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**ANTIDISCRIMINATION LAW AND LEGAL
MOBILISATION IN ITALY.
SHAPING EQUALITY FOR MIGRANTS.**

TUTOR:

PROF.SSA OLIVIA BONARDI

PH. D. CANDIDATE:

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PREFACE

On 7 March 1991, 27.000 Albanians, escaping from the post-communist chaos in their home country, arrived in Brindisi on board of merchant ships. It was the first great exodus of migrants towards Italy. The country discovered itself to be a land of immigration.

Eight years later, the Parliament adopted Law n. 40/1998 then merged into the Legislative Decree n. 286/1998, the so-called Testo Unico Immigrazione (hereafter TUI) representing the first organic regulation on migration. Moving from the idea that equal rights represent the very foundation of integration policies, the TUI besides establishing the conditions of entry and residence in the country, provided the first *ad hoc* antidiscrimination clause on grounds of race, ethnic origin and nationality, while regulating access to employment, social protection, healthcare and education. Only two years following the adoption of the TUI, the national legislature, admittedly distant from solidarity concerns, would start a process of reconsideration of the steps taken by the TUI, opting in favour of more a repressive approach to immigration and restricting the scope for equal treatment under the TUI.¹

Yet, protection from discrimination and equality of treatment for migrants is far from being the exclusive domain of national authorities. The framework of International conventions indeed poses significant constraints to States in view to safeguarding human rights or otherwise directly focusing on migrants' rights. The International Convention on the Elimination of all Forms of Racial Discrimination, the European

¹ Art. 80 (19) Law n. 388/2000; Law n. 189/2002; Law n. 94/2009

Convention on Human Rights and the ILO Convention on Migrant Workers n. 143/75 represent only the main examples in this regard.

In addition, following the entry into force of the Treaty of Amsterdam in 1997, the European Union has intervened in both respects. As to the first, in 2000 the EU adopted the Racial Equality Directive (RED) aiming to implement the principle of equal treatment between persons irrespective of racial or ethnic origin. The adoption of the Directive proved the EU was resolute in its will to take action against race and ethnic discrimination and was praised as an important step forward in the fight, in particular in consideration of the attention it pays to the enforcement of the prohibition of discrimination. As to the second, the EU has taken steps to narrow the differences of treatment between TCNs and EU nationals adopting a number of equality clauses granting equality of treatment to TCNs as regards areas such as employment and social security, though with different degrees according to the legal *status* TCNs enjoy under EU law.²

The RED and equal treatment clauses provided under the above EU Directives, despite the flaws that have characterized the process of their implementation in the national system, have enhanced the opportunities for actors to challenge through courts differences of treatment related to nationality.

Whereas the first years following the adoption of the TUI appear to have been marked by particularly low levels of litigation³, national reports on the enforcement of the prohibition of discrimination following the implementation of the RED clearly point to significant increase in the number of judicial decisions in this regard as well as to growing engagement of civil society organizations in litigation.⁴

² EU Directives 2003/109/EC; 2004/83/EC, 2009/50/EC; 2011/98/UE, 2014/36/UE.

³ D. Gottardi, *Le discriminazioni basate sulla razza e sull'origine etnica*, in M. Barbera (ed.), *Il nuovo diritto antidiscriminatorio*, Giuffrè, 2007, p. 1; A. Guariso, *L'azione civile contro la discriminazione*, in M. Ferrero and F. Perocco (ed.) *Razzismo al lavoro. Il sistema della discriminazione sul lavoro, la cornice giuridica e gli strumenti di tutela*, Franco Angeli, 2011, p. 286.

⁴ See in particular in this regard ECRI Reports on racism and discrimination in Italy. As to the

Equal rights litigation assumes particular salience in the national context in the light of the legal framework regulating acquisition of citizenship. Indeed, though Italy has progressively become home to long-term immigrants, the law on citizenship, as adopted in 1992⁵, fails to take into account this changing reality. It reflects the vision of a country of emigration providing distinct mechanisms of acquisition of citizenship for the descendants of Italian emigrants and the “newcomers”, clearly prioritizing the former compared to the latter. In order to be eligible for Italian citizenship, the law requires first generation migrants at least ten years of uninterrupted legal residence. For those born in Italy the path isn’t any easier. In order to qualify for citizenship second generations are required uninterrupted legal residence in Italy up to the age of eighteen. In addition excessively long procedures for establishing entitlement and a number of procedural constraints further contribute to withholding citizenship rights.

This study intends to explore how, under what conditions and with what consequences, legal actors have relied on the prohibition of discrimination to challenge nationality related differences of treatment.

It will do so, through a qualitative and quantitative analysis of the case law, combining legal research with the analytical tools of the historical-comparative research in social sciences.

The research will rely on original data gathered from lower courts decisions issued from 1998 to 2015 and concerning the enforcement of the prohibition of discrimination under the TUI and the national legislation implementing the RED at the national level.

The collection of case law includes 232 lower courts decisions. Relevant case law has been selected through multiple sources: national case law databases (in particular,

engagement of civil society organizations see in particular A. Guariso (ed.), *Senza distinzioni. Quattro anni di contrasto alle discriminazioni istituzionali nel Nord Italia*, Quaderni di Apn, 2, 2012. The publication collects 52 judicial decisions, most of which issued following claims filed by civil society organizations.

⁵ Law n. 91/1992.

Foro Italiano, De Jure, Sistema Leggi D'Italia), institutions (in particular, the National Office Against Racial Discrimination and the Emilia Romagna Region), and civil society organizations and networks engaged in migrants' rights advocacy (in particular, ASGI and Melting Pot).

Data have been collected and classified through a research software (Atlas.ti) used by social science scholars mostly for qualitative research, though not exclusively. The software allows to classify and code parts of the imported documents that are considered relevant for the purposes of the research and includes a number of analytic tools that help the researcher in the interpretation of data, such as the possibility to build queries and display absolute and relative frequencies of codes.

The research moves from an analysis of the US literature on public interest law, on law and social change and law and social movements. Despite adopting different approaches, these three different areas of research share a common concern: does law and litigation strategies matter for social reform?

Since the National Association for the Advancement of Colored (NAACP) campaign against public segregation in education and the consequent decision of the US Supreme Court in *Brown v. Board of Education*⁶ that held segregation unconstitutional, US scholars have articulated such concern under different forms, questioning the ability of courts to bring about "real change", asking under what conditions litigation is more likely to emerge and be successful, and finally exploring how litigation affects grassroots, social actors themselves and their interaction with political opponents.

The first chapter will provide an overview of the scientific literature in this regard, in the US and European contexts.

Chapter two will focus in particular on tracing how the implementation of the RED and TCNs equal treatment clauses provided by EU law has effected the opportunities for effective enforcement of the prohibition of discrimination at the national level.

⁶ *Brown v. Board of Education* 347 U.S. 483, 495 (1954).

Chapter three will analyse the extent to which such enhanced opportunities have provided the incentives for legal actors to turn to courts and shaped their legal strategies and chances to succeed in court. In addition it will trace the impact of litigation in terms of achieving equal rights in courts.

Finally, the last chapter will investigate whether litigation has contributed to significant social reform by shifting focus from courts to policy response.

Chapter I

LAW AND SOCIAL REFORM

1. Brown's legacy.

On May 17, 1954, the US Supreme Court delivered a unanimous opinion in *Brown v. Board of Education*⁷ declaring that segregation in public schools entailed a violation of the Fourteenth Amendment. Refusing to set the clocks back to the time the Fourteenth Amendment was adopted⁸, the Court underlined the importance of public education as “the very foundation of good citizenship” and stated that segregated public schools were not “equal” and could not be made “equal”.

“To separate them from others of similar age and qualifications solely because of their race”, emphasized the Court, “generates a feeling of inferiority as to their *status* in the community that may affect their hearts and minds in a way unlikely ever to be undone”.⁹

Segregation of children in public schools solely on the basis of race, physical facilities and other “tangible” factors being equal, represented in itself, according to the Court, a

⁷ Ft. 6

⁸ Acknowledging the inconclusive nature of the Fourteenth Amendment's history with respect to segregated schools is the status of public education at that time, the Court states: “In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout”. See p. 492 of the decision.

⁹ *Ibid*, p. 494.

denial of equal educational opportunities and equal protection of laws.

The ruling represents the culmination of the National Association for the Advancement of Colored People (NAACP) legal campaign¹⁰ targeting the system of racial subordination linked to segregation and the legal doctrine of “separate but equal” established by the US Supreme Court in *Plessy v. Ferguson*¹¹. Under this doctrine, equality of treatment was “guaranteed” when the “races” were provided substantially equal, although separate, facilities.

When the NAACP legal campaign took shape, segregated schools were anything but equal. Disparities varied from one State to another. Whereas in North Carolina, the best of Southern States, the *ratio* of expenditures for white pupils to those for black pupils was less than 2 to 1, and teachers’ monthly salaries averaged \$98.20 for whites and \$66.53 for blacks, disparities in South Carolina were extremely alarming. The *per capita* expenditures on whites were \$36.10 and on blacks \$4.17 and the average annual salary for white teachers was \$885 and that for blacks \$261.¹² Disparities concerning physical facilities and transportation were even more dramatic.

It was a time when “alternative forms of protest - political mobilisation, economic boycotts, street demonstrations, and physical resistance - were largely unavailable to southern blacks, that lived under a ruthlessly repressive regime of racial subordination”.¹³

¹⁰ For an extended account of the campaign, see M. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950*, The University of North Carolina Press, 2005.

¹¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896). Plessy involved the constitutionality of Louisiana statute requiring railroads to provide separate and equal accommodations for black and white passengers.

¹² M. Tushnet, *The NAACP's Legal Strategy, cit.*, p. 5 and 6. The data appear in NAACP reports on disparities in *per capita* expenditures for white and black students and differences in salaries paid to white and black teachers in Georgia, Mississippi, North and South Carolina, and Oklahoma. The reports were published from 1926 to 1928.

¹³ M. Klarman, *Brown v. Board of Education and the civil rights movement*, Oxford University Press, 2007, p. 230. See also M. Tushnet, *The NAACP's Legal Strategy, cit.* p. 12. The author gives account of the arguments of Charles Thompson, dean of the School of Education at

The litigation campaign was originally intended to support litigation seeking to “make the cost of a dual school system prohibitive and therefore speed the abolishment of segregated schools”. Nonetheless, since the early stages of its implementation the legal staff would also directly act to erode the “separate but equal” system of public education, though the choice between desegregation and equalization of expenditure would be left to the defendants. As a result, the campaign entailed a double attack on segregation, directly in cases in which States chose to equalize spending by integrating schools and indirectly by making the cost of segregated schools unaffordable.¹⁴

The NAACP could count on brilliant lawyers like Charles Houston and Thurgood Marshall who were deeply committed to the campaign, able to adapt it to local demands and conditions and to actively engage in community meetings contributing to raise comprehension on the issues at stake and obtain support to the campaign.¹⁵

Between 1933 and 1950 the NAACP’s legal staff filed cases targeting three distinctive objectives: segregation of graduate and professional schools, disparities on salaries between black and white teachers, disparities concerning physical facilities at black and white elementary and secondary schools.¹⁶

Finding plaintiffs, filing claims and winning them in court was only one part of the struggle. Enforcing courts’ decisions was often very difficult. Pressure on plaintiffs was not irrelevant. It required a lot of effort to prevent them from accepting settlements for less than they could win through litigation, or on the contrary, from rejecting offers for more than they could win. Furthermore, non-parties’ elusive practices of legal precedents forced litigants to invest on follow-up cases time and resources comparable

Howard University, in support of a litigation campaign. Thompson first considers that no alternatives to litigation were reasonable. Migration was inconceivable, revolt suicidal, and appeals to the sense of fairness of whites likely to be useless. Thus blacks “must resort to the courts. They have no other reasonable litigation legitimate alternative”.

¹⁴ M. Tushnet, *The NAACP’s Legal Strategy*, cit. p. 14 e 27.

¹⁵ *Ibid*, p. 44.

¹⁶ *Ibid*, p. 34.

those required by the test cases. “Litigation was draining the NAACP’s resources, with increasingly small returns for the effort”.¹⁷

After 1950, it became clear that the equalization strategy would not work in pressuring Southern States towards desegregation. The NAACP decided to change the plan and directly target segregation. They litigated and won the *Brown* case.¹⁸

But yet, “*Brown* was two decisions, one on the merits and the other on the remedy”¹⁹. On May 17, 1954, the US Supreme Court declared segregation unlawful but it provided no immediate remedy. Justices ordered reargument on several issues which they considered of particular complexity: should desegregation be immediate or gradual, how detailed the decree should be, should the Court limit relief to the named parties in the lawsuit.²⁰

Although the NAACP strongly pressed for immediate desegregation, to be accomplished before the fall of 1956,²¹ on May 31, 1955, the Court decided in favour of gradual desegregation. Cases were remanded to District Courts that would supervise desegregation issuing decrees consistent with “local conditions” and order the admission of “parties to these cases” to public schools on a racially non-discriminatory basis “with all deliberate speed”. The Supreme Court provided no deadlines or clear guidelines for desegregation. “With all deliberate speed” was viewed as “a signal that encouraged both noncompliance with, and even resistance to desegregation”.²²

The after *Brown* era was characterized, on one hand by elusive practices of non compliance, such as transfer options, which permitted parents to move their children

¹⁷ *Ibid*, p. 82.

¹⁸ The Board of directors of NAACP resolution in July 1950 declared the Association would “seek education on a non-segregated basis and no relief other than that would be acceptable”.

¹⁹ M. Tushnet, *Symposium: Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall, Public Law Litigation and the Ambiguities of Brown*, in *Fordham Law Review*, 61, 1, 1992, p. 23.

²⁰ *Brown v. Board of education II*, 347 U.S. 294, 301 (1955).

²¹ M. Klarman, *Brown v. Board of Education*, *cit.* p. 80.

²² M. Minow, *Surprising Legacies of Brown v. Board*, in *Washington University Journal of Law and Policy*, 16, 2004, p.14.

out of desegregated schools, pupil placement schemes, which assigned students to schools on the basis of a list of apparently neutral criteria and freedom of choice plans living to the student the choice as to the school in which to enrol, and on the other by manifest resistance to desegregation and sometimes violence.²³

A few months after *Brown* was decided, new white supremacist organizations, the White Citizens' Councils, were formed, with the primary objective of opposing desegregation of schools.

Early in 1956, 19 Senators and 82 Representatives signed the Southern Manifesto which defined the decision of the Supreme Court in *Brown* as a "clear abuse of judicial power" and showed strong support to Southern States intending to resist the implementation of *Brown* with all "lawful means".

School boards, under the pressure of community resistance had strong reasons not to desegregate before courts had ordered it, making litigation necessary in almost every county. The NAACP was struggling to provide the necessary support to litigants while facing severe institutional attacks and violence from white segregationists.²⁴

Furthermore, the Supreme Court avoided further involvement over school desegregation until 1963, denying full review in a number of cases, with the sole exception of the Little Rock case.²⁵

In September 1957, notwithstanding the approval by the District Court of a gradual desegregation plan, state *militia* under the authority of Governor Faubus and white mob violence prevented nine black students from entering Little Rock high school.

After weeks of persistent criticism, President Eisenhower decided to intervene sending the army's 101st Airborne Division to escort black students to and from Little Rock Central High School and to provide them with protection while inside the school.

²³ M. Tushnet, *Symposium: Brown v. Board, cit.* p. 24; M. Klarman, *Brown v. Board of Education, cit.* p. 88, M. Minow, *Suprising Legacies, cit.* p. 12.

²⁴ M. Klarman, *Brown v. Board of Education, cit.*, p. 126.

²⁵ *Ibid*, p. 90.

Following the chaos and the inconceivable violence determined by these events the Board of Little Rock asked the District Court to suspend the desegregation plan for two and a half years in order to allow community resistance to lessen. The District Court agreed, but the decision was reversed in appeal.²⁶

In *Cooper v. Aaron*²⁷ the Supreme Court confirmed the appellate decision insisting that “the constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed”.

Notwithstanding the criticism of the NAACP, it took the justices almost 10 years to return on the issue of school desegregation and the concept of “all deliberate speed”.

At the time, the civil disobedience movement under the leadership of Martin Luther King was mobilising African Americans all across the country.

In response to the eruption of direct action protest, many lower court judges had already begun to reject “gradualist tactics” and national politicians were increasingly expressing their dissatisfaction with the pace of desegregation.²⁸

Within this transformed context the US Supreme Court decided *Watson v. Memphis*.²⁹ The case concerned desegregation of public parks and other publicly owned recreational facilities from which African Americans were excluded. The city of Memphis defence pointed at the partial segregation already achieved and justified its delay by urging the need to proceed gradually towards full desegregation.

For the first time the Court referred to its decision on the remedies to clarify that it “never contemplated that the concept of ‘deliberate speed’ would countenance indefinite delay in elimination of racial barriers in public schools, let alone other public

²⁶ District Court for the Eastern District of Arkansas, 163 F.Supp. 13 and Court of Appeal for the Eighth Circuit, 257 F.2d 33.

²⁷ *Cooper v. Aaron*, 358 U.S. 1 (1958).

²⁸ In February 1963, in a special civil rights message to the Congress, President John F. Kennedy declared *Brown* to be “both legally and morally right” and criticized the process of desegregation as “too slow, often painfully so.” M. Klarman, *Brown v. Board of Education, cit.*, p. 101.

²⁹ *Watson v. City of Memphis*, 373 U.S. 526 (1963).

facilities not involving the same physical problems or comparable conditions.”

The same year in *Goss v. Board of Education*³⁰, the Court invalidated a minority-to-majority transfer scheme that allowed that any student, upon request, would be permitted, solely on the basis of his own race and the racial composition of the school to which he was assigned to transfer from such school, where he would be in the racial minority, back to his former segregated school, where his race would be in the majority.

In *Griffin v. School Board*³¹, the Court held that the closure of public schools in order to avoid full implementation of Brown was as well not permissible.

The concept of “all deliberate speed” was definitively set aside only in 1968 in *Green v. County*³² concerning a “freedom of choice” plan for desegregation permitting students to choose annually between the two schools of the County.³³

During the plan's three years of operation, “no white student had chosen to attend the all-Negro school”, and although 115 African Americans enrolled in the formerly all-white school, 85% of the African American students in the system still attended a segregated school.

It is for the School Board, stated the Court “to provide a plan that promises realistically to work now, and a plan that, at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is intolerable.”

Lower courts reacted to this change of pace starting to supervise the operation of schools more aggressively and the NAACP intensified its efforts in bringing cases before courts and demanding more effective policies. Nonetheless, actual desegregation in the Deep South came only after Congress enacted the 1964 Civil

³⁰ *Goss v. Board of Education*, 373 U.S. 683 (1963).

³¹ *Griffin v. School Board*, 377 U.S. 218 (1964).

³² *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

³³ M. Klarman, *Brown v. Board of Education*, *cit.*, p. 90.

Rights Act.³⁴ Besides authorizing the Department of Justice to enforce *Brown* through litigation, the act provided the possibility for the latter to withhold federal funds from school systems that discriminated against African Americans.³⁵

The percentage of southern black children in desegregated schools shot up from 1.18% in 1964, to 6.1 % in 1966, to 16.9 % in 1967, 32 % in 1969, and roughly 90 % in 1973.³⁶

Did *Brown* matter, then? More than half a century after *Brown* was decided, the debate is still very much alive, although there is significant agreement as to its limited direct effects on segregation in public education.³⁷ A more recent picture of public education in the US might provide further support to this view. Since the 1980s in many districts where court supervised desegregation was ended, it is shown that there has been a major increase in segregation.³⁸ But, it might also shed some light on the hardships of changing society, inviting us to carefully consider where to set the threshold of relevance when assessing the importance of litigation for social reform. *Brown* did not end segregation, neither the Civil Rights Act did.

This considered, as Klarman puts it, “counting the number of black children attending desegregated schools is only one way - and perhaps a rather poor one - for evaluating *Brown*’s importance”.³⁹

His brilliant analysis of *Brown* shows that the US Supreme Court decision meant in much more complex ways. Building on historical evidence, he claims that although *Brown* did not create the Civil Rights Movement, the ruling had significant indirect

³⁴ *Ibid*, p. 110.

³⁵ M. Minow, *In Brown's wake: Legacies of America's educational landmark*, Oxford University Press, 2010, p. 22.

³⁶ M. Klarman, *Brown v. Board of Education cit.* p. 124 (These figures do not distinguish between blacks attending schools with many whites and with few whites).

³⁷ D. A. Schultz (ed.), *Leveraging the law: Using the courts to achieve social change*, Peter Lang Pub Incorporated, 1998.

³⁸ G. Orfield and L. Chungmei, *Brown at 50: King's dream or Plessy's nightmare, 2004*, quoted in M. Minow, *Surprising Legacies, cit.*, p.13.

³⁹ M. Klarman, *Brown v. Board of Education cit.* p. 125-148.

effects.⁴⁰

Firstly, the decision clearly inspired blacks: “to have the Court declare segregation to be unconstitutional was symbolically important, and it furthered the hope and the conviction that fundamental racial change was possible.”

In Klarman’s account, it mattered also in another more tortuous way. *Brown* “raised the salience of school desegregation” forcing politicians, political parties and social organizations to take a position on the issue, which they had previously been able to avoid doing”. It forced southern politicians to take a position that given the dominant public opinion in the South could not be other than one of support of segregation and condemnation of *Brown*.

Shifting the focus of southern blacks to school desegregation *Brown* forced confrontation on an issue on which southern whites were much more resistant contributing in turn to “the prosperity of extremists”. The backlash was powerful. Yet, “the violence ignited by *Brown*, especially when directed at peaceful protestors and broadcast on television, produced a counterbacklash”. By the early 1960s, northerners were no longer prepared to tolerate the brutal beatings of peaceful black demonstrators, and they responded to such scenes by demanding civil rights legislation that attacked segregation at its core.⁴¹

In conclusion, looking at the litigation campaign that brought to *Brown*, the vision of the future radiating from the US Supreme Court decision, its embattled aftermath and its relevance for the civil right movement, it is hard no to agree with Minow describing *Brown* as both “the ‘landmark’ emblem of social justice” and “the symbol of the

⁴⁰ For an opposing view see G. N. Rosenberg, *The hollow hope: Can courts bring about social change?*, University of Chicago Press, 2008. According to the author the decision of the Supreme Court was nothing more than a “hollow hope”. It had no impact on ending segregation or on the Civil Rights Movement.

⁴¹ M. Klarman, *Brown v. Board of Education cit.* p. 229.

limitations of court-led social reform.”⁴²

2. Public interest law. Looking behind and ahead.

The Supreme Court decision in *Brown v. Board of Education* supported the view that courts can be a powerful ally for protecting the rights of subordinated groups, especially when political pressure and direct action are not available strategies.

Inspired by the promise of social reform embodied in *Brown*, new organizations, modelled on the NAACP and other civil rights groups such as the American Civil Liberties Union (ACLU) and Legal aid,⁴³ developed in the 1960s and 1970s, generating what became known as the “public interest law movement”.⁴⁴

After blacks, other minorities, the poor, environmentalists, consumers, and women turned to lawyers and courts to vindicate their rights.⁴⁵

Some contextual factors contributed to the growth of public interest law during this period. The “rise of the administrative state”, the “civil rights litigation”, and “enhanced social protection through the welfare state” legitimized public interest law practice. Public interest practice was viewed as a supplement to all of three, making sure that all interest were taken into consideration, that rights became reality and welfare benefits went to the legitimate recipients.⁴⁶

⁴² M. Minow, *Suprising Legacies*, cit., p.12.

⁴³ M. Tushnet, *Some Legacies of Brown v. Board of Education*, in *Virginia Law Review*, 2004, p. 1695.

⁴⁴ The classic approach to public interest practice, and the model of firms that embodied this idea, emerged in the 60s and 70s. Although there were precursors such as the NAACP, ACLU, and Legal Aid, the idea of broad “public interest” practice really crystallized in this period. See L. G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the “New Public Interest Law*, in *Wisconsin Law Review*, 2005, p. 457 and J.F. Handler, *Social Movements and the Legal System: Theory of Law Reform and Social Change*, Academic, 1976. According to Handler “by the end of the 60s the use of litigation as an instrument for social reform became so widespread that it can be called a movement”.

⁴⁵ J.F. Handler, *Social Movements*, cit. p. 27.

⁴⁶ See L.G. Trubek, *Crossing Boundaries*, cit. p. 458.

Centralized agencies subject to reform through impact litigation potentially affecting millions of people all across the country, an activist judiciary, and an expanding welfare system open to enforcement provided the conditions to effectively deploy legal strategies at the federal level.⁴⁷

Available resources were relevant as well.⁴⁸ Federal funding for legal services, fee-shifting rules and private foundations grants, provided the necessary financial resources for litigation. In 1965 the federal government launched the Office of Economic Opportunity (EOE) Legal Services Program. The program went beyond providing legal services, pursuing in the late 1960s and early 1970s systemic law reform on behalf of the poor. Following the dismantlement of EOE, the Legal Services Corporation (LSC), an independent federally funded entity provided the resources to dramatically expand local legal services for poor communities. During the same period federal courts relied on their equitable powers to grant attorney fees to successful plaintiffs in public interest cases, while the 1964 Civil Rights Act and environmental protection laws provided a statute basis for fee shifting. Finally, substantial financial support came from foundation grants⁴⁹. In 1970 the Ford Foundation launched its public interest law initiative becoming one of the main supporters of public interest law organizations.⁵⁰

Such factors did also influence the features of the movement, consolidating its focus on impact litigation, although there was some room for individual representation especially in the poverty field, and the pre-eminence of lawyers and their skills over

⁴⁷ S. Cummings and D. Rhode, *Public Interest Litigation: Insights From Theory and Practice*, in *Fordham Urban Law Journal*, 36, 4, 2009, p. 606.

⁴⁸ C. R. Epp, *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective*, University of Chicago Press, Chicago, 1998; C. A. Albiston and L. B. Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, in *Law & Social Inquiry*, 39,1, 2014, p. 62

⁴⁹ L. B. Nielsen, and C. R. Albiston, *Organization of Public Interest Practice: 1975-2004*, in *North Carolina Law Review*, 84, 2005, p. 1616.

⁵⁰ *Ibid.*

the practice of public interest law.⁵¹

In 1976, the use of litigation for social reform was so widespread that reflecting on what was happening in federal courts at the time, Chayes noticed the emergence of a new model of adjudication, the “public law” adjudication model.⁵² Unlike the traditional model, commonly viewed as a vehicle for solving disputes between two private parties, “public law” litigation aimed at bringing institutional reform involving a multiplicity of interests and had widespread effects beyond the parties of the case. As such it required complex forms of relief, special non-legal expertise and continuing involvement of the judge over the course of implementation.

As legal scholars started to investigate the complexities inherent to this different adjudication model as to the role of the judge⁵³, the forms of relief⁵⁴ and the fair representation of plaintiffs,⁵⁵ and assessing its relevance in defining the role of courts in the American political system,⁵⁶ the context that favoured its emergence was already changing.

During the 1970s and 1980s, as the right gained power, growing conservatism among the judiciary,⁵⁷ reform of centralized federal agencies following the trend of decentralization and drastic curtailment of welfare benefits at the federal level, significantly limited opportunities for litigation strategies.⁵⁸

⁵¹ L.G. Trubek, *Crossing Boundaries*, *cit.* p. 458.

⁵² A. Chayes, *The Role of the Judge in Public Law Litigation*, in *Harvard Law Review* 89, 7, p. 1281 and. O. M. Fiss, *The Supreme Court, 1978 Term. Foreword: the forms of justice*, in *Harvard Law Review*, 93, 1, 1979, p.1.

⁵³ A. Chayes, *The Role of the*, *cit.* p. 1281.

⁵⁴ O. M. Fiss, *The civil rights injunction*, 1978.

⁵⁵ D. L. Rhode, *Class Conflicts in Class Actions*, in *Stanford Law Review*, 1982, p. 1183.

⁵⁶ A. Chayes, *The Role of the*, *cit.*.

⁵⁷ D. L. Rhode, *Public Interest Law: The Movement at Midlife* in *Stanford Law Review* 60, 6, 2008, p. 2034-2037.

⁵⁸ S. L. Cummings and D. Rhode, *Public Interest Litigation: Insights From Theory and Practice*, in *Fordham Urban Law Journal* 36, 4, 2009, p. 607; S. L. Cummings, *The Future of Public Interest Law*, in *University of Arkansas at Little Rock Law Review*, 33, 4, 2011, p. 367-369.

Additionally, liberal public interest law groups underwent an even more insidious attack aiming to undercut their financial resources. They had to face reduced federal funding for legal services, rules limiting political advocacy by organizations that were supported, even only in part, by such funds and restrictive interpretation of fee shifting statutes by the Supreme Court.⁵⁹ “What the government provides, the government can take away,” observes Tushnet in criticising the (over)reliance of public interest organizations on governmental funds.⁶⁰

While limiting opportunities for liberal groups, these changes cleared the way to conservative advocacy groups.⁶¹ During this period, conservative groups experienced significant success in using liberal’s legal tactics pushing forward competing agendas on religious freedom, criminal law, property rights, and affirmative action, starting what Southworth defines as “the contest over the meaning of public interest law”.⁶²

The conservative’s reaction to the success of liberal public interest groups coincided with scholarly critique, both from the left and from the right.

Notwithstanding increasing involvement of conservative groups in impact litigation, critics from the right contested reform oriented litigation for circumventing the legislative policy making process and thus for being fundamentally undemocratic.⁶³

Criticism from progressives, on the other hand, openly expressed disenchantment towards public interest law along different concerns.

⁵⁹ C. A. Albiston and L. B. Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, in *University of California Law Review*, 54, 2007, p. 1087.

⁶⁰ M. Tushnet, *Some Legacies of Brown*, *cit.* p. 1701.

⁶¹ S. L. Cummings and D. Rhode, *Public Interest Litigation*, *cit.* p. 607.

⁶² A. Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law*, in *University of California Law Review*, 52, 2005, p. 1223. See also A. Southworth, *Lawyers of the Right: Professionalizing the conservative coalition*, University of Chicago Press, 2009.

⁶³ C. A. Albiston and L. B. Nielsen, *Funding the Cause*, *cit.* p. 68.

The first line of criticism, led by Bell⁶⁴ and Lopez⁶⁵ focused on the relation between public interest lawyers and affected constituencies and moved from the concern of the former disempowering rather than empowering the latter. Focusing on school desegregation, Bell offered an account of the NAACP's legal campaign ignoring the preferences of local black communities. Additionally, Lopez highlighted the dangers of "lawyer domination" of poor people, urging public interest lawyers to "ground their work in the lives of the communities of the subordinated themselves."

The second line of critique was more concerned with the consequences of litigation strategies. It exposed on one hand the inefficacy of such strategy for achieving significant social reform, and on the other the risks it entailed for more promising social reform strategies, such as political mobilisation.

Analysing the impact of litigation strategies across several areas of practice of public interest law – environmental, consumer, civil rights and social welfare –Handler highlighted its limits vis-à-vis what he considered the most relevant factor predicting the success of litigation strategies, the "bureaucratic contingency".⁶⁶ Lack of transparency, administrative field-level discretion and technically complex decisions, in his account, prevent litigation from achieving significant tangible results, pushing reformers towards costly and time consuming activities, likely to drain their resources.

Scheingold warned against what he termed the "myth of rights" and its underlying assumption, the belief that "litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change"⁶⁷. Stressing that the relation between rights, remedies and social change is much more complex in the real world and often

⁶⁴ D. A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation* in *The Yale Law Journal*, 85, 4, 1976, p. 470.

⁶⁵ G. P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*. Westview Press, Boulder, 1992.

⁶⁶ J. F. Handler, *Social Movements*, cit. p. 18 -22.

⁶⁷ S. A. Scheingold, *The politics of rights: Lawyers, public policy, and political change*, Yale University Press, 1974, p. 5.

reflects the same dynamics of power that litigation is expected to transform, he considers that “confusion of the symbolic with the real” is likely to divert attention from the inertial forces which sustain the *status quo*” and exhaust movement resources for more effective strategies. Additionally, he observes that litigation strategies tend to reformulate social conflicts within the framework of the adversary process, fractionalizing political action and therefore “dividing rather than uniting those who seek change.”

Notwithstanding their concerns as to the limited direct effects of litigation strategies, both Handler and Scheingold provide a more optimistic assessment of litigation in discussing its potential “indirect effects”.

According to Handler, in addition to evaluating success of litigation strategies at obtaining tangible benefits, it is also necessary to evaluate their indirect effects. Litigation can be used, as part of a larger campaign, to protect members involved in direct action, increase the bargaining power of the social reform group, support fundraising and provide legitimacy to the claims of the movement.

“Regardless of the problems of implementation, observes, Scheingold, “rights can be useful political tools”. “It is possible to capitalize on the perceptions of entitlement associated with rights to initiate and to nurture political mobilisation, a dual process of activating a quiescent citizenry and organizing groups into effective political units.”

In conceptualizing “indirect effects”, they indeed paved the way to contemporary approaches.

In “Rights at work”, McCann analyses the impact of litigation campaigns on pay equality in the United States providing empirical support to Handler’s and Scheingold’s considerations.⁶⁸ The author offers a detailed picture of the litigation campaign on pay equity in the United States analysing its impact on grassroots mobilisation, its transformative legacy, as well as its use as a means for political pressure and policy

⁶⁸ M. McCann, *Rights at Work: Pay equity reform and the politics of legal mobilization*, Chicago University Press, 1994.

implementation. McCann concludes that legal practices contributed significantly to pay equity reform, especially during the first stages of the emergence of the pay equity movement. Litigation helped in mobilising potential beneficiaries and “altering their perceptions about what advances might be viable (...).”⁶⁹

New understandings of the role of law and lawyers and the limits of litigation as a strategy have developed among public interest law leaders, as well.

Increasing complexity of the problems at issue and growing conservatism, across different sites – the judiciary, the congress, the general public – have exacerbated such limits. Public interest law organizations seem to be deeply aware of this and share concerns about putting too much faith in litigation strategies to the detriment of political strategies.

Away from the “utopian vision” of the founding period, leaders of public interest appear to be “less reliant on litigation and more innovative in their use of multiple legal, political and educational approaches.”⁷⁰ They still sometimes heavily rely on litigation to mobilise the necessary support and financial resources for political mobilisation and in cases in which other strategies are not available.⁷¹

Most leaders are also well aware of the value of pursuing these initiatives in collaboration with other public interest and grassroots organizations and sometimes with government or private interest.

In particular, collaboration with grassroots is expected to provide additional resources, perspectives and legitimacy, enhancing the chances to achieve major policy change and ensure better accountability.⁷²

This shift towards more collaborative practices is connected to another shift away from the “lawyer as the heroic figure” to the lawyer viewed, according to the circumstances,

⁶⁹ *Ibid*, p. 280.

⁷⁰ D. L. Rhode, *Public Interest Law*, *cit.*, p. 2076.

⁷¹ *Ibid*, p. 2044.

⁷² *Ibid*, p. 2064 – 2067.

as a collaborator or facilitator, managing collaborations with other actors in the first case, and facilitating the participation of affected constituencies in regulatory processes in the second.⁷³

Analysing a series of campaigns undertaken by a community coalition engaged in the struggle for racial and economic justice, Gordon provides further support for these findings. She describes the role played by lawyers “as supporting players rather than main characters, seeking to help organizations build the power needed to achieve their goals”.⁷⁴

Her narrative of the relationship between lawyers and affected communities offers the opportunity to envisage an alternative model of public interest practice beyond the concerns of “lawyer domination”. In her account, lawyers provide the necessary expertise needed to translate information about the law and make it intelligible to community groups as they make decisions on their strategic choices, legal tactics included, as well as translate community needs and organizational claims into legal causes of action, use legal tactics to support and protect community organizations and pursue legal change as a route to opening up spaces for community voice.

3. Contemporary theoretical approaches

Defining Public Interest Law

The above brief history of the emergence, expansion and embattled era of the public interest law movement⁷⁵ allows illustrating the difficulties related to defining public interest law as a discrete category of practice.

One of the first and most commonly used definitions of the term, referred to public

⁷³ L. G. Trubek, *Public Interest Law: Facing the Problems of Maturity*, in *University of Arkansas Little Rock Law Review*, 33, 2011, p. 10.

⁷⁴ J. Gordon, *Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change in California Law Review*, 95, 5, 2007, p. 2133.

⁷⁵ C. A. Albiston and L. B. Nielsen, *Funding the Cause*, *cit.* p. 63.

interest law as the “representation of the underrepresented.”⁷⁶ Public interest law was expected to correct underrepresentation through two different, although connected activities: individual representation for poor people, or people otherwise not in the condition to afford a lawyer and collective representation of specific groups excluded from or underrepresented in the policy making process.

The definition has undergone the same challenges the public interest law movement has been subject to. It has been strongly contested, on the one hand in relation to the legitimacy of public interest law to represent the underrepresented, and on the other in relation to the concept of “underrepresentation” itself. Basically, conservatives have claimed that identifying who is underrepresented depends on political attitudes and context. As already mentioned, in the mid 1970s, conservative groups started to systematically use liberal public interest lawyers’ legal tactics to advance their own agendas emphatically claiming the public interest designation.

In the light of the difficulties of defining the boundaries of the category of public interest law, Austin Sarat and Stuart Scheingold proposed the alternative concept of “cause lawyering.”⁷⁷ It referred to the lawyer’s motivation rather than to their engagement in the realization of a particular vision of society.

Yet “cause lawyering” raised other concerns as to how ample the notion of “cause” should be or the opportunity of considering under the same category lawyers moved by utterly different “causes”, such as those pursuing strategies of deregulation of financial markets and those seeking stronger protection for retail consumers of financial services.

Moving away from the idea that “the public interest’ in ‘public interest law’ is simply in the eye of the beholder”, Cummings, building on the definitions of public interest

⁷⁶ Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America*, 1976.

⁷⁷ A. Sarat and S. A. Scheingold (eds.), *Cause Lawyers and Social Movements*, Stanford University Press, 2006.

law provided by Handler et al.,⁷⁸ suggests to define public interest law as a “category of practice (...) used to describe legal activities that advance the interest and causes of constituencies that are disadvantaged in the private market and political process relative to more powerful social actors.”⁷⁹

In drawing attention to the concept of “relative disadvantage” as referred to the ability of a constituency to mobilise resources (money, expertise, social capital) for advancing individual and collective group interests, he suggests that it is possible to identify the constituencies served by different organizations, in different cases, and then to assess the power differential between them as a basis for distinguishing which among competing causes might legitimately lay claim to the public interest.

On this ground, he identifies two different dimensions of public interest law. The first is related to basic market inequality (access dimension) and the second to political inequality (policy dimension).

The access dimension consists in providing with no cost and on individual basis legal services to individuals deprived of the possibility to ask legal redress because they are too poor to afford a lawyer. In this case, the justification of public interest law is procedural in nature. The access dimension is limited to achieving effective access to justice meant as equal opportunities to bring claims in court. This makes it far less controversial compared to the policy dimension as far as it does not choose some claims over others and promote a specific vision of society.

The second dimension of public interest law is aimed to address political inequality. The disadvantage in this case consists in the impossibility or limitations some social groups face in advancing their interests through political channels.

Relying on concept of relative disadvantage the definition allows to include “activities on both sides of the political spectrum that legitimately advance disadvantaged

⁷⁸ B. A. Weisbrod, J. F. Handler, and N. K. Komesar. *Public Interest Law: An Economic and Institutional Analysis*, University of California Press, 1978.

⁷⁹ S. L. Cummings, *The Pursuit of Legal Rights - And Beyond*, in *University of California Law Review*, 59, 2012, p. 523.

interests, but excludes those on behalf of the existing structures of power” and “it does not in the end suggest that all claims asserted by less powerful groups necessarily advance a normative conception of the public interest to which all segments of society should subscribe.”⁸⁰

Yet most scholars have moved away from the attempt to define public interest law adopting a more pragmatic approach. Rather than focusing on the normative justification of the practice, contemporary research tends to focus primarily on how law and litigation strategies matter for actors interested in social reform.

Law as politics

Contemporary approaches consider legal tactics as one of the many tactics available to social movements⁸¹ and share a basic premise: law has limits and its relevance for social change deeply depends on context, accounting for both legal and extra legal factors.⁸²

Borrowing McCann’s words, “how it (the law) matters depends on the complex, often changing dynamics of the context in which struggles occur. Legal relations, institutions, and norms tend to be double-edged, at once upholding the larger infrastructure of the *status quo* while providing limited opportunities for episodic challenges and transformations in that ruling order.”

Building on social movement scholarship theorizing about collective action based on “political process models”, the approach named “legal mobilisation” provides a framework for investigating how law matters for social movements during the different stages of development of movement activity and for examining the contextual factors (be this legal or extra legal) that encourage the use of legal tactics and determine their effectiveness.

⁸⁰ *Ibid*, p. 525.

⁸¹ P. Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity* in *American Journal of Sociology*, 96, 5, 1991, p. 1201.

⁸² M. McCann, *Law and Social Movements: Contemporary Perspectives*, in *Annual Review of Law and Social Science*, 2,1, 2006, p. 17.

Before going into further detail, it is important to clarify what the concept of “legal mobilisation” stands for and how this approach conceptualizes law.

In relation to the first, scholars adopting the legal mobilisation approach commonly refer to the definition of legal mobilisation provided by Zemans.⁸³ Highlighting the importance of citizens’ mobilisation of law as a form of political participation, he considers that “law is (...) mobilized when a desire or want is translated into a demand as an assertion of one’s rights.” The definition is deliberately very broad encompassing a wide range of activities through which individuals or collective actors use law as a means to advance their claims towards other individuals or society.⁸⁴

As to the second, moving away from a narrow conceptualization of law in strictly positive terms, the legal mobilisation approach relies on a much more sophisticated understanding of law. Whereas not excluding instrumental considerations about the direct, tangible effects of litigation, courts and lawyers, this approach focuses also on law’s power as a “constitutive convention of social life”⁸⁵. Law’s constitutive power works in a twofold way: legal knowledge contributes to moulding the identities and the behaviour of individuals in society structuring their very understanding, expectation and interaction with others and represents a resource that can be used to structure relations with others, to formulate rightful claims and to negotiate disputes. Law can thus matter as both end of and means of action for social struggle.

The legal mobilisation approach acknowledges that law reflects the distribution of power in society supporting the *status quo*, and that there are constraints as to what is accepted as a legally sound or persuasive interpretation of law, and that some actors, like for example governing authorities, enjoy considerable advantages in the contest over its meaning. This does not however exclude that at times those interested in

⁸³ F. K. Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, in *American Political Science Review*, 77, 3, 1983, p. 690.

⁸⁴ Likewise Epp defines legal mobilisation as “the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights”. C. R. Epp, *The rights revolution cit*, p. 18.

⁸⁵ M. McCann, *Law and Social Movements, cit*. p. 21.

challenging the *status quo* might be able to promote alternative interpretations of the law generating a complementary “constitutive” process, in which actors effect to some degree the understanding of the law. Such process can take place in the courtrooms, as well as outside, with reciprocal influences. Sometimes law’s impact is even more powerful outside of the courtrooms: litigation used as a threat might shape interaction and influence bargaining far more than actual direct intervention of a judge.⁸⁶

This considered, as regards the relationship between law and social movements contemporary research shows that probably the most significant contribution of law for social movements is during early stages of movement building. According to McCann⁸⁷ law’s impact during this stage can be twofold.

Firstly, it can contribute to the so-called agenda setting, by which movement actors draw on legal discourses to name and challenge existing social wrongs or injustices. Legal norms or litigation can become important elements in the process of explaining how existing relationships are unjust, in defining movement group goals and constructing a common identity among diversely situated citizens.

Secondly, law and especially impact litigation can contribute to create a sense of vulnerability among both states and non-states authorities (exposing systemic vulnerability) and impart salience and legitimacy to the social movement claims.

Apart from strongly influencing movement building, law and litigation are viewed as a source of institutional and symbolic leverage against opponents along two different stages of movement activity, for obtaining responsive actions to policy demands and ensuring implementation and enforcement.

As to identifying the contextual factors that encourage the adoption of legal strategies and determine their effectiveness, scholars tend to focus on three main approaches: political opportunity structure (POS), legal opportunity structures (LOS), and resource mobilisation (RM).

⁸⁶ *Ibid*, p. 22.

⁸⁷ *Ibid*, p. 25-29.

“Political opportunity structure” refers broadly to the “institutional and sociocultural factors that shape social movement options - by making some strategies more appealing than others.”⁸⁸ According to Tarrow, the concept includes “consistent - but not necessarily formal or permanent - dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure.”⁸⁹ There is broad consensus as to the inclusion in POS of access to institutional structure, presence of allies, and configuration of power, that is to say the existence of conflicts among power elites on a given issue.

Early studies on legal mobilisation have relied on the concept of POS to explain the choice of some groups to engage in litigation. Researchers focused specifically on the NAACP legal strategy have argued that “politically disadvantaged groups” are more likely to turn to the courts lacking the strength and means to push their agendas through political pressure. However subsequent research has provided examples where the contrary, that is to say political strength, is found to provide a persuasive explanation of legal mobilisation.⁹⁰

Critics of the adoption of POS approach for explaining legal mobilisation have identified as one of its major limits the failure to treat law as a separate variable.⁹¹ In accordance with such critique, Pedriana has revisited the concept of “political opportunity structure” to define specific attributes of a legal opportunity structure, arguing that legal rules and institutions, although generally not theorized in the political process literature, are themselves a type of political opportunity structure that enables or constrains social movements.⁹²

⁸⁸ E. A. Andersen, *Out of the closets and into the courts: Legal opportunity structure and gay rights litigation*, University of Michigan Press, 2005, p. 6.

⁸⁹ S. Tarrow, *Power in movement: Social movements, collective action and politics*, Cambridge University Press, 1994, p. 85.

⁹⁰ L. Epstein, *Conservatives in court*, University of Tennessee Press, 1985.

⁹¹ C. Hilson, *New social movements: the role of legal opportunity*, in *Journal of European Public Policy*, 9, 2, 2002, p. 238.

⁹² N. Pedriana, *Help wanted NOW: Legal resources, the women's movement, and the battle over sex-segregated job advertisements*, in *Social Problems* 51, 2, 2002, p. 182.

The relevance of law and institutions in this regard has attracted growing attention among scholars leading to the development of a second approach to studying legal mobilisation, specifically focusing the legal (elements) of the opportunity structure such as rules concerning legal standing and access to resources and legal resources, including legal rights and favourable legal doctrine.

According to the LOS approach such elements are likely to encourage or constrain litigation strategies and affect the success of actors in court.

The third abovementioned approach shifts the focus away from the structuring environment to the characteristics of actors. Scholars adopting this approach highlight the importance of resources claiming that well-resourced groups are more likely to “come out ahead.” The term “resources” commonly includes financial resources to sustain litigation and legal expertise. Such approach relies on Galanter’s 1974 seminal piece on the potential and limits of the American legal system as a means for social change. The author argues that “haves”, which engage in similar litigation over time, enjoy a number of advantages in the legal system. Besides developing legal expertise and having lower costs for starting a new case, “haves” are in the position to afford high risk when key favourable rule development is at stake, skewing as a consequence rule development in their favour.⁹³

Epp further acknowledges the importance of resources in his analysis of the “rights revolution” in the United States. He shows that conventional explanations, focusing on constitutions, courts, culture and rights consciousness provide in this regard an incomplete explanation. As he puts it “cases do not arrive in (supreme) courts as if by magic.” Effective enforcement of rights, he argues, becomes possible only when a “support structure” including “rights advocacy organizations, rights advocacy lawyers, and sources of financing”⁹⁴ has developed.

⁹³ M. Galanter, *Why the "haves" come out ahead: Speculations on the limits of legal change*, in *Law and Society review*, 1974, p. 95.

⁹⁴ C. R. Epp, *The rights revolution*, *cit.* p. 3.

Resources however do not represent the only characteristic of actors playing a role in strategy choice. Vanhala proposes in this regard a fourth approach specifically looking at movement characteristics and key to explaining why groups that we would expect to adopt legal strategies don't and others operating in environments hostile to legal strategies keep relying on them regardless of the obstacles and related costs⁹⁵.

Her approach focuses specifically on framing processes and collective identity.

Defining a meaning frame as a interpretative scheme "that enables individuals to locate, perceive, identify and label aspects of an event in ways that make them meaningful", she analyses the process through which collective frames are generated and their influence in shaping strategy choices. Frames guide perceptions and expectations of individuals or groups, defining therefore the perimeter of what is considered as an appropriate collective action and what is not.

At the bottom of this approach lies the idea that the process of negotiation of collective frames might "dictate courses of actions that are considered more appropriate than others". This implies, as Vahnala exemplifies, that organizations defining their membership as rights holders and the courts as an appropriate venue within which to pursue social movement agendas will be more likely to pursue legal strategies than organizations not considering their constituencies in the same terms and having strong preferences for non institutional strategies.

The above mentioned four approaches, although presented as distinct do not exclude each other. In fact most studies combine usually more than one approach.

Hilson provides an explanation of the strategy choices of the environmental, lesbian and gay movement in the UK through a stimulating analysis of the interaction between POS and LOS⁹⁶.

⁹⁵ L. Vanhala, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization*, Cambridge University Press, 2011.

⁹⁶ C. Hilson, *New social movements*, *cit.*

McCann analysis of the contextual factors that supported or undermined legal rights advocacy for pay equity relies on a model taking into account the changing opportunities for litigation and the organizational resources movement activists were able to mobilise⁹⁷.

Epp for example considers courts and rights (defining although not explicitly a sort of legal opportunity structure) to provide only incomplete explanations, therefore arguing in this regard on the influence of the support structure.⁹⁸

Scholars adopting LOS approaches show how the LOS does not always represent the independent variable, adopting a more balanced view of the relevance of the legal opportunity structures and explicitly acknowledging the reciprocal influence between the structuring environment and actor agency.⁹⁹ In other words, this means that the existence of a favourable LOS will not automatically translate in legal action, on the one hand, and that actors might actively engage in litigation in view to changing an adverse LOS in view to expanding opportunities for action.

Highlighting the mutually constitutive relation between legal and cultural frames Andersen concludes action will depend on “frame alignment”, that is to say the process “where the speaker’s discussion of a subject leads the receiver of the discussion to alter the criteria on which she judges the subject”.¹⁰⁰

A favourable legal opportunity structure might therefore change the way social actors look at themselves while the way social actors perceive themselves might provide the incentives to change the law.

⁹⁷ M. McCann, *Rights at Work*, cit.

⁹⁸ C. R. Epp, *The rights revolution*, cit. p. 11-14.

⁹⁹ E. A. Andersen, *Out of the closets* cit. p. 56; L. Vanhala, *Legal Opportunity Structures*, cit. p. 525.

¹⁰⁰ E. A. Andersen, *Out of the closets*, cit. p. 8.

4. Legal mobilisation in Europe

Whereas until recently most studies of legal mobilisation were focused on the US and comparative studies were indeed exceptional,¹⁰¹ legal mobilisation is attracting increasing interest among European scholars, now actively engaged in the dialogue on legal mobilisation, providing empirical evidence of legal mobilisation in European and national contexts and contributing to theory development, as well¹⁰².

But before turning to these growing body of research, it is useful to investigate the underlying idea of American exceptionalism lying behind the initial focus on the US.

According to Kagan, whose work is considered foundational in this regard, the exceptional nature of the “American way of law” relies on the prevalence in the United States, compared to other Western Europe democracies, of a distinctive “method of policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation”, which he calls “adversarial legalism”.¹⁰³

“Adversarial legalism”, in the lights of its findings, manifests itself in “(1) more complex bodies of legal rules; (2) more formal, adversarial procedures for resolving political and scientific disputes; (3) more costly forms of legal contestation; (4) stronger, more punitive legal sanctions; (5) more frequent judicial review of and intervention into administrative decisions and processes; (6) more political controversy about legal rules and institutions; (7) more politically fragmented, less closely coordinated decision-making systems; and (8) more legal uncertainty and instability.”¹⁰⁴

While recognizing the negative effects of “adversarial legalism”, its inefficiencies, high costs and unpredictability, Kagan highlights its virtues, in particular its openness

¹⁰¹ C. R. Epp, *The rights revolution, cit.*; C. Harlow and R. Rawlings, *Pressure through law*, Routledge, 1992.

¹⁰² L. Vanhala, *Legal Mobilization*, Oxford University Press, 2012.

¹⁰³ R. Kagan, *Adversarial Legalism*, Harvard University Press, 2003, p. 3.

¹⁰⁴ *Ibid*, p. 7.

towards new kind of justice claims, its ability to empower citizens and make powerful institutions or corporations accountable.

Investigating the roots of “adversarial legalism”, he points to the American legal culture and its specific view of the law as “the malleable (and fallible) output of an on going political battle to make the law responsive to particular interests and values.” Ultimately adversarial legalism has been shaped by a fundamental tension in American broader political culture between demands for justice and protection from the government and mistrust towards concentration of power translating in fragmented governmental structure and accountability mechanisms through judicial review.

More specifically, he finds that the collision between claims for major social transformations growing out of the strong political movements of the 1960s – civil rights, feminist, environmentalist, anti-poverty - with the limited powers of the federal government vis-à-vis state and local governments intensified reliance on adversarial legalism. Since most of the areas of policy interested by these claims were under the competences of state and local governments, the constitutional limits of federalism prevented the federal government from providing adequate responses and provided strong incentives to bypass such limits through litigation. Social justice claims were therefore formulated in terms of constitutional grounded legal rights, and social policies were articulated and implemented under court supervision.

Fragmented governmental power has been indeed acknowledged by scholars contesting the exceptional nature of the US legal system, as the main factor contributing to the spreading in the European Union of a distinct variant of “adversarial legalism”. Daniel Kelemen calls this variant “eurolegalism” and links its emergence to the process of European integration.¹⁰⁵

He claims that vertical (EU – Member States) and horizontal (EU institutions) fragmentation of power in the European Union has encouraged in some policy areas the adoption of detailed legislation whose implementation is supported through

¹⁰⁵ D. Kelemen, *Eurolegalism*, Harvard University Press, 2011.

transparency requirements and judicial enforcement. Furthermore, EU extremely limited implementation and enforcement capacity has generated, in his account, strong incentives towards the framing of policy objectives in terms of individual rights that Member States are obliged to respect, empowering private parties to serve as the enforcers of EU law.

Such incentives operate in conjunction with other factors. In the case of competition policy, Kelemen finds the process of deregulation and reregulation linked to the creation of the common market has undermined traditionally cooperative, informal and less judicialised regulatory approaches to regulation in favour of more formal and transparent approaches with increased room for enforcement by private parties.

In other policy areas, such as disability rights, he notes the need to provide legitimacy to European institutions in the eyes of EU citizens has mattered as well.

The growing catalogue of EU rights and spread of policies supporting effective access to justice are both considered to reflect and likely to provide fertile ground for the spread of Eurolegalism.

He concludes that although Eurolegalism shares the same defining characteristics as US adversarial legalism, we can hardly expect it to resemble the American model. Existing national institutions and legal culture are likely to have a moderating influence, constraining this variant of adversarial legalism compared to its US counterpart.

European scholars have entered the frame providing detailed accounts of the emergence of legal mobilisation in the EU and its impact on the process of European integration, EU policies, political mobilisation and democratic participation of EU citizens, as well as offering sophisticated analysis of the interaction between the opportunities for litigation created at the EU level and domestic opportunities, identifying therefore the conditions under which national actors are more likely to engage in litigation strategies.

Focusing on gender equality and environmental protection, Cichowski provides a particularly insightful analysis of the dynamic relation between litigation, mobilisation and governance in the EU. Relying on preliminary references to the ECJ, she documents how individuals and groups have exploited the opportunities for litigation provided by the EU law and the ECJ to highlight the impact of litigation in shaping EU governance, creating new opportunities for future social action and enhancing opportunities for public participation in the EU.¹⁰⁶ She also contributes to a better understanding of cross-national national variations in the use of litigation stressing the impact of legal resources - governmental agency legal support, legal expertise and legal standing rules - on preliminary reference rates.

Investigating the impact of EU law on gender equality policies in the UK, Alter and Vargas show how EU regulation has contributed to shift the balance of power in favour of actors fighting for gender equality, such as the British Equal Opportunities Commission, enhancing their capacity to target through litigation national legislation in contrast with the EU Directives on gender equality. The success of a EU litigation strategy depends, on their account, on the existence of EU law with direct effect, mobilisation of domestic groups, judicial support and sustained implementation of favourable decisions.¹⁰⁷

Looking at the process of enforcement of EU environmental law in domestic courts, Borzel¹⁰⁸ provides a less optimistic prospective on the effects of opportunities for litigation created by EU legislation. Her research highlights that, despite expectations, whether such opportunities will lead to greater participation of citizens through law enforcement and rights claiming will ultimately depend on domestic opportunity structures and specifically on the degree of access to national courts and the amount of

¹⁰⁶ R. A. Cichowski, *The European Court and Civil Society Litigation, Mobilization and Governance*, Cambridge University Press, 2007

¹⁰⁷ K. J. Karen and J. Vargas, *Explaining Variation in the Use of European Litigation Strategies European Community Law and British Gender Equality Policy. Comparative Political Studies*, 33, 4, 2000, p. 452.

¹⁰⁸ T. A. Börzel, *Participation Through Law Enforcement: The Case of the European Union. Comparative Political Studies* 39, 1, 2006, p. 128.

resources available to support legal action. Comparing the processes of enforcement of EU environmental law in Germany and Spain she notes: the EU enforcement system is most likely to empower actors actively engaged in domestic and EU politics, in other words “the already powerful”.¹⁰⁹

In addition, scholars have studied increasing levels of legal mobilisation around the European Convention on Human Rights (ECHR) highlighting the relevance of the ECHR as an arena for public participation of EU citizens¹¹⁰, its impact on the development of social rights in the EU¹¹¹ and national policies.¹¹²

Lastly, legal mobilisation in the European multilevel system has been the focus of a recently published book exploring the dynamics of legal mobilisation at the national as well as European level, identifying the European Court of Justice and European Court of Human rights as the main arenas in this regard.¹¹³

“Over the past few decades”, can be read in the first lines of the introduction, “Europe has witnessed the emergence of a notable and far-reaching “rights revolution”. (...) (Law and Rights) have become increasingly relevant and salient for the demands advanced by different social groups, but also the political strategies they craft. Individuals from and at times on behalf of various social marginalised groups invoke legal norms in front of courts - domestic, European and international – or quasi judicial

¹⁰⁹ For a comparative analysis the enforcement of environmental law in France, Germany and the Netherlands, see S. Reinhard, *The Judicial Enforcement of EU Law through National Courts: Possibilities and Limits*, in *Journal of European Public Policy*, 16, 3, 2009, p. 378

¹¹⁰ R. A. Cichowski, *Courts, Rights, and Democratic Participation*, in *Comparative Political Studies*, 39, 1, 2006, p. 50.

¹¹¹ L. Conant, *Individuals, Courts, and the Development of European Social Rights*, in *Comparative Political Studies*, 39, 1, 2006, p. 76.

¹¹² D. Anagnostou, and E. Psychogiopoulou (eds.), *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context*, Martinus Nijhoff Publishers, 2010.

¹¹³ D. Anagnostou (ed.), *Pursuit of Social Change, Legal Mobilisation in the Multi-Level European System*, Hart Publishing, 2014

bodies to assert their rights and claim protection vis-à-vis state action or private parties.”

The book explores the extent and the ways in which legal rights have been mobilised in national and European courts by less privileged social actors, placing litigation strategies within the broader context of social and political struggles they are incorporated in. It does so considering the multi-level structure of protection of rights in Europe including the national constitutional level, the EU law, the Charter of Fundamental Rights and the European Convention on Human Rights.

The book moves from the idea that interaction between the different levels of protection will ultimately shape litigation both at the national and at supranational and international levels: in assessing the conditions under which citizens in Europe are more likely to pursue their interest and seek to influence policy making through the courts, it specifically invites to consider the mitigating effect of domestic opportunity structures, both political and legal, and the differences between the different national systems as to available resources and support structures for litigation.

Acknowledging the existence of a gap in social science and legal scholarship in this regard, the book investigates whether, why and with what consequences individual or collective actors “turn to courts”.

Although the European Court of Justice and the European Court of Human Rights have recently attracted scholarly attention on legal mobilisation, it is important to acknowledge that practices of using law as a tool for social reform long pre-existed such developments.

Contrary to studies focusing on the impact of EU law and EU institutions on the emergence of legal mobilisation in Europe, Israël analyses the case of legal mobilisation for migrant’s rights in France, arguing it represents the result of the processes of interaction between lawyers and social movements during the late 1960s

and 1970s and the practices of “cause lawyering” that were generated at the time.¹¹⁴

As far as Italy is concerned, there are at least two major reasons suggesting that the idea of law as a means for social reform has its roots in the claims for social justice growing out of the political movements of the 1960s.

The first one is related to the so-called experience of the “alternative use of law”. It refers to a two days conference aiming to encourage a view of the legal system as an arena for social struggle, deliberately rejecting formalist conceptions of the law as a compact and consistent set of rules in favour of an instrumentalist conception of the latter as a structure potentially able, if properly used, to safeguard the interest of dominated classes and contribute to the renewal of the social structure.¹¹⁵

The second is an empirical study coordinated by Treu focusing on the enforcement of the “Workers’ Statute”¹¹⁶, the role of trade unions, judges and lawyers and the impact of the Statute in institutionalizing the Italian industrial relations system.

The first part of the research focuses on trade unions and aims to explore their role in the process of enforcement of the Statute, on the one hand in organizing/supporting the claims of individual workers and on the other in influencing from a qualitative point of view the aggregate product of such claims and the way they were framed.

Acknowledging the political connotations of both activities, the research provides an empirically grounded analysis of the extent to which trade unions have exploited the legal opportunities provided by the Statute to pursue broader political objectives.

Additionally, it shows how the “political use of the Statute” is mediated by the organizational identity and the characteristics of the context in which such trade unions operate. The findings are particularly interesting as far as they show that the use of the

¹¹⁴ L. Israël, *Rights on the Left? Social Movements, Law and Lawyers after 1968 in France*, in *Rights and Courts* in D. Anagnostou, (ed.) *Pursuit of Social Change, Legal Mobilisation in the Multi-Level European System*, Hart Publishing, 2014, p. 79.

¹¹⁵ P. Barcellona (ed.), *L'uso alternativo del diritto*, Laterza, 1973.

¹¹⁶ T. Treu (ed.), *Sindacato e magistratura nei conflitti di lavoro: L'uso politico dello Statuto dei lavoratori*, Il Mulino, 1975.

Statute is more aggressive in those areas where trade unions are organizationally weaker and therefore risks related to demanding the collective conflict to a third party are lower.

Finally the research highlights the general approach of trade unions towards the law and courts. Legal strategies are used to support political action rather than in substitution of the latter. In doing so, it stands as a precursor of the contemporary scholarly approaches placing legal mobilisation within the broader political context and investigating the role social actors and their strategy choices.

Chapter II

SHIFTING OPPORTUNITIES

1. Legal opportunity structure (LOS).

The previous chapter provided a general overview of the different approaches to explaining the emergence and success of legal mobilisation in contemporary literature. The present paragraph will instead focus specifically on the “legal opportunity structure” (LOS) approach. It will briefly review the literature on the concept and define the dimensions of the legal opportunity structure that will be included in the following analysis.

As previously underlined, the concepts of “political opportunity structure” (POS) and “legal opportunity structure” (LOS) are strongly connected; the latter concept indeed has developed in the wake of the former. Whereas both have been used to highlight under what conditions legal mobilisation is more likely to emerge and to be successful, LOS approaches specifically focus on law and legal institutions as relevant variables. In doing so, the LOS approach allows to define the degree of “openness or accessibility of the legal system to the social and political goals and tactics of individuals and/or collective actors”.¹¹⁷

The concept of LOS has been extensively used to study legal mobilisation in different areas of social struggle, although with some differences as to the elements the concept should include. Whereas there is broad consensus as to the inclusion of rules concerning legal standing, available resources and rights and favourable legal doctrine,

¹¹⁷ L. Vanhala, *Legal Opportunity Structures*, *cit.*, p. 527.

more recent work has considered as part of the structure also elements such as élite alignment, cultural frames and presence of allies.

Pedriana was the first to explore the “legal dimensions of the political opportunity structure,” arguing that legal rules and legal institutions just like their political counterparts enable and constrain social movements.¹¹⁸

His analysis of the initial legal battles of women’s movement over sex specific jobs advertisements shows that the narrow interpretation of the Equal Employment Opportunity Commission (EEOC) of Title VII of the Civil Rights Act prohibiting sex discrimination (Title VII was interpreted as allowing sex specific job advertisement) “challenged, angered, and eventually inspired women’s groups in ways that sent the women’s movement in aggressive new directions”.¹¹⁹

In his account the creation of the National organization of Women (NOW) - the most important feminist organization in the US – relied in part on the opportunities created by the inclusion of the prohibition of discrimination on grounds of sex and the expectations it created among women’s advocates. The narrow interpretation of the EEOC ultimately allowing segregated job advertisement created the conditions for the NOW to change the course of the movement, breaking free from governmental ties and adopting litigation as a strategy to pressure the EEOC to take sex as seriously as “race” and enforce the prohibition of discrimination on grounds of sex with the same strength they reserved to “race”. In doing so, the movement contributed to expanding the legal opportunities that influenced its very emergence and created the conditions to extend its fight for equal treatment beyond sex specific advertisement.

For the purposes of explaining the strategy choices of the environmental, lesbian and gay, animal welfare and women’s movements in the UK, Hilson was among the first to refer to a distinct concept he terms “legal opportunity”, that encompasses relatively stable or structural features concerning access to justice, such as laws on legal standing

¹¹⁸ N. Pedriana, *Help wanted NOW*, cit. p.183.

¹¹⁹ *Ibidem*, p. 187.

and the availability of state funding and more contingent features such as judicial receptivity.¹²⁰

His analysis provides a very insightful account of the interplay between political and legal opportunities and their influence on social movements' strategy choices, relating the adoption of a litigation strategy to a poor POS and the emergence of protest activity to poor LOS and POS.

In the case of women's movement, for example, he maintains one of the key reasons for the women's movement adopting a national court litigation strategy was the lack of PO at both national and EC levels. In comparison, EC-based national LO was much more favourable. Relying on such opportunities and the propensity of industrial tribunals to make references to the European Court of Justice, the British Equal Opportunity Commission (EOC) successfully used litigation to overcome national policies not consistent with EU law as interpreted by the Court of Justice¹²¹.

By contrast, in the case of the lesbian and gay movement, poor political opportunities at national level and poor legal opportunities following the closure of the ECJ towards the extension of the prohibition of discrimination in the workplace to homosexuals influenced, the emergence of protest activity.¹²²

Wilson and Cordero provide another example that illustrates how the LOS matters for social reform.¹²³ They focus on the impact of reform of the Costa Rican Constitutional Court providing free and general access to the Court. Analysing litigation efforts on lesbian and gay rights, AIDS patient's rights and labour rights, they conclude that the broadened access to the Court and substantial reduction of costs "enabled marginalized

¹²⁰ C. Hilson, *New social movements, cit.* p. 243

¹²¹ C. Barnard, *A European litigation strategy: the case of the Equal Opportunities Commission*, in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union*, Clarendon Press, 1995, p. 254.

¹²² Judgment of 17 February 1998, *Grant C-249/96*, EU:C:1998:63.

¹²³ B. M. Wilson and J. C. Rodríguez Cordero, *Legal Opportunity Structures and Social Movements The Effects of Institutional Change on Costa Rican Politics*, in *Comparative Political Studies* 39, 3, 2006, p. 325.

groups to push for their rights and effectively circumvent the traditional policy-making process”.

Case and Givens use the concept of LOS in their analysis of the policy-making process and potential impact of the adoption of the Race Equality Directive (RED) at the European level. To this end, they specifically consider available legal resources, rules on access to courts, and access to legal advocacy. Classifying legal opportunity structures in a liberal-conservative continuum, where liberal structures facilitate litigation strategies and conservative structures by contrast impede them, they argue that RED significantly liberalises opportunities for litigation, both at the European and national level and highlight the influence of civil society in the process of adoption of the rules implying such liberalisation.¹²⁴

Andersen’s study of legal mobilisation for gay rights in the United States represents the most systematic application of the concept of LOS to investigate the relevance of law for social struggle. Andersen’s book “Out of the closet and into the courts: Legal opportunity structure and gay rights litigation” relies on the LOS approach to explain the varying ability of Lambda and other US social movement organizations to successfully use the law for advancing the interests of the LGBT community.¹²⁵

Her analysis considers four different dimensions of the legal opportunity structure: access to courts; presence of allies; cultural and legal frames and elite alignment.

Firstly, she emphasizes the importance of the “access” dimension. Building on the parallelism with its counterpart in POS she stresses, “as much as access to political institutions shapes the emergence, progress, and outcomes of collective action, access to courts shapes the emergence, progress, and outcomes of legal action”.

In relation to the “presence of allies and/or opponents” Andersen argues that allies matter as far as they can support devising legal strategies or intervene in court through

¹²⁴ E. Case and T. Givens, *Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive* in *Journal of Common Market Studies*, 48, 2, 2010, p. 221.

¹²⁵ E. A. Andersen, *Out of the closets*, *cit.* p. 17-27

amicus curiae briefs whereas the presence of opponents can undermine legal strategy through the same means.

As to legal resources, she considers their relevance in terms of shaping the kind of claims that can be made, the persuasiveness of those claims and the facts that are to be considered relevant. She further adds that legal frames cannot be considered in isolation from cultural frames and highlights their mutually constitutive relationship: “cultural symbols and discourses shape legal understandings just as legal discourses and symbols shape cultural understandings.”

Finally, “*élite alignment*” matters in her account since the alignment of judges on a specific claim, whether they uniformly reject or accept the claim or whether they are divided among themselves, impacts the decision to engage in litigation: legal claims that are uniformly rejected exit the litigation process; claims that are uniformly accepted also exit the litigation process, because they get settled out of court; where judges are divided further litigation of the claim is stimulated.

Whereas the relevance of “access to court” and “legal resources” appears undisputable, the other dimensions of LOS have raised some criticism.

On the one hand, as far as “presence of allies and/or opponents” is concerned, it has been observed that although in the case of the gay rights movement in the US, the configuration of allies was relatively established, other movements might face configurations of allies and adversaries that are much more contingent on the specific issue at stake¹²⁶. The consideration of cultural frames as an element of the LOS, on the other hand, as Vanhala puts it, bears the risk “of scholars picking and choosing which elements of culture make their case in explaining any particular social movement’s emergence and choice of strategy and incorporating that under the rubric of structure.”¹²⁷

Ultimately, with regard to “*élite alignment*”, whereas it is undisputable that the way

¹²⁶ L. Vanhala, *Making Rights a Reality*, *cit.* p. 18.

¹²⁷ *Ibid.* p. 20.

courts are oriented on a specific claim defines the chances of winning in court, the consideration of such chances is not the only aspect that matters in a conflict over the interpretation of a specific regulation. Parties might consider going to court more convenient in terms of financial costs or count on the length of the legal proceedings in terms of delaying the implementation of an obligation. To illustrate such critique it appears sufficient to consider the case of an employer litigating over the discriminatory exclusion of some employees from a certain welfare benefit. Although judges could be aligned in considering the provision discriminatory, it might be much more convenient for the employer to go to court rather than to settle the dispute. Accepting a settlement could be likely to encourage other employees to advance the same claim making the overall operation more expensive, whereas the burden of covering the costs of legal proceedings might play the other way around. Therefore it would be more appropriate to limit the consideration of “élite alignment” in terms of favourable or non-favourable judicial interpretation of the relevant regulation defining the chances of winning in court, and as such a legal resource, rather than as an element impacting the decision to engage in litigation.

Building on these considerations, the following research will take into account three different dimensions of the LOS: legal resources, access to courts and resources available for litigation. In assessing their relevance, it will rely in particular on Evans and Case classification of legal opportunity structures in a liberal-conservative continuum.¹²⁸

Firstly, as to the “access to courts” dimension, the research will focus on rules on legal standing. The openness of the legal systems to legal actors other than individuals, such as civil society organizations enhances the chances of effective and strategic enforcement of the prohibition of discrimination. Depending on how legal standing is regulated, civil society organizations might be able to participate in the proceedings in support of the victim of discrimination or in their own name. Whereas in the first case

¹²⁸ E. Case and T. Givens, *Re-Engineering Legal*, cit., p. 223.

the organization might be still compelled by the fact that victims of discriminations are often reluctant to go to court due to the high emotional and material costs legal proceedings are associated with or constrained by considerations related to achieving the best possible outcome for the individual concerned and by his or her decisions in this regard, in the second case we can reasonably expect social movement organizations to be less constrained in planning and pursuing legal strategies on their own.

As far as “legal resources” are concerned, antidiscrimination law provisions, judicial interpretation of the prohibition of discrimination will be taken into account. The LOS will be considered more liberal (therefore providing better incentives for the adoption of legal strategies) to the extent that it includes an enforceable right not to be discriminated, includes a definition of discrimination that is characterized by an objective approach to discrimination and therefore does not require proof of intent rather focuses on the effects, addresses through the prohibition of indirect discrimination also cases in which the criterion, provision, or practice being challenged, although neutral in nature, determines a particular disadvantage for protected groups, and includes rules allowing a shift of the burden of proof once the complainant has established a *prima facie case*.

Finally, in relation to “rules on available resources”, the research will focus in particular on two elements. As the US research on public interest litigation shows, funding is crucial. Victims of discrimination typically lack the resources to access legal expertise and sustain the cost of litigation and organizations pursuing equality on behalf of the latter are very much likely to struggle for funding, therefore rules concerning court fees and attorney fees are expected to have a particularly strong impact on legal mobilisation. The existence of other public forms of support to legal claims, such as the possibility to access legal aid or the existence of public bodies providing financial support or other forms of support for individuals or other legal actors interested in enforcing the prohibition of discrimination might be important as well.

Having defined the different dimension of the legal opportunity structure, the following two preliminary premises are necessary.

First, the analysis will take into consideration the multilevel nature of protection against discrimination involving national, EU and international law. It will offer an overview of the interaction of the different levels of protection in shaping opportunities for litigation from a domestic perspective. Although there is a growing body of research on legal mobilisation in the EU, most of this research has its focus on the EU level and in particular on the preliminary ruling mechanism and the interaction between national judges and the European Court of Justice. There are indeed only a few studies of legal mobilisation around EU law adopting a domestic point of view.¹²⁹

Second, the research will take into account the reciprocal influence between the structuring environment and legal actors and highlight how legal actors instead of responding passively to legal opportunities actively engage in changing the structure and creating their own opportunities. As Andersen notes the LOS shape strategy choices and are shaped by these choices in turn.¹³⁰

Actors interested in litigation can act both outside and within the LOS. They can lobby government or elected representatives, in the first case, or promote through the courts an understanding of the law such as to make the LOS more open to their strategies, in the second case.

¹²⁹ See L. Conant, *Individuals, courts, cit.*; R. D. Kelemen, *Eurolegalism. cit.*; T. A. Börzel, *Participation Through, cit.*; R. Slepcevic, *The judicial enforcement of EU law through national courts: possibilities and limits*, in *Journal of European Public Policy* 16, 3, 2009, p. 378; C. Kilpatrick, *Gender Equality: A Fundamental Dialogue*, in S. Sciarra (ed.), *Labour Law in the Courts. National Judges and the European Court of Justice*, Hart Publishing, 2001, p. 31; T. Tesoka, *Judicial Politics in the European Union: Its Impact on National Opportunity Structures for Gender Equality*, MPIfG Discussion Paper, 1999.

¹³⁰ E. A. Andersen, *Out of the Closet, cit.* p. 9.

2. The International and Constitutional framework.

The international framework

Following the classic mechanism of international law, international conventions oblige Parties to act in conformity with their provisions and respect the rights and freedoms they establish and subject them to the authority of the organism to which the interpretation and enforcement of the Convention is demanded. The European Convention on Human Rights (ECHR) for example obliges the members of the Convention to respect the fundamental rights guaranteed by the latter and subjects them to the jurisdiction of the European Court of Human Rights (ECtHR).

Looking at international conventions from a domestic point of view, there is also a second mechanism through which the ECHR explicates its effects. Art. 117(1) of the Constitution requires the legislature to abide by EU law obligations and international conventions. This has implied, at least with reference to the ECHR, two main consequences. Firstly, the ECHR provisions as interpreted by the ECtHR represent parameters for constitutional review, meaning that a national provision can be declared constitutionally unlawful for violating the provisions of the Convention¹³¹. Secondly, the same provisions represent criteria for interpreting national law, meaning that between different interpretations of the law, the interpretation better conforming to the Convention should be preferred¹³².

Art. 14 ECHR establishes that the rights and freedoms of the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other *status*.

The ECHR equality and non-discrimination clause does not provide a freestanding right to be protected from discrimination. As known it applies only to cases that

¹³¹ See in this regard Constitutional Court n. 187/2010.

¹³² Constitutional Court n. 348/2007 and 349/2007.

involve the enjoyment of the rights and freedoms guaranteed by the Convention.

In order to ensure protection from discrimination beyond the enjoyment of rights and freedoms guaranteed by the Convention, the Council of Europe adopted Prot. 12, which was open for signature in 2000. Regrettably only 19 out of 47 Members of the Council of Europe have ratified the Protocol¹³³. Italy, although among the first signatories, has not ratified the Protocol to the present day.

This considered, art. 14 covers discrimination based on an extensive number of grounds. Moreover as the use of terms “any ground such as” and “or other *status*” leads to conclude the list of grounds is not exhaustive¹³⁴.

According to the Court's established case law, a difference of treatment is discriminatory, within the meaning of art. 14, if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realized”. Nevertheless, in some cases, to some extent depending on the “suspect” character of the ground concerned, the Court applies a significantly stricter test requiring differential treatment to be justified by “very weighty reasons” and the means used to be both appropriate and necessary¹³⁵.

Since the 90' the Court has increasingly considered nationality as a “suspect” ground concluding in a number of cases concerning access to welfare that very “weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention”.

¹³³ Among the Members of the EU only Croatia, Cyprus, Finland, Spain, the Netherlands, Luxembourg, Malta, Romania and Slovenia have ratified the Protocol.

¹³⁴ J. H. Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights* in *Human Rights Law Review* 13, 1, 2013, p. 5 -6.

¹³⁵ O. De Schutter, *The prohibition of discrimination under European Human Rights Law*, European Commission, 2011, p. 42-44

The Court did so for the first time in *Gaygusuz v. Austria*¹³⁶. The case concerned a Turkish national who was denied access to unemployment benefits due to his foreign nationality. The Court considered the applicant had worked in Austria for a long time and contributed to the unemployment insurance fund “on the same capacity and on the same basis as Austrian nationals” before finding that the refusal of the Austrian authorities to grant the applicant the unemployment benefit was discriminatory for the purposes of art. 14.

The Court has followed the same approach with regard to differences of nationality concerning access to a disability allowance (non contributory)¹³⁷, admission to a professional social security scheme¹³⁸, criteria applying for the purposes of pension calculation,¹³⁹ and the granting of an allowance for large families (non contributory).¹⁴⁰

The Court has also issued a number of judgments in which only certain categories of foreigners were subject to differential treatment. In *Niedzwiecki v. Germany* and *Okpisz v. Germany* the Court concluded, although without referring to the “very weighty reasons” test, that there were no sufficient reasons justifying the difference of treatment with regard to child benefits between non nationals holders of a long term permit of stay and others that were not.¹⁴¹ Yet, in *Ponomaryouvi v. Bulgaria* the Court has applied strict scrutiny though the difference of treatment affected only migrants not qualifying for a long-term residence permit of stay. The claimants were two Russian nationals excluded from school since they were able neither to pay enrolment fees nor to benefit from the exemption provided by the legislation for long-term residents or EU

¹³⁶ ECtHR, *Gaygusuz v. Austria*, 16 September 1996, Appl. n. 17371/90.

¹³⁷ ECtHR, *Koua Poirrez v. France*, 30 September 2003, Appl. n. 40892/98.

¹³⁸ ECtHR, *Luczak v. Poland*, 27 November 2007, Appl. n. 77782/01.

¹³⁹ ECtHR, *Andrejeva v. Latvia* (Grand Chamber), 18 February 2009, Appl. n. 55707/00.

¹⁴⁰ ECtHR, *Fawsie v. Greece*, 28 October 2010, Appl. n. 40080/07; ECtHR, *Saidoun v. Greece*, 28 October 2010, Appl. n. 40083/07; ECtHR, *Dhabhi v. Italy*, 8 April 2014, Appl. n. 17120/09. See L. Slingenbergh, *Social security in the case law of the European Court of Human Rights*, in F. Pennings and G. Vonk (eds), *Research Handbook on European Social Security Law*, Edward Elgar Publishing, 2015, p. 53.

¹⁴¹ ECtHR, *Niedzwiecki v. Germany*, 25 October 2005, Appl. n. 58453/00 and ECtHR, *Okpisz v. Germany*, 25 October 2005, Appl. n. 59140/00.

citizens.¹⁴²

By contrast in *Moustaquim and C. v. Belgium* the Court has concluded that the Belgian immigration rules providing that TCNs could be deported for public order reasons although Belgian or EU nationals could not have been deported on the same grounds did not violate art. 14.¹⁴³ Whereas the position of TCNs is considered not to be comparable to that of nationals, the Court agrees that TCNs and EU national are in a comparable situation concluding that the difference of treatment between the two categories is nonetheless justified in the light of the special character of the EU legal order.

The different approach adopted by the Court appears to follow Gerard's distinction between the "external" dimension of nationality relating to entry and residence and its "internal" dimension related to areas such as employment and access to welfare.¹⁴⁴ Whereas in the first case differences between national and non nationals are widely accepted, in the second case such differences are more difficult to justify, leading the Court to treat nationality as a suspect ground only with regard to the "internal dimension" of nationality.

This difference appears to explain to a certain extent the tensions underlying the Court's decision in *Bah v. United Kingdom*.¹⁴⁵ The case concerned a Sierra Leonean national and her son, who was admitted in the UK under conditional leave, the condition being that he must not have recourse to public funds. Shortly after her sons arrival they became homeless and applied for assistance. Whereas under the national law a homeless person with a minor would qualify as being in priority, in the case of the applicant, her son was not taken into consideration for establishing whether she

¹⁴² ECtHR, *Ponomaryovi v. Bulgaria*, 21 June 2011, Appl. n. 5335/05.

¹⁴³ ECtHR, *Moustaquim v. Belgium*, 18 February, 1991, Appl. n. 5335/05; ECtHR, *C v. Belgium*, 7 August 1996, Appl. n. 21794/93.

¹⁴⁴ J. H. Gerards, *The Grounds of Discrimination* in D. Schiek, L. Waddington and M. Bell (eds.) in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart Publishing, 2007, p. 66.

¹⁴⁵ Cfr. ECtHR, *Bah v. the United Kingdom*, 27 September 2011, Appl.n. 56328/07.

was in priority for social housing. Though the applicant had claimed that she was treated differently based on the nationality of her son (which the Court considers to equate to “national origin” for the purposes of Article 14), the Court concludes that in the case under review the differential treatment was based on her son immigration *status* and in particular on the fact that he was granted entry to the United Kingdom on the express condition that he would not have recourse to public funds. The Court goes on holding that the element of choice involved in immigration *status* implies that although differential treatment based on such *status* should still be reasonably and objectively justifiable, the justification is not required to be as weighty as in the case of a distinction based on nationality.

The case law shows the Court applies a particularly strict scrutiny with regard to differential treatment based on nationality, in areas such as access to social security or social benefits, though in cases involving differential treatment targeting only some categories of migrants, the Court appears more willing to take into consideration the possibility of justification.

By contrast, as the *Bah* case shows, with regard to areas covered by immigration law, the assessment of the Court allows States a particularly high margin for distinguishing between nationals and non-nationals.

Whereas the ECHR is undoubtedly the most important international convention to be considered under art. 117 of the Constitution there are at least two other international conventions worth considering in this regard: the ILO Migrant Workers Convention n. 143/75 and the International Convention on the Elimination of all Forms of Racial Discrimination.

The first, which was ratified by Italy in 1981, requires under art. 10 each Member of the Convention to pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect to employment and occupation, social security, trade union and cultural rights and individual and collective freedoms for migrant workers with regular

residency *status* and members of their families.

As to access to employment, art. 14 allows Members to restrict access to limited categories of employment or functions where this is necessary in the interests of the State.

The second prohibits racial discrimination considering as such “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Whereas originally the Convention excluded from its scope of application “distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”, in its General Policy Recommendation n. 30, the Committee on the elimination of Racial discrimination holds that under the Convention, differential treatment based on citizenship or immigration *status* will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of such aim.

The Constitutional framework.

An accurate description of the domestic legal opportunity structure necessarily needs to consider the constitutional provisions on the scope of the principle of equality and non-discrimination and the legal *status* of foreigners.¹⁴⁶

Art. 3 of the Constitution represents a key provision in this regard. The first paragraph of the article states “all citizens are invested with equal social *status* and are equal before the law, without distinction as to sex, race, language, religion, political

¹⁴⁶ The Constitution does not include a definition of “foreigner”. The defining characteristic of the category of foreigners is the absence of Italian citizenship. Such category includes TCNs, European citizens, asylum seekers, and stateless persons. See E. Grosso, *Straniero (statuto costituzionale dello)*, in *Digesto delle discipline pubblicistiche*, Utet, 1999, p. 158.

opinions, and personal or social conditions”. It establishes therefore a general principle of equality while providing an open-ended list of discriminatory grounds. The second paragraph is instead informed by an aspiration towards substantial equality. It establishes that “it is responsibility of the Republic to remove all economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the individual and the participation of all workers in the political, economic, and social organization of the country”.

Notwithstanding the wording of the provision the Constitutional Court has acknowledged since 1967¹⁴⁷ that the principle of equality before the law under art. 3 applies also to foreigners, at least as far as the exercise of fundamental rights is concerned.

The textual reference to citizens according to the Court does not exclude foreigners from the scope of application of the principle of equality. Art. 3 of the Constitution should be interpreted, has stated the Court, in connection with art. 2 and art. 10 (2) of the Constitution.

The former guarantees the inviolable rights of every human being. Whereas drawing the dividing line between “inviolable” rights and rights that can be lawfully reserved to citizens has given rise to opposing views with regard to the relevance of the textual reference to “citizens” in the Constitution¹⁴⁸, the wording of art. 2 (rights of every human being), as confirmed by the Constitutional Court in different occasions, clearly indicates that it is intended to protect the rights of every human being as such, irrespective of his/her citizenship.¹⁴⁹

The latter states that the legal *status* of foreigners is defined by law, in accordance with international conventions. The provision strongly enhances the level of protection of

¹⁴⁷ Constitutional Court n. 120/1967, n. 104/1969, n. 144/1970, n. 54/1979

¹⁴⁸ See in this regard, F. Biondi Dal Monte, *Dai diritti sociali alla cittadinanza: la condizione giuridica dello straniero tra ordinamento italiano e prospettive sovranazionali*, Giappichelli Editore, 2014, p. 23-26.

¹⁴⁹ Constitutional Court n. 105/2001.

foreigners constraining the legislature to abide by international law, here included provisions concerning fundamental rights and protection of migrants.¹⁵⁰ The provision is complemented by the above-mentioned art. 117(1) stating that legislative authority is subject to the constraints arising from EU law and international obligations.

However, such a broad interpretation of art. 3 has not prevented the Court from considering constitutionally conform differences of treatment affecting the level of protection of fundamental rights. The Constitutional Court has admitted that the principle of equality does not preclude differences of treatment between citizens and foreigners, provided that such differences are reasonably justified in consideration of the “factual differences” underlying each *status*¹⁵¹ and ultimately pertaining to the specificities of the relationship between the state and its citizens. In particular the Court observes that citizens have their permanent residence in the territory of the Republic and have the right to reside anywhere with no time limit and cannot be deported for any reason, whereas foreigners usually reside in the country for a limited period of time and are subject to deportation.

Therefore, according to art. 3 of the Constitution, the legislature is allowed to introduce differences of treatment between citizens and non-citizens provided that such differences are consistent with the principle of reasonableness and do not compromise the enjoyment of fundamental rights¹⁵².

Yet more recently the Court has opted for a more rigorous approach to equality¹⁵³

¹⁵⁰ The International Conventions the article refers to can be classified into two categories: conventions concerning the protection of fundamental rights (for example the Universal Declaration on Human Rights, the European Convention on Economic, Social and Cultural Rights) and conventions specifically dealing with migrants’ rights (ILO Migrant Workers Convention n. 143/75 or the Geneva Convention on Refugees).

¹⁵¹ See in particular Constitutional Court n. 104/1969 and n. 244/1974

¹⁵² In addition, art. 3 of the Constitution has been interpreted as applying also to differential treatment between non citizens, unless such differences are provided by the Constitution itself, such as in the case of asylum seekers, or are due to international obligations, such as the in the case of EU citizens.

¹⁵³ W. Chiaromonte, *Lavoro e diritti sociali degli stranieri*, Giappichelli Editore, 2013.

declaring constitutionally unlawful or adopting constitutionally conform interpretations of legislation affecting the right to healthcare, the right of defence and the right to family unity without a prior assessment based on reasonableness¹⁵⁴, on the one hand, and extending its scrutiny under art. 3 to situations clearly falling outside of the scope of fundamental rights, on the other hand.¹⁵⁵

The Constitutional Court case law concerning access to welfare is particularly significant for delineating the scope of protection provided under art. 3 of the Constitution, offering essential indications as to the differences of treatment between nationals and foreigners the Court has considered in contrast with art. 3, on the one hand, and the differences of treatment the Court has been willing to accept as conforming with the latter, on the other¹⁵⁶.

The path traced by the Constitutional Court begins with the decision n. 432/2005. The Court was called to examine the constitutionality of a regional law (Lombardia) providing Italian citizenship as a requirement for accessing a “free transport card” reserved to totally disabled persons.

Extending the scope of the principle of equality beyond the area of fundamental rights (there was no dispute as to the fact that the considered benefit did not impact the enjoyment of fundamental rights), the Court states that the legislature is not allowed to differentiate between Italian citizens and non citizens or stateless persons without establishing a “reasonable correlation” between the requirement of nationality and the rationale of the benefit considered.

The Court agrees that limited resources might impose choices aimed at narrowing down the number of potential beneficiaries. Nevertheless such choices cannot introduce arbitrary distinctions and should conform, under any circumstances, to the

¹⁵⁴ See in this regard Constitutional Court n. 245/2011.

¹⁵⁵ Constitutional Court n. 432/2005.

¹⁵⁶ The case law of the Constitutional Court and the implications of art. 3 of the Constitution for migrants have been thoroughly analysed in W. Chiaromonte, *Lavoro e diritti sociali*, cit.; F. Biondi Dal Monte, *Dai diritti sociali*, cit.

principle of reasonableness under art. 3.

The Court had the occasion to confirm the same principle a few years later, in a case concerning once again a regional law (Friuli Venezia Giulia) establishing a “system of interventions and services for the promotion and protection of the rights of social citizenship” which limited access to Italian and EU nationals with at least thirty-six months of residence in the Region.

Reminding that under art. 3 of the Constitution the legislature is subject to the principle of reasonableness, the Court highlights the arbitrariness of the nationality clause and protracted residence for thirty-six months in the light of the other eligibility criteria provided by the regional law. Such criteria, underlines the Court, refer to personal conditions of social or psycho-physical hardship defining the eminently social nature of the regional benefits under review, holding on this account the lack of a reasonable correlation between the criteria being challenged before the Court and the rationale of the benefit.

In the same line, the Court has considered constitutionally unlawful a number of other regional laws for limiting access to social security to TCNs with at least five years of residence in the region¹⁵⁷, or requiring three years of residence in the region and the possession of the EU long-term residency *status* for accessing a monetary benefit aimed at supporting people with disabilities.¹⁵⁸

In a more recent decision, the Court clarifies that the legislature can lawfully reserve certain benefits to nationals or people that are comparable to them, whose *status* proves in itself the existence of an adequate link between their participation in the political, economic and social life of the Republic, and the granting of the benefit. This, however, does not exclude that a link worthy of protection might emerge with regard to the position of those who, while lacking the same *status*, have a stable prospective of work and family life within the community and should be considered as a matter of

¹⁵⁷ Constitutional Court n. 2/2013; Constitutional Court n. 133/2013.

¹⁵⁸ Constitutional Court n. 172/2013; Constitutional Court n. 4/2013.

fact part of latter. The Court therefore confirmed the exclusion of TCNs lacking five years of residence from social protection measures established at the regional level violates art. 3.

On the contrary, the Court considers generally admissible for the same purposes a “twenty-four months residence in the region” criterion applying to everyone irrespective of nationality, but for cases in which the benefit under review is aimed to respond to the population basic needs.¹⁵⁹ As a consequence, the Court holds the requirement is unlawful with regard to benefits aiming to support the right to education and fighting poverty and social disadvantage, while dismissing the unconstitutionality claims with regard to a benefit aiming to support families with new born babies, housing subsidies, and social housing.

Finally, another judgment of the Court completes the picture as to the protracted residency requirements applying to everyone irrespective of their citizenship.¹⁶⁰ The Court was asked to assess the conformity to the Constitution of the Law of the Valle d’Aosta limiting access to social housing to nationals or foreigners with at least eight years of residence in region. Reminding that the legislature can lawfully refer to the *criterion* of residence for the purposes of regulating access to social housing, the Court clarifies that the *criterion* should be contained and consistent with the aims of social housing, excluding that “eight years of residence” could be considered reasonable in this regard. In addition the Court considers the requirement to entail also an “indirect disadvantage” for EU citizens and other categories of TCNs that enjoy equal treatment under EU law.

¹⁵⁹ Constitutional Court n. 222/2013. The Court highlights in this regard the regional dimension of the requirement and argues that the Region, within the limits provided by the principle of reasonableness, may well favour its residents, also in relation to their contribution to the community. See also as to the 24-month residency requirement as a condition for benefiting from a “baby bonus” for families with at least two dependant children, the Constitutional Court n. 141/2014. In this case the Court considered the requirement lawful since the benefit was granted on the basis of the duration of residence in the Region irrespective of other conditions.

¹⁶⁰ Constitutional Court n.168/2014.

Finally the Constitutional Court has repeatedly intervened in relation to Law n. 388/2000 limiting access to monetary social assistance benefits granted by national law to TCNs with long-term residence.

The Court was first called to assess the constitutional conformity of the requirement in 2008 and 2009, with regard to disability benefits, specifically incapacity allowance (indennità di accompagnamento)¹⁶¹ and inability pension (pensione di inabilità)¹⁶². In both cases the requirement was considered unlawful following the scrutiny of reasonableness, which focused mainly on the fact that for the purposes of issuing the long-term residence permit of stay the applicant was required to provide proof of a certain income.

As to the first case, the Court notes that by limiting access to TCNs with a long term permit of stay the legislature had indirectly introduced a minimum income requirement with regard to a benefit that was granted regardless of the income of the disabled. The unreasonable nature of the provision was even more evident in the second case considered that the legislation on the inability pension provides the benefit is granted to disabled people whose income is lower than the one required for obtaining the long term permit of stay. It followed in both cases a declaration of unconstitutionality limited to the income requirement.

The approach of the Court changed significantly with decision n. 187/10. The Court investigates in the first place the rationale of the benefit considered concluding it pertains to the area of fundamental rights since it aims to satisfy the basic needs of the recipients. Framing the difference of treatment as a difference on grounds of nationality¹⁶³, the Court maintains the lawfulness of the requirement of long-term residence should be examined in the light of the ECtHR case law on access to social security (art. 14 of the Convention and art. 1 Prot. 1). Going beyond the scrutiny of

¹⁶¹ Constitutional Court n. 306/2008.

¹⁶² Constitutional Court n.11/2009.

¹⁶³ Indeed in the present case TCNs were subject to a number of additional requirements (minimum income, 5 years of residence etc.)

reasonableness the Court reminds that according to the ECtHR case law, as far as access to social security is concerned, only very “weighty reasons” can justify a difference in treatment based on nationality, concluding the requirement of the long term residence permit of stay violated Article. 14 ECHR and as a consequence art. 117(1) of the Constitution.¹⁶⁴

The same principle was confirmed in relation to a number of other benefits¹⁶⁵, here included the incapacity allowance and the inability pension with regard to which the Court initially had limited the declaratory of unlawfulness to the criterion of income.¹⁶⁶

On the one hand, the case law of the Constitutional Court is very clear in considering differences of treatment based on nationality (including provisions limiting access to holders of a long term permit of stay or imposing for the same purposes a length of residence requirement only on TCNs) in contrast with the principle of equality under art. 3 and art. 117 (1).

On the other, the Court appears open to uphold the constitutional conformity of the criterion of residence, provided that it is referred to measures that are not aimed at satisfying the basic needs of the beneficiaries and the number of years required is contained and consistent with the nature of the benefit considered, and does not entail an indirect disadvantage for EU citizens and TCNs that enjoy equality of treatment under EU law.

¹⁶⁴ Constitutional Court n. 187/2010.

¹⁶⁵ Constitutional Court n. 329/2011 concerning to a “school attendance” allowance for minors with disabilities; Constitutional Court n. 22/2015 and Constitutional Court n. 230/2015 concerning respectively an “incapacity allowance” granted to visually impaired individuals and an inability pension granted to those affected by deafness.

¹⁶⁶ Constitutional Court n. 40/2013.

3. The TUI

The antidiscrimination clause and equality of treatment in the TUI.

The first general antidiscrimination clause under Italian law dates back 1970¹⁶⁷. It was introduced by Law n. 300/1970 entitled the “Workers’ Statute”. The original provision concerned discriminatory behaviour on grounds of trade union affiliation, political opinions, and religious belief. It sanctioned as null any act or pact aimed at affecting access to employment, firing or disadvantaging an employee based on the protected grounds. The article, according to Barbera “provides a snapshot of the 70s” conveying the image of a society in which the great divisions seem to run along the lines of class and ideology.¹⁶⁸ Furthermore, as she observes, we can reasonably assume that the prohibition of discrimination on grounds of religion under art. 15 of the Statute, while paying tribute to non discrimination clauses provided in international law (see for example the International Covenant on Civil and Political Rights), all of them including religion as a protected ground, was based on the underlying idea that religious discrimination was symptomatic of other forms of discrimination belonging to the political and ideological sphere. Whereas the absence of race, colour, and national origin can be explained through the fact that at the time Italy was more a country of emigration rather than of immigration, the failure to include sex among the protected grounds appears to reflect the lack attention towards sex discrimination, both by the legislature and the labour movement itself, still significantly anchored to claiming “special protection” measures for women in the workplace.¹⁶⁹

This considered, the effectiveness of the provision has been strongly undermined by two factors: the embracing by courts of a theoretical elaboration of the concept of discrimination as an intentional act and the inadequacy of the sanction of nullity, as the

¹⁶⁷ Prior to the adoption of art. 15, national legislation prohibited discriminatory dismissal on grounds of political opinion, religion and trade union affiliation (art. 4 Law n. 604/1966) and marriage (art. 1 Law n. 7/1963).

¹⁶⁸ M. Barbera, *La tutela antidiscriminatoria al tempo dello Statuto e ai tempi nostri*, in *Diritti lavori mercati*, 3, 2010, p. 724.

¹⁶⁹ *Ibid*, p. 727.

only available remedy, to discrimination.¹⁷⁰

Law n. 903/1977 entitled “Equal treatment between men and women at work” extended protection under art. 15 Law n. 300/1970 to gender, race and language.

The law was adopted under the impetus of EU legislation on equal treatment between women and men, implementing into national law EU Directives 75/117/EC on equal pay and 76/207/EC on equal treatment as regards access to employment, vocational training and promotion, and working conditions. The law included no definition of discrimination and, except for art. 15 that introduced the possibility for trade union organizations to act on behalf of the victim of discrimination and the power for the judge to order the offender to terminate unlawful conduct and remove its effects, was reticent on enforcement.

The following years were characterized by the establishment of a number of institutional actors with the scope of promoting gender equality and fighting discrimination. In 1983, the government created the National Equality Committee attached to the Labour and Welfare Ministry and in 1984 the Commission for Equal Opportunities attached to the Prime Minister’s Office. In the same year Law n. 863/1984 created the institutional figure of the Equality Advisors. The latter would be appointed by the Labour and Welfare Ministry with the task of ensuring the implementation of the principle of equal treatment between men and women in employment.

It is the adoption of Law n. 125/1991 “Positive actions for the realization of gender equality at work” that allows tracing the emergence of the contemporary model of protection against discrimination.¹⁷¹

¹⁷⁰ M. Barbera, *Discriminazioni ed eguaglianza nel rapporto di lavoro*, Giuffrè, 1991, p. 218-223.

¹⁷¹ See L. Gaeta and C. Zoppoli (eds.) *Il diritto diseguale. La legge sulle azioni positive*, Giappichelli, Torino, 1992; M.V. Ballestrero, *La legge sulle azioni positive*, in *Spazio Impresa*, 18, 1991, p. 3; M. Barbera, *Una legge per le azioni positive*, in *Diritto e pratica del lavoro*, 20, 1991, p. 1240; T. Treu, *La legge sulle azioni positive: prime riflessioni*, in *Rivista italiana di*

The law moved from the explicit aspiration to realize substantive equality between men and women in the workplace through the adoption of “positive actions” measures aiming to overcome inequality in educational and vocational training, access to employment, career advancement; to promote the diversification of career choices for women; to overcome organizational practices with a disparate impact on women; to promote the inclusion of women in professional activities where they are underrepresented, and encourage a better distribution of family responsibilities. To these ends, it introduced a public funding mechanism for positive action measures in the private sector as well as an obligation to adopt positive action measures in the public sector.

Although apparently not its major focus, the law brought a second critical improvement: new definitions of discriminatory behaviour. Its innovative capacity in this regard has been accurately analysed and acknowledged.¹⁷² On the one hand, by defining as discriminatory any act or behaviour determining, directly or indirectly, a prejudicial effect on grounds of sex, and therefore explicitly pointing to the effects of the behaviour considered, it marks a breaking point with reference to the enforcement practices of art. 15 of the Statute as far as intent is concerned. On the other hand, it introduces the concept of indirect discrimination prohibiting any prejudicial treatment following the adoption of criteria that disproportionately disadvantage workers on grounds of sex and do not relate to an essential occupational requirement.

The law also provides new rules on the distribution of the burden of proof ensuring that once the claimant provides facts, here included statistical data, from which it can be presumed the existence discrimination, it will be for the respondent to prove that there has been no breach of the principle of equal treatment.

diritto del lavoro, I, 1991, p.109.

¹⁷² T. Treu, *La leggi sulle azioni cit.*; M.V. Ballestrero, *La nozione di discriminazione nella legge n. 125/1991*, in *Rivista critica di diritto del lavoro*, 1992, p. 773; M. Barbera, *La nozione di discriminazione*, in *Le nuove leggi civili commentate*, XVII, 1, 1994, p. 46, S. Scarponi, *Le nozioni di discriminazione*, in C. Zoppoli and L. Gaeta (eds.) *Diritto diseguale. La legge sulle azioni positive*, Giappichelli, Torino, 1992, p. 43.

In doing so the Law n. 125/1991 clearly builds on the Court of Justice case law on discrimination on grounds of sex. In particular the definition of indirect discrimination noticeably recalls the Court of Justice decisions in *Bilka*¹⁷³ and subsequent case law on indirect discrimination, whereas the part on the burden of proof the related ECJ doctrine elaborated starting from *Danfoss*.¹⁷⁴

Unlike art. 15 of Statute, the law provided the power for the judge to impose to the employer the adoption of “a plan of removal of discrimination” to be defined in collaboration with trade union organizations and equality advisors and strengthened the power of equality advisors granting them legal standing to act on behalf or support of the victim of discrimination and in their own name in instances of collective discrimination¹⁷⁵.

Such developments according to Kilpatrick are to be understood as taking place “within a labour law context where there is a huge degree of cross-over between the academic and left-centre governmental spheres”.¹⁷⁶

The draft of the new equality law, she explains, was entrusted to the National Equality Committee and practically to its two technical members prof. Treu and prof. Ballestrero, both distinguished scholars of labour and equality law. “Although the draft they created was subject to substantial modification by successive governments and parliaments, the law which finally emerged remains strongly marked by the authors’ awareness of EU law developments and their perception of the deficiencies of the 1977 law’s vision of equality and discrimination”. She further acknowledges the role of academics giving account of their input during the parliamentary process in terms of the meaning of equality, the existing institutional *apparatus* and the experiences of and lessons to be learned from other jurisdictions.

¹⁷³ Judgment of 13 May 1986, *Bilka* C-170/84, EU:C:1986:204.

¹⁷⁴ Judgment of 17 October 1989, *Danfoss* C-109/88, EU:C:1989:383.

¹⁷⁵ G. De Simone, *Gli organismi collettivi per le pari opportunità*, in *Le nuove leggi civili commentate*, XVII, 1, 1994, p. 101.

¹⁷⁶ C. Kilpatrick, *Gender Equality*, *cit.* p. 107.

Compared to gender discrimination, the prohibition of discrimination on grounds of race, ethnic origin and nationality has a more recent history. The first *ad hoc* antidiscrimination clause in this regard was introduced with the adoption of the first organic regulation on migration, Law n. 40/1998 later on merged into the Legislative Decree n. 286/1998, the TUI.

It was 1998 and Italy was turning into a country of immigration. According to the data included in the “Dossier immigrazione 2005”, whereas in 1970 the number of migrants in Italy was 144.000, it exceeded half a million in 1987, and one million in 1997¹⁷⁷. Data denoted a general increasing trend that would be confirmed in the years to come.

The process for the adoption of a new law on migration moved from the idea that “emergency legislation” could not provide adequate answers to the issues raised by a sustained and structural process of immigration, as to regulation of entry and residence of TCNs on the one hand, and their integration in the host society on the other.

Unlike previous legislative interventions the first organic law on migration established equal rights for foreign workers, regulated under title V access to education, healthcare, welfare and housing and introduced the first prohibition of direct and indirect discrimination on grounds of racial, ethnic origin and nationality. Nevertheless, only a few years after its adoption, the legislature will intervene with several reforms restricting the guaranties established by the TUI, admittedly distant from solidarity considerations¹⁷⁸.

Before turning to examining its contents, the process that brought to the draft proposal approved by the parliament might once again provide some explanations as to why it was adopted the way it was. In extending the prohibition of discrimination to direct as well as to indirect discrimination, the TUI preceded by a few years the implementation

¹⁷⁷ Caritas/Migrantes, *XV Rapporto sull'immigrazione. Dossier Statistico 2005*, Anterem, 2005.

¹⁷⁸ Law n. 388/2000 and Law. n. 189/2002; L. Calafà, *Migrazione economica e contratto di lavoro degli stranieri*, Il Mulino 2012; W. Chiaromonte, William, *Lavoro e cit.* F. Biondi Dal Monte, *Dai diritti sociali cit.*

of the RED in national legislation.

As in the case of gender discrimination, academic's role in the elaboration of the draft proposal of the TUI has been particularly significant. In addition, the analysis of the process that brought to the adoption of the prohibition of discrimination shows the contribution of civil society has been important as well, while allowing to identify another link worth exploring between civil society and the academics involved in the process.

In 1993 a Ministerial Decree created the National Study Commission on the Legal *Status* of Foreigners in Italy with the scope of overcoming previous regulatory interventions in favour of a more comprehensive approach to migration, taking into account obligations as well as rights of migrants. The Commission entrusted the drafting of the new law proposal to a restricted committee whose members were distinguished academics and experts of Migration Law: prof. Adinolfi; prof. Nascimbene and prof. Bonetti. The first two were also founding members of the newly established "Associazione Studi Giuridici sull'Immigrazione" (ASGI), a civil society organization aiming to promote research on Migration Law and exchange of information and good practices within the community of migrant lawyers.

The committee's proposal was submitted in 1994 to the Prime Minister's Office. The draft included an article entitled "Repression of xenophobic and racist acts". It addressed four different hypothesis of prejudicial treatment concerning relations with public authorities, access to goods and services, employment and self-employment, access to social welfare and sanctioned perpetrators with an administrative fee. Despite the title, the article referred without any exception to objective situations of prejudicial treatment based on the protected grounds. Indeed the four situations referred to in the article were later incorporated in the final draft under the title "lawsuit against discrimination". The final proposal represented the end result of the collaboration between prof. Bonetti and a group of religious organizations lobbying for migrants' rights coordinated by Caritas Italiana.

Pressure from civil society together with strong expertise proved crucial to the adoption of the antidiscrimination clause. In particular the awareness of the authors of the draft proposal submitted to the Parliament of the recent developments on fighting discrimination, at the international and national level, appears to have strongly influenced the specific features of the clause.

Indeed the first part of art. 43 TUI corresponds to the definition of discrimination on grounds of race provided under the International Convention on the Elimination of All Forms of Racial Discrimination, while the second part literally recalls, with regard to discrimination concerning employment, the definition of indirect discrimination provided by Law n. 125/1991. In addition the enforcement clause (now art. 44 TUI) incorporated the rule on the distribution of the burden of proof provided under the latter, and more specifically the part shifting the burden of proof on the defendant once the claimant has provided facts, including statistical data, from which discrimination can be presumed.

Except for the latter part, which was subject to substantial revisions during the parliamentary debate, the prohibition of discrimination was approved and included in the TUI with no substantial modifications.

Art. 43 TUI qualifies as discriminatory any behaviour, that “directly or indirectly, involves a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, beliefs and religious practices, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social and cultural life and in every other field of public life.”¹⁷⁹

The second part of the article includes a number of specifications of discriminatory

¹⁷⁹ In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

behaviour concerning relations with public authorities, access to goods and services, employment and self-employment, housing, education, training, social services and social protection. It also defines indirect discrimination in employment as every prejudicial treatment resulting from the adoption of criteria that disproportionately disadvantage workers belonging to a particular “race”, to a particular ethnic or linguistic group, to a particular religious denomination or nationality¹⁸⁰.

As anticipated, the part of the draft concerning the distribution of the burden of proof was amended during the parliamentary process. It was in particular strongly contested by centre-right and right representatives as being against the rule of law, abusive and legally absurd.¹⁸¹

The final version of art. 44 TUI established that the complainant could prove the existence of discrimination by providing facts, here included statistical data concerning recruitment, contributory schemes, qualifications, career advancements and dismissals¹⁸². Such facts however had to be considered under the general rule of the on “simple presumptions”. This implied on the one hand that their consideration was left to the discretionary appreciation of the judge, and on the other that the presumption of discrimination would be admissible only when grounded on facts providing “weighty, accurate and consistent” elements of proof. Any reference to the shift of the burden of proof was eliminated.

As to remedies, the enforcement clause introduced a “urgent” procedure for discrimination claims aiming to guarantee the adoption of a final judgment in a very short time and provided the power for the judge to order the offender to terminate discriminatory conduct and adopt any other measure, necessary under the circumstances to remove its effects besides imposing the adoption of a “plan of

¹⁸⁰ P. Bonetti *et al.*, *La tutela contro le discriminazioni razziali, etniche e religiose*, in B. Nascimbene, *Diritto degli stranieri*, Cedam, 2004, p.1082-1134.

¹⁸¹ See the statements of the member of the Parliament Raffaele Marotta http://documenti.camera.it/_dati/leg13/lavori/stenografici/sed273/s250.htm#Titolo33_82

¹⁸² L. Curcio, *Le azioni in giudizio e l'onere della prova*, in M. Barbera (ed.), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Giuffrè, 2007, p. 529.

removal” of the concerned conduct.

Besides prohibiting discrimination the TUI includes a number of “equal treatment clauses” concerning employment, education, healthcare, social protection and social housing, identifying for each case the categories of migrants that benefit from equal treatment¹⁸³.

Article 2 (3) TUI establishes a general principle of equal treatment in favour of migrant workers legally residing in Italy. The Italian Republic, states the provision, in accordance with ILO Convention 143 of 24 June 1975 guarantees to all foreign workers regularly residing in its territory, and their families, equal treatment and full equality of rights compared to national workers¹⁸⁴.

Art. 34 establishes the right to equal treatment in access to healthcare and regulates registration procedures for different categories of TCNs, whereas art. 35 identifies the categories of healthcare services guaranteed to TCNs irrespective of their irregular residency *status*.

Art. 38 extends compulsory school attendance to TCNs minors and guarantees equal treatment in access to education and participation to the school community life. Art. 39 addresses access to higher education establishing the right to equal treatment in access to higher education for all TCNs with regular residence *status*.

Art. 40 and art. 41 are dedicated to access to social housing and social assistance. The original formulation of art. 40 extended equality of treatment in access to social housing to TCNs with regular residence who were registered as unemployed or regularly employed or self-employment. The article was revised in 2002¹⁸⁵ limiting equality of treatment to TCNs that are granted at least a two-year working permit and

¹⁸³ P. Bonetti *et al.*, *Sanità, istruzione, alloggio e integrazione*, in B. Nascimbene, *Diritto degli stranieri*, Cedam, 2004, p. 973-1081.

¹⁸⁴ On the scope of the principle of equality under art. 2 TUI and the ILO Conventio see Constitutional Court n. 454/1998.

¹⁸⁵ Law n. 189/2002. The implications of the reform has been thoroughly analysed in T. Vettor, *I diritti sociali degli stranieri: le innovazioni della legge n. 189/2002*, in T. Tursi (ed.), *Lavoro e immigrazione*, Giappichelli, 2005, p. 291.

are regularly employed or self-employed. Art. 41 TUI ensures, with regard to social assistance, equality of treatment to TCNs with at least one-year residence permit. A couple of years later the legislature would seriously limit its scope of application through art. 80 (19) Law n. 388/2000 granting access to monetary social assistance benefits only to TCNs holders of a long-term residence permit of stay.

Early enforcement efforts of the antidiscrimination clause.

Although during the parliamentary debate those opposing the adoption of the prohibition of discrimination “warned” against the risks inherent to the prohibition of discrimination and its enforcement clause, “such as to induce nationals to avoid any interaction with migrants only to avoid lawsuits”¹⁸⁶, the number of judicial decisions during the first years following the adoption of the TUI is exiguous.

The Court of Florence decided the very first case on the prohibition of discrimination, in 1999.¹⁸⁷ The claimant, a Peruvian national, claimed to have been subject to discriminatory behaviour during a ticket inspection on a public bus. In particular she maintained that the decision to forcedly accompany her for identification at a police station following the inspection was based on racial grounds. Furthermore, while she was taken to the police station, she maintained the ticket inspector had intimidated her prospecting the possibility of a forced return in her country of origin.

The decision provides the opportunity to introduce two key aspects discussed in the case law during the first years of the enforcement of the prohibition of discrimination.

The first one concerns the distribution of the burden of proof. As discussed earlier, the rule on burden of proof approved by the Parliament was limited to expressively state

¹⁸⁶See the statements of the member of the Parliament Rolando Fontan, available at the following link http://documenti.camera.it/_dati/leg13/lavori/stenografici/sed273/s250.htm#Titolo33_82

¹⁸⁷Court of Firenze, 30 December 1999, in *Diritto, immigrazione e cittadinanza*, 1, 2000, p. 111; L. Mughini, *Prime riflessioni a margine dell’ordinanza del Court of Firenze in materia di azione civile contro la discriminazione razziale*, in *Diritto, immigrazione e cittadinanza*, 2000, 1, p. 82.

the application of the general rules on “simple presumptions” and was deliberately silent as far as the shift of the burden of proof is concerned. Based on such rule, the judge dismissed the claim due to the absence of univocal evidence on alleged behaviour, irrespective of the existence of testimonial evidence supporting the description of events presented by the claimant.

The rule was applied in similar terms, although with different outcomes in a 2000 decision of the Court of Milano¹⁸⁸ and a 2001 decision of the Court of Bologna.¹⁸⁹ Both cases concerned the refusal of a real estate agency to negotiate with TCNs due to the reluctance of their clients to rent to the former. In the Court of Milano case, the claimant made contact with the agency through an organization engaged in assisting migrants. As soon as the employee of the agency came to know that the person interested in the apartment was from the Ivory Coast, he refused to continue the negotiation due to the fact that “the owners had no intention to rent the apartment to foreigners”. In the second case, those interested in renting could view available apartments using a website which included among “personal conditions of the tenants” the category of TCNs. Once flagged the option TCNs in the input form, the research provided no apartments at any available price.

The second aspect before mentioned concerns the concept of discrimination itself. Despite the definition of discrimination in the TUI clearly refers alternatively to the “purpose or effect” of the behaviour considered, the decision of the Court of Firenze seems to fall into the trap of “intention” requiring the claimant to prove that what was deemed as “arbitrary behaviour” of the ticket inspector was exclusively due to her “race”.

A subsequent decision of the Court of Bologna in 2000¹⁹⁰ would maintain ambiguity in this regard. It concerned the publication in a local newspaper of an article concerning

¹⁸⁸ Court of Milano, 30 March 2000, in *Foro It*, I, 2000, p. 2041.

¹⁸⁹ Court of Bologna, 22 February 2001, in *Diritto immigrazione cittadinanza*, 1, 2001, p. 101

¹⁹⁰ Court of Bologna, 17 October 2001; M. Pipponzi, *L'onere della prova nell'azione civile contro la discriminazione*, in *Diritto immigrazione e cittadinanza*, 4, 2000, p. 86.

“marriages of convenience” together with a picture of the claimant, an Italian black man, with his Italian white wife, in which only her face was screened in order to protect her identity. The Court admits that the publication of the picture without screening the face of the claimant was discriminatory irrespective of the absence of intention to discriminate. By contrast, in considering for the same purposes the fact that the picture of the claimant was associated to an article potentially able to create an environment hostile to immigrants, the Court surprisingly states that its consequences are due to the existence of such blameful practices among immigrants, as acknowledged in the press, rather than to the intention of the journalist.

Uncertainties concerning the relevance of intention would be overcome by a decision of the Court of Milano in 2002. It concerned a regulation of the Municipality of Milano on social housing, which assigned Italian nationals five additional points for the purposes of their ranking in the list of beneficiaries. Reminding that under art. 43 TUI there is no room for investigating intention, the Court assessed the discriminatory nature of the regulation based on its prejudicial effect on foreign citizens.¹⁹¹

In addition the decision of the Court is absolutely worth mentioning for rejecting the defence of the public administration according to which the prohibition of discrimination should not apply to the public administration when exercising discretionary powers. Acknowledging the prohibition of discrimination entails a fundamental right, the Court dismisses the idea that its scope can be limited based on the characteristics of the defendant or the bounded rather than discretionary exercise of powers by the latter.¹⁹²

¹⁹¹ A year later, following the same approach, the Court of Monza would declare discriminatory the statute of a housing association requiring Italian nationality for the purposes of membership. See Court of Monza, 27 March 2003, in *Foro It*, I, 2003, p. 3179.

¹⁹² Court of Milano, 21 March 2002, in *Foro It*, I, 2003, p. 3175. There are two other decisions dealing with access to social housing: TAR Lombardia (Sezione di Brescia) n. 264/2005 in *Diritto, immigrazione e cittadinanza*, 2, 2005, p. 130 and TAR Piemonte n. 323/2002, in *Diritto, immigrazione e cittadinanza*, 2, 2002, p. 117. Both cases involved local regulations subordinating access to social housing for TCNs to criteria different from those provided by the TUI. Although the claims are not based on the prohibition of discrimination they have

The approach of the Court of Milano would be followed by the Court of Firenze in 2002, the first decision enforcing the prohibition of discrimination with regard to access to employment in the public sector.¹⁹³

It should be noted before going into further detail that regulation concerning access to employment is particularly complex given that it involves different levels of regulation (national, European and international) and the overall framework is to some extent inconsistent.

While DPR n. 3/57 entitled “Code on the *status* of civil servants” included Italian citizenship among the necessary requirements to access employment in public sector, EU law and international law, in particular the ILO Convention on Migrant workers (implemented in Italy through Law 158/1982), would significantly narrow the scope of its application.

As known, art. 45 of the TFUE in establishing freedom of movement for workers in the EU excludes from its scope of application employment in the public sector. The provision has been interpreted restrictively by the European Court of Justice that has admitted such limitation to the freedom of movement of workers only in relation to “posts involving the exercise of public authority and the safeguard of general interests”¹⁹⁴.

important implications for its enforcement. In the first one, the Municipality of Chiari had adopted a narrow interpretation of the regional law concerning access to social housing requiring the claimant to provide proof of “reciprocity”. The Court maintained that the local regulation was in violation of national law therefore suspended its effects. In the second, the Municipality of Torino admitted TCNs applications under the condition that they had worked for at least three years in accordance with the regional law on social housing. The Court rejected the claim dismissing the request of the applicants to refer the issue to the Constitutional Court provided that in its account the regional law was consistent with the principle of reasonableness under art. 3.

¹⁹³ Court of Appeal of Firenze n. 281/2002 in *Rivista italiana di diritto del lavoro*, 2003, II, 272 G. Mammone, *L'accesso al lavoro pubblico dei cittadini stranieri fra divieto di discriminazione e restrizioni all'accesso degli extracomunitari*, in *Rivista italiana di diritto del lavoro*, II, 2003, p. 272.

¹⁹⁴ *Judgment of the Court of 26 May 1982, Commission, C- 149/79, ECLI:EU:C:1982:195.*

Italian law would implement the principle established by the Court of Justice extending to European citizens access to employment in the public sector, with the only exception of posts implying direct or indirect exercise of “public authority” or pertaining to the national interest and delegate the identification of such posts to a subsequent decree¹⁹⁵. Indeed DPCM n. 174/1994 identifies the posts in public sector for which the requirement of Italian citizenship is not dispensable.

The rule establishing the right of EU citizens to access employment in the public services was later merged into Legislative Decree n. 165/2001. The Legislative Decree is silent as to access to employment in the public sector for TCNs. With regard to situations not covered by the decree it defers to previous legislation on access to employment in the public sector, here included the requirement of citizenship.

However before concluding that the law excludes TCNs from access to employment in the public sector, it is necessary to turn to the provisions of the ILO Convention on migrant workers. While establishing the obligation upon Members of the Convention “to declare and pursue a national policy designed to promote and to guarantee (...) equality of opportunity and treatment in respect of employment and occupation”, art. 14 of the ILO Convention admits only restrictions that are justified in the interests of the State and concern limited categories of employment or functions.

Italy has implemented the ILO Convention with Law 158/1982. In addition, as above mentioned the TUI refers to the ILO Convention when establishing the right of migrant workers to equal treatment. Art. 2 of the TUI, “in accordance with the ILO Convention 143 of 24 June 1975 guarantees to all foreign workers regularly residing in Italy and their families equal treatment and full equality of rights compared to national workers”.

Art. 2 TUI allows to reasonably conclude that access to employment in the public service for TCNs is informed by the same principle regulating access for European citizens: equality of treatment represents the general rule, whereas Italian citizenship

¹⁹⁵ Legislative Decree n. 29/1993 and Presidential Decree n. 487/1994

can be required only under particular circumstances, that is to say when it is necessary in the interest of the State.

It is important to notice that the Constitutional Court has clearly acknowledged, though not specifically in relation to access to employment in the public sector, that art. 2 TUI, in accordance with the ILO Convention, provides a general principle of equal treatment of migrant workers that have been authorized to employment, as regards working conditions and access to employment. The case concerned the constitutional conformity of the lack of a legislative provision allowing migrant workers to benefit from disability hiring quotas. Provided that art. 2 TUI grants foreign workers equal rights with nationals, observes the Court, there is no need to for a provision specifically extending migrant workers the possibility to access employment though hiring quotas¹⁹⁶.

Still, the complexity of the legal framework regulating access to employment in the public sector will give rise to different interpretations and conflict between different judicial doctrines¹⁹⁷.

The first discrimination case dealing with the issue concerned an Albanian national applying for a post as a nurse's assistant. His application was initially accepted under condition and subsequently rejected due to the absence of Italian citizenship. He claimed the refusal of the Public Administration was discriminatory on grounds of nationality. The Court of Pisa¹⁹⁸ initially dismissed the claim based on the fact that the decision of the respondent was adopted in accordance with regulations concerning access to employment in the public service, but the Court of Appeal of Firenze reversed the decision¹⁹⁹. It is not under dispute, states the Court, building on a 2001

¹⁹⁶ Constitutional Court n. 454/1998

¹⁹⁷ See Court of Cassation n. 18523/2014, in *Rivista Italiana di Diritto del Lavoro* 2, II 2015, p. 467; Court of Cassation n. 24170/2006, in *Rivista Italiana di Diritto del Lavoro*, 2, II, 2007, p. 302

¹⁹⁸ Court of Pisa, 26 October 2001, not published.

¹⁹⁹ Court of Appeal of Firenze n. 281/2002, in *Rivista italiana di diritto del lavoro*, II, 2003, p. 272.

decision of the TAR Liguria²⁰⁰, that art. 2 of the TUI has implicitly amended such regulations. This considered, the Court analyses the behaviour of the Public Administration in the light of the prohibition of discrimination under art. 43 TUI and the specific hypothesis of discriminatory behaviour under the same article, and in particular the clause concerning discrimination in access to employment. The Court concludes the refusal of the respondent to hire the claimant due to the lack of Italian citizenship should be considered unlawful since the law prohibits any behaviour consisting in imposing disadvantageous conditions or refusing to employ a foreigner with regular residency *status* on grounds of her/his nationality.

Another line of decisions enforcing the prohibition of discrimination is related to the exclusion of foreigners from membership in national sports federations (volleyball, basketball, football, and swimming). The first case in this regard was decided by the Court of Reggio Emilia in 2000.²⁰¹ The Court agreed with the applicant that the federal regulation limiting the enrolment of TCNs football players was discriminatory. Since the applicant was already employed by a football club the Court points to the prejudicial effect of the contested regulation in terms of constraining the right to work and free choice of employment. A year later the Court di Pescara²⁰² would confirm the same principle with regard to non-professional sporting activity, though the decision would be reversed by the second instance decision.²⁰³ According to the latter art. 43 TUI applies only in connection with fundamental rights and freedoms. Provided that the prejudice lamented by the applicant consisted in the impossibility to participate in the national championship of water polo, no violation of such rights and freedoms was envisaged.

²⁰⁰ TAR Liguria n. 399/2001, in *Diritto, immigrazione e cittadinanza*, 2, 2001, p.161. The Court considers that art. 2 TUI has implicitly abrogated art. 2 of the DPR 487 del 1994. As a consequence, according to its reading the only limitation applying to TCNs access to employment in the public sector is represented by the posts implying direct or indirect exercise of “public authority” or pertaining to the national interest. For an opposing interpretation see TAR Toscana n. 38/2003, not published.

²⁰¹ Court of Reggio Emilia, 2 Novemebr 2000 in *Foro It*, I, 2002, p. 909. See also Court of Teramo, 30 March 2001, in *Foro It*, I, 2002, p. 907.

Legal standing

Legal standing, as already observed represents one key element of the legal opportunity structure.

As far as Italy is concerned, the first provision to go beyond individual enforcement is represented by art. 28 of the Workers' Statute.²⁰⁴ The provision grants trade unions legal standing before the courts for challenging anti-trade union behaviour. On the contrary of art. 15 of the Statute, previously mentioned as the first general antidiscrimination clause under national legislation, art. 28 has been widely used in courts.²⁰⁵

Relying on the model of enforcement provided under art. 28 of the Workers' Statute, art. 15 Law n. 903/1977 provided the possibility for trade union organizations to act on behalf of the victim of discrimination and Law n.125/1991 extended legal standing to equality advisors. The latter could act on behalf of the victim or in their own name in instances of collective discrimination.

The TUI provisions concerning legal standing significantly build on the latter provision. The first draft of the law included the creation of an ombudsman for the rights of migrants, at the national and regional level. As to protection against discrimination, the draft provided that, in cases of collective forms of discrimination concerning employment, the claim could be filed by the ombudsman operating at the regional level or trade union organizations. After the proposal on the creation of the ombudsman was set aside, the provision was modified accordingly, limiting legal standing to trade union organizations.

In absence of an explicit provision in this respect, civil society organizations might still claim legal standing relying on the doctrine elaborated with regard to environmental

²⁰² Court of Pescara, 18 October 2001, in *Foro It*, I, 2002, p. 905.

²⁰³ Court of Pescara, 14 November 2001 in *Foro It*, I, 2002, p. 898.

²⁰⁴ T. Treu, *Condotta antisindacale e atti discriminatori*, Milano, 1974.

²⁰⁵ T. Treu (ed.), *Sindacato e magistratura*, cit.; M. Barbera, *Vecchi e nuovi attori sulla scena dello Statuto*, in *Rivista giuridica del lavoro e della previdenza sociale*, n. 1, 1995, p. 11.

advocacy organizations.

Although the Civil Procedure Code excludes, except for cases in which it is provided by law, the possibility to take legal action for enforcing somebody else's rights, as far as environmental advocacy organizations are concerned courts have since the '70, though not unanimously, admitted the possibility for such organizations to enjoy legal standing based on their statutory objectives, the continuity of their engagement and the existence of a link with the territory affected by the contested measures.²⁰⁶

Whereas this doctrine is strictly related to environmental organizations, there are also examples in which the above criteria have been applied for the purposes of legal standing in discrimination cases. In the already mentioned 2002 case of the Court of Milano, the Court agreed the applicant organizations enjoyed legal standing provided that their statute included the objective of promoting the fundamental rights of Italian and foreign workers with particular regard as far as the latter are concerned to aspects concerning their integration and access to housing. In addition, it was considered the continuity of their activities and the link with the territory affected by the contested regulation of the Municipality of Milano.²⁰⁷

In alternative to claiming legal standing in their own name civil society organizations might claim the right to intervene in the proceedings to support one of the parties.

The Civil Procedure Code allows a supporting third party intervention provided that the third party has "an autonomous interest" in this regard.

Although the case law provides no definitive answers on what qualifies "an autonomous interest" as such,²⁰⁸ the inclusion of fighting discrimination among the

²⁰⁶ S. Gobbato, *Legal Standing of Environmental Associations: The New "Democratic Approach" of the Italian Supreme Administrative Court*, in *Journal of environmental law*, 19, 2, 2007, p. 259.

²⁰⁷ Court of Milano, 21 March 2002, in *Foro It*, I, 2003, p. 3175. Cfr. Court of Bologna, 17 October 2001, in *Diritto, immigrazione e cittadinanza*, 2002, 1, p. 101.

²⁰⁸ According to a narrow interpretation, the intervention is admissible upon the existence of "a qualified legal interest" to prevent any negative consequences even only indirectly related to the final judgment. Cfr. Court of Cassation n. 3323/2016.

statutory objectives and performance of activities aimed to this end on a continuous basis might legitimize the intervention of associations engaged in protection migrants' rights.

The dependent supporting intervention is however subject to a series limitations: the intervention is valid only if submitted within the terms provided by the Civil Procedure Code, it is not possible to present new claims, and finally the third party has no autonomous power to appellate the judgment.

In conclusion, claiming legal standing irrespective of a legal provision in this regard, though not inconceivable from a legal point of view, appears at the very least a risky strategy.

4. Shifting opportunities

The adoption of the Race Equality Directive

By June 2000, The European Council adopted the Racial Equality Directive (RED). The Directive implements the principle of equal treatment between persons irrespective of racial or ethnic origin. It was adopted on the basis of art. 13 TCE (now art. 19 TFUE) that enables the European Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The adoption of the Directive made “a clear and unequivocal statement to the Union's own citizens and other persons within the territory, to its Member States and future Member States, and to the wider world, that the European Union is committed to the elimination of racism and racial or ethnic discrimination”.²⁰⁹

²⁰⁹ E. Howard, *The EU Race Directive: Its Symbolic Value - Its Only Value?*, in *International Journal of Discrimination and the Law*, 6, 2, 2004, p. 141.

Apart from its symbolic value, the Directive was acknowledged as an important step in moving forward the European agenda on fighting discrimination.²¹⁰

The Directive has a significantly broad scope of application. It applies to all persons, as regards both the public and private sectors, in relation to access to employment and working conditions, vocational training, social protection, including social security and healthcare, social advantages, education, access to goods and services, including housing.

Art. 2 defines the concept of discrimination. The RED applies with regard to four different forms of discrimination: direct, indirect, harassment and instruction to discriminate. In particular under the Directive, direct discrimination “shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin” and indirect discrimination “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

In view to ensuring the effective enforcement of the prohibition to discriminate, the Directive provides a number of obligations upon Member States concerning burden of proof, access to judicial and administrative procedures, assistance from civil society organizations, effective remedies and equality bodies.

²¹⁰ E. Guild, *The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations*, in *Industrial Law Journal*, 2000, 29, p. 416; S. Fredman, *Equality: A New Generation?*, in *Industrial Law Journal* 30, n. 2, 2001, p. 145; E. Howard, *Anti Race Discrimination Measures in Europe: An Attack on Two Fronts*, 2005, 11, 4 p. 468; D. Schiek, *A New Framework on Equal Treatment of Persons in EC Law in European Law Journal?*, 2002, 8, p. 290. L. Waddington and M. Bell, *More Equal than Others: Distinguishing European Union Equality Directives in Common Market Law Review* 38, 3 2001, p. 587. M. Bell, *Antidiscrimination law in the European Union*, Oxford University Press, 2002.

Art. 8 requires Member States, in accordance with their national judicial systems, to ensure that the burden of proof is shared between the claimant and the respondent in cases of discrimination. In other words, when the claimant is able to bring before the Court facts from which it may be presumed that there has been direct or indirect discrimination, it should be for the respondent to prove that there has been no breach of the principle of equal treatment.

Finally, art. 15 specifies that Member States should adopt adequate remedies and sanctions in case of violation of the national provisions adopted pursuant to the Directive. The sanctions, which may comprise the payment of compensation to the victim, should be effective, proportionate and dissuasive. To be effective, remedies and sanctions must achieve the desired outcome; to be proportionate, they must adequately reflect the gravity, nature and extent of the loss and/or harm; and to be dissuasive, sanctions must deter future acts of discrimination.²¹¹

As to access to justice, art. 7 of the Directive provides an obligation upon Member States to ensure that judicial and/or administrative procedures are available to victims to enforce their right not to be discriminated against.

In addition, under the same article, Member States are obliged to allow that associations, organizations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of the RED are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under the Directive. The CJEU has clarified in the *Feryn* case that Member States may also adopt more generous rules of legal standing, allowing claims to be brought without the permission of the victim,

²¹¹ C. Tobler, *Remedies and sanctions in EC non discrimination law*, European Commission, 2005; B. Cohen, *Remedies and sanctions for discrimination in working life under the EC antidiscrimination directives*, in J. Cormack, *Discrimination in Working Life, Remedies and Enforcement* – Report of the 4th specialized equality bodies experts’ meeting, 2014, p.17.

or even where no identifiable victim exists²¹².

Finally, art. 13 requires the establishment of a body or bodies responsible for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. Such bodies, which may form part of national human rights agencies, should offer assistance to victims in pursuing their complaints, conduct independent surveys and publish independent reports and make recommendations on any issue relating to discrimination.²¹³

Analysing the policy making process of the RED, Evans Case and Givens argue that the adoption of some of the provisions of the latter were part of a deliberate strategy to promote strategic litigation at the EU and domestic level²¹⁴.

Whereas acknowledging that the adoption of Directive was promoted by politicians and that the timing of the adoption is clearly related to contemporaneous events, such as Haider's extreme right-wing becoming part of the governing coalition in Austria and the domination of centre left political parties in Europe, they conclude that national politicians were not the proponents of key measures in RED that would open opportunities for litigation at the EU and domestic level. On the contrary, according to their findings, national representatives sought to weaken several provisions of the draft directive on legal standing and national enforcement bodies.

They argue that the "Starting Line Group" (SLG), a network of nearly 400 organizations with special expertise in antidiscrimination law, working with the support of the European Parliament and later of the European Commission, was the

²¹² Judgment of 10 July 2008, *Feryn* C-54/07, EU:C:2008:397.

²¹³ H.M.T. Holtmaat, *Catalysts for Change? Equality bodies according to Directive 2000/43/EC*, European Commission, 2007; C. O' Cinneide, *The racial equality directive as a basis for strategic enforcement*, in J. Cormack, *Strategic enforcement and the EC equal treatment directives. Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialized bodies*, Migration Policy Group (MPG), 2004; K. Yesilkagit, and B. Snijders, *Between Impartiality and Responsiveness: Equality Bodies and Practices of Independence*, Equinet, 2008.

²¹⁴ E. Case and T. Givens, *Re-Engineering*, cit. p. 222.

key actor in this regard²¹⁵. Whereas it is well known that part of the innovative provisions in the RED clearly capitalizes on the evolution of the ECJ jurisprudence and the sex discrimination Directives, the introduction of key provisions like those on legal standing and national enforcement bodies are found to have their roots in the SLG's 1993 and 1998 draft directives.

Overall, the RED clearly contributes to opening opportunities for litigation, at the EU and domestic level. This appears with definite evidence if we look at the provisions of the Directive through the lenses of the LOS approach.

In particular as far as availability of legal resources or legal stock is concerned, the RED introduces three key provisions: art. 3 significantly expands the scope of the prohibition of discrimination; art. 8 shifts the burden of proof once sufficient evidence has been presented to establish a presumption of discriminatory behaviour; art. 2 provides an objective definition of discrimination clearly excluding any relevance of the intent to discriminate and broadens, as far as direct discrimination is concerned the "area" of available comparators. In addition it introduces a new notion of indirect discrimination that "is designed to be wider and less dependent on the production of statistical evidence"²¹⁶.

As to "access to courts", the provision requiring Member States to ensure that associations, organizations or other legal entities may engage, either on behalf of or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under the Directive together with the broad interpretation of the clause in *Feryn* clearly opens

²¹⁵ The influence of the Starting Line Group in the process that brought to the adoption of the Directive is fully acknowledged among legal scholars. See in this regard M. Bell, *Anti-Discrimination Law and the European Union*, Oxford University Press, 2002, and *Beyond European Labour Law? Reflections on the EU Racial Equality Directive* in *European Law Journal* 8, 3, 2002, p. 384; See also I. Chopin and J.Niessen (eds.) *The Starting Line and the Incorporation of the Racial Equality Directive into the National Laws of the EU Member States and Accession States*, Migration Policy Group, 2001.

²¹⁶ E. Case and T. Givens, *Re-Engineering*, cit. p. 227.

opportunities for organizations fighting discrimination to enforce and mobilise around the newly adopted provision of discrimination.

Finally, art. 13 requiring the establishment of national enforcement institutions aiming, besides conducting research on discrimination, to providing assistance to victims of discrimination in pursuing their complaints might potentially contribute to the creation of public bodies supporting the enforcement of the prohibition of discrimination with financial resources or legal expertise and therefore contributing to liberalise the legal opportunity structure as far as access to resources for litigation is concerned.

As Case and Givens note, quoting Epp, the provision on legal standing and the one on public enforcement bodies “potentially lay the groundwork for the development of a ‘support structure’ for legal mobilization”.²¹⁷

Whereas the material scope of the RED, as defined in art. 3 (1), is quite far-reaching and satisfactory in terms of protection against discriminatory behaviour. It should be noted however that art. 3(2) establishes a relevant as well as controversial limitation. The Directive, as is well known, specifies that it “does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal *status* of the third-country nationals and stateless persons concerned”.

The Directive itself has been subject to severe criticism as a result of such limitation.²¹⁸ It has been suggested that the limitation clause should be interpreted restrictively as allowing only differences of treatment concerning the entry, residence and legal *status*

²¹⁷ *Ibid*, p. 228

²¹⁸ B. Hepple, *Race and law in fortress Europe* in *The Modern Law Review*, 67, 1, 2004, p. 1; S. McNerney, *Legal Protection against Discrimination Based on Racial and Ethnic Origin Under European Union Law - Necessary but Not Sufficient?*, in *International Journal of Discrimination and the Law*, 6, 1, 2003, p. 3; L. Roseberry, *Like Carrying Water With a Sieve: An Analysis of the New EC Race Discrimination Directive From a Comparative Legal Historical Perspective*, in *Julebog*, 2001, p. 247.

of TCNs rather than any difference of treatment based on nationality.²¹⁹ Furthermore differences on grounds of nationality could fall under the prohibition of discrimination based on racial and ethnic origin in cases in which nationality is used as a proxy for racial and ethnic origin or where they result in a particular disadvantage for people belonging to a particular ethnic group or affect them disproportionately.²²⁰

In its first decision on the RED, the European Court of Justice appeared willing to adopt a narrow interpretation of art. 3(2). As is well known the *Feryn*²²¹ case concerned a number public statements made by one of the directors of the company announcing that the firm intended to recruit fitters but that was not willing to employ “Moroccans” because its customers were reluctant to give immigrants access to their residences. Though the statement referred to nationality, the Court considered it amounted to direct racial and ethnic discrimination, though it did argue on the relation between the prohibitions of discrimination under art. 2 and art. 3(2).

Other EU equality clauses.

In the Tampere Conclusions in 1999, Member States highlighted for the first time the importance of fair and equal treatment of TCNs legally residing in the EU²²². According to such conclusions, TCNs legally residing in Europe should be granted rights as near as possible to those to EU citizens in view to their integration in the EU. Notwithstanding the emphasis, the aftermath of the Tampere Summit proved

²¹⁹ M. Bell, *Meeting the Challenge? A comparison between the EU Racial Equality Directive and the Starting Line*, in I. Chopin, and J. Niessen (eds.), *The Starting Line and the Incorporation of the Racial Equality Directive into the National Laws of the EU Member States and Accession States*, Commission for Racial Equality/ Migration Policy Group, 2001, p. 22.

²²⁰ O. De Schutter, *Links between migration and discrimination*, European Commission, 2009; C. Favilli, *La non discriminazione nell’Unione europea e l’applicazione ai cittadini di paesi terzi*, in D. Tega (ed.) *Le Discriminazioni Razziali Ed Etniche. Profili Giuridici Di Tutela*, Armando Editore, 2011 p. 46; G. N. Toggenburg, *The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe*, in *European Yearbook on Minority Issues*, 2001, p. 231, S. B Lahuerta, *Race equality and TCNs, or how to fight discrimination with a discriminatory law*, in *European Law Journal* 15, 6, 2009, p. 738.

²²¹ Ft. 212.

²²² Tampere European Council, 15 -16 October 1999, Presidency Conclusions SN 200/99.

consensus among Member States was illusory, at least with regard to the conditions of entry and residence of third-country nationals for employment reasons.²²³

While it is acknowledged that the Tampere objectives have gradually become “shared nostalgia” and the goal of giving TCNs legally residing in EU equal rights compared to EU citizens has been set aside²²⁴, in the last years the engagement of the EU legislature on equality and legal *status* of TCNs has become increasingly tangible.

Such activism has translated in a number of equality clauses referring to specific categories of TCNs. This has resulted in a highly fragmented framework, which on the one hand poses serious challenges as to its interpretation, and on the other raises strong criticism as to the merits of the approach followed by the legislature.²²⁵

Furthermore, the equality clauses leave Member States a wide margin of discretionary power to limit the scope of equality²²⁶. This is particularly clear as far as social security and social benefits are concerned.

Finally, it should be noted that unlike the prohibition of discrimination such clauses are devoid of enforcement mechanisms.

The first European Directives to introduce equality clauses were: Directive 2003/109/EC²²⁷ concerning the *status* of third-country nationals who are long-term

²²³ L. Calafà, *Migrazione economica*, cit. p. 30-31.

²²⁴ E. Brouwer and K. de Vries, *Third-Country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach*, in M. van den Brink, S. Burri and J. Goldschmidt, *Equality and Human Rights: Nothing but Trouble?*, Netherlands Institute of Human Rights, Utrecht University, 2015, p. 123, quoting S. Carrera, *Integration of Immigrants in EU Law and Policy*, in L. Azoulay, and K. M. de Vries, K.M. (eds.), *EU Migration Law. Legal Complexities and Political Rationales*, Oxford University Press, Oxford, 2014.

²²⁵ L. Calafà, *Migrazione economica*, cit. p. 42.

²²⁶ S. Morano Foadi and K. de Vries, *The equality clauses in the EU directives on non-discrimination and migration/asylum* in S. Morano Foadi, and M. Malena (eds.) *Integration for Third Country Nationals in the European Union: The Equality Challenge*, Edward Elgar Publishing, 2012, p. 16; E. Brouwer and K. de Vries, *Third-Country Nationals*, cit. p. 136.

²²⁷ Implemented through Legislative Decree n. 3/2007.

residents; Directive 2004/83/EC²²⁸ on refugees and beneficiaries of subsidiary protection and Directive 2004/38/EC²²⁹ establishing the conditions governing the exercise of the right to free movement and residence within the territory of the Member States by EU citizens and their family members.

Art. 11 of the Directive 2003/109/EC establishes that long-term residents shall enjoy equal treatment among the areas identified by the article: (a) access to employment and self-employed activity, provided that such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration; (b) education and vocational training, including study grants in accordance with national law; (d) social security, social assistance and social protection as defined by national law; (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing.

The same article then specifies that Member States may limit equal treatment in respect of social assistance and social protection to core benefits.

In this regard, the European Court of Justice, besides clarifying that the equal treatment clause has immediate and direct effect in national law and therefore requires the disapplication of conflicting provisions, has emphasized that, any exception to the right to equal treatment should be interpreted strictly.²³⁰

Art. 28 Directive 2004/83/EC provides the obligation for Member States to ensure that beneficiaries of refugee or subsidiary protection *status* receive, in the Member States that has granted international protection, the necessary social assistance and access to healthcare under the same conditions as nationals. By exception, Member States may limit social assistance granted to beneficiaries of subsidiary protection (only to them; it

²²⁸ Implemented through Legislative Decree n. 251/2007.

²²⁹ Implemented through Legislative Decree n. 30/2007.

²³⁰ Judgment of 24 April 2012, *Kamberaj* C-571/10, EU:C:2012:233. For an analysis of the case see K. De Vries, *Towards integration and Equality for Third Country Nationals? Reflections on Kamberaj*, in *European Law Review*, 38, 2, 2013, p. 248.

does not apply to refugees) to core benefits, which will then be provided at the same levels and under the same eligibility conditions applying to nationals. In addition the Directive requires Member States to authorize beneficiaries of refugee *status* or subsidiary protection *status* to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service.

Art. 24 Directive 2004/38/EC reminds that all European Union citizens residing on the basis of the Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The Directive then specifies that equality shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence. The Directive specifies that this right is subject to limitations only with reference to the first three months of residence as regards access to social assistance.

In 2009 the EU has adopted the Blue Card Directive²³¹ which ensures equal treatment as regards working conditions, including payment and dismissal, access to goods and services and the supply of goods and services made available to the public, including procedures for obtaining housing, education and vocational training. However, the right to equal treatment can be limited with regard to study and maintenance grants and loans or other grants and loans regarding secondary and higher education and vocational training, and procedures for obtaining housing. In addition the right to equal treatment may be restricted if the cardholder moves to a second Member State.

More recently Directive 2011/98/UE²³² has been approved. The Directive regulates a single application procedure for a permit of stay for third-country nationals residing and working in the territory of a Member State while aiming to guarantee the latter a common set of rights.²³³

²³¹ Implemented through Legislative Decree n. 108/2012

²³² Implemented through Legislative Decree n. 21/2014

²³³ The Directive nevertheless excludes from its scope of application specific categories of workers such as seasonal workers, self-employed TCNs and posted workers.

Art. 12 establishes that third-country nationals residing in a Member State enjoy the right to equal treatment with regard to working conditions, including pay and dismissal as well as health and safety at the workplace; branches of social security, as defined in Regulation (EC) n. 883/2004; access to goods and services and the supply of goods and services made available to the public including procedures for obtaining housing as provided by national law.

The article itself provides the possibility for Member States to limit access to social security although such option cannot be used to limit equality of treatment for third-country workers who are in employment or who have been employed for a minimum period of six months and who are registered as unemployed.

Finally in 2014, the EU legislature approved Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. Art. 23 grants seasonal workers a lower standard of equality by allowing Member States to restrict equality as far as access to social security is concerned to exclude seasonal workers from family benefits and unemployment benefits and failing to include housing among the areas covered by equality.

In addition the EU has concluded a number of cooperation or association agreements with third countries. Such agreements are particularly important since they commonly include equality clauses granting to the national of the third country equality of treatment with nationals in areas such as employment, employment conditions and social security. The agreement establishing an Association between the EU and Turkey and the Euro-Mediterranean Agreements with Lebanon, Algeria, Egypt, Jordan, Israel, Morocco and Tunisia all prohibit differential treatment on grounds of nationality with reference to the above-mentioned areas.²³⁴ As to the legal effect of such clauses, it should be considered that the European Court of Justice case law is well established as to the fact that these provisions are of immediate and direct effect in national law,

²³⁴ D. Thym, and M. Zoeteweyj-Turhan, *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship*. Brill/Nijhoff, 2015.

therefore requiring the disapplication of incompatible national provisions²³⁵. The point is crucial since the beneficiaries of such clauses are entitled as a consequence to rely on the clause before the national courts in order to invoke the disapplication of national provisions violating the equality clause.

The implementation of the RED.

The RED was implemented at the domestic level through the adoption of Legislative Decree n. 215/03.²³⁶ Its implementation liberalised legal opportunity structures at the domestic level fulfilling and, to some extent, going beyond the expectations of its promoters.

Art. 2 of the Legislative Decree introduces new definitions of discriminatory behaviour literally reproducing the definitions provided by the Directive. It also, albeit timidly, attempts to coordinate the new prohibition of discrimination with the already existing prohibition of discrimination under art. 43 TUI, which as specified above, explicitly includes nationality among the prohibited factors. Art. 2 of the implementing decree refers to art. 43 TUI clarifying that “the present definition is without prejudice to art. 43 (1) and (2) of TUI, concerning immigration and the *status* of foreigners.”

With regard to the scope of application, art. 3 defines the material and personal scope of the implementing decree in the same terms as the Directive. Therefore the prohibition of discrimination applies to access to employment and working conditions, vocational training, social protection, including social security and healthcare, social advantages, education, access to goods and services, including housing. It excludes from its scope differences of treatment based on nationality though it specifically refers, in addition to conditions relating entry, residence and any other treatment arising from the legal *status* of TCNs, also to access to occupation and social welfare.

As far as enforcement is concerned, the implementing decree referred to art. 44 TUI, extending the application of the special proceeding under the TUI to the new

²³⁵ Judgment of the Court of 31 January 1991, *Kziber* C-18/90, EU:C:1991:36.

²³⁶ D. Gottardi, *Le discriminazioni basate cit.*

prohibition of discrimination.

Furthermore, it replicated the rule concerning the burden of proof under art. 44 TUI, stating “the complainant can prove the existence of discrimination by providing weighty, accurate and consistent facts”, here included statistical data that will be considered by the judge under the civil procedure rules on simple presumptions.

It was only after the activation by the European Commission of an infringement procedure against Italy²³⁷ that the provision of the burden of proof changed. Law n. 101/2008 subsequently specified that once the plaintiff provides facts, here included statistical data, such as to establish, in precise and consistent terms, the presumption of acts, agreements or discriminatory behaviour, it is for the respondent to prove there is no discrimination.

The decree confirmed the provisions of the TUI on remedies. It provided the power for the judge to condemn the perpetrator to pay damages, here included moral damages, and order the latter to end discriminatory behaviour and remove its effects, and in view to preventing discrimination from occurring in the future to impose the adoption of a plan of removal.

Since 2011, as part of an overall reform to simplify the rules of civil procedure, the legislature has created a new proceeding on discrimination, applying to both the TUI and the implementing decree. Art. 28 Legislative Decree n. 150/2011 reorganizes the previous regulations with one substantial innovation: it extends the rules on burden of proof under Legislative Decree n. 215/03 to the prohibition of discrimination on grounds of nationality under the TUI.

Art. 5 of the implementing decree besides establishing that civil society organizations having an interest in enforcing the prohibition of discrimination can act on behalf and in support of the complainant, with his or her approval, provides the possibility for such organizations to act in their own name in cases of collective discrimination where

²³⁷ Procedure n. 2005/2358 and n. 2006/2441, respectively, with reference to implementation of Directive 2000/43/EC and Directive 2000/78/EC

the victims of discriminatory behaviour are not subject to immediate and ready identification therefore providing legal standing to organizations other than trade union organizations.

Legal standing is granted upon the condition that civil society organizations are included in a special register approved by Decree of the Minister of Labour and Social Policy and the Minister for Equal Opportunities. Although the implementing decree was adopted in 2003, the Department of Equal Opportunities established the register only in December 2005, almost three years later.²³⁸ Following its adoption the register was updated for the first time only in April 2010.

Art. 5 limits the possibility of registration for the purposes of legal standing to civil society organizations included in the register of organizations carrying activities aimed at promoting social integration for TCNs, which was established under the TUI²³⁹ and civil society organizations engaged in fighting discrimination that are included in the register established under art. 6 of the implementing decree. The latter subjects the inclusion in the register to a number of requirements relating to the statute of the organization, financial transparency and continuity of its activities, criminal record of the legal representatives and potential conflict of interest.

The implementing decree establishes UNAR, the National Office against racial discrimination²⁴⁰. UNAR, which is attached to the Prime Minister Office, is under the institutional obligation to monitor and promote compliance with the principle of equality. The implementing decree specifies the Office should provide assistance to victims of discrimination along judicial and/or administrative procedures also through the submission to the Court of relevant information or observations on the merits of the case; investigate cases of discrimination; promote the adoption, by public and private entities, of specific measures, including positive action, aiming to prevent or compensate disadvantages linked to racial or ethnic origin; promote knowledge and

²³⁸ Equal Opportunities Department, Decree. 16 dicembre 2005.

²³⁹ Presidential Decree n. 394/1999 implementing the TUI.

²⁴⁰ <http://www.unar.it/unar/portal/?lang=it>

research on discrimination and finally race awareness among the public. The obligation to assist victims of discrimination has been intended by UNAR, until very recently, as limited to submitting a “pre-litigation opinion” on the merit of the discriminatory conduct allegations rather than providing the victim with the necessary legal expertise to file the claim. In November 2014, UNAR established a solidarity fund aiming to financially support legal claims concerning discrimination by individual victims, civil society organizations that are granted legal standing under art. 5 Legislative Decree 215/03 and trade union organizations. As far as this aspect concerns specifically access to resources it will be considered in the following paragraph.

5. Resources for litigation

Art. 44 TUI and later art. 28 Legislative Decree 150/2011 provide the possibility for the victim of discrimination to personally stand before the court. Although the provision might appear revolutionary and indeed there have been cases in which allowing the claimant to personally stand before the court has opened the door of the justice system to the most vulnerable groups in society²⁴¹, it should be noted that the highly technical nature of antidiscrimination law and civil procedure law together with the reasons that often dissuade victims of discrimination even in cases in which access to legal expertise is provided, are very much likely to seriously limit the application of the provision. So far there is no knowledge of cases in which the claimant stood before the court without being represented by a lawyer.

Scholars of legal mobilisation have repeatedly highlighted the importance of access to resources to legal expertise as one of the main factors explaining the emergence of litigation strategies.

From a LOS perspective fee shifting rules are considered crucial in this regard. According to art. 92 of the Italian Civil Procedure Code, the basic rule concerning cost and fee allocation is that the losing party has to reimburse all his or her opponent's

²⁴¹ B. M. Wilson and J. C. Rodríguez Cordero, *Legal Opportunity*, *cit.* p. 343.

expenses including court fees and lawyer's fees.

Fee shifting undoubtedly represents a key resource for legal actors and this is especially true if we consider the unequal distribution of resources that often characterizes parties in proceedings on discriminatory behaviour. There is however a flip side of the rule that scholars tend to ignore and it is related to the risk of being condemned to pay the defender's lawyer's fees and the impact such risk can have on the decision to engage in litigation. With the aim of covering situations in which such a consequence appears not to respond to justice, art. 92 of the Civil Procedure Code provides the possibility to derogate to the general rule allowing the judge to decide that each party should bear its own costs. According to the original version of the provision, the judge was allowed to decide in the aforesaid terms in two different cases: a split outcome or the presence of a "good cause". The wording of the clause allowed the judge enough discretion to decide that each party would have to pay its own attorney based on considerations concerning the behaviour of the parties and their impact on the duration and the course of the proceedings, but also in relation to equity reasons²⁴².

In Labour Courts, for example, judges commonly referred to the "nature of the dispute", "the different characteristics of the parties" or in general to their different personal and financial conditions, and finally to their position in the proceedings in order not to impose on the worker who had not succeeded in court the payment of the expenses of the winning party where such a consequence appeared unfair.²⁴³

The provision was amended in 2005 requiring the judge to explicitly state in the decision the "good cause" and subsequently in 2009 allowing the judge to derogate to the general rule only for "serious and exceptional reasons" clearly limiting the

²⁴² Court of Cassation n. 8540/2005 (in *Giuriprudenza Italiana*, 2, 2006, p. 236) recognized the judge wide discretionary powers in this regard stating that lower courts had no obligation to explicitly state the "good cause"; A. De Luca, *Italy: A Tale of Successful Resistance?*, in M. Reimann, *Cost and Fee Allocation in Civil Procedure. A comparative study*, Springer, 2012, p. 184.

²⁴³ A. Terzi, *La nuova disciplina delle spese processuali*, in *Questione Giustizia*, 2010, p. 164.

possibility to derogate the general rule for equity reasons. In 2014, the legislature replaced “serious and exceptional reasons” with reasons related to the “absolute novelty of the issues considered or overruling of precedents on the issues at stake”.

Whereas the above mentioned reforms consider the obligation to reimburse the opponent’s expenses mostly as a mechanism to sanction frivolous litigation and abuse of procedural rights, labour scholars are highlighting the risks it bears as to the enforcement of worker’s rights, arguing the reform is likely to discourage, besides frivolous litigation, also genuine cases.²⁴⁴

Indeed the prospective to win the case and benefit from fee shifting rule might promote access to justice, however on the other hand the risk of losing and being obliged to pay the others party’s lawyer might operate the other way around. The deterrent effect is particularly clear as far as employment or welfare or discrimination cases are concerned. The lower the resource available to the claimant, the higher is the risk of an unfavourable outcome.

As previously stated, art. 92 of the Civil Procedure Code was last reformed in 2014, therefore assessing its impact at the time being would be premature.²⁴⁵ However, it is clear that in this regard preventing the judge from deciding each party should pay his/her own lawyer based on equity reasons can be viewed as contributing to making the LOS more conservative.

The same trend can be observed in relation to regulations concerning courts fees, which represent the major cost of litigation after lawyer’s fees. Whereas in comparison with other EU countries court fees in Italy are considered to be modest, and therefore as having a lower impact in terms of access to justice, it appears that in case the current trend of increasing fees is confirmed in the year to come, there will be enough room to question such assessment.

²⁴⁴ A. Terzi, *Il trattamento delle spese processuali nel processo del lavoro dopo la riforma del 2014: dubbi di costituzionalità*, 2015.

²⁴⁵ There is a pending constitutional review proceeding on the provision. See the decision of the Court of Torino, 30 January 2016, in *GU, 1a Serie Speciale - Corte Costituzionale*, 28, 2016.

In 2002, Presidential Decree n.115/2002 (Justice Costs Consolidated Act) introduced the payment of the so called “contributo unificato”, a standard court fee due at the beginning of the proceedings.²⁴⁶ The amount of the fee is determined based on the value of the claim and the type of proceedings (in 2002, for example, the claimant was required to pay a fee of € 310 in civil proceedings with a value that from € 25.823 to € 51.646 or with indeterminable value).

The decree was without prejudice to the full exemption from court fees applying to “employment and welfare” proceedings, since the ‘70.²⁴⁷ The exemption for employment and welfare proceedings applied also to discrimination cases concerning access to employment or access to welfare. When this is the case, the claim is assigned to “employment and welfare” judges and is subject to the same obligations in terms of court fees.

The Justice Costs Consolidated Act was revised in 2011. The most significant changes concerned the exemption applying to employment and welfare proceedings. D.L. n. 98/2011 introduced a threshold income requiring the claimant, in case their family income exceeded the threshold (€31.884,48), to pay the minimum fee in welfare proceedings and half of the standard fee in employment proceedings (that is to say €37 and €225)²⁴⁸. With reference to appellate proceedings the “contributo unificato” is increased by half and is doubled in the proceedings before the Court of Cassation.²⁴⁹

Yet the exemption applies only with reference to individual claimants therefore civil society or trade unions organizations filing a discrimination claim concerning employment or welfare will be required, under any circumstances, to pay half of the

²⁴⁶ The previous regime was based on the payment of a stamp (of € 14.62) every four pages of the initial procedural act. See. D.P.R. 6/10/1972, n. 642.

²⁴⁷ Law n. 533/1973.

²⁴⁸ In 2015 the updated costs are: €259 (Court of First Instance), €388,50 (Court of Appeal) and €518 (Court of Cassation).

²⁴⁹ In addition, as provided by Law n. 183/2011, when the appeal is totally dismissed, the appealing party should pay an additional sum, equal to the “contributo unificato” due for the appeal.

standard fee.²⁵⁰

Likewise rules concerning fee shifting and court fees, regulations concerning legal aid potentially represent another key resource for legal mobilisation. Nevertheless, in the Italian case there are two main barriers to the impact of legal aid in this regard. The first concerns the limited scope of the benefit. Indeed it is granted only to those with annual income lower than € 11.528,41. The second one is related to lawyer's fees, which under the consolidated act are reduced by half as far as civil proceedings are concerned.

The above mentioned solidarity fund established by UNAR in November 2014 complements legal aid providing financial support to victims of discriminations that are unable to satisfy the threshold income requirement under the Justice Cost Consolidated Act. For civil society organizations that are granted legal standing under art. 5 Legislative Decree n. 215/03 and trade union organizations such condition does not apply. Whereas the Fund regulation does not provide a maximum income threshold, it establishes beneficiaries are entitled to receive a fixed amount of €600 euros for each level of the judicial proceedings. As in the case of the rules concerning derogation to fee shifting, the recent nature of the fund does not allow any assessment of its impact. Although it would be reasonable to expect that its effectiveness might be constrained by the provision limiting the benefit to €600, the establishment of the fund, may provide an additional resource for mobilisation around equality.

²⁵⁰ The applicant will be required to pay the same amount (half of the standard fee) in cases of discrimination not concerning employment or access to welfare, since there is a 50 % reduction for the “processo di cognizione sommaria”

Chapter III

INTO THE COURTS

1. Forging opportunities.

Nationality under art. 3(2) the RED.

Recital 3 of the Directive reminds that the right to equality before the law and protection against discrimination for all persons constitutes a universal right as recognized *inter alia* by the International Convention on the Elimination of all Forms of Racial Discrimination and by the European Convention on Human Rights, to which all Member States are signatories.

Notwithstanding the emphatic proclamation of the right to equality as a universal right, the Directive suffers serious shortcomings in terms of ensuring protection against discrimination for all persons in Europe.

As previously noted art. 3(2) of the RED specifies that the Directive “does not cover differences of treatment based on nationality” and “is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal *status* of the third-country nationals and stateless persons concerned”.

The exclusion is reiterated in recital 13 of the Directive, which on the one hand clarifies that the prohibition of discrimination “should also apply to nationals of third

countries” and on the other confirms “differences of treatment based on nationality” and provisions “governing the entry and residence of third-country nationals and their access to employment and to occupation” are not included within the scope of the Directive.

It follows that the Directive does protect TCNs from discrimination on grounds of race and ethnic origin but differences of treatment based on nationality²⁵¹ such as those between TCNs and nationals of one Member State and in particular those concerning entry and residence and “any other treatment” arising from their legal *status* as TCNs are not covered for the purposes of the RED.

The exclusion of nationality from the scope of the RED has been considered, together with the absence of positive social, economic and cultural obligations, as one of the main factors limiting its effectiveness in promoting a “pluralistic culture of human rights in Europe.”²⁵² The effects of the exclusion, according to Hepple, are felt disproportionately by ethnic minorities who make up the majority of TCNs. Their inferior legal *status* has serious repercussion on the perception of ethnic minorities generally, and on their integration”. “Inhumane restrictions on welfare benefits, harsh policies against family reunification, and marginalization in the labour market” he observes “prevent the realization of the principle of equality which must be the foundation of all integration policies”²⁵³.

To this day, whereas the EU has taken important steps to overcome the exclusion of TCNs and align their legal *status* to that of nationals of Member States, these developments do not ensure full equality of treatment²⁵⁴ and are not backed by the

²⁵¹ According to De Schutter, differences of treatment on grounds of nationality fall under three categories: such differences may be created (a) between the nationals of one Member State and foreigners; (b) between nationals of one Member State and nationals of other EU Member States on the one hand and nationals of third countries on the other; and (c) between nationals of different third countries. O. De Schutter, *Links between migration cit.*, p. 9.

²⁵² B. Hepple, *Race and law in, cit.*, p. 3.

²⁵³ *Ibid.* p. 7.

²⁵⁴ O. De Schutter, *Links between migration cit.*, p. 8

enforcement mechanisms the RED provides.

Fighting discrimination based on race and ethnic origin, while excluding nationality from its scope of application, has been compellingly compared to “(like) carrying water with a sieve”, given the existence of an obvious link between racial and ethnic discrimination and migrant communities.²⁵⁵

According to another critic, despite the formal inclusion of TCNs within the personal scope of the Directive, art. 3(2) fails to recognize “the specific nature of the racist constructs surrounding T.C.N”, explicitly excluding the “distinctions most relevant to the plight of T.C.N. as members of racial or ethnic minorities”. The mere possibility that T.C.N. will be protected under the Directive, warns McInerney “is insufficient legal protection against the specific and multiple forms of race discrimination to which they remain susceptible.”²⁵⁶

Yet, the exact implications of article 3 (2) are still far from being clear. The language used in the article is rather loose and ambiguous. Art. 3(2) consists of two parts. The first one refers to any difference of treatment based on nationality whereas the second to differences of treatment which are based on nationality and concern provisions and conditions relating to the entry, residence and any treatment which arises from the legal *status* of the TCNs and stateless persons concerned.

On a literal reading, the first part of the article appears to “screen” any difference of treatment based on nationality from being considered under the RED. If this were the case, the second part of the article would have no purpose other than that of reiterating the irrelevance under the RED of differences of treatment targeting TCNs, and are therefore based on their nationality, with regard to the concerned areas.

Since such an interpretation would ultimately result in making the second part of art. 3(2) completely superfluous, the latter should be rather understood as specifying the areas in which differences of treatment based on nationality are indeed “screened”

²⁵⁵ L. Roseberry, *Like Carrying Water*, *cit.* p. 247

²⁵⁶ S. McInerney, *Legal Protection against*, *cit.* p. 14.

form the prohibition of discrimination on grounds of race and ethnic origin.

It follows that art. 3(2) does not exclude from the scope of the Directive any difference of treatment based on nationality but only those concerning the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and any treatment which arises from the legal *status* of the third-country nationals and stateless persons concerned.

This is not to say that nationality should be included on its own as a protected ground under the Directive, but that outside of the areas specifically mentioned, art. 3(2) does not preclude from considering whether a difference of treatment based on nationality results in a violation of the prohibition of direct and indirect discrimination based on race and ethnic origin. As Hepple notes “nationality discrimination may simply be the cloak for direct or indirect discrimination on grounds of ethnic origin.”²⁵⁷

In addition, a different interpretation of the provision would conflict with the objective of effectively fighting discrimination based on ethnic origin, let alone with the universal nature of the right not to be discriminated and the legal principle according to which derogations to such right should be interpreted restrictively.

This potential conflict appears with evidence if we investigate the meaning of race and ethnic origin under the RED. As Gerards notes the definition of the prohibited grounds is key to defining the scope of application of the prohibition of discrimination²⁵⁸. The scope of the RED, therefore, will be more or less inclusive based on the definition of race and ethnic origin.

As known the Directive is of little help in this regard since it does not provide any definition of the two concepts, apart from making explicit in recital 7 that “the European Union rejects theories which attempt to determine the existence of separate human races and the use of the term “racial origin” in this Directive does not imply an acceptance of such theories.”

²⁵⁷ B. Hepple, *Race and law in, cit.*, p. 6.

²⁵⁸ J. H. Gerards, *The Grounds of Discrimination*, 2007, p. 33

Distinguishing between race and ethnic origin and nationality is anything but an easy task. Perpetrators do not usually name the ground and it is quite common that TCNs belong to different overlapping groups, making it difficult to draw a straight line between discrimination based on nationality (not protected) and racial and ethnic discrimination (protected).²⁵⁹

In this regard, it has been noticed that such distinction may be even more challenging in some countries compared to others. In countries with relatively recent experiences of mass migration and naturalization policies, which are designed to withhold citizenship, such as the case of Italy, is much more likely that nationality, race and ethnic origin will overlap.²⁶⁰

Defining race and ethnic origin isn't an easy task either. Whereas nationality is commonly understood as referring to the link existing between the state and individual, the meaning of race and ethnic origin tends to be blurred. It could not be otherwise. Race and ethnic origin are social constructs, which vary across time and space. "Race and ethnic groups, like nations, are imagined communities. People are socially defined as belonging to particular ethnic or racial groups, either in terms of definitions employed by others, or definitions which members of particular ethnic groups develop for themselves".²⁶¹

Before the eighteenth century, the term race was used to denote "nothing more than a group of people with a common line of descent, a common ancestry".²⁶² It was only later on that race assumed a biological connotation and was linked to a hierarchy between the races and therefore "used to justify exclusion, subordination and even

²⁵⁹ S. B Lahuerta, *Race equality and TCNs, cit.*, p. 739.

²⁶⁰ C. Favilli, *La non discriminazione, cit.*, p. 52; In this regard, see the data provided in M. Bell, *Racism and Equality in the European Union*, Oxford University Press, 2008, p. 18.

²⁶¹ O. De Schutter, *Links between migration cit.*, p. 19 quoting M. Bulmer and J. Solomos, *Introduction: Re-thinking Ethnic and Racial Studies*, in *Ethnic and Racial Studies*, 21, 5, 1998 p. 822

²⁶² E. Howard, *Race and Racism: Why Does European Law Have Difficulties with Definitions?* in *The International Journal of Comparative Labour Law and Industrial Relations* 24, 1, 2008, p. 10.

extermination of certain groups that were considered to be inferior”²⁶³.

Although theories about the biological existence of races have been largely disproved since the ‘30, race is still very much present in the public discourse and everyday life. It is commonly used to refer to visible physical differences, and irrespective of whether it is believed to exist or not in a biological sense, it is still almost inextricably linked to the same idea of hierarchy.²⁶⁴

Ethnicity on the other hand, although often used together with the term race and indeed in many aspects overlapping with the former, appears to refer more to cultural rather than physical differences. Therefore it is related to membership of a group that shares certain cultural traits.²⁶⁵

Whereas it has been suggested that we should be careful in drawing clear-cut distinctions between race and ethnic origin since it would ultimately have the effect of validating a biological understanding of race in contrast to the cultural understanding of ethnic origin, the fact that the RED mentions ethnic origin along race prevents from considering the two terms as synonyms²⁶⁶. On this account, the use of race together with ethnic origin should be interpreted as covering under the prohibition of discrimination differences of treatment based on physical traits as well as differences of treatment based on cultural traits.

The difference between race and ethnic origin is confirmed by the European Court of Justice in the first decision ever addressing the meaning of ethnic origin for the purposes of the RED. In the *Chez* judgement²⁶⁷ the Court, in considering whether

²⁶³ *Ibidem*

²⁶⁴ E. Howard, *Race and Racism, cit.*, p. 10.

²⁶⁵ As Bell notes “pinning down the limits to ethnicity has troubled courts and law-makers in various Member States”. In the UK, for example Sikhs and Jews have been accepted as ethnic groups, whereas Rastafarians have not. In the Netherlands, case law from the Equal Treatment Commission has recognized that discrimination related to ethnic origin can cover Jews and, in certain circumstances, Rastafarians and Muslims. M. Bell, *Racism and Equality, cit.* p. 10.

²⁶⁶ O. De Schutter, *Links between migration cit.*, p. 20.

²⁶⁷ Judgment of 16 July 2015, *CHEZ* C-83/14, EU:C:2015:480

Roma are an ethnic group for the purposes of the RED notably states that the concept of ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds. In doing so the ECJ explicitly refers to the ECtHR case law on art. 14 ECHR. In a well-established line of case law, the latter has repeatedly observed that “ethnicity and race are related and overlapping concepts” and that “whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds”.²⁶⁸

In providing a “geographically sensible” definition of ethnicity the two courts strongly point to cultural markers such as nationality, language and religion.²⁶⁹ On this account, it can be argued that both cases in which nationality is used as a proxy for ethnic origin and cases of differential treatment genuinely based on nationality which put persons of a racial or ethnic origin at a particular disadvantage or affect them disproportionately should be considered under the prohibition of discrimination on grounds of ethnic origin. Whereas the first calls into question the prohibition of direct discrimination, the second should be considered under the prohibition of indirect discrimination²⁷⁰.

Several scholars have called for a consistent interpretation of the RED, in line with this argument. Guild points out that equality law must not accept as being beyond its reach discrimination that has as an essential element differential treatment on grounds of race or religion only because it has been formally categorized as nationality

²⁶⁸ ECtHR, *Timishev v. Russia*, 13 December 2011, Appl. nn 55762/00 and 55974/00, paragraph 55.

²⁶⁹ M. Bell, *Racism and Equality*, cit.p. 25.

²⁷⁰ For De Schutter these are both forms of indirect discrimination. See O. De Schutter, *Links between migration cit.*, p. 8. For a discussion on the issue see M. Ambrus, M. J. Busstra, and K. Henrard, *The Racial Equality Directive and Effective Protection Against Discrimination: Mismatches Between the Substantive Law and its Application*, in *Erasmus Law Review*, 3, 3, 2010, p. 165.

discrimination”²⁷¹. Likewise Lahuerta insists that a broad interpretation of the concept of racial discrimination would allow to consider that racial discrimination ‘which is presented as’ religion or nationality discrimination falls within the scope of the RED.²⁷²

De Schutter considers that art. 3(2) does not necessarily imply that indirect discrimination on grounds of race and ethnic origin is not prohibited for the simple reason that it results from a difference of treatment based on nationality,²⁷³ while adding that a reading of the Directives adopted on the basis of art. 13 in accordance with the developments in international human rights law would certainly favour an interpretation of the clause according to which it does not exclude challenging nationality based differences of treatment when they amount to indirect discrimination on grounds of race and ethnic origin or religion.²⁷⁴ For Bell, an interpretation of art. 3(2) such as to exclude from the scope of the directive any treatment based on nationality, where such treatment is also indirect racial discrimination, raises a potential conflict between art. 3(2) and art. 2(2)(b).²⁷⁵

This is, on the other hand, also the position of the European Commission which explicitly considers in its Report on the application of the RED, that “Directive 2000/43/EC does not cover discrimination on the basis of nationality as such (unless differentiation on the basis of nationality or language turns out to be indirect discrimination on the basis of ethnic origin)”²⁷⁶.

²⁷¹ E. Guild, *The Legal Elements of European Identity. EU Citizenship and Migration Law*, Kluwer Law International, 2004, p. 250.

²⁷² S. B Lahuerta, *Race equality and TCNs*, *cit.*, p. 739.

²⁷³ O. De Schutter, *Links between migration* *cit.*, p. 28.

²⁷⁴ *Ibid*, p.78 see also C. Favilli, *La non discriminazione*, *cit.*, p. 52; G. N. Toggenburg, *The Race Directive*, p. 236.

²⁷⁵ M. Bell, *Meeting the Challenge*, *cit.*, p. 31.

²⁷⁶ European Commission, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and

Any treatment?

These considerations set the ground for reflecting on a second interpretative issue. If art. 3(2) has to be interpreted as not “safeguarding” any difference of treatment based on nationality but only those regarding the entry, residence and “any treatment” arising from the legal *status* of TCNs, what does “any treatment” stand for?

The vague reference to “any treatment” appears to imply that also TCNs that are already admitted in the EU do not enjoy protection against differential treatment arising from their legal *status* in any of the areas covered by the Directive even when it indirectly determines race and ethnic origin discrimination.

The adoption of art. 3(2) is commonly explained in the light of the concern of many Member States that the Directive would interfere with national regulations on border control and immigration policies.²⁷⁷ Interestingly, neither art. 3(2) nor recital 13 were included in the original proposal²⁷⁸. They were introduced during the negotiations, confirming that the regulation of migration was at the time of the adoption of the RED, and still is, a highly sensitive issue on which Member States are willing to preserve their control.

As Bell notes, based on information, which is available on the Council’s deliberations, it appears that pressure from Member States in this regard was specifically related to the fear that restrictions on access employment imposed by work permits could be challenged under the prohibition of indirect discrimination. On this account, he considers that the main aim of the provision is to protect Member States’ immigration law instruments, which regulate access to employment by TCNs.²⁷⁹

occupation (‘Employment Equality Directive’), 2014.

²⁷⁷ B. Hepple, *Race and law in, cit.*, p. 6.

²⁷⁸ E. Howard, *The EU Race Directive: Time for Change?*, in *International Journal of Discrimination and the Law* 8, 4, 2000, p. 244. She reports Member States insisted in the adoption of the clause not feeling reassured by the European Commission statement that immigration laws and border control were not included under the scope of the RED.

²⁷⁹ M. Bell, *Meeting the Challenge, cit.*, p. 31.

Interestingly the aforementioned recital 13, unlike art. 3(2), refers only to “access to employment or occupation” rather than to “any treatment” arising from their legal *status*.

A reading of the exclusion clause as limited to access to employment and occupation might find further support also in the light of the strict interaction between admission policies and the right of permanence of third country nationals on the one hand and being employed on the other hand. Apart from cases of family reunification and other more marginal hypothesis, having a job offer or being employed represents the main condition required for the purposes of being admitted in the EU and granted the right to stay.

Regardless of whether it is concluded that art 3(2) refers only to access to employment or that it refers to any treatment, including as such also access to welfare, the provision should at the most be intended as covering only differences of treatment that satisfy the following two conditions: are established by law and are strictly related to the legal *status* of TCNs.²⁸⁰

Bell best illustrates this point through a couple of examples concerning access to employment. “An employer who paid third country nationals workers less than EU citizens for the same occupation should not be entitled to claim this was due to a difference in their ‘legal *status*’”. Provided that all workers enjoy the right to engage in employment under the same conditions, he moves to consider that “then there is no relevant difference in their legal *status*, which could apply to the employer’s unequal treatment”. Similarly, he observes, whilst recruitment by employers of EU nationals in preference to third country nationals (seeking to enter the EU maybe required by national or EU law), recruitment practices entailing a total exclusion of third-country through statements such as “EU nationals only need apply”, should not be protected by reference to Article 3(2).”²⁸¹

²⁸⁰ *Ibid.*; G. N. Toggenburg, *The Race Directive*, p. 236.

²⁸¹ M. Bell, *Meeting the Challenge*, *cit.*, p. 31

A different reading of art. 3(2) would find no justification in light of the context and the motivations that animated its proponents nor in the wording of the provision, besides undermining the aim of the Directive to effectively fight discrimination on ground of race and ethnic origin and conflict with the duty to interpret restrictively derogations to the universal right not to be discriminated against.

A restrictive interpretation of the clause finds further support in the interpretation of the Court of Strasbourg of art. 14 ECHR considering nationality as a suspect ground and a number of international conventions mentioned by recital 3 of the RED and to which all member states are signatory.

It is of particular relevance for the same purposes the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Convention as highlighted in the previous chapter defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

According to art. 2, the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to the Convention between citizens and non-citizens. This has not prevented the Committee on the Elimination of Racial Discrimination from acknowledging a strong interaction between racial, ethnic or national origin discrimination and discrimination on the basis of nationality, noting that in some cases nationality may actually be used as a proxy for race.²⁸²

Most importantly, following the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001, which acknowledged that “xenophobia against non-nationals particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and

²⁸² *Ziad Ben Ahmed Habassi v. Denmark*, CERD Views of 17 March 1999, Communication 010/1997.

that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices”, the Committee adopted its Recommendation n. 30 stating that under the Convention, “differential treatment based on citizenship or immigration *status* will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”

Finally, a restrictive interpretation of art. 3(2) would find further support in the European Commission against Racism and Intolerance (ECRI) Recommendation n. 7, which defines ‘racism’ as “the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.”²⁸³

This considered, an understanding of art. 3(2) as safeguarding from the prohibition of discrimination only differences of treatment that are established by law and arise from the *status* of TCNs appears to explain the different outcomes of the Court of Justice in the cases *Feryn*²⁸⁴ and *Kamberaj*²⁸⁵.

Interestingly in *Feryn*, the controversial declarations referred to the nationality of the applicants. Thus, it would have been possible to argue that it was a case of non-EU nationality discrimination, excluded from the scope of the RED²⁸⁶. Neither the AG, nor the Court entered into this discussion qualifying the concerned statements as direct racial discrimination under article 2(2)(a) of the RED.

²⁸³ ECRI is a monitoring body established by the Council of Europe with the objective to combat racism, xenophobia, antisemitism and intolerance at the level of greater Europe and from the perspective of the protection of human rights. For an analysis of the ECRI recommendation and the differences between the RED and the Recommendation see E. Howard, *Anti Race Discrimination cit.*, p. 468.

²⁸⁴ Ft. 212.

²⁸⁵ Ft. 230.

²⁸⁶ S. B Lahuerta, *Race equality and TCNs, cit.*, p. 754.

By contrast in *Kamberaj* the Court appeared as not willing to adopt a restrictive interpretation of art. 3(2).²⁸⁷ The case concerned an Albanian long-term resident that was denied access to a benefit aimed at supporting low-income families pay for rent. The denial was due to the creation of two separated funds depending on whether the applicants were EU or third-country nationals. The fund dedicated to the latter group had a comparatively lower budget and the claimant application was rejected due to the exhaustion of monetary resources.

Asked by the Court of Bolzano if the Directive applied to the case, the Court affirmed without further specifications that the RED does not cover differential treatment based on third-country national *status*.

The Court of Justice does not explain the different outcomes. The decision simply affirms that “under articles 1 and 2(1) and (2) of Directive 2000/43, the Directive applies only to direct or indirect discrimination based on racial or ethnic origin” and literally quotes art. 3(2). It is nevertheless tempting to argue that such different outcomes could be reconnected to the fact that in *Feryn* differential treatment was related to statements coming from a private employer, whereas in *Kamberaj* differential treatment was established by law and related to the legal *status* of TCNs and as such attracted within the scope of art. 3(2).

The opinion of the AG is likewise of little help. After recalling art. 3(2), it is limited to stating: “It is apparent from the order for reference that Mr. Kamberaj has not suffered any direct or indirect discrimination based on his racial or ethnic origin. The difference in treatment allegedly suffered compared with citizens of the Union, under the provincial law, is based on his *status* as a third-country national, and therefore on his nationality”.

Yet the referring judge had made explicit that the applicant was of Albanian ethnic origin and of Muslim faith pointing to the indirectly discriminatory effects of the

²⁸⁷ S. Morano Foadi and K. de Vries, *The equality clauses, cit.*, p. 19.

national provision. Interestingly, not too long after *Kamberaj*, in *Chez*²⁸⁸ the Court would explicitly acknowledge the interaction between ethnic origin, nationality and religion in considering that ethnicity as stated by the ECtHR “has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds”.

Nonetheless, the Court found that the differential treatment violated the equality clause established by art. 11 Directive 2003/109/EC in favour of long-term residents. Art. 11(1)(d) of Council Directive 2003/109/EC concerning the *status* of third-country nationals who are long-term residents, according to the Court, “must be interpreted as precluding a national or regional law, such as that at issue in the main proceedings, which provides, with regard to the grant of housing benefit, for different treatment for third-country nationals enjoying the *status* of long-term resident conferred pursuant to the provisions of that Directive compared to that accorded to nationals residing in the same province or region when the funds for the benefit are allocated, in so far as such a benefit falls within one of the three categories referred to in that provision and art. 11(4) of that Directive does not apply”.

Whatever the legal reasoning lying behind the decision of the Court, it is necessary to acknowledge that, although since the adoption of the RED the European Union has made important progress in closing the gap between the rights granted to TCNs and EU nationals, the concerns and pressures that pushed the adoption of art. 3(2) still seem to be very much in place.

Getting back to art. 3(2), the Court omits to consider that the differential treatment based on the legal *status* of TCNs provided by national law was, according to its own assessment, in clear contrast with EU law, that allows no differences of treatment as to access to housing. The consequences are to some are puzzling. Provided that EU law in regulating long-term residents legal *status* grants to this category of TCNs equality of treatment, it appears that there should be no room for any differential treatment arising

²⁸⁸ Ft. 267.

from their legal *status*, such as to justify the application of the “legal *status*” defence under art. 3(2).

Finally, there is nothing to prevent Member States from granting more extensive protection against discrimination. Indeed in at least 11 Member States, domestic legislation implementing the RED explicitly mentions nationality as a protected ground. In other 11 Member States, domestic legislation already included a prohibition of discrimination on grounds of nationality²⁸⁹. As the previous chapter showed, Italy is included in the latter group.

This considered, as De Schutter notes “a distinct question is whether domestic legislation prohibiting discrimination on grounds other than nationality particularly on grounds of race or ethnic origin, (...) – extends, or can be interpreted to extend, to differences of treatment on grounds of nationality where this may amount to indirect discrimination on these other grounds.”²⁹⁰

Domestic solutions

The implementing decree n. 215/2003 does not appear to have made any significant attempt of clarity, with regard neither to the implications of art. 3(2), as far as nationality is concerned, nor to the coordination of the new prohibition of discriminatory behaviour with the pre-existing one, which as known includes nationality among the protected grounds.

As to the former art. 3(2) of the implementing decree replicates art. 3(2) of the RED but for the explicit reference to “access to occupation and access to social welfare”.

As to the latter, art. 2 of the implementing decree is limited to specifying that the new definition of discrimination in the implementing decree is not intended to affect (is without prejudice to) art. 43 TUI. The limits of the approach of the legislature seem to have been overcome by courts and civil society organizations granted legal standing

²⁸⁹ O. De Schutter, *Links between migration cit.*, p. 73-74

²⁹⁰ *Ibid*, p. 73.

under Legislative Decree n. 215/03.

The analysis of the case law allows to clearly trace the influence of the latter in promoting and contributing to consolidate through sustained litigation an interpretation of the prohibition of discrimination based on race and ethnic origin such as to cover also nationality related differential treatment.

The persistence of civil society organizations, in this regard, is not a coincidence, provided that they enjoy legal standing, in support or on behalf of the victim of discrimination, or on their own in instances of collective discrimination only under Legislative Decree n. 215/03.

As already highlighted, although the RED was implemented in 2003, the register of associations granted legal standing under art. 5 was established only by December 2005.

Actually civil society organizations, in particular ASGI and SOS Razzismo had claimed that they were granted legal standing under art. 7 of the RED, even before the establishment of the register under art. 5 Legislative Decree n. 215/03, complaining about the inactivity of the national authorities in this regard. The claim was nonetheless dismissed on the account that art. 7 of the RED could not be considered to have direct effect.²⁹¹

From a quantitative prospective, the analysis of the case law allows establishing that from 2004 to 2015, out of 219 filed claims on discrimination, 57 were filed under art. 43 TUI, 1 under art. 2 Legislative Decree n. 215/2003 and 161 filed under art. 43 TUI together with Legislative Decree n. 215/03 (Table n.1).

Focusing on the second group of claims, reference to the TUI and the implementing decree can be considered as a marker of the fact they concern nationality based

²⁹¹ Court of Padova, 19 May 2005, in *Giurisprudenza italiana*, 5, 2006, p. 949, confirmed in second instance by Court of Padova, 5 October 2005, not published. The case concerned a bar tender applying higher prices to foreigners, in the attempt to drive away “black immigrants and Albanians” that “were deemed as inappropriate clients”

differential treatment. Indeed, further analysis allows confirming that most of such cases (145 out of 161) have dealt with nationality related differential treatment.

Looking at how courts have dealt with the issue in point, it should be acknowledged that in most of the cases (96), whereas the ruling refers to both regulations to qualify the concerned conduct as discriminatory, it does not specifically argue on the coordination between the TUI and the implementing decree, since and the applicability of latter appears not to have been contested by the defender. In 43 cases courts have specifically argued on the issue or indirectly concluded so, by arguing on whether civil society organizations could claim legal standing in the case under consideration. By contrast, the applicability of Legislative Decree n. 215/03 has been excluded only in 5 cases (Table n. 2)

It should be noted that civil society organizations have acted in their own name in 36 out of 44 cases in which the court have concluded on the applicability of Legislative Decree n. 215/03. As far as contested behaviour is concerned, this group of cases concerns mostly provisions requiring Italian citizenship or European citizenship for the purposes of access to employment or social protection. Cases not concerning nationality clauses deal with selective *criteria* referring to the “length of residence” or a specific type of permit of stay. Finally in one case, applicants have complained about the discriminatory nature of a number of public statements made by a city councillor, inviting the city not to rent or sell their properties to foreigners.

<i>Legal basis</i>	<i>n. of cases filed</i>
TUI	57
RED	1
TUI & RED	161

Table 1

<i>Outcome</i>	<i>n. of cases decided</i>
Applies to nationality	44
Does not apply to nationality	6
Not contested	95
Other	16

Table n. 2

Moving to analysing the case law from a qualitative point of view, it is clear that the interpretation of the implementing decree as covering also nationality based differential treatment relies on two distinct arguments.

The first one is based on art. 2 Legislative Decree n. 215/03 that defines discriminatory behaviour for the purposes of the implementing decree. Following the definition of direct and indirect discrimination on grounds of race and ethnic origin, art. 2 refers to art. 43 TUI specifying that such definitions are without prejudice to the definition of discrimination provided by the latter.

The above reference has been considered to manifest the intention of the legislature not to limit the prohibition of discrimination under the implementing decree only to race and ethnic origin. On this account, courts have argued that the notion of discrimination under art. 2 Legislative Decree n. 215/03 includes also discrimination on grounds of nationality as defined by art. 43 TUI.

A decision of the Court of Brescia clearly illustrates this point. The case was filed by ASGI and Fondazione Guido Piccini and concerned the establishment of “pre-school fee subsidy” and the process of allocation of a number of city-owned apartments aimed at over 65s. As to the first the City limited the benefit to TCN children whose parents were both holders of a long-term residence permit. As to the second, Italian citizenship

and ten years of residence in the city were required in order to qualify for the allocation. The court considers:

*“The notion of discrimination provided in art. 2 Legislative Decree n. 215/03 includes different types of discriminatory conduct. It certainly includes the type of discriminatory conduct described by art. 43 TUI, which is explicitly recalled by art. 2 Legislative Decree n. 215/03. Indeed, the following paragraph begins by stating that are also considered discriminatory for the purposes of the first paragraph (...), that is to say that also the type of behaviour mentioned by the second paragraph shall be considered discriminatory for the purpose of implementing the principle of equality under the Legislative Decree”.*²⁹²

Other decisions rely instead on the notion of indirect discrimination. In line with suggestions from antidiscrimination scholars, courts argue the prohibition of indirect discrimination covers nationality related differential treatment where it results in indirect discrimination based on grounds of race and ethnic origin.

Following the claim of Avvocati per Niente (APN) and Associazione Volontaria di Assistenza Socio Sanitaria e per i Diritti degli Stranieri e Nomadi Onlus (NAGA), the Court of Milano has decided that the requirement of Italian citizenship for the allocation of student housing by the Province of Sondrio was discriminatory under Legislative Decree n. 215/03 and the TUI. The court specifically argues on the relevance of the implementing decree in the case in point:

“It should be observed that Legislative Decree n. 215/03 does certainly prohibit any discrimination formally based on ethnic origin, but not exclusively. It does also apply to indirect discriminations, which are realized through apparently neutral criteria; it should be noticed that the criterion of citizenship, applied in the absence of the conditions legitimizing its use, as specified by the Constitutional Court, determines a

²⁹² Court of Brescia, 17 October 2011, in A. Guariso (ed.) *Senza distinzioni, cit.*, p.105. See also Court of Bergamo, 3 November 2011, not published; Court of Bergamo, 15 March 2011, in A. Guariso (ed.) *Senza distinzioni, cit.*, p. 255; Court of Milano, 13 July 2011, Guariso (ed.) *Senza distinzioni, cit.*, p. 344

*discrimination on grounds of race and ethnic origin, given that notoriously most foreigners belong to ethnic groups other than the native groups”.*²⁹³

In another case filed by ASGI, CGIL, CISL and UIL together with an individual applicant and concerning the requirement of “ten years of residence in Italy and five years of residence in region” as a precondition for benefiting from a “baby bonus” measure implemented at the regional level, the Court of Udine in addressing the objection of the defender as to the applicability of Legislative Decree n. 215/03 to nationality, argues as follows:

*“The discrimination under review is indirect discrimination, mainly based on nationality, though at a closer look it goes further resulting in discrimination based on race and ethnic origin covered by Directive 2000/43/EC, which was implemented by Legislative Decree n. 215/03. Indeed, the choice of the concerned criterion is intended to facilitate and favour individuals that have stronger ties to the territory and belong for the most to native communities characterized by cultural and ethnic cohesion. (...) In addition it should be considered that in a country like Italy where the law on citizenship is based for the most on the principle jus sanguinis foreign nationals, whether or not belonging to the European Union, are overwhelmingly part of ethnic groups other than the natives groups.”*²⁹⁴

²⁹³ Court of Milano, 9 February 2010, in A. Guariso (ed.) *Senza distinzioni, cit.*, p. 115. The reference to the conditions legitimizing its use, as specified by the Constitutional Court, is intended to safeguard those differences of treatment that are provided by law and are consistent with the constitutional principle of equality. On the same argument, see also Court of Verona, 28 October 2014, not published. Interestingly in affirming the relevance of the implementing decree, the Court quotes the French *Agence des Droit* 2010 Report considering that differential treatment based on nationality often “hides” indirect forms of discrimination based on ethnic origin. See also Court of Brescia, 13 June 2012, in A. Guariso (ed.) *Senza distinzioni, cit.*, p. 101. The court considers: “*there is no doubt that the requirement of citizenship determines as a matter of fact a discrimination based in ethnic origin against all those that despite holding a permit of stay in Italy, are not Italian citizens*”.

²⁹⁴ Court of Udine, 17 November 2010, in A. Guariso (ed.) *Senza distinzioni, cit.*, p. 109.

In fact, racial and ethnic prejudice in cases involving nationality related differences is often less hidden than it might appear. In the decision quoted above, for example, the court identifies a clear intention to prioritize native communities pointing to a later amendment to the regional law providing a general exemption as to the requirement of residency for the “*people of the region and their descendants that decide to re-establish their residence in the Region.*” In another case introduced by ASGI and ANOLF against the Municipality of Palazzago, the defendant appears to have justified the granting of a “baby bonus” only to children with at least an Italian parent in view to ensure a “minimum safeguard to the historical and social characteristics of our community.”²⁹⁵

Specifically addressing the scope of art. 3(2), in assessing whether the granting of a baby bonus only to children born in families where both parents hold Italian citizenship filed by ASGI, APN e FARSI PROSSIMO, the Court of Milano maintains:²⁹⁶

“(…) art. 3 is mainly meant to safeguard certain national provisions concerning specific matters in relation to which the legal status of third-country nationals may be relevant.”²⁹⁷

²⁹⁵ Court of Bergamo, 17 May 2010, in *Responsabilità civile e previdenza*, 12, 2010, 12, p. 2541

²⁹⁶ Court of Milano, 30 July 2010, in A. Guariso (ed.) *Senza distinzioni, cit.*, p. 147. The decision was confirmed in second instance by Court of Milano, 29 September 2010, in *Rivista critica di diritto del lavoro*, 3, 2010, p. 875.

²⁹⁷ *Contra*, Court of Rimini, 27 September 2011, in *Foro It*, I, 2012, p. 934, Assessing the discriminatory nature of the requirement Italian citizenship for a nurse post the Court considers: “Equally irrelevant is the reference to art. 3 Legislative decree n. 215/03 (implementation of Directive 2000/43 / EC), according to which the principle of equal treatment regardless of race or ethnic origin applies to all persons in both the public and private sectors and is susceptible to judicial protection with reference, among other areas to to self-employment and to occupation, including selection criteria and recruitment conditions. In the case under review, in fact, it is not being discussed about a possible discrimination based on grounds of racial or ethnic origin, but about a different based of citizenship, that outside the scope of the directive, whose thirteenth recital explicitly states that “the prohibition of discrimination should also apply to citizens of third countries, but it does not cover differences of treatment based on

Most recently the Court of Appeal of Milano has addressed the issue in particularly clear terms²⁹⁸. The case concerned the discriminatory nature of art. 65 L. 448/98 to the extent that it required Italian or EU citizenship to access the “large family allowance” established by the same article. The City of Milan had specifically contested that ASGI and APN could claim legal standing since the differential treatment being contested was based on nationality.

The court first of all highlights the interaction between nationality, race and ethnic origin:

“As far as the legal standing of the applicant associations is concerned, the objection of the appellant moves from the assumption that the discrimination in the case in point is based solely on nationality, whereas in fact such discrimination is subtended after all by indirect discrimination based on race and ethnic origin, as observed by the defence of N.(applicant) making reference to the Recommendation 1.10.2004 n. 30 of the UN Committee (on the Elimination of Racial Discrimination) concerning the UN Convention (on the elimination of Racial Discrimination) to which has Italy is a party.”

As to the exclusion clause provided in the implementing decree the Court considers:

“The exclusion provided by art. 3(2) of the aforementioned Legislative Decree n. 215/03 refers in particular to the possibility for the state to regulate immigration with regard to entry and conditions of access to occupation, social security, and social assistance by foreigners, within the limits of the principle of reasonableness and compatibility with EU law as articulated in the EU Directives, to which national law should conform.”

nationality. Likewise, the second paragraph of the aforementioned Article. 3 states: “this legislative decree does not cover differences of treatment based on nationality and is without prejudice to national provisions and conditions relating to entry, residence, access to employment and welfare by TCNs and stateless persons, and to any treatment, adopted by law that arises from the legal status of the aforementioned parties”.

²⁹⁸ Court of Appeal of Milano, 22 May 2015, not published.

In essence, on the one hand the Court agrees that the exclusion clause does not concern any difference of treatment based on nationality but only those established by law as specified above, on the other hand the Court adds that not any difference of treatment provided by national law should be covered by art. 3(2) but only those differences that comply with the constitutional principle of reasonableness and those that conform to EU law.

The decision of the Court of Appeal of Milano provides an interesting prospective on how these different levels of protection interact. bringing together national law, constitutional principles and EU law. As far as constitutional principles are concerned, national law should be interpreted in conformity with the principle of reasonableness. In cases in which conform interpretation is not possible then lower courts need to ask the Constitutional Court to assess the constitutional compatibility of the concerned provision. Courts are left with the same options in case of conflict between a national law and the ECHR or the ILO Convention on Migrant Workers n. 143/75.

As far as EU law is concerned, the principle of direct effect, if applicable, requires courts to “set aside” national law in contrast with EU law. In the case in point the Court finds the national law provision to be in contrast with EU Directive 2003/109/EC and in particular with the equality clause it provides which as known has been considered by the Court of Justice in *Kamberaj* to have direct effects. The same conclusions should apply with regard to equality clauses provided by the Association and Euro-Mediterranean Agreements.

Whereas it is acknowledged that art. 3(2) protects differential treatment related to the legal *status* of TCNs that is established by law, the Court of Milano shifts the focus to tracing within a multilevel system of law, such as the one resulting from the integration of EU and domestic legal orders, the provisions that regulate such *status*. If EU law grants long-term residents equality of treatment and any provision conflicting with such principle should be disapplied then there is no room for protecting differential treatment based on nationality only because it is formally embodied in national law. A different reading would be difficult to reconcile with the ECJ doctrine on supremacy

and direct effects and the related obligation upon national authorities and courts to disregard such domestic provisions in favour of EU law.²⁹⁹

The above analysis provides a clear picture of the ways in which courts have provided a consistent interpretation of the prohibition of discrimination on grounds of race and ethnic origin such as to ensure the effectiveness of the right not be discriminated vis-à-vis nationality based differences of treatment, overcoming the limits related to a broad interpretation of art. 3(2) of the RED.

Yet such a consideration does not tell the whole story. As Epp puts it cases do not arrive in courts by magic.³⁰⁰ Lawyers, rights advocacy organizations and financial resources are crucial. In the light of the above analyses, it appears that civil society organizations have strongly contributed in this regard, through a forward-looking legal strategy and sustained litigation on the issue. It could be argued that claiming that the implementing decree applied to nationality based differences was an obvious choice or that the above interpretation would have prevailed irrespective of the support of civil society organizations granted legal standing under its art. 5. This analysis is not meant to argue that without support by civil society organizations a different reading of the prohibition of discrimination would have prevailed. It is meant to explain how and why things happened the way they did.

As McCann notes “legal relations, institutions, and norms tend to be double-edged, at once upholding the larger infrastructure of the *status quo* while providing limited opportunities for episodic challenges and transformations in that ruling order.”³⁰¹ The blind exclusion of nationality and the differences of treatment targeting TCNs can be viewed as upholding the *status quo*, the very infrastructure the European Union is based on and deeply rooted on the distinctions between European national and TCNs. Nevertheless, the adoption of RED and the process of implementation and that followed appear to have provided also the opportunities to challenge the *status quo*.

²⁹⁹ Judgment of 22 June 1989, *Fratelli Costanzo SpA* C-103/88, EU:C:1989:256.

³⁰⁰ C. E. Epp, *The rights revolution*, cit. p.18.

³⁰¹ M. McCann, *Law and social movements cit.* p.19.

Relying on such opportunities civil society organizations have promoted and helped to consolidate an interpretation of the domestic legislation implementing the RED such as to include within the reach of the prohibition of discrimination on grounds of race and ethnic origin nationality based differential treatment, forging new opportunities for fighting such differences of treatment in the national context³⁰²

2. The access dimension. Legal standing.

As anticipated in the previous paragraph, 145 out of 161 cases, which have been filed under the TUI and the Legislative Decree n. 215/03, concern nationality based on differential treatment. The case law provides also examples in which the prohibition of discrimination has been invoked in relation to differential treatment or harassment targeting Roma communities or otherwise unambiguously linked to the ethnic origin of the communities concerned, though such cases remain marginal in comparison.

In order to get a general overview on the success of litigation, it should be considered that in 146 out of 161 cases courts have agreed with applicants as to the discriminatory nature of the criterion, practice or behaviour concerned.

<i>Outcome</i>	<i>2004-2015 (TUI&RED)</i>
It is discriminatory	146
It is not discriminatory	10
Referral to the Constitutional Court	4
Other	1

Table n.3

³⁰² N. Pedriana, *Help wanted NOW*, cit.

Chapter II showed scholars adopting the legal opportunity approach put particular emphasis over the importance of rules defining “access to courts” for explaining legal mobilisation. Indeed, judicial assessment on legal standing, regardless of whether the interest of the applicant is limited to the individual claim or pursues also objectives of social reform, is preliminary to considering the merits of the challenge. Applicants not enjoying legal standing have no chance to be heard, irrespective of the robustness of their legal arguments. Therefore, it would be reasonable to expect that the extent to which the legal system grants “voice” also to actors different from individual victims, such as civil society organizations, will influence their choices with regard to the pursuing of litigation strategies, delineating available options and affecting besides other factors their expectation of success in court.

Provided that acknowledging the relevance of the legal opportunity structure in this regard does not imply that legal actors will passively adapt their choices to the latter, the granting of legal standing to civil society organizations under the implementing decree of the RED appears to have influenced the emergence and success of legal strategies in a two fold way: providing the conditions for civil society organizations to challenge the exclusion of differences of treatment based on nationality from the scope of the implementing decree of the RED (and ultimately expanding the legal opportunities that provided the incentives for the turn to the courts in the first place), on the one hand, and to systematically enforce the prohibition of discrimination, on the other.

The analysis of the case law shows civil society organizations have extensively relied on the legal opportunities resulting from the implementation of the RED, acting in their own name in more than half of the cases filed from 2004 to 2015 under art. 43 TUI and art. 2 Legislative Decree n. 215/03 (82 out of 161). As Table n. 4 shows, civil society organizations have acted in their own name as the only applicant in the proceedings in 26 cases and together with an individual victim or trade union organization in other 56 cases. In addition there is a number of cases where civil society organizations appear to have a secondary role being their intervention rather than in their own name, in support

of an individual applicant.

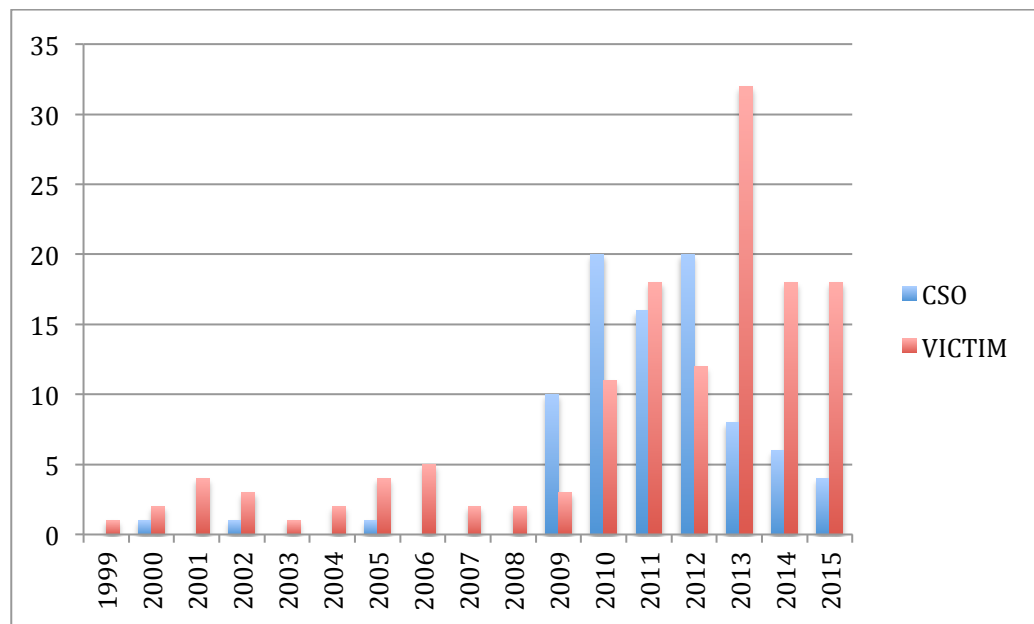
<i>Applicant</i>	<i>n. of cases filed</i>
Civil society organization (as the only applicant)	26
Trade union organization (as the only applicant)	1
Civil society organization and trade union organization	2
Individual applicant (as the only applicant)	72
Individual applicant and civil society organization	51
Individual applicant and trade union organization	6
Individual applicant, civil society organization and trade union organization	3
<i>Ad adiuvandum</i> /civil society organization	3
<i>Ad adiuvandum</i> /trade union organization	1
<i>Ad adiuvandum</i> /civil society organizations and trade union	2

Table n. 4

The evolution of case law over time provides further insight as to the background that prompted civil society organizations to “turn to courts”. Whereas data shows a general increasing trend in the number of cases concerning antidiscrimination law decided by courts in the years following the full implementation of the RED (Charter n. 1), it also shows that litigation levels during the years immediately following such implementation are in line with those characterizing the pre-implementation period, and still, with very limited exceptions, related to individual enforcement of the prohibition of discrimination.

In this regard, it is probably helpful to remind that though the RED was implemented in the domestic order in 2003, as far as legal standing was concerned, the register allowing civil society organizations to claim standing in court was adopted only in

2006 and updated for the first time only in 2010. Whereas this consideration might explain to some extent the litigation trend, it does not explain the clear increase in the number of cases filed by civil society organization starting from 2009 (Charter n. 1). The described trend appears all the more puzzling if we consider that civil society organizations had already in 2005 claimed legal standing directly invoking art. 7 of the RED³⁰³ allowing to conclude that low levels of litigation from 2006 to 2009 are most likely not related to lack of awareness of the opportunities created by RED.



Charter n.1

An in depth analysis of the cases decided in 2009 clearly points to the exacerbation of the political debate around migration and the policy developments that followed the emergence of the centre-right as the clear winner of the 2008 general election and the local elections held between 2008 and 2009 in a number of northern Italy municipalities.

³⁰³ Ft. 290.

Following its victory, the centre-right majority, in line with its electoral campaign strongly focused on security and fight against illegal migration, adopted under the leadership of its Minister of Interior, a representative of the anti-immigrant Northern League Party, the so called “security package”³⁰⁴. The law, besides criminalizing unauthorized entry and permanence and introducing a number of other repressive measures, provided municipalities with extended powers concerning public safety and urban security. In particular urban security was intended to refer “to a public good that should be protected through initiatives promoting respect for rules governing civilian life with the aim of improving living conditions in urban areas, peaceful coexistence and social cohesion”³⁰⁵.

Such extended powers translated into the adoption of a number of local ordinances, in particular in Northern Italian municipalities governed by the centre-right majority, that directly or indirectly targeted migrants. The most classical example in this regard is represented by ordinances on population registration providing additional conditions for the registration of migrants such as a certain income or a passport with an entry visa or limiting registration only to certain categories of migrants such as holders of a long term resident permit.³⁰⁶

Such interventions were integrated by a number of welfare measures adopted at the local level aiming to selectively support the resident population including in most cases nationality clauses or limiting access to such measures only TCNs holding a long-term residence permit or requiring a particularly high number of years of residence in the

³⁰⁴ Law n. 94/2009

³⁰⁵ N. Zorzella, *I nuovi poteri dei sindaci nel pacchetto sicurezza e la loro ricaduta sugli stranieri*, in *Diritto, immigrazione e cittadinanza*, 3/4, 2008, p. 57.

³⁰⁶ A. Lorenzetti and S. Rossi (eds.), *Le ordinanze sindacali in materia di incolumità pubblica e sicurezza urbana. Origini, contenuti, limiti*, Jovene, 2009; A. Lorenzetti, *Discriminazioni razziali ed etniche nelle ordinanze dei Sindaci e negli ordinamenti municipali*, in D. Tega (ed.) *Le Discriminazioni Razziali Ed Etniche. Profili Giuridici Di Tutela*, Armando Editore, 2011 p. 205; For a collection of such ordinances see, CITTALIA, *Oltre le ordinanze: I sindaci e la sicurezza urbana*, Anci, 2009.

country or in the city. In this regard local regulations excluding migrants from benefiting from baby bonuses or housing benefits or other forms of support for low-income families became a sort of “best practice” among the above municipalities.

This set of measures has contributed to establishing at the local level what has been termed as the “local policies of exclusion”. According to Ambrosini, that has coined the term and analysed and catalogued the local government interventions aimed (mainly) at immigrants, such policies are “aimed at marking the boundaries of the legitimate local community, reinforcing a duality between rightful members (the insiders, coinciding with the native population or those of Italian nationality) and outsiders, whose right to residence tends to be redefined in more limited and conditional forms.”³⁰⁷ In doing so, they reassure the indigenous citizens about the priority of their *status* compared to that of migrants, and communicate that they are actively defended by local governments, while at the same time encouraging the perception of the former group as to the fact that TCNs are a threat to “urban safety” and are responsible for draining the few resources available for welfare measures at the local level.³⁰⁸

The increasing numbers of cases filed by civil society organizations starting from 2009 should be therefore understood in the light of pressures upon civil society organizations to provide “adequate” responses to the policies of exclusion of migrants at the local level and challenge their legitimacy in the eyes of the general public.

Borrowing from Hilson,³⁰⁹ the increasing engagement of civil society organizations in litigation on the prohibition of discrimination might be more properly explained as a result of the interplay between the closure of political opportunities and the opportunities for action provided by RED. In the light of the above context, legal standing has contributed to including litigation among the available tactics to contain

³⁰⁷ M. Ambrosini, *We are against a multi-ethnic society: policies of exclusion at the urban level in Italy*, in *Ethnic and Racial Studies*, 36, 1, 2013, p.143

³⁰⁸ *Ibid.*, see also M. Ambrosini, and E. Caneva, *Local policies of exclusion: the Italian case, Accept Pluralism Project*, 7 th EU Framework Programme, European University Institute, 2012

³⁰⁹ C. Hilson, *New social movements, cit.*

exclusion policies.

Indeed, the first claim filed by civil society organizations in 2009 concerned the establishment of a “baby bonus” that was granted only to children with at least one parent holding Italian citizenship. ASGI together with a number of individual applicants claimed the nationality clause was discriminatory under the TUI and Legislative Decree n. 215/03. The Court of Brescia acknowledged civil society organizations enjoyed legal standing under the latter and declared the discriminatory nature of the nationality clause. In addition the Court ordered the Municipality to end its discriminatory behaviour, extend the benefit to all residents irrespective of their citizenship and postpone the original deadline for the submission of applications. Finally the judge ordered the publication of the decision in one of the three most circulated newspapers in the country.³¹⁰

Notwithstanding success in court, the case provided a view on how challenging effective enforcement can be. Indeed following the first instance decision, which was confirmed in second instance, the Municipality revoked the regulation establishing the benefit justifying such choice in view to the “supervening impossibility to enact the intervention in line with its original purpose”. The applicants filed a new claim relying on the prohibition of victimization under Legislative Decree n. 215/03. The Court of Brescia acknowledged the behaviour of the Municipality was retaliatory and ordered the latter to restore the baby bonus rejecting the idea that in the case in point equality could be respected either by extending the benefits to the categories unlawfully excluded or by eliminating the benefit completely.³¹¹ Ultimately, while showing

³¹⁰ Court of Brescia, 26 January 2009, in *Rivista critica di diritto del lavoro*, 1, 2009, p. 277. The decision was confirmed in second instance by Court of Brescia, 20 February 2009, in *Rivista critica di diritto del lavoro*, 1, 2009, p. 278.

³¹¹ Court of Brescia, 12 March 2009, in *Rivista critica di diritto del lavoro*, 1, 2009, p. 278. F. Rizzi, *La vicenda del bonus bebè a Brescia: quando la parità "al ribasso" diventa ritorsione*, in *Rivista critica di diritto del lavoro*, 1, 2009, p. 289. The decision was confirmed in second instance by Court of Brescia, 27 May 2009, in *Rivista critica di diritto del lavoro*, 2, 2009, p. 527; A. Lassandari, *Agli italiani o a nessuno: i c.d. bonus bebè e la ritorsione discriminatoria*, in *Rivista Italiana di Diritto del Lavoro*, 1, 2010, p. 198.

effective enforcement might be time and resource intensive, the case provided support to the idea that the prohibition of discrimination was more than a “hollow shell”.

During the same year civil society organizations successfully invoked the prohibition of discrimination against the Municipality of Brignano d’Adda for reserving to nationals access to local social services, income support for the unemployed and refunds for dental expenses for minors, in addition to limiting registration among the resident population to migrants holders of a long-term permit of stay³¹²; against the Province of Sondrio for limiting to Italian citizens access to student housing³¹³ and against the Municipality of Ospitaletto for requiring for the purposes of registration in the residential roll of TCNs a certificate of the criminal record of the applicant.³¹⁴

While supporting the view of litigation as a promising strategy to counter “local exclusion policies”, early success in court has provided on the one hand valuable precedents, and on the other the incentives for extending the scope of litigation strategies to other exclusionary policies, such as those concerning access to employment in the public sector left mostly to individual enforcement³¹⁵ or access to social security until then almost exclusive domain of constitutional review.

The process here described has ultimately resulted in the creation of a “support structure”. The analysis of the case law definitely allows identifying a well-established network of civil society organizations engaged in litigation on a systematic rather than occasional basis.

ASGI has without doubt a prominent role in this regard. It should be noted that the association was founded by a group of lawyers and university professors in 1991 with very high expertise on migration law and has become over time a point of reference on

³¹² Court of Bergamo, 28 November 2009, in *Giurisprudenza di merito*, 10, 2010, p. 2445.

³¹³ Court of Milano, 1 August 2009 in A. Guariso (ed.) *Senza distinzioni, cit.*, p. 108, confirmed in second instance by Court of Milano, 9 February 2010, see ft. 292.

³¹⁴ Court of Brescia, 25 July 2009, in A. Guariso (ed.) *Senza distinzioni, cit.*, p. 2040, confirmed by Court of Brescia, 7 December 2009, not published.

³¹⁵ Court of Milano, 17 June 2009 and Court of Milano, 20 July 2009, in *Rivista critica di diritto del lavoro*, 3, 2009, p. 669.

migration, asylum and citizenship and most recently in antidiscrimination law.

Whereas one of the association's first aims was to promote research and exchange of information and good practices within the community of migrant lawyers and contributing to drafting law proposals and promoting migrants rights, it has over time dedicated increasing resources to fighting discrimination, developing from 2010 a well-established structure of antidiscrimination focal points that provide legal advice, representation for victims, and training for lawyers interested in enforcing antidiscrimination law.

Besides litigation, the association is particularly active in lobbying activities ranging from issuing reasoned opinions in cases of violation of the prohibition of discriminations, to lobbying national representatives and denouncing violations to the European Commission.

Another association worth mentioning is APN, a pro-bono lawyers promoted by CARITAS, aiming to provide free legal assistance to socially disadvantaged individuals. The association operates mostly in the area of Milan and has devoted increasing attention to discrimination and participated, in most cases together with ASGI, to promoting litigation, besides offering legal advice to individual applicants and training for lawyers interested in enforcing the prohibition of discrimination.

Case law shows the two above-mentioned organizations appear to have indirectly supported also individual enforcement. Indeed looking at individual enforcement cases, lawyers associated with both of them have assisted individual applicants in the vast majority of the cases concerned.

Table n. 5 shows that also Fondazione Guido Piccini has promoted litigation in a significant number of cases. The Foundation, that is an institutional partner of CGIL, operates in the area of Brescia and is aimed at "promoting culture, solidarity and equal protection of human dignity" mainly through training initiatives, education and social assistance projects and human rights protection activities.

While setting the ground for further research as to the characteristics of the above

organizations, the foundation of their commitment towards migrant communities, how they interact with each other, how litigation strategies are put in place and what are the motivations behind the choice to do so, this first analysis of litigation around antidiscrimination law in Italy has provided an evidence based narrative of the increasing engagement of civil society organizations in litigation strategies highlighting in this regard the relevance of rules concerning legal standing, both in terms of explaining the emergence of legal strategies and setting the conditions for systematic enforcement of the prohibition of discrimination in courts.

<i>Civil society organizations</i>	<i>n. of claims</i>
Associazione Studi Giuridici sull'Immigrazione (ASGI)	75
Associazione avvocati per niente (APN)	25
Fondazione Guido Piccini Onlus	18

Table n. 5

3. Legal resources.

Chapter II showed that the implementation of RED, besides providing legal standing for civil society organizations, has also liberalised the legal opportunity structure adopting new definitions of discriminatory behaviour and providing for an adaptation of the burden of proof in favour of the applicant. In addition, it pointed for the same purposes to the evolution of EU law as far as TCNs are concerned, in particular as regards the adoption at the EU level of a number of equal treatment clauses granting specific categories of TCNs equality of treatment in areas such as access to employment and welfare.

This paragraph intends to trace the relevance of these legal resources in shaping equality for migrants.

The analysis of the case law illustrates that the implementation of the RED and the

subsequent adoption of new definitions of discrimination has contributed to consolidate an understanding of the prohibition of discrimination that points to the prejudicial effect of the conduct concerned rather than to the intention to discriminate, and to the acknowledgment that such a prohibition entails an individual right not to be discriminated that protects victims with regard to any kind of conduct that can be qualified as discriminatory according to such definitions.

Proof of intent is commonly considered among antidiscrimination scholars as a *probatio diabolica* likely to severely jeopardize the effectiveness of the prohibition of discrimination. Indeed, the embracing by courts of a theoretical elaboration of the concept of discrimination as an intentional act has been considered as one of the main reasons contributing to the ineffectiveness of the prohibition of discrimination under art. 15 of the Workers' Statute³¹⁶. Though the definition of discrimination adopted by the TUI explicitly refers to the "purpose or effect" of any behaviour that directly or indirectly involves a distinction, exclusion, restriction or preference based on the protected grounds, the view that discrimination can be traced back to discriminatory intent appears to be particularly persistent. The analysis of the early enforcement cases of the prohibition of discrimination under art. 43 TUI, revealed, as a matter of fact, some reluctance as to ruling out any relevance of the intention to discriminate,³¹⁷ though in this regard the 2002 decisions of the Court of Milano³¹⁸ and Court of Firenze³¹⁹, the first concerning access to social housing and the second concerning access to employment in the public sector, distinctly opted for an objective understanding of discrimination.

The introduction in the domestic legal system of new definitions of discrimination providing detailed descriptions as to when a specific conduct can be deemed to be discriminatory and manifestly pointing to prejudicial effect has contributed to anchoring such understanding to the explicit wording of the law.

³¹⁶ See chapter II, p. 62.

³¹⁷ Ft. 187 and 189.

³¹⁸ Ft. 192.

³¹⁹ Ft. 199.

It suffices to mention two leading cases in this regard. The first is the already mentioned decision of the Court of Brescia on the discriminatory baby bonus³²⁰. The second is a decision of the Court of Milano concerning the inclusion of nationality clauses with regard to recruitment in the public sector.

In assessing the discriminatory nature of the nationality clause, the Court of Brescia considers:

“It should be immediately noted that it is difficult to discern in the choice of the Municipality of Brescia to reserve the baby bonus to Italian citizens any intention to discriminate, though this is not enough to rule out the “objective” discriminatory nature of the conduct of the municipality being contested before the court, given that the choice of the former determines in practice unequal treatment between Italian citizens and foreigners, disadvantaging the latter: what matters is the existence of a causal link between the conduct of the municipality and the disadvantage (...)”

In the same line, after recalling the non-discrimination clause provided under art. 43 TUI and the definition of indirect discrimination under the implementing decree of the RED, the Court of Milano observes³²¹:

“The consideration that discriminatory behaviour should be excluded since the defendant has acted in accordance with the law and therefore its behaviour is devoid of any intention to discriminate or to create any prejudice is irrelevant. The legislature in delineating also cases of indirect discrimination has referred to behaviour that although lacking intent to discriminate, still assumes a discriminatory connotation. Therefore the subjective element does not have any relevance (...) since what is important is the final outcome constituted by the objective condition of unequal treatment related to being or not a citizen.”

The qualification of discriminatory behaviour in relation to the prejudice it creates to

³²⁰ Ft. 310.

³²¹ Court of Milano, 30 May 2008, in *Diritto, immigrazione e cittadinanza*, 3/4, 2008, p. 219.

the detriment of the protected groups is related to the second issue that was mentioned. What happens when the discriminatory conduct is attributable to the public administration? Provided that intent is irrelevant, can the latter claim it is not subject to the prohibition of discrimination since the act, practice or behaviour contested has been adopted within the domain of its discretionary powers or that its conduct was constrained by national law precluding in the understanding of the defendants the possibility for the public administration to act otherwise?

As emerges from the passages reported above, the decisions of the Court of Brescia and the Court of Milano provide two clear examples of courts dealing with the “administrative discretion” and the “national law constraint” argument that represent, according to the analysis of the case law, the main defence arguments put forward by public administrations.

In both cases, moving from the definitions of discrimination provided under art. 43 TUI and art. 2 Legislative Decree n. 215/03, courts have disregarded such arguments acknowledging that the prohibition of discrimination can be violated by any kind of conduct that entails prejudicial treatment in connection with a protected factor, including an act of the public administration.

Indeed once the applicant has established a *prima facie* case, the only way to exclude discrimination is to prove there is no prejudicial treatment or that it is not related to one of the protected factors, and according to the form of discrimination, that a derogation clause applies with regard to direct discrimination, or that the criterion, practice or behaviour is justified in cases of indirect discrimination.

The understanding of the prohibition of discrimination endorsed by the Court of Brescia and the Court of Milano has found support in two related decisions of the Court of Cassation³²², which was asked by the defendant in both cases to assess

³²² Court of Cassation n. 3670/2011, in *Foro It.* 4, I, 2011, p. 1101 and Court of Cassation n. 7186/2011, in *Rivista italiana di diritto del lavoro*, 4, II, 2011, p. 1095. A. Guariso, *Sulla giurisdizione nei giudizi antidiscriminatori: un punto fermo e un punto interrogativo nella*

whether the concerned proceedings were rightfully promoted before ordinary courts rather than administrative courts. Since the distribution of jurisdiction between ordinary and administrative court relies on the nature of the legal position of the applicant vis-à-vis the public administration, in establishing that the two cases were rightfully introduced before ordinary courts, the Court of Cassation affirms:

“In presence of rules that, with the aim to ensuring equal treatment and prohibiting unjustified discrimination, provide particularly incisive and detailed prohibitions of discrimination, in relation to factors worthy of special consideration in the light of the constitutional and supranational law, (...), it must be considered that the legislature has established for the protection of victims an individual right that can be qualified as an absolute right since it is aimed to protect the individual’s freedom and potential from any kind of violation of the former.”³²³

A thorough analysis of the following case law shows with evidence how the interpretation of the prohibition of discrimination provided by courts in these two milestone cases, and endorsed by the Court of Cassation, has strongly impacted the chances for legal actors to successfully enforce the prohibition of discrimination, in particular with regard to institutional forms of discrimination.

As to the irrelevance of intention, it should be noted that the idea that the prohibition of discrimination under art. 43 and art. 2 Legislative Decree n. 215/03 leaves no room for investigating intention to discriminate has been unanimously shared by the following decisions.

As to the scope of the prohibition of discrimination with regard to differential treatment that has been put in place by the public administration, the vast majority of cases has considered irrelevant the fact that such conduct might be related to the exercise of discretionary powers or otherwise “bounded” by national law provisions

pronuncia della Cassazione a Sezioni Unite n. 3670/2011, in Diritto, immigrazione e cittadinanza, 1, 2011, p. 112.

³²³ Court of Cassation n. 7186/2011, in *Rivista italiana di diritto del lavoro*, 4, II, 2011, p. 1095.

that are in conflict with EU law or should be interpreted in the light of other supranational sources of law. It is important to mention nonetheless that in this regard there are some exceptions.³²⁴

This is not, however, the only way in which the new definitions of discrimination have impacted success in court. As far as the prohibition of indirect discrimination is concerned, in focusing on differences between the definition of discriminatory behaviour under the TUI and the implementing decree of RED, chapter II pointed in particular to the fact that the prohibition of discrimination adopted by the latter is less reliant on statistical proof.

Whereas the importance of the prohibition of indirect discrimination under Legislative Decree n. 215/03 has in part already been acknowledged in terms of supporting a reading of the implementing decree such as to cover also nationality related differences of treatment, it is important to notice that the above interpretation has relied on the idea that differences of treatment based on nationality entail “a particular disadvantage” for persons of a racial or ethnic origin suggesting the adoption of a definition of discrimination, which is less reliant on statistical evidence has most likely been crucial in this regard³²⁵. In addition the prohibition of discrimination has also been invoked in a number cases concerning the adoption of criteria applying to all beneficiaries irrespective of their nationality such as the case of the ten years residency requirement provided by the Friuli Venezia Giulia law for the allocation of baby bonuses or “housing benefits”. In this regard, reminding that long-term residents and beneficiaries of international protection enjoy equality of treatment as to access to social security under Directive 2003/109/EC e 2004/83/EC, the Court of Udine³²⁶ in examining the criterion under the prohibition of indirect discrimination states as follows:

³²⁴ Court of Brescia, 26 June 2010, not published; Court of Arezzo, 3 November 2011 in *Redazione Giuffrè*, 2011, Court of Rimini 27 September 2011, *Foro It*, I, 2012, p. 934.

³²⁵ Ft. 292 and 297

³²⁶ Ft. 293

“The residency requirement imposed by regional law is evidently a criterion that generates an indirect discrimination that is not admissible with regard to this two categories of third country nationals (...) since it puts these protected categories at clear disadvantage compared to nationals or regionals”.

This considered, it should be noted that most of the cases being analysed concern discriminatory conduct perpetrated by public administrations through ordinances, regulations or decisions explicitly referring to criteria such as Italian nationality or additional requirements provided only with regard to TCNs or limiting access to a certain benefit or to registration in the population roll only to TCNs holding a specific type of permit of stay.

In terms of proving discriminatory behaviour this means that the causal link between the protected factor and the prejudice can be immediately inferred from the conduct of public administration itself.

In addition, with few exceptions, applicants have invoked the violation of the prohibition of discrimination together with the violation of an equal treatment clause, significantly easing the assessment of the court as to the discriminatory nature of the criterion concerned.

This is true in particular with regard to cases in which the difference of treatment is framed as an indirect discrimination. Provided that nationality based differences of treatment are considered indirectly discriminatory to the extent that they put people of a particular ethnic origin at a particular disadvantage compared to other people, unless the use of the criterion of nationality is objectively justified by a legitimate aim and the means for achieving that aim are appropriate and necessary, the existence of an equal treatment clause granting equality of treatment to migrants (or certain categories of migrants) has been considered by courts in terms of limiting the scope of the justification defence. In other words the equal treatment clause allows the court to exclude that the criterion of nationality might be justified by a legitimate aim, given that with regard to the scope of the equality clause, the law excludes the possibility to

lawfully refer to such criterion.

An example might be helpful to illustrate the point. Going back to the previously mentioned case of the Court of Milano³²⁷ concerning access to employment in the public sector, the Court after considering that TCNs enjoy equality of treatment with regard to access to employment in the public sector, with the exception of posts involving the exercise of public authority and the safeguard of general interest considers:

“(…) the same article (the reference is to article 2 that establishes the prohibition of indirect discrimination) establishes that should not be considered as discriminatory differences of treatment that although apparently discriminatory are objectively justified by a legitimate aim pursued through appropriate and necessary means. It follows (...) that nationality can be required without assuming a discriminatory connotation only when justified by specific aims that are limited to activities involving the exercise of public authority and the safeguard of the national interest that in relation to their content should be performed only by those that have a particularly strong bond with the country.”

These two aspects make the cases under analysis “easy cases” in consideration of the fact that prejudicial treatment is immediately linked to the protected factor through a “declaration” of the defendant and the violation of the prohibition of discrimination tends to coincide with the violation of the equality of treatment clause.

Whereas the specificities of the case law do not allow a full assessment as to how the new definitions of discriminations and the new rules on the burden of proof have actually affected success in courts as far as proving discrimination is concerned, the same specificities contribute to highlight the role equal treatment clauses have played in this regard.

The analysis of the case law provides a clear picture of what could be considered as a virtuous interplay between the prohibition of discrimination and such clauses, in which

³²⁷ Ft. 320.

the first, the prohibition of discrimination, assumes instrumental character as regards the enforcement of the second, the equal treatment clause.

Thus, in cases involving nationality related differential treatment established by local authorities, the prohibition of discrimination has been enforced in connection with equality of treatment clauses provided under the TUI, and in particular: art. 2 that guarantees, in accordance with ILO Convention on Migrant Workers n. 143/75, to all foreign workers regularly residing in Italy and their families equal treatment and full equality of rights compared to national workers; art. 40 that grants to third-country nationals holding at least a two-year residence permit and are employed or engaged in self-employment activity the right to equal treatment as regards access to public housing; art. 41 TUI stating with regard to access to social assistance that third-country nationals that are granted at least a one-year residence permit enjoy equality of treatment with nationals and finally art. 6 granting equality of treatment to third country nationals as regards registration in the population roll.

In cases concerning differential treatment resulting from national law provisions, courts have systematically referred to equal treatment clauses established at the supranational level. The analysis of the case law shows such clauses have mattered in a twofold way. Firstly, they have provided the opportunity for courts, according to the mechanisms that govern their effect in the domestic system, to “set aside” the national provision that violates such clauses or provide an interpretation of the former that is consistent with the latter. Secondly, they have provided the standard of equality in the light of which courts have assessed whether the alleged discriminatory conduct violated the prohibition of discrimination.

The case law provides in this regard multiple examples in which the discriminatory nature of the conduct of the public administration adopted in accordance with national legislation excluding migrants from a certain welfare benefit or from employment in public sector has been examined in connection with equality clauses provided under EU Directives or other sources of EU law and international conventions, and in particular the ILO Convention on Migrant Workers n. 143/75 and the ECHR as

interpreted by the Court of Strasbourg. In addition, it also allows identifying a clear preference of legal actors for EU equality clauses, especially when it comes to cases involving individual applicants benefiting from equality clauses established at both levels.

Whereas the ECHR and ILO Convention on Migrant Workers n. 143/75 are characterized by a universal approach not distinguishing between different categories of migrants in contrast with the fragmented web of equal treatment clauses resulting from EU law, such sources, unlike the latter are not backed with direct effect. Though both Conventions have been acknowledged to enjoy “sub-constitutional *status*” meaning their provisions should inform the interpretation of national law, in cases where conform interpretation is not legally acceptable, lower courts are left with no other choice but to refer to the Constitutional Court.³²⁸

This “comparative advantage” of EU equality clauses appears to explain the extensive reliance of legal actors and courts on the equality clause provided under the Directive 2003/109/EC. Indeed, despite having the Directive a more limited personal scope compared to the ECHR and the ILO Convention on Migrant Workers, Table n. 6 shows the Directive has been widely invoked to disapply national provisions in contrast with its equality clause or otherwise provide a conform interpretation of national law (48 cases), either with regard to access to employment in the public sector or access to social security. In addition the case law show courts have been particularly receptive to the indications of the Court of Justice in the *Kamberaj* case³²⁹, notwithstanding the different outcome that the latter reached on the applicability of the RED to cases concerning nationality based differences of treatment.

This does not mean that legal actors or courts are not willing to exploit the opportunities offered by the ECHR and the ILO Convention on Migrant Workers to go

³²⁸ According to the doctrine of the Constitutional Court (see ft.132), ordinary courts are bound by the provisions of the ECHR as interpreted by the ECtHR, but they cannot disapply national provisions that are in conflict with the Convention. The assessment of the compatibility of domestic legislation with the ECHR is exclusively reserved to the Constitutional Court.

³²⁹ Ft. 230.

beyond the standard of equality established by the national and the EU legislature and challenge the principle according which the assessment concerning the compatibility of national provisions with the such sources is reserved exclusively to the Constitutional Court. Indeed the analysis shows, besides cases in which courts have referred the issue to the Constitutional Court prospecting a violation of art. 14 ECHR,³³⁰ also a number of cases in which courts have provided a conform interpretation of the national provision ultimately reaching results equivalent to the mechanism of disapplication related to EU law³³¹ or explicitly disappplied national legislation non consistent with the ECHR.³³²

<i>Supranational sources</i>	<i>2014-2015 (TUI&RED)</i>
2003/109/EC	48
2004/83/EC	5
2004/38/EC	2
2011/98/EU	2
ECHR	8
ILO C. n. 143/75	13
2009/59/EC	2
Association Agreement with Turkey	1
EU-Morocco Agreement	4

Table n.6

³³⁰ Court of Reggio Calabria, 30 March 2015, in *GU, 1a Serie Speciale - Corte Costituzionale*, 41, 2015; Court of Bergamo, 30 November 2015, in *GU, 1a Serie Speciale - Corte Costituzionale*, 12, 2016

³³¹ Court of Ivrea, 24 July 2014, not published; Court of Appeal of Milano, 24 August 2012, not published.

³³² Court of Brescia, 9 October 2015, in *Redazione Giuffrè*, 2015

4. Resources for litigation. Fee shifting.

Chapter II provided a general outline of legal rules concerning fee shifting and the cost of access to justice in the domestic system highlighting their relevance in terms of favouring or otherwise constraining legal mobilisation around antidiscrimination law.

It also suggested that whereas legal aid might in general represent a key resource for legal actors in this regard, in the Italian case, its relevance is likely to be limited in consideration of the particularly low income threshold provided by DPR n. 115/02 and the mechanism according to which, under the same decree, lawyers' fees in civil proceedings are reduced by half.

The analysis of the case law shows fee shifting has generally played in favour of actors interested in enforcing the prohibition of discrimination.

It might be helpful, in this regard to remind that art. 92 of the Civil Procedure Code provides that the "losing party should reimburse all his or her opponent's expenses including court fees and lawyer's fees" allowing the judge to derogate to the general rule only in case of "split outcome" and "serious and exceptional reasons".

With the aim of understanding the working of the rule in action, the analysis has distinguished between cases in which courts have ruled in favour of applicants and cases in which the discriminatory claim has been dismissed.

Table n. 7 shows out of 146 cases in which applicants have resulted as the winning party, in 109 cases the court has condemned the defendant to fully refund the applicant's lawyers and court fees, and in other 29 cases that each party should bear its own expenses.

An in-depth analysis of these 29 cases shows the most common reasons lying behind the decision of the court to derogate the general rule are related to the "peculiarity of the issues under review", to the "complexity of legal framework" or to the "novelty of the issues addressed by the court" denoting a certain level of unpredictability of the rule, provided that the above reasons are often used as generic formulas not grounded

on specific arguments and ultimately related to the nature of the legal framework rather than to the behaviour of applicants or to the outcome of the dispute.

The issue is all but irrelevant. The risks related to a “loose” application art. 92 of the Civil Procedure Code are clearly highlighted by the Court of Appeal of Brescia³³³. In reversing a first instance decision providing each party should bear its own costs despite allowing that the conduct of the defendant violated the prohibition of discrimination with regard to access to social security, the Court observes:

“Considered moreover the very small amount of the credit, the decision not to apply the fee shifting rule would ultimately make legal action completely superfluous, provided that the economic benefit granted to the applicant would barely cover his lawyers’ fees”.

<i>Decision on lawyer’s and court’s fees</i>	<i>2004-2014 (TUI&RED)</i>
Each party bears its own cost	29
Full refund of the expenses of the applicant	109
Does not rule in this regard.	7

Table. n. 7

The same motivations on the other hand appear to have to some extent protected applicants from the obligation to refund the defendant’s legal expenses in cases in which the court has dismissed the claim. Only in 3 out of 10 cases in which the discrimination claim is dismissed, the applicant has been condemned to pay the winning party’s costs.

Finally the case law confirms the expectations as to the limited relevance of legal aid (there is only 1 case in which the applicant was actually admitted to legal aid).

Chapter II also highlighted a gradual increase of costs related to access to justice

³³³ Court of Appeal of Brescia, 2 October 2014, not published.

starting from 2011. Whereas the rising cost of the “contributo unificato” appears not to have discouraged litigation, the exclusion of civil society organizations from benefiting from exemption from court fees, as far as proceedings concerning employment and access to welfare are concerned, appears to have pushed civil society organizations to adapt their strategies to acting in their own name only in cases entailing strategic relevance and limiting their involvement to supporting and proving expertise to individual claimants in follow up cases. (See in this regard Charter. n.1)

5. Fighting institutional discrimination.

This paragraph intends to provide a general overview on litigation highlighting in particular who are the perpetrators, what is the object of litigation and how litigation has contributed to narrowing the differences between nationals and non-nationals in specific areas.

As to the first issue, it was already anticipated that most of the cases being analysed concern institutional discrimination. As Table n. 8 shows in 146 out of 161 claims filed from 2004 to 2015 under the TUI and Legislative Decree n. 215/03 the allegedly discriminatory conduct was put in place by the public administration. By contrast, private parties were involved only in 11 cases. Table n. 9 provides further detail as to the bodies of the public administration that have been held responsible for discrimination. It shows, in particular that INPS and Municipalities are the main subject being targeted by litigation.

<i>Defender</i>	<i>2004-2015(TUI&RED)</i>
Public administration	146
Private	11
Private and Public administration	4

Table n. 8

<i>Public administration bodies</i>	<i>2004-2015(TUI&RED)</i>
INPS	58
Government	22
Region	7
Province	6
Hospital	11
Police	1
Municipality	102
University	1
Other PA	3

Table n. 9

Before going into further detail in analysing the case law, it is important to reflect on the extent to which such findings mirror the reality of discrimination in Italy. In other words, does the considerably higher number of discriminatory claim towards the public administration signify private parties tend to discriminate less in comparison?

There are at least two distinct reasons preventing such a reading of the data.

Firstly, it is commonly accepted that prejudicial treatment resulting from the conduct of a public administration is far easier to detect, due to the transparency requirements the public administration is subject to compared to the level of informality generally characterizing the private sector. In order to illustrate such argument, be it sufficient to consider the difference between challenging in court a nationality clause included a public recruitment notice compared to the decision of a public employer not to hire based on the same ground. Indeed in the case law under analysis the overwhelming majority of cases concerns nationality related requirements provided by local regulations or the law.

Secondly, the significant difference in the number of claims involving the public administration compared to those involving private parties could be influenced also by the specific features of the support structure that has developed in the Italian context of fighting discrimination. Civil society organizations that have engaged in legal mobilisation on behalf of migrants can be characterized as “external allies” meaning that they lack significant numbers of migrants among their membership and their supporting activity is justified in the light of “a variety of material and or ideological commitments” towards the aggrieved population³³⁴. Lack of migrants among their membership and lack of organizational presence in “sensitive areas” for the purposes of fighting discrimination such as the workplace are very likely to have skewed litigation towards the public administration, leaving the private sector in the background.

On this account, data on perpetrators should not be considered as marking a difference between the diffusion of discriminatory practices in the public sector and the private sector.

This considered, distinguishing among cases filed against the public administration based on the object of the claim, it appears clear that litigation against discrimination of migrants has mainly focused on social security and benefits, employment and self-employment, and services offered by the public administration.

It should be acknowledged that the classification of case law in Table n.10 should not be considered in rigid terms. Whereas case law concerning registration in the population roll has been classified under access to services offered by the public administration according to a broad understanding of “access to goods and services” such as to include also services that are offered to the public by the public administration, litigation on the issue overlaps to some extent with access to social security and social benefits since the “registration on the population roll” represents a precondition for benefiting from any social protection intervention enacted at the

³³⁴ M. W. McCann, *Rights at work*, cit. p.108-109.

territorial level or established at the national level, in relation to which implementation is demanded to local authorities.

The same is true for cases classified under “other”. The heading includes cases concerning “access to community service”, “sports federation membership” and a case challenging as discriminatory the failure of competent authorities to abide by the law with regard to an administrative regularization procedure for undeclared work; a case concerning a public declaration of a city councillor not to rent or sell houses to foreigners and cases concerning a municipality ban of burkini, burqa and street vendors. The first three categories are connected to access to employment and the other two to access to goods and services, though their peculiarities suggest it would be better to classify them separately.

<i>Object of the claim</i>	<i>2004-2015(PA)</i>
Social security and benefits	96
Employment and self-employment	24
Services offered by the PA	18
Education	1
Other	14

Table n. 10

Providing a complete overview of litigation is particularly challenging, if not impossible. Therefore the following will be limited to outline the main issues addressed by the case law with the purpose of highlighting the relevance of litigation in narrowing the differences between the *status* of TCNs and nationals.

Looking at the political context that favoured increasing involvement of civil society organizations in litigation strategies paragraph n. 2 pointed to the so called “local policies of exclusion”. Litigation arising from pressures to contain the effects of such policies has dealt mainly with access to social benefits and registration of TCNs in the

resident population roll.

As regards the first, the case law provides an extensive number of examples in which courts have firmly excluded the possibility for local authorities to refer for the purposes of access to social benefits to criteria such as Italian nationality or limit a certain benefit only to migrants with a specific type of permit of stay or otherwise provide particularly burdensome requirements of “length of residence” (10 years) such as to indirectly exclude the TCNs from the scope of potential beneficiaries.

Such decisions have covered a wide range of benefits such as baby bonuses³³⁵, income support aimed at individuals that have lost their occupation,³³⁶ school fees subsidies,³³⁷ refunds for vision and dental expenses for minors, access to the whole system of social protection at the local level,³³⁸ access to student housing³³⁹, housing subsidies³⁴⁰ or other forms of support aiming to facilitate access to housing³⁴¹ and allocate municipality owned apartments.³⁴²

Likewise, lower courts have clarified that local authorities are not allowed to put in place any limitation to the right of TCNs to enrolment in the population register under the same conditions provided for Italian citizens, therefore qualifying as discriminatory local regulations requiring for such purposes long-term *status*³⁴³, absence of criminal record³⁴⁴, or a minimum income and the presentation of the applicants passport with a

³³⁵ Court of Appeal of Brescia, 31 January 2013, in *Rivista critica di diritto del lavoro*, 1/2, 2013, p. 264; ft. 310; ft.296; ft. 295;

³³⁶ Ft. 312; Court of Bergamo, 8 July 2010, in A. Guariso (ed.) *Senza distinzioni*, cit., p.122.

³³⁷ Ft. 292.

³³⁸ Ft. 312.

³³⁹ Ft. 293.

³⁴⁰ Ft. 335.

³⁴¹ Court of Bergamo, 15 July 2010, in A. Guariso (ed.) *Senza distinzioni*, cit., p.132.

³⁴² Court of Brescia, 13 June 2012, in A. Guariso (ed.) *Senza distinzioni*, cit., p. 101; ft. 292.

³⁴³ Ft. 312.

³⁴⁴ Court of Brescia, 9 April 2010, in A. Guariso (ed.) *Senza distinzioni*, cit., p. 246.

regular entry visa³⁴⁵.

If local authorities are not allowed to refer to nationality related criteria to differentiate between nationals and migrants, courts have clarified the national legislature faces limitations as well.

With regard to the so-called “large family allowance”, established under art. 65 Law n. 448/1998 with the aim to financially support low-income families with at least three children and reserved only to Italian and EU nationals, courts have repeatedly considered the requirement of nationality to be in violation of the prohibition of discrimination. Whereas with regard to beneficiaries of international protection, following the implementation of Directive 2004/83/EC, INPS, that is in charge of the payment of the benefit, issued an administrative circular clarifying beneficiaries of international protection qualified for the benefit, with regard to long-term residents the Institute has failed to provide municipalities, which are in charge of collecting and forwarding applications, with indications as to the inclusion of the latter among beneficiaries.

The analysis of the case law shows most cases considering the nationality clause to be in violation of the prohibition of discrimination have done so in connection with the equal treatment clause provided under Directive 2003/109/EC, though there are also examples in which courts have reached the same conclusion with regard to other categories of third country nationals pointing to the need to provide an interpretation of national legislation that is consistent with art. 14 ECHR.³⁴⁶ As known the ECtHR has dealt specifically with the issue in the case *Dhabbi v. Italy*³⁴⁷ reiterating that “very weighty reasons” would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with art. 14 of the Convention. The ECtHR has also specified that although budgetary

³⁴⁵ Court of Brescia, 5 May 2011, not published; Court of Brescia, 15 March 2011 and Court of Brescia, 31 March 2011, in A. Guariso (ed.) *Senza distinzioni, cit.*, p. 255 -266.

³⁴⁶ Ft. 331.

³⁴⁷ ECtHR, *Dhabbi v. Italy*, 8 April 2014, Appl. n. 17120/09.

reasons advanced by the Italian Government were to be considered a legitimate aim in this regard, such reasons could not be considered sufficient to establish a reasonable relationship of proportionality in the instant case that would render the impugned distinction compatible with the requirements of art. 14 of the Convention.

Case law concerning the so-called “basic maternity allowance” established under art. 74 Legislative Decree n. 151/2001 has on the other hand repeatedly considered the requirement of long-term residence to be discriminatory just like the requirement of nationality. Providing further evidence on how the enforcement of the prohibition of discrimination has contributed to shifting the boundaries of equality for migrants, courts have extended the benefit to TCNs in connection with equality clauses under the Directive 2011/98/UE and the Euro Mediterranean agreement with Morocco³⁴⁸, the Agreement establishing the Association between the European Economic Community and Turkey³⁴⁹ and finally according to a reading of the national legislation that is consistent with art. 14 ECHR.³⁵⁰ In three other cases, based on the premise that the national provision does not allow a consistent interpretation, the issue has been referred to the Constitutional Court in relation to the compatibility of the requirement with art. 14 ECHR as interpreted by the Court of Strasbourg, art. 2 and 3 of the Constitution.³⁵¹

The case law provides additional examples in which nationality related differential treatment has been considered to violate the prohibition of discrimination with regard to other benefits established by the national legislature on a transitory basis, including a holiday bonus³⁵², social card³⁵³, and baby bonuses³⁵⁴.

³⁴⁸ Court of Alessandria, 9 November 2014, not published and Court of Alessandria 25 May 2015, not published.

³⁴⁹ Court of Reggio Emilia, 16 July 2012, not published.

³⁵⁰ Ft. 331.

³⁵¹ Ft. 330.

³⁵² Court of Milano, 17 August 2010, not published.

³⁵³ Court of Trieste 19 September 2012, in A. Guariso (ed.) *Senza distinzioni, cit.*, p. 233, Court of Trieste, 26 January 2012, not published.

³⁵⁴ Court of Monza, 28 October 14, not published.

Ultimately a decision of the Court of Brescia has considered discriminatory the criterion of ten years of continuous residence in the country in connection with the equal treatment clauses provided under Directive 2003/109/EC and Directive 2004/38/EC. The assessment of the discriminatory nature of the requirement of ten years of residence is in line with several decisions assessing the discriminatory nature of the same criterion with regard to access to “housing subsidies” and a regional “childbirth grant” established by the region of Friuli Venezia Giulia³⁵⁵.

Access to employment and self-employment is another area that has been at the forefront of litigation, in particular as regards access to employment in the public sector.

As already observed, the legislation concerning access to employment in the public sector has given rise to significant inconsistencies as to the requirement of nationality for the purposes of employment in the public sector resulting in a widespread practice of exclusion of TCNs from opportunities of employment in the public sector.

Litigation in this regard has been strongly connected to the enforcement in the domestic system of the ILO Convention on Migrant Workers n. 143/75, which as already mentioned grants equality of treatment to all migrants with regular residency *status* as regards access to employment (included employment in the public sector), with the only exception of posts with regard to which restrictions can be considered justified in the interests of the State, though the case law includes also a number of rulings in which courts has specifically referred to Directive 2003/109/EC.

Courts have repeatedly considered discriminatory for the purposes of art 43 TUI and art. 2 Legislative Decree n. 215/03 the exclusion of TCNs from posts in the public sector that do not entail exercise of public authority, including posts as nurses and other healthcare professionals,³⁵⁶ administrative staff and guardians,³⁵⁷ software

³⁵⁵ Ft. 294 and Court of Udine, 7 March 2011, not published.

³⁵⁶ Court of Lodi, 18 February 2011, not published; ft. 321; Court of Biella, 23 July 2010, not published; Court of Milano 21 April 2011, in *Foro It*, I, 2011, p. 2177; Court of Milano, 19

technicians³⁵⁸, receptionists³⁵⁹, census officers³⁶⁰, researchers³⁶¹, teachers.³⁶²

The requirement of nationality has been likewise considered discriminatory with regard to access to self-employment and in particular to the professional examination allowing exercising the profession of employment consultant³⁶³.

Finally, an analysis of how litigation has contributed to narrow differences between Italian nationals and migrants cannot be conceived without referring to litigation on the issue of access to “community service”³⁶⁴. Whereas from a legal point of view, the arguments upholding the discriminatory nature of the requirement of Italian nationality with regard to “community service” are no different from those elaborated by courts with regard to access to employment in the public sector, such decisions hold particular relevance since they appear to make explicit an idea that flows throughout the case law under analysis, the idea that in addition to the traditional concept of community that is linked to citizenship, there is a community that goes beyond citizenship, that is based on the choice to move and reside in a certain country fulfilling the obligations and enjoining the rights it grants to its members.

As the Court of Appeal of Milano observes:

November 2012, not published, Court of Perugia, 8 June 2012, not published, Court of Milano, 5 October 2011, not published, Court of Trieste, 22 July 2011, not published.

³⁵⁷ Court of Milano, 30 July 2010, in *Rivista critica di diritto del lavoro*, 3, 2010, p. 786.

³⁵⁸ Court of Firenze, 23 January 2014, in *Redazione Giuffrè*, 2014.

³⁵⁹ Court of Siena, 3 September 2012, not published.

³⁶⁰ Court of Brescia, 29 December 2011, not published; Court of Genova, 16 August 2011, not published; Court of Milano, 12 August 2011, in *Rivista critica di diritto del lavoro*, 4, 2011, p. 894

³⁶¹ Court of Roma, 20 December 2012, not published.

³⁶² Court of Roma, 14 December 2012, not published; Court of Milano, 4 March 2015, in *Foro It*, I, 2015, p. 2531.

³⁶³ Court of Milano, 29 August 2013, not published.

³⁶⁴ Court of Milano, 12 January 2012 in *Foro It*, 2, I, 2012, p. 594, confirmed by Court of Appeal of Milano, 22 March 2013, in *Redazione Giuffrè*, 2013; Court of Milano, 19 November 2013. The Court of Cassation n. 7951/16 referred the issue to the Constitutional Court that ultimately declared the requirement of nationality unconstitutional in accordance with art. 3 of the Constitution (Constitutional Court n. 119/2015)

“The concept of ‘national community’ as defined by the Constitution and interpreted by the Constitutional Court does not refer to the concept of “national borders” rather than a to community of people living within such borders; it is clear that the concept of citizenship is linked to being part of this community that lives and interacts within a specific territory.”

It is important to note that in narrowing differences between the *status* of nationals and non-nationals lower courts stand in a complementary relationship with the Constitutional Court, subjecting, through the enforcement of the prohibition of discrimination, national provisions entailing differences of treatment based on nationality to judicial review.

Important as it is, the acknowledgement of equal rights in courts does not necessarily translate in significant social reform. In order to assess the role of litigation and courts in this regard, is necessary to investigate the impact of litigation beyond courtrooms.

Chapter IV
JUSTICE CONTAINED

1. From court victories to policy response.

The previous chapter highlighted how the legal opportunity structure has influenced legal mobilisation around the prohibition of discrimination affecting the strategies of legal actors and their chances of winning in court. It also provided an overview of litigation illustrating how lower courts have contributed to narrowing differences between the legal *status* of national and foreigners.

This chapter intends to go further, moving from court decisions to policy response. In doing so it will focus on two specific areas of litigation, access to employment in the public sector and access to welfare, and in particular access to the “large family allowance” under art. 65 Law n. 448/1998.

The choice of these specific issues is related to the fact that they have generated, compared to the other areas included in the analysis, exceptionally high levels of litigation, and in relation to both “European Law 2013” n. 97/2013 has amended national legislation allowing access to employment in public sector to long-term residents, beneficiaries of international protection and EU national family members and extending the area of the beneficiaries of the “large family allowance” to long-term residents.

In discussing the evolution of the public interest law in the US, this research pointed to the criticism the “first wave” of public interest law was subject to and in particular to the liberal critique concerned with the limits of litigation as a strategy for social change. Indeed, both Handler and Scheingold have brilliantly illustrated the difficulties of translating court decisions into meaningful change and the risks associated with pursuing legal strategies as to “atomizing” collective claims and draining resources from more promising strategies such as political mobilisation³⁶⁵.

Such legitimate concerns have been to a certain extent overcome by more recent research showing how law matters for social reform should be assessed in the light of the ability of actors to promote sustained litigation³⁶⁶ and to strategically use victories in court for obtaining responsive actions to policy demands and ensuring enforcement.³⁶⁷

Focusing on the impact of European Court of Justice and national decisions on different areas of EU law, among which access to employment in the public sector and access to welfare for EU nationals, Conant elaborates a theoretical model which links policy response to patterns of legal and political mobilisation, arguing that the variations in the ability of actors interested in reform to initiate legal challenges and mobilise pressure to broaden the scope of legal victories will ultimately be crucial for judicial impact. Yet she notes the mobilisation of competing interest will also influence policy response compelling decision makers to contain justice by restricting the scope of such legal victories³⁶⁸.

With these considerations in mind, the following paragraphs will trace the national authorities’ policy response to judicial decisions and weigh the impact of litigation on the process that brought to the 2013 reform.

³⁶⁵ J. F. Handler, *Social Movements*, cit. S. A. Scheingold, *The politics of rights*, cit.

³⁶⁶ C. R. Epp, *The rights revolution* cit

³⁶⁷ M. McCann, *Law and Social Movements*, cit,

³⁶⁸ L. J. Conant, *Justice contained: law and politics in the European Union*, Cornell University Press, 2002.

2. Access to employment in the public sector.

The analysis of the case law showed courts have assessed the discriminatory nature of the nationality clause as regards access to employment in the public sector taking into account the multilevel nature of regulation applying to the issue, and in particular the constraints arising from EU and international law as to the cases in which nationality can be lawfully required for such purposes.

The previous chapters provided an account of how this different levels of regulation, national, international and European, have affected the strategies of legal actors and defined their chances of success in court.

Indeed, the analysis highlighted the relevance of the ILO Convention on Migrant Workers n. 143/75 and of the EU Directives on long-term residents and beneficiaries of international protection in allowing legal actors to challenge discriminatory practices linked to an interpretation of the national legislation regulating access to employment in the public sector such as to include, except for European citizens, a general requirement of Italian nationality.

It didn't take long, following the adoption of the TUI, before such practices were challenged before courts for violating the prohibition of discrimination under art. 43.

As already mentioned, the first ruling considering the nationality clause discriminatory for the purposes of art. 43 TUI was the 2002 decision of Court of Appeal of Firenze³⁶⁹ which argued thoroughly on the effects of the ILO Convention in the domestic system, concluding that the only admissible restrictions applying to access to employment in the public sector were those mentioned by art. 14 of the Convention.

The decision would start a vivid discussion between employment and administrative courts as to the correct interpretation of existing legislation, with the former

³⁶⁹ Ft. 199.

considering the requirement of citizenship discriminatory and the latter, except for the TAR Liguria³⁷⁰, endorsing the lawfulness of the same requirement for the purposes of recruitment in the public administration.³⁷¹

Apparently the legal uncertainty ultimately arising from these conflicting approaches prompted the issuing of an “opinion” on behalf of the governmental “Public Service Department”³⁷². The “opinion” considered and disregarded the arguments supporting the possibility for TCNs to access public-sector employment.³⁷³

The opinion would not as a matter of fact discourage further litigation. A year after it was issued, in 2005 the Court of Appeal of Firenze³⁷⁴ would confirm the arguments supporting the withdrawal of the requirement of Italian citizenship in national legislation.

In 2007, Legislative Decree n. 3/2007 implemented Directive 2003/109/EC specifically addressing the issue of access to employment. Art. 9 established holders of the EC long-term residence permit have access to any employment or self-employment activity that is not explicitly limited by law to nationals. Notwithstanding the fact that the only activities that are explicitly limited to the latter are those involving the exercise of public authority and the safeguard of the general interest, the provision was interpreted as confirming the exclusion of TCNs from employment in public sector.

³⁷⁰ Ft. 200.

³⁷¹ Court of Genova, 19 July, 2004, not published; Court of Genova 21 April 2004, in *Diritto, Immigrazione e cittadinanza*, 2, 2004, p. 172. *Contra* TAR Toscana n. 38/2003, not published; TAR Veneto, n. 782/2004, not published.

³⁷² The Public Service Department is in charge of the coordination and monitoring of the organization and functioning of public administrations, as well as for the coordination of the Public Administration with regard to admission and conditions applying to public sector employment.

³⁷³ Parere dell’Ufficio per il personale delle pubbliche amministrazioni n. 196/2004, in *Diritto, Immigrazione e cittadinanza*, 3, 2004, 3, p. 239.

³⁷⁴ Court of Appeal of Firenze, 21 December 2005, in *Diritto, Immigrazione e cittadinanza*, 2 2006, p. 110.

Legislative Decree n. 251/2007 implementing Directive 2004/83/EC and Legislative Decree n. 30/2007 implementing Directive 2004/38/EC had the merit of being less ambiguous in this regard both extending, respectively, to beneficiaries of refugee *status* (the law fails to mention beneficiaries of subsidiary protection) and EU national's family members access to employment in the public sector under the same conditions applying to EU nationals. In addition the national legislature would extend access to employment in the public sector also to family members of Italian nationals in order to avoid "reverse discrimination".

Though one could reasonably expect the implementation of the EU directives granting equality of treatment to the above categories of TCNs to lower the number of grievances and therefore limit litigation as far as these categories are concerned, the analysis of the case law shows the new provisions did only change the law in the books. Though their impact in opening public-sector employment to TCNs was limited, the above Directives provided essential arguments for legal actors and courts to rely on in arguing on the unlawfulness of nationality clause.

Looking at the overall litigation generated on the issue (Table n. 10), the data shows the 2002 decision of the Court of Appeal of Firenze was followed by 46 lower courts decisions assessing the discriminatory nature of the nationality clause, with courts agreeing with the applicant in 45 out of 46 cases decided and one referral to the Constitutional Court.

<i>Outcome of the proceeding</i>	<i>n. of decisions</i>
Referral to the Constitutional Court	1
It is not discriminatory	1
It is discriminatory	45

Table n. 10

Consensus among lower courts on the discriminatory nature of the nationality requirement has proved so strong that it was able to overcome the setback of the Court of Cassation in 2006 considering the requirement to be in line with national and international law³⁷⁵ and attain in 2011 the indirect support of the Constitutional Court.³⁷⁶ The latter indeed seemed willing to align with lower courts in declaring the referral of the Court of Rimini³⁷⁷ not admissible provided that the referring judge appeared to have already identified a reading of the relevant regulations that was conform with the Constitution. According to such reading the referring judge had concluded the applicant, a third country national, had the right to access employment in the public sector under the same conditions applying to EU nationals.

The consolidation among lower courts of an inclusive reading of domestic legislation would also affect the official position of UNAR on the issue. In 2010 asked to provide an opinion on the discriminatory nature on the nationality clause, UNAR would simply acknowledge the existence of conflicting case law and refer to the official position of the government before concluding on the “impossibility, *de jure condito*, to open the doors of employment in the public sector to individuals not holding Italian or European citizenship”, though the Office wished for an evolution of the legal framework in that direction.³⁷⁸ Less than a year later, making explicit reference to lower courts decisions, the Office will maintain that in light of the existing regulatory framework and related case law, nationality could be lawfully required only with regard to posts involving the exercise of public authority and the safeguard of the general interest. Apart from these cases, it is concluded, the requirement assumes a discriminatory connotation, implying a differential and disadvantageous treatment for

³⁷⁵ Court of Cassation n. 24170/2006, in *Rivista Italiana di Diritto del Lavoro*, 2, II, 2007, p. 302

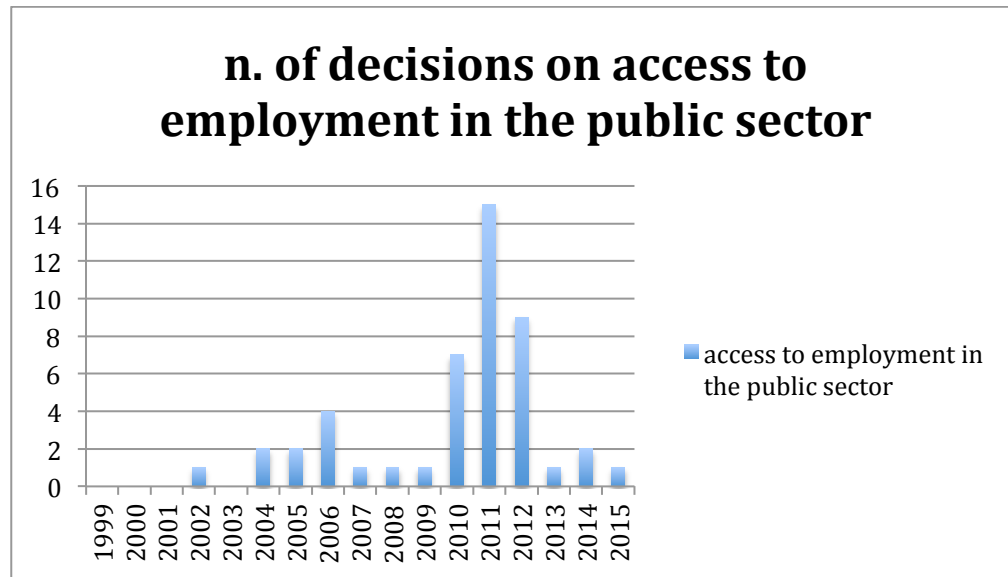
³⁷⁶ Constitutional Court, n. 139/2011

³⁷⁷ Court of Rimini, 22 June 2010, in *GU Ia Serie Speciale - Corte Costituzionale*, 45, 2010.

³⁷⁸ UNAR, Opinion n.15, Rep. n. 219/2010

migrants that cannot be justified in the light of the objective differences between the *status* of national and non-nationals³⁷⁹.

Litigation will be particularly intense between 2010 and 2013. During this three years period will be filed 31 out of 47 cases.



Charter n. 2

Notwithstanding considerable success in court, reform amending Legislative Decree n. 165/2001 extending the exemption provided for EU citizens to TCNs with EU long-term resident *status*, beneficiaries of refugee and subsidiary protection and EU nationals' family members is more likely to be related to the intervention of the European Commission on the issue. Therefore, multilevel protection of migrants as to the issue of access to employment in the public sector, besides strongly affecting enforcement, allows also to explain the process that brought to the 2013 reform.

The influence in this regard of the European Commission institutional support is confirmed by the legislative instrument chosen by the Italian government to this end. The so-called "European law" is specifically used for the purposes of adapting the

³⁷⁹ UNAR, Opinion n. 23, Rep. n. 369/2011

domestic legislation to obligations arising from EU law. This is confirmed by an explicit reference in Law n. 97/2013 to the EU Pilot pre-infringement proceedings 1769/11/JUST and 2368/11/HOME, the first concerning the correct implementation of Directive 2004/38/EC and the second the implementation of Directives 2003/109/EC and 2004/83/EC.

The failure of the legislature to take into account and extend equality of treatment to categories of migrant workers different from those covered by EU legislation confirms, beyond formal arguments, the importance of the pressure coming from the European Commission in the process that brought to the adoption of Law n. 97/2013.

During the parliamentary proceedings, civil society organizations would draw the attention of the legislature on the need to modify national legislation in accordance with the ILO Convention on Migrant Workers and the related national case law granting migrant workers, other than those protected under EU law, equality of treatment as regards access to employment in the public sector³⁸⁰. Though the issue was raised before both chambers of the Parliament in line with civil society organizations' appeals³⁸¹, eventually the law remained silent in this regard.

While the legislative amendment has dissolved any doubt with regard to the categories of TCNs it specifically refers to, the minimalist approach of the legislature seems to have re-opened the discussion with reference to the categories of TCNs not mentioned by Law n. 97/2013.

Indeed the fact that Legislative decree n. 165/2001 was amended allowing access to public sector employment only to the categories of TCNs migrants covered by EU law was considered by the Court of Cassation as an indication of the persistence in national legislation of a general principle according to which Italian nationality represents a necessary condition for the purposes of access to public sector

³⁸⁰ ASGI, Migrants and access to employment in the public sector: appeal for a new discrimination, 17/07/2003; S. Briguglio, Notes on access to employment in the public sector by migrants, 22/07/2013.

³⁸¹ ODG Camera dei deputati 9/1327/7; ODG Senato G7.100.

employment, except for cases where the national legislature expressly provides an exception in this regard.³⁸²

The sequence of the events here described echoes Conant's findings on the policy responses following the ECJ case law granting EU nationals access to most fields of employment in the public sector. She argues that Member States were initially reluctant to honour the policy implications of the ECJ restrictive interpretation of the "public service exception" responding to legal challenges on a case-by-case basis rather than through general reform³⁸³.

In her account, whereas limited enforcement before national courts and the ECJ failed to generate such policy change, the European Commission engagement provided a critical source of pressure towards the enactment in the early '90 of legislative reforms abolishing nationality clauses, at least in relation to some areas of public-sector employment.

Nonetheless the case of access of TCNs to public sector employment in Italy appears to be different, at least with regard to two different aspects.

In explaining the above pattern of policy response, Conant points in particular to two factors. The first refers to the lack of organizational capacity of EU migrants and associations supporting them to pursue legal opportunities effectively and migrants' lack of national franchise, ultimately insulating host Member States from their demands. The second is related to limited interest of Member States either to reform their policies or to resist change. Indeed the latter were able to retain full exemption for "sensitive" posts, had no cost in allowing EU nationals to access public sector employment and could rely on the limited number of EU migrants not to generate political opposition from their constituencies.

³⁸² Court of Cassation n. 18523/2014, in *Foro It*, 10, I, 2014, p. 2732. *Contra*, Court of Firenze 23.1.2014, ft. 358.

³⁸³ L. J. Conant, *Justice contained, cit.*, p. 151-176.

The analysis of the national case law shows migrants and civil society organizations have been able to successfully exploit legal opportunities and build significantly broad consensus among lower courts.

Whereas it could be argued that the failure to reform existing legislation in accordance with the EU Directives and national court decisions could also be explained in the light of the non-compliance record of Italy as just another example of lack of administrative capacity, there are several reasons for considering an alternative explanation.

First, notwithstanding the decision to amend national legislation in line with the indications of the European Commission, the document accompanying the draft law specifies, as regards long-term residents and beneficiaries of refugee *status* and subsidiary protection that the government does not share the position of the European Commission as to the incompatibility of national legislation precluding access to such categories with the EU Directives and justifies reform in view to avoiding the opening of an infringement procedure.³⁸⁴

Second, the evolution of the political discourse on TCNs and immigration policies targeting TCNs both marked by emphasis on repression of illegal migration, restrictions on access to national labour market and retraction of equal rights to those already admitted in the national territory provide a strong argument on the interest of national authorities in resisting reform.³⁸⁵

Whereas the analysis of the case law shows trade union organizations might share to a certain extent the objective of opening public sector jobs to TCNs (they have actually acted together individual claimants or even filed collective claims, sometimes together with civil society organizations), the opinion of the general public appears to leave no room for speculation. Indeed according to ISTAT, though 71,7% of Italians consider “absolutely not justifiable” the decision of an employer not to hire a migrant, though

³⁸⁴ Document accompanying European Law 2013, A.C. 1327

³⁸⁵ L. Calafà, *Migrazione economica cit.*; W. Chiaromonte, William, *Lavoro e cit.* F. Biondi Dal Monte, *Dai diritti sociali cit.*

she has all required qualifications, 48,7% agree that in times of scarcity of occupational opportunities, employers should give priority to hiring Italians over migrants, while 24,6% neither agree nor disagree with the same statement.³⁸⁶

It appears that in the case under examination, higher levels of enforcement have been counterbalanced by stronger interest of public authorities to resist general reform. Notwithstanding sustained litigation and related costs, national authorities' preferences appear to have been shaped by concern of exposure on a particularly sensitive issue for political opponents and the general public.

3. Access to the “large family allowance”.

As for the case of access to employment in the public sector, the interaction between different levels of regulations has played an essential role, both in relation to the successful enforcement of the prohibition of discrimination in court and the 2013 reform extending the benefit to long-term residents.

The large family allowance, as previously mentioned, was established under art. 65 Law n. 448/1998 and granted exclusively to Italian or European nationals according to the following mechanisms: the benefit is granted by municipalities following the application of those qualifying as recipients and is paid by INPS based on data provided by municipalities.

Following the implementation of Directive 2004/83/EC, INPS issued an administrative circular clarifying that beneficiaries of international protection were entitled to the benefit³⁸⁷. By contrast, the Institute did not provide any guideline in relation to the inclusion of long-term residents among the beneficiaries of the “large family allowance”.

Such failure could be explained, at least in relation to the immediate aftermath of the implementation of Directive 2003/109/EC, in the light of the ambiguous wording of

³⁸⁶ ISTAT (Istituto nazionale di statistica), *I migranti visti dai cittadini*, 2012.

³⁸⁷ INPS, Circular n. 9/2010.

the implementing decree as to the rights granted to long-term residents with regard to access to social security and social assistance.

Indeed the latter established that long-term residents are “entitled to social assistance and social security benefits and to those relating to subsidies for health, education and social matters (...) *unless otherwise provided* and on the condition that it is shown that the foreign national actually resides in national territory (emphasis added).”

Questioning the above provision could qualify under art. 11 of Directive 2009/109/EC as an expression of the intention of the national legislature to limit equality of treatment as regards social assistance and social protection to “core benefits”, while arguing at the same time that the “large family allowance” clearly falls within the scope of “core benefits”, ASGI together with an individual claimant challenged for the first time the discriminatory nature of the nationality clause before the Court of Gorizia³⁸⁸.

Arguing that it was not apparent that the legislature had intended to rely on the derogation from the equal treatment clause established under art. 11 of the Directive, the Court found the exclusion of long-term residents from the benefit was in violation of Directive 2003/109/EC, and held that the denial of the application of the claimant was discriminatory for the purposes of art. 43 TUI and 2 Legislative Decree n. 215/03. The Court ordered both INPS and the defendant municipality to grant to benefit.

Relying on the decision of the Court of Gorizia, ASGI publicly urged INPS to adapt its policies in line with the judgment of the Court³⁸⁹. While acknowledging the issue was worthy of consideration in relation to its social implications, INPS insisted that according to the current state of legislation only Italian and European nationals qualified for the benefit, also pointing to the fact that the national legislature had specified long-term residents are granted equal treatment “unless otherwise provided”

³⁸⁸ Court of Gorizia, 1 October 2010, in *Rivista critica di diritto del lavoro*, 3, 2010, p. 875, confirmed in second instance by Court of Gorizia, 7 December 2010, not published.

³⁸⁹ ASGI/INPS and ANCI, letter dated 20/10/2010.

and to its limited competences on the issue, being the granting of the benefit, according to INPS a matter for municipalities³⁹⁰.

The decision of the Court of Gorizia paved the way for further litigation on the issue.

By April 2012, legal actors and national courts could count on the support of the highest court in EU law confirming their arguments on the scope of the derogation clause and urging national courts to disapply domestic law provisions in contrast with the Directive. Indeed, in the *Kamberaj* case the Court of Justice held that since the integration of third-country nationals who are long-term residents in the Member States and the right of those nationals to equal treatment in the sectors listed in art. 11(1) of Directive 2003/109 is the general rule, the derogation provided for in art. 11(4) must be interpreted strictly. In addition, the Court specified that the derogation provided for in article 11(4) of Directive 2003/109/EC requires Member States to state clearly that they intend to depart from the general rule³⁹¹.

Despite the European Court of Justice left no room to insist on an alternative understanding of the Directive, such as to exclude the entitlement of long-term residents to the “large family allowance”, by May 2012 INPS issued a “message” confirming that on the basis of the “existing regulatory framework”, long-term residents could claim no right in this regard. The message referred to a reasoned opinion of the Ministry of Labour and Social Affairs and the Ministry of Economy and Finance pointing to the fact that a regulatory intervention would imply an “increasing financial burden” on national authorities and concluded that in absence of a regulatory intervention on the issue, INPS had no other choice but to apply “the law”.³⁹²

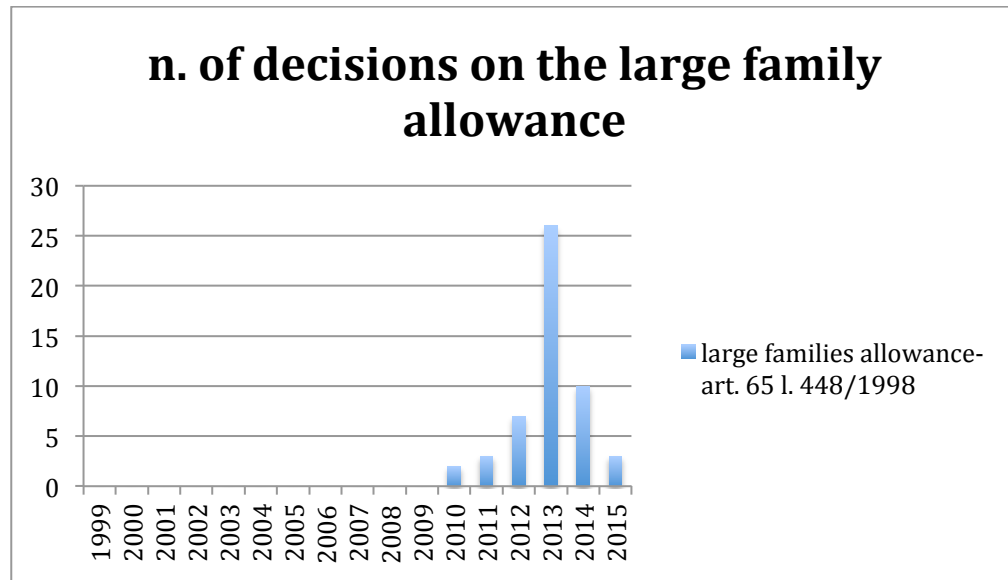
Between 2010 and August 2013 were filed 31 (out of a total number of 51 cases) claims concerning the discriminatory nature of the nationality requirement for the purposes of the “large family allowance”, with litigation reaching its peak in 2013 (Charter n. 3). Courts agreed on the discriminatory nature of the nationality

³⁹⁰ INPS/ASGI, letter dated 22/10/2010.

³⁹¹ Ft. 230, paragraph n. 86-88.

³⁹² INPS, Message n. 8468/2012.

requirement in 30 cases, with only one exception represented by the Court of Monza deciding to refer the issue to the Constitutional Court³⁹³.



Charter n. 3

Despite the insistence of INPS on the “existing regulatory framework”, it is interesting to notice that its main “defence strategy” has consisted in “blaming municipalities.” Prior to the 2013 reform the Institute has been condemned in 29 out of 30 cases to grant the benefit to the individual applicant and refund together with the municipality involved the legal expenses of applicants. Notwithstanding the consolidation of the case law on the issue, the Institute has failed to adjust its policy in accordance with national courts rulings containing compliance with EU law to distinct court orders, and thereby containing justice in the process.

Once again the European Commission would make a difference, forcing national authorities to amend art. 65 Law n. 488/1998. Art. 13 of European Law 2013

³⁹³ Court of Monza, 9 March 2011, in *GU Ia Serie Speciale - Corte Costituzionale*, 1, 2011. The referral was declared inadmissible by the Constitutional Court lacking the referral any information as to the specific conditions of the applicant and due to lack of motivation as to the relevance of the referral to the Constitutional Court.

specifically refers the infringement procedure n. 2013/4009 initiated by the European Commission on the “non-conformity of Italian law with the equal treatment principle of Directive 2003/109/EC”.

Having traced the process that brought to the amendment of national legislation, it should be acknowledged that the same factors that shaped policy response with regard to access to employment apply also to the case of “large family allowance”. On the one hand, TCNs complete political disenfranchisement has insulated the national government from the claims of migrants for equal rights. On the other hand, pressure on national authorities exercised by political counterparts and the general public, in addition to the substantial financial burden connected to policy change, have limited the impact of litigation and provided strong incentives to limit compliance to individual decisions avoiding reform. In times of economic stagnation and austerity policies, welfare is a very sensitive topic, especially if associated with migration.

Such pressures have been very much in place even with regard to the definition of the scope of the newly established rights, providing further confirmation to the above considerations.

While finally acknowledging the long-term resident’s entitlement to the “large family allowance”, the legislature indirectly restricted scope of the entitlement by limiting the allocation of financial resources for such purposes to the period starting from July 2013, therefore excluding the benefit could be awarded in relation to the first semester of 2013, though according to the provision regulating the submission of applications recipients could still apply in this regard.

The issue also affected those that had taken the initiative to submit their applications for the previous years despite persistence of competent authorities in claiming they had not right. These cases include for the most long-term residents that had already started a case or were willing to do so.

The Ministry of Labour and Social Affairs³⁹⁴ and INPS³⁹⁵ aligned along a narrow interpretation of the right of long-term migrants to benefit from the “large family allowance” such as to take effect from July 2013.

The restriction triggered a new wave of litigation with legal actors claiming in courts that long-term residents were entitled to the benefit also with regard to the past. Such claims mainly referred to the fact that “European law 2013” while explicitly acknowledging that long-term residents were qualified for the benefit, did not as a matter of fact establish a new right, since their entitlement preceded legislative reform, having its roots in art. 11 Directive 109/2003/EC, which as the ECJ confirmed in *Kamberaj* has direct effects.

In 16 out of 16 cases filed on the issue courts agreed with applicants and therefore declared discriminatory the refusal of the competent authorities to award the benefits in relation to periods prior to July 2013.

It is particularly significant in this regard the decision of the Court of Milano³⁹⁶ specifically addressing the discriminatory nature of the administrative circular issued by INPS aiming to limit the effects of the equal treatment principle, in the light of the 2013 reform (circular 4/2014). In assessing the discriminatory nature of the circular, the Court held that indeed the right of long-term residents to the large family allowance was not dependant on the choice of the legislature as to the allocation of resources and ordered INPS to terminate its conduct and to publish the decision on its website.

Remarkably, INPS has issued a new administrative circular³⁹⁷ giving account of the decision of the Court of Milano and expressing the intention to proceed to payments with reference to the first semester of 2013.

³⁹⁴ Ministry of Labour and Social Affairs/Municipality of Monza, letter dated 10/10/2014

³⁹⁵ INPS, Circular n. 4/2014.

³⁹⁶ Court of Milano, 20 May 2014, not published, confirmed in second instance by Court of Appeal of Milano, 22 May 2015, not published.

³⁹⁷ INPS, Circular n. 97/2014

Whereas caution is advised in assessing whether the policy reaction of INPS can be considered to break the pattern of limited compliance, it cannot be ignored that it indeed opens to the possibility of a more transparent dialogue with the institution.

Prior to the 2013 reform, equality existed only for those that had access to courts. Outside of courtrooms differential treatment based on nationality prevailed in the everyday practices of institutions that were under the obligation to give effect to equal rights. Legal actors successfully exploited the legal resources at their disposal building broad consensus among lower courts as to the right of long-term residents to access the “large family allowance”, though the financial burden associated to reform and concerns of political opposition skewed policy response to “contained justice.”

4. Litigation as part of a broader strategy

The above analysis highlights the limits of litigation as a strategy for achieving social reform when political opposition is strong and affected constituencies lack the possibility to influence decision makers to adapt their policies in line with judicial decisions.

Notwithstanding significant success in court, the case of access to employment in the public sector and the case of access to the “large family allowance” showed the impact of litigation beyond the courtroom was contained. While migrants lack political rights and are not therefore in the condition to exercise any pressure on national or local authorities, the policy preferences of the latter appear to have been shaped by concerns of exposure on issues considered to be particularly sensitive for political opponents and the electorate.

Should therefore those interested in fighting for migrant rights better focus on more promising strategies, such as lobbying of institutions like the European Commission or elected representatives instead of spending scarce resources on litigation?

The question is misleading for two different reasons. Firstly, it should be noted that what drove civil society organizations towards legal strategies is indeed related to the constraints migrants suffer in advancing their interests through political channels.

Secondly, it assumes that litigation as a strategy for social reform is pursued in alternative to political mobilisation and tends to ignore the interaction between legal and political mobilisation.

Indeed if we go back to the cases under review, if litigation did not end practices of exclusion, it clearly contributed to highlight the scope of EU law and document the diffuse practice of exclusion of TCNs from public-sector employment and access to social assistance, while at the same identifying legal solutions for overcoming such practices pointing to the inconsistencies of national regulation on access to employment in the public sector and access to social assistance. By doing so it brought into the agenda claims that would otherwise remain unexpressed.

But most importantly, both cases allow highlighting the importance of litigation as part of a broader strategy, including lobbying for institutional support.

Indeed, exploring the process that brought the European Commission to start the EU Pilot cases 1769/11/JUST and 2368/11/HOME (concerning the implementation of Directives 2004/38/EC, 2003/109/EC and 2004/83/EC as regards access to employment in the public sector) and the infringement procedure n. 2013/4009 (concerning the implementation of Directive 2003/109/EC as regards the equal treatment principle under the Directive), it is possible to link the initiative of the EU Commission to two separate complaints filed by ASGI in 2009³⁹⁸ and a 2011.³⁹⁹

The first complaint documented to the European Commission the state of domestic legislation on access to employment in the public sector while referring to national case law on the issue, as a source of support of the accuracy of the complaint from a

³⁹⁸ ASGI, Complaint to the Commission, 31/10/2009

³⁹⁹ ASGI, Complaint to the Commission, 06/04/2011

legal point of view and as a means for documenting the diffuse practice of exclusion from public sector employment of the categories of TCNs covered by EU law.

The second complaint specifically addressed the issue of the incompatibility with EU law of the exclusion of long term residents from the “large family allowance” illustrating in detail the national regulatory framework, the generalized practice of exclusion of long term residents while pointing to the interpretation of the equal treatment clause endorsed by national courts and to their position as to the incompatibility of art. 65 Law 448/1998 with the former.

Scholars warning about the limits of litigation as a strategy for social change correctly point to the fact that courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform.⁴⁰⁰ What is perplexing about this critique is the underlying assumption that general policy reform enacted by legislature alone can generate social change.

The above analysis showed the adoption at the EU level of legislation aiming to extend to specific categories of TCNs equal treatment as regards access to employment or social protection and their implementation by national law did not prevent national authorities from narrowing the scope of the principle of equality or contain practices blatantly departing from the latter.

The analysis of the aftermath of the 2013 law reform unfortunately confirms this view. As far as access to social protection is concerned, the case law showed the amendment of art. 65 Law n. 448/1998, while finally acknowledging the right of long-term residents to receive the “large family allowance”, triggered a new line of case law addressing the narrow interpretation of INPS as to the coming into effect of such right.

As to access to employment in the public sector, based on its monitoring activities of public recruitment notices ASGI has already denounced the existence of diffused practices in the public administration having the effect, if not the aim, to limit the opening of public sector employment to TCNs and consisting in the publication of

⁴⁰⁰ G. N. Rosenberg, *The hollow hope: Can courts bring, cit.*

notices of recruitment mentioning exclusively Italian and European nationality, while making obscure references to the applicable law or to “nationals that enjoy equal treatment with European nationals”. In doing so ASGI has asked the governmental “Public Service Department” to issue a new “Opinion” clarifying for the public administration the obligations they are subject to under the law.⁴⁰¹

In addition, it appears that civil society organizations have already turned to the courts, proving the expectations that the 2013 reform would put end to discriminatory practices were over-optimistic. APN, ASGI together with Confederazione Unitaria di Base (CUB) have challenged before the Court of Milano a Ministerial Decree issued by the Ministry of Education requiring Italian or European nationality for the purposes of hiring substitute teachers, while establishing that TCNs candidates could apply only with regard to positions concerning “foreign languages that are official languages exclusively in non-EU countries.” In addition the Decree specifies that potential candidates that meet the requirement of EU nationality will be conferred priority in this regard. Interestingly the Ministry failed to enter an appearance. The Court of Milano agreed with the applicants, issuing yet another decision on discrimination and access to employment in the public sector.⁴⁰²

In conclusion, this analysis allows to highlight how legal and political mobilisation interact, and their complementarity for pursuing social reform. Initial litigation targeting the nationality clause contributed to highlight the scope of protection under art. 11 of the EU Directive 2003/109/EC and document patterns of practices of exclusion of long-term residents, while allowing civil society organizations to lobby for the support of the European Commission to put pressure on national authorities to enact legislative reform. Following the adoption of European Law n. 97/2013, litigation appears to be still very much needed to ensure that the national authorities will fulfil their obligations towards their “silent constituency.”

⁴⁰¹ ASGI/Public Service Department, 01/08/2014

⁴⁰² Court of Milano, 4 March 2015, in *Foro It*, 7/8, I, 2015, p. 2531.

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