Forum di QUADERNI COSTITUZIONALI
RASSEGNA
ISSN 2281-2113

Collective discrimination without an identifiable victim in EU law. Discrimination by public speech

FEDERICA CECCARONI*

Abstract (EN): The article seeks to examine the theme of collective discrimination in the case in which there is no identifiable victim. In particular, this work aims to provide a functional assessment of the implications of "collective rights", with a specific focus on discrimination through public speech. After reviewing from a theoretical approach the case in which the CJEU explicitly recognised for the first time a direct protection to the *group* (the *Feryn* case) – the relevance of which is extremely topical in the light of the recent judgment *NH v. Associazione Avvocatura per i diritti LGBTI - Rete Lenford* – this work attempts to illustrate practical issues that the *group* encounter in the enforcement phase. Following this, with the illustration of the enforcement mechanisms the *group* could take advantage of to represent his rights in a judicial procedure, the article seeks to investigate if the procedural tools that Member States are required to ensure in accordance with EU obligations are sufficient to grant effectiveness of EU "collective rights".

Sommario

Data della pubblicazione sul sito: 26 giugno 2020

Suggerimento di citazione: F. CECCARONI, *Collective discrimination without an identifiable victim in EU law. Discrimination by public speech*, in *Forum di Quaderni Costituzionali*, 2, 2020. Disponibile in: www.forumcostituzionale.it

* Dottoressa in Giurisprudenza nella Libera Università Internazionale degli Studi Sociali Guido Carli (LUISS) di Roma. Indirizzo mail: fd.ceccaroni@gmail.com.

1. Introduction

In the last fifty years, European Union (EU) has expanded the arsenal of rights related to equality law[1]. The origin of EU equality law can be traced back to the right to equal pay between men and women, initially conceived as a market right to prevent unfair competition. However, from the 1970s equal treatment started to be perceived as a social right, which was progressively developed through secondary legislation[2].

Protections exist today with respect to discrimination on the basis of gender, racial or ethnic origin, religion or belief, disability, age, gender reassignment and sexual orientation, still mostly in the area of employment, but under the social dimension, also in other areas[3].

In this context, the role of the Court of Justice of the European Union (CJEU) is crucial. In his position of final interpreter of the meaning of European legal norms, the CJEU clarifies the limits of protections accorded by EU equality Law. In particular, two fundamental decisions in this area seems to expand these protections: in *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford*[4] case (a preliminary ruling related to sexual orientation discrimination) and in *Feryn* case[5] (a preliminary ruling in the field of racial discrimination), the CJEU found that a discrimination case can be pursued without any requirement of a victim[6].

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[1] For an enlightening analysis focusing on the transformation of EU law through the anti-discrimination provision (art. 19 of the TFEU), see L. BURGORGUE-LARSEN, *Il principio di non discriminazione nel diritto dell'Unione. L'articolo 19 del Trattato sul funzionamento dell'Unione europea, ovvero la rivoluzione silenziosa*, in *Ragion Pratica*, 1/2011, pp. 55-73.

[2] S. B. LAHUERTA, *Taking EU Equality Law to the Next Level: In Search of Coherence*, *European Labour Law Journal*, 7(3), 2016, pp. 348-367. For a comprehensive overview see D. SCHIEK, *A New Framework on Equal Treatment of Persons in EC Law?, European Law Journal*, Vol. 8, No. 2, 2002, pp. 290-314; M. BELL – L. WADDINGTON, *Equality and diversity: challenges for EU Anti-Discrimination Law*, *Maastricht Journal*, 2006, pp. 277-278; D. MARTIN, *Egalité et non-discrimination dans la jurisprudence communautaire. Etude critique à la lumière d'une approche comparatiste*, Bruxelles, 2006.

[3] See L. CARLSON, *Comparative Discrimination Law: Historical and Theoretical Frameworks*, Leiden, 2017.

[4] *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford, C–507/18,* 23 April 2020.

[5] *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV,* C-54/07.

[6] L. CARLSON, *op.cit.*, p. 80.

In the latter case the Court, embracing the fundamental goals of the Race Equality Directive[7] (RED), states: "The objective of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of Directive 2000/43 were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer"[8].

Following a teleological rather than a literal interpretation of legal norms, the CJEU opted for the higher level of protection against discrimination.

The recognition that discrimination could occur even if there is no identifiable victim is an advocacy effort to promote equality principles: if a protected group is treated less favourably than others, it could guarantee its rights. This collective dimension of EU equality law envisages the possibility of an increasingly plausible scenario: a developing collective 'vigilance'. In other words, collective enforcement mechanisms could be a remarkable tool to combat discrimination using law instruments[9].

Overall, the abovementioned cases revealed the proactive role of the CJEU in the fight against discrimination[10]. A scrutiny of this case-law could lead to a better understanding of the problems that stand at the core of this work.

The essay is inspired by the following two central questions embedded within these cases, with regard to the theme of 'victimless' discrimination:

(a) the issue of the tricky balance between the freedom of expression and the anti-discrimination principle;
(b) problems arising in the phase of the enforcement of 'collective' rights. Hence, our analysis also identifies some important weaknesses in the system of remedies provided by European Law.

[7] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[8] *Feryn*, cit., para 24.

[9] See, among others, T. BOSTERS, *Collective Redress and Private International Law in the EU*, The Hague, 2017, p. 9.

[10] For an exploration on the genesis and main stages in the development of EU anti-discrimination law see U. BELAVUSAU – K. HENRARD, *A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives, German Law Journal*, Vol. 20, 2019, pp. 614-636; S. FREDMAN, *Discrimination law*, Oxford, 2002; E. ELLIS, *EU Anti-discrimination law*, Oxford, 2005; M. BELL, *Anti-discrimination law and the European Union*, Oxford, 2002; J. CROON, *Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination–or–Alternative Tales on Equality Reasoning, European Law Journal*, Vol. 19, n. 2/2013, pp. 153–173.

1.1 Critical race theory as a special lens to analyse the *Feryn* case

Different methodological approaches are required to examine the issues of this essay.

First of all, the *Feryn* case will be analysed through the lens of the Critical Race Theory (CRT), since it is related to racial discrimination[11]. Indeed, this theoretical framework could succeed in identifying the social background and the implications of the sentence which first recognizes the importance of anti-discrimination protection when no victims are identified. CRT is usually classified as a branch of critical legal studies (CLS)[12] concerning issues of power and discrimination (in particular, gender, sex and colour). This movement emerged in the United States[13], during the post-civil rights period, when a noted group of legal scholars, including Derrick A. Bell, Jr., Charles Lawrence, Richard Delgado, Lani Guinier, Mari Matsuda, Patricia Williams, and Kimberle Crenshaw began to question the role of law in maintaining and further constructing racially based society[14].

[11] For information about the historical roots of CRT and surrounding the basic tenets of CRT see A. H. DAFTARY, *Critical race theory: An effective framework for social work research, Journal of Ethnic & Cultural Diversity in Social Work*, 2018, p. 5. In particular, the Author explains how CRT's tenets can be used as a guiding framework for social work research and scholarship.

[12] See R. UNGER, *The Critical Legal Studies Movement*, *Harvard Law Review*, 96(3), 1983, pp. 561-675.

[13] For an analysis of the response to CRT in Europe see M. MOSCHEL, *Color Blindness or Total Blindness - The Absence of Critical Race Theory in Europe*, *Rutgers Race & L. Rev.,* Vol. 9, 2007, p. 57-127. The Author explains that, in spite of offering a general legal theory, CRT has not really stepped outside the United States' legal system and has, very surprisingly, received almost no attention at all in the continental European legal world, unlike the Law & Economics movement. In fact, an extensive research in current French, German, Italian, and Austrian legal literature has produced only very limited results, and even on a broader level, CRT seems to have gone practically unheeded in Europe. In particular, a broad mix of cultural, ideological, historical, political, philosophical, and legal reasons seems to have prevented CRT from becoming more influential in Europe. See also M. MOSCHEL, *Race in mainland European legal analysis: towards a European critical race theory, Ethnic and Racial Studies*, Vol. 34, No. 10, 2011, p. 1648-1664.

[14] For a further investigation on CRT see A. TESAURO*, Riflessioni in tema di dignità umana, bilanciamento e propaganda razzista,* Turin, 2013, p. 67*;* G. PINO, *Discorso razzista e libertà di manifestazione del pensiero, in Politica del diritto,* n. 2/2008, p. 287*;* K. THOMAS – G. ZANETTI (eds.), *Legge razza diritti. La Critical Race Theory negli Stati Uniti,* Reggio Emilia, 2005*;* K. CRENSHAW (eds.), *Introduction to Critical Race Theory: the key writings that formed the movement*, New York, 1996; D. M. ATHENA, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, *Denver University Law Review*, 2006, p. 329: «[CRT] basic premises are that race and racism are endemic to the

As a school of legal theory contents are not fixed, but fluid. However, certain elements are deemed to be integral to CRT: racism as an endemic problem, scepticism toward dominant legal claim of colour-blindness and meritocracy, the necessity of a contextual/historical analysis of the law, the centrality of experiential knowledge, intersectionality and the commitment to an anti-racist social justice[15].

In the *Feryn* case, the CJEU has shown to be a driving force in the struggle against racial discrimination. At first glance, the fact that mere statements (in relation to which there is no evidence that they have been translated in a discriminatory recruitment procedure) could integrate a 'discriminatory treatment'[16] seems to be an undue impairment of the liberty of expression. Offering a race-conscious approach to understand inequality and structural racism, the CRT is a helpful tool to analyse this problem. Indeed, the increasing awareness of both subtle and overt forms of racist nativism and growing inequities is crucial to understand the necessity of a collective dimension of EU equality law.

Another important feature of the CRT is the critique of liberalism. Scholars argue that formal equality and legal rules requiring equal treatment, are capable of redressing only the most dramatic forms of injustice. Colour-blindness contributes to maintain forms of segregation[17].

Building upon these insights, the application of absolutist free speech principles, according to CRT scholars, is a choice to burden one group with a disproportionate share of the costs of speech promotion[18]. These considerations are useful to consolidate the conclusions of the Court.

Furthermore, since it is the first case in which the CJEU adopted a so narrow interpretation of EU equality provisions, it should be questioned if there is a convergence with self-interests of the dominant group[19]. Therefore, the reconstruction of the position in Luxembourg through the CRT methodological strategies of rhetorical and victim-centred constitutional analysis will be helpful to

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American normative order and a pillar of American institutional and community life. Further, it suggests that law does not merely reflect and mediate pre-existing racialized social conflicts and relations. Instead law, as part of the social fabric and the larger hegemonic order, constitutes, constructs and produces races and race relations in a way that supports white supremacy».

[15] L. CARLSON, cit., p. 90.

[16] See Art. 2(2)(a) of the RED.

[17] For an in-depth analysis and critique of liberalism see R. DELGADO, – J. STEFANCIC (eds.), *Critical race theory*: *An Introduction*, New York, 2001; R. DELGADO, – J. STEFANCIC (eds.): *Critical Race Theory: The Cutting Edge*, Philadelphia, 2000.

[18] M. J. MATSUDA, *Public Response to Racist Speech: Considering the Victim's Story*, *Michigan Law Review*, Vol. 87, No. 8, 1989, p. 2320-2381.

[19] D. A. BELL, *Brown v. Board of Education and the interest convergence dilemma*, *Harvard Law Review*, 1980.

examine the consequences and the meaning of this case. The argument is dealt with in greater detail in § 2.2.

In addition, the thesis is mainly based on legal analysis, using a legal dogmatic method. It consists in clarifying the meaning and significance of legal rules, proceeding from its own content. The formal dogmatic approach studies law as such, without considering it in economics, politics, ethics and other social sciences[20]. Thus, law, case law and doctrine will be examined.

2. *Feryn* case: a starting point for the issue of collective discrimination through use of speech

In the *Feryn* case[21] the CJEU recognises that, although the RED definition of direct discrimination is framed in *individual* terms ("*one person* is treated less favourably than another"), a public statement that discriminates against a certain *group* of potential employees would also be covered by the Directive. Following a teleological interpretation, the ECJ found that «direct discrimination is not dependent on the identification of a *complainant* who claims to have been the victim»[22]. EU equality law protects also the *group* as such[23]. This is a relevant achievement because of it implies the possibility to demand the rights of the *group* before a Court. In addition, it could not be underestimated the deterrence that

[20] V. ALEXANDER – P. V. ZYRYANOV, *Formal-Dogmatic Approach, Legal Science in Present Conditions, Journal of Siberian Federal University. Humanities & Social Sciences*, 2018.

[21] As doctrine on this case see, *inter alia*, F. BAYREUTHER, *Drittbezogene und hypothetische Diskriminierungen, Neue Zeitschrift für Arbeitsrecht*, 2008, pp. 986-990; N. REICH, *Kurzbesprechung der Schlussanträge des Generalanwalts Poiares-Maduro vom 12.3.2008 in der Rechtssache C-54/07*, *Europaische Zeitschrift fur Wirtschaftsrecht*, 2008, pp. 229-230; J. CAVALLINI, *Une dèclaration publique d'un employeur peut constituer en elle-même une discrimination fondée sur la race ou l'ethnie*, *La Semaine Juridique – Social*, 2008, pp. 25-26; A. POTZ, *Öffentliche Aüßerungen eines Unternehmers im Lichte des europäischen Gleichbehandlungsrechts*, *Zeitschrift für europaïsches Sozial und Arbeitsrecht*, 2008, pp. 495-505; L. FABIANO, *Le "parole come pietre" nel diritto antidiscriminatorio comunitario*, *Diritto pubblico comparato ed europeo*, 2008, pp. 2054-2058; R. CISOTTA, *Il principio di non discriminazione basata sulla razza o sull'origine etnica nella sent. 10 luglio 2008, C-54/07, Feryn*, in G. BIAGIONI – I. CASTANGIA (a cura di), *Il principio di non discriminazione nel diritto dell'Unione europea*, Naples, 2011, pp. 167-184.

[22] *Feryn*, cit., para 25.

[23] See S. B. LAHUERTA, *Enforcing EU equality law through collective redress: lagging behind?*, *Common Market Law Review*, 55, 2018, pp. 783-818.

these collective redress, as a means of facilitating access to justice, could have on the so-called *duty-bearers*[24] (e.g. employers).

Although it is a rather dating case, the *Feryn* case will be examined for its epochal scope: in fact it is the first case in which the CJEU admits the possibility of direct judicial protection with regard to "collective rights".

The facts of this case highlight a tricky issue in the field of collective discrimination: could a mere public statement of a recruitment policy be a discrimination under Article 2 (2) of the RED? The CRT is a conceptual tool to understand why the decision of the CJEU has to be viewed as a great effort to counteract racial discrimination.

2.1 The *Feryn* case

The case is about the interpretation of the RED, which prohibits discrimination "on the grounds of race and ethnic origin" in the fields of employment, social protection, education and access to goods and services.

This case concerns a public announcement by the director of a company in Belgium, Mr. Pascal Feryn, who declared that he would not hire persons of Moroccan origin because its customers were reluctant to give them access to their private residences[25]. The *Centrum voor gelijkheid van kansen en racismebestrijding* (Centre for equal opportunities and combating racism, "CGKR"), an anti-racist organization, brought the case before the Belgian Labor Tribunal, arguing that Feryn's statements constituted discrimination. The Court dismissed CGKR's claim. It held that the public statements made by the employer were merely evidence of potential discrimination: there is no proof of discrimination and no presumption that a person had applied for a job and had been rejected.

Subsequently, the Labor Court of Appeal subsequently asked the CJEU for a preliminary ruling regarding, *inter alia*, whether the statements could themselves constitute direct discrimination, without particular complainants having come forward contending that they had been victims of discrimination.

The UK and Irish governments intervened in the case arguing, as in the original case in the Belgian Labor Court, that there could be no direct discrimination where an employer had not acted on its discriminatory statements. They also argued that, in absence of an identifiable victim it is not possible to bring a claim before a national court.

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[24] For a deeper investigation on this concept see T. KHAITAN, *A Theory of Discrimination Law*, Oxford, 2015.

[25] D. STRAZZARI, *Corte di Giustizia e discriminazione razziale: ampliata la tutela della discriminazione diretta?*, in *Rivista giuridica del lavoro e della previdenza sociale*, n. 4/2008, p. 776.

The CJEU affirmed that a finding of discrimination on the basis of the Directive does not presuppose an identifiable victim[26].

More importantly, the Court held that:

The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim of that discrimination[27].

The CJEU recognised that employers can *directly* discriminate by declarations and held that discriminatory preferences of customers are no justification for discriminating (future) employees.

As a side note, it has to be noted that regarding to discriminatory issues, the fundamental disregard for employer's policy or interests[28] is not something uncontroversial in CJEU's case law. When it comes to the question of legitimacy of religious dress restrictions adopted by employers, the guidance descending from the *Feryn* case would be highly desirable in creating a more harmonised protective approach. In particular, it has to be remembered the recent *Achbita* case[29], in

[26] The argument that the concept of direct discrimination also includes purely potential comparative judgments was already been expressed in Literature, see M. BARBERA, *Eguaglianza e differenza nella nuova stagione del diritto antidiscriminatorio comunitario*, in *Giornale di Diritto del Lavoro e di Relazioni industriali*, 2003, p. 411 e P. CHIECO, *Le nuove direttive comunitarie sul divieto di discriminazione*, in *Rivista Italiana di Diritto del Lavoro*, n. 1/2002, p. 8.

[27] *Feryn*, cit., para 1.

[28] Pandering to (alleged) customers' preferences could not excuse a direct discrimination. As AG Maduro correctly pointed out in *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV,* C- 54/07, Opinion of AG Maduro, para 18: «market alone will not cure discrimination».

[29] Corte UE 14 marzo 2017, *Samira Achbita c. G4S Secure Solutions NV*, Causa n. C-157/15. For an analysis of the Judgment see J.H.H. WEILER, *Je Suis Achbita*, in *Rivista Trimestrale di diritto pubblico*, n. 4/2018, pp. 1113-1144; J.R. MARÍN AÍS, *Freedom of Religion in the Workplace v. Freedom to Conduct a Business, the Islamic Veil Before the Court of Justice: Ms. Samira Achbita Case*, *European Papers*, 1/2018, p. 409-417; G. AMOROSO, *Libertà di culto e principio di «neutralità» nella prestazione di lavoro*, in *Foro italiano*, n. 4/2017, IV, p. 254; V. PROTOPAPA, *I casi Achbita e Bougnaoui. Il velo islamico tra divieto di discriminazione, libertà religiosa ed esigenze di impresa*, in *Argomenti di Diritto del Lavoro*, 2017, p. 1083); A. GUAZZAROTTI, *Bandire il velo dal posto di lavoro o prendere sul serio la dimensione pubblica dell'identità religiosa?*, in *Quaderni costituzionali*, n. 2/2017, p. 422; A. VALENTINO, *Il velo islamico di nuovo all'attenzione delle Corti europee tra rispetto*

which the Court stated that the prohibition of wearing the *hijab* (a head scarf) arising from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that Directive 2000/78/EC[30]. Hence, the CJEU clarifies that this rule may constitute indirect discrimination «if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary»[31].

Particularly critical is the line of argumentation concerning the characterization of the company measure as potentially creating indirect discrimination but not direct discrimination. Indeed, the purpose of ensuring 'neutrality' for the presumed purpose of offering a more 'professional' contact between company employees or some such objective, is pursued through a measure introduced for reasons relating to religion (and personal beliefs) and targeting all the protected class itself. The comparison of the disparate impact of the measure between the position of believers and non-believers could help to better understand its discriminatory effect. Accordingly, the very targeting of the protected category in the definition of neutrality makes the policy in this respect direct discrimination[32]. Otherwise, it follows the paradox that *discrimination* against all religious people would not be problematic. Probably only the different consequences it produces among religions (because of the rituality that characterized the practice related to some religions, e.g. Muslim or Jewish believers, with respect to others, e.g. Catholicism) remains indirect discrimination[33].

Departing from other consideration on this regard, criticisms could be moved also with respect to the proportionality test carried out by the CJEU to justify indirect discrimination.

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della scelta della società e esigenze di neutralità delle aziende private (nota a sentenza di Belcacemi e Oussar c. Belgio della Corte di Strasburgo e dei casi C-157/15 e C.-188/15 della Corte di Giustizia dell'Unione Europea), in *Rivista Associazione italiana dei costituzionalisti (AIC),* n. 3/2017, p. 5; R. BIN, *Il velo svelato*, *European Papers*, 2017, II, 1, p. 457 E. HOWARD, *Islamic headscarves and the CJEU: Achbita and Bougnaoui, Maastricht Journal of European and Comparative Law*, 2017, p. 357.

[30] For a different position of the CJEU with regard to a similar issue see ECJ 14 March 2017, C-188/15, *Asma Bougnaoui & ADDH v Micropole SA*.

[31] *Achbita*, cit., para 45.

[32] J.H.H. WEILER, *Je Suis Achbita*, cit., p. 1120.

[33] J.H.H. WEILER, *op.cit.,* p. 1120.

In particular, in this case the "wish to project an image of neutrality towards customers", which is an expression of the "freedom to conduct a business that is recognised in Article 16 of the Charter"[34], has been considered legitimate[35] and the rule imposed to achieve this aim of neutrality has been regarded as necessary[36].

This line of argument gives rise to great perplexity: if in the *Feryn* case customer's wish or preference seems to be irrelevant for establishing discrimination[37], in *Achbita* case, by virtue of an alleged "neutrality policy", the employer could exclude manifestation of religion or other 'convictions': on a closer examination, unless the pursuit of atheism or any kind of religious nihilism, the major purpose of this neutrality policy is precisely the willingness of the employer to not offend customers' susceptibility!

Moreover, apart from the doubtfulness on the legitimacy of a similar policy, in the judgment there is no proper argumentation on the strict balancing between employer's interest and the freedom of religion, which is the typical third stage of the proportionality test[38]. Certainly, a more accurate reflection on this point could have been able to reverse the judgment.

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[34] *Achbita*, cit., para 38.

[35] With regard to the strict criterion that may justify differentiated treatments for employees see D. IZZI, *Eguaglianza e differenze nei rapporti di lavoro. Il diritto discriminatorio tra genere e fattori di rischio emergenti*, Naples, 2005, p. 394.

[36] In relation to the necessity of the to achieve the aim of neutrality, the CJEU stated that the prohibition must be limited to what is strictly necessary and concluded that this is the case if the company rule covers only workers who interact with customers. The CJEU also stated that it is for the referring Court to ascertain whether it would have been possible for the company, when faced with Ms Achbita's refusal to take off her headscarf, to offer her a post not involving any visual contact with customers (*Achbita*, cit., para 43).

[37] In para 91 of *Achbita* judgment the CJEU reminded this point: «if, for example, a customer, even an important customer, sought to make a demand on an undertaking to the effect that he be served only by employees of a particular religion, ethnic origin, colour, sex, age or sexual orientation, or only by employees without a disability, this would quite obviously not constitute a legitimate objective on the basis of which the undertaking concerned could lay down for its employees occupational requirements within the meaning of Article 4(1) of Directive 2000/78».

[38] On this topic see the brilliant critique of J.H.H. WEILER, *Je Suis Achbita*, *in European Journal of International Law*, Vol. 28, 2017, pp. 989-1018: «third stage proportionality was left out. The Court subsumes the third test into the first test. It holds, quite categorically, that in principle the policy of projecting an image of neutrality towards customers is legitimate, '… notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers'. Having held that, it is understandable why its only concern is whether the company, without undue burden, could hide the likes of Chaya [*alias* Achbita] in the back office and does not address the central conflict of values issue».

2.2 Balancing the Rights to Freedom of Expression and Equality: critical race theory perspective

A starting point to analyse the *Feryn* judgement is the United Kingdom and Ireland position in the process. As said above, they argued that, provided that an employer had not acted upon its own discriminatory statements, any discrimination was only hypothetical. As such it could not be covered by the RED. Such an attitude outlines the core of the discriminatory speech problem. In other words, the issue of whether mere speech can constitute an act of discrimination. There is no express reference in the process about that, but it could not be denied its relevance.

The Advocate General Maduro, in his opinion, links the *performative* potential of the degrading expression to *speech acts theory* with a clear reference to Searle[39] and thus suggests the directly discriminatory effect of the speech discouragement for a job application by immigrants[40]:

By publically stating this intention not to hire persons of a certain racial or ethnic origin, the employer is, in fact, excluding those persons from the application process and from his workflow. He is not merely talking about discriminating, he is discriminating. He is not simply uttering words, he is performing a 'speech act'[41].

In view of all as been illustrated so far, two positions are at issue. On the one hand, the classical libertarian model of free speech, that constitutes a principle firmly rooted in the European context. On the other hand, a victim-centred approach, that is supported by Maduro AG. Remarkably, he starts his opinion with the metaphorical statement: «contrary to conventional wisdom, words can hurt». This explicit reference to the CRT most cited collection of articles with regard to hate speech, i.e. *Words that wound,* is a clear signal of the influence of this perspective[42].

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[39] According to this approach, certain utterances do not just "sound" in the semiotic space of oral expressions, written texts, pictures, and songs, but perform as acts. This can be evident when considering consequences with legal implications (consider the role of "I do" as an answer to "Do you agree to marry Ms. X?" during a wedding ceremony or "Kill the nigger!" coming from a group of skinheads, addressed to a person of African origin). See J. SEARLE, *Austin on Locutionary and Illocutionary Acts*. In *The Philosophical Review*, 77, 4, 1968, pp. 414-418; J. L. AUSTIN, *How To Do Things With Word,* Oxford, 1975. For the perhaps most influential work on hate speech through the methodology of speech acts, see J. BUTLER, *Excitable Speech: A Politics of the Performative,* London, 1997.

[40] U. BELAVUSAU, *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies*, New York, 2013.

[41] Opinion of AG Maduro in *Feryn* (C-54/07), cit.

[42] M. J. MATSUDA – C. R. LAWRENCE – R. DELGADO – K. W. CRENSHAW (eds.): *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment*, Boulder, 1993.

Observations of CRT are also pertinent here[43]. When examining the issue concerning the freedom of expression, the historical and cultural context related to a stigmatizing statement could not be disregarded[44]. In *Feryn*'s words is inherent a defamatory symbolism of marginalization, having a painful impact on the Moroccan: they explicitly reveal the systemic and pervasive nature of racism within Europe[45]. CRT asserts that these incidents are neither random nor isolated manifesting: they are symptomatic of a society that remains entrenched in racist ideologies[46].

Thus, a passive attitude tolerating similar statements serves to perpetuate the permanence of racism: if the culture allows an employer to feel comfortable in targeting a group, racist behaviour is not handled and a hostile and alienating environment for certain ethnicities is supported.

'Hate' speech does act and does discriminate when experienced through the lens of a marginalised community: when addressing issue of discriminatory speech, a race-conscious approach has to be taken[47]. Thus, the absolutist liberal belief of freedom of expression must be rejected.

Applying these principles at the case at stake, it is noticeable that the race-based remedy proposed by the opinion of Maduro AG, the content of whom is confirmed in the CJEU's decision, is in line with arguments of the CRT.

This point of view, that is the CJEU orientation, could be considered an encouraging signal demonstrating a serious EU commitment to eradicate racial discrimination. In this respect, markedly, the *Feryn* case has been viewed as a possible catalyst for what has been called a 'European critical race theory'[48].

However, the possible interference of the *interest convergence* principle could not be ruled out. Derrick Bell, the pioneer of this doctrine, proposed the thesis

[43] For an account of CRT and its potential applicability in European law, see also U. BELAVUSAU, *Instrumentalisation of Freedom of Expression in Postmodern Legal Discourses, European Journal of Legal Studies*, n. 3/2010, pp. 145-167.

[44] U. BELAVUSAU, *Fighting Hate Speech through EU Law, Amsterdam Law Forum*, vol. 4, no. 1, 2012, pp. 20-35.

[45] See G. PINO, *Discorso razzista e libertà di manifestazione del pensiero*, in *Politica del Diritto*, n. 2/2008, pp. 287-305. According to the Author's view, when a relationship of marginalization and subordination of one social group is proposed in linguistic form, words cease to be mere words to become instruments that contribute to the repetition of the oppression towards that minority.

[46] D. L. MCCOY, – D. J. RODRICKS, *Critical Race Theory in Higher Education: 20 Years of Theoretical and Research Innovations*, San Francisco, 2015, pp. 1-117.

[47] P. QUINN, *The problem of stigmatizing expressions: The limits of anti-discrimination approaches, International Journal of Discrimination and the Law*, 2017, pp. 23-50.

[48] U. BELAVUSAU, cit., p. 25

that the white majority group tolerates advances for racial justice only when it suits their interests to do so[49].

Thus, *Feryn*'s outcome should be scrutinized through a critical perspective. This apparently strong effort to combat racism demonstrated by the CJEU could be the result of civil society pressure or other factors, e.g. the need to offer an image of crusader of minority rights (considering the strengthening of EU law social dimension)[50]. This gain could not make a substantive difference if there is not a change in culture. It could only give a perception of strong protection of the discriminated group. Social reality is something different: the great deal of cross-sectional data suggests a striking persistence of high level of racism in Europe[51], especially in labour market.

This critique, actually, should be interpreted consistently with Crenshaw's *expansive* and *restrictive view* of equality in the body of antidiscrimination law: the *expansive view* interprets the objective of antidiscrimination law as the eradication of substantive conditions of subordination and it attempts to enlist the institutional power of the courts to further this goal. The *restrictive* vision, which exists side by side with this expansive view, treats equality as a process, downplaying the significance of actual outcomes[52].

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[49] For instance, the idea that 'gains' resulting from the *Brown vs. Board of Education* reflected racial tolerance is misleading. The Supreme Court was merely giving effect to a momentary coincidence of interests: the principled justification for favouring rights of Blacks was the U.S. interest of improving its international image during the Cold War. See D. A. BELL, cit., p. 54.

[50] However, it should be noted that even in the *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford* case the CJEU adopted a very restrictive interpretation of the European anti-discrimination law. As better explained in section 4.1. the case concerned a case of discrimination in relation to sexual orientation, nevertheless perhaps it could be considered as a sign of an effective effort by the Court in Equality area, not restricted to racial matters.

[51] In line with the Eurostat statistics, all national Reports underline that migrants face higher rates of unemployment compared to the native population. In Austria, for instance, the unemployment rate for non-EU born persons is double that of the native-born population and in Finland and Belgium, it is even three times the national average. In addition, conducting field experiments national, national Reports converge in highlight that at the point of application, discrimination manifests itself when there are no public job postings, the selection is on the basis of names and addresses, or there is a requirement to add a picture to the letter of application. For more information see European Network against racism, *Racism and discrimination in employment in Europe*, ENAR Shadow Report 2012 -2013

[52] K. CRENSHAW – N. GOTANDA – G. PELLER – K. THOMAS, *Critical Race Theory: The Key Writings that Formed the Movement,* New York, 1995, pp. 302-312.

However, despite the above reservations in assessing the achievements of EU jurisprudence, the fact that the CJEU is granting protection to cases of collective rights inherent also other grounds of discrimination (see the recent *NH v. Associazione Avvocatura per i diritti LGBTI - Rete Lenford* case, concerning discrimination on the basis of sexual orientation), undoubtedly shows a certain sensitivity in acknowledging the pervasiveness of discriminatory logics. Coherently, the Court seems to actively address existing power imbalances, with the awareness of the sociological issues that stem from matters relating to discrimination. In this way, efforts are being made to move towards genuine substantial protection and to create a more egalitarian state of affairs.

3. The enforcement of collective discrimination without an identifiable victim: critical remarks

As previously stated, substantive EU law grants protection to groups of individuals targeted by discrimination, even when individual victims cannot be identified.

Traditionally, the burden of pursuing anti-discrimination proceedings is an individual one.

Now discrimination transcends individual harm: the Court became a place also to remedy community exclusion. Thus, the *group* could bring actions in the public interest, namely for the respect of the equality principle.

Hence, as far as a *group* is concerned, what procedural instruments could it invoke? The next paragraph provides the legal basis to answer this question.

3.1 Legal Framework of EU collective redress

A proceeding in which individual plaintiffs do not need to be identified is called *actio popularis*. In equality law area, lawsuit is filed by NGOs, or other legal entities, who demonstrates an interest to defend the right to equal treatment[53]. Instead of the harm suffered by individual victims, *actio popularis* focuses on patterns, trends and practices of discrimination[54]. Thus, it is ideal for tackling institutional, structural, or *de facto* discrimination[55].

[53] On this regard, see C. FAVILLI*, I ricorsi collettivi nell'Unione europea e la tutela antidiscriminatoria: verso un autentico approccio orizzontale,* in *Diritto dell'Unione Europea*, n. 3/2014, 3, pp. 439-463; B. HESS, *A coherent approach to European collective redress*, D. FAIRGRIEVE – E. LEIN (eds.), *Extraterritoriality and collective redress*, Oxford, 2012, p. 107.

[54] European Network of Legal Experts in the Non-Discrimination Field. (2014) *European Anti-discrimination Law Review.*

[55] Also the European Court of Human Rights (ECtHR) has recently dealt with institutional cases of discrimination. The ECtHR has held that a person must be directly affected by the impugned measure in order to file a complaint and that the Convention did not envisage the bringing of an actio popularis complaint, (e.g. *Tănase v. Moldova* [GC],

According to Art. 7(2) of the RED "associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, *with his or her approval*, in any judicial and/or administrative procedure provided for the enforcement of obligations contained in this Directive"[56].

The most significant evidence that stems from this provision is that legal entities may only engage in legal proceedings *with the complainant's approval*. Thus, in cases of 'victimless discrimination' there is no obligation incumbent on Member States to provide the remedy of *actio popularis*. Legal remedies are thus seen largely in individual terms; the role of collective actors is mostly concerned with supporting actual victims who need to carry the claim or approve of it[57].

However, in *Feryn* case the CJEU clarifies the meaning of this provision «it does not follow from that provision that Member States are precluded from granting additional possibilities for legal enforcement or redress». On the contrary, the Directive expressly provides that «Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive» and that «[t]he implementation of this Directive shall under no circumstances constitute grounds for a reduction

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no. 7/08, § 104, ECtHR 2010). Nevertheless, ECtHR has allowed a legal standing (*locus standi*) to an association as it was a party to the proceedings brought by it before the domestic Courts to defend its members' interests. *See* also *Aksu v.* Turkey. Here the plaintiff, who was of Roma origin, complained about remarks and expressions in publications which allegedly debased the Roma community. The ECtHR noted that although the plaintiff had not been personally targeted, he could have felt offended by the remarks concerning the ethnic group to which he belonged. In view of the fact there had been no dispute in the domestic proceedings regarding his standing and the need to apply the criteria governing victim status flexibly, the Court accepted that the plaintiff could be considered a victim. These are results of particular interest considering the implications of the pilot judgment procedure that the ECtHR could activate.

For more information on *actio popularis* see S. CHUBRIKJ – N. C. DIMOVSKA, *Use of* actio popularis *to cases of discrimination, Committee for Human Rights in the Republic of Macedonia*, Helsinki, 2016.

[56] Among the non-judicial means identified by the States when implementing the directive, the most prominent are those that attribute competence to labor inspectorates, ombudsmen or human rights agencies; M. BELL, *Developing the Anti-Discrimination Law in Europe. The 25 EU Member States Compared, Human European Consultancy and European Commission*, 2006, p. 66.

[57] E. MUIR – M. DAWSON – M. CLAES, *A tool-box for legal and political mobilisation in European equality law*, D. ANAGNOSTOU – M. CLAES (eds.), *Rights in pursuit of social change: legal mobilisation in the multi-level European system*, London, pp. 105-126.

in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive»[58].

Thus, the introduction of more favourable provisions, i.e. *actio popularis*, is a mere faculty left to the margin of discretion of the Member States. It is a matter of domestic law whether or not an equal treatment body such as the CGKR may bring legal action if it is not acting on behalf of a specific complainant. This is due to the principle of procedural autonomy of Member States[59]. Therefore, only in those countries, such as Belgium or Italy, that provides equality organizations to bring claims on behalf, without the necessity of the victim consensus, the group's rights are likely to be enforced.

Overall, this legal overview suggests that, from a substantive perspective, EU Law protects both individual and *groups*. Nevertheless, if Member States does not ensure an appropriate national procedure to enforce the right of the *group*, «there can […] be EU rights without judicial protection»[60]. Indeed, the range of discriminatory behaviour prohibited by the Directive is one thing; the range of enforcement mechanism and remedies which the Directive specifically imposes is quite another[61].

However, according to the principle of effective judicial protection (art. 47 of the EU Charter of Fundamental Rights), there is a duty for Member States to provide remedies *sufficient* to ensure *effective* legal protection in the fields covered

[58] *Feryn*, cit., para 13.

[59] See *International Fruit Company NV and others v Produktschap voor groenten en fruit,* C-51-54/7. From the literature on the principle of procedural autonomy, see P. WATTEL, *National Procedural Autonomy and Effectiveness of EC Law, Legal Issues of Economic Integration*, 2008, p. 109; D. U. GALETTA, *L'autonomia procedurale degli Stati membri: Paradise lost?,* Turin, 2009.

[60] S. BELJIN, *Rights in EU Law*, S. PRECHAL – B. VAN ROERMUND, (eds.), T*he Coherence of EU Law: The Search for Unity in Divergent Concepts,* Oxford, 2008.

[61] Similar issues have in recent years been the subject of much attention in the area of EU environmental law, as a consequence of the EU's accession to the Aarhus Convention. In a recent ruling, the CJEU insisted that, although Article 9(3) of the Convention does not itself grant a right of action to environmental groups, domestic Courts should interpret, "to the fullest extent possible", the national procedural rules in the light of the objectives of Art 9(3) and the objective of effective judicial protection of the rights conferred by EU law (Case C-240/09 *Lesoochranárskezoskupenie* [2011] ECR I-1255). This shall be done "in order to enable" an environmental protection organisation to challenge before a Court a decision taken following administrative proceedings liable to be contrary to EU environmental law. Such developments should be kept in mind when reflecting on the legal framework setting minimum procedural rules for the enforcement of EU equality law. For a further investigation see E. MUIR – M. DAWSON – M. CLAES, *A tool-box for legal and political mobilisation in European equality law*, cit., p. 124.

by EU law[62]. Therefore, applying this principle, Member States procedural systems should provide *appropriate* collective redress, i.e. *actio popularis*, to not render the rights granted by EU law merely theoretical and illusory[63]. This is due to the fact that it is the only judicial procedure that permit the enforcement of "collective rights", such as those invoked in the *Feryn* case[64].

The principle of sincere cooperation laid down in Article 4(3) TEU consolidates this argument.

The fact that minority groups falling within the scope of the Equality Directives have the right not to be discriminated against, but EU law does not require that groups, as such, or legal entities representing them, have access to judicial and/or administrative procedures under national law seems to be a paradoxically inconsistence[65]. Conclusively, it has to be argued that the success of EU Equality Law in terms of protection against discrimination depends, *inter alia*, on the coherence between substantive and procedural provisions. The *mimimum* standard laid down by the RED could be not sufficient to grant protection to harmful acts against a certain group.

[62] According to art. 47, para 1, CFREU: "(1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal […]". A further specification can be found in art. 19, para 1, of the Treaty on European Union: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

[63] S. B. LAHUERTA, cit., p. 807.

[64] For a detailed analysis of the principle of effective judicial protection see G. D'AVINO, *Il diritto alla tutela giurisdizionale effettiva nell'art. 47 par. 1 della Carta dei diritti fondamentali dell'UE*, in *Tutela dei diritti fondamentali e spazio europeo di giustizia. L'applicazione giurisprudenziale del Titolo VI della Carta*, A. DI STASI (eds.), Naples, 2019. The Author remarked that the Treaties (by virtue of the principle of effective judicial protection in addition with the corollaries of the principles of equivalence and effectiveness) have not «intended to create new remedies in the national Courts to ensure the observance of Community law other than those already laid down by national law» (*Unibet (London) Ltd e Unibet (International) Ltd v. Justitiekanslern*, Case C-432/05, para 40). However, the conduct of the State shall be subject to censure only *in cases where the it is precluded satisfaction with regard to EU Law* or where the positions of individuals are treated in a different way from that intended for those of origin purely internal. It seems to us that the case of discrimination without an identifiable victim is entirely attributable to the first hypothesis in so far there is no possibility of taking legal action where there is no State rule allowing access to justice for associations representing the interests affected.

[65] S. B. LAHUERTA, cit., p. 807. This point as has been also emphasized by R. KRAUSE, *Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, Common Market Law Review*, 2010, pp. 917-931.

4. A practical approach concerning the implementation of EU Equality Directive

To be effective, remedies and sanctions must achieve the desired outcome, and to be dissuasive, sanctions must deter future acts of discrimination.

It is clear that even if the ECJ has shown sensitivity in discrimination issues, sanctions will be none of these if there are no effective, simple, swift and sustained mechanisms for enforcement[66].

In this sense, a proper implementation of EU equality law, as illustrated in 3.1, is an important tool to achieve equality. Indeed, two studies promoted by the European Commission and the European Union Agency for Fundamental Rights had highlighted how collective redress could play a very useful role in overcoming the problems related to access to justice against discrimination[67]. Both studies agreed that victims of discrimination, even though they are aware of the infringement of their rights and of the possibility of taking legal action, show difficulties in addressing a court through an individual appeal for a variety of reasons. In particular, the complexity of the relevant law and procedures creates uncertainty with regard to the real convenience of the action. In addition to that, the comparison of costs, benefits and other negative consequences of the compliant often discourages victims. Some of these difficulties can be overcome through collective redress, assigning a special position to representative organizations. Indeed, NGOs great relevance in this context could be perceived considering that they could be able to overcome the lack of economic resources of the victims and make their expertise in this area available. Moreover, practice has shown that frequently people react against discrimination only through the intervention of a non-governmental organization. This demonstrates the major role of collective actors in compensating for the weakness of individual enforcement

[66] See B. COHEN, *Remedies and Sanctions for Discrimination in Working Life under the EC Anti- Discrimination Directives*, *Discrimination in Working Life: Remedies and Enforcement*, 2004; M. BARBERA, *Il nuovo diritto antidiscriminatorio: il quadro comunitario e nazionale,* Milan, 2007.

[67] *Access to justice in cases of discrimination in the EU - Steps to further equality*, European Union Agency for Fundamental Rights, Wien, 2012; *Comparative study on access to justice in gender equality and anti-discrimination law, European Commission - Milieu*, Brussels, 2011. See also the *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'),* COM(2014)2, 2014.

and in raising awareness of discriminated people's rights[68]. For this reason, the existence of a collective remedy through a representative organization becomes essential to grant each person's fundamental right to an effective remedy. Furthermore, in the case of victimless discrimination collective redress is the only way to ensure the right to equal treatment (*ubi ius ibi remedium*).

This section provides an overview on a specific country, i.e. Italy, which has implemented collective redress, giving an account of the effects of such provisions. That is to say that civil society could be a key-tool for the empowerment of the discriminated group.

Nineteen Member States allow NGOs to take action in the public interest, without representing an identified, individual victim (*actio popularis*), although such standing does not always cover all the fields or all the grounds, and in some instances, only covers certain types of proceedings[69].

4.1 The Italian perspective. Towards an advancing protection of equality rights: *NH v. Associazione Avvocatura per i diritti LGBTI - Rete Lenford* case

In 2003 the Employment Directive 2000/78/EC (on equal treatment irrespective of religion or belief, disability, age, or sexual orientation regarding employment and occupation) and the Directive 2000/43/EC (which introduced prohibition of discrimination on the basis of race or ethnicity in the context of employment) have been implemented in Italy by, respectively, Legislative decree n. 216 and n. 215 (of 9 July 2003), issued by the government acting upon delegation of the Parliament.

Pursuant to Article 5(2) of the Legislative Decree n. 216/2003, entities being regarded as representing the interests of the injured parties collectively have legal standing where discrimination in matters of employment is directed against a

[68] See the periodic reports published in «Antidiscrimination Law Review». For a special overview on the Italian context see A. GUARISO (eds.), *Quattro anni alle discriminazioni istituzionali nel Nord Italia*, Milan, 2012.

[69] Italy, Austria, Bulgaria, Croatia, France, Germany (this option exists only on the basis of disability law), Hungary, Liechtenstein (this option is nevertheless restricted. Articles 27 to 29 and 31 of the Act on Equality of People with Disabilities entitle associations for people with disabilities to make legal claims on their own behalf for accessibility provision in public buildings, for accessibility of public roads and traffic areas, and for accessibility on public transport systems), Luxembourg, the former Yugoslav Republic of Macedonia, Malta (only the National Commission for the Promotion of Equality may launch an *actio popularis*), Montenegro (anyone can initiate a procedure for the protection of public interest before the Constitutional Court), the Netherlands, Norway, Portugal, Romania, Serbia, Slovakia and Spain (only in criminal proceedings and in the field of employment, for trade unions). *A comparative analysis of non-discrimination law in Europe,* Directorate General for Justice and Consumers (European Commission), European network of legal experts in gender equality and non-discrimination*,* 2019.

whole category of persons rather than against an identified victim (i.e. *actio popularis*)[70]. In addition to that, pursuant to Article 5(1) these entities may engage in civil proceedings for the enforcement of principle of equality, in the name and on behalf of victim, against the alleged perpetrator of discrimination. In such cases, they must be authorized from the presumed victim with public act or private deed.

With regard to discriminations related to race and ethnic origin, Article 5(3) of the Legislative Decree n. 215/2003, provides the same protection with respect to the other grounds of discrimination, with the specificity that the Department for Equal Opportunities of the Presidency of the Council of Ministers keeps a list of associations and bodies selected on the basis of "their purpose and the degree of continuity in their action". The aforementioned list under the Department of Equal Opportunities contains 453 associations[71]. This data shows a growing relevance of organization as well as a widespread presence of civil society in promoting equality. Associations are more aware of their key role in strategic litigations[72].

These findings support the idea that provisions which provide legal entities promoting equality with appropriate tools to enforce rights are not something redundant[73]. Also, in the practical experience should be noted that their role in bringing justice has been encouraged.

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[70] For an overview of the *Feryn* decision with particular regard to the Italian anti-discrimination law, see F. SAVINO, *Discriminazione razziale e criteri di selezione del personale*, in *Rivista italiana di diritto del lavoro*, n. 1/2009, pp. 243-251. On this regard it is worth to be mentioned the special focus on the problems of coordination of the Legislative decree 215/2003 (which has implemented the Directive 2000/43/EC) and the existing legislation (Legislative decree 286/1998). See also D. IZZI, *Il divieto di discriminazioni razziali preso sul serio,* in *Rivista giuridica del lavoro e della previdenza sociale*, n. 2/2008, p. 765.

[71] *Relazione al Presidente del Consiglio dei Ministri sull'attività svolta e al Parlamento sull'effettiva applicazione del principio di parità di trattamento e sull'efficacia dei meccanismi di tutela*, Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull'origine etnica, 2018.

[72] See, i.g, Ord. proc. n. 17035/2012, Tribunale di Roma, Sez. Civile. In this case two NGOs filed an action against the municipality of Rome claiming that the policy of placing Roma in a camp named La Barbuta, a large settlement in the remote outskirts of Rome and so hindering their effective inclusion in society, was discriminatory. The Tribunal of Rome convicted the Municipality of Rome for indirect discrimination according to Art. 2 of Legislative decree 215/2003 implementing Directive 2000/43/EC.

[73] M. CAIELLI, *Il public interest law movement italiano: avvocati e giudici contro le discriminazioni a danno degli stranieri*, in *Diritti uguali per tutti? Gli stranieri e la garanzia dell'uguaglianza formale*, A. GIORGIS, E. GROSSO, M. LOSANA (eds.), Milan, 2017, p. 95.

Not only the Italian legislator has transposed the provisions of the EU equality Directives concerning procedural mechanisms to enforce 'collective' rights in an extensive manner, but also Italian jurisprudence has accepted CJUE's case law in a promising way. The most significant judicial cases concerning directly discriminatory declarations could be useful to illustrate this trend.

Apart from the famous *Taormina* case described below, another considerable case was settled in 2015 thanks to the active role of ASGI and the Associazione 21 luglio. The judgment was made by the Court of Rome on 6 February 2015, ruling against an editor for the publication of a legal handbook containing discriminatory examples of criminal conduct perpetrated by Roma people, referred to as 'Gypsies'. It is clear that these cases could be brought before the national Court thanks to the fact that Italy implemented the EU Equality directives in a manner that also *actio popularis* are available[74].

Hence, it is worth to be mentioned another remarkable case concerning directly discriminatory declarations, whose relevance goes beyond national borders because of the involvement of the CJEU for a preliminary ruling. The case, whose protagonist was the well-known lawyer and Professor Carlo Taormina, was concerned with discrimination on the ground of sexual orientation[75]. Taormina

[74] Even more relevant is the case law regarding the legal standing of associations when there is a case of discrimination on grounds of nationality. In three recent decisions, the Supreme Court of Cassation held the associations listed in the list referred to in art. 5 Legislative Decree n. 215/03 are also actively entitled to collective discrimination based on the factor 'nationality', notwithstanding the lack of express provision in this regard. «*The legitimacy of collective bodies in the matter of discrimination is* in fact *a general rule*, functional to the need to provide protection, through a remedy of an inhibitory nature, to an indeterminate series of subjects to counter the risk of an injury of a diffusive nature and that therefore must be, as far as possible, prevented or circumscribed in its offensive scope»; consequently an interpretation of the rules that excludes such legitimacy as is provided for all other factors, for the nationality factor alone, would not be admissible. In doing so, the Supreme Court offers a systematic interpretation of the provisions regarding discrimination on the ground of nationality (Art. 44, para. 10, Legislative Decree no. 286/1998) in accordance with those on discrimination on the ground of racial and ethnic origin. Hence the Court clarifies that collective actions against discrimination may also be brought against an administrative act that has a dissuasive effect on municipalities and on persons who are potentially affected by the act, in that they have been persuaded not to apply for the benefit concerned (Cass. Civ. sez. lav., 07/11/2019, (ud. 11/09/2019, dep. 07/11/2019), n. 28745; Cass. civ. sez. lav., 08/05/2017, (ud. 08/02/2017, dep. 08/05/2017), n. 11166 Cass. civ. sez. lav., 08/05/2017, (ud. 08/02/2017, dep. 08/05/2017), n. 11165).

[75] For a detailed analysis on the Italian case-law involving the unequal treatment in employment and occupation on the grounds of sexual orientation, see G. VIGGIANI, *Orientamento sessuale e discriminazione sul luogo di lavoro. Un resoconto sull'utilizzo del*

stated, in an interview during a radio programme, that he would not wish to recruit homosexual persons to his law firm. The *Associazione avvocatura per i diritti LGBT - Rete Lenford*[76], pursuant to art. 5 of the Legislative decree 216/2003 brought proceedings against Taormina, complaining that he had violated the prohibition of direct discrimination. The defendant argued that the facts were concerned with a hypothesis of merely abstract discrimination. Indeed, at the moment of the interview no selection was in progress and that the contested statements had a joking character and were an expression of the defendant's freedom of thought. By order of 6 August 2014, the District Court of Bergamo, sitting as an employment tribunal, ruled Taormina's conduct to be unlawful in so far as it was directly discriminatory[77]. In particular according to the Tribunal a direct discrimination may occur even when there is not an identifiable complainant who claims to have been victim of such discrimination. In addition, discriminatory

D.lgs. 216/2003 in sede giudiziale, in *Materiali per una storia della cultura giuridica*, n. 1/2017, pp. 45-66.

[76] The *Associazione avvocatura per i diritti LGBT - Rete Lenford* is an association of lawyers that defends the rights of lesbian, gay, bisexual, transgender or intersex persons (LGBTI) in Court proceedings.

[77] The District Court of Bergamo quoted in the sentence several paragraphs of the CJEU judgment *Accept (Asoçiatia ACCEPT c. Consiliul National pentru Combaterea Discriminarii,* C-81/12, 25 April 2013), due to the similarity with the case at stake. In this case, a club patron heralded that he will never hire a homosexual football player to the team. Regarding this decision, see U. BELAVUSAU, *A penalty card for homophobia from EU non-discrimination law: comment on Asociaţia Accept (C-81/12)*, *Columbia Journal of European Law*, vol. 21.2, 2015, p. 370; L. CALAFÀ, *Dichiarazioni omofobiche nel calcio: il caso FC Steaua Bucarest e la discriminazione per orientamento sessuale alla Corte di Giustizia*, in *Rivista italiana di diritto del lavoro*, n. 4/2014, pp. 133-138; M. CASTELLANETA, *Se un dirigente di calcio fa dichiarazioni omofobe il club deve provare l'assenza di discriminazione. Spetta agli Stati membri prevedere sanzioni effettive e proporzionate*, in *Guida al diritto*, n. 21/2013, pp. 88-90; Z. NENDL, *La jurisprudence de la Cour de justice et du Tribunal de l'Union européenne. Chronique des arrêts. Non-discrimination en raison de l'orientation sexuelle. Arrêts «Associaţia Accept», Revue du droit de l'Union européenne*, 2013, p. 366; L. TOMASI, *L'unico caso italiano di discriminazione fondata sull'orientamento sessuale in materia di lavoro? Nota a Tribunale di Bergamo, 6 agosto 2014 – Corte d'appello di Brescia, 11 dicembre 2014*, in *GenIUS Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, n. 1/2015, pp. 221-235. Upon closer examination the case in commentary was the perfect transposition of the *Feryn* case-law because both were related with cases of discrimination without an identified victim. Instead, the *Accept* case, even if it was concerned with discrimination on the basis of sexual orientation, differed from the Italian case because it involved statements made against a particular person who refrained from taking an action. This subtle distinction is correctly noted by the Court of Appeal of Brescia, which seems to prefer referring to *Feryn* case line of arguments.

statements as those made by the defendant were likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market[78]. On that basis, the Court ordered Taormina to pay EUR 10 000 to the Associazione in damages and ordered extracts from that order to be published in a daily newspaper.

By judgment of 23 January 2015, the Court of Appeal of Brescia dismissed Taormina's appeal against that order[79]. Thereafter, the Supreme Court of Cassation, before which Taormina had appealed the decision, made a referral to the CJEU on the question of whether the organization had legal standing to bring proceedings under Article 9(2) of the 2000/78/EC Directive[80].

With regard to this issue, has to be remembered that in the *Feryn* case a public entity (that we could qualify as an independent administrative authority) brings the proceeding before the Court, while in the present case the petitioner is a private body whose representativeness of the collective interest is derived solely from its statutes. In particular, it is an association of lawyers whose principal objective is to offers legal assistance to LGBTI persons and its statutes provides that it also aims to promote respect for the rights of those persons.

In this sense, the principle established by the CJEU according to which «Directive 2000/78 must be interpreted as not precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically, on account of that objective and irrespective of whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination […]

[78] For an analysis of the ECJ case-law with a critical approach evaluating the application of that outcomes into Italian legal system in the light of the recent judgment of the Corte di cassazione about punitive damages (decision n. 16601/2017 of the Joined Chambers) see F. BILOTTA, *La discriminazione diffusa e i poteri sanzionatori del giudice, in Responsabilità civile e previdenza*, n. 1/2018, pp. 69-104.

[79] With regard to the entire judicial case see M. RANIERI, *Da Philadelphia a Taormina: dichiarazioni omofobiche e tutela antidiscriminatoria,* in *Rivista Italiana di Diritto del Lavoro*, n. 1/2015, pp. 125-133.

[80] Pursuant to Article 9(2) of the Directive 2000/78/EC: «Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive». The provision is substantially equivalent to Article 7(2) of the 2000/43/EC Directive.

against that category of persons and it is not possible to identify an injured party» is of great relevance because of the potential widespread of a pluralism of private entities legitimate to enforce anti-discrimination rights. Following this, where legitimate interest is made out it is open to an association to ask for discriminatory conduct to be sanctioned in an effective, proportionate and dissuasive manner (which can include an award of damages).

In addition to that, the Court of Cassation was doubtful whether the lawyer's statements could fall within the material scope of the Directive 2000/78 and, more particularly, within the concept of 'conditions for access to employment [...]or to occupation' provided that there was no individual recruitment negotiation or public offer of employment at the time when those statements were made. Ultimately the Court asked if these statements could find protection by virtue of the freedom of expression[81].

The existence of a discriminatory public statement and the absence of an identifiable victim are the traits shared by the case in commentary and the leading case *Feryn*. Notwithstanding this similarity, has to be remarked that in the present case there is no an actual recruitment procedure. For this reason, the interpretation of the Directive as covering discriminatory statements, «even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical», is very impactful[82].

[81] See C. POWELL, *'Words have wings': Advocate General Sharpston considers that homophobic comments made in a radio interview can contravene the Equal Treatment Framework Directive*, *Discrimination Law Association Briefings*, Vol. 69, 2020, pp. 13-14.

[82] As regards the criteria to be taken into consideration to establish if there is a sufficient (or better, *not merely hypothetical*) link between certain statements and the conditions for access to employment, the CJEU reminds points 53 to 56 of the Opinion of Advocate General Sharpston (delivered on 31 October 2019, Case C-507/18, *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford,* EU:C:2019:922). The CJEU states: «the relevant criteria are, first, the status of the person making the statements being considered and the capacity in which he or she made them, which must establish either that he or she is a potential employer or is, in law or in fact, capable of exerting a decisive influence on the recruitment policy or a recruitment decision of a potential employer, or, at the very least, may be perceived by the public or the social groups concerned as being capable of exerting such influence, even if he or she does not have the legal capacity to define the recruitment policy of the employer concerned or to bind or represent that employer in recruitment matters. Also relevant, second, are the nature and content of the statements concerned. They must relate to the conditions for access to employment or to occupation with the employer concerned and establish the employer's intention to discriminate on the basis of one of the criteria laid down by Directive 2000/78. Third, the context in which the statements at issue were made – in particular, their public or private character, or the fact

Therefore, the Court clarifies the scope of application of Directive 2000/78/EC in situations where there is no identifiable compliant with an interpretation that overcomes also the precedent *Feryn:* protection is now accorded also with regard to discriminatory statements pronounced by someone who merely has the authority to open a recruitment procedure. The crucial point is that the absence of a recruitment procedure does not constitutes a sufficient element for considering the statements to fall outside the scope of the Directive.

The EU Equality law finds in the case *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford, C-507/18,* new application developments and important confirmations. In particular, relevant anti-discrimination law principles – such as the *locus standing* of an association representing the interests affected (as in *Feryn* and *Asociaţia Accept* case) or the relevance of direct discrimination even though no actual victim could be identified – could be considered consolidated. In the case here illustrated the CJEU seems to continue to interpret Directive 2000/78/EC in light of the objective to ensure full effectiveness of the principle of equal treatment in employment, refusing to define its scope of application narrowly.

The CJEU also addressed the issue concerning the balancing between the right to equal treatment and the freedom of expression. In particular, the Court stated that stems from Article 52(1) of the Charter that freedom of expression is not an absolute right and its exercise may be restricted provided that limitations are required by law and proportionately serves objectives of general interest. In this case restrictions result directly from the anti-discrimination directive and are applied only for the purpose of reaching its objectives (namely to safeguard the principle of equal treatment in employment). In addition, the interference with the exercise of freedom of expression does not go beyond what is necessary to attain the objectives of that directive, in that only statements that constitute discrimination in employment and occupation are prohibited. Furthermore, these limitations are necessary to guarantee the rights in matters of employment of the persons covered by that directive. Indeed, the CJEU explains that the very essence of the protection afforded by that directive in matters of employment and occupation could become illusory if discriminatory statements fell outside the scope of the directive, solely because they were made in the context of a radio programme or constitute the expression of a personal opinion of the person who made them[83].

that they were broadcast to the public, whether via traditional media or social networks – must be taken into consideration».

[83] *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford* case, cit., paras 47 to 56.

Therefore, the CJEU, as in *Feryn* case, remarks properly the relevance of the 'dissuasive force' of mere speech in antidiscrimination area, demonstrating that the equality directives are capable of being applied to a wide range of stigmatizing expressions or statements, even in the absence of treatment. The outcome is a judgement where there is an adequate balance between different values at stake.

In light of this, it could be argued that the underlying principles of this sentence, by showing ECJ inclination to expand the notion of discrimination, are another positive step in Europe to combat discrimination. In fact, the extent of the protection accorded with regard to discrimination in employment matter demonstrates the commitment of the CJEU to give full effectiveness to the Article 2 of the TEU and 10 of the TFEU, together with secondary law in this area. What's more, all the decisions ruled and the national legislation adopted to enact the anti-discrimination directives demonstrate the crucial transformation of the European integration process, and the growing role of human rights in it.

Quite interestingly, though, is the emergence of an advanced form of judicial protection which is independent by a specific victim's mobilization and that rely on collective actors. Clearly, this great opportunity is with no effect with regard to those Member States that have not implemented adequate provisions concerning collective redress. Through the overview of the Italian situation it is provided a clear example of the results that could be achieved by an appropriate transposition of EU Equality Law. Accordingly, the exploiting of law instruments concerning collective redress could be crucial to achieve a more effective justice in antidiscrimination area and, thus, to mark progressive cultural and attitudinal changes.

5. Concluding remarks

The article has examined the theme of collective discrimination at the EU level. Even if particular cases have been analysed, i.e. the *Feryn* case and *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford* case, the principles stemming from these judgments may have a broader impact, being applicable with respect to other grounds of discrimination. From this consideration results that public statements of unwillingness to employ a certain ethnic group, women, homosexuals, or people of a certain religion would be equally liable to sanction. It has been pointed out also that the link between these statements and the recruitment process tend to be more and more nuanced, so that anti-discrimination protection has become increasingly pervasive.

This work, furthermore, has illustrated that legal standing to legal entities promoting equality is not required by the obligations stemming from EU law. Nonetheless, normative reasons and the fundamental contribution that civil society could offer to promote equality lean towards the necessity that Member States

grant this possibility. This pressure from the bottom is crucial to ensure full effectiveness in practice of EU equality law and to give vitality to the fundamental effort of the Court of Justice in defining an advanced moral identity of Europe.