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## Human rights in Italy in the rulings of the Supreme Court, the Constitutional Court and Supranational Courts (Part I)

### Introduction

The Italian Constitution belongs to the first wave of the Constitutions which have started the process of constitutional transition and democratic consolidation after the end of World War II. It was reported at the time of its entry into force for innovation, breadth and articulation of the content of its first part, that were dedicated to the recognition and protection of human rights, and provided a good example for successive Constitutions.

If compared with the Constitutions of the second wave which occurred during the second half of the seventies (particularly Greece, Portugal, Spain) and the third wave of constitutional transitions that affected the legal systems of Central and Eastern Europe after 1989 (the Constitution of Poland, 1997, appears in this respect of peculiar importance and interest)<sup>1</sup>, the structure of the rights covered by the *formal* Constitution appears outdated and overwhelmed by the economic, social, cultural and technological progress. This (phenomenon) has been remedied by an extensive case law of the Constitutional Court and the Supreme Court of Cassation which have significantly contributed to the development

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<sup>1</sup> L. Mezzetti, *Teoria e prassi delle transizioni costituzionali e del consolidamento democratico*, Padua 2003, p. 115 et seq.; G. de Vergottini, *Le transizioni costituzionali*, Bologna 1998, p. 57 et seq.

of the *substantial* Constitution, both exploiting the potential of contents inherent in the formal Constitution and maintaining a constant dialogue with the Court of Justice of the European Union and the European Court of Human Rights.

### 1. The Italian constitutional system for the recognition and protection of human rights

The Italian system of protection of rights and liberties adheres to the multilevel scheme and is predominantly based firstly upon the core principles and constitutional dispositions contained in the Constitution of 1948: Art. 1-11 enunciate various principles pertaining in a direct or indirect way to the protection of human rights and fundamental liberties, the whole part I of the Constitution, articulated in four chapters (chapter I – civil relationships, chapter II – ethical-social relationships, chapter III – economic relationships, chapter IV – political relationships) is devoted to the recognition and the guarantees of classical *fundamental rights* (habeas corpus, inviolability of the domicile, freedom and secret of correspondence, freedom of circulation and stay, freedom of reunion, freedom of association, religious freedom, freedom of expression, a right of defence, freedom of art and science), of *social rights* (among others: a right to health, a right to education, and welfare rights), of *economic rights* (among others, the worker's rights, freedom of labour association, a right to strike, freedom of private economic initiative, property right), of *political rights* (right to vote, right to associate in political parties, right of petition, right to have access to public offices and public positions)<sup>2</sup>.

The system of recognition of rights and freedoms is completed by the individualization of incumbent duties on the citizens or on all the members of the society (among others: duty of defence of the Country, duty to contribute to public expenses, duty of fidelity to the Republic, duty to carry out public functions with discipline and honour)<sup>3</sup>. The development and the updating of such system is due to the jurisprudence of

<sup>2</sup> L. Mezzetti, *Storia dei diritti umani*, in: *Diritti e doveri*, ed. by L. Mezzetti, Turin 2013, p. 1 et seq. For English translation of the text of the Constitution of the Italian Republic of December 22, 1947, (effective January 1, 1948), cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>3</sup> F. Polacchini, *I doveri inderogabili di solidarietà*, in: *Diritti...*, p. 596 et seq.

the Constitutional Court (CC) and the Supreme Court of Cassation (SC), that have contributed in a decisive way to the integration and the development of the rights originally recognized in the text of the fundamental Charter. Such work has been developed and is carried out in a constant and profitable dialogue with the Court of Justice of the European Union and with the European Court of Human Rights.

To the constitutional level are added the recognition and the protection offered by the ordinary legislator, also through the predisposition of various *codes* (for example the code for the protection of personal data, the consumers' code), as well as the recognition of principles and rights within the Statutes of ordinary Regions. The legal status of aliens is regulated by the Constitution and by ordinary legislation.

## 2. The constitutional principles on human rights

Within the fundamental constitutional principles which represent the essential values and – to quote the Constitutional Court's words – “belong to the supreme values essence over which the Italian Constitution is founded”, are included different principles that are directly related to human rights and fundamental freedoms<sup>4</sup>. These principles are *human dignity* (the “most fundamental” principle), the *personalistic principle*, the *solidarity principle*, *equality*, the *international principle*, the principle of *jurisdictional protection*; and also the *republican principle*, the *democratic principle*, *popular sovereignty*, *separation of powers*, the *rule of law*, the *labour principle*, *autonomy and decentralization*, *protection of minorities*, the *secular principle*, and the *principle of a cultural State*<sup>5</sup>.

### 2.1. The principle or value of human dignity

Human dignity is a principle or a supreme value that the Italian Constitution does not qualify explicitly. The Constitutional foundation of the principle may be found in the combination of Art. 2 and 3 of the Consti-

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<sup>4</sup> Decision of the Constitutional Court (CC) of 29 XII 1988, No. 1146/1988, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>5</sup> L. Mezzetti, *Valori, principi, regole*, in: *Principi costituzionali*, ed. by L. Mezzetti, Turin 2011, p. 1 et seq.

tution. The Constitutional Court recognizes a connection between the value of dignity and the primacy of human beings as persons<sup>6</sup>.

In the CC decision of 29 December 1988 – where the Court was asked to decide over the constitutionality of insane asylum law – the value of human beings as persons was already arisen in our constitutional system as a principle of central importance concerning the idea of dignity<sup>7</sup>. In fact, the constitutional judges assumed that “the act of the authority for the public security” should have been taken “respectfully towards the human person” (Art. 2 and 32 of the Constitution), and that the same authority “cannot act without consideration of the disabled person, while it is stated in article 32 that the treatment of a disabled must be inspired by maximum concern”<sup>8</sup>. Furthermore, there are several decisions which refer not only to “equal social dignity” as stated in Art. 3 of the Constitution, but also to the wider concept of “equal personal dignity”. These decisions take into consideration “the primacy of human persons and the rights with which they are endowed” as a founding element of the constitutional system<sup>9</sup>. The Court recognizes people as holders of inviolable rights as they are seen as “human beings” and not because “they are participating members part of some specific political community”<sup>10</sup>. The roots of dignity have been identified by the Court to the constitutional principles included in Art. 2 and 3 of the Constitution and it has been particularly underlined in the reasons of the decision 78/2007. In that case, the constitutional judges, were asked to decide over the constitutionality of some acts regarding the penitentiary system. The judges stated that the determination of the balance between different exigencies involved by the infliction of a punishment is the legislator’s not Court’s competence. And yet they found implementation of the law intended to diversify criminal punishment on the basis of the citizenship

<sup>6</sup> C. Drigo, *La dignità umana quale valore (super)costituzionale*, in: *Principi...*, p. 177 et seq.

<sup>7</sup> Decision of the CC of 20 VI 1968, No. 74/1968, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>8</sup> *Ibidem*.

<sup>9</sup> Decisions of the CC: of 8 II 1999, No. 26/1999, <http://www.giurcost.org> (accessed: 18 I 2014); of 13 X 1999, No. 390/1999, <http://www.giurcost.org> (accessed: 18 I 2014); of 10 V 2001, No. 159/2001, <http://www.giurcost.org> (accessed: 18 I 2014); of 24 X 2002, No. 448/2002, <http://www.giurcost.org> (accessed: 18 I 2014); of 23 X 2006, No. 341/2006, <http://www.giurcost.org> (accessed: 18 I 2014); of 10 X 1987, No. 561/1987, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>10</sup> Decisions of the CC of 5 VII 2010, No. 249/2010, <http://www.giurcost.org> (accessed: 18 I 2014); of 22 III 2001, No. 105/2001, <http://www.giurcost.org> (accessed: 18 I 2014).

of illegal immigrants unconstitutional. The Court held that “the general and absolute prohibition to get the benefit of an alternative punishment rather than prison [...] is against the principles inspiring the penitentiary law which, on the basis of the constitutional principles of equal personal dignity and re-educative purpose of punishment (art. 2, 3 and 27 of the Constitution), prevents any discrimination about criminal treatment on the basis of the respect of migration law”<sup>11</sup>.

There are many other decisions that put the concept of human dignity only in relation to the principles of Art. 2 of the Constitution. For example, the decision of the Constitutional Court of 25 November 1987 (regarding the law about workplace health conditions) underlined “the absolute value of the human being as a person stated in art. 2 Constitution”<sup>12</sup>. In a later decision of 11 February 1988 the Constitutional Court held that among “the tasks the Government can never reject” there is that imposing “to take care of people’s life in order to make it reflect the universal representation of human dignity every day and under every single aspect”<sup>13</sup>. Other interesting cases where the concept of human dignity comes up just from the provisions of Art. 2 of the Constitution are also represented by the decisions of the Constitutional Court of 8 April 1991, of 9 July 1992, of 26 February 1993, of 26 April 1996<sup>14</sup>. Moreover, the reasoning of the Constitutional Court in the decision of 23 March 1988 appears to be particularly convincing<sup>15</sup>. In that case, the constitutional judges defined with clarity the importance the Constitution gives to a value of human person and, as a consequence, to human dignity. It has been stated that the constitutional system “put the human person at the top of the values’ hierarchy” (so, it cannot be restrained even for purposes of general prevention) and that “the Constitution requires all the individuals to endeavor maximally and constantly in order to respect

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<sup>11</sup> Decision of the CC of 5 III 2007, No. 78/2007, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>12</sup> Decision of the CC of 25 XI 1987, No. 479/1987, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>13</sup> Decision of the CC of 11 II 1988, No. 217/1988, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>14</sup> Decisions of the CC: of 8 IV 1991, No. 167/1991, <http://www.giurcost.org> (accessed: 18 I 2014); of 9 VII 1992, No. 368/1992, <http://www.giurcost.org> (accessed: 18 I 2014); of 26 II 1993, No. 81/1993, <http://www.giurcost.org> (accessed: 18 I 2014); of 26 VI 1996, No. 224/1996, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>15</sup> Decision of the CC of 23 III 1988, No. 364/1988, <http://www.giurcost.org> (accessed: 18 I 2014).

other persons' interests"<sup>16</sup>. So forth, "if the absolute irrelevance of the criminal law ignorance is accepted, the protection of juridical goods will prevail unconditionally in spite of the liberty and dignity of the people"<sup>17</sup>. This interpretation would entail a violation of "the whole spirit of the fundamental Charter and the essential principles which inspired it" or, in other words, "it would dismantle the fundamental warranties a democratic Government recognizes to the citizen and it would manipulate the concept of human being as a person, letting it degrade from the priority position it fills, and that it must fill, in the constitutional protected values hierarchy"<sup>18</sup>.

Many decisions about the right to health included in Art. 32 of the Constitution refer to the concept of human dignity<sup>19</sup>. There is a reference to the inviolable dignity of human persons in the decision of the Constitutional Court of 6 July 1994 regarding the "right to health treatment"<sup>20</sup>. In some cases the Constitutional Court recalled the concept of dignity in order to strengthen other constitutional values, but there are many cases where it represents an independent reference as an autonomous relevant value. In this sense the decision of the Constitutional Court of 7 February 1985 can be cited because it sets a connection between the concept of human dignity and the recognition of a right to alimony. When statutes explicitly provide for it, the provision of the duty to pay alimony is functional for the protection of essential values such as life and human dignity. That protection is due "to solidarity reasons towards members of the family community which are in a state of need"<sup>21</sup>. Another reference may be found in the decision of the Constitutional Court of 11 January 2010 where the Constitutional Court justified the central

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<sup>16</sup> *Ibidem*.

<sup>17</sup> *Ibidem*.

<sup>18</sup> *Ibidem*.

<sup>19</sup> Cf. decisions of the CC: of 7 II 2011, No. 40/2011, <http://www.giurcost.org> (accessed: 18 I 2014); of 21 II 2011, No. 61/2011, <http://www.giurcost.org> (accessed: 18 I 2014); of 7 V 2008, No. 148/2008, <http://www.giurcost.org> (accessed: 18 I 2014); of 28 XI 2005, No. 432/2005, <http://www.giurcost.org> (accessed: 18 I 2014); of 13 XI 2000, No. 509/2000, <http://www.giurcost.org> (accessed: 18 I 2014); of 7 VII 1999, No. 309/1999, <http://www.giurcost.org> (accessed: 18 I 2014); of 7 VII 1998, No. 267/1998, <http://www.giurcost.org> (accessed: 18 I 2014); of 5 VII 2001, No. 252/2001 <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>20</sup> Decision of the CC of 6 VII 1994, No. 304/1994, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>21</sup> Decision of the CC of 7 II 1985, No. 37/1985, <http://www.giurcost.org> (accessed: 18 I 2014).

Government's invasion of regional competences when it is necessary "to guarantee effective protection to subjects which are in a state of need and are endowed with a fundamental right so connected with the protection of the unrestrainable core of dignity and of human person that it must be respected all over the Nation in a uniform, appropriate and timely way by a coherent regulation for that purpose"<sup>22</sup>. Moreover, another reference is found in the decision of the Constitutional Court of 10 December 1987 where the judges recognized a constitutional protection of a new right (the right to sexual liberty) without referring to another constitutional right or recalling the general Art. 2 of the Constitution as an open clause, but reasoning on the base of the human dignity concept. In fact, it has been held that "the sexual liberty" represents "a form of expression of the human person" and that "the right to have it at one's disposal is, without any doubt, an absolute subjective right which must be included among the subjective positions directly protected by the Constitution as an inviolable right of the human person"<sup>23</sup>. The Constitutional Court recalled often the notion of dignity as related to the concepts of freedom and equality. In this sense there are many decisions of the Court where the judges made an attempt to build such a relationship among the three different values. So far, freedoms come up to be thought as having a correlation with the human dignity through a "conscious passage among the dignity, the rights and the freedoms, where the first one will represent the foundation for many of the second ones, and these, in their complex, will let freedoms to be effective for each man, demonstrating the natural inclination of dignity towards freedom"<sup>24</sup>. In this way the value of dignity, once it earned more importance in its unchanging consistency, can be seen as an essential element (founding or strengthening) for most of the rights whose protection will guarantee the freedom of every man. These include, for example, the Constitutional Court's decision of 30 September 1996 granting the freedom of religion and the Constitutional Court's decision of 24 March 1993 concerning the right of information<sup>25</sup>. The analysis of the connection between dignity and equality seems to be much more

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<sup>22</sup> Decision of the CC of 11 I 2010, No. 10/2010 (recalled by the later decision of the CC of 21 II 2011, No. 61/2011, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>23</sup> Decision of the CC of 10 XII 1987, No. 561/1987, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>24</sup> A. Pirozzoli, *Il valore costituzionale della dignità*, Rome 2007.

<sup>25</sup> Decisions of the CC: of 30 IX 1996, No. 334/1996, <http://www.giurcost.org> (accessed: 18 I 2014); of 24 III 1993, No. 112/1993, <http://www.giurcost.org> (accessed: 18 I 2014).

complicated under a taxonomic point of view. It is noteworthy that the Court, in this context, uses two expressions which are similar in form but different in content. These two expressions are “equal dignity” and “equal social dignity”<sup>26</sup>.

“Equal dignity”, when it is not used when making a general reference to a human person, can frequently be found associated with the proper meanings of equality, especially when it is used in reference to subjects belonging to specific categories (e.g. members of the parliament – CC 417/1999 – or taxpayers – CC 287/2000 – or believers of a recognized church – CC 329/1997)<sup>27</sup>. However, there is no perfect coincidence between equality and dignity for, at least, two reasons. Firstly, from the linguistic point of view, the junction between the word “equality” and the expression “equal dignity” evokes a relationship of coordination and not of coincidence because, otherwise, the expression would be redundant. Secondly, from the logical point of view, if the Court sees the concept of equal dignity as perfectly coincident with the concept of equality, there would be no reason to use the former expression<sup>28</sup>.

The expression “equal social dignity” is based on an external element which consists of the perception of others’ opinions and on the actual consideration we have of that community. Even in this context there are many of examples in constitutional jurisprudence, mostly of positive actions<sup>29</sup> or of substantive equality<sup>30</sup>. Beyond the cases where the notion of dignity emerges from the constitutional frame as an autonomous value which sometimes amounts to a real principle, there are decisions in which the notion of dignity comes out influencing positive law. In fact, many Constitutional Court’s decisions have seen the connection between dignity and liberty under a limitative prospective so that the former is meant as a real limitation of the latter. The concept of dignity becomes a parameter for balancing the application of constitutional rights by the

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<sup>26</sup> A. Pirozzoli, *op. cit.*, p. 17.

<sup>27</sup> Decisions of the CC of 27 X 1999, No. 417/1999, <http://www.giurcost.org> (accessed: 18 I 2014); of 6 VII 2000, No. 287/2000; <http://www.giurcost.org> (accessed: 18 I 2014); of 10 XI 1997, No. 329/1997, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>28</sup> A. Pirozzoli, *op. cit.*, p. 23.

<sup>29</sup> Decision of the CC of 24 III 1993, No. 109/1993, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>30</sup> Decisions of the CC: of 28 I 1991, No. 48/1991, <http://www.giurcost.org> (accessed: 18 I 2014); of 22 I 1996, No. 15/1996, <http://www.giurcost.org> (accessed: 18 I 2014); of 6 IX 1995, No. 422/1995, <http://www.giurcost.org> (accessed: 18 I 2014) and of 20 XI 2002, No. 494/2002, <http://www.giurcost.org> (accessed: 18 I 2014).

legislator or by the constitutional judge. In this sense, the value of dignity works as a limitation for the Government action that will not be free to cause “an infringement or a deterioration of the person’s dignity or honor so severe to be considered like a subdual to someone else power, and, so far, constituting a violation of the habeas corpus principle”<sup>31</sup>.

Moreover, there are several decisions concerning the connection between the freedom of economic initiative and the value of dignity intended, again, as a general limitation. For example, it is useful to remind the decision of the Constitutional Court of 23 June 2010 concerning the freedom of economic initiative and market competition<sup>32</sup>. In that case (Art. 41 of the Constitution establishes that “the private economic initiative cannot be exerted contrary to the social utility or in a way that jeopardizes the security, the freedom and the human dignity”<sup>33</sup>) the Court affirmed that “every economic activity, public or private, can be directed and coordinated in order to implement social purposes”<sup>34</sup>. So far, it’s not surprising the Court reached the conclusion that “the constitutional provision allows regulations which can guarantee the protection of interests having nothing to do with the protection of a competitive market”<sup>35</sup>.

Two other decisions of the Constitutional Court of 5 April 1974 and of 29 January 1970 indicated a different but coherent prospective<sup>36</sup>. In those cases the constitutional judges consented a limitation of the economic initiative freedom in order to protect the value of human dignity. The Court held that “human activities may be carried on in many different ways and a regulation intended to protect dignity and human personality cannot rule human activities without taking into consideration the different way of living”<sup>37</sup>.

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<sup>31</sup> Decision of the CC of 20 VI 1964, No. 68/1964, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>32</sup> Decision of the CC of 23 VI 2010, No. 270/2010, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>33</sup> Constitution of the Republic of Italy of 1 I 1948 (Consolidated text, cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>34</sup> Decision of the CC of 23 VI 2010, No. 270/2010, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>35</sup> *Ibidem*.

<sup>36</sup> Decisions of the CC of 5 IV 1974, No. 111/1974, <http://www.giurcost.org> (accessed: 18 I 2014) and of 29 I 1970, No. 12/1970, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>37</sup> Decisions of the CC: of 21 VI 2005, No. 345/2005, <http://www.giurcost.org> (accessed: 18 I 2014); of 7 IV 2005, No. 161/2005, <http://www.giurcost.org> (accessed: 18 I 2014); of 9 X 2000, No. 419/2000, <http://www.giurcost.org> (accessed: 18 I 2014); of 6 IX 1995, No. 427/1995, <http://www.giurcost.org> (accessed: 18 I 2014); of 25 XI 1987, No. 479/1987,

Concluding the analysis of the connections between dignity and fundamental liberties, an influential doctrine observed that the constitutional jurisprudence has delineated the concept of human dignity apt to work as a “border aim for the constitutionally protected freedoms, just because it represents the only aim they always must respect and follow”<sup>38</sup>. Under this prospective, “human dignity ends up to constitute a **super constitutional** value compared with other liberties protected (art. 13 and subsequent) and with inviolable human rights”<sup>39</sup>. It has to be underlined that “the expression just used, in the context of constitutional values hierarchy, has the function of substantial «completing rule» or founding and abstracting value/principle at the base of the teleologically personalistic nature of our law system”<sup>40</sup>.

## 2.2. The personalistic principle; the solidarity principle

The first part of Art. 2 of the Constitution includes the following provision: “the Republic recognizes and guarantees the inviolable human rights individually and towards social communities where the individuals realize their personality”<sup>41</sup>. With such a provision the drafters of the Constitution acknowledged that the fundamental human rights had a metalegal foundation and were logically antecedent. This acknowledgement assumed a priority of the value which entails “the full development of human person” as the main aim of the social organization (personalistic principle)<sup>42</sup>.

The personalistic principle postulates the existence of some range of an individual’s autonomy which cannot be infringed by government powers, even if the social majority thinks that some public purposes or specific goals need to be protected. This principle represents an expression of a peculiar conception of human dignity intended as, first of all, an invio-

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<http://www.giurcost.org> (accessed: 18 I 2014); of 28 VI 1963, No. 125/1963, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>38</sup> G. Silvestri, *Dal potere ai principi*, Rome 2009, p. 115.

<sup>39</sup> *Ibidem*, p. 116.

<sup>40</sup> A. Ruggeri, A. Spadaro, *Dignità dell'uomo e giurisprudenza costituzionale*, in: *Libertà e giurisprudenza costituzionale*, ed. by V. Angiolini, Turin 1992, p. 228 et seq.

<sup>41</sup> Constitution of the Italian Republic of December 22, 1947, (effective January 1, 1948), cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>42</sup> A. Vendaschi, *Il principio personalista*, in: *Principi...*, p. 274 et seq.

lable right to physical and moral integrity of the person. The same right is protected by other constitutional provisions involving more specific aspects (under this point of view, it is interesting because Art. 13 para. 3 of the Constitution provides that “every physical or moral violence on people, however restricted in their liberty, must be punished”<sup>43</sup> and, so providing, it recognizes and confirms the inviolability of the essential/minimal core of the human person idea which, being a value by itself, cannot be used just to achieve different social purposes). Other constitutional provisions regarding this point of view are Art. 3 para. 1, Art. 27 para. 3–4, and Art. 32 para. 2 of the Constitution: “the law can **never** violate the limitation imposed by the respect of the human person”<sup>44</sup>. The protection of human dignity, as a value included in the personalistic principle, does not only impose on (for) the Government the duty of self-restraint from unduly interference in the range of individual autonomy (a negative duty), it also involves the relative duty to protect that range of individual autonomy from unduly interferences of other private subjects (a positive duty). This conclusion derives from two factors. Firstly, it comes from the natural “horizontal efficacy” of the human dignity clause and of some fundamental liberties that carry out its significance. Both the Founders and the international declarations of human rights accepted this idea in different ways<sup>45</sup>. Secondly, the above illustrated corollary comes from the development beyond the static concept of fundamental freedoms on the basis that one of the Republic’s main tasks is to modify or to remove the economic or social conditions which hinder the full development of the human person (Art. 3 para. 2 of the Constitution).

The personalistic principle is strictly connected with the pluralist principle because the concept of a human person does not only include the individual profile as characterized by decisional and moral autonomy and by the capacity to be endowed with “fundamental rights”. The human person is also seen as a centre of multiple relationships that give shape to autonomous organizations (“intermediate bodies”) endowed with some rights. The provision included in Art. 2 of the Constitution,

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<sup>43</sup> Constitution of the Italian Republic of December 22, 1947, (effective January 1, 1948), cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>44</sup> Constitution of the Italian Republic of December 22, 1947, (effective January 1, 1948), cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>45</sup> Decision of the CC of 24 VI 1970, No. 122/1970, <http://www.giurcost.org> (accessed: 18 I 2014).

in fact, recognizes the inviolable human rights not only to individuals but also to persons gathered in “social formations where they can realize their personality”<sup>46</sup>. The social formations the Constitution refers to are the organizations ruled by law and, in a manner more or less detailed, by constitutional provisions, as much as free aggregations born in the exertion of the right to assembly (Art. 18 of the Constitution). For the purpose of this analysis, every real human person is treated as a centre of complex relationships that can find realization through different unlimited fundamental expressive functions. The primary value recognized to human persons, strengthens the opinion under which the rights that are explicitly stated in the Constitution (Art. 13, 14, 15, 24 of the Constitution) or that are granted to all the people without distinction (Art. 19, 21, 22, 25 of the Constitution) are not the only ones considered inviolable, because also some liberties expressly reserved for citizens must be also recognized as inviolable. This reasoning brings us to the conclusion that beyond what is explicitly written in the Constitution, all the people – and not only citizens – should have been endowed with all the guarantees that are necessary for the exertion of fundamental rights. In this sense the guarantee of formal equality (Art. 3 para. 1 of the Constitution) is a peculiar example<sup>47</sup>.

The tendency to extend the range of application of constitutional provisions that guarantee the endowment with fundamental liberties derives from a peculiar technique of interpreting the Constitution intended to emphasize the unchanging profile that characterizes that kind of law provisions (*value oriented interpretation* or *rationale continuum interpretation*). So far, the opinion to share has been that under which Art. 2 of the Constitution would have the function of protecting and guaranteeing all the “freedom claims” that, even if not yet codified in constitutional provisions, are already defined by social life. This approach is frequently experienced in the international practice of recognizing new liberties<sup>48</sup>. Therefore the provision of Art. 2 of the Constitution represents an “open formula” because it constitutes the framework for constitutional codi-

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<sup>46</sup> Constitution of the Italian Republic of December 22, 1947, (effective January 1, 1948), cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>47</sup> Decisions of the CC: of 4 I 1977, No. 46/1977, <http://www.giurcost.org> (accessed: 18 I 2014); of 15 VI 1979, No. 54/1979, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>48</sup> Decisions of the CC: of 24 III 1988, No. 404/1988, <http://www.giurcost.org> (accessed: 18 I 2014); of 13 X 1999, No. 388/1999, <http://www.giurcost.org> (accessed: 18 I 2014); of 11 IV 2002, No. 135/2002, <http://www.giurcost.org> (accessed: 18 I 2014).

fied rights, for “new rights” – added because of the jurisprudence or the legislator’s intervention – and for incoming rights. This opinion has generally prevailed and it brought to the recognition of the *right to sexual liberty*<sup>49</sup>, the *right to a dwelling*<sup>50</sup>, the *right to privacy*<sup>51</sup>, and also the *rights to decency, to honor, to respectability, to intimacy and to reputation*<sup>52</sup>, to a *healthy environment*<sup>53</sup>, the *rights to personal identity*<sup>54</sup>, to *life*<sup>55</sup>, to *sexual identity*<sup>56</sup>, the *right to leave the Country*<sup>57</sup>, the *right of the minor to take part in a family*<sup>58</sup> and the *right of the disabled to be accompanied*<sup>59</sup>. For the same reasoning it seems possible to consider as “fundamental” some other rights like abortion, free sexual orientation, divorce and, generally, all new claims of liberty that are already an essential part of public opinion, especially when they are endorsed by international or national consent<sup>60</sup>.

There exists a tight connection between the rights and compulsory duties of a political, economic and social solidarity which the Republic requires to be fulfilled<sup>61</sup>. From this, an idea derives that individual rights

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<sup>49</sup> Decision of the CC of 10 XII 1987, No. 561/1987, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>50</sup> Decisions of the CC: of 24 III 1988, No. 404/1988, <http://www.giurcost.org> (accessed: 18 I 2014); of 16 V 1989, No. 252/1989, <http://www.giurcost.org> (accessed: 18 I 2014); of 6 XI 1991, No. 419/1991, <http://www.giurcost.org> (accessed: 18 I 2014); and of 24 III 1999, No. 119/1999, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>51</sup> Decision of the CC of 7 III 1990, No. 139/1990, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>52</sup> Decision of the CC of 5 IV 1973, No. 38/1973, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>53</sup> Decisions of the CC: of 22 V 1987, No. 210/1987, <http://www.giurcost.org> (accessed: 18 I 2014), of 17 XII 1987, No. 641/1987, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>54</sup> Decision of the CC of 24 I 1994, No. 13/1994, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>55</sup> Decision of the CC of 25 VI 1996, No. 223/1996, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>56</sup> Decision of the CC of 6 V 1985, No. 161/1985, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>57</sup> Decision of the CC of 4 VI 1992, No. 278/1992, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>58</sup> Decision of the CC of 10 II 1988, No. 183/1988, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>59</sup> Decision of the CC of 14 VI 1989, No. 346/1989, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>60</sup> L. Mezzetti, *I nuovi diritti*, in: *Diritto costituzionale. Casebook*, ed. by L. Mezzetti, Rimini 2013, p. 489 et seq.

<sup>61</sup> Article 2, paragraph 2 of the Constitution. Cf. decision of the CC of 24 III 1983, No. 77/1983, <http://www.giurcost.org> (accessed: 18 I 2014).

are not unlimited because the legislator can reasonably restrict them for purposes of general interest<sup>62</sup>, without violating the human dignity, as a derivation of the principle of human solidarity/responsibility. On the basis of that principle, individual and collective liberties cannot be expected to have been granted by the Government if there is no will to take part in the realization of others, in the development of social life<sup>63</sup>, in the responsible preservation of human species, and in the recognition of the dignity of the future existence of humanity<sup>64</sup>. *Duties* are usually divided in *two categories*. In the first category of duties prevail the *political profile* (faithfulness to the Republic (Art. 54 of the Constitution) and election participation (Art. 48 of the Constitution)). In the second category of duties prevail the *social and economic profile* (the duty to defend the Country (Art. 52 of the Constitution), the right-duty to work (Art. 4 of the Constitution) and the duty to pay taxes (Art. 53 of the Constitution)).

### 2.3. The equality principle

The principle of formal equality referred to in Art. 3 para. 1 of the Constitution provides that “all citizens [...] are equal before law without distinction of sex, race, language, religion, political opinions, personal and social conditions”<sup>65</sup>. The constitutional doctrine agrees on the idea that the concept of formal equality defines, first of all, the strength and the general efficacy of law<sup>66</sup>, because it implies that law must apply to members of the Government as much as to the governed people (Art. 97 and 101 of the Constitution). The provisions of Art. 3 para. 1 of the Constitution also imply a presumed prohibition of individual or personal legislation<sup>67</sup>.

<sup>62</sup> Decisions of the CC: of 4 I 1977, No. 29/1977, <http://www.giurcost.org> (accessed: 18 I 2014); of 15 VII 1983, No. 252/1983, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>63</sup> Decision of the CC of 17 II 1992, No. 75/1992, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>64</sup> Cf. Decision of the CC of 10 VII 1996, No. 259/1996, where the Court held that the use of water intended as a limited resource must take into consideration “solidarity as a parameter and the fundamental right to preserve human species and future generations”, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>65</sup> F. Polacchini, *Il principio di eguaglianza*, in: *Principi...*, p. 251 et seq.

<sup>66</sup> Decision of the CC of 5 VII 2004, No. 206/2004, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>67</sup> Decisions of the CC: of 6 XII 1960, No. 70/1960, <http://www.giurcost.org> (accessed: 18 I 2014); of 2 V 1978, No. 134/1978, <http://www.giurcost.org> (accessed: 18 I 2014); of 23 X 2000, No. 461/2000, <http://www.giurcost.org> (accessed: 18 I 2014).

Notwithstanding the “hard core” of the provision, the principle of formal equality does not entail any absolute prohibition to make a distinction between different subjects categories, because “a system which does not differentiate between one circumstance from another one [...] is not even thinkable, also for the reason that it would end up not to put any rule at all”<sup>68</sup>. The constitutional jurisprudence has shared the opinion under which the formal equality is not constituted simply by the prohibitions mentioned in the provisions of Art. 3 para. 1 of the Constitution, and it must be considered as included among the highest general principles pervading the whole system of law. The same jurisprudence observed that from the aforesaid constitutional principle derives “a general canon of coherence for the system of law”<sup>69</sup> which can be modulated on the basis of the different law realities. Then, the principle of formal equality that allowed the development of a general principle of non-discrimination among the different egalitarian articulations.. This general principle came out because no other classification criterion was explicitly included in Art. 3 para. 1 of the Constitution and “the principle of equality would have been, however, violated if the law, without a reasonable justification, applied a different treatment to citizens that were in the same situation”<sup>70</sup>. This approach does not require that a correct application of the equality principle results in an absolute obligation to adopt law differentiations, but it demands the adoption of reasonable differentiation criteria. So far, a *principle of reasonableness* inspires this interpretation and it bounds the legislator to treat in the same way what is objectively the same and to treat in a different manner what is objectively different, respecting the characteristics and the diversities<sup>71</sup>.

The appreciation of the reasonableness of an act which distinguishes similar contexts, or assimilates different circumstances, needs an assessment of the general purposes of the law, or of the specific aims which inspired the act. After that assessment, the coherence and the finalization of the provision must be verified in connection with the assessed

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<sup>68</sup> Decision of the CC of 23 XI 1961, No. 64/1961, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>69</sup> Decisions of the CC: of 29 XI 1982, No. 204/1982, <http://www.giurcost.org> (accessed: 18 I 2014); of 17 III 1966, No. 25/1966, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>70</sup> Decision of the CC of 16 III 1960, No. 15/1960, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>71</sup> Decisions of the CC: of 24 III 1961, No. 21/1961, <http://www.giurcost.org> (accessed: 18 I 2014); of 25 I 1980, No. 5/1980, <http://www.giurcost.org> (accessed: 18 I 2014); A. Morrone, *Il custode della ragionevolezza*, Milan 2002, p. 107 et seq.

legitimate purpose that has to be followed<sup>72</sup>. The correct application of the principle of reasonableness ends up to influence the content of the law as long as it requires to “limit unjustified derogations and arbitrary exceptions within the borders of established rules or of general principles of law”<sup>73</sup>. It should be noted that the provisions of Art. 1 of the Constitution include an explicit *antidiscrimination clause* which prevents making any difference on the basis of factors expressly indicated (i.e. sex, race, language, religion, political opinion, social and personal conditions). This clause hides a presumption of unconstitutionality for law treatments based on this “suspected factors”<sup>74</sup>. However, this presumption is characterized by a relative nature and cannot be assumed as a presumption *iuris et de jure*. If it were otherwise, the opportunity (allowed by Art. 3 para. 2 of the Constitution) to legislate in favor of vulnerable categories would entail a judgment of unconstitutionality. Eventually, the mere suspected distinction is not enough to jeopardize equality because it needs to be unreasonable and unjustified. This approach, based on a rule of reason, allows distinctions apparently prohibited, although it also tends to extend the prohibition out of a reasonableness judgment. Beyond the national boundaries, there is a tendency to interpret equality (especially the antidiscrimination clauses) in the light of a human dignity value. It seems reasonable and, in some way, plausible that the Italian constitutional jurisprudence assessed the lack of justification and, consequently, the unconstitutionality of law classifications which, even if not involving suspected factors, have the unique purpose of hindering an unpopular minority, thus violating the right to human dignity.

The provisions of Art. 3 para. 2 of the Constitution state also the *principle of substantive equality* for which “it’s a Republic task to remove economic and social obstacles that, limiting in fact the liberty and the equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic

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<sup>72</sup> Decisions of the CC: of 14 VI 1973, No. 91/1973, <http://www.giurcost.org> (accessed: 18 I 2014); of 25 III 1996, No. 89/1996, <http://www.giurcost.org> (accessed: 18 I 2014); of 8 VII 2004, No. 223/2004, <http://www.giurcost.org> (accessed: 18 I 2014); of 12 I 2005, No. 27/2005, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>73</sup> Decisions of the CC: of 30 IX 1983, No. 314/1983, <http://www.giurcost.org> (accessed: 18 I 2014); of 22 I 1957, No. 28/1957, <http://www.giurcost.org> (accessed: 18 I 2014); of 9 I 1975, No. 9/1975, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>74</sup> Decision of the CC of 29 IX 1958, No. 56/1958, <http://www.giurcost.org> (accessed: 18 I 2014).

and social organization of the Country”<sup>75</sup>. This principle can be seen as a guarantee for the effective application of formal equality because formal equality cannot prevent the substantial inequality due to social and economic difficulties. So far, the formal equality provides an universal endowment of fundamental rights, while the substantial equality provides the equal opportunity to exert these rights in fact, charging the Republic with the duty to remove all social and economic distortions. The aforesaid article promotes full development of individuals’ personality on the basis that there can be no effective human dignity without the universal guarantee of the essential capacity to exert fundamental rights. In this sense, Art. 3 para. 2 of the Constitution justifies the pieces of legislation “apparently discriminating towards categories or groups of citizens but that, eventually, recover the condition of equality for these categories or groups”<sup>76</sup>. This kind of legislation is generally called “positive actions” and is intended to promote, for example, through a combination of incentives, the same work conditions for a man and a woman<sup>77</sup>. On the other hand, Art. 3 para. 2 of the Constitution does not allow/permit (makes it impossible?) to justify the legislation that limits the opportunity for both sexes to be represented in electoral lists beyond a specific proportion (“pink share”). In that case, the purpose of promoting women’s access to elective positions was not enough to save the law because it infringed Art. 51 of the Constitution, which establishes that “all citizens of both sexes can have access to public offices and to elective positions with equal conditions, respecting the requirements imposed by law”<sup>78</sup>. Sex cannot be intended as a requirement of eligibility because it is not a prejudicial and necessary condition to be elected and so it does not constitute an essential factor to exert the political passive right<sup>79</sup>. Regions with special statutes tried to avoid the effects of the Court

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<sup>75</sup> Constitution of the Italian Republic of December 22, 1947, (effective January 1, 1948), cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>76</sup> Decision of the CC of 11 XII 1962, No. 106/1962, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>77</sup> Decision of the CC of 24 III 1993, No. 109/1993, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>78</sup> Constitution of the Italian Republic of December 22, 1947, (effective January 1, 1948), cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>79</sup> Decision of the CC of 6 IX 1995, No. 422/1995, <http://www.giurcost.org> (accessed: 18 I 2014).

decision implementing ad hoc “pink amendments” (e.g. Art. 15 St. Valle d’Aosta has been approved as constitutional<sup>80</sup> for the occurrence of the constitutional reform<sup>81</sup>). The constitutional reform act No. 1/2003 represented an attempt of the Republic to implement, new measures for equal opportunity between men and women to have access to public offices and elective positions (new Art. 51 of the Constitution). A relevant application of this reform is represented by the provision of art. 3 (act No. 90/2004) where it is provided that, for European Parliament elections, “both sexes must not be represented in electoral lists in a proportion that is superior to the two thirds of the number of candidates”<sup>82</sup>.

### 3. New Rights

The birth of a new rights’ category represents a *third generation* of rights that is distinguished from the *first generation*, civil and political rights – *negative liberties* – and from the *second generation*, social and economic rights – *positive liberties*<sup>83</sup>. The new generation of rights derives from the protection progressively accorded by the legislator or by the jurisprudence (even in European, or in other international contexts) to particular situations deserving formal consideration for the public opinion and previously not considered. These rights are “new”, in other words, because they are not explicitly included in the Constitutional Charter, they derive their importance from the people’s experience and consideration. They are characterized as heterogeneous because they can be reserved for individuals or for social groups. The extension of these rights, along with the reasoning that affords full constitutional protection, changes on the basis of the approach thought to be followed as well. In particular, it is of crucial importance to the interpretation given to Art. 2 of the Constitution as a “close or open formula”. In the first instance, in fact,

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<sup>80</sup> Decision of the CC of 10 II 2003, No. 49/2003, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>81</sup> Constitution reform act No. 2/2001, <http://www.parlamento.it/parlam/leggi/01002lc.htm> and the new art. 117, par. 7, of the Constitution of the Italian Republic of December 22, 1947, (effective January 1, 1948), cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>82</sup> Constitution of the Italian Republic of December 22, 1947, (effective January 1, 1948), cf. [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed: 18 I 2014).

<sup>83</sup> G.F. Ferrari, *Le libertà. Profili comparatistici*, Turin 2011, p. 1 et seq.

the new rights can be interpreted as a development of the “implicit potentialities” encompassed within the constitutional provision that can have place through an extensive and evolutive interpretation. Instead, in the second instance, Art. 2 of the Constitution can already guarantee constitutional protection of the new rights as long as they are generally advocated by the people and the legislator, and by the jurisprudence or international declarations which recognize them. The Constitutional Court has adopted the latter approach and, by this way, it has afforded constitutional protection of some new personality rights among which there are the *right to life*<sup>84</sup>, the *right of the minor to take part in a family*<sup>85</sup>, the *right to privacy*<sup>86</sup>, the *right to social liberty*<sup>87</sup>. The application of this approach started with the decision of the Constitutional Court of 10 December 1987 where the Court stated that “the *right to sexual liberty* is, without any doubt, an absolute right of the individuals because it represents an essential way to express the human person. This must be included among the subjective positions directly protected by the Constitution and, so far, it must be considered an inviolable right of the human person under the guarantee of Art. 2 of the Constitution”<sup>88</sup>.

Furthermore, an influential doctrine defines some “new rights” as being a consequence of the constitutional jurisprudence analysis. First of all, the *right to personal identity* or “the right to be yourself” is intended as the respect of the subject representation as participating in the social life. This right ends up as the interest in the shared experiences and ideas, the ideological, religious, moral and social opinions, that distinguish and characterize individuals. The Constitutional Court’s decision of the Constitutional Court of 24 January 1994 recognized this right as “unforsaking asset of the human person” under the protection of Art. 2 of the Constitution<sup>89</sup>.

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<sup>84</sup> Decision of the CC of 25 VI 1996, No. 223/1996, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>85</sup> Decision of the CC of 10 II 1988, No. 183/1988, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>86</sup> Decision of the CC of 18 I 1990, No. 39/1990, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>87</sup> Decision of the CC of 9 III 1998, No. 50/1998, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>88</sup> Decision of the CC of 10 XII 1987, No. 561/1987, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>89</sup> Decision of the CC of 24 I 1994, No. 13/1994, <http://www.giurcost.org> (accessed: 18 I 2014). Cf. decisions of the CC: of 18 VII 1996, No. 297/1996, <http://www.giurcost.org>

Moreover, the *right to sexual identity*, the *right to honor*, the *right to a dwelling*, the *right to have access to administrative documents*, the *right to procreate*<sup>90</sup>, the *unborn rights to life and health*, the *right to peace and to the preservation of the universal heritage of humanity*, the *right to social, economic, cultural and political development* are some of the new rights the doctrine has defined.

It is worth spending some time to comment on the recent doctrinal debate around the definition of a new right like the *right to security*. The debate increased after the recent law reforms enacted as a consequence of the increase of international terrorism. The general interest protected by this right is the prevention of any behavior that can put in jeopardy the security of the people, or that can ingenerate a feeling of “insecurity”. In this sense, the last law reforms, also known as “2008/09 Security Package” (including act No. 125/2008 converting the decree No. 92/2008 “Urgent measures about public security”, act No. 38/2009 converting decree No. 11/2009 “Urgent measures about public security, sexual violence and persecution behaviors”, act No. 94/2009 “Provisions about public security”)<sup>91</sup> must be taken into consideration.

### 3.1. The right to a healthy environment

The right to a healthy place of living is not explicitly provided for in the Constitution and it has been developed by the constitutional jurisprudence along with the doctrine. The constitutional law reform of Title V, second part, introduced the concepts of “environment” and “ecosystem” in the Italian Constitutional Charter through new Art. 117<sup>92</sup>. Before this law reform, the jurisprudence of the Constitutional and of the Supreme Court recognized a specific *right to the environment protection* reasoning on the base of Art. 2, 9 (regarding the landscapes protection), 32, 41 and 42

(accessed: 18 I 2014); of 7 V 2001, No. 120/2001, <http://www.giurcost.org> (accessed: 18 I 2014); of 20 XI 2002, No. 494/2002, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>90</sup> Decisions of the CC of 1 IV 2009, No. 151/2009, <http://www.giurcost.org> (accessed: 18 I 2014); of 8 III 2010, No. 97/2010, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>91</sup> Act of No. 125/2008, <http://www.camera.it/parlam/leggi/081251.htm> (accessed: 19 I 2014); decree No. 92/2008, <http://www.camera.it/parlam/leggi/decreti/08092d.htm> (accessed: 19 I 2014); act No. 38/2009, <http://www.camera.it/parlam/leggi/09038l.htm> (accessed: 19 I 2014); decree No. 11/2009, <http://www.camera.it/parlam/leggi/decreti/09011d.htm> (accessed: 19 I 2014); act No. 94/2009, <http://www.parlamento.it/parlam/leggi/09094l.htm> (accessed: 19 I 2014).

<sup>92</sup> Constitution reform act No. 3/2001, <http://www.parlamento.it/parlam/leggi/01003lc.htm>.

of the Constitution. Some decisions of the Supreme Court must be mentioned like, for example, the decision of the Supreme Court of 9 March 1979<sup>93</sup> and, particularly, the decision of the Supreme Court of 6 October 1979<sup>94</sup>, stating that the right to health includes a *right to a healthy environment*. The Constitutional Court decisions of 12 July 1979, 22 February 1989, 4 July 1989<sup>95</sup> took into consideration the right to a healthy environment as given.

In the constitutional jurisprudence evolution, two decisions dating 1987 represented the cornerstone steps. One confirmed the legitimacy of the powers vested in the Minister of the Environment for coordinating and directing purposes regarding decisions about the impact on the environment. The Constitutional Court held that the extension of such powers is justified on the basis of the European obligations the Republic bears, and of the necessity to safeguard national interests and primary constitutional values like environment and health (Art. 9, 32 of the Constitution). This development entails a new conception of the environment safeguard as a fundamental right of the people and as a general interest of the community<sup>96</sup>.

In the second decision<sup>97</sup>, the Court recognized the environment as “unique immaterial good” and as “primary and absolute value” recalling past decisions<sup>98</sup> where the claim under Art. 2043 of the civil code was admitted in front of ordinary judges in order to recover damages for the violation of the aforesaid rights. The later evolution of the Court decisions, instead, qualified the environment just as a *constitutional value*, rejecting the prospective of environment protection as a subjective claim and reconnecting it with other constitutional values<sup>99</sup>. However, since

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<sup>93</sup> Decision of the Supreme Court (SC) of 9 III 1979, No. 1463/1979, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>94</sup> Decision of the SC of 6 X 1979, No. 5172/1979, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>95</sup> Decisions of the CC: of 12 VII 1979, No. 88/1979, <http://www.giurcost.org> (accessed: 18 I 2014); of 22 II 1989, No. 101/1989, <http://www.giurcost.org> (accessed: 18 I 2014); of 4 VII 1989, No. 391/1989, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>96</sup> Decision of the CC of 22 V 1987, No. 210/1987, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>97</sup> Decision of the CC of 17 XII 1987, No. 641/1987, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>98</sup> Decisions of the CC: of 10 VII 1974, No. 247/1974, <http://www.giurcost.org> (accessed: 18 I 2014); of 30 VI 1986, No. 184/1986, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>99</sup> Decision of the CC of 10 VII 2002, No. 407/2002, <http://www.giurcost.org> (accessed: 18 I 2014).

2007, this interpretation has been gradually rejected by the constitutional judges, and recently they have qualified environment as a technical matter specifically regarding new Art. 117 of the Constitution.

### 3.2. The right to privacy

The right to privacy is not explicitly provided in the Constitution, but it is constitutionally founded on the liberty of domicile included in Art. 14 of the Constitution and on the liberty and secrecy of every form of communication included in Art. 15 of the Constitution<sup>100</sup>.

This right has been recently reformed by the parliament. Firstly, act No. 675/1996 (Privacy Act) established the *Authority for personal data protection*, implementing the Strasburg Convention of 1981 and the European directive No. 95/46<sup>101</sup>. More recently, the legislative decree No. 196/2003 (Personal Data Protection Code) abrogated and replaced the older Privacy Act and enacted a new European directive (No. 2002/58) on the treatment of personal data and the protection of private life in the context of electronic communications<sup>102</sup>. The Supreme Court decisions recognized the *right to privacy* as an inviolable human right that is founded and granted in the fundamental Charter because it includes the right to representation, the right to a name, the right to honor and reputation, which are all evidences of importance the Constitution gives to human personality as one<sup>103</sup>.

### 4. The contribution of the Supreme Court in interpreting human rights

A key area in which the Italian Supreme Court of Cassation has contributed to the implementation and promotion of the substantial Constitution could be identified in the recognition and protection of human rights.

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<sup>100</sup> Decision of the CC of 11 IV 2002, No. 135/2002, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>101</sup> Act No. 675/1996, <http://www.parlamento.it/parlam/leggi/96675l.htm> (accessed: 18 I 2014).

<sup>102</sup> Legislative Decree No. 196/2003, <http://www.parlamento.it/parlam/leggi/delegh/03196dl.htm> (accessed: 18 I 2014).

<sup>103</sup> Decisions of the SC: of 14 X 2008, No. 25157/2008, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 11 XI 2008, No. 26972/2008, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

The Court of Cassation's case-law has been crucial not only in interpreting and developing a wide catalogue of "new rights" (personal identity, healthy environment, privacy, oblivion), but also in the elaboration, implementation and realization of the content of new rights already established by the Constitutional Court case law (life, sexual freedom, sexual identity)<sup>104</sup>.

#### 4.1. The right to life

The *right to life* has not been expressly declared by the Constitution but it was recognized as inviolable according to Art. 2 of the Constitution by the case-law of the Constitutional Court<sup>105</sup>. Furthermore, in its decision of 18 February 1975 the Constitutional Court argued that the protection of an unborn child has constitutional bases as "art. 2 of the Constitution recognizes and guarantees inviolable human rights, including the legal status of the unborn child"<sup>106</sup>.

In its decision of February 10, 1981, the Constitutional Court decided on the constitutionality of abortion, stating that "the safeguarding of the *nasciturus*, which is not still a person, cannot prevail over the right to life and the right to health of the mother which is already a person"<sup>107</sup>.

More recently, in the decision of February 10, 1997, No. 35, the Constitutional Court, judging the admissibility of a referendum on abortion, considered that the right to life is inscribed among the fundamental rights protected by Art. 2 of the Constitution. More precisely, the Court argued that the right to life has to be included "among those rights that occupy in the constitutional order a privileged position, as they belong to [...] the essence of supreme values on which the Constitution is found"<sup>108</sup>.

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<sup>104</sup> L. Fanotto, *Corte di Cassazione, Corte costituzionale, Costituzione sostanziale*, Bologna 2012, p. 156 et seq.

<sup>105</sup> Decisions of the CC: of 15 VI 1979, No. 54/1979, <http://www.giurcost.org> (accessed: 18 I 2014); of 2 V 1985, No. 132/1985, <http://www.giurcost.org> (accessed: 18 I 2014); of 25 VI 1996, No. 223/1996, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>106</sup> Decision of the CC of 18 II 1975, No. 27/1975, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>107</sup> Decision of the CC of 10 II 1981, No. 26/1981, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>108</sup> Decision of the CC of 10 II 1997, No. 35/1997, <http://www.giurcost.org> (accessed: 18 I 2014).

In another decision<sup>109</sup>, originated from the well known case of an Italian citizen of which the United States of America (USA) asked for extradition because of a crime punishable in the USA by death penalty, the Constitutional Court noted that the right to life as the primary inviolable right protected by the Art. 2 of the Constitution imposes an absolute guarantee.

The case-law of the Supreme Court has contributed to clarify certain issues related to the protection of the unborn child. In our legal system Art. 1, para. 2, of the Civil Code provides that fundamental rights recognized by law in favour of the unborn child are subordinated to the birth of the child. This legislative provision introduces two principles: a) the rights of the unborn child must be provided by law; b) in any case, these rights are subordinated to the birth of the child. Thus, the unborn child has the legal capacity to be recognized by natural parent (Art. 254, paragraph 1 of the Civil Code), to succeed due to death (Art. 462, para. 1, of the Civil Code), to acquire by donation (Art. 784 of the Civil Code)<sup>110</sup>.

The Supreme Court has not yet completely clarified the legal status of the *nasciturus*; however, in its decision of July 29, 2004, it reminds that the sacrifice of the *nasciturus* cannot be configurable as a right of the mother and is allowed only because the physical and the mental health of the mother is considered as a preeminent interest<sup>111</sup>. The case originated from a complaint filed by parents who, after the birth of their daughter that suffered from *thalassemia major*, demanded compensation for damage against the obstetrician who had not informed them of the risks for the *nasciturus*, denying thus the existence of a right to be born healthy and consequently the existence of the right to be not born malformed. The Court of Cassation also noted: "the legal system is protecting the unborn children and the pregnancy only in anticipation of the birth, and not of the «no-birth» either configuring in this way a «right to be born» and a «right to be born healthy», which must be understood, however, only in its positive sense"<sup>112</sup>.

More recently, in the decision of 2009, concerning a similar case, the Supreme Court stated that the legal subjectivity has to be recognized to

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<sup>109</sup> Decision of the CC of 25 VI 1996, No. 223/1996, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>110</sup> Civil Code, Royal Decree of 16 III 1942, No. 262, <http://www.altalex.com/index.php?idnot=34794> (accessed: 19 I 2014).

<sup>111</sup> Decision of the SC of 29 VII 2004, No. 14488/2004, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>112</sup> *Ibidem*.

unborn children although this recognition is limited to the ownership of certain personal and protected interests<sup>113</sup>.

In this case we can identify profiles of continuity and discontinuity with the previous case law. On the one hand the decision endorses the conclusions reached by the previous case law<sup>114</sup> about the existence of the right of unborn children to be born healthy as the explanation of the right to health under Art. 32 of the Constitution. On the other hand the decision moves away from the previous case law in which the Supreme Court did not recognize the legal subjectivity of unborn children. Indeed, the Supreme Court affirmed that “no one can recognize to the person-*nasciturus* the ownership of a protected interest without attributing them the subjectivity”<sup>115</sup>. Consequently, starting from the existence of a right to be born healthy, the Court of Cassation states that the *nasciturus* has the right to compensation for damage for failure to fulfil the duty to provide information to parents and for prescribing teratogenic drugs, knowing of of the existing and scientifically documented risk.

## 4.2. The right to die

Recently, the Supreme Court was called to decide on the *right to refuse medical treatments* which represents not only the negative aspects of the right to health, but also the right to live with dignity, understanding the latter as a freedom to choose matters of the highest privacy and the most personal nature without influences imposed coercively by third parties.

In the decision of October 16, 2007, concerning the well-known case of Eluana Englaro, the Supreme Court addressed the problem of the existence, the extension and the definition of the right to life, participating in this way in the bioethical debate that has assumed “global” dimensions, also considering that the most effective legal solutions are offered by supranational Courts and States Higher Courts<sup>116</sup>.

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<sup>113</sup> Decision of the SC of 11 V 2009, No. 10741/2009, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>114</sup> Decision of the SC: of 22 XI 1993, No. 11503/1993, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 29 VII 2004, No. 14488/2004, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>115</sup> Decision of the SC of, 29 VII 2004, No. 14488/2004, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>116</sup> Decision of the SC of 16 X 2007, No. 21748/2007, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

Indeed, the Supreme Court has identified the Oviedo Convention on Human Rights and Biomedicine, implemented in Italy by act No. 145 of March 28, 2001, although not yet ratified, as one of the main interpretative parameters to use in order to give a proper solution to the case<sup>117</sup>. The decision contains many references to the interpretations offered by foreign Courts, especially the German Constitutional Court and the House of Lords, and to the principles developed by the European Court of Human Rights regarding the right to life issues in connection with the right to self-determination in choosing medical treatments.

The Supreme Court identified in the right to self-determination and in the right to life two subjective situations potentially conflicting and established some key principles. According to the Court, if a patient is in a state of irreversible coma, cannot relate in any way to the outside world and is hydrated and fed by nose-gastric tube, the Court may authorize the disabling of medical treatments only when the vegetative state is, according to a rigorous clinical appreciation, irreversible, and there is no chance of recovery according to internationally accepted scientific standards. Furthermore, the Court may authorize the suspension of medical treatment only if the patient had been aware of the dignity of life, which can be inferred from his/her previous pronouncements or personality or from the style of life adopted before the loss of capacity.

The Court of Cassation excluded that artificial hydration and nutrition with nose-gastric tube constitute a form of aggressive medical treatment and considered that in the Italian legal system there is doesn't exist a duty of the individual to be submitted to health treatments including the duty of the patient not to deny cures and therapies that help him/her to keep alive.

The solution adopted by the Court of Cassation in its decision of 4 October 2007 did not find a confirmation in the Constitutional Court case law<sup>118</sup>. Indeed, when the Constitutional Court was called to decide on a constitutional dispute brought by the Parliament against the decision of the Court of Cassation, in the judgment of 8 October 2008 the Constitutional Court decided not to express itself on merits of the case<sup>119</sup>.

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<sup>117</sup> Act of 28 III 2001, No. 145/2001, <http://www.parlamento.it/parlam/leggi/01145l.htm> (accessed: 19 I 2014).

<sup>118</sup> Decision of the SC of 4 X 2007, No. 21748/2007, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>119</sup> Decision of the CC of 8 X 2008, No. 334/2008, <http://www.giurcost.org> (accessed: 18 I 2014).

### 4.3. The right to personal identity

The *right to personal identity* that emerges from the right to a name and likeness can be expressed as the interest that everybody has to be represented with his/her real identity, i.e. with the identity that appears in concrete and unequivocal circumstances of social life. In other words, it is the claim that one's cultural, professional, religious, political, social experiences should not be distorted, misrepresented, falsified, confused, contested, or the like, by means of the ascription of false (even if not necessarily defamatory) statements or acts.

In terms of case law, the *right to personal identity* appeared for the first time in a decision of May 6, 1974 given by the District Court of Rome, in which it was stated that the law protects one's right to the acknowledgment of one's own acts, and, conversely, the right to repudiate acts that one has never done; in other words, the right to personal identity<sup>120</sup>.

However, only after the decision of the Supreme Court of June 22, 1985, so called *Veronesi case*, the right to personal identity was definitely recognized in the Italian constitutional order<sup>121</sup>. In particular, the Supreme Court, overturning the approach of lower courts, argued that each person has to be represented with his/her real identity. The Court also noted that the Parliament did not provide expressly for the protection of personal identity even if the individual is expressed through an intangible social projection<sup>122</sup>. The features of the name and of the pseudonym identify the subject only on the material plane of existence and of the civil and legal status, while the image evokes only the person's physical appearance. The identity is otherwise a synthetic formula to describe subjects from a global profile, in its many special features and events.

The Supreme Court explicitly recognized in its decision the autonomy of this right, and rooted its normative foundation directly in Art. 2 of the Constitution, accepting the "open clause" conception of the latter. The Court of Cassation observes that "the right to personal identity aims to ensure the accurate and complete representation of the individual personality of the subject within the community in which that personality was held, expressed itself and developed. It is an essential, fundamental interest that qualifies the person. The purpose of Art. 2 of the Constitu-

<sup>120</sup> Decision of the District Court of Rome of 6 V 1974, Giur. it. 95 I, 2, 514.

<sup>121</sup> Decision of the SC of 22 VI 1985, No. 3769/1985, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>122</sup> Ibidem.

tion is to protect the human person in its entirety and in its ways to be essential. Art. 2 does not simply summarize the rights expressly protected in the Constitution and even those inherent to the human person in the Civil Code, but it places in the centre of the entire constitutional system and takes as its point of reference the human being in the complexity and unity of its values and needs, both material and spiritual<sup>123</sup>.

Ten years later the Constitutional Court followed the same line of argumentation recognizing the autonomy of the right to personal identity.

In these terms, the Constitutional Court in its decision of 24 January 1994 affirmed that personal identity constitutes a good in itself, independently of the personal and social condition of the subject, whose constitutional basis are to be found in Art. 2 of the Constitution<sup>124</sup>.

Later the Court of Cassation in its decision of 7 February 1996 partially corrected its approach of 1985, affirming that the normative foundation of the right to personal identity can be found directly in Art. 2 of the Constitution, in conjunction with Art. 3, para. 2, of the Constitution<sup>125</sup>.

#### 4.4. The right to sexual identity

Before the entry into force of act No. 164/1982<sup>126</sup>, the case law of the Supreme Court, not always followed by lower courts, was exclusively oriented in the sense that “the correction of the indication of the sex in contrast with physiological element and psychological attitude of the subject cannot be legitimate for the surgical intervention that artificially altered the original sexual apparatus”<sup>127</sup>.

This approach of the Supreme Court was due to the literal interpretation of the provisions then in force, and was related to a more general

<sup>123</sup> Decision of the SC of 22 VI 1985, No. 3769/1985, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>124</sup> Decision of the CC of 24 I 1994, No. 13/1994, <http://www.giurcost.org> (accessed: 18 I 2014). See also Decision of the CC: of 18 VII 1996, No. 297/1996, <http://www.giurcost.org> (accessed: 18 I 2014); of 7 V 2001, No. 120/2001, <http://www.giurcost.org> (accessed: 18 I 2014); of 20 XI 2002, No. 494/2002, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>125</sup> Decision of the SC of 7 II 1996, No. 978/1996, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>126</sup> Act No. 164/1982, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1982-04-14;164> (accessed: 19 I 2014).

<sup>127</sup> Decision of the SC of 3 XII 1974, No. 3948/1974, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

qualification of the sexual identity, tending to give priority to somatic-exterior aspects rather than to implications of psychological nature<sup>128</sup>.

In its decision of April 7, 1975, the Supreme Court considered the reference to cultural values existing in the community as fundamental in defining the expressed guidelines, for which the difference of sex is essential for the determination of relationships that take place at a certain level of intimacy, emphasizing that “the common conscience funds meeting between people of different sex on the bases on natural and not artificial recognition”<sup>129</sup>.

The Constitutional Court expressed a similar view to that expressed by the Supreme Court in the decision of 12 July 1979<sup>130</sup>. The Constitutional Court argued that the right to recognize and register a different sex does not form a part of the inviolable rights acquired with a surgical transformation and does not form a part of inviolable rights<sup>131</sup>. According to the Court, the possible solutions of the problem can evoke in Italy, as well as in other countries, the attention of the Parliament, but cannot be solved in terms of constitutionality of the contested provisions<sup>132</sup>.

Later, the Court of Cassation, in its decision of April 3, 1980, reaffirmed and explained that the “phenomenon of trans-sexualism cannot constitute a sufficient ground for holding that the person must be qualified according to its sexual characteristics”<sup>133</sup>.

The Legislative, prompted in part by the case law of the Supreme Court and of the Constitutional Court and by critiques/criticism of many scholars, adopted act No. 164/1982<sup>134</sup>.

The changing of the legal framework led the Constitutional Court to recognize, in its decision of 6 May 1985, both the right to sex change in the event of a natural evolution of situations originally not well defined

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<sup>128</sup> Decisions of the SC: of 5 IV 1975, No. 1236/1975; of 13 VI 1972, No. 1847/1972, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>129</sup> Decision of the SC of 7 IV 1975, No. 1236/1975, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>130</sup> Decision of the CC of 12 VII 1979, No. 98/1979, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>131</sup> *Ibidem*.

<sup>132</sup> *Ibidem*.

<sup>133</sup> Decision of the SC of 3 IV 1980, No. 2161/1980, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>134</sup> Act No. 164/1982, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1982-04-14;164> (accessed: 19 I 2014).

and in the case where the individual, declaring a different sexuality, has been subjected to surgery for the sex change, under Art. 2 and 32 of the Constitution<sup>135</sup>.

#### 4.5. The right to sexual freedom

The freedom of sexual behaviour can be understood as the right of self-determination of the subject in full autonomy and as the freedom of sexual relations.

The protection of freedom of sexual behaviour can be found in criminal case law that, while not directly addressing the issue of sexual freedom, recognizes its existence. In particular, the Supreme Court stated in a decision of October 19, 1987, that the parent, pursuant to Art. 147 of the Civil Code, is also the guarantor of the moral integrity and of the sexual freedom of the children<sup>136</sup>. According to the Court, from this provision derives a legal obligation for parents to prevent, whenever possible, any event that threatens personal rights of children<sup>137</sup>.

Following the decisions of the Supreme Court, the Constitutional Court argued in its decision of 10 December 1987 that "sexuality is one of the essential ways of expression of the human person whereby the right to dispose freely of sexuality is certainly an absolute individual right"<sup>138</sup>. The Court recognized the autonomy of this right and rooted its normative foundation in art. 2 of the Constitution. This approach allowed the Court to clarify that any violation of the right to sexual freedom involves harms because the "sexual violence implies [...] the infringement of fundamental values of freedom and human dignity and may also result in prejudices in social life. These infringements are different from psychological disturbances that sexual violence involves, and from any financial loss resulting from this: and their repair is unavoidable, since those values are, in fact, subject to direct constitutional protection"<sup>139</sup>.

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<sup>135</sup> Decision of the CC of 6 V 1985, No. 161/1985, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>136</sup> Decision of the SC of 19 X 1987, No. 7420/1987, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>137</sup> *Ibidem*.

<sup>138</sup> Decision of the CC of 10 XII 1987, No. 561/1987, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>139</sup> *Ibidem*.

More recently, the Supreme Court concluded that homosexuality should be recognized as a “condition that must be protected in conformity with constitutional provisions”; from this approach derives that sexual freedom should be understood “also as the freedom to live without interference and restrictions to the sexual preferences which are an expression of the right to the implementation of one’s personality, protected by Art. 2 of the Constitution”<sup>140</sup>.

Following the recognition of the right to sexual freedom pronounced by the Constitutional Court, the Supreme Court through its case law has further implemented the protection of sexual freedom.

#### 4.6. The right to health as a right of personal integrity

The *right to health* is the only right that the Constitution defines as *fundamental*. It is also defined by the Constitutional Court as *primary and fundamental*<sup>141</sup>.

In addition, the right to health is not only fundamental but also multiform, due to the multiplicity and heterogeneity of subjective situations that it constitutionally guarantees. In fact it is covered by at least three different subjective legal situations: a) the right to personal integrity; b) the right to medical treatments; c) the right to healthy environment.

Under the first profile, concerning the *right to personal integrity*, the Constitutional Court has specified that the object of protection under the Constitution can be identified in a psycho-physical integrity and not only in physical integrity<sup>142</sup>.

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<sup>140</sup> Decision of the SC of 16 IV 2007, No. 16417/2007, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>141</sup> Decisions of the CC: of 24 V 1977, No. 103/1977, <http://www.giurcost.org> (accessed: 18 I 2014); of 12 VII 1979, No. 88/1979, <http://www.giurcost.org> (accessed: 18 I 2014); of 30 VI 1986, No. 184/1986, <http://www.giurcost.org> (accessed: 18 I 2014); of 10 XII 1987, No. 559/1987, <http://www.giurcost.org> (accessed: 18 I 2014); of 12 X 1988, No. 992/1988, <http://www.giurcost.org> (accessed: 18 I 2014); of 26 X 1988, No. 1011/1988, <http://www.giurcost.org> (accessed: 18 I 2014); of 14 VI 1990, No. 298/1990, <http://www.giurcost.org> (accessed: 18 I 2014); of 26 IX 1990, No. 455/1990, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>142</sup> Decision of the CC: of 6 V 1985, No. 161/1985, <http://www.giurcost.org> (accessed: 18 I 2014); of 3 VI 1987, No. 215/1987, <http://www.giurcost.org> (accessed: 18 I 2014); of 29 IV 1999, No. 167/1999, <http://www.giurcost.org> (accessed: 18 I 2014); of 19 VI 2002, No. 282/2002, <http://www.giurcost.org> (accessed: 18 I 2014).

Following the argumentation of the Constitutional Court, the Supreme Court has also recently argued that health should no longer be understood “as the mere absence of illness but as a state of complete physical and mental welfare that involves also the interior aspects of life as perceived and lived by the subject in his experience”<sup>143</sup>.

The Supreme Court has further defined the *right to health*, especially in the sense of a right to personal integrity, as a primary and absolute right, valid *erga omnes* which is directly actionable in Courts, without the need of a legislative intervention<sup>144</sup>.

An important aspect related to health protection can be found in recognizing by the case law of the right to the indemnification of biological damages. In its decision of 12 July 1979 the Constitutional Court argued that the Constitution gives to the right to health a primarily protection<sup>145</sup>. From this provision derives that the indemnity of the damage “is not limited to the consequences from violations that affect on the attitude to produce income”, but also includes effects produced by the infringement of the right<sup>146</sup>.

<sup>143</sup> Decision of the SC of 4 X 2007, No. 21748/2007, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>144</sup> Decisions of the SC: of 21 III 1973, No. 796/1973, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 9 IV 1973, No. 999/1973, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 6 X 1975, No. 3164/1975, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 9 III 1979, No. 1463/1979, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 6 X 1979, No. 5172/1979, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 6 VI 1981, No. 3675/1981, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 17 IV 2000, No. 9389/2000, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014). See also decisions of the CC: of 25 VI 1986, No. 167/1986, <http://www.giurcost.org> (accessed: 18 I 2014); of 30 VI 1986, No. 184/1986, <http://www.giurcost.org> (accessed: 18 I 2014); of 10 XII 1987, No. 559/1987, <http://www.giurcost.org> (accessed: 18 I 2014); of 14 VI 1990, No. 307/1990, <http://www.giurcost.org> (accessed: 18 I 2014); of 26 IX 1990, No. 445/1990, <http://www.giurcost.org> (accessed: 18 I 2014); of 23 IV 1991, No. 202/1991, <http://www.giurcost.org> (accessed: 18 I 2014); of 11 VII 1991, No. 356/1991, <http://www.giurcost.org> (accessed: 18 I 2014); of 2 VI 1994, No. 218/1994, <http://www.giurcost.org> (accessed: 18 I 2014); of 5 IV 1996, No. 118/1996, <http://www.giurcost.org> (accessed: 18 I 2014); of 11 XII 1996, No. 399/1996, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>145</sup> Decision of the CC of 12 VII 1979, No. 88/1979, <http://www.giurcost.org> (accessed: 18 I 2014).

<sup>146</sup> *Ibidem*. See also decision of the CC: of 30 VI 1986, No. 184/1986, <http://www.giurcost.org> (accessed: 18 I 2014); of 10 XII 1987, No. 559/1987, <http://www.giurcost.org> (accessed: 18 I 2014); of 10 XII 1987, No. 561/1987, <http://www.giurcost.org> (accessed: 18 I 2014); of 28 I 1991, No. 87/1991, <http://www.giurcost.org> (accessed: 18 I 2014); of 11 VII 1991, No. 356/1991, <http://www.giurcost.org> (accessed: 18 I 2014); of 7 II 1994, No. 37/1994, <http://www.giurcost.org> (accessed: 18 I 2014); and decisions of the SC: of 16 VI 1981, No. 233/1981, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014);

#### 4.7. The right to privacy

Arriving at the decision of September 14, 1953, the Court of Rome decided on the limits of the freedom of artistic expression affirming on the basis of the interpretation of Art. 10 and Art. 93–97 of the Copyright Act that in the Italian legal system exists the right to privacy involving the prohibition of any interference by third parties in the personal life of the person<sup>147</sup>. However, three years later, the Supreme Court, with the decision of December 22, 1956, concerning the case of the film on Caruso's life, denied the existence of an absolute right to respect the intimacy of private life<sup>148</sup>. The Court noted that "no express provision of law allows to conclude that the absolute respect of the intimacy of private life is recognized as a general principle and as a limit to the freedom of art"<sup>149</sup>.

In another case, in a decision of December 7, 1960, the Supreme Court mitigated the rigidity of its approach, specifying the limits within which the private sphere of the person can be engraved<sup>150</sup>.

Yet in still another case, in its decision of April 20, 1963, the Supreme Court recognized the right to privacy, affirming that "the existence in our legal system of an absolute right to self-determination in the development of personality can be considered implicit. This right can be considered violated when information of a private life of a person is disclosed without his/her consent"<sup>151</sup>.

In 1973, the Constitutional Court with the decision of 5 April 1973 placed incidentally the right to privacy among the inviolable human rights protected by the Constitution, referring to Art. 12 of the Universal Declaration of Human Rights and to art. 8 of the European Convention on Human Rights<sup>152</sup>.

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of 2 II 1981, No. 2258/1981, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 6 VI 1981, No. 3675/1981, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 6 IV 1983, No. 2396/1983, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); of 14 IV 1984, No. 2422/1984, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>147</sup> Decision of the Court of Rome of 14 IX 1953, *Foro it.*, 1953, I, c. 115.

<sup>148</sup> Decision of the SC of 22 XII 1956, No. 4487/1956, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>149</sup> *Ibidem*.

<sup>150</sup> Decision of the SC of 7 XII 1960, No. 3199/1960, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>151</sup> Decision of the SC of 20 IV 1963, No. 990/1963, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>152</sup> Decision of the CC of 5 IV 1973, No. 38/1973, <http://www.giurcost.org> (accessed: 18 I 2014).

Finally, the Supreme Court, in its decision of May 27, 1975, changed its jurisprudence, following guidance of the Constitutional Court, and established definitively the existence of an autonomous *right to privacy* and made a first attempt in order to limit the content of this right by introducing the concept of “social interest to information” as a principal limitation of the right to privacy<sup>153</sup>.

The decision of 24 April 2008 of the Supreme Court must be emphasised here. It concerned a particular case of the publication of an article in a newspaper that was considered harmful<sup>154</sup>. The publication of the article was followed by a partial correction and by a proposition of an action for damages. The newspaper, however, published a letter in which the victim had asked for compensation, giving the name and the surname of the person whose privacy was violated.

The decision is of particular interest because it summarized that “freedom of the press and criticism, which has its basis in the constitutionally guaranteed freedom of the press (Art. 21, para. 2, of the Constitution) due to fundamental public interest to be informed, is liable to result in prejudicial activities to the personal identity, understood as a social image, even if the publication does not offend the honour or the reputation”<sup>155</sup>.

Based on this premise, the decision stated that: a) the right to privacy, which protects the needs of the person that the events of his private life are not publicly disclosed, has merged into the right to protection of personal data pursuant to the provisions contained in the act of December 31, 1996, no. 675; b) it is different from the right to moral integrity because the prohibition of the disclosure of private facts of life is independent of their shameful content it relates to a core value of the person and is within the inviolable rights of the individual proclaimed by Art. 2 of the Constitution; c) the infringement of a absolute right to privacy implies the civil obligation for compensation for pecuniary and non-pecuniary damage/loss?; d) the freedom of the press prevails over the right to privacy and the right to honour, as long as the publication is justified by the function of the information and conforms itself to the standards of professional integrity<sup>156</sup>. In particular, it is justified by the function of

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<sup>153</sup> Decision of the SC of 27 V 1975, No. 2129/1975, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>154</sup> Decision of the SC of 24 IV 2008, No. 10690/2008, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>155</sup> *Ibidem*.

<sup>156</sup> *Ibidem*.

the information, whereas there is a considerable public interest in the knowledge of private facts in light of cultural or educational purposes, and more in general, the social significance of such equipment.

Decisions in which the Supreme Court dealt with the *right to image*, understood as a “classic” right of personality as well as a manifestation of the right to privacy, are also of particular interest. A first case to note is the decision of the Supreme Court of 19 March 2008, on the delicate issue of the publication of a private person’s image in the newspapers<sup>157</sup>. In similar cases several fundamental rights are opposed to each other, like the right to privacy, understood as the right of the person, through the protection of the image, to keep unpublished a photo in which that person’s detention can be deduced, and the freedom of the press protected by Art. 21 of the Constitution. In this specific case, the Italian Data Protection Authority had prohibited further dissemination of a photo which represented the subject in a state of detention, already published in the newspaper. The decision of the Supreme Court contained an important assertion, affirming that “the inessentiality of the publication of a photo in relation to a case that involved the freedom of the press is not reflected in any normative acts. On the contrary, the legality of this publication is expressly confirmed in Art. 114 of the Criminal Procedure Code [...] that states that it is forbidden to publish the image of a person deprived of personal freedom taken while the person was handcuffed or was subjected to other means of physical coercion, without the permission of the interested person”. The Court recognizes both the primary importance of the right to information (whose legitimate expression can be the publication of an image) and argued that the publication is essential respect to the information. Furthermore, the Court affirmed that is not “the detention highlighted by handcuffs or other forms of coercion that makes the image unpublishable, but the representation of the detention in a manner predicted by the published image. In other words, the image of the person under arrest with handcuffs on his wrists, if represents the subject in a pose where the handcuffs are not visible, does not meet any normative prohibition of publication”<sup>158</sup>.

As it can be seen, the sensitivity of the matter and the importance of the conflicting interests makes a choice necessary, so a right will result recessive to the other.

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<sup>157</sup> Decision of the SC of 19 III 2008, No. 7261/2008, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>158</sup> Decision of the SC of 19 III 2008, No. 7261/2008, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

In a decision of 2008, concerning the case of an actor against a publisher for damages resulting from the unauthorized publication of two photos that represented him “in an article that advertised a new Kodak film”, the Supreme Court reaffirmed that the right to image “falls within the rights of personality that integrate the inviolable rights of the person”<sup>159</sup>. The violation of these rights determinate the right to compensation for non-pecuniary damage/loss. However, since “each person has the exclusive right to its image and the exclusive right to exploit it economically, it follows that with the unauthorized publication the offender misappropriates the economic benefits accruing to the victim. The benefit compensation consists in the re-transfer those benefits from the offender to the victim”<sup>160</sup>.

#### 4.8. The right to oblivion

A few months after the decision of 6 November 1995 on personal identity, the Supreme Court recognized the existence of a constitutional *right to oblivion*, whose constitutional basis derives from Art. 2 of the Constitution<sup>161</sup>.

The Court of Rome in its decision of November 20, 1996 affirmed that the claim to regain the exclusive possession of the information of one’s own life which, although publicized, has lost its relevance, rooted its normative foundation in Art. 2 of the Constitution, intended as a general clause which may provide constitutional cover to the emerging values of the person<sup>162</sup>.

In its decision of April 9, 1998, the Supreme Court confirmed this approach stating that it is not permissible to divulge again, after a substantial time, news that had been lawfully published, as it comes to “consider a new view of the right to privacy – recently described as a right to oblivion – understood as an interest of every person not to remain indefinitely exposed to the further damage of his/her honour and reputation from the repeated publication of a notice legitimately published

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<sup>159</sup> Decision of the SC of 16 V 2008, No. 12433/2008, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>160</sup> Decision of the SC of 6 XI 1995, No. 5548/1995, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>161</sup> Decision of the SC of 7 II 1996, No. 978/1996, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>162</sup> Decision of the Court of Rome of 20 XI 1996, <http://www.ittig.cnr.it/BancheDati-Guide> (accessed: 20 I 2014).

in the past”<sup>163</sup>. In other words, the right to oblivion is understood as the right to silence on past events in life that are no longer occurring. This approach was confirmed more recently by the Supreme Court in the decision of April 5, 2012<sup>164</sup>.

#### 4.9. The reasonable duration of the trial

Only with the reform of Art. 111 of the Constitution in 1999, has the Italian constitutional order implemented the principle of the reasonable duration of the proceedings which falls within the system of values ensuring a fair trial<sup>165</sup>.

However, compared to the international level, where the reasonable duration of the trial is explained in terms of subjective rights, the violation of which leads to the injured party to give a “fair satisfaction” (Art. 41 ECHR), into the domestic law the principle is referred to the legislator which must adopt normative acts on trials and organization of justice in order to ensure the reasonable duration of the proceedings. In other words, as stated by the Supreme Court, “the principle of procedural economy [...] is clearly incompatible with any unnecessary repetition of procedural activities and any waste of energy in the performance of the Courts”<sup>166</sup>.

More specifically, from the explicit introduction of the principle of reasonable duration of the process in Art. 111, para. 2, of the Constitution derives a dual obligation on the legislative: a) to give to the trial a structural setting that can ensure the rapidity of the trial without compressing other fundamental guarantees<sup>167</sup>; b) to provide the whole “system of justice” with adequate instruments in order to ensure the reasonable duration of the proceedings.

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<sup>163</sup> Decision of the SC of 9 IV 1998, No. 3679/1998, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>164</sup> Decision of the SC of 5 IV 2012, No. 5525/2012, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>165</sup> Constitutional Reform Act of 22 XI 1999, No. 1/1999, <http://www.parlamento.it/parlam/leggi/99001lc.htm> (accessed: 19 I 2014).

<sup>166</sup> Decision of the SC of 26 VI 2003, No. 11228/2003, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

<sup>167</sup> Decision of the CC: of 4 VI 2001, No. 204/2001, <http://www.giurcost.org> (accessed: 18 I 2014); of 1 III 2002, No. 78/2002, <http://www.giurcost.org> (accessed: 18 I 2014); of 30 XI 2009, No. 317/2009, <http://www.giurcost.org> (accessed: 18 I 2014).

In fact, all the latest reforms in procedural matters appear to be inspired by the need to give effect to this constitutional principle. For example, we can consider the act of November 26, 1990, No. 353, which amended a large part of book II of the Civil Procedure Code; the legislative decree of February 19, 1998, No. 51; the decree of March, 14, 2005, No. 35, converted into the act of May 14, 2005, No. 80 and amended by the act of December 28, 2005, No. 263; the act of May 26, 2009, No. 69<sup>168</sup>.

The so-called "Pinto act" that enables claimants to obtain an equitable remedy for damage due to the violation of the reasonable term of the process, has allowed a growth of a phenomenon of interaction and integration between the European Union and the domestic case laws in the matter of protection of fundamental rights<sup>169</sup>.

In this regard, for the last ten years the Supreme Court has stated that the constitutionalization of the principle of a reasonable duration of proceedings requires a new sensitivity and a new interpretative approach. Any solution concerning provisions that regulate trials must be verified both in terms of logical and conceptual coherence and for its operational impact in order to achieve the principle of reasonable duration of the trial<sup>170</sup>.

## **PRAWA CZŁOWIEKA WE WŁOSZACH W ORZECZNICTWIE SĄDU NAJWYŻSZEGO, TRYBUNAŁU KONSTYTUCYJNEGO I TRYBUNAŁÓW PONADNARODOWYCH (CZĘŚĆ I)**

### **Streszczenie**

Zgodnie z wielowarstwowym systemem ochrony praw człowieka włoski porządek konstytucyjny wyznacza zasady odnoszące się do ochrony praw i podstawowych wolności. Cała pierwsza część Konstytucji, ujęta w cztery rozdziały, poświęcona została uznaniu fundamentalnych zasad i zapewnieniu gwarancji praw politycznych, gospodarczych, społecznych i kulturalnych. System uznania praw i wolności został

<sup>168</sup> Act of 26 XI 1990, No. 353/1990, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1990-00-00:353> (accessed: 20 I 2014); Legislative Decree of 19 II 1998, No. 51/1998, <http://www.parlamento.it/parlam/leggi/deleghe/98051dl.htm> (accessed: 20 I 2014); Decree of 14 III 2005, No. 35/2005, <http://gazzette.comune.jesi.an.it/2005/62/1.htm>, Act of 26 V 2009, No. 69/2009, <http://www.parlamento.it/parlam/leggi/09069l.htm> (accessed: 20 I 2014).

<sup>169</sup> Act of 24 III 2001, No. 89/2001, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2001;81> (accessed: 20 I 2014).

<sup>170</sup> Decision of the SC of 30 VII 2008, No. 20604/2008, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014).

dodatkowo uzupełniony przez indywidualizację obowiązków obywateli, a także pozostałych członków społeczeństwa.

Na mocy postanowień zawartych w tytule V części II Konstytucji regionalne i lokalne organy samorządowe zostały wyposażone w funkcje i kompetencje związane z ochroną praw człowieka. Nie bez znaczenia w zakresie ochrony tych praw pozostaje jurysprudencja Trybunału Konstytucyjnego i Sądu Najwyższego. W drodze stałego dialogu z Trybunałem Sprawiedliwości Unii Europejskiej oraz z Europejskim Trybunałem Praw Człowieka linia orzecznicza tych instytucji przyczyniła się znacząco do integracji i rozwoju praw pierwotnie uznanych w tekście Konstytucji. Czyniąc użytek z postanowień, które umożliwiają wprowadzenie do wewnątrz krajowego porządku prawnego praw i wolności wyznaczonych w instrumentach międzynarodowych (art. 2 i 117 ust. 1 Konstytucji), Trybunał Konstytucyjny i Sąd Najwyższy przyczyniły się do poszerzenia katalogu praw konstytucyjnych we Włoszech. Innymi słowy, sądy te skutecznie wykorzystały potencjał zawarty w oryginalnych postanowieniach Konstytucji, by na podstawie wolności zagwarantowanych przez społeczność międzynarodową na gruncie prawa pozytywnego i orzecznictwa sądów ponadnarodowych inkorporować nowe prawa do włoskiego porządku konstytucyjnego.

**Słowa kluczowe:** prawa człowieka, Włochy, konstytucja, Trybunał Konstytucyjny, Sąd Najwyższy