Essays

The Prohibition of Discrimination as a Limit on Contractual Autonomy

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Abstract

The essay analyzes the progressive assertion of non-discrimination as a principle within Italian and European contract law. After having examinated the legislative concept of contractual discrimination, the scope of the prohibition and the extent of its impact, the Author shows that the direct applicability of the principle of equality within private law relations is inseparable from the issue of the review of contractual autonomy, where it expresses the core essence of the anti-discrimination paradigm. In order to assure full and effective protection, the paper focuses on diversification of techniques for protecting against discrimination and the choice of the "right" civil remedy.

I. Contractual Discrimination Within a Pluralist Consumer Society. The Need for Exogenous Intervention to Regulate the Market

The need to revisit the private law rules of a social market economy poses new and difficult questions for private lawyers that call for a reimagining of the relationship between production, competition and solidarity, reconciling freedom of contract with equality in access to the market. If considered from the standpoint of general contract theory, these issues are closely intertwined with the phenomenon of contractual discrimination, ie the impact of widespread preconceptions rooted throughout society on market mechanisms and contractual dynamics.[1]

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[1] On contractual discrimination see, P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 456-606; P. Morozzo della Rocca, 'Gli atti discriminatori e lo straniero nel diritto civile', in P. Morozzo della Rocca ed, *Principio di uguaglianza e divieto di compiere atti discriminatori* (Napoli: Edizioni Scientifiche Italiane, 2002), 19-69; B. Troisi, 'Profili civilistici del divieto di discriminazione', in P. Rescigno et al eds, *Il diritto civile oggi. Còmpiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 295-306; D. Maffeis, *Offerta al pubblico e divieto di discriminazione* (Milano: Giuffrè, 2007); Id, 'Libertà contrattuale e divieto di discriminazione' *Rivista trimestrale di diritto e procedura civile*, 401-434 (2008); Id, 'Discriminazione (Diritto privato)' *Enciclopedia del diritto Annali* (Milano: Giuffrè, 2011), IV, 490-510; Id, 'Il diritto contrattuale antidiscriminatorio nelle indagini dottrinali recenti' *Le nuove leggi civili commentate*, 161-180 (2015); D. La Rocca, 'Le discriminazioni nei contratti di scambio di beni e servizi', in M. Barbera ed, *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale* (Milano: Giuffrè, 2007), 289-346; Id, *Eguaglianza e libertà contrattuale nel diritto europeo. Le discriminazioni nei rapporti di consumo* (Torino: Giappichelli, 2008); A. Gentili, 'Il principio

The sensitivity of contractual parties to the personal characteristics of the relevant counterparty – including in particular gender, religion and national or ethnic origin – may influence the exercise of powers of private autonomy, thereby giving rise to discriminatory effects on two levels: 1. preventing members of the disadvantaged group from acquiring the goods or services exchanged; or 2. imposing different or more onerous contractual terms on them. Under the former scenario, they are prevented from enjoying goods or services as a result of the refusal to contract or the refusal to perform. Under the latter the market transforms the prejudice into a surcharge, which is added to the price of the goods or services: the social position of the victim of discrimination translates into a further cost, which he or she is forced to pay in order to obtain the contractual benefit.[2]

Anti-discrimination rules apply to situations of cultural conflict, which is characterised by the capacity of risk factors to distort a transactional relationship by generating an opposition between the parties that needs to be resolved by the legal order.[3] For example this may include the refusal by an estate agent to deal with non-EU clients,[4] the articles of a housing cooperative that state that only EU nationals are eligible for membership,[5] or the charging of different prices to different clients depending upon their ethnic origin.[6] In these cases the discrimination, which results in a refusal to contract or the imposition of more onerous conditions, results both in a violation of the counterparty's human

di non discriminazione nei rapporti civili' *Rivista critica del diritto privato*, 207-231 (2009); A. Somma, 'Principio di non discriminazione e cittadinanza nel diritto privato europeo', in G. Alpa et al eds, *Il* Draft common frame of reference *del diritto privato europeo* (Padova: CEDAM, 2009), 259-280; Id, 'Razzismo economico e società dei consumi' *Materiali per una storia della cultura giuridica*, 447-477 (2009); L. Sitzia, *Pari dignità e discriminazione* (Napoli: Jovene, 2011); B. Checchini, 'Eguaglianza, non discriminazione e limiti dell'autonomia privata: spunti per una riflessione' *Nuova giurisprudenza civile commentata*, 186-198 (2012); G. Carapezza Figlia, *Divieto di discriminazione e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2013); Id, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' *Rivista di diritto civile*, 1387-1418 (2015); Id, 'Contratto, dignità della persona e ambiente civile. Riflessioni sul divieto di discriminazione nei rapporti contrattuali', in G. Calabresi et al eds, *Benessere e regole dei rapporti civili. Lo sviluppo oltre la crisi* (Napoli: Edizioni Scientifiche Italiane, 2015), 423-457; E. Navarretta, 'Principio di uguaglianza, principio di non discriminazione e contratto' *Rivista di diritto civile*, 547-566 (2014); G. Donadio, *Modelli e questioni di diritto contrattuale antidisciminatorio* (Torino: Giappichelli, 2017).

[2] See P. Femia, n 1 above, 530-537.

[3] The internal dispute may be 'pre-transactional' where it arises during the contracting phrase when the terms are being negotiated, or 'prospective' where it comes to light upon performance. In the latter eventuality, the dispute will not have been foreseen at the time the contract was concluded or, although a discriminatory element was already apparent, the dispute was temporarily left to one side and only came to a head at the time the contract was to be performed: P. Femia, n 1 above, 452-454.

[4] Tribunale di Milano 30 March 2000, *Foro italiano*, I, 2040 (2000); Tribunale di Bologna 22 February 2001, *Diritto immigrazione e cittadinanza*, 101 (2001).

[5] Tribunale di Monza 27 March 2003, *Foro italiano*, I, 3177 (2003).

[6] Tribunale di Padova 19 May 2005, *Giurisprudenza italiana*, 951 (2006).

dignity and his or her freedom to access commercial exchanges as well as in market failure through a reduction in transactions and interference with the machinery of price formation, accordingly undermining collective economic wellbeing.[7]

From the perspective of some scholars of the economic analysis of law, the market is capable of abolishing irrational constraints on its own, including those resulting from discrimination. In this view, the task of removing discrimination within contractual exchanges must be left not to the law but to competition, as the victim of discrimination (who is considered as a buyer) will easily find an operator willing to sell him or her the goods or services at the market price.[8] However, it has been shown that the market, especially where it is fragmented, is not only unable to abolish discriminatory practices on the grounds that they are anti-economic but also internalises them within a broader mechanism for calculating costs and benefits.[9] Aligning with social prejudices turns into a strategy for maximising profits, increasing productivity, or even avoiding the collapse of the business.[10]

The tendency of market mechanisms – which become an 'instrument for weakening social relations'[11] – to perpetrate and amplify widespread misconceptions, transforming them into contractual dynamics, demonstrates how exogenous intervention to combat discrimination is necessary. This intervention manifests itself in the legal prohibition of discrimination, which outlaws the transformation of differences (which are a matter of fact) into inequalities (as value judgments). The elaboration over the last two decades of complex anti-discrimination legislation, often imposed by EU law, results from a model for heterogeneous market regulation focused on contract law. In order to prevent markets from distortion by prejudice it is necessary to purge the full scope of contractual activity of the influence of discriminatory factors: from the pre-negotiation stage (refusal to enter into negotiations or to conclude a contract), through the determination of the terms of the agreement (application of more onerous terms), to the implementation of the bargain (refusal to perform, choice of the manner of performance or the discriminatory exercise of contractual powers).

[7] See D. Maffeis, *Offerta al pubblico* n 1 above, 41-46.

[8] On this matter, within the German literature, K.H. Ladeur, 'The German Proposal of an "Anti-Discrimination" Law: Anticostitutional and Anti-Common Sense. A Response to Nicola Vennemann' *German Law Journal*, 3 (2002); E. Picker, 'L'antidiscriminazione come programma per il diritto privato' *Rivista critica di diritto privato*, 701-703 (2003).

[9] See I. Ayres, 'Fair Driving: Gender and Race in Retail Car Negotiation' 104 *Harvard Law Review*, 817 (1991).

[10] Discrimination by economic operators may result from the need to 'comply with an external belief as a strategy (…) for the efficient allocation of resources': P. Femia, n 1 above, 533-534.

[11] On this point, P. Perlingieri, 'Mercato, solidarietà e diritti umani' *Rassegna di diritto civile*, 84 (1995); Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 243; M.R. Ferrarese, *Diritto e mercato. Il caso degli Stati Uniti* (Torino: Giappichelli, 1992), 42.

II. The Progressive Assertion of Non-Discrimination as a Principle Within Italian and European Contract Law

The current era has been figuratively defined as 'a new "golden age" of anti-discrimination legislation'[12] due to the wealth of legislation that has expanded and deepened civil protection against discrimination. While the establishment of the prohibition of discrimination within private law relations in Italy has commonly been ascribed to EU law, it was in fact first formulated within a purely national provision, namely Arts 43 and 44 of Decreto legislativo 25 July 1998 no 286.[13] A body of law with a strongly public law focus – laid down in the Consolidated Act on Immigration – surprisingly contained what has been defined as a 'general anti-discrimination clause',[14] which is backed up by a specific civil action and complemented by a variety of instruments for protection.[15] However, it is true that the *acquis communautaire* has played the key role in elevating non-discrimination to the status of a principle of contract law, which has then been propagated throughout the individual national legal systems by the normal harmonisation mechanisms. Although the prohibition on discriminating against counterparties had already been incorporated into the *Principles of the Existing EC Contract Law*, it was only recently that it was asserted within derived Community law following the introduction by the Treaty of Amsterdam in 1997 of Art 13 into the Treaty Establishing the European Communities (now Art 19 TFEU).[16]

Within the new Italo-European law, according to a dynamic view,[17] the

[12] See M. Barbera, 'Introduzione', in Id, *Il nuovo diritto antidiscriminatorio* n 1 above, XIX.

[13] On Arts 43 and 44 Testo Unico Immigrazione see P. Morozzo della Rocca, n 1 above, 31-39.

[14] P. Morozzo della Rocca, n 1 above, 31; B. Troisi, n 1 above, 297-299; L. Sitzia, n 1 above, 58-67; M. Mantello, *Autonomia dei privati e principio di non discriminazione* (Napoli: Edizioni Scientifiche Italiane, 2008), 7.

[15] On Art 44 decreto legislativo 25 July 1998 no 286, see G. Scarselli, 'Appunti sulla discriminazione razziale e la sua tutela giurisdizionale' *Rivista di diritto civile*, I, 805 (2001).

[16] Within the original version of the Treaty Establishing the European Communities the prohibition of discrimination was not only not a central element but was focused exclusively on the objective of ensuring the free movement of the factors of production and the establishment of the common market (Arts 7, 40(3), 48, 52, 59 and 119 of the EC Treaty). On this point see C. Favilli, 'Uguaglianza e non discriminazione nella Carta dei diritti dell'Unione europea', in U. De Siervo ed, *La difficile Costituzione europea* (Bologna: il Mulino, 2001), 228. The change in the Community law approach, which is enshrined in the Treaty of Amsterdam and the Nice Charter (Arts 20 and 21) was an expression of a general reconsideration of the role of the prohibition of discrimination under European law, and involved both an expansion of the types of prohibited discrimination as well as the reinforcement of the horizontal effect of the prohibition and its direct actionability in relations between private individuals. On this matter see D. La Rocca, *Eguaglianza e libertà contrattuale* n 1 above, 50, who provides a detailed account of the evolution of the paradigm of equality within European private law.

[17] According to A. Celotto, Sub 'Art. 21', in R. Bifulco et al eds, *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea* (Bologna: Il Mulino, 2001), 173, while Art 21 of the Nice Charter prohibits discrimination through a provision with negative effect, Art 19 TFEU imposes a positive obligation on Community bodies to develop policies and initiatives

prohibition of discrimination has been extended beyond employment relations to all market exchanges, and applies in relation to race, ethnic origin[18] and gender[19] and is reinforced by dedicated procedural rules applicable to discrimination disputes.[20] Although the view that parties have full and absolute freedom to choose counterparties is still very widespread today,[21] the choice of contracting party is now in fact governed by copious – and fragmentary – legislation which subjects to review any inequality effects within access to goods and services that are brought about by the exercise of contractual autonomy.

Eloquent proof of the renewed legislative approach, which enhances the actionability of the prohibition of discrimination within relations between private individuals, is offered by the initiatives that have been undertaken to review the European law of contract, namely the Acquis Principles and the Draft Common Frame of Reference. While the anti-discrimination directives may not have been conceived of as directives in the area of contract law, the Acquis Group – developing the perspective opened up by the case law of the Court of Justice of the European Union (CJEU), which regards non-discrimination as a 'general principle of Community law'[22] – has included the prohibition

to counter discrimination. See, also, M. Bell, 'The Right to Equality and Non-Discrimination', in T. Hervey and J. Kenner eds, *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective* (Oxford-Portland: Hart, 2003), 98; L. Ferrajoli, 'Uguaglianza e non discriminazione nella Costituzione europea', in A. Galasso ed, *Il principio di uguaglianza nella Costituzione europea. Diritti fondamentali e rispetto delle diversità* (Milano: Giuffrè, 2007), 15.

[18] Council Directive 2000/43/CE of 29 June 2000, transposed by Decreto legislativo 9 July 2003 no 215.

[19] Council Directive 2004/113/CE of 13 December 2004, transposed by Decreto legislativo 6 November 2007 no 196, which has inserted Arts 55 *bis*-55 *decies* to Decreto legislativo 11 April 2006 no 198.

[20] Decreto legislativo 2 September 2011 no 150, Art 28.

[21] See in particular within the private law literature, F. Galgano, 'Il negozio giuridico', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale*, directed by Mengoni and continued by P. Schlesinger (Milano: Giuffrè, 2nd ed, 2002), 53, according to whom it is possible 'to say no exercising one's own contractual autonomy, without having to give reasons for the refusal'; V. Roppo, 'Il contratto', in *Trattato di diritto privato*, directed by G. Iudica and P. Zatti (Milano: Giuffrè, 2nd ed, 2011), 79, who, whilst identifying exceptions, asserts that: 'insofar as it represents the *realm of freedom*, the contract may also be the *realm of inequality and discrimination based on the free choices of the contracting parties*'.

[22] See the settled case law of the CJEU: Case C-810/79 *Überschär*, Judgment of 8 October 1980, ECR 2747; Case C-144/04 *Werner Mangold* v *Rüdiger Helm*, Judgment of 22 November 2005, *Foro italiano*, IV, 133 (2006); *Giurisprudenza italiana*, 1816 (2006), with a note by L. Ciaroni, 'Autonomia privata e principio di non discriminazione', who argues that the source of the principle of non-discrimination is not an act of derived EC law, but may be found 'in various international instruments and in the constitutional traditions common to the Member States'. Since non-discrimination has been classified as a 'general principle of Community law', the requirement of compliance does not engage solely upon expiry of the deadline for the transposition of the relevant individual directors containing such a requirement. The national courts are therefore at all times required to ensure effective protection to individuals, striking down any provision of national law with contrary effect, in addition to ensuring the correct and timely transposition of derived Community law. See also Case C-555/07 *Seda Kücükdeveci*,

amongst the general principles of contract law,[23] thereby rooting it in a terrain different from employment law.[24] For its part, the Draft Common Frame of Reference dedicates chapter 2 of book II to the prohibition of discrimination and discusses, for the first time, the 'right not to be discriminated against'.[25] The adoption of different terminology is important as it conceptualises non-discrimination not only in the objective terms of a prohibition, but also with reference to subjective legal interests, thereby favouring its penetration right to the heart of private law: the law of contract.

III. The Legislative Concept of Contractual Discrimination and the Scope of the Prohibition. The Extent of Indirect Discrimination and the Requirement of Justification for Inequality Effects

The definitions contained in the legislation concerning the prohibition of discrimination in relation to contracts are not perfectly overlapping. However, it is possible to identify a common conceptual core. First and foremost, discrimination does not mean the same thing as idiosyncrasy or individual aversion. Anti-discrimination rules prohibit any significance being afforded within the contracting process to particular personal characteristics, which are defined as risk factors. These are elements of an individual's identity, which have been enumerated in law due to the widespread prejudices in relation to them.[26] These differences include race and ethnic origin (Art 43 of Decreto

Judgment of 19 January 2010, ECR I-356 where, albeit in relation to a more ambiguous formulation, individual anti-discrimination rules were held to have direct horizontal effect on the grounds that they were inspired by the general principle of equality. See within the literature on all points C. Favilli, 'Il principio di 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* (Roma: Armando, 2011), 59-63, according to whom 'direct horizontal effect is an inherent corollary of the principle of non-discrimination, classified as a keystone principle with mandatory status within EU law'.

[23] The whole of chapter 3 of the Acquis Principles is dedicated to the prohibition of discrimination, falling between those dedicated respectively to pre-contractual obligations (chapter 2) and the conclusion of contracts (chapter 4). On this matter, see D. Maffeis, 'Il divieto di discriminazione', in G. De Cristofaro ed, *I «princìpi» del diritto comunitario dei contratti. Acquis communautaire e diritto privato europeo* (Torino: Giappichelli, 2009), 265.

[24] Art 1:101(3) of the Acquis Principles stipulates that they do not apply in the area of 'labour law', with the result that the directives prohibiting discrimination are considered to be a source of Community law applicable to the law of contract, aside from the traditional area of employment law.

[25] On this point, see V.A. Berger, 'Privatrechtlicher Diskriminierungsschutz als Grundsatz im Gemeinsamen Referenzrahmen für Europäisches Vertragsrecht' *European Review of Private Law*, 864, (2008); A. Somma, 'Principio di non discriminazione' n 1 above, 259.

[26] See the 'danger of considerable exclusion', J. Neuner, 'Protection against Discrimination in European Contract Law' *European Review Contract Law*, 35, 45 (2006). The legislative classification of risk factors also identifies '*disadvantaged groups*': F. Stork, 'Comments on the Draft of the New German Private Law Anti-Discrimination Act: Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law' 6 *German Law Journal*, 538, (2005);

Legislativo 25 July 1998 no 286 and of Decreto Legislativo 9 July 2003 no 215, implementing Directive no 2000/43/EC); colour, ancestry or national origin (Art 43 of Decreto legislativo 25 July 1998 no 286); gender (Decreto legislativo no 196 of 2007, implementing Directive no 2004/113/EC); disability (Italian Law no 67 of 1 March 2006 and proposal for a Directive of 2 July 2008 COM (2008) 426); age (proposal for a Directive of 2 July 2008 COM (2008) 426); religion (Art 43(2) of Decreto legislativo 25 July 1998 no 286); and personal convictions and sexual orientation (proposal for a Directive of 2 July 2008 COM (2008) 426). The diffusion of the prejudice justifies the prohibition as it may potentially entail exclusion from access to contractual exchanges and the resulting social marginalisation.[27]

The prohibition of discrimination is not subject to particular restrictions with regard to its application, either at the objective level of the contractual type[28] or at the subjective level in terms of the nature of the parties or the role played by them within the bargaining process.[29] Anti-discrimination law thus has the special feature of applying also to contracts concluded between private individuals with equal contractual power – with the express inclusion of real estate contracts through the reference to access to housing – which represent 'a conservative area' where limitations on freedom of contract are generally more sporadic.[30]

On the other hand, the application of the prohibition on indirect discrimination within contract law is disputed.[31] Indirect discrimination occurs where an 'apparently neutral' 'disposition', 'criterion', 'practice', 'act', 'agreement' or 'course of conduct' is liable to put people say of a particular sex, race or ethnic origin 'in a particularly disadvantaged position' compared to others unless that

M. Barcellona, 'Sulla giustizia sociale nel diritto europeo dei contratti' *Europa e diritto privato*, 645 (2005).

[27] The problem regarding the relevance of grounds for discrimination that are different from those expressly stipulated within ordinary legislation may be resolved in the light of a systematic interpretation drawing on those referred to within hierarchically superior sources, such as Art 3 of the Italian Constitution, Art 19 TFEU and Art 21 of the Nice Charter. See E. Navarretta, n 1 above, 563-564.

[28] The sources refer to 'the access to and supply of goods and services', which does not suggest precise types of transaction, but the receipt of the benefits exchanged under contract. It also disregards the nature of the effects (real or personal) of the transaction as well as the object.

[29] As regards the subjective scope of the prohibition of discrimination, see G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 81-88, where it is also asserted that the prohibition applies to legal persons and entities, in view not only of the individual characteristics of the participants, but also of the purpose and nature of the entity.

[30] G. De Nova, 'Contratto: per una voce' *Rivista di diritto privato*, 643 (2000).

[31] Are in favour, G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 89-100; B. Troisi, n 1 above, 298; L. Sitzia, n 1 above, 259-275; A. Bettetini, 'Divieto di discriminazioni e tutela del soggetto debole', in P. Gianniti ed, *I diritti fondamentali nell'Unione Europea. La Carta di Nizza dopo il Trattato di Lisbona*, in A. Scialoja, G. Branca and F. Galgano eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 2013), 640, against, D. Maffeis, *Offerta al pubblico* n 1 above, 76-82.

disposition, criterion, practice, act, agreement or course of conduct 'is objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary' (Art 55-*bis*(2) of Decreto legislativo 11 April 2006 no 198 and Arts 2(1)(b) and 3(4) of Decreto legislativo 9 July 2003 no 215).[32]

Some commentators within the literature argue that the prohibition on indirect discrimination should be limited to employment relations, where the individual characteristics of the worker take on more central importance.[33] However, not only is such a solution not justified by any provision within the text of the law, but also this interpretation would have the effect of negating a variety of legal provisions which clearly and unequivocally apply the prohibition on indirect discrimination to the law of contract.[34] The notion of indirect discrimination may be regarded less as an expansion of the general concept of discrimination but rather as a 'technique' that seeks to give significance to the otherwise invisible causal link between a discriminatory factor and the inequality brought about by freedom of contract. The analysis is focused on the likelihood that the exclusion is not causal,[35] 'unmasking' the supposed neutrality of a criterion for access to contractual benefits, which is apparently applicable to any individual, but *de facto* acts against members of one particular group compared to society as a whole.

In this way – as has been held also within the most recent case law of the

[32] Also Art 43 of Decreto legislativo 25 July 1998 no 286 uses a formulation that is capable of covering indirect discrimination in referring to 'any conduct that directly or *indirectly* results in a distinction, exclusion, restriction or preference' based on a risk factor.

[33] D. Maffeis, *Offerta al pubblico* n 1 above, 76-82; Id, 'Il divieto di discriminazione' n 23 above, 267; Id, 'Il diritto contrattuale' n 1 above, 171.

[34] Art 2(1) of Decreto legislativo 9 July 2003 no 215 prohibits 'any direct or indirect discrimination on grounds of racial or ethnic origin' (Art 2(1) of and recital 13 to Directive 2000/43/EC are framed in identical terms); similarly, according to Art 55-*ter*(1) of Decreto legislativo 11 April 2006 no 198, 'there shall be no direct or indirect discrimination based on sex in access to goods and services and the supply thereof is prohibited' (Art 4 of and recital 12 to Directive 2004/113/EC are framed in identical terms). According to D. Maffeis, 'Il diritto contrattuale' n 1 above, 173, 'EU law in the area of contract law has laid down rules and definitions that mix anti-discrimination *employment* law with anti-discrimination *contract* law; however, the task of interpreting bodies is to keep the two areas of law separate from each other, elaborating different rules for each' (original italics). However, the applicability of the prohibition on indirect discrimination to the law of contract is definitively confirmed by Art 3:102 of the Acquis Principles, which reiterates the principles on indirect discrimination contained in derived Community law, stipulating their applicability to the law of contract, aside from labour law which, as mentioned above, is excluded from the scope of the Principles (Art 1:101).

[35] In order to establish indirect causality it is not necessary to 'conclude that the discriminatory effect was known and intended, and therefore that the discrimination was *wilful*' (see D. Maffeis, 'Il diritto contrattuale' n 1 above, 176); on the other hand, the relevance of subjective states is downplayed, with a greater emphasis being placed on objective techniques such as those based on statistics, by G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 93-95; C. Favilli, *La non discriminazione nell'Unione europea* (Bologna: il Mulino, 2009), 149, 250; A. Bettetini, n 31 above, 640.

merits courts – the discrimination is inherent in the unequal outcome, unless it is objectively justified by a legitimate aim.[36] The core of the problem consists precisely in the need to justify less favourable contractual treatment. In fact, it is clearly apparent from the legislation applicable to indirect discrimination that the creation of an unequal outcome is not prohibited where it is 'objectively justified by legitimate aims pursued through appropriate and necessary means'.[37]

Therefore, any discrimination will be prohibited where there is no reason for the difference in treatment or if the reason given is spurious, where there is a significant detriment for the person affected by the conduct.[38] On the other hand, there will be no discrimination where the effect of the inequality is offset by the pursuit of an aim that is worthy of protection, provided that it is achieved in a manner that is not disproportionate.[39] For example, a prohibition on entry into a shop open to the public by clients wearing particular closing (such as a

[36] The argument proposed in this text has also been endorsed by the case law: Tribunale di Roma 8 March 2012, *Nuova giurisprudenza civile commentata*, I, 964 (2012); Tribunale di Catania 11 January 2008, *Foro italiano*, I, 1687 (2008), which, having held that the defendant had acted in such a manner as to place 'disabled persons in a less favourable position compared to other persons', held - disregarding the issue as to whether the action was intentional - that unlawful discrimination had occurred and awarded non-pecuniary damages.

[37] See also Art 3(4) of Decreto legislativo 9 July 2003 no 215 and Art 55-*bis*(7) of Decreto legislativo 11 April 2006 no 198. According to the settled case law of the CJEU, indirect discrimination is not prohibited where it is 'objectively justified': Case 127/07 *Arcelor Atlantique et Lorraine and others*, Judgment of 16 December 2008, *Raccolta della Corte di Giustizia CE*, I-9895, para 23 (2008); Case 236/09 (GC) *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt e Charles Basselier*, Judgment of 1 March 2011, *Nuova giurisprudenza civile commentata*, 493 (2011); Case 542/09 *Commissione* v *Paesi Bassi*, Judgment of 14 June 2012, para 55, available at www.eur-lex.europa.eu; Case 20/12 *Giersch e altri*, Judgment of 20 June 2013, para 46, available at www.eur-lex.europa.eu. In the ECHR's case law: 'a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, 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 realised' (Eur. Court H.R. (GC), *X and Others* v *Austria*, Judgment of 19 February 2013, para 98, avaible at www.hudoc.echr.coe.int.

[38] According to D. Maffeis, 'Il diritto contrattuale' n 1 above, 172, this argument (previously endorsed in G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 95-100, 204-212 and *passim*) would lead to absurd outcomes if implemented: 'It would not only be necessary to prohibit the sale of meat on Fridays (in order not to offend Christians) but also of pork at all times (in order not to offend Muslims) and also of dog and cat meat at all times (which is much appreciated by the Chinese but causes offence to Europeans)' D. Maffeis, 'Il diritto contrattuale' n 1 above, 172. Nevertheless, these examples do not have anything to do with the prohibition on indirect contractual discrimination, which concerns situations involving a *refusal to contract with* or *the imposition of less favourable contractual terms on* a *counterparty* to whom a particular risk factor applies.

[39] For this reason, it would appear excessive to subject contracting parties to a duty to take account of the specific cultural or religious requirements of potential counterparties, thereby 'guaranteeing respect for 'diversity', as the foundation for the right to identity and to be different' (see contra B. Troisi, n 1 above, 298). The justification for any unequal effects of a discriminatory act, conduct or criterion for imposing unequal treatment is subject to the limit of appreciable sacrifice to one's own interest. See, *amplius*, G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 95-100.

veil or the *kippah*) may be considered to constitute indirect discrimination where it is liable to result in a difference in treatment for the members of certain groups (Muslim women or male orthodox Jews). In addition, condominium or timeshare regulations governing the use of common areas and services in such a manner as to prohibit the conduct of activities that are specific to particular cultural groups may also amount to indirect discrimination.[40] However, there will be no such discrimination where an adequate and proportionate justification can be adduced for the inequality effect, consisting for example in particular security requirements, the need to readily identify people, or health and environmental hygiene.

IV. The Contracting Procedure and Differences in the Extent of the Impact of the Prohibition of Discrimination: The Problem of Individual Exchanges

A further problematic aspect is the debate concerning the application of the prohibition of discrimination to contracting techniques in general.[41] Although it is commonplace within the literature to identify as the axiological basis for the prohibition a principle of significant 'expansive potential',[42] such as human dignity,[43] it is often argued that its scope should be limited only to declarations made to the public at large.[44] Various reasons have been proffered in support of

[40] See P. Femia, n 1 above, 541, note 845; C.M. Bianca, 'Il problema dei limiti all'autonomia contrattuale in ragione del principio di non discriminazione', in C.M.Bianca et al eds, *Discriminazione razziale e autonomia privata. Atti del Convegno di Napoli 22 marzo 2006* (Roma, 2006), 65.

[41] European private law often uses the formulation 'goods and services, which are available to the public' (Art 3(3) of Directive 2004/113/EC; Art 55-*ter* of Decreto legislativo 11 April 2006 no 198; Art 3:201 of the Acquis Principles). The similar phrase 'goods or services offered to the public' is also used by Art 43(2)(b) of the Italian Consolidated Act on Immigration. The prohibition of discrimination is limited to 'access to and (the) supply of goods and services' under Art 3(1)(h) of Directive 2000/43/EC and Art 3(1)(i) of Decreto legislativo 9 July 2003 no 215 and, in relation to 'access to housing' under Art 43(2)(c) of the Consolidated Act cited above.

[42] E. Navarretta, n 1 above, 552.

[43] C.M. Bianca, n 40 above, 64; D. Maffeis, *Offerta al pubblico* n 1 above, 44; A. Gentili, n 1 above, 228; E. Navarretta, n 1 above, 551-556. See G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 179-187, for the critical argument that to consider the core essence of the concept of discrimination to lie in the caused offence to dignity and not in the creation of an inequality effect is to overlook the multiplicity of interests affected by the issue and to crystallise it as a tort, thereby disregarding the breadth and flexibility of the remedies available under anti-discrimination legislation.

[44] This argument is supported by detailed argument in D. Maffeis, *Offerta al pubblico* n 1 above, especially 203; Id, 'Il diritto contrattuale' n 1 above, 166. The prohibition of discrimination is applied only to declarations directed at the public at large also by U. Breccia, Sub 'Art. 1322 c.c.', in E. Navarretta and A. Orestano eds, 'Dei contratti in generale. Artt. 1321-1349', in E. Gabrielli ed, *Commentario al Codice civile* (Torino: UTET, 2011), 105; E. Navarretta, n 1 above, 551-559. On the other hand, its extension to individually tailored declarations is supported by

this view.

Some commentators assert that only discrimination in relation to contracts open to the public at large is capable of undermining market efficiency and the dignity of those who are excluded.[45] Thus, if he or she so desires, a contracting party may avoid the application of the prohibition of discrimination, although in order to do so must bear the burden of exclusion from the offer to the public and rather make a declaration (or declarations) tailored to his or her individual circumstances as a prelude to engagement in negotiations. In such an eventuality, the contracting party may lawfully discriminate against the other party by refusing to conclude a contract or imposing different or more onerous terms owing to a particular risk factor.[46] This argument has attracted the 'facile objection'[47] that it is inspired by a mercantile-type logic incompatible with the systemic axiology, so much so as to reduce 'a serious humiliation to the dignity of the individual to the fact of being prohibited on the grounds that the transaction is not beneficial for the market'.[48] Moreover – as will be demonstrated in the following pages – discrimination within individually negotiated contracts may also exclude the victim from access to market exchanges and undermine collective economic wellbeing.[49]

A second argument is based on the general principle that 'contractual choices are ordinarily not open to question',[50] which is purportedly breached by the legislator only in relation to offers to the public at large, in the light of the balance struck between individual freedom and equality of opportunity in accessing the market for a broader number of people.[51] The prerequisite of 'the exclusion of a class of people'[52] is claimed to constitute the rationale for the prohibition of discrimination in relation to contracts, which thus justifies the restriction of that prohibition only to situations involving declarations made to the public at large, where there is 'a sacrifice by a class of people (on the one side) as against the interest of one individual (on the other side)'.[53]

However, it does not appear that the argument based on the 'sacrifice by a class' is capable of excluding the application of the prohibition of discrimination

G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 105-118; L. Sitzia, n 1 above, 97-100; B. Checchini, n 1 above, 193-195.

[45] D. Maffeis, *Offerta al pubblico* n 1 above, 43-44.

[46] D. Maffeis, *Offerta al pubblico* n 1 above, 215-217; Id, 'Il diritto contrattuale' n 1 above, 166.

[47] E. Navarretta, n 1 above, 553.

[48] A. Gentili, n 1 above, 225.

[49] See A. Gentili, n 1 above, 224-228; G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 105-108.

[50] See E. Navarretta, n 1 above, 555, according to whom 'as long as silence as to whether to choose to contract is legitimate, then also the expression of a choice, including one based on discrimination, must be deemed to be irrelevant'.

[51] E. Navarretta, n 1 above, 560-561.

[52] ibid 561.

[53] ibid 560.

to individually negotiated exchanges, in particular where the contracting party (while not making any declaration to the public at large) makes systematically discriminatory choices in relation to individually tailored negotiations. Consider an estate agency which – rather than addressing a particular (indeterminate but) restricted category of persons[54] by an offer to the public at large – issues a variety of individually tailored declarations to a class of persons selected as potential clients and reserves the right to refuse to conclude a contract with counterparties who, during the course of the negotiations, prove to have a particular ethnic origin or religious conviction in order to ensure the cultural homogeneity of the condominium.

Secondly, the dissemination of social prejudice within a specific relevant market may result in a scenario whereby, when confronted with the same discriminatory conduct, notwithstanding that it occurs in relation to individually tailored negotiations, the access by the members of the disadvantaged group to particular goods or services is significantly impaired or even excluded. An example of this may be found in cases involving real estate markets with a particular geographical focus where the conduct of the owners, who do not make any offers to the public at large, entirely prevents the victims of discrimination from securing housing due to the fact that it is impossible to negotiate with third parties.[55] Thus, the fact as to whether one individual or a wider class is excluded must be assessed not in abstract terms in the light of the negotiation technique but rather specifically with reference to the individual relevant market: even where no declaration is made to the public at large, discrimination may undermine equality of opportunity in accessing the market for a class of individuals.

More generally, in order to classify individual exchanges in different terms, it must be presumed that the prohibition of discrimination does not negate the freedom of choice of the contracting party, even when a declaration is made to the public at large. EU law clearly asserts that the prohibition of discrimination 'should not prejudice the individual's freedom to choose a contractual partner' on one of the risk factors (Art 3(2) of Directive 2004/113/EC; Art 55-*ter*(4) of Decreto legislativo 11 April 2006 no 198).[56] While the literature has traditionally

[54] The predominant solution within the literature accepts that the offer to the public must be directed at a limited class of people: P. Forchielli, 'Offerta al pubblico' *Novissimo digesto italiano*, XI, (Torino: UTET, 1968), 764; G. Sbisà, *La promessa al pubblico* (Milano: Giuffrè, 1974), 256; G. Oberto, 'Offerta al pubblico' *Digesto delle discipline privatistiche*, *Sezione civile*, XIII, (Torino: UTET, 1995), 10; A. Federico, Sub 'Art 1336 c.c.', in G. Perlingieri ed, *Codice civile annotato con la dottrina e la giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2010), IV, 1, 467.

[55] On this matter, see P. Femia, n 1 above, 477-486.

[56] The prohibition of discrimination does not preclude what U. Breccia, 'Contrarietà all'ordine pubblico', in M. Bessone ed, *Trattato di diritto privato. Il contratto in generale* (Torino: UTET, 1999) XIII, 3, 200, defines as 'the freedom to choose a counterparty and to contribute to the formulation of contractual terms without having to worry about treating potential contracting parties in the same way'.

considered private autonomy to be in opposition to the prohibition of discrimination,[57] it has limited itself to requiring the rejection by the law of certain factual differences, which must not condition the opportunity to access market exchanges. It must also be reasserted that the review of the discriminatory nature of a contractual choice – even outside of offers to the public at large – relates exclusively to the refusal to contract or to the imposition of more onerous contractual terms. The prohibition of discrimination therefore does not give rise to any 'general obligation to provide reasons for contractual choices'[58] since, when applied to individually tailored negotiations, it requires that there be a pre-contractual relationship between the parties,[59] and is thereby in keeping with the tendency within the law of contract to frame the exercise of autonomy as an exercise of discretion only in particular contexts[60] involving a certain degree of relationionality between the parties.

Thus, the burden of justifying the inequalities created by private autonomy will manifest itself in different ways, depending *inter alia* on the manner in which the contract was concluded. However, the solution to the tension between freedom of contract and the prohibition of discrimination cannot be inferred once and for all from the fact that a declaration is directed at the public at large, with the result that in some cases freedom of contract prevails (for tailored declarations) whilst in other cases the prohibition of discrimination is engaged (for declarations to the public at large).[61] On the one hand, even where a

[57] An insuperable contradiction between the general recognition of the principle of equality, construed however as equal treatment, and freedom of contract is identified by P. Rescigno, 'Sul cosiddetto principio d'uguaglianza nel diritto privato' *Foro italiano*, I, 664 (1960), now in Id, *Persona e comunità. Saggi di diritto privato*, I, (Padova: CEDAM, 1987), 335; D. Carusi, *Principio di eguaglianza, diritto singolare e privilegio. Rileggendo i saggi di Pietro Rescigno* (Napoli: Jovene, 1998), 13; G. Pasetti, *Parità di trattamento e autonomia privata* (Padova: CEDAM, 1970), 43; Id, 'Parità di trattamento' *Enciclopedia giuridica* (Roma: Treccani, 1990), XXII, 1.

[58] See however E. Navarretta, n 1 above, 556, who fears 'an interpretation that substantially negates freedom of contract'. According to the author in fact, the application of the prohibition of discrimination also to individual exchanges would require that the parties 'always give reasons *ab initio* for their own contractual choices'.

[59] Unless this were to occur, it would be inconceivable either to refuse to conclude a contract or to impose less favourable contractual terms. Thus, the application of the prohibition of discrimination to individual exchanges does not – as is by contrast argued by D. Maffeis, 'Il diritto contrattuale' n 1 above, 170 – prevent a contracting party from 'making a contractual proposal to a person of his or her choosing, and only to that person' as the examination as to whether individual exchanges involve discrimination does not focus on the proposal but rather – it is important to repeat once again – on the refusal to contract and the imposition of more onerous terms.

[60] On the review of contractual autonomy see P. Perlingieri, 'Nuovi profili del contratto' *Rassegna di diritto civile*, 545 (2000) now in Id, *Il diritto dei contratti fra persona e mercato* n 11 above, 415; Id, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile,* I, 326 (2010), who sets out in stages and in substantive terms the reference principles for reviewing the legitimacy of legal provisions and reviewing contracts.

[61] G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 108-118.

declaration to the public is made, the contracting party may have an appreciable interest in choosing amongst various counterparties, provided that the criterion adopted is not discriminatory.[62] Conversely, within individual exchanges, the contracting party's interest in not being subject to any restrictions in terms of the ability to choose the counterparty cannot be considered to be protected in all cases. It has been established in fact that the (non) transferability of the proposal must be associated with the (non-)transferability of the contract with the result that, if a proposal is not directed at a specific individual, it may circulate even without the consent of the person who made it.[63] This negates the assumption that it is only where a declaration is made to the public at large that the contracting party does not have any interest in distinguishing between counterparties depending upon their individual characteristics.[64] There are relationships that do not feature such an interest, even if contracts are concluded on the basis of an individually tailored declaration.

A variety of legislative provisions confirm the need to diversify the manner in which the prohibition of discrimination is applied, although with reference to teleological and systematic considerations and not merely to a procedural approach focusing on contract formation. In fact, the scope of anti-discrimination legislation is limited by the reference to goods and services 'that are offered outside the ambit of private and family life and the transactions made within this area'.[65] Were the prohibition of discrimination to apply only in the event that a declaration were made to the public at large, the exclusion of exchanges made within the ambit of private and family life would lack any self-standing normative significance. In fact, anti-discrimination legislation would already have to be considered not to be applicable by virtue of the use of contracting techniques different from an offer to the public and an invitation to treat.

Once again, the question must be resolved in terms of the justification of the inequality effect brought about by the exercise of private autonomy. The more a contract impinges upon the personal sphere of the individual (the so-called *Kernbereich der persönlichen Freiheitssphäre*), the more limited the review of the freedom of choice of the other contracting party must be, and this review must be negated entirely in dealings falling under the 'area of private

[62] See D. Maffeis, *Offerta al pubblico* n 1 above, 206; G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 112.

[63] This argument is supported by R. Sacco, in R. Sacco and G. De Nova eds, *Trattato di diritto civile - Il contratto* (Torino: UTET, 2004), II, 337.

[64] In this way, instead, D. Maffeis, *Offerta al pubblico* n 1 above, 205.

[65] See Art 3(1) of Directive 2004/113/EC and Art 55-*ter*(2) of Decreto legislativo 11 April 2006 no 198. Directives 2000/43/EC and 2004/113/EC add in the preamble that the principle of non-discrimination must be balanced against 'other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context'. N.M. Pinto Oliveira and B. Mac Crorie, 'Anti-discrimination Rules in European Contract Law', in S. Grundmann ed, *Constitutional Values and European Contract Law* (Austin: Wolters Kluwer, 2008), 115, distinguish between 'public and private spheres of the individual'.

and family life', which is exempt from the operation of the prohibition of discrimination, such as in cases involving the letting of a holiday home to a member of the family or of a room within a private residence.[66] Otherwise, aside from these situations, the prohibition may be applied also to individual exchanges where the inequality outcome is not justified by an appreciable interest under the legal system. Consider a scenario under which an individual negotiation is engaged in by a person during the course of business or professional activities, who then breaks off negotiations or refuses to conclude a contract for a discriminatory reason, which may even be expressly declared.[67] Consider also a scenario involving the owner of a residential complex who, without addressing the public at large, leases out identical units subject to contractual terms that are significantly more detrimental for lessors with a particular ethnic origin or religious belief.

In conclusion, the refusal to assert in absolute terms that indirect discrimination is not possible except in relation to offers to the public at large does not necessarily entail – as has been argued – the negation of freedom of contract,[68] but allows for the acknowledgement that, within different practical contexts, the effect of the prohibition of discrimination differs in terms of its extent due to the different status of the interests in play and the degree to which they are protected.[69] In some cases, such as those involving exchanges within

[66] The full freedom to choose the counterparty in the area of 'private and family life' is justified by the need to promote the broad self-determination of the individual within his or her own existential dimension (J. Neuner, 'Diskriminierungschutz durch Privatrecht' *Juristen Zeitung*, 57 (2003); F. Stork, n 26 above, 539). It is thus inappropriate to refer to privacy as a 'protected domain within which selective and also discriminatory choices may be made', provided that the contracting party does not 'decide to make others party to that discrimination, thereby waiving his or her right to privacy' (P. Morozzo della Rocca, n 1 above, 43). Within this perspective in fact, the prohibition of discrimination could not be extended to invitations to treat followed by a refusal rooted in discrimination (see however Tribunale di Milano 30 marzo 2000, *Foro italiano*, I, 2040 (2000)), where 'the discriminatory reason is not made known to the public' (E. Navarretta, n 1 above, 553-555).

[67] For example, reference may be made to a company that refuses to provide its real estate brokerage services on the grounds of the nationality of the person requesting them or the provider or food and drink refuses to provide catering services owing to the ethnic origin of the client.

[68] See D. Maffeis, 'Il diritto contrattuale' n 1 above, 168-175 according to whom 'freedom of contract is, in essence, at odds with the possible manifestation of the principle of solidarity' and E. Navarretta, n 1 above, 555, criticising the argument proposed by this author regarding the prohibition of discrimination within individual exchanges (G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 105-118).

[69] If the issue is considered in terms of the constitutional significance of private autonomy (P. Rescigno, 'I contratti in generale', in N. Lipari and P. Rescigno eds, *Diritto civile*, coordinated by A. Zoppini, III, *Obbligazioni*, 2, *Il contratto in generale* (Milano: Giuffrè, 2009), 1), without however elevating it to the status of a fundamental right (P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 321), the approach to the prohibition of discrimination within contracts must inevitably be focused on the search for a proper balance between the competing principles and interests, in the light of the specific facts of the individual case.

the 'area of private and family life', the legislator strikes a direct balance between the countervailing interests, providing that freedom of contract prevails; in other cases, such as in the examples referred to above involving individually tailored negotiations, the law permits the justification of the inequality outcome brought about by the counterparty's choices to be subject to review.

V. Equality as the Axiological Foundation for the Prohibition of Discrimination and the Structure of the Judgment Concerning Discrimination

The conceptual core of the prohibition of discrimination in justifying the inequality effect has finally also been identified within the case law of the Court of Cassation. Having overcome its initial reticence to engage with the issue,[70] the Court of Cassation identified the basis for the prohibition of discrimination directly in Art 3 of the Italian Constitution, construed as a whole,[71] thereby moving beyond its traditional aversion both to searching for the sources of equality in other constitutional principles as well as to invoking arguments that are more common within the literature, such as public order or morals.[72]

The Joint Divisions accepted the calls made within the European case law – which considers non-discrimination, insofar as it is an expression of the principle of equality,[73] as a fundamental human right immediately actionable against other private persons[74] – and inferred from numerous international instruments (Art 14 ECHR; Art 2 of the EU Treaty; Arts 18 and 19 TFEU; Art 21 of the EU Charter of Fundamental Rights), but above all 'from the fundamental constitutional principle of equality (Art 3 of the Italian Constitution)' an 'absolute individual right' not to be discriminated against 'established in order to protect an area of freedom and potential of the individual against any type of violation'.[75]

[70] Corte di Cassazione-Sezioni Unite 29 May 1993 no 6030, *Giustizia civile*, I, 2341 (1993). On this matter, see E. Giorgini, *Ragionevolezza e autonomia negoziale*, (Napoli: Edizioni Scientifiche Italiane, 2010), 163.

[71] Corte di Cassazione-Sezioni Unite 15 February 2011 no 3670, *Foro italiano*, I, 1101 (2011); Corte di Cassazione-Sezioni Unite 30 March 2011 no 7186, *Rivista italiana di diritto del lavoro*, 1095 (2011). On the Art 3 of the Italian Constitution see P. Perlingieri, 'Eguaglianza, capacità contributiva e diritto civile' *Rassegna di diritto civile*, 724 (1980), now in Id, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni scientifiche italiane, 1989), 135.

[72] A critical analysis in G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 142-146.

[73] Cf, *ex multis*, Case C-810/79 *Überschär* n 22 above; Case 354/95 *The Queen* v *National Farmers' Union et al*, Judgment of 17 July 1997, ECR I-4559, para 61 (1995); Case 13/94 *S.* v *Cornwall County Council*, Judgment of 30 April 1996, para 18, ECR I-2165 (1996); Case 144/04 *Werner Mangold* v *Rüdiger Helm* n 22 above.

[74] The definition of fundamental right in Case 442/00 *Àngel Rodríguez Caballero*, Judgment of 12 December 2000, *Raccolta della Corte di Giustizia CE*, I, 11915, § 32 (2002); Case 144/04 *Werner Mangold* v *Rüdiger Helm* n 22 above; Case 555/07 (GC) *Seda Küciükdeveci,* Judgment of 19 January 2010, *Raccolta della Corte di Giustizia CE*, I-356 (2010).

[75] See Corte di Cassazione-Sezioni Unite 15 February 2011 no 3670, n 71 above; Corte di

In this way, the prohibition on contractual discrimination makes clear the twofold role which the principle of equality is able to play in recognising its horizontal effect:[76] both an individual right of the person as well as an objective limit on legislative powers *lato sensu*,[77] including transactional autonomy.[78] Therefore, the direct applicability of the principle of equality within private law relations is inseparable from the issue of the review of contractual autonomy, where it expresses the core essence of the anti-discrimination paradigm.

Within this perspective, it is possible to engage with the issue of the nature and structure of discrimination cases. According to the most broadly accepted viewpoint, cases seeking a finding of discrimination are relational in nature as they require a comparator and two terms for comparison.[79] However, any assertion that discrimination cases are tripartite in nature – whether based on actual or virtual comparators – will end up conflating discrimination with unequal treatment.[80] The comparison between two scenarios with reference to a pre-existing paradigm will in fact tend to consider whether a rule of equality has been respected, which rule operates as a pre-constituted parameter for assessing

Cassazione-Sezioni Unite 30 March 2011 no 7186, n 71 above. According to D. Maffeis, 'Il diritto contrattuale' n 1 above, 178, the 'classification endorsed by the Joint Divisions in that case of the foundation for the prohibition of discrimination was not properly considered' and leads to an 'aberrant' result. However, the author does not take account of the fact that the decisions of the Supreme Court are fully aligned with the now settled position within the case law of the European Court of Human Rights, which considers the prohibition of discrimination as: 1) a general principle of law; 2) an expression of the principle of equality; 3) having direct horizontal effect in relations between private persons; and 4) as having the status of a fundamental right. The '*right not to be discriminated against*' is enshrined in Art II.–2:101 of *Draft Common Frame of Reference*.

[76] Within the private law literature the significance of Art 3 of the Constitution within relations between private individuals has been proposed by G. Oppo, 'Eguaglianza e contratto nella società per azioni' *Rivista di diritto civile*, I, 633 (1974); C.M. Bianca, *Le autorità private* (Napoli: Jovene, 1977), now in Id, *Realtà sociale ed effettività della norma* (Milano: Giuffrè, 2002), I, 1, 50; P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 69 above, 459; Id, 'Eguaglianza, capacità contributiva' n 71 above, 137.

[77] On this matter see M. Barbera, *Discriminazioni ed eguaglianza nel rapporti di lavoro* (Milano: Giuffrè, 1991), 11; Id, 'Introduzione', in Id, *Il nuovo diritto antidiscriminatorio* n 1 above, XXVIII.

[78] Normative powers in a broad sense are considered to include those 'that legitimise the imposition of the rules that are applicable to the specific individual case': P. Perlingieri, 'Applicazione e controllo' n 60 above, 326. See also F. Criscuolo, 'Autonomia negoziale e autonomia contrattuale', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2008), 1-41.

[79] In this way, B. Troisi, n 1 above, 297-298; L. Sitzia, n 1 above, 249-257; D. La Rocca, *Eguaglianza e libertà contrattuale* n 1 above, 175.

[80] Within real comparison, the comparator is another specific case: Tom refuses to negotiate with Dick on the grounds that he is Jewish, but concludes contracts with Harry who has a different religious faith. However, if following the refusal to contract with Dick no other contracts are concluded there will be no relevant comparator. This therefore justifies the recourse to virtual comparison, which uses a standard as a comparator, namely the hypothetical conduct that Tom should have followed with a counterparty lacking the personal characteristic that constituted grounds for discrimination.

the act or conduct. The *tertium comparationis* reveals the inequality outcome in access to contractual benefits, although does not indicate whether it is justified.

The view that a finding of discrimination – such as in relation to incidental bad faith falling under Art 1440 of the Italian Civil Code – must be based on an examination as to whether the individual characteristic of the counterparty impinged upon the contracting process is not very distant from this model.[81] In this way in fact, a virtual comparison is still necessary in order to verify whether the treatment of the counterparty is worse than how he or she would hypothetically have been treated in the absence of the prejudice.[82]

However, it is possible to frame the assessment in different terms in a manner that is consistent with the reciprocal indifference of contractual relations involving different counterparties, which tends to be characteristic of the law of contract.[83] In fact, under current law not only does discrimination not presuppose the necessary operation of any 'distinction' or 'preference', but rather simply requires an 'exclusion' or 'restriction' (Art 43 of Decreto legislativo 25 July 1998 no 286), but above all any differences in treatment that are 'objectively justified by legitimate aims pursued through appropriate and necessary means' 'will not in any case constitute discrimination' (Art 3(4) of Decreto legislativo 9 July 2003 no 215; Art 55-*bis*(7) of Decreto legislativo 11 April 2006 no 198).[84] Prohibited discrimination also includes harassment (Art 2(3) of Decreto legislativo 9 July 2003 no 215; Art 55-*bis*(4) and (5) of Decreto legislativo 11 April 2006 no 198), which amounts to conduct in breach of

> 'an *absolute right* not to be intimidated, degraded, humiliated or offended (and in any case not to be '*disadvantaged*' and not simply '*more disadvantaged*') due to a person's own individual characteristics'.[85]

The abandonment of the comparative assessment model has been further confirmed in the case law both of the European Court of Human Rights[86] as

[81] D. Maffeis, *Offerta al pubblico* n 1 above, 59; L. Sitzia, n 1 above, 250-252.

[82] Although D. Maffeis, *Offerta al pubblico* n 1 above, 67, explicitly denies this, he still nonetheless construes the judgment concerning discrimination in a tripartite manner as he compares the treatment of the counterparty, in the light of the reference parameter, with a *tertium comparationis* taken as an abstract standard, namely the hypothetical treatment that would have been provided in the absence of any risk factor.

[83] See S. Patti, 'Alcune innovazioni del codice del 1942 nella materia dei contratti e la loro incidenza sulla autonomia privata', in M. Giorgianni et al, *I cinquant'anni del codice civile* (Milano: Giuffrè, 1993), II, 767.

[84] Within the case law of the Court of Justice, if there are grounds for justification there can be no discrimination: C. Favilli, *La non discriminazione* n 35 above, 112.

[85] See further M. Barbera, 'Introduzione', in Id, *Il nuovo diritto antidiscriminatorio* n 1 above, XXXII (original italics) who argues that, in cases involving harassment, 'the protection afforded under the new Community legislation is not dependent upon any comparison'.

[86] According to whom a difference in treatment will constitute discrimination pursuant to Art 14 of the Convention when 'there is no objective and reasonable justification' as 'it does not pursue a 'legitimate purpose' ' or there is no 'reasonable relationship of proportionality between

well as the CJEU which, in discrimination disputes, now tend not to refer to a comparator and to base the judgment on the link between less favourable treatment and the presence of a risk factor.[87] It has thus been demonstrated that the violation of the prohibition on contractual discrimination does not result from the existence of a situation of inequality *vis-à-vis* a (hypothetical or actual) comparator scenario with similar characteristics; on the contrary, such a violation will result from a finding that a certain act or conduct prevents or limits access to goods or services by the other contracting party on account of a personal characteristic that represents a risk factor without any objective or reasonable justification.

In terms of application, the different conceptions of the notion of discrimination give rise to significant differences. A paradigmatic example is that of ethical banks which, in accordance with their charters, do not enter into

> 'financial relations with economic operators that either directly or indirectly impede human development and contribute to the violation of fundamental human rights'.[88]

The conduct of ethical banks will amount to prohibited discrimination, both if the judgment is focused on relational engagement and where the impact on consent of an individual characteristic of the counterparty is considered.[89] However, the result may be different if the review of the contracting party's choice seeks to establish whether the creation of an inequality outcome is 'objectively justified by legitimate aims pursued through appropriate and necessary means'. In this light, the exclusion or limitation of market exchanges put in place by the ethical bank in relation to counterparties will not amount to unlawful discrimination wherever it pursues in a proportionate manner an interest that is worthy of protection under the legal order.

It has been argued that, in this way, the ' 'normative preference' in favour of the application of the prohibition of discrimination may be identified with the

the means used and the aim pursued': *ex multis*, Eur. Court H.R., *Karlheinz Schmidt* v *Germany*, Judgment of 18 July 1994, para 24; Eur. Court H.R., *Petrovic* v *Austria*, Judgment of 27 March 1998, para 30; Eur. Court H.R., *Niedzwiecki* v *Germany*, Judgment of 25 October 2005, para 32; Eur. Court H.R., *Si Amer* v *France*, Judgment of 29 October 2009, para 39, all available at www.echr.coe.int.

[87] The case law on sex discrimination has emblematic value. For example, it is impossible to use a male comparator in cases involving pregnancy, with the result that the Court bases its judgment on whether there is an evident link between the less favourable treatment and the risk factor: Case 177/88 *Dekker*, Judgment of 8 November 1990, ECR 3941 (1990); Case 32/93 *Webb*, Judgment of 14 July 1994, ECR I-3567 (1994). See also, Case 13/94 *S. e Cornwall County Council* n 73 above, I- 2165, para 22; Case 117/01 *K.B.*, Judgment of 7 January 2004, ECR I-541 (2004).

[88] In this way, Art 5 of the Banca Popolare Etica's Statute. On this matter see R. Milano, *La finanza e la banca etica. Economia e solidarietà* (Milano: Paoline, 2001), 132.

[89] D. Maffeis, *Offerta al pubblico* n 1 above, 193; Id, 'Il diritto contrattuale' n 1 above, 178.

personal preference of the interpreting body', as 'the notion that a hierarchy of interests can be created is ahistorical'.[90] By contrast, it must be reiterated that, under current law, there is in fact a hierarchy of interests, which must be inferred from constitutional axiology.[91] This means that, for example, the refusal by ethical banks to conclude contracts with undertakings carrying on activities involving the production and sale of arms (Art 11 of the Italian Constitution),[92] the use and development of energy sources and technologies that are harmful for humans and the environment (Arts 2, 9 and 32 of the Italian Constitution), the exploitation of child labour (Art 37 of the Italian Constitution) or the violation of workers' human rights (Art 36 of the Italian Constitution) may be deemed to be justified.

VI. Strict Liability for Discrimination

That this interpretation is correct is confirmed both by the rules on the criteria for establishing whether unlawful discrimination has occurred and also by the regime applicable to evidence. Some commentators within the literature consider that unlawful discrimination must be fault-based and add that this *animus* must be '*unique and exclusive*'.[93] It is indispensable that the personal characteristic of the opposing party is a decisive factor – exclusively – for the consent by the contracting party, with the result that the latter '*acknowledges, and intends* to provide' the other person with 'treatment that is harmful or otherwise less favourable'.[94] However, this argument is open to numerous objections.

First and foremost, in order to move beyond the general equivalence between wilful action and fault, laid down by the general clause on liability under tort (Art 2043 of the Italian Civil Code),[95] it must be considered that the rule is based on the assumption that the unlawful act will only be capable of causing undue harm if it is committed wilfully.[96] In fact, unlawful acts that require

[90] D. Maffeis, 'Il diritto contrattuale' n 1 above, 179.

[91] See P. Perlingieri, 'Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti' *Rassegna di diritto civile*, 787 (1999), now in Id, *L'ordinamento vigente e i suoi valori. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006), 348.

[92] According to D. Maffeis, *Offerta al pubblico* n 1 above, 193, note 38, on the other hand, 'It is massively doubtful whether the production of and trade in arms furthers the general interest. This is not the case for anyone that *repudiates war*; this is the case for anyone that considers war to be one of the instruments for the pacification of peoples' (italics added). However, see Art 11 of the Italian Constitution: 'Italy *repudiates war* as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes'.

[93] D. Maffeis, *Offerta al pubblico* n 1 above, 160.

[94] In this way ibid 161.

[95] See G. Alpa, *Trattato di diritto civile*, 4, *La responsabilità civile* (Milano: Giuffrè, 1999), 234; M. Franzoni, 'L'illecito', in M. Franzoni ed, *Trattato della responsabilità civile* (Milano: Giuffrè, 2nd ed, 2010), I, 385.

[96] In this way, P. Cendon, *Il dolo nella responsabilità extracontrattuale* (Torino: Giappichelli,

wilful action manifest a value judgment that the interests of the perpetrator prevail over those of the victim:[97] by imposing the requirement of intentional action, the legal system expands the area of freedom of action for the perpetrator.[98] However, in relation to contractual discrimination the normative preference applies in favour of the legal position of the victim, as the agent's freedom of contract (which is not classified as an inviolable human right)[99] conflicts with the 'absolute individual right not to be discriminated against', which the case law has recognised as a fundamental right 'with constitutional and supra-national status'.[100]

Furthermore, in regulating the prohibitions on discrimination, the legislator not only does not refer to wilful action, but also even disregards the issue of fault, adopting objective criteria of strict liability. In order for discrimination to be considered to have occurred as a matter of law, it is necessary, in some cases, either that 'the purpose *or* effect' or the 'object *or* consequence' is discriminatory (Art 43 of Decreto Legislativo 25 July 1998 no 286;[101] in relation to harassment, Art 2(3) of Decreto Legislativo 9 July 2003 no 215 and Art 55-*bis*(4) and (6) of Decreto legislativo 11 April 2006 no 198), in other cases that there be 'less favourable treatment' (Art 2(1) of Decreto Legislativo 9 July 2003 no 215; Art 55-*bis*(1) of Decreto legislativo 11 April 2006 no 198), and in other cases a 'particular disadvantage' (Art 2(1) of Decreto Legislativo 9 July 2003 no 215; Art 55-*bis*(2) of Decreto legislativo 11 April 2006 no 198) in accessing and obtaining the provision of goods or services, without any reference to whether the conduct was intentional.[102] A common feature of the forms of discrimination mentioned

1974), 156; G. Visintini, *I fatti illeciti* (Padova: CEDAM, 1990), II, 247.

[97] P. Cendon, n 96 above, 465.

[98] M. Franzoni, n 95 above, 373.

[99] See further P. Rescigno, 'L'autonomia dei privati' *Justitia* (1967), now in Id, *Persona e comunità* (Padova: CEDAM, 1988), II, 422; P. Perlingieri, *Profili istituzionali del diritto civile* (Napoli: Jovene, 1975), 70; Id, *Il diritto civile nella legalità costituzionale* n 69 above, 334; G. Alpa, 'Libertà contrattuale e tutela costituzionale' *Rivista critica di diritto privato*, 44 (1995); L. Mengoni, 'Autonomia privata e Costituzione' *Banca borsa e titoli e credito*, 1 (1997); M. Pennasilico, sub 'art. 1322 c.c.', in G. Perlingieri ed, *Codice civile annotato* n 54 above, 374.

[100] Corte di Cassazione-Sezioni Unite 30 March 2011 no 7186, n 71 above; Corte di Cassazione-Sezioni Unite 15 February 2011 no 3670, n 71 above; Case 442/00 *Angel Rodríguez Caballero* n 74 above.

[101] B. Troisi, n 1 above, 305.

[102] Also C. Favilli, *La non discriminazione* n 35 above, 149, 255, argues that, within the Community definitions of discrimination, 'it is always irrelevant what intention the author of discriminatory treatment has'. Albeit with reference to Spanish law, there is general consensus within the literature that contractual discrimination gives rise to strict liability: F.J. Infante Ruiz, 'El desarrollo de la prohibición de no discriminar en el derecho de contratos y su consideración en la jurisprudencia' *Revista de derecho patrimonial*, 30, 191 (2013); M. García Rubio, 'Discriminación por razón de sexo y derecho contractual en la Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y ombre' *Derecho privado y Constitución*, 161 (2007); C. Mesa Marrero, 'Consecuencias jurídicas de las conductas discriminatorias: ¿un resquicio para los punitive damages?', in Á. López López ed, *El levantamiento del velo. Las mujeres en el Derecho Privado* (Valencia: Tirant lo Blanch, 2011), 1204; M.J. Reyes Lopez, 'El

above is the irrelevance of any intention on the part of the actor: what matters is the functional aspect of the act, expressed by the creation of an unjustified effect of inequality based on the presence of a risk factor.

VII. The Rules Governing Evidence and the Nature of a Legal Presumption of Discrimination

The hypothesis that the legislation establishes strict liability for discrimination is supported by the rules governing the burden of proof laid down by Art 28(4) of Decreto legislativo 1 September 2011 no 150 which provides that:

> 'Where the claimant provides factual indications, inferred also from data of a statistical nature, from which the existence of discriminatory acts, agreements or conduct may be inferred, it shall be for the defendant to establish that there was no discrimination'.

An interpretation of this provision in the light of EU law is capable of establishing a legal presumption to this effect, which, in allocating the burden of proof,[103] protects the weaker party to the relationship, who encounters greater difficulty in proving factual assertions.[104]

However, there is a question as to how the division of the burden of proof operates in practice. What is the basic fact that must be proven by the claimant? And what is the presumed fact 'that is relevant for the decision'?[105] According to the provision, the basic facts are the 'discriminatory acts, agreements or conduct', whilst the presumed fact is the 'discrimination'. It is necessary to give meaning to the expressions used by the legislator, starting from the legal presumption in question, which expresses preferential treatment by the legal order for the party

principio de igualdad de trato en las relaciones contractuales' *Revista juridical del notariado*, 646 (2010).

[103] The Court of Justice has however clarified on numerous occasions that, in disputes concerning discrimination, it falls to the victim to 'establish the facts from which it may be presumed that there has been direct or indirect discrimination. It is only where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination' (Case 104/10 *Kelly* v *National University of Ireland*, Judgment of 21 July 2011, ECR I-06813, para 30 (2011); Case 415/10 *Meister* v *Speech Design Carrier Systems GmbH*, Judgment of 19 Aprile 2012, *Diritto e pratica del lavoro*, 39, § 36 (2012)). The existence of discrimination may be contested by the respondents 'by any legally permissible means' (Case 303/06 Grand Chamber *Coleman* v *Attridge Law e Steve Law*, Judgment of 17 July 2008, ECR I-5603, para 55 (2008); Case 81/12 *Accept* v *Consiliul Naţional pentru Combaterea Discriminarii*, Judgment of 25 April 2013, para 56, available at www.eur-lex.europa.eu; Case 415/10 *Meister* v *Speech Design Carrier Systems GmbH* n 103 above, para 36), including a 'body of consistent evidence' capable of refuting the presumption of discrimination (Case 81/12, para 58).

[104] S. Patti, 'Probatio *e* praesumptio*: attualità di un'antica contrapposizione*' *Rivista di diritto civile*, I, 486 (2001).

[105] ibid 484.

that is exempt from the burden of proof.

Within this perspective, the basic fact that must be proven by the claimant is the effect of the inequality, as qualified by a risk factor: the refusal to contract or the proposal of more onerous terms. On the other hand, the fact presumed, which the claimant is not required to demonstrate, is the lack of justification for the inequality effect. Thus, once the interested party has provided evidence of the inequality effect, the legislator requires the court to presume that discrimination has occurred, unless the defendant is able comply with the burden of demonstrating that it is not true or that there is justification for the discrimination alleged.[106] Therefore the perpetrator runs the risk of being unsuccessful in the proceedings if it is unable to furnish proof both of the existence and eligibility for protection of the justification for the discriminatory effect as well as the proportionality of this basis for justification. Assuming that the legislator uses objective criteria for establishing whether discrimination has occurred, the objection that the burden of proof borne by the defendant would also extend to proving a negative fact, namely the absence of any discriminatory intent, will also be inoperative. The defendant will in fact be required to furnish positive proof, namely the existence of justification for the inequality effect, and it will be in a privileged position as regards access to such proof.

VIII. Diversification of Techniques for Protecting Against Discrimination and the Choice of the 'Right' Civil Remedy

The legislation governing the private law protections that may be invoked against contractual discrimination offers a broad array of remedies to the courts, without any hierarchical distinction. Violations of the legal prohibition may be countered with functionally different forms of protection, which may in some cases be cumulative.[107] Accordingly, any reading of the prohibition of discrimination as either a prerequisite for validity or as a rule for establishing liability must be rejected.

In some cases, discrimination will result in the case being classified as unlawful, with the result that the transaction is void in its entirety. This will be

[106] See, Case C-303/06 (GC) *Coleman* v *Attridge Law and Steve Law*, Judgment of 17 July 2008, para 55, available at www.eur-lex.europa.eu, where it was held that, if the claimant demonstrates facts that enable it to be presumed that discrimination has occurred, the defendant may contest the assumption that the unequal treatment was unlawful by demonstrating 'by any legally permissible means' that the act or conduct was 'justified by objective factors unrelated to any discrimination' on the grounds of any personal characteristic that constitutes a risk factor.

[107] On the requirement for a confluence between remedies and interests in the light of the requirements of reasonableness and proportionality, see P. Perlingieri, 'Il «giusto rimedio» nel diritto civile' *Giusto processo civile*, 1 (2011), according to whom the 'special circumstances of the specific individual case' will determine the choice of the remedy, also 'beyond the confines laid down by the legislator'.

the outcome for 'discriminatory transactions or agreements' resulting in obligations between the parties to refrain from contracting or to apply more onerous terms to members of the group that is discriminated against.[108] The verification as to whether the cause is lawful – the traditional instrument for the control of acts of private autonomy – is enriched by the reference to the prohibition of discrimination, which is capable of classifying as invalid a transaction requiring the parties to comply with a rule with discriminatory effect.

Where the discrimination occurs during the pre-contractual stage, consisting in a refusal to launch or pursue negotiations, the core remedy is by contrast the injunction by which the legal system seeks to obtain the 'cessation of the detrimental discriminatory behaviour, conduct or act' (Art 28 of Decreto legislativo 1 September 2011 no 150).[109] It is also possible to issue an order of specific performance,[110] which obliges the defendant to conclude a contract, provided that the goods or services are still available and it is possible to conclude the contract. Where the perpetrator persists in the unlawful conduct and fails to comply with the obligation to act in a non-discriminatory manner, this circumstance may be assessed when liquidating the amount of damages payable.[111]

In addition to a refusal to contract, discrimination may also consist in the imposition of individual clauses that result in less favourable treatment. Consider the provision within a lease prohibiting any cohabitee of the lessor who is not an EU citizen or authorising subletting, except to homosexuals. In such cases, the discrimination pertains to the substantive terms of the contract, and its negative effect is limited only to certain clauses, which may be ruled void in part,[112] and where appropriate supplemented or corrected.[113]

[108] There has always been an awareness within the private law literature that 'any 'anti-constitutional' discrimination that penetrates into the cause or into the actual terms of the contract may without doubt result in it being void on the grounds that it is unlawful': see, G. Oppo, n 76 above, 634, who provides the example of an agreement by which the parties undertake to refrain from contracting with blacks, Jews or Italians; P. Rescigno, 'Sul cosiddetto principio' n 57 above, 666; P. Femia, n 1 above, 483-485; D. Maffeis, *Offerta al pubblico* n 1 above, 313; G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 247-256.

[109] An injunction may also be imposed in order to avoid the continued or repeated imposition of more detrimental terms within so-called 'serial' contracts (eg general terms and conditions, standard-form contracts, etc). In such an eventuality, the conduct will be unlawful, with the result that the order to desist will take the form of an injunction.

[110] See further A. di Majo, *La tutela civile dei diritti* (Milano: Giuffrè, 4th ed, 2003), 144; D. Maffeis, *Offerta al pubblico* n 1 above, 283.

[111] In fact, according to Art 28(6) of Decreto legislativo 1 September 2011 no 150, 'the court shall take account of whether the discriminatory act or conduct amounts to retaliation for previous legal action or an unfair response to previous activity by the injured party seeking to secure compliance with the principle of equal treatment'.

[112] See also P. Femia, n 1 above, 545-546; D. La Rocca, *Eguaglianza e libertà contrattuale* n 1 above, 198; E. Navarretta, n 1 above, 557-558.

[113] Partial annulment may be followed by the automatic incorporation of the clauses generally adopted by the contracting party pursuant to Art 1339 of the Italian Civil Code (G. Pasetti, n 57 above, 313), by subsequent validation pursuant to Art 1374 of the Italian Civil Code (L. Ciaroni, n 22 above, 1822), or by rectification as a form of compensation in kind

Where the discriminatory conduct results in detrimental consequences for the victim, he or she may also claim damages. Art 28(5), (6) and (7) of Decreto legislativo 1 September 2011 no 150 lay down special provisions on damages, which strongly emphasise their punitive function, as is demonstrated by: the setting of rigorous criteria for the liquidation of the quantum,[114] the express provision that non-pecuniary harm is eligible for compensation[115] and the possibility of ordering the publication of the order awarding damages.

In terms of remedies, the most problematic issue consists in the admissibility of real protection for the substantive interest in accessing the benefit available through contracting. In fact, when confronted with the refusal to contract, the remedies of an injunction or an award of damages may not be adequate in order to offer full and complete protection to the victim of discrimination. In the event that an injunction is not complied with, the question will therefore arise as to whether a court ruling can establish the effects of the contract that was not concluded. Art 2932 of the Italian Civil Code is commonly held not to apply, as the prohibition of discrimination cannot give rise to an obligation to contract.[116] Nevertheless, some commentators use Art 2058 of the Italian Civil Code as a basis for establishing the effects of a contract that was not concluded, as a form of compensation in kind.[117]

However, this is not a desirable solution. In contrast to compensation in kind, the imposition of a contract does not seek to re-establish the situation that would have arisen without the unlawful effect, but rather to bring about an effect that is constitutive of a new legal relationship. Moreover, the remedy cannot be reduced to the ordinary forms of restitution in kind, which presuppose the material elimination of the detrimental consequences of the unlawful act.

Moreover, on a procedural level, compensation is based on protection through specific performance (tutela di condanna), whereas the imposition of a contract must strictly speaking be classified as 'constitutive' relief as the order of the court is liable to impinge directly on relations between private individuals. Within this perspective, Art 28 of Decreto legislativo 1 September 2011 no 150 may be considered as one of the 'cases provided for by law' in which, according

pursuant to Art 2058 of the Italian Civil Code (R. Sacco, in Id and G. De Nova eds, n 63 above, 100; D. Maffeis, *Offerta al pubblico* n 1 above, 286). However, it would appear to be preferable to infer any amendment or supplementation of the contract from the court's power to cancel the effects of discrimination pursuant to Art 28(5) of Decreto legislativo 1 September 2011 no 150 (G. Carapezza Figlia, *Divieto di discriminazione* n 1 above, 272-276).

[114] The amount of compensation must be based not only on the harm suffered by the victim (compensatory-satisfactory function) but also on the seriousness of the breach, which may be heightened where the discrimination constitutes 'retaliation' or an 'unfair response' to the conduct of the injured party (Art 28(6), cited above).

[115] See P. Virgadamo, *Danno non patrimoniale e "ingiustizia conformata"* (Torino: Giappichelli, 2014), 195.

[116] G. Scarselli, n 15 above, 824; P. Morozzo della Rocca, n 1 above, 36; B. Troisi, n 1 above, 302; D. Maffeis, *Offerta al pubblico* n 1 above, 277.

[117] R. Sacco, in Id and G. De Nova eds, n 63 above, 313; L. Sitzia, n 1 above, 301-303.

to Art 2908 of the Italian Civil Code, the courts may issue constitutive rulings. This provision in fact grants the court the power to adopt, when accepting the claim, 'any measure capable of removing the effects' of the discrimination. The removal is achieved through the establishment of a substantive legal relationship, which gives effect to the 'right to contract' of the victim of the discrimination.[118] It is also evident in this respect that the imposition of a contract is a very different remedy to compensation in kind, since the legal result sought by the party is only actually be provided through constitutive relief and not by compensation in kind without pursuing any enforcement proceedings.[119]

However, it must be possible to issue a constitutive judgment. In order to do so, two preconditions must be met: the goods or service must still be available and the terms of the contract must be sufficiently specific. Thus, the scope of the remedy appears to be limited to situations involving the unjustified refusal to conclude a standard form contract or the breaking off of negotiations conducted in an attempt to reach agreement concerning the essential aspects of a transaction.

In conclusion, since the principle of equality may be fulfilled in various ways in the area of contractual relations, it is also necessary that the forms of relief and the manner in which relief is provided are also different. This places the emphasis on the responsibility of interpreting bodies, which are called upon to identify the civil remedy that is capable of striking the 'right balance' between the competing rights: punishing the unjustified creation of inequality effects, while placing the narrowest possible restriction on freedom of contract.

[118] See S. Mazzamuto, 'L'esecuzione forzata', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 2nd ed, 1998), XX, 410.

[119] In this way, A. di Majo, n 110 above, 364; A. Chizzini, 'Sentenza nel diritto processuale civile' *Digesto delle discispline privivatistiche, Sezione civile* (Torino: UTET, 1998), XVIII, 28.