

## **The discipline to protect discrimination.**

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The principle of equality and prohibitions of discrimination are the most complex and controversial part of the recent regulatory season; there have been numerous national, community and international interventions aimed at protecting the equal treatment of people, strengthening, widening the prohibition of discrimination and increasing its protection. The anti-discrimination legislation today enjoys a vast and diverse range of sources that support the prohibition of discrimination against the principle of equality and the protection of fundamental rights.

At the international level, the first anti-discrimination groups, concerning the recognition and enjoyment of human rights as fundamental freedoms, are present in the United Nations Charter of 26 June 1945, in the Universal Declaration of Human Rights of 10 December 1948, in the European Convention for the safeguarding human rights and fundamental freedoms of 4 November 1950 and in ILO Convention n. 111, on the discrimination in the matter of the work of 25 June 1958. The list of possible factors of discrimination, in these acts, for the need to offer more protection and to protect every possible situation of discrimination, is gradually widened, so much that today the list of elements that cause discrimination is exemplary but not exhaustive. The key concepts present in the norms reiterate the equality of rights among individuals, their equality as human beings regardless of physical differences or personal convictions, and as workers who offer the same work performance and therefore are entitled to the same remuneration. The European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in the framework of the Council of Europe in 1950, is considered the central text on the protection of fundamental human rights as it is endowed with a permanent judicial mechanism which allows each individual to request protection of the rights guaranteed to him through the appeal to the European Court of Strasbourg.

Article 14 ECHR provides "the enjoyment of the rights and freedoms recognized in this Convention must be guaranteed without any discrimination, in particular those based on sex, race, color, language, religion, political opinions or other opinions, national or social origin, belonging to a national minority, wealth, birth or any other condition ", with a non-exhaustive list, as repeatedly established by the Court of Strasbourg. The art.14 qualified as accessory the right of non-discrimination with respect to other human rights; until the Protocol n. 12/2000 provided an extensive interpretation of the rights sanctioned by the ECHR, extending the scope of the prohibition of discrimination and ensuring equal treatment in the enjoyment of all rights, including those provided for by national laws.

ILO Convention n. 111/1958 is another fundamental act. Its specific object is discrimination in employment and in professions. The Convention obliges "every Member State to formulate and apply a policy to promote, by methods appropriate to national circumstances and practices, the equality of possibilities and treatment in employment and profession, in order to eliminate any discrimination in this area ". Measures to promote equality and equal treatment are not preconditions for the principle of non-discrimination, but tools to eliminate any existing discrimination.

The principle of non-discrimination in the Community is derived from the general principle of equality: the Union's actions aim to eliminate inequalities, to promote equality between men and women, to combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation. Are specified cases of equal "opportunities on the labor market", same treatment at work "and"

equal pay for the same job or for a job of equal value. Any discrimination based on nationality is forbidden. By focusing on equality, equality of treatment and adopting measures to strengthen anti-discrimination law, the European Union has made clear the need to consolidate a coherent and integrated approach to the fight against discrimination. The extension of the prohibition of discrimination (the Nice Charter of 2000) is fully binding on the European institutions and the Member States. The Charter establishes the fundamental character and scope of human rights for citizens of the Union. Also in the Community sphere the principle of non-discrimination represents a manifestation of the principle of equality, considered by the Court of Justice to be one of the fundamental and basic principles of Union law in a multiplicity of sentences. Article 21 of the Charter "prohibits" any form of discrimination based, in particular, on sex, race, skin color or ethnic or social origin, genetic characteristics, language, religion or beliefs, political opinions of any other nature, belonging to a national minority, heritage, birth, disability, age or sexual orientation ". Subsequently, three so-called "second generation" directives are issued (2000/43 / EC of 29 June, 2000/78 / EC of 27 November and 2002/73 / EC of 23 September). The first two concern the equal treatment of people regardless of racial ethnic origin; equal treatment in employment and working conditions. They aim to introduce a set of rules aimed at ensuring a minimum level of protection against discrimination throughout the European Union; forcing the States to take into account the emergence of new emerging risk factors, to guarantee an efficient apparatus of protections covering the different factors of discrimination. The rapid approvals of these directives are explained by political concerns. European states want to give a strong signal to those countries that manifested racist and xenophobic movements, to remedy the gaps in protection, to refine their sensitivity to differences, following the increase in immigration and the accession of further states to the Union, to provide tools for the promotion of equal opportunities and the fight against xenophobia and racism. The aim of Community protection is to prohibit discrimination in the employment sector, to extend the prohibition and protection to other fields "to ensure the development of democratic and tolerant societies that allow the participation of all people regardless of race or from ethnic origin. Specific actions in the fight against discrimination based on racial or ethnic origin should go beyond access to self-employment and self-employment activities, cover areas such as education, social protection, including social security, health care, social benefits, access to goods and services and their supply ". Equal treatment in the workplace, in a broader context and not strictly related to the race, deals with the Framework Directive 2000/78 / EC concerning the protection against discrimination in the field of labor law; the directive establishes a general framework for combating discrimination based on religion, beliefs, disabilities, age, sexual orientation. The concept of gender equality is updated by Directive 2006/54 / EC which represents a reference point for the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The aim is to consolidate the different and earlier gender equality directives by simplifying, modernizing and improving Union legislation on equal treatment in all areas of social life, including work. This document emphasizes that the promotion of equal treatment must be carried out both by the member countries with bodies that protect this principle and ensure its correct application, both by companies, which must promote and strengthen the principle of gender equality in the environment and in working conditions. The binomial equality - non-discrimination has become a fundamental objective in all Member States, such as social protection and cohesion, employment and the improvement of the quality of life, as well as a key instrument for promoting equal treatment and rights to life. inside and outside the working environment. At the Italian level, anti-discrimination legislation, the recognition and the prohibition of differentiated treatments were

contemplated almost exclusively with reference to the sex factor, since the manifestations of discrimination were evident, discrimination entailed the violation of the equal dignity of human beings and the denial of equal enjoyment of fundamental rights. The first interventions were inspired by a formal conception of equality, any "sex distinction" was forbidden as the cause of an injury to "equal social dignity", an obstacle to the full realization of the human person in the social, but above all, work. The law n. 903/1977 affected discrimination on the grounds of sex in relation to access and working conditions, initiatives concerning guidance, training, improvement and professional updating, remuneration, attribution of qualifications, tasks and progression in career, to promote equal opportunities between men and women (implementing European directives 75/117 and 76/206). A first notion of discrimination is present in the Italian law n. 125/1991: art. 4, paragraph 1, "constitutes direct discrimination any act or behavior that produces a detrimental effect discriminating against workers on the grounds of sex", accepting an "objective" notion of discrimination and definitively sanctioning the non-necessity of intent as a precondition of the discriminatory situation. Law 125/1991, having as its objective a substantial promotional equality of equal opportunities, has broadened the notion of discrimination by including the indirect one, "any injurious treatment resulting from the adoption of criteria that proportionately disadvantage workers in one or more other sex and relate to non-essential requirements for the performance of work".

The concept of discrimination includes not only acts, but also discriminatory behaviors and focuses attention on the functional link between the conduct implemented and the effect produced, provides a clarification of indirect discriminatory treatment, which occurs in all cases where the perpetrator of the prejudicial behavior, although not apparently violating the principle of equal treatment, adopts the selection criteria intended to have a different and non-impartial effect on workers and workers.

Legislative Decree 215/2003 establishes that equal treatment involves the absence of direct and indirect discrimination and defines the contents. Direct discrimination exists "when, for race or ethnic origin, a person is treated less favorably than it is, has been or would be treated another in a similar situation". The innovative element of the decree is that a comparative relational judgment is required, for which the assessment of discrimination must be assessed in relation to the treatment reserved for other categories of subjects in similar situations and can not be formulated in absolute terms. Among the discriminatory acts of the decree the legislator has inserted the harassment, equaled both for content and for effects to the discriminatory treatment, disposing that the harassment is considered as "discrimination", that is, those unwanted behaviors, put in place for reasons of race or ethnic origin having the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating and offensive climate". A distinction between direct and indirect discrimination only on the grounds of sex is formally presented in Legislative Decree 145/2005, and transfused in the Code of equal opportunities between men and women (Legislative Decree 198/2006) which provides an unequivocal definition of the concept of discrimination on the basis of gender in both its forms which today constitutes the normative source to which reference is made for the identification of the concept of discrimination on the grounds of sex. Article 25 of Legislative Decree 198/2006 in indicating the elements that directly / indirectly can produce discrimination reiterates the bidirectional nature of the anti-discrimination protection, admitting that the treatment of disfavour can also take place against the male sex, has foreseen that the occurrence of discriminatory treatment can be concrete or only potential. Legislative Decree 5/2010 has extended the notion of discrimination to less favorable treatment "because of the state of pregnancy, maternity or paternity, including adoptive ones, the less favorable treatment suffered by a worker or a worker due to the fact that refused to submit to harassment. The factors of discrimination are

those characteristics that define the identity of a person or a group, exposing them to the risk of discrimination. These change according to the places, historical moments and civil communities involved, but those recognized by the community and incorporated in the Italian are gender, race, ethnic origin, religion, beliefs, disability, the ' age, sexual orientation. The list is not exhaustive, but only by way of example, since the normative evolution has shown that it is possible to have discriminatory behaviors or acts that, directly or indirectly, lead to marginalization or exclusion of a person, also due to other personal characteristics, such as political opinions, language, social conditions, trade union activity, type of contract, physical characteristics.

Sometimes discrimination factors overlap, creating situations of multiple discrimination, in which a person is discriminated according to different elements. These hypotheses present considerable complexity, since they result in social inequalities that are difficult to combat. The discomfort the marginalization that victims suffer is higher than that caused by a single factor. There is not a mere sum but factors that interact with each other producing exponential negative relapses that make the subject particularly vulnerable. The "gender" is considered the prototype of risk factors. The principle of equal treatment and the prohibition of discrimination on the basis of the gender of the worker or worker. he finds out from Article 37 of the Constitution, according to which "the working woman has the same rights and, for equal work, the same pay as the worker is entitled". The normative system for equal opportunities starts from the implementation of the principle of formal equality in the working environment to move on to substantial equality. The positive actions indicated in the various rules are aimed at "eliminating the de facto inequalities women are subject to in education and vocational training, in access to work, in career progression, in working life and in periods of mobility, promoting the inclusion of women in the activities, in the professional sectors and in the levels in which they are underrepresented, favoring, also through a different organization of work, conditions and working time, the balance between family and professional responsibilities, a better distribution of such responsibilities between the two sexes ". The term "person" has been replaced by "worker or worker" in order to underline the "bidirectional" nature of the anti-discrimination provisions by enriching the list of means and instruments through which a discriminatory situation can occur.

The principle of equal treatment and the prohibition of discrimination on the grounds of gender have been significantly expanded: the prohibition of discrimination is operational not only with regard to access to employment and initiatives on guidance, training and professional development, but also for what concerns "affiliation and activity in an organization of workers or employers, or in any organization whose members exercise a particular profession, and the services provided by such organizations". In the Code of equal opportunities the prohibition of sexual discrimination is associated with the promotion of equal opportunities between men and women in every field; Legislative Decree 5/2010, has clarified some aspects, strengthening access, tools and social security protection for both sexes, exacerbating the penal and administrative sanctions foreseen for the employer in case of violation of the principle of equal treatment between men and women. Despite all the protections, there are situations in which, especially in the phases of access to employment and career progression, the prohibition of discrimination on the grounds of gender is violated. In the case of the implementation of discriminatory behavior or treatment, the right to act lies with the subject who has suffered discrimination, who can present the appeal personally, be in court even without the assistance of a lawyer. This procedure was considered not very effective and fair, given the "relationship of forces between the parties involved, especially in a field in which significant probative difficulties will inevitably arise". In order to overcome these problems, the Community regulation establishes that States allow "associations,

organizations and other legal persons to initiate, through judicial or administrative procedures, on behalf of or in support of the injured party and with their consent, a procedure aimed at the execution of obligations arising from this Directive. ' Directives 2000/43 / EC and 2000/78 / EC prescribe the right to act "on behalf of or support" of the discriminated person, without providing for the possibility of exercising discriminatory action in its own name, as it is the interest of the individual to be taken into primary consideration and to have priority over the collective interest of the institution or association. The national law by implementing the directives has provided for the possibility for certain collective subjects to appeal before the court "under delegation of the person who has interest, or to intervene in the judgments promoted by the same". The collective subjects legitimated to act are: the associations and the institutions included in a special list approved by decree of the Minister of Labor and Social Policies of the Minister for Equal Opportunities, Associations and Entities registered in the appropriate register and the Associations and Entities carrying out activities in the field of combating discrimination and promoting equal treatment. The organizations belonging to the first of the three cases mentioned above are entitled to act "by virtue of delegation, under penalty of nullity, by public deed or authenticated private deed, in the name and on behalf or in support of the taxable person of discrimination" or "in cases of collective discrimination if persons injured by discrimination are not directly and immediately identifiable ".

The provision of registration in special registers is necessary to ensure the legitimacy to act only to legal entities that present a seriousness of purpose, whose primary objective is to support individuals who are discriminated against. In cases where the organizations act "in the name and on behalf of the victim", the taxable person must issue a proxy, while if they act "in support" of the person who has been discriminated against, as a voluntary intervention there is no need of the applicant's power of attorney. In Legislative Decree No. 216/2003 on discrimination based on religion, beliefs, disabilities, age or sexual orientation with regard to employment and working conditions, it is addressed only to "local representatives of the most representative trade union organizations at national level ". The same are entitled to act by proxy, in the name and on behalf or in support of the taxable person of discrimination, against the natural or legal person to whom the behavior or the discriminatory act refers or in the case of collective discrimination if they are not identifiable persons directly affected by discrimination in a direct and immediate manner. The limitation of collective representation only to the trade unions in these cases appeared to be reductive and inconsistent with the Community legislation, which recognizes the right of action and representation in court to all associations that have "legitimate interest in ensuring that the provisions of the directive are respected. " For this reason, Legislative Decree 59/2008 extended the legitimacy to "trade unions, associations and organizations representing the law or injured interests"; they must not be included in any list and / or register and subject to the conditions and requirements that follow.

Other persons entitled to take action are the Equal Advisors, ie subjects that, having rigorous and determined requisites regarding equal opportunities and the labor market, perform functions of promotion and control of the implementation of the principles of equality of opportunity and non-discrimination. between men and women in the workplace. The action against discrimination is regulated in our legal system by Legislative Decree 215/2003 as amended by Legislative Decree 150/2011 concerning the "provisions complementary to the code of civil procedure concerning the reduction and simplification of civil cognitive procedures" . The d.gl. 150/2011 has rationalized the previous situation, eliminating the expressed perplexities that made the non-unitary anti-discrimination discipline, uniting the different hypotheses of discrimination in the same regulation. This decree states that all disputes concerning discrimination, are governed by the summary rite of cognition, unless otherwise provided. The fact

that the anti-discrimination proceeding is expressly placed by the legislator in the summary rite of cognition allows to exclude the precautionary and biphasic nature of the proceedings and makes clear that the provision that defines the anti-discrimination judgment is effective as judged, according to the provisions of article 702 -quater. The application is filed with recourse to the Court in monochrome composition of the place of domicile of the appellant, with the application of the provisions of article 702-bis of the CPC which provide for the establishment of the defendant no later than ten days before the hearing and the notification of the defendant's appeal at least thirty days in advance of the date set for its establishment. If the order is not appealed within thirty days from its communication or notification, it produces the effects referred to in article 2909 of the Italian Civil Code. with the consequences that the order becomes final.

The judicial authority can take several measures: it can order the cessation of behavior, conduct or discriminatory act by taking all measures suitable to remove the effects, may have to adopt a plan to remove the established discrimination and can order the defendant to pay compensation of damage, including non-pecuniary damage. One of the most complex aspects of civil action against discrimination is the burden of proof, due to the difficulty of ascertaining the existence of differential treatment and demonstrating discriminatory behavior by victims. This problem was taken into consideration by the legislator, providing for measures less burdensome for the applicant. The European regulation delegates to the Member States the task of taking the necessary measures, in accordance with their judicial systems, to facilitate the test, for the benefit of those who complain of having been discriminated against, and to ensure that the victims expose "facts from which can presume that there has been direct or indirect discrimination ". At that point it is incumbent 'on the defendant to prove that there has been no violation of the principle of equal treatment without prejudice to the right of the Member States to lay down provisions on evidence which are more favorable to the parties'. The Community directives require to provide for a probative mechanism which requires the plaintiff only to deduce facts or to produce factual elements from which one can only presume an unlawful conduct and not to directly prove such conduct, then by leaning against the party brought to trial. lack of the discriminatory nature of its action. In the EU regulation the option is therefore that of an inversion of the probative burden on the procedural level, which States have the obligation to implement in their judicial systems, recognizing the possibility of adopting a more favorable discipline for the victim of discrimination. (leg.125 / 91, legislative decree 196/2003 new code of Legislative Decree 198/2006). If with the discriminations of gender the Italian discipline preceded that of the community, with the other types of discrimination we can not say the same, up to the laws of 2008 and 2011. On the probative level there are important changes with the enactment of the legislative decree. 150/2011, art. 28 "when the appellant supplies factual elements, also deduced from statistical data, from which the existence of acts, pacts or discriminatory behaviors can be presumed, it is the defendant's responsibility to prove the non-existence of the discrimination. Statistical data may also be related to recruitment, contributory schemes, assignment of tasks and qualifications, transfers, career progression and dismissal of the company concerned ". The inversion of the burden of proof is carried out, it is up to the defendant after the applicant has provided significant facts, to prove otherwise. The issue of remedies and sanctions to be applied in case of discrimination is of primary importance, since the aim is to offer an appropriate and effective solution to remove the wrongdoing and prevent repetition. At Community level, on the subject of equal pay for men and women, the right of interested parties to take legal action was imposed by imposing on the Member States the obligation to adopt "effective instruments to enable them to comply with this principle". This provision has consolidated a jurisprudential

orientation which has progressively widened the scope of the right to act in court, specifying its contents (Court of the Commission v Greece, in which it was decided that the sanctions should have "an effective, proportionate and deterrent 'and Marshall, in which it was stated that' the re-establishment of the situation of equality could not be achieved without compensation in adequate money for the damage actually suffered '). There are three criteria to which sanctions must correspond: effectiveness, proportionality and dissuasiveness. The sanctions applied must effectively implement and implement the principle of non-discrimination; they must be proportionate in their gravity, to the degree of disvalue in conduct "to prevent, discourage the repetition of the unlawful conduct and future discriminatory acts.

The right of the discriminated person to obtain an effective, dissuasive and proportionate remedy from the State is a general principle and the State must supervise its effective application. The compensation for damage is considered as one of the possible remedies, but does not exhaust the range of instruments suitable for guaranteeing the effectiveness of protection. It is intended as additional and not substitutive with respect to the specific protection tools, must be provided for injunctions and restorers. The removal plan is regulated in the internal law by article 28 of legislative decree 150/2011 "The judge can order the cessation of the behavior, of the conduct or of the injurious discriminatory act, adopting, also towards the public administration, any other appropriate provision to remove the effects. In order to prevent the repetition of the discrimination, the judge can order to adopt, within the term established in the provision, a plan to remove the established discrimination. In cases of discriminatory behavior of a collective nature, the plan is adopted after consulting the recurring collective body ". The current formulation highlights the importance of the remedy that we want to put into being and the effectiveness we want to achieve. The order of implementation of a removal plan allows to prevent the repetition of the established discriminations, eliminating upstream the conditions that can generate them. It is on the basis of these considerations that the judge can adopt: the cessation of the behavior or discriminatory act avoiding further prejudices, the removal of the effects restoring the status quo ante eliminating the damaging conduct. The anti-discrimination law in domestic law expressly provides for the possibility of compensation for damages, once the discrimination has been ascertained. Compensation for damages is also non-pecuniary. The discriminatory offense involves a violation of "inviolable rights inherent to the person" which can be compensated for non-pecuniary damage, which may consist of "alteration of the relationship life, loss of quality of the life, in the impairment of the existential dimension of the person in an "intimate suffering, constituting subjective moral harm" and up to integrate a "biological damage" if a "lesion to the psychophysical integrity" is presented. The need to provide for compensation for non-pecuniary damage by anti-discrimination laws derives from the fact that discrimination leads to the injury of a right or property of the constitutionally protected person, according to which the damage and the entity varies considerably. of compensation.

For the purposes of settling the damage, the judge can order the manager to remove the effects of the discrimination and to compensate the damage on the basis of objective criteria of attribution, since the direct and indirect discrimination may also occur in the absence of fault or malice. Furthermore, for the purposes of settling the damage, account is taken of the fact that the act or discriminatory behavior constitutes retaliation to a previous legal action or unjust reaction to a previous activity of the injured party aimed at obtaining compliance with the principle of equal treatment. ». The judge can order the publication of the measure at the expense of the defendant in a newspaper of national circulation ». This sanction is accompanied by compensation and is particularly relevant as it leads to serious harm to the image to the author of discriminatory behavior. To ensure effective equality of treatment and

non-discrimination as well as promote positive actions and facilitations in the process, strengthen the role of institutions and create new bodies with awareness, information, technical and legal assistance to victims of discrimination and investigative powers and consultants. A key role in the fight against discrimination has some bodies set up to guarantee and protect gender equality and the promotion of equal opportunities between men and women. To combat discrimination on the basis of the sex factor, the National Equality Committee was formed, composed of representatives of the trade unions, members of associations representing and assistance in the field of equality, national equality advisor, experts in legal, economic and sociological matters. representatives of various Ministries and assisted by the Board of Statutory Auditors and a Technical Secretariat, the Equal Advisers. These subjects and the Committee have the task of promoting equal opportunities, also through the removal of discrimination that effectively limits the equality between men and women in access to work, in promotion and in professional training and in working conditions. The legislative provisions would be useful to curb discrimination at work and to effectively protect discriminated individuals, if they were properly applied. What has to be questioned is not their effectiveness, but their actual application: it often happens that those who suffer discrimination are so traumatized that they do not disclose it, and suffer the wrong without turning to the judicial authorities. The failure to appeal is due to the strong lack of information of the victims about the multiple and effective forms of protection provided by law. To the problem of the lack of awareness of the subjects and of the lack of practical application of the regulations, the law provides specific measures and initiatives with the aim of preventing and combating discrimination, promoting equal opportunities and providing support to those who have undergone differential treatment. To achieve these purposes is not enough legislation alone, a number of concrete measures are necessary at Community and national level that have as their object the strengthening of equality bodies their functions, the facilitation of recourse to judicial authorities, the procedure and a tangible improvement in the knowledge of rights, through training and awareness programs that lead victims to report cases of discrimination at work and not passively suffer them.