Statewatch Analysis

Italy
Series of defeats in court for the "security package"

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A number of the measures introduced as part of the so-called "security package" adopted in May 2008, in the wake of an election campaign dominated by the law and order agenda and by criticism of migrants and Roma people by members of the coalition led by Berlusconi, have been quashed in a series of recent decisions by the Italian Constitutional Court and the European Court of Justice in Luxembourg. Three key issues that the rulings highlighted include the discrimination that introducing longer sentences for the same criminal offences in cases involving "illegal" immigrants entails, that the imprisonment under criminal law of immigrants who have been caught while their status is illegal and have not complied with an order to leave the country contravenes the so-called Returns Directive, and the unconstitutionality of the wide-ranging expansion of local councils' powers (in particular mayors) to issue ordinances on matters pertaining to policies on security and public order.

Powers entrusted to mayors under the Constitutional Court's scrutiny

In a ruling on 4 April 2011, the Constitutional Court found that article 54 point 4 of legislative decree no. 267/2000, the single act on the ordering of local authorities, as it was modified by the decree on "urgent measures for security" of 23 May 2008, converted into law and modified by law no. 125/2008 of 24 July, contravened the constitution's article 3 point 1, which lays out the principles of equality, non-discrimination and the removal of social and economic obstacles to full development as a person. The matter was referred to the Constitutional Court by the Veneto TAR (regional administrative court) on 22 March 2010 in the context of a complaint submitted by the association "*Razzismo Stop*" against a number of local councils including Selvazzano Dentro. The key aspect of the case were the expanded powers assigned to mayors to introduce measures "to prevent and eliminate threats to urban security", with "normative content and effective for an indefinite period", even outside of a situation of "contingency and urgency". The norm's unlawfulness stems from the insertion of the term "*anche*" ("also", or "even") before this condition, which indicates that approval of such measures would also be allowed in different situations. The provision which elicited the complaint concerned mayoral measures against begging that forbade "asking for money in public places", "even" in a "petulant or annoying" manner, leading the plaintiffs to complain that this means that it would also apply to cases that do not fit this description. The measure, applicable in wide areas under the local council's control, envisages fines for offenders, which may be paid in reduced amounts on the first two occasions when a person is prosecuted for this offence. In its complaint, "Razzismo Stop" noted that the measure contravenes the principle of proportionality, because there are no details of threats for public safety and urban security attached to the decision and, hence, the conditions of "contingency and urgency" are not applicable. Its indefinite time span is another aspect that removes the measure from the scope of "contingent and urgent" measures. Another aspect that the plaintiffs deemed unlawful was the punishment of begging

practised in a manner that is "not invasive", for which the scope of norms applicable to begging that causes annoyance or is practised while exploiting minors or disabled people is unduly expanded. The association also considered norms to exclude the possibility of applying for fine reductions in accordance with the ordinary regime to be unlawful.

The Veneto TAR deems that the relevance of the local council's measures against begging on discrimination stems from the "clear relationship between «begging», poverty and social exclusion, and from the high risk that nomads or migrants belonging to minority ethnic groups may be in such conditions". Moreover, and significantly, if one considers the plethora of measures introduced against specific groups and their lifestyles that are concealed behind a veneer of neutrality by focussing on their lifestyle and activities rather than the group to which they belong, the court appreciates that the law also punishes "indirect" discrimination whereby "a provision, a criteria, a practice, an act, a pact or a behaviour that is apparently neutral can place people of a specific race or ethnic origin in a particularly disadvantaged position in relations to others". In referring the case to the Constitutional Court, the Veneto TAR judge argued that in the absence of useful elements to set limits to mayors' discretion to issue ordinances, they are granted "a vast and indefinite normative power" that may entail derogation from ordinary laws, simply because it has a stated objective of protecting urban security. Moreover, the inclusion of a term ("*anche*") that widens the scope of mayoral powers cannot be deemed incidental or "involuntary", because it was the result of a specific amendment proposed by the government during parliamentary scrutiny for the conversion of law decree no. 93 of 2008. Noting that art. 54 point 4 of the decree has resulted in mayoral ordinances being issued on varied subject matters, "often imposing prohibitions or obligations to behave in ways that are significant at a religious level, or that of ethnic traditions", the TAR noted that depending on their political views, mayors have acquired "uncontrolled" normative powers on matters pertaining to rights and fundamental freedoms.

The prime minister's office intervened in the case through the state attorney general's office, which argued that the complaints should be deemed inadmissible and unfounded. The purpose of the norm was to strengthen the instruments available to local councils in security matters, and art. 54 established that mayors could exercise their new powers in situations of "danger, actual or potential, of a threat to public well-being and urban security", adding that in this context the danger should be "serious" and the measure should have a "definitive function". The requirement for such a measure to be "proportionate and reasonable" should be inferred from the duty to comply with the general principles of the legal order. Provisions laying out the scope of the decree in Article 2 are deemed to further limit the measures to "specific areas for action, all of which relate to activity for the prevention or repression of criminal offences". The alleged vagueness of mayoral powers is further limited by the need to discuss any measures to be adopted with the *prefetto* (government official in charge of security in a city), and the decree is described as merely "perfecting" local councils' involvement in the "national public security system" without violating the "principles of legality, specificity and limiting of discretionality".

In ruling that art. 54 point 4 of the decree is unconstitutional, the Constitutional Court's findings included:

- the norm does not allow derogations of ordinary legislation, which are only allowed for contingent and urgent measures, and these must be "limited in time" and fall within the concrete situation that is being tackled (thus there is no violation in this sense);

- nonetheless, mayors are assigned powers to approve "ordinary" ordinances with "practically unbounded discretionality" for the purposes of "preventing and eliminating serious dangers that threaten public well-being and urban security" (contravening the principle of "substantial legality", which does not allow a person or body entrusted with a function to act in "total freedom");

- the measures affect the freedoms of people living in a local council's territory, by imposing behaviour, prohibitions, obligations to do or not to do certain things, thus restricting citizens' freedoms beyond what art. 23 of the Constitution allows, on the basis of an ill-defined general goal;

- the problem is not resolved by a subsequent decree issued by the interior minister on 8 August 2008, which establishes that the *prefetto* (acting on behalf of the interior ministry) must be informed in advance of any measures adopted, because it does not limit "administrative discretion in relations with citizens", but only in relations with the minister;

- a violation of art. 97 of the Constitution, which sets out the requirement of impartiality for public administrations, is appreciated, because the law does not envisage limits apart from those which generically refer to the purpose of a measure;

- apart from negatively affecting the guarantee of impartiality of the public administration, the lack of a valid legal basis for the powers entrusted to mayors also undermines the equality of citizens before the law (art. 3.1), because the same behaviour could be deemed lawful or unlawful depending on the mayors responsible for the different parts of the national territory, thus affecting the sphere of citizens' freedoms.

Two instances in which measures approved by mayors in Lombardy in application of their expanded powers were deemed to be discriminatory were a case brought before the court in Brescia by the *Associazione di Studi Giuridici sull'Immigrazione* (ASGI) and the *Associazione Guido Piccini per i diritti dell'uomo* and a second one in Bergamo lodged by the *Associazione Nazionale Oltre le Frontiere - Bergamo* (ANOLF), ASGI and the *Comunità Immigrati Ruah*. The first case concerned regulations laid out by the mayor of Calcinate for the registration of foreigners in the *anagrafe* (official register of residents) which do not apply to Italians. On 31 March 2011, the ruling in Brescia concluded that the part of the mayoral ordinance of Calcinate dated 30 March 2010 is discriminatory, in the parts that oblige third-country or EU nationals to submit documents other than those required from Italian citizens to register in the *anagrafe*, pursuant to art. 3 of the Constitution. These include a residence permit, a valid passport with a regular visa, certification of the suitability of their accommodation and sufficient income to support themselves. The ordinance must thus cease to have effect and Calcinate town council is called upon to "abstain from enacting analogous acts of discrimination in relation to registration in the *anagrafe* of residents in the future". The other case was resolved by a similar ruling in Bergamo a fortnight earlier in relation to similar requirements introduced by the mayor of Telgate for registration in the *anagrafe*.

ECJ finds Italy in breach of the Returns Directive

On 28 April 2011, in one of a series of cases referred to the ECJ in Luxembourg, the first chamber of the court found that national rules imposing imprisonment on third-country nationals residing illegally in a member state who fail to comply with an order to leave the country "is liable to jeopardise the attainment of the objective of introducing an effective policy for removal and repatriation in keeping with fundamental rights". Hassen El Dridi, a third-country national who entered Italy illegally, was issued an expulsion order by the Turin *prefetto* on 8 May 2004 which served as a basis for an order to leave the national territory within five days issued by the *questore* (police chief) of Udine on 21 May 2010. El Dridi failed to comply with the order and was sentenced to one year's imprisonment by the District Court in Trento pursuant to article 14.5b of legislative decree 286/1998 (on immigration) as it was modified by law no. 94 of 15 July 2009, which allows imprisonment for between one and four years for failure to comply with an order to leave the national territory issued by the *questore*.

In considering his appeal, the Appeals Court in Trento referred the matter of "whether the Directive on the return of illegally staying third-country nationals ... precludes national rules which provide for a prison sentence to be imposed on an illegally staying foreign national on the sole ground that he remains on the national territory without valid grounds, contravening an

order to leave that territory within a given period" to the ECJ in a request lodged on 20 February 2011. In particular, noting that a prison term of between one and four years is "extremely severe", the Appeals Court asked "whether a criminal penalty may be imposed during administrative procedures concerning the return of a foreign national to his country of origin due to non-compliance with the stages of those procedures", in light of the "principle of sincere cooperation", "attainment" of the directive's objectives and "the principle that the penalty must be proportionate, appropriate and reasonable".

Dealing with the request by "urgent procedure" because El Dridi was in detention, the ECJ noted that Members States "may not depart" from the "standards and procedures" established by the Returns Directive "with a view to implementing an effective removal and repatriation policy for persons with respect for their fundamental rights and their dignity" by applying stricter standards. Detention "for as short a period as possible" in specialised centres and separately from ordinary prisoners may only be imposed after the first two stages in the procedures (first a return order imposing voluntary departure for which between 7 and 30 days are allowed, followed by "forced removal using the least coercive means possible"). The only departures from the directive establishing "common standards and procedures" that are allowed are detailed in art. 4, and include instances where more favourable conditions exist or are adopted (art. 4.3) that are compatible with the directive.

Furthermore, the ECJ notes that Italy has failed to transpose the Returns Directive but that its provisions that are "unconditional and sufficiently precise" as to their subject matter (in this case, arts. 15 and 16), may be relied upon by individuals even if a country has failed to transpose them. The mentioned articles limit the instances in which a person may be deprived of their freedom to cases in which their personal conduct may compromise the enforcement of a return decision, and establish that it must be for "as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence"; it must be "subject to review at reasonable intervals" and must "terminated" when there is no "reasonable prospect" of the removal being enacted; its maximum length is 18 months, and it must be in "specialised facilities", or in circumstances in which they are kept separate from ordinary prisoners.

The ECJ also argues that "the Italian removal procedure differs significantly from that provided for by that directive". While criminal legislation is a responsibility of Member States, and the Returns Directive allows measures pertaining to criminal law to be adopted in "cases where coercive measures have not led to removal", legislation must be adjusted to comply with European Union law. This means that rules, including criminal ones, "which are liable to jeopardise the achievement of the objectives pursued by a directive and deprive it of its effectiveness" may not be applied. The ECJ deems that custodial sentences such as those envisaged in Italian law in the El Dridi case may not be imposed "to remedy the failure of coercive measures adopted in order to effect a forced removal" solely as an effect of illegal residence.

Thus the ECJ's first chamber concluded that:

> "*Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period*".

Hence, the referring court in Trento must "refuse to apply any national provision which is contrary to the result of the Directive (including a provision providing for a prison sentence of

between one and four years)", and the decision is binding for any other national courts before which a similar issue is raised.

The El Dridi case was one of four similar cases referred to the ECJ by Italian courts between 31 January 2011 and 20 February 2011: *Tribunale Ordinario Di Milano*, lodged on 31 January 2011, concerning criminal proceedings against Assane Samb (Case C-60/11); *Tribunale di Ivrea*, lodged on 4 February 2011, concerning criminal proceedings against Lucky Emegor (Case C-50/11); and *Tribunale di Ragusa*, lodged on 9 February 2011, concerning criminal proceedings against Mohamed Mrad (Case C-43/11). Moreover, on 10 March 2011, the *Corte Suprema di Cassazione* [Italy's highest appeals court] submitted a query to the ECJ asking for an opinion on the correct interpretation of art. 2 para. 2, b); art. 7 para. 1 and 4; art. 8 para. 1 and 4; art. 15, para. 1, 4, 5 and 6 of the Returns Directive. The referral was in response to a request by the chief appeal court prosecutor to annul the offence detailed in art. 14.5 *quater* of law 286/1998 on immigration, which turns the repeated failure to comply with expulsion orders into an offence liable to incur one to five years' imprisonment, because it "is in contrast with Directive 2008/115/EC". This series of referrals should not be deemed surprising, considering that both interior minister Roberto Maroni and under-secretary Alfredo Mantovano explained that provisions in the "security package", and particularly the criminalisation of illegal residence, were adopted to prevent negative consequences on Italian expulsion policy that the "Returns Directive" may have given rise to.

Increased sentences for "illegals" deemed unconstitutional

On 14 July 2010, in response to cases referred to it by courts in Leghorn and Ferrara, the Constitutional Court ruled that art. 61 point 11*bis* of the penal code, as it was amended by law decree no. 92 of 23 May 2008 and in its subsequent conversion into law, is constitutionally unlawful, in sentence no. 249/2010. The norm in question instructs judges to increase sentencing for convictions by one third as a result of migrants' irregular status.

On 4 February 2009, Leghorn court raised the issue in a case involving a migrant for whose criminal offence, pursuant to art 61.11*bis* of the penal code, his irregular residence in Italy represented an aggravating circumstance entailing an increase in the length of his sentence. The judge noted that irregular status *per se* is not an element that can be used to presume that a person is dangerous if their past conduct has not shown that they are prone to commit criminal offence. The incoherence of the measure, deemed to violate art. 3 of the Constitution, results from the fact that aggravating circumstances may derive from abuse of a position of authority, a duty of care or a relationship of trust, as well as cases involving people who are known to be dangerous as a result of previous behaviour (for instance, their being on the run from justice or repeat offenders), but not having a valid residence permit is not a condition that can be equated to the former. People's status thus acquires undue importance in sentencing, regardless of whether it is relevant to the offence that has been committed. The personal element in penal responsibility would also be violated, in view of of heavier sentences being issued as a result of the "type of person" the culprit is, rather than any concrete verification of their dangerousness. A penalty that is disproportionate, in that it exceeds a person's criminal responsibility, would also undermine the re-educational function of a sentence.

On 26 January 2010, a court in Ferrara referred a further case to the Constitutional Court, for which proceedings were united with those of the case submitted by the Leghorn court (see above). In the context of a trial for possession of illegal drugs by a Nigerian residing irregularly in Italy, the issues raised by the Ferrara judge include the fact that the provision would entail different sanctionatory treatment for "identical" material conduct, which would assume "paradoxical" traits in situations involving two people (one "illegal" migrant and an Italian citizen) who commit the same crime in association. The re-educational purpose of the sentence (art. 23.3 of the Constitution) would also be violated by an aggravating circumstance that only affects some people (third-country nationals and stateless people), and the court also deemed the exclusion of such people from access to prison benefits such as the suspension of short

custodial sentences, contrary to Constitutional Court jurisprudence, purely as a result of their status. Further "unreasonable" aspects of the norm include the assumption that not complying with immigration norms renders a person more dangerous, a lack of distinction between different situations in which someone may be in breach of regulations on residence, and the fact that illegal residence cannot be equated to the situation of repeat offenders. Hence it calls for art. 1 point 1 of law no. 94/2009 to be declared unconstitutional.

The PM's office, represented by the state attorney general's office, lodged its request for the complaint to be deemed inadmissible and unfounded on 18 May 2010, arguing that it is not true that the norm merely penalises a "legal status", but rather, that it only affects "foreigners who violate provisions on immigration through a 'conscious and intentional conduct'", an interpretation that is lent further value by the introduction of the criminal offence of "illegal entry and residence in the State's territory".

The two Constitutional Court highlighted that the cases raise multiple concerns over the violation of art. 3 of the Constitution (equality before the law and non-discrimination), with Ferrara court also arguing that arts. 25 and 27.1 are breached by increasing sentences on the basis of conditions that are unrelated to the criminal conduct (a sort of "penal law based on the author"), whereas the Leghorn court argued a breach of art. 27.1 concerning the proportionality of sentencing on the basis of someone's "personal degree of responsibility". Both courts noted that an excessive sentence in relation to the offence undermines any re-educational function it may have, both objectively and due to a convict's subjective perception of the situation, in breach of art. 27.3 of the Constitution. Thus, Ferrara court called for art. 61.11*bis* of the penal code, art. 1.1 of law no. 94/2009 and art. 656.9a of the code of penal procedure (which precludes the suspension of short sentences) to be declared unconstitutional.

The Constitutional Court ruled that the matter raised by the Leghorn court regarding the relevance of the aggravating circumstance to the offence that has been committed is not admissible because there are already provisions in the penal court that make it impossible to apply, as art 61 of the penal code already specifies that aggravating circumstances only apply "when they are constitutive elements or special aggravating circumstances" for an offence. The Ferrara court's complaint was deemed to be founded because pertains to rights that cannot be violated that apply to people "as human beings". Hence, the legal status of foreigners cannot be treated as a cause for "diversified and worse treatment", on the basis of the guarantees that individuals have before the state's sanctionatory power. The principles that support this argument include the fact that respect for human rights precludes the possibility for personal characteristics unrelated to the offence to give rise to stricter penal treatment, the principle of equality "does not tolerate discriminations between the position of citizens and that of foreingers". Only a "constitutionally relevant primary public interest" may allow restrictions on fundamental rights, and assessing this interest relies on considerations of whether such a measure is "reasonable". As "personal and social conditions" are among the seven criteria that are explicitly mentioned in art. 3 of the Constitution as conditions that are irrelevant for the purpose of establishing separate regimes, and past conduct cannot lead to norms that turn personal qualities into a "distinctive sign" of people falling within a category who should be treated differently, the court deems that the provision does not fall within the logic of "greater harm or greater danger for the public good that the penal norms safeguard". Furthermore, trying to stop illegal immigration by treating people differently on the basis of who they are detaches punishment from the criminal conduct enacted (all the more so after EU nationals were excluded from the norm, although they may be committing an identical offence by residing illegally in Italy).

The introduction of the criminal offence of irregular residence does not alter the situation. It highlights the discriminatory nature of the aggravating circumstance that is being assessed more clearly, "intensifying sanctionatory treatment" and, while the matter of status and offence being unrelated was already apparent, it laid the premises for "duplication or multiplication" of sanctionatory measures, as it is punished *per se* and in relation with other criminal offences that

may be committed, harming interests and values that are unrelated to controlling illegal immigration. It also entails a risk of *bis in idem*, that is, of being punished twice for the same offence. Thus, the provision contravenes art. 3 of the Constitution, which "does not tolerate unreasonable differences in treatment".

The ruling further notes that "The substantial rationale on which the criticised norm is based is a general and absolute presumption that an irregular immigrant is more dangerous, which is reflected in the sanctionatory treatment for any violation of penal law enacted by them". Unduly staying in the country in spite of irregular status or of an expulsion issued against someone, is a condition that does not constitute "a verified or assumed dangerousness of the subjects", and it cannot be used to infer dangerousness, as this would require a case-by-case assessment. It turns irregular status into a "stigma" serving as a premise for differential treatment. This contrasts with the Constitution's art. 25.2 which specifies that conduct, and not personal qualities, should be what leads to punishment. This is not changed by the existence of aggravating circumstances for absconding from justice or repeat offenders, and the provision is thus deemed to be in breach of art. 25.2 of the Constitution. The connection between these findings and art. 656.9a of the code of penal procedure, which excludes "crimes involving the aggravating circumstance in art. 61.1 of the penal code" (deemed unconstitutional) from prison benefits, also makes this norm unconstitutional.

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