Ethnic Monitoring of in Italy viz. the
Incautious Use of a Substantive Equality Framework

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Work in progress, not for quotation, comments welcome

Introduction

In the past few years ethnic monitoring has become a “hot topic” in Europe. The collection of information on the ethno-racial background of a population for demographic or antidiscrimination purposes is largely employed outside Western Europe.1 The US and British census forms where one has to choose among different ethno-racial categories, or the obligation made upon American firms to transfer information on the ethnic background of their employees to the relevant equal treatment authorities are just some examples of that. Yet, with the increasing ethnic diversification of contemporary European societies brought about by the globalization of migration flows, both European social scientists and governments perceive the need of monitoring groups at risk of racial discrimination. Improved data collection capacity for ethnic discrimination is especially being encouraged, in recent times, by European Union’s institutions.2

This notwithstanding, the historical legacy of the profiling of Jews by the Nazi has made ethnic monitoring a taboo in most Western Europe. France, in particular, has been the arena of a nation-wide debate on the opportunity to collect ethno-racial data in between 2006 and 2007.3 The querelle opposed a pro-monitoring faction, mainly composed by social scientists, and an “anti-

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profiling” faction, lead by anti-racist NGOs and supported by different political and civil society actors and was, at least temporarily, settled by a judicial decision. In December 2007, France’s Conseil Constitutionnel stroke down a provision facilitating the collection of ethno-racial data arguing, among other considerations, that race and ethnic origin are “non-objective” and prohibited criteria in light of the French Constitution. Basing scientific data collection and, even more so, public policy measures upon such criteria should therefore be considered as illegal.⁴

The Conseil’s decision raised concern among French and European anti-discrimination experts. If race and ethnicity are non-objective criteria, on what may anti-discrimination measures be based upon? And how to collect aggregate information on racial discrimination, with the purpose of fighting it?

Just a few months later, in May 2008, the Italian government adopted an emergency decree requiring a census of the nomadic population in three Italian regions. The decision provoked a vast - although mainly international - concern, leading the European Parliament to adopt a resolution in which the measure was described as an “ethnic census”.⁵ In fact, the decree’s implementation measures would mainly affect Roma and Sinti residing in so called “nomadic camps”.

So far, the literature has pointed to France’s Vichy experience and to its civil law tradition in order to explain its preference for a non-categorizing, “colour-blind” approach to racial discrimination.⁶ This paper attempts to answer the question why, in spite of many similarities with France as regards experiences of collaboration in profiling Jews and the close legal tradition, the issue of ethnic monitoring, in Italy, could be approached in such a different way.

In order to answer this question, the paper explains how different formulations of the principle of equality have legitimized positive action in favour of ethnic minorities in a country and not in the other. Discussing the implications of such a difference for historical and new minorities, I show how it mattered for the implementation of anti-discrimination policy measures inspired by the European Union’s Racial Equality Directive (RED).⁷ Afterwards, I address the nexus between positive action and ethnic monitoring. Moving finally from practices established for historic minorities to counts on “new” minorities, I approach the difference between monitoring ethnic characteristics of a population and the monitoring of specific ethnic groups. Thereby, I finally explain how it was possible for the Italian government to adopt a measure such as the “Nomad

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Census Decree” and I explore the problems raised by the latter.

A historical-legal perspective on the Italian approach to the protection of autochthonous minorities clarifies present differences, with respect to France, as concerns the monitoring of “newer” ethnic groups. The overview also points out specific difficulties linked to devising any form of ethnic monitoring. Finally, it suggests that any use of “ethnic conscious” policy measures needs a high degree of caution and thorough scrutiny.


I have already mentioned that Italy shares with France the experience of collaborating with the Nazis in profiling Jews and that such a common history might suggest that a similar caution is required in both countries when talking about classifying citizens on the base of their ethnic or racial origin.8 And undeniably, the use done of the Italian world for race, *razza*, is just as infrequent and “taboo” as the corresponding French expression, *race*. The term is mentioned in both Constitutions’ equality clause. In November 2007, the French Constitutional Council invoked precisely such clause to justify the refusal of ethno-racial categorization. In Italy, a few more lines in the same clause have instead grounded a contrary approach not much for ethnic classification in itself, but for the possibility to establish positive action for ethnic minorities.

The Italian equality clause enshrines a rather “classical” formulation of the principle of equality, which is in all similar to the French wording, viz.

All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.9

The second paragraph of the Italian equality clause adds, however, that

It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

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9 Art. 3 (1) of the Italian Constitution. The corresponding French text reads “France … shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.”
Such a formulation marks a notable exception in the European constitutional panorama and constitutes a cornerstone for our explanation. One the one hand, the French equality clause has always been interpreted by the Conseil in a literal, restrictive and “formalistic” way: equality is to be granted by the fact that the law does not distinguish on specific, prohibited grounds. The longer Italian formulation, on the contrary, suggests in itself a more substantial approach to the overall concept of equality, and Italian Constitutional jurisprudence and doctrine have repeatedly confirmed the goodness of such interpretation. While the French constitutional formula welcomes only the first sentence of the famous Aristotelian formula - treating equal situation equally, the Italian notion includes the different treatment of differing situations.

Why is such a difference relevant to explain opposite implications for ethno-racial categorization in Italy and France?

The constitutional principle of substantive equality has been used to justify all forms of positive action adopted in Italy. This was also the case for measures adopted in the post-war years and targeted at an ethnic group, that of the Jews disadvantaged by the race-laws. As Raffaele Chiarelli notes,

the passage of certain laws... benefiting individuals previously harmed by the race-laws raised... certain jurisprudential concerns... over the difficulty of reconciling the absolute prohibition on race-based differentiation, which derives from the constitution, and the choice of grouping, in a separate legal category quite different from all others, all those individuals who qualified on the basis of their ethnic belonging. It was, however, judged that the compensatory nature of this provision found its legitimacy in the constitutional provisions of the second clause of Art. 3.

A compensatory paradigm, similar to the one evoked to justify affirmative action in the Unites States, was the legitimatizing element for unequal treatment of a disadvantaged minority,
identified on an ethnic criterion.14

Apart from the remote precedent concerning Italian Jews, the answer to our research question deserves a closer analysis of the broader legal framework applying to ethnic minorities, and in particular to the autochthonous ones.

In France, the Conseil’s strict interpretation of France’s equality clause has constantly been evoked to defend the republican unitary conception of citizenship and to impede the legal recognition of any French minority, such as the Basques, Bretons or Corses. Accordingly, information was never collected on the consistence of any of such ‘ethno-linguistic’ groups, nor positive actions ever designed for them. Rejecting any acknowledgment of the existence of subsets in the French population has lead France so far as not to sign the Council of Europe’s Framework Convention on the Recognition of National Minorities.15

In Italy, instead, the vast body of norms concerning ethno-linguistic minorities has evolved in a rigorously opposite sense. In particular, for the Constitutional Court,

the principle of linguistic minority protection ... without doubt represents something additional and novel compared to the principle of the equality of all citizens and the logical corollary of the more general principle of the first clause of Article 3 of the Constitution (viz., equality of all citizens before the law, without distinctions of ‘language’). Minority protection ... means ... the need for treatment which is specifically differentiated, and which applies instead article 6 of the Constitution, which prescribes that the Republic “protects, with appropriate legislation, linguistic minorities”.16

Constitutional jurisprudence has, on numerous occasions, confirmed particular instances of linguistic minority protection (in particular for those “recognised” minorities originally protected by post-war international treaties), even to the point of asking the Parliament to regulate, in a uniform manner, the situation of historical ethno-linguistic minorities.17 Such regulation came only in 1999,
with an Act implementing Art. 6 of the Constitution on the linguistic minorities.\textsuperscript{18} The act defined the number of historical minorities recognised in law and their prerogatives, and created a special fund in order to cover the costs incurred by “positive” policies designed to favour such minorities. The adoption of this statute normalized some forms of protection which were previously guaranteed only to so-called “super-protected” minorities (those for which existed treaties with their respective kin-states) and extended positive actions to all minorities included in the law.\textsuperscript{19}

The relevance of this account for ethnic monitoring is perhaps not self-evident, but it becomes clearer knowing that the choice of limiting Article 6 of the Constitution to “linguistic” minorities was due to a reticence of the Constitutional Assembly to employ the term “ethnic”. An explicit reference to additional, ethnic characteristics was, in fact, removed during the approval of the definitive text of the Constitution in 1948.\textsuperscript{20}

This reticence was destined to be very temporary as it did not prevent the introduction of the wording “ethnic proportion” (proporzionale etnica, or Proporz) to describe genuine affirmative action on ethno-linguistic grounds adopted nearly at the same time for the population of a Northern Italian region Trentino Alto-Adige. There a post-war international agreement foresaw a complex mechanism designed to safeguard the German-speaking group and compensate them for the abuses of power inflicted on them during the Fascist period.\textsuperscript{21} In spite of initially its restorative and temporary character,\textsuperscript{22} the constitutionality of the Proporz has been reaffirmed at several and even recent occasions. In particular, still in 1987, the Constitutional Court kept considering appropriate that the three ethno-linguistic groups recognised in the region (German, Italian, and Ladin) have proportional representation in regional institutions, a proportionate share in the Region’s resources, as well as proportionate posts in the regional bureaucracy. The Court went further on to declare that the form of affirmative action embodied in the Proporz was not to be considered in derogation of the fundamental principles of the Constitution.\textsuperscript{23}

\textsuperscript{18} Act 482 of 15 December 1999, Norme a tutela delle minoranze linguistiche storiche.
\textsuperscript{19} F. Palermo and J. Woelk, \textit{op cit.}, p. 262, fn. 98.
\textsuperscript{20} The deletion of the text came about not only to avoid an indirect reference to the Fascist race laws, but also to avoid a direct reference to the ethno-national characteristics of certain historic minorities claiming independence from the new Republican State. See Elisabetta Palici and Sunti Prat, “La tutela giuridica delle minoranze tra Stato e Regioni in Italia”, in Sergio Bartole et al. (eds.), \textit{La tutela giuridica delle minoranza}, Padova: Cedam, 1998, p. 150; Susanna Mancini, \textit{Minoranze autoctone e stato: tra composizione dei conflitti e secessione}, Padova: Cedam, 1996, p. 163, and Bonetti, \textit{op. cit.}, p. 20 fn. 96.
\textsuperscript{21} See, in Article 1 of the ‘De Gasperi-Gruber Agreement’ of 1946 the “d” clause: “German speaking residents... will be guaranteed complete equality of rights with Italian speaking residents, in the framework of special dispositions designed to safeguard the \\textit{ethnic character} and the cultural and economic development of the German language group... the equality of rights insofar as entry into the public administration is concerned, aims at achieving a more perfect proportion between the two ethnic groups” (my translation and emphasis).
\textsuperscript{22} The proportions used were originally to be fixed every thirty years.
\textsuperscript{23} The Statute of the Trentino Alto-Adige region took the status of a constitutional law in 1972 (Act 1/1972). Constitutional Court sentence No 289/1987 affirms that: “the meaning of articles 61 and 89 of the statute [those concerning ethnic proportionality] cannot be other than profoundly different from what was the case prior to statute
From this account we can therefore conclude that the authors and the interpreters of the Constitution as well as the ordinary legislator have judged ethno-linguistic and ethnic and racial characteristics as legitimate bases for the attribution of specific protections, to the extent of permitting *ad hoc* affirmative action, in certain cases even through quotas.

This has been confirmed more recently by the transposition and implementation of the Racial Equality Directive\(^2\), the EU legislation establishing a uniform framework for the protection of ethno-racial discrimination in the Union. In Italy, the National Office against Racial Discrimination (UNAR) created in application of the directive was explicitly entrusted with the promotion of positive actions for ethnic minorities.\(^2\) The corresponding body established in France in compliance with the RED, the HALDE (the *Haute autorité de lutte aux Discriminations et Promotion de l’Egalité*), was never delegated similar powers.

### II. Ethnic Census, Privacy and Anti-discrimination Monitoring

The distribution of scarce resources on the basis of positive action programmes presupposes that public authorities know the number of the potential beneficiaries of the measure and their relevant characteristics. It is therefore not surprising that in Italy, the collection of statistical data on ethno-linguistic minorities is a practice established in almost all those regions which have some ethno-linguistic minority and that such practice is, in most cases, connected to the census.\(^2\) Even less surprising is that whenever questions concerning ethno-linguistic monitoring have been put to the Constitutional Court or the Supreme Administrative Court, both courts have not even mentioned the possible unconstitutionality of such practices. One of the Constitutional Court’s first decisions on the subject, in 1961, made no reference to the objectivity of the ethnic data to be collected, limiting itself to a judgement on the exclusive competence of the State, rather than the province, to conduct the collection.\(^2\)

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\(^2\) For the Ladin population in the province of Trento (provincial law of the 30th August 1999, no. 4, art. 4); indirectly for the Slovenian language population in Friuli-Venezia-Giulia (respondents may answer the questionnaire in Slovenian), and, finally, as shall be seen in greater detail below, for the inhabitants of the province of Bolzano.
This notwithstanding, the gathering of ethnic information for positive action purposes has raised a number of different problems. The province of Bolzano, where the use of an ethnic census has, from the moment of its approval, provoked most debate, is the most significant example of the problems linked to compulsory ethnic monitoring practices.  

In contrast to other Italian provinces, where individuals’ ethnic affiliation is collected anonymously, the requirements of the Proporz have meant that, in Bolzano’s province, public authorities have to know the ethnicity of every single resident. Thus, for an extended time, residents of Alto-Adige have had to make a compulsory ‘declaration of linguistic affiliation’, the controversial character of which is much greater than that involved in the French statistiques ethniques. In this latter case, the entire question turned around the legitimacy of surveying individuals asking them to voluntarily self-declare their ethnic background.  

The crucial problem in the Proporz, instead, was one of a real clash between the need to survey the ethno-racial make-up of the population to assign the resources granted through positive action, and the individual right to choose one’s own ethnic belonging.  

During a long time, in fact, not only the declaration of linguistic affiliation used to be compulsory, but it was also constrained into only two categories (Italian and German), which could not be combined. Furthermore, the public authority pretended that the declaration reflect the “objective truth” of group affiliation. This requirement of “unambiguity” was held necessary so as to avoid ad hoc declarations made in order to benefit from, for example, the larger number of posts open to German-speaker group, which regularly outnumbered Italian speakers in the census.  


29 Cf. Art. 89 of the Trentino Alto-Adige statute (“... the adjustment to the population of the language groups as revealed by the last general census”) and presidential decree no. 752 of the 26th July 1976. For a more in-depth treatment of the ethnic census in Bolzano in a comparative light, see Giovanni Poggeschi, Il Censimento e la dichiarazione d'appartenenza linguistica, in Joseph Marko, Sergio Ortino, and Francesco Palermo (eds.), L'ordinamento speciale della provincia autonoma in Bolzano, Padova, 2001, pp. 653-685.  

30 These were the terms in which the French National institute for Demographic Studies presented the data collection practices to be used for the survey named Trajectoires et Origines (TEO), which was the concrete measure affected by the above-mentioned decision of the Conseil Constitutionnel.  

31 As guaranteed by article 3 of the Framework Convention for the Protection of National Minorities, as well as, previously, by the jurisprudence of the Constitutional Court: cf. Constitutional Court judgement no. 239-1984 of the 13th July as cited in Poggeschi, op. cit., n111.  

Such three characteristics of the declaration have raised, in the years following 1981, a number of protests from those who did not want to declare themselves or those born from one Italian and one German speaking parent. The instance on the compulsory census has even lead to glamorously unpopular political choices, such as the exclusion of the “ethno-linguistically undeclared” South-Tyrolean politician Alexander Langer from the race for the municipality of Bolzano in 1995.

All those polemics and contradictions, together with increased international attention, have finally brought to an evolution of the law which, without judging the restorative function of the Proporz absolved, has at least moderated the constrained and univocal character of the declaration of ethnic affiliation. The Statute was modified a first time in 1999 on the request of the Supreme Administrative Court in order to allow those who did not feel that they belonged to any of the historical groups to declare themselves as “other” - despite then having to choose a group to belong to for the purposes of the Proporz. In 2005, an amendment following on from an opinion of the Privacy Watchdog, as well as the unfavourable opinion of the Consultative Committee on the Framework Convention on the Protection of National Minorities, made finally become the declaration free, voluntary and subject to later modification, as well as anonymous until its use is required for public recruitment.

The reference to the norms concerning the census in Alto-Adige and the declaration of linguistic affiliation are important to our discussion on ethnic monitoring in societies of immigration. They reveal in fact that in Italy legal reflections on the methods to collect ethno-racial data have reached an already advanced state thanks to the presence of historic minorities.

This much can be seen from similarly recent orientations taken by public authorities on the issue of monitoring new ethnic minorities. In 2006, for instance, the Italian Privacy Watchdog had to answer a question from the National Office against Racial Discrimination on the implementation of quantitative studies aimed at demonstrating the ethnic composition of specific populations. In that case, the Watchdog cited precisely the legal opinions given concerning the census in Alto-Adige and census questions in Slovenian.

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33 Consiglio di Stato, judgement 497/1999.
34 See Legislative Decree no. 99/2005.
35 UNAR’s mandate includes “promoting studies, research, training courses and exchange of experience, in collaboration with... institutes specialised in statistical data collection, in order to elaborate guide lines to help in the fight against discrimination” (legislative decree 215/2003, art. 7, second clause, (g)).
In the 2006 case, the Watchdog’s position clarified further the current legal situation concerning the right to privacy for the collection and retention of sensitive data such as ethnic or racial identity.37 Such a process requires not only the written consent of the affected party, in addition to authorisation from the Watchdog itself, but also the adoption of a specific statutory provision (which must specify the public interest served by the retention of the data, the type of data held and the operations carried out upon it) and the registration of the body carrying out the investigation in the national statistical system wherever that the data is collected by a public authority.

As in the French case which gave rise to the Conseil Constitutionnel's decision of 2007, the collection of data by public and private entities is regulated in different ways according to whether the data held on individuals is anonymous or not. In particular, in the Italian as well as in the French context, the legal burden is more demanding for public bodies.38

The requirement for a statute to be passed before the collection of data by the National Office against Racial Discrimination has been superseded with the adoption of a tailor-made prime-ministerial decree – the 2006 Regolamento concernente il trattamento dei dati sensibili e giudiziari presso la Presidenza del Consiglio, which declares an intent to collect data on racial and ethnic origin of affected parties qua potential victims of discrimination.39

In summary, race and ethnicity are still to date considered legitimate categories for study and research on minorities, even to the point of collecting statistical data on these categories in connection with the census or to adopt specific provisions allowing for their collection and treatment.

The precedent of ethno-linguistic minorities has allowed, in more recent time, a further specification of the norm in those cases where the inquiry is designed within the context of anti-discrimination policies and for non-historic minorities. The concrete consequences of such legal situation in the current socio political are to be analysed in the last sections of the paper.

37 If a private body carries out a study or survey which is not anonymous, the survey is subject “only” to a Good Conduct code (an annexe to the Code on Privacy) and to the private body’s declaration that it shall not hold the data without the freely-obtained written consent of the affected party and the authorisation of the Privacy Watchdog. See Law no. 675/1996, which transposed directive 95/46/CE, and D.Lg. no. 196/2003, “Code of conduct for the collection of personal data” (henceforth, “Privacy code”), in particular articles 20 and 22.

38 The regulation through the use of a code is a consequence of the principles set out in directive 95/46. cf. in particular Art. 9, Codice di deontologia e di buona condotta per i trattamenti di dati personali a scopi statistici e di ricerca scientifica.

39 DPCM no. 312 of the 30th November 2006, on the basis of opinions of the watchdog and the Consiglio di Stato given on the 30th June 2005 and the 23rd October 2006 respectively.
Save the Privacy Watchdog’s opinion released in 2006, the quantitative measurement of diversity of and discrimination against non-autochthonous groups has as yet provoked little discussion in Italy. This can be explained, at least in part, by the fact that most individuals with a visibly non-Italian ethnic background might still be easily isolated thanks to their citizenship or place of birth. In virtue of a comparatively young migration phenomenon, and of a citizenship legislation which is much less inclusive than in other countries, the percentage rate of naturalisation in Italy (equal to around 0.6% of the foreign population in 2005) is amongst the lowest of those countries which are commonly considered as countries of immigration. 125,335 individuals have become Italian citizens over ten years (between 1995 and 2005), i.e. less than the number for 2005 alone in the United Kingdom (161,900, equal to 5.7% of the foreign population), France (150,000, or 4.6%), and little more than in Germany (117,000, or 1.6%).

Contrary to the widespread alarmism surrounding the issue, the number of Roma in Italy is amongst the lowest of all Mediterranean countries, and few are the Roma who have Italian citizenship. This means that future studies on discrimination may continue, quite legitimately, to use the proxy of citizenship or place of birth in order to evaluate the risk of discrimination faced by individuals who belong to minorities whose non-indigenous background is clearly visible, at least for some years.

The fact that differences in citizenship are, even today, an incontrovertible element found at the root of potential discriminatory behaviour is moreover demonstrated by the incorrect and pejorative use of the term “third country national” (extra-comunitario), now employed to define any individual who has clearly visible characteristics which mark them out as foreign, even if they originate from within the European Union.
The utility in the study of discrimination of those categories judged to be non objective by the French Conseil is, however, likely to increase in future years with the settlement of the immigrant community and the expansion – slow though it may be – of citizenship to the second generation progressively eliminates the impact of country of origin.

ISTAT – the Italian statistical institute – has, on the basis of international and EU recommendations, decided to refine its survey for the 2010 census year with a questionnaire in which it will be possible to trace the origin of second-generation migrants thanks to new and more detailed questions concerning the nationality and place of birth of respondents’ ancestors. This innovation, whilst showing marked progress in the awareness of the need to have statistical information on non-native communities, will not, however, involve an ethnic or racial description of these new minorities on the census.

Aside from the census, it is impossible to avoid noting that the adoption of the above-mentioned decree on the treatment of sensitive data following the request from the National Office against Racial Discrimination aimed at starting a quantitative survey on new minorities. The request by UNAR does, however, demonstrate an attitude which is very much open concerning potential anti-discrimination policy measures – such as a statistical study. The study envisaged by the Office was in fact was not only aiming to collect, qua object of the study, sensitive information such as race or ethnicity, but also to define the subjects of the study on that basis. In particular, the office aimed at initiating a census of one specific ethnic group - that of the Roma and Sinti population - which, in the end, it never started for different reasons.

Having said this, it should not be taken for granted that newer minorities may be included under the aegis of positive measures as easily as they may become the object of monitoring. The story of the official recognition of the ethnic group which is most frequently quoted reference to discrimination or monitoring necessities, the Roma themselves, is exemplary. Indeed, the

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45 cf. UNECE Conference of European Statisticians, Recommendations for the 2010 Censuses of Population and Housing, prepared in co-operation with the Statistical Office of the European Communities (Eurostat), Paris, June 2006, and Regulation 763/2008/CE concerning the census of population and housing, in particular the attachment “Variables to retain”.
47 Statistical sources generally indicated as the most reliable concerning the dynamics of migration in Italy, and related phenomenon, are collected not by a public research institute but rather by the research and study centre Idos Caritas Migrantes, an private editorial cooperative supported by the Caritas diocese in Rome, Caritas Italiana, and the Migrantes Foundnation (see Caritas/Migrantes, Immigrazione – Dossier statistico, 2007, XVII Rapporto, Roma, Idos, 2007).
“objectively” historical nature of the Roma and Sinti minority has been just as controversial for the Italian legislator as the concept of race has been for the French Conseil Constitutionnel.

Bills for the official recognition of the Roma and Sinti minorities in Italian legislation have been proposed over a number of years. Referenced in the first draft of the cited Act 482/1999 on protected historic minority languages, but scratched from its final version, the Romany language and the Roma minority have been included an extensive number of times in subsequent as yet un-adopted bills. Despite the fact that the Parliament has already legislated to define, in an ad-hoc manner, the legal position of a specific minority (the Slovene minority), the adoption of similar proposals for the Roma – in the pipelines until a few years ago- does not seem to be on the political agenda anymore. Act 482/1999 did not protect minorities or linguistic minorities per se, but rather “minorities in the territory where the language is used”, whether this be a region, a province, or a municipality. The legislative proposals cited do not refer to precise territories, in part due to the fact that a minority of Italian Roma are still nomadic, in part because the precise distribution of the Italian Roma population is unknown. It is no wonder, thus, that most of the proposals aimed at “recognising and protecting” the language also proposed the creation of a regular census of the Roma and Sinti population to be carried out by ISTAT.

IV. Ethnic Monitoring of Roma: Yet Another Legitimate Ethnic Census?

In the light of the premises built so far I would finally like to approach the case which has constituted the pretext for this excursus over ethnic monitoring in Italy. The case was linked to the adoption, in May 2008, of a Prime Ministerial Decree which declared “a state of emergency concerning the settlement of nomadic communities in the regions of Campania, Lazio and Lombardy”. The decree preceded the approval of three ordinances which delegated extraordinary emergency powers to the prefects of Napoli, Milan and Rome, and required

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49 See the preparatory acts, in which the Romani language appears next to Croatian and Slavic languages, cited in Susanna Mancini, op cit., p. 176.
51 Law no. 38 of the 23rd February 2001, “Norms protecting the Slovenian language minority in the Region of Friuli-Venezia Giulia”.
53 Only 8% of the Italian Roma population is still nomadic. See P. Arrigoni and T. Vitale, op cit., p. 185n121.
54 See article 9 of each of the three above-cited proposals.
55 Gazzetta Ufficiale no. 127 of the 31st May 2008.
... a census of those individuals, including minors, and those families present in ... authorised camps in which nomadic communities and illegal settlements are found..., through the collection of descriptive data.\textsuperscript{56}

Following these provisions the prefects of Naples and Milan decided to fingerprint the “nomads” to collect the required descriptive data. Furthermore, a “census form” used in Naples and complete with boxes for the collection of data on ethnicity and religion was brought to the attention of the press.\textsuperscript{57} These two events made an argument break out in the Italian and international media concerning the discriminatory character of an “ethnic” census in which sensitive data and fingerprints were collected. While the Italian press and organizations such as UNICEF were particularly concerned by the fact that fingerprints would also be taken from minors, most of the international observers and the Roma right organizations denounced the single-ethnic focus of the provisions, in connection with the xenophobic attacks of Ponticelli (Naples) dating from only some weeks before.\textsuperscript{58}

How to interpret such allegations in light of the precedents over ethnic monitoring discussed so far?

The most controversial aspect is that of the legitimacy of an act limited to subjects identified on the basis of their ethnicity or, rather, their residence in camps reserved for nomadic populations. As the press and a number of NGOs noted, a measure for “persons present... in nomad camps and illegal settlements” mainly applies to individuals belonging to the Roma and Sinti communities.\textsuperscript{59} The European Parliament did not express any doubts about this connotation, naming its resolution “on the census of the Roma on the basis of ethnicity” (emphasis added). Here the European MPs noted that the actions taken by the government “would clearly constitute an act of direct discrimination based on race and ethnic origin prohibited by Article 14 of the ECHR and. Furthermore, an act of discrimination between EU citizens of Roma origin and other citizens, who are not required to undergo such procedures”.

This interpretation might easily be connected to the recent jurisprudence of the European Court of Human Rights in the field of indirect discrimination against the Roma in DH vs. Czech

\textsuperscript{56} My translation of ordinances No 3676, 3677, 3678 of 30 May 2008.
Republic. IN DH the European Court of Human Rights affirmed 60

…that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (Hugh Jordan, cited above, § 154; and Hoogendijk, cited above). In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC (see paragraphs 82 and 84 above) and the definition provided by ECRI (see paragraph 60 above), such a situation may amount to “indirect discrimination”, which does not necessarily require a discriminatory intent.

In light, among other things, of this jurisprudence national courts have yet to decide on the legitimacy of the census decree and ordinances. A number of claims 61 based on Italian anti-discrimination legislation 62 has been lodged in reaction of the decree by several human right NGOs. The suits have gone so far as to request preliminary ruling of the European Court of Justice in Luxembourg to verify that the “nomad census” provision conforms to the EU Racial Equality Directive. The latter, indeed, defines indirect discrimination (Art. 2) as “an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons [ ..]”.

The court's response may lead to creative answers to this first question in those cases where Italian judges refer to ECHR or EU norms on indirect discrimination. In the first decision on these appeals, however, the judge held that the claim no longer had substance given new implementing guidelines released in July by the Minister of the Interior, which modified the way in which the census had to be carried out, outlawing the collection of racial and ethnic data and drastically limiting the fingerprinting. 63 The rejection of the first instance judge has prevented any examination of conformity with European Union law by the court of Luxembourg. 64 Moreover, the reviewed guidelines, which substantially modified the initial approach to the Roma census, received green light even after the scrutiny of the European Commission's responsible, Jaques Barrot.

The fact that the implementing guidelines were so deeply reviewed was however only marginally reported by the Italian press and never highlighted by other European media, thus

60 See in particular European Court of Human Rights, “Case Of D.H. And Others V. The Czech Republic- Application no. 57325/00”, judgement of the 13th November 2007, §184..


62 Artt. 43 and 44 of legislative decree no. 286/1998,


fostering the idea that the fingerprinting was up and running.

A second point to be analysed concerns the treatment of sensitive data gathered during the census operations in Milan and Naples which began in June of 2008. The collection of data on ethnicity and religion such as that carried out in Naples in the first month of the census (before the modification of the implementing decree), in addition to the collecting and retention of descriptive data (“extremely personal data”), has implications for the right to discretion on the part of the authorities which, obviously, were not dealt with when the provisions were first adopted. This much was revealed by the reaction of the Privacy Watchdog itself to the way in which the census was carried out, a reaction cited both in the above-mentioned resolution of the European Parliament and on the website of the watchdog itself. The watchdog declared on the 14 July 2008 that there was “no green light from the Watchdog for the files on nomads”. As for sensitive data, the u-turn of the Ministry of the Interior is in line with above-mentioned guidelines released when it was made clear that no data on race or the religion of those included in the census would be collected, and that government delegates were to designate the Italian Red Cross as the agency responsible for collecting and retaining any data gathered, including descriptive data.

As mentioned above, the Red Cross, qua private entity, is not bound by the restrictions of the law on the collection of data, nor is it obliged to register with the SISTAN, making it easier for the provisions of the law to be respected. The Code on Privacy foresees instead that non-profit organisations may even hold such data without the written consent of those affected (but with the authorisation of the watchdog) if those concerned have declared their wish to join the organisation. The fact that the Red Cross has, in the affected settlements, distributed membership forms for the health and welfare services provided by it, may be the characteristic feature of the case as far as problems of discretion are concerned.

Finally, it is useful to note that if in Italian law, as in EU law, one could invalidate a provision for an improper juridical basis, the provision adopted by the Prime Minister's Office on the 21 May could easily be declared illegitimate. The “state of emergency concerning the settlement

65 Press release of the 14th July 2008, “With reference to the news articles which continue to appear in the local news sections of certain national newspapers, concerning the files used in the census of the nomadic population which have been adopted by individual Government commissioners in the several cases, the Watchdog wishes to make it clear that it has never received, and thus, has not been able either to examine nor express an opinion on the provision”. http://www.garanteprivacy.it/garante/doc.jsp?ID=1538643
66 We cannot, in this article, analyze the regulation concerning the acquisition and retention of descriptive data as governed by the Unified Text of Public Security concerning police actions, which raises the delicate question of ethnic profiling. The use of this data by administrative authorities, is, by contrast, subject to the Privacy code, article 53, first clause, and article 54, c. 2
67 Privacy Code, art. 26, clause 4.
of nomadic communities in the regions of Campania, Lazio and Lombardy” was, in fact, decreed with reference to the law on public security (Law no 225 of the 24 February 1992): the same law used, in fact, to resolve the refuse crisis in Naples. Article 2, clause (c) of the law specifies that the state of emergency and the powers conferred by the provision may be bestowed in connection with “natural calamities, catastrophes or other events which, for their intensity and spread, must be tackled with extraordinary methods and powers” (emphasis added).

If the Italian courts which are now deciding on the suits lodged by human right NGOs and Roma right NGOs were to avoid a “politically sensitive” decision either on the discriminatory nature of the decree in its dealing with those to whom it is directed, or on the permissibility of the collection of sensitive personal data, the absence of the state of emergency as a presupposition for the adoption of the decree would be an easy solution.68

Conclusions

The debate over the collection of census data from the Roma demonstrates, without doubt, that the current patterns of migration, a political contest which is so sensitive to issues concerning foreigners and the Roma, as well as the implementation of international and community obligations, are beginning to pose the question of monitoring new minorities in Italy.

Generally speaking, it is possible to recognise in Italy a greater openness to the consideration of the ethnic factor in studies and public policy measures, both in the Constitution and in the attitude of the authorities which protect personal data. One may ask, however, whether this is due to a well-grounded conviction that “colour-conscious” measures are permissible, or whether it is instead due to the delay in reflecting upon anti-discrimination policies for non-native ethnic or racial minorities.

From what I have shown so far, if Italian judges and policy-makers were to adopt a progressive attitude, at least as far as ethnic and racial equality is concerned, they would have at their disposal a range of precedents which could be easily invoked to justify a substantive approach to equality of treatment of these new Italian minorities. In this sense, the “Italian integration model” frequently invoked by the Minister Maroni could be if not among the most advanced, at least among

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68 See the above mentioned appeal in Mantova promoted by ASGI and SUCARDROM, p. 4, in which they underline how the “simple fact of belonging (or being suspected or perceived to belong) to a ethnic group classified as “nomadic” is the only presupposition made in the measure...”, in which case it is the presence of specific ethnic minorities in itself which takes on the characteristics of an emergency.
the most race-conscious in continental Europe. The total lack of national policy measures for integration and the hazardous methods for the first monitoring initiative may raise, however, some scepticism about this collocation.

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69 “The Italian integration model is among the first and most efficient in Europe” (translation of the author), http://www.adnkronos.com/IGN/Politica/?id=3.0.2604101649