's declared intentions, then it should be pointed out the fact that for the disabled with physical impairments there is mainly a problem that must be challenged: it is the impossibility to set up the efficient and natural relationship with the environment. This issue involves access matters but it goes even beyond pure access in itself: it is the whole anthropological experience that is involved. Indeed autonomy, independence and equal access are definitely needed both for disabled and non disabled. We can (and we have to) tend to inclusion: it cannot be forgotten that, *It is duty of the Republic to remove those obstacles […] which, limitating in fact the freedom end equality among citizens, hinder the full development of any human person* (Italian Constitution, article 3)[5].

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4 For a comment on the potential impact of the law on tourism in Calabria see Turismo accessibile a Scilla : tra opportunità di sviluppo strategiche e strumenti normativi by Angelo Marra published in In iure Praesentia, 1-2005, Italy. Also available on http://www.personaedanno.it/site/sez_browse1.php?campo1=27&campo2=249&browse_id=4246

5 Translation of all the articles of the Italian Constitution used in this paper is by the Author, and is non-official.

I think it is appropriate to give an overview of what Italian law provides for. As I have already said, many provisions were issued in Italy about different aspects of disability. Here follows a list of the most important.
As regards design and Architecture, see law No. 13/1989 on demolition of architectural obstacles in private buildings, issue which is now entirely regulated by articles 10-15 of the Consolidated Building Act (Decree of the President of the Republic No. 380/01) and linked provisions.
Law No. 104/1992 (frame-law on the rights of handicapped persons) gives the official definition of “handicapped person”, as it (i) sets out what the general rights for disabled persons are, based on medical statements, used in the whole further legislation; and (ii) concerns: medical issues, rehabilitation, education, permits given to parents, competitions undertook by disabled applicants, work, sort, transport, mobility, design, civil rights, housing, taxes and general policy. As regards rights in employment and at work, law No. 68/2000 on right of disabled people to work, and legislative decree 216/2003, implementing 2000/78/CE directive, provide for equal treatment and aim to improve the employment of disabled workers. Law No. 4/2004 issues ITC and new technology aspects: it regards access of disabled to computer systems; in the same year law No. 6/2004 on support administration was issued.
The most recent provision is law No. 67 of 1 March 2006, which sets out provisions for judicial protection of persons with disabilities, who are victims of discrimination (and which is published on the Italian Official Journal No. 54 of 6 March 2006).

3 Methods for enforcement: general overview

It is appropriate to give to the non-italian reader an outline on the systems of law enforcement used in Italy as it may appear very peculiar. On the one hand, rights of each individual are to be enforced before civil courts. On the other hand, cases concerning employment in particular need be enforced before labour courts, which are specialized sections of ordinary civil courts. In addition, when justice is claimed against an act of the public administration, cases fall under the competence of
administrative courts.
In general, it is possible to claim for damages before civil courts if a subjective right is violated. Such an actions would be filed under the Italian civil code general rules, such as articles 2043 and
subsequent.
The main provision on torts in Italy is art. 2043 c.c. : a transplant of famous art. 1382 C.Nap. It was translated in English 1 as follows : " Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages".
As a matter of principle it is quite evident that no distinction is made between physical damages and
pure economic losses. Both may be an unjustified injury.

The standard doctrine was that an injury is unjustified whenever there is an offence to an absolute right of the victim such as property, liberty, life or reputation. Only in such cases the tort feaser should be bound to pay damages, otherwise the victim could not recover, except when the tort was intentional.
From a comparative perspective the standard doctrine in interpreting a transplant from French legislation was quite similar to the provisions of the German Code (par. 823 and 826 BGB) ![6]

4 Laws on Access to built environment

Special provisions have also been issued in relation to other specific fields of protection of disabilities rights, such as laws on building and environment. In relation to accessibility to built environment, the following sanctions are provided by Italian law. Pursuant to article 77.4, of
presidential decree No. 380/2001 (hereinafter referred to as the Testo Unico Eedilizia which stands for “Consolidated Building Act**”**), in case of renovation of entire buildings or in case of new buildings it is compulsory to attach to each project a declaration, issued from a qualified professional, which certifies compliance of the project with the applicable law. Such reference to applicable law is intended to be to any regulations issued in accordance with the Consolidated Building Act.
According to current law (article 82.4 Testo Unico), all works made in open-to-the-public buildings, either public or private, not complaining with provisions preventing architectural barriers, shall be declared “inagibili”(as a consequence on building , cannot be legally inhabited or use in any way) if such lack of compliance makes it impossible for handicapped persons to use the building.
Such declaration of “unfitness for use” (inagibilità), although it should be a very powerful tool to enforce accessibility regulations, does not seem to be an efficient measure in order to properly reach
wanted results and provide an actual protection to the rights connected with disability.
The sanction provided for by article 82 of the Consolidated Building Act remains merely theoretical and can not have any actual application. The reason for such non-application perhaps lies in the way how the rule is formulated. In fact , it is not clear when the use of a building by disabled should be acknowledged as impossible leading to “unfitness for use”.
What makes the Consolidated Building Act weak is the lack of understanding about what should be
intended for use of a building by disabled citizens. No provision says what impossible use exactly is

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6 [7] From a paper on torts by Monateri. See http://www.jus.unitn.it/cardozo/review/Torts/Monateri-1995/ecolos.html#a

or under which terms we should evaluate it.
The result is that no building is declared “inagibile” despite the lack of compliance with the motioned regulations.
It is highly desirable that courts in Italy issue decisions on article 82 of the Consolidated Building Act in order to give an interpretation of the concept of “impossible use by disabled”. at the moment there are in all cases helping in answering this question. Furthermore, each of the planner, the director of the works, the technician responsible for fitness-for-use checks and the tester is directly responsible for lack of compliance with the Consolidated Building Act, in relation to works executed after law No. 104/92 has come into force.
Each of them may be punished with a fine of Euro 5,164 to 25,822 and the suspension from the respective professional registers for 1 to 6 months.
The question is: why do such provisions still remain ineffective?

5 Discrimination against people with disabilities

From a more particular point of view, as regards claims against discriminatory acts suffered by persons with disabilities it is also possible to file an action pursuant to article 3 of Law No. 67 of 1 March 2006, entitled “*Provisions for judicial protection of persons with disabilities, victims of discrimination*, which so reads:
“*3. When granting the appeal the judge may, if so requested, acknowledge a compensation for damages, even when no financial loss is involved, and order the termination of the behaviour, conduct or discriminatory act, if still existing, as well as adopt any adequate measure, according to circumstances, suitable to remove such discriminatory effects, including adoption, prior to the expiry of the term established in the measure itself, of a plan for the removal of the identified discrimination*”.
As an additional sanction, the judge may order, but only once, publication of the measure under paragraph 3 on one of the major daily newspapers having a wide circulation on the national territory, at the expenses of the defendant.
Such sanction, having a deterrent effect, may indirectly help the enforcement of the above mentioned law.

5.1 Discrimination enacted by negligence of duty: will law no 67 help in enforcement of (existing) duties concerning Access?

There are further issues that arise in relation to the provisions examined so far. Such issues are ancillary to those discussed above, but they seem essential for the purpose of properly understanding the terms and limits of the protection granted by law 67/2006. I will hereby give an outline of the issues still controversial, above all with respect to their respective implications, for the purpose of giving a framework of the most complex matters connected with the introduction of Law 67/2006 in the Italian legal system.

Italian legal system contains a number of duties related to certain

behaviours. In some cases provisions have a general field of application (*e.g.*, obligation to enter into a contract with anyone asks for it by public shops), in other cases provisions are directed to avoid that disabled people are in non favourable conditions (*e.g.*, duty to build without architectural barriers: but there is not an explicit duty of positive actions in terms of adjustments for private service providers or citizens[7]).

There is no doubt that, as a matter of fact, the negligence of duty by the person in charge for the compliance with the provision causes a practical situation equal to the active conduct leading to discrimination under Law 67/2006. Can such events be deemed as falling within the provisions of Law 67/2006? This question turns to become, is it possible to challenge such events through the legal instruments provided for by Law 67/2006?[8]

A deeper analysis shows that duties to enter into a contract and to remove architectural barriers already existed in the law regulating the subject matter. What is really interesting to examine is whether Law 67/2006 has introduced anything really new if compared to the pre-existing regulation.

Public law provisions, which regulate public authorities' relationships under Italian law, have proved to be largely insufficient to cover disabled people's needs. It was already provided for in Italian law that public buildings' restructuring had to comply with accessibility requirements.

But **if compliance would have lacked, law did not provide disabled citizens with any remedy suitable to force the public authorities** (or private subjects) **to build or restructure the building in compliance with the law.**

Before Law 67/2006 the only remedy provided for by the Italian legal system was (the public sanction which Public Administration shall apply i.e.,) **the closure of the unlawful building to the public**. A question then arises: why should a disabled person resort to such an abnormal remedy (moreover useless indeed), given that it would not satisfy the practical access needs of the disabled person, and it would moreover prevent the public to use the said

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[7] On the issue of positive obligations see OLIVER DE SCHUTTER, *Reasonable Accommodation and Positive Obligations in the European Convention of Human Rights* in *Disability rights in Europe from theory to practice* by ANNA LAWSON and CAROLINE GOODING Eds. Hart Publishing 2005

[8] It has been argued that "A law which simply prohibited direct and indirect discrimination against disabled people would therefore seem to be too blunt a tool with which to tackle the disabling barriers against people with impairments. It would not impose any clear obligation on employers, service providers and others to consider the particular person with an impairment who wished to work for them or to use their service and to identify methods by which any obstacles preventing their full participation could be circumvented or removed". (ANNA LAWSON, *Reasonableness and its Role in Disability Equality Law*, Paper delivered at a Research seminar for the ReasonableAcces EU Project, Leeds, April 2006). The argument, referred to UK legal system, is relevant even in Italy (given the absence of positive duties of adjustments **upon private subjects**) but – as the courts should aim **to remove the effects of discrimination** (i.e. disadvantage) – the order issued at the end of trial can be to remove obstacles (this would be in accordance with the principles underpinning the Italian legal system and provisions contained in law no 104/1992 which where ,in fact, only theoretical due to the absence of an Antidiscrimination action. The need for antidiscrimination civil-right-based action to make provisions of law 104 effective was argued also by Venchierutti in 1997)

building.

Law 67/2006 outlined an instrument capable of greater practical effects, far from the old remedies only suitable to remove and prohibit. Before Law 67/2006 it was not clear whether the duties provided for in relation to the public building actually gave rise to a specific right of the disabled person.

Law 67/2006 has instead acknowledged and regulated a right of disabled people to not be discriminated.

Nor can be ignored that a new category of injury had recently been created, which is neither physical nor moral injury: **existential injury**, which occurs in situations which make life more difficult. The proper right of disabled people has now been acknowledged, so that those prior duties, formerly seen as simple duties under public/administrative law within the Italian legal system, became now actual criteria for the assessment of the awareness in the process of causing a damage event under a civil law point of view.

The connection between the fact that caused discrimination and the discrimination suffered by the disabled has a number of reasons. The causation relevant under Law 67 can also derive from negligence of duty, under the Italian criminal law principle for which *not avoiding an event that one has a duty to avoid equals to cause it*.

The acknowledgement of the right to not be discriminated implies that all of the traditional elements of the restoration obligation can be ascertained in this kind of duty: unlawful behaviour; causation connection; and injury, even in the discrimination cases caused by negligence of duty.

It is exactly in the discrimination cases caused by negligence of duty that the other legal instrument appears crucial: the adoption, by court, of *any other measure that the court may deem appropriate in order to remove the effects of the discrimination.*

The effects of the discrimination can only be removed by adopting the behaviours provided for by law 67/2006, *i.e.* by complying with those duties unlawfully neglected. Therefore, this is a way to actually obtain compliance with the law and respect for the disabled peoples' individual rights. It is clear that such a goal could not have been achieved through the previous destructive laws.

It is now appropriate to recall the concept of "**passive discrimination**". I already said above that passive discrimination means discrimination following not to an act, fact of active behaviour, but a passive action, or omission, by a certain person. Such concept can be easily clarified, for the purposes of this paper, through a simple example.

Let us take into account administrative law and public bodies. In this field, it is strongly unlikely that discriminatory active acts or facts are made. Civil law scholars have observed that it is easy to assume that no public

officer would ever enact discriminatory behaviours. It is more likely that public bodies enact policies which are actually, but not formally, discriminatory[9].

With reference to this notation from Morozzo Della Rocca, it can be added that those acts, “seemingly neutral”, which lead to a practical discrimination are the object of paragraph 3 of article 2 of Law 67/2006, under the concept of indirect discrimination.

It is interesting moreover to recall a comment to a recent decision issued in relation to judicial venue as regards cognizance of unlawfulness of a discriminatory administrative act. Many legal scholars believe that ordinary civil courts (which are different to the so called *administrative* courts under Italian law) can not censure public authorities’ behaviour. This opinion is nevertheless not shared by all. Neither do I agree with it.

Traditional view is based upon a distinction of *legal subjective position* amongst individual rights (*diritti soggettivi*), traditionally falling under ordinary jurisdiction, and legitimate interests (*interessi legittimi*), falling under the so called *administrative* jurisdiction.

Such a distinction, typical of Italian law, should be soon replaced by new legal categories deriving from European Union law. I think that it should be appropriate to better outline the allocation of *ordinary* and *administrative* jurisdiction. This would certainly push courts to better assess the behaviours enacted by public authorities, by virtue of their role as guardian of individual rights. And this would probably leave behind the obscure category of *legitimate interests*.

In the subject matter law definitely wanted to devote to ordinary courts any assessment power on whether certain behaviours are discriminatory or not. It is also clear that the law intended not to provide for any distinction based upon the nature of the individual rights as individual rights (*diritti soggettivi*) or legitimate interests (*interessi legittimi*).

I therefore believe that courts shall only comply with the law if they will verify each and every step of the behaviour enacted by the public authorities.

6 Issues concerning employment and other relevant fields: ongoing problems

Cases on employment issues, as said above, fall under the competence of labour courts and this is a field in which protection is more efficient. The procedure is quicker than before ordinary courts and the judge has extremely strong powers. Nevertheless people with disabilities still remain unemployed in most cases. For a report see http://ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/disabfull_it.pdf.

[9] see P. MOROZZO DELLA ROCCA *Gli atti discriminatori nel diritto civile, cit.*

Services provided disabled citizens by central or local authorities spring mainly from the above mentioned law no 104/1992. Involving the public administration this regards administrative law. The main problem is that most of the rights acknowledged by this law require some services to be given by public authorities: often these authorities have not . the duty of doing something, but simply “can” provide a given service (this is the case e.g. for personal assistance) within the limits of their own financial resources.
So many services (which are indeed fundamental for real inclusion) depend on the goodwill - and financial capacity - of any single local authority. It has to be considered that, within Italian legal system, the so-called “administrative discretion” in choices . normally cannot be challenged in my judge, if not under what merely regards procedural issues. So that if the public administration (regardless if it is central or local) choose not to provide a service it was allowed, but not obliged –
to implement in its policy, nobody can put a legal complain on it.
Furthermore, due to the different levels of central, regional, and local authorities, some services can be provide only after the co-ordination of those bodies requested by law (see art. 26 one public transport or art. 39 entitled “ duties on the regions” which sets the role of those bodies without actually placing any duty upon them , and seemly allows provide number services throughout a long co-ordination process) which is not peaceably enforceable. This, of course, makes really uncertain and unequal the kind and the quality of services provided to achieve social inclusion of those in with disabilities in the whole national territory. It is time to understand what makes so ineffective all this laws and if inclusive policies can be improved.

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