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Fundamental Rights in Italy

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Joerg Luther

UNIVERSITA' DEL PIEMONTE ORIENTALE “Amedeo Avogadro” ALESSANDRIA

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Fundamental Rights in Italy

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National Co-ordinator:

Prof. Jörg Luther,
Università del Piemonte Orientale, Italy

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Contents (Detailed)

Chapter 1

RIGHT TO LIFE, RIGHT TO PHYSICAL AND MENTAL INTEGRITY, HUMAN DIGNITY

Ciolfi, Fontana, Montella, Salmoni and Tripodina

FIRST PART: RIGHT TO LIFE*

I. Death, Killing

1. *Death Penalty*

In Italy the death penalty was abolished in 1889 and reintroduced in 1926. The Penal Code of 1931 increased the number of capital crimes against the State and also provided the death penalty for some common serious offences. The post fascist government enacted by a decree of 10 August 1944, a law which substituted the death penalty for life imprisonment and the Italian Constitution of 1947 prohibited the death penalty, except in cases defined by martial law (Art. 27 Para. 4). The Constitutional Court first stated that the death penalty could be restored ‘on the basis of a revised constitution’¹, but now considers the provision based on ‘the essential good of life’.² This value can be referred to an inviolable

* I. and II. Giovanna Montella, Ricercatore confermato di diritto pubblico comparato, Università la Sapienza, Roma;
III. and IV. Fiammetta Salmoni, Professore associato di Istituzioni di diritto pubblico, Università del Molise;
V. and VI. Chiara Tripodina, Ricercatore confermato di diritto costituzionale, Università del Piemonte Orientale.

¹ Sentence no. 54 of 25 April 1979.

² Sentence no. 223 of 25 June 1996.

human right to life, acknowledged by Article 2, applying to both citizens and foreigners.

2. Death Penalty in Time of War and in State of Emergency

The Constitution of 1948 provides for the declaration of a state of war but not a specific state of internal emergency. The criminal law code for war and peace times provided that the death penalty should be carried out ‘by shooting in the chest’, and in cases of degradation ‘by shooting in the back’. The Law no. 589 of 13 October 1994 has abolished capital punishment even in martial law, but not revised Article 27 Para. 4 of the Constitution. In times of war, the abolition act could be repealed and the death penalty restored.

3. Death Penalty as an Impediment to Extradition

The Constitutional Court has declared unconstitutional the treaty on extradition between France and the Kingdom of Italy of 1870, allowing Italy to concur with the execution of the death penalty for crimes liable to capital punishment provided for another State.³ Other bilateral conventions on extradition and Article 698 Para. 2 of the Code of Criminal Procedure of 1989 allowed extradition for crimes, provided that the demandant State gives ‘assurance, considered sufficient both by the court and by the Ministry of Justice, that the penalty in question will not be inflicted or, if inflicted, will be not applied’. In 1996, the Court struck down this rule and the Law no. 225/1984, gave force to a similar clause in the extradition treaty between Italy and the United States of America. The formula for the ‘sufficient assurance’ was held constitutionally unacceptable, because the protection of life against the death penalty needs an ‘absolute guarantee’. The Court did not state a lack of remedies in the foreign legal system, but hold inconsistent with the absoluteness the presence of a norm which leads to discretionary considerations, case by case, for the reliability and effectiveness of the warranties granted.⁴

4. Killing in Self-Defence or Necessity

Death can be a result of an action of self-defence or state of necessity if the action is not prohibited by the rule of proportionality (Arts. 52, 54 Criminal Code, Arts. 42–44 military criminal code for peace time). The penal departments of the

³ Sentence no. 54/1979.

⁴ Sentence no. 223/1996.

Supreme Court of Cassation have stressed that proportionality can be disproved if the aggression is not directed against life or if the defendant could have struck the aggressor in less-vital body parts.⁵

5. *Fatal Shot by the Police*

Article 53 of the Penal Code and Article 41 discharges a public official who, in order to fulfil his duty, uses or commands the use of weapons or other means of physical compulsion when he is forced by necessity to repel violence or to overcome somebody's resistance to authority or if he attempts to prevent the commission of some particularly serious crimes, namely man slaughter, shipwreck, engulfment, air disaster, train crash, manslaughter, armed robbery, kidnapping. The Supreme Court with sentence no. 12137 of 29 November 1991 reckoned that the police man who used his weapon to prevent a person fleeing cannot call for discharge.

6. *Documentation*

6.1. RELEVANT LEGISLATION

Articles 52–54 Codice penale (Regio Decreto 19 Oct. 1930, no. 1398), Gazzetta Ufficiale 28 Oct. 1930, no. 253

Articles 41–44 Codice penale militare di pace (Regio Decreto 20 Feb. 1941, No. 303), Gazzetta Ufficiale 27 Sep. 1941, No. 107

Law no. 589 of 13 Oct. 1994 (Abolition of the Death penalty in the Criminal Military Code for Peacetimes), Gazzetta Ufficiale 25 Oct. 1994, No. 250

6.2. ESSENTIAL CASE-LAW

Corte Costituzionale, rulings no. 54/1979, 223/1996

6.3. SELECTED BIBLIOGRAPHY

G. Gemma, 'Vita (diritto alla)', *Digesto delle discipline pubblicistiche*, Torino 1999, pp. 670 ss.

⁵ Sentence no. 7250/1977.

II. Abortion

1. Legal Assessment According to Fixed Time Periods During the Pregnancy

Termination of pregnancy has been regulated by the controversial Law no. 194 of 22 May 1978. Termination can occur within the first ninety days of pregnancy, with no assessment of specific justifications such as the medical or social indications on the free self-determination by the expectant mother. After the first ninety days of pregnancy, voluntary termination can be practised only where there is a serious danger to the woman's health, both physical and psychological. A special judge's decision is required for the cases in which a termination demanded by a minor is in contrast with the real or presumptive will of the parents.

2. Legal Assessment According to Medical Indications

In Italy the social changes passed in the period amidst the 60's and the 70's ended the consensus of society for the traditional ban against voluntary abortion. In 1975 the Constitutional Court declared the abortion prohibition (Art. 546 of the Penal Code) incompatible with the right to health of the woman (Art. 32 of the Constitution) in those cases where a further gestation would cause medically-established and unavoidable serious troubles or danger to the woman.⁶

The Law of 22 May 1978 abrogated the crimes against the integrity and health of progeny in the Penal Code of 1930. The controversies over the liberalisation of abortion were settled by a referendum to abrogate the reform act. The Constitutional Court controlled the legitimacy of the petitions of the referendum proposed by the opposed factions and, even though it admitted certain petitions to abrogate single provisions of the Law, it stopped the 'maximum' query which veers to abrogate the entire Law no. 194/78, leaving without a minimum of protection the right to health of the woman.⁷

3. Ancillary Duties (Counselling and Advice)

Furthermore, the Court even held inadmissible the question whether the subordination of the father's will (Art. 5 of Law 194/78) would violate constitutional guarantees of family life given by Articles 29 and 30 of the

⁶ Sentence no. 27/1975.

⁷ Sentence no. 26/1981, no. 35/1997.

Constitution. The political choice to leave the unique responsibility of the abortion to the mother is unquestionable, being coherent to the scheme of the law as a whole and in particular to the importance of the pregnancy and for the health, both physical and psychical, of the expectant mother.⁸

The Court upheld the legislature's choice to leave the responsibility for the decision on abortion exclusively to the expectant mother, even if a minor.⁹ The parental authority in a case of voluntary termination, in accordance authority can thus be substituted by the control of the special tutelary judge. There is no duty to inform parents about the decision of the minor, if it is well-known that they are hostile to that decision because of their own moral and religious ideas. The tutelary judge has no power of co-decision, his authorisation serves as a guarantee of the awareness of the minor about the gifts at stake and he can claim no right to conscientious objection.¹⁰

4. Documentation

4.1. RELEVANT LEGISLATION

Law 22 May 1978, no. 194 'Rules for the Social Protection of Pragnancy and on Voluntary Termination of Pregnancy', Gazzetta Ufficiale 22 May 1978, no. 140

4.2. ESSENTIAL CASE-LAW

Corte Costituzionale, rulings no. 27/1975, 26/1981, 109/198, 196/1987, 389 and 463/1988, 293/1993, 76/1996, 35/1997

4.3. SELECTED BIBLIOGRAPHY

M. Zanchetti, *La legge sull'interruzione della gravidanza*, Padova 1992

III. Artificial Insemination

Italian academic opinion is divided on the question of the recognition of an actual right to artificial procreation. Some, on the basis of the fundamental nature of the reproductive process with regard to the right to create family and the consequent

⁸ Decree no. 389/1988.

⁹ Sentence no. 109/1981.

¹⁰ Sentence no. 196/1987, decrees no. 463/88, no. 293/93 and no. 76/96.

protection of the 'filiazione', maintain the distinction between natural and artificial procreation and acknowledge the interested party with a positive pretence/pretext in respect to public powers/authorities to procreate also by artificial means as the objectification/externalisation of the right to procreation constitutionally guaranteed by Articles 2, 29, 30 of 31 Constitution.¹¹ Others maintain, that the different insemination techniques are to be considered as exceptional remedies to infertility and as such instruments aimed at safeguarding health – broadly speaking – through medical and therapeutic intervention, equivalent and subsidiary with respect to natural insemination.¹² From this perspective, each individual possesses the right to therapy as the right to health constitutionally safeguarded according to Article 32 of the Constitution.

Only recently, Law no. 40/2004 attempted to resolve problems related to artificial insemination. The Constitutional Court declared inadmissible a referendum aimed at the total repeal of such a law, 'which undoubtedly involves a multitude of relevant constitutional interests, which as a whole, require a balance between them which ensures a minimum level of legislative protection.'¹³ Four referendums on the abolition of individual directives, deemed not to contain constitutionally limited or necessary material have been declared constitutionally admissible (*infra*).

1. Homologous Artificial Insemination

Law no. 40/2004 allows homologous artificial insemination on the part of adult heterosexual couples, either married or living together, of a potentially fertile age, with both partners alive¹⁴, only when there are no other effective therapeutic methods available to eliminate the causes of sterility or infertility. These and other restrictions, however, are not considered to be constitutionally binding. Indeed, the request for a referendum which was declared admissible aimed to allow access to medically assisted procreation for purposes other than the solution

¹¹ Così S. Rodot, *Tecnologie e diritto*, Bologna 1995, p. 157.

¹² P. Perlingieri, 'Il diritto alla salute quale diritto della personalità', *Rassegna di diritto civile* 1982, pp. 1020 ss.; F. Santosuosso, *La fecondazione artificiale umana*, Milano 1984, p. 118; D. Vincenzi Amato, 'Libertà della persona e intervento pubblico nella procreazione', in: G. Ferrando (a cura di), *La procreazione artificiale tra etica e diritto*, Padova 1989, pp. 182 ss. See also M. Mori, *La fecondazione artificiale*, Bari 1995 and A. Trabucchi, 'Procreazione artificiale e genetica umana nella prospettiva del giurista', *Rivista di diritto civile* 1986, pp. 495 ss.

¹³ Ruling no. 45/2005.

¹⁴ For insemination post mortem Tribunale Palermo, ord. 29 dicembre 1998, *Famiglia e diritto* 1999, pp. 55 ss.

to reproductive problems deriving from sterility or infertility; ‘graduality’ is to be excluded from the principles that govern the application of the relevant techniques; revocation of consent, on the part of the couple in question, even after the fertilisation of the ovule is permitted; operations carried out on the embryo for diagnostic and therapeutic purposes, even if different from those originally foreseen, are permitted; the creation of a number of embryos greater than that necessary for a single or simultaneous implant, and in any case greater than three, is permitted; the cryoconservation of embryos where it is not possible to transfer the embryos into the uterus is permitted.¹⁵

The promotion of the referendum also resulted from doubts regarding constitutionality, particularly the exclusion of access to the techniques of medically assisted procreation for those who are not sterile or infertile but who are the carriers of genetic pathologies which can be transmitted to offspring.¹⁶

2. Heterologous Artificial Insemination

Law no. 40/2004 prohibits heterologous insemination (Art. 4 Para. 3). Even such a ban, however, does not constitute a constitutionally binding regulation and can be repealed by means of a referendum.¹⁷ In the past, heterologous insemination posed certain controversial legal problems like that of legal paternal attribution (Art. 231 Civil Code), of the *status* of the donor of semen used for the insemination. According to the Constitutional Court, Article 235 Civil Code, which permits the denial of paternity actions, does not apply because

‘it exclusively regards the generation born of adultery, admitting disownment of paternity in the event that the circumstances indicated by the legislature lead to the presumption that the pregnancy is traceable, in violation of the reciprocal duty of faithfulness, to sexual intercourse with a person other than the husband’.¹⁸

3. Surrogate Motherhood

Surrogate motherhood today constitutes an offence according to Article 12 (6) Law no. 40/2004. In the past, such contracts were deemed null and void due to

¹⁵ Ruling no. 48/2004.

¹⁶ Contrary Tribunale di Catania, 3 May 2004, with a comment by A. Di Martino, in: www.associazionedeicostituzionalisti.it. Constitutional Court’s ruling no. 369/2006 left open the question whether strict prohibition of preimplantation diagnosis of such pathologies is unconstitutional.

¹⁷ Ruling no. 49/2005.

¹⁸ Ruling no. 347/1998.

the lack of lawfulness (Arts. 1418 and 1346 Civil Code) and due to the violation of Article 5 Civil Code, which prohibits making one's own body available for such practices, as well as the laws governing the attribution of motherhood (Arts. 239, 248 and 269 Para. 3 Civil Code and Art. 567 Penal Code) according to which motherhood must be attributed to the same person who gave birth¹⁹.

IV. The Protection of Genotype and Genetic Technology

According to Italian academic opinion on civil law, those parts of the body involved in the reproduction process receive different treatment from the others, subject to ownership rights. Even the 'genoma' of a person is unalienable by virtue of a person's right to identity.²⁰ In the past, the only discipline regarding the protection of the 'genoma' was Article 43 of the code of medical conduct:

'Any intervention carried out upon the human "genoma" must tend towards the prevention or correction of pathological conditions. Genetic manipulation of the embryo is forbidden unless its aim is to prevent or correct pathological conditions.'

Today, Law no. 40/2204 prohibits all types of clinical and experimental research on human embryos which do not pursue purely therapeutic and diagnostic objectives with the aim of safeguarding the health and development of the said embryo, or when alternative methodologies are available. On the other hand, the request for a referendum judged constitutionally admissible aims to increase the possibilities of clinical and experimental research on embryos with therapeutic and diagnostic aims, both through the removal of such limits, and through the elimination of the ban on cloning by means of nucleus transfer and cryoconservation, in as much as they are procedures which apply the techniques of 'staminal' cell utilisation, while nevertheless maintaining the ban on creating processes aimed at obtaining an identical human being, with regard to nuclear-genetic make up, to another, either alive or dead.

The directive of 6 July 1998, no. 98/44 CEE for the protection of biotechnological inventions has still not been implemented, with its difficult equilibrium between the needs for scientific freedom (Art. 33 of the Constitution) and those for the promotion of scientific and technical research (Art. 9 of the Constitution), but also the right to a healthy environment (Arts. 9, 32 of the

¹⁹ Tribunale Napoli, 20 July 1988, *Giustizia civile* 1989, I, pp. 235 ss.; Tribunale Monza, 27 Oct. 1989, *Giustizia civile* 1990, I, pp. 478 ss. Contra Tribunale Roma, ord. 17 Feb. 2000, *Famiglia e diritto* 2000, pp. 156 ss.

²⁰ L. Lenti, *La procreazione artificiale*, Padova 1993, pp. 154 ss.; A. Santosuosso, *Corpo e libertà*, Milano 2001.

Constitution) which also seems to provide the basis for the so-called principle of precaution.²¹

Documentation (III. and IV.)

1. Relevant Legislation

Law 19 Feb. 2004, no. 40 ‘Rules for medically assisted procreation’, *Gazzetta Ufficiale* 24 Feb. 2004, no. 45.

2. Essential Case-Law

Corte Costituzionale, rulings no. 347/1998; 45–49/2005

3. Selected Bibliography

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M. Mori, *La fecondazione artificiale*, Bari 1995

S. Rodotà, *Tecnologie e diritto*, Bologna 1995

F. Santosuosso, *La fecondazione artificiale umana*, Milan 1984

idem, *Corpo e libertà*, Milan 2001

A. Trabucchi, ‘Procreazione artificiale e genetica umana nella prospettiva del giurista’, *Rivista di diritto civile* 1986, pp. 495 ss.

V. Euthanasia

In the Italian legal system, it is impossible to arrive at an *ad hoc* position on the subject of euthanasia.²² Whether or not the subject consents to the killing, compassionate euthanasia is classified as a *omicidio del consenziente* – homicide of the consenting person – (Art. 579 of the Penal Code), with attenuated penalties comparable to voluntary homicide and with the exclusion of the application of

²¹ L. Chieffi (ed.), *Biotechnologie e tutela del valore ambientale*, Torino 2003.

²² The word euthanasia in the current debate is used exclusively in the sense of voluntary compassionate euthanasia, that is of painless killing, brought about by the request of the victim, through compassion for the special circumstances which invoke it. One distinguishes in the legal position between the case where one asks that medical treatment is no longer given, even if this will lead to his/her death (passive euthanasia) and the case where one asks for the application of a treatment that will lead directly and without pain to death (active euthanasia).

aggravating circumstances as in Article 61 of the Penal Code. However in cases of persons of less than eighteen years of age, 'a person infirm of mind, or who finds himself in a condition of mental deficiency, because of another illness or from alcohol or substance abuse' (Art. 579 Para. 3 Penal Code). It is necessary to apply the more rigorous regulation of common voluntary homicide²³, without taking into account the subjective motive of mercy and the objective conditions of a fatal illness as attenuating circumstances, either on the basis of Article 62b of the Penal Code (general extenuating circumstances), or on the basis of Article 62 of the Penal Code which takes into consideration the extenuating circumstances of 'having acted through motives of particular moral or social value'. In spite of these extenuating circumstances, in cases of mercy killing there are usually specific aggravating circumstances such as familial relationships between the killer and the victim, the use of poisonous substances or premeditation, in which case the prevailing verdict may lead to the application of the maximum penalty.²⁴

In contrast to the rigour of the penal regulations, there is, in the hospitals and in the courts, a daily reality where there are strong signals of widespread acceptance in the social conscience of the practice of euthanasia aimed at allowing a dignified death to those who find themselves in the final stages of an incurable illness. The real problem around which the whole Italian doctrinal debate circles is, then, the existence of any possible gap, not material, but ideological in the current system: that is the adequacy of the current regulations in the light of the principles drawn from the Constitution.

1. The Right to Die (Active Euthanasia)

The most controversial question is whether there is a constitutional basis for a 'right to euthanasia' through an active choice as to the time and manner of one's own death, even if one requests the help of a doctor or another third party to procure, assist or accelerate the lethal event.

The most widespread opinion in the Italian constitutional doctrine is the one that holds that every law which would recognise the legality of euthanasia and a right to die, would offend the letter and the spirit of the Italian Constitution. Article 2 which recognises and guarantees the inviolable rights of man, prohibits absolutely, albeit implicitly, the fulfilment of any act directed at interrupting or abbreviating the life of a person. In particular, a joint reading of Article 2 and Article 32 (right to health) would lead to the conclusion that the Constitution

²³ In this sense, see Corte di Cassazione, 18 Nov. 1954 [(5), 151 ss.].

²⁴ For the distinction between homicide with consent and assisted suicide, Art. 580, see Corte di Cassazione, 6 Feb. 1998 [(7), 456 ss.].

intends to safeguard the right to life as a right to physical and biological existence, from conception to death, without either quantitative or qualitative ulterior specifications, and therefore also to life in the terminal phases of illness. In consequence any constitutional cover for a 'right of active choice over one's own death' would be precluded²⁵, a major reason being that if such a right is configured as 'the right to be killed' by a third party, on whom would be laid a corresponding – and clearly unlawful – 'duty to kill'.²⁶

But the doctrine is anything but unanimous and others give an interpretation diametrically opposed to the same constitutional regulations and the same principle of 'respect of the person'. The joint reading of Articles 2 and 32 of the Constitution would be the legitimating – rather than the excluding – basis of the right to the active choice of one's own death. They are convinced that life itself is protected, not only in the merely biological sense of 'being alive', but in the weightier sense of the biographical fact of 'having a life' which is significant and rewarding for the person who lives it: the respect of the person, the respect of their freedom, the respect of their dignity as sanctioned by the Constitution would also impose, in consequence, the respect of a decision which goes against their own life, qualifying such a decision in fact as an authentic 'right'. And the principle of equality (Art. 3 Para. 1 of the Constitution) would be violated if such a right was denied precisely to those who, finding themselves in an impossible position to procure their own death, or not wishing to go through a long and protracted period of dying, ask other persons to help them carry out their wish in the quickest and least painful way possible.²⁷

2. Right to Refuse Treatment and the Right to be Left to Die (Passive Euthanasia)

Less ambiguous are the indications that can be drawn from the basic Charter as to the definition in law of the right to passive euthanasia. Article 32 Para. 1, of the Constitution defines health both as a 'fundamental right of the individual' and as in the 'interests of the community', such that the question could arise if, in case of conflict between the individual profile and the social profile, health as a right or as a duty should prevail. For the jurisprudence²⁸ and the clearly dominant

²⁵ Nicotra Guerrera [(5), 147].

²⁶ D'Agostino [(2), 94 ff.]; D'Aloia [(3), 615].

²⁷ Algotino [(1), 3218].

²⁸ Corte costituzionale 471/1990; Corte costituzionale 118/1996; Corte di Cassazione, 15 Jan. 1997, no. 364 [(6), 771 ss.].

doctrine²⁹, Para. 2 of Article 32 in the Constitution – which states that ‘nobody can be obliged to follow a specific health treatment unless provided for by the law’, and in no case may the law violate ‘the limits imposed by respect for the person’ – removes any doubt on the subject: the constitutional regulation (often read jointly with Art. 13 Para. 1 of the Constitution, which guarantees the inviolability of personal liberty) becomes almost unanimously interpreted in the sense that health treatments can be legitimately imposed only in exceptional cases determined by a law providing for the safeguard of public interests – *in primis*, the health of other associates – not otherwise guaranteed. In all other cases, the Constitution gives absolute priority to the principle of individual self-determination, such that any health treatment administered in the absence of or contrary to the consent of the right-holder would be illegal, even if it is to safeguard his well-being.³⁰

Every patient, then, has the sanctioned constitutional right to have his refusal of diagnostic and therapeutic actions respected; everyone has the right not to follow treatment; the right to loss of health; the *right, also, to be allowed to die*.³¹ This is the negative implication of the right to health guaranteed in the Constitution. In this way the refusal of a patient who is legally capable³², conscious and informed³³, not only renders the abstention of the doctor from providing care lawful, but also a duty; and the conduct of the physician who nevertheless decides to follow a medical or surgical procedure is to be considered unacceptable as much constitutionally as ethically, and as such to commit, in the worst case, a penal offence *ex* Article 610 of the penal code or another crime against individual freedom, constituting violent coercion to undergo something explicitly refused.

If the principles that form the Constitution do not allow a generalised and indiscriminate imposition of the duty to be healthy or the duty to life, this does

²⁹ D’Aloia [(3), 611]; Luciani [(4), 9].

³⁰ This reflection on Art. 5 of the Civil Code does not lead to different results, which forbid acts of disposal of the body which ‘cause a permanent diminution of physical integrity’. According to the main interpretation, in fact, this article would forbid only positive acts of disposal of the body, of self-mutilation, not the negative ones, which first and foremost is the refusal of medical treatments.

³¹ D’Aloia [(3), 611]; Luciani [(4), 9].

³² In the case of an incapable subject, because he/she is a minor, a right to refuse treatment cannot be made by the parents, in that their power with regard to the minor is not depicted ‘as [...] personal liberty, but as a right and a duty which finds in the interests of the child, its functions and its limits.’ (Corte costituzionale 132/1992). See also, Corte d’Assise di Cagliari, 10 Mar. 1982 [(7), 27 ss.].

³³ Corte di Cassazione, 15 Jan. 1997, no. 364 [(6), 771 ss.].

not mean that in the Italian legal system there is a principle of indifference towards the citizens.³⁴ On the contrary, the Constitution's objective of material and social solidarity summarises in a paradigmatic manner the awareness of the inseparability of the safeguarding of rights and of the guarantee of the material conditions for a dignified life (Art. 3 Para. 2). If a State that wants to commit itself realistically to the protection of the right to life, must stop short of a free and conscious choice, even extending to the point of renouncing life, then it must be held at the same time to free the individual from forms of privation which could lead him/her to come to choose death under the tormenting pressure exercised by conditions of need and suffering and from the impossibility of insuring for himself and his family a dignified life, even in conditions of illness, invalidity, or old age.³⁵

Encouraging palliative care and therapies to control pain, creating and guaranteeing systems for assistance and material and psychological support for the terminally ill and for their families constitute duties of the Italian State that emerge clearly from the constitutional Charter.

3. Documentation

3.1. RELEVANT LEGISLATION

Articles 62, 579, 580, 610 Codice Penale
Article 5 Codice Civile

3.2. ESSENTIAL CASE-LAW

Corte Costituzionale, rulings 471/1990; 132/1992; 180/1994; 118/1996
Corte di Cassazione, rulings 18 Nov. 1954, *Foro italiano* 1955, II, 151; 15 Jan. 1997, no. 364, *Foro italiano* 1997, I, 771; 6 Feb. 1998, *Foro italiano* 1998, 456 ss.
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F. D'Agostino, 'Diritto e euthanasia', *Bioetica* 1/1999, pp. 94 ss.

³⁴ In this sense, see Corte costituzionale, ruling no. 180/1994.

³⁵ D'Aloia [(3), 621]; Nicotra Guerrera [(5), 148 ss.]

- A. D'Aloia, 'Diritto di morire? La problematica dimensione costituzionale della "fine della vita"', *Politica del diritto* 1998, pp. 608 ss.
- M. Luciani, 'Diritto salute–diritto costituzionale', *Enciclopedia giuridica* XXVII, Rome 1991, pp. 1 ss.
- I. Nicotra Guerrera, *'Vita' e sistema dei valori nella Costituzione*, Milan 1997

VI. Organ Transplant

The constitutional principles which underpin and legitimise the legal discipline of the transplant of organs are, on the one hand, the protection of the health and life of the human being (Art. 32 Constitution), and on the other hand, human and social solidarity (Art. 2 Constitution). Such principles cannot be validated in an absolute manner, but need to be taken in conjunction and balanced with other principles, including those of constitutional standing, that put forward claims in part contradictory and which may be viewed differently according to whether the organ for transplant comes *ex vivo* or *ex mortuo*.

1. Transplant of Organs Between Living Persons

In the transplant of organs between living persons, constitutional limits are posed to safeguard the life, health and the physical and psychological well-being of the donor, as well as that of the receiver (Art. 32 Constitution); the respect for the liberty of both to decide autonomously the operations which their body will undergo (Arts. 13, 32 Para. 2 Constitution); the protection of their identity and human dignity, even beyond that which they themselves may allow (Arts. 2, 32 and 41 Constitution); finally the principle of equality and the same dignity for all human beings, whether they be potential recipients of organs, or potential donors (Art. 3 Constitution).

The legal discipline of transplants from living persons, apart from in these constitutional principles, takes its essential regulatory reference from Article 5 of the Civil Code, which prohibits acts of disposition of the body when they cause a permanent diminution of physical integrity or when they may be otherwise against the law, contrary to public order or decency. On the basis of this regulation, the removal of organs, even double ones, whose removal could bring about a permanent detriment to biological functions or might have negative consequences on the progress of the donor's social relations is always prohibited.

Law 458/1967, which first contained principles in the matter of transplants of organs *ex vivo*, made the transplant of *kidneys* lawful, subject to the case in which there may be a voluntary decision to undergo the operation on the part of the donor. Law 482/1999 made lawful the transplant between living persons of part

of the liver. Such dispensations to the prohibition of the disposition of the body justify for humanitarian purposes and exclusively altruistic reasons the pursuit of the operation and for the consequences of the act itself which, while permanent, does not result in serious disablement to the biological and social life of the donor.

An element that cannot be set aside in the area of organ transplants between the living is the consent to the removal given by the donor, which must be personal, free, spontaneous and conscious (showing, that is, that the subject is fully able and adequately informed on the consequences of his/her assent); revocable up to the moment of the surgical operation, unconditional and free (any private agreement which includes compensation to the donor in money or other goods being null and void, *ex* Articles 2, 3 and 42 of the Constitution). Clearly inviolable is the consent to the transplant from the beneficiary, from the moment which, as with all other therapeutic treatments, the organ transplant (*ex vivo* or *ex mortuo*) is lawful only where the interested party, suitably informed, has consented to it (Art. 32 Para. 2 of the Constitution).

2. Transplant of Organs From Corpses

In the case of the transplant of organs from corpses, the right to health of the beneficiary must be balanced and contemporaneous with the right to choose the allocation of the dead's body organs and with the right-duty dictated by *pietas* to give the final care and honouring of the mortal remains to the relatives of the dead person. These too are rights, for which there is a certain constitutional basis, in the protection of the person and his/her dignity (Arts. 2, 3 Constitution); of the freedom of choice and conscience (Arts. 13, 19 of the Constitution); of the family, as the social form in which, from birth to death, the individual finds care and welfare and space for the development of his/her personality (Arts. 2, 29–31 of the Constitution).

The general principle of *favor personae* which permeates the Italian Constitutional Charter privileges life.³⁶ But a law which imposes this choice in a coercive manner, ignoring any different desire (even if it be purely selfish interests), would be disrespectful to the equally fundamental constitutional principle which protects individual freedom.

The Law 91/1999 was formulated precisely in an attempt to bring into balance the values of social solidarity with those of individual liberty. It makes it

³⁶ On the pre-eminence of the right to health dependant on organ transplant in comparison with other constitutionally guaranteed rights (the right to strike), Corte di Cassazione, 4 Dec. 1980, [(2), 257 ff.].

obligatory for all citizens who have reached their majority (at the age of 18) to declare expressly and formally their will on the matter of the donation of their organs after death, stating clearly that failure to do so (and therefore by their silence) will be taken as a declaration of assent to donation (the possibility of changing the will is obviously safeguarded). The removal of organs is therefore allowed in those cases in which either the dead person had expressed during his/her life a willingness to donate organs or, although informed, has not expressed any will (silence equals consent). No wish of the relatives has any legal value whatsoever.

The Law 578/1993, establishing a safe scientific criterion, has declared that for all legal purposes 'death is identified with the irrevocable cessation of all the functions of the brain'. The purpose of the law was to reassure the public that the removal of organs cannot take place before cerebral death has occurred (death *tout court*, according to the law)³⁷.

The law provides many objective limits on the possibility of carrying out transplants from the corpse: genetic manipulation is prohibited for the purposes of transplant, as is the removal of 'extremely personal' organs (gonads and brain). Also prohibited is the sale or the removal of organs for monetary gain (Art. 2 Constitution), and their export to States which allow such commerce or their import from States where the legislation allows the possibility of the removal and sale of parts of the body from people condemned to death (Art. 3 Constitution).

Recognising the value and dignity of the family's right so that the mortal remains of the deceased are to be treated with the maximum respect and due honour (Arts. 2, 29–31 Constitution), the law provides that the transplant is carried out in such a manner that mutilation or unnecessary dissection is avoided, and requires that the body is reconstructed with maximum care.

The law does not address the problem of the 'tragic choices' that have to be faced in the moment when decisions have to be made about the recipient/s of the organ/s taken from the body, nor does it establish clear criteria of equality and equal dignity and opportunity for everyone (Art. 3 Constitution), either in access to the waiting lists (determined exclusively by clinical and immunological parameters), or in the assignment of the organs (decided solely on the basis of urgency and compatibility).

³⁷ Corte Costituzionale, no. 414/1995, made an indirect pronouncement on the Law 578/1993, declaring it as 'the current state of knowledge and of prevailing thought [...], in that it reflects scientific progress and aims to achieve social solidarity and the fundamental needs of justice (respect for life, a single concept of death, certainty of the irreversible extinction of the person), is not set in opposition to the regulations and principles of the Constitution'.

3. Documentation

3.1. RELEVANT LEGISLATION

Article 5 Civil Code (1942)

Law 26 June 1967, no. 458 'Transplant of kidneys between living persons', *Gazzetta Ufficiale*, 27 June 1967, no. 160

Law 29 December 1993, no. 578 'Regulations for verification and certification of death', *Gazzetta Ufficiale*, 8 January 1994, no. 5

Law 16 December 1999, no. 482, 'Regulations for allowing the partial transplant of the liver', *Gazzetta Ufficiale*, 20 December 1999, no. 297

Law 1 April 1999, no. 91, 'Provisions on the subject of removal and transplant of organs and tissues', *Gazzetta Ufficiale*, 15 April 1999, no. 87

3.2. ESSENTIAL CASE-LAW

Corte Costituzionale, ruling no. 414/1995

Corte di Cassazione, 4 December 1980, *La giustizia penale* 1981, II, pp. 257 ss.

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V. Palermo/E. Ravera, 'Note sulla legge 1/4/1999 no. 91', *Rivista di Diritto delle Professioni Sanitarie* 1999, pp. 104 ss.

P.M. Vecchi, Trapianti e trasfusioni, *Enciclopedia giuridica*, XXXI, Roma 1994, pp. 3 ss.

3.4. INTERNET

AIDO (Associazione Italiana Donatori Organi): <http://www.ib.pi.cnr.it/aido>

VII. Constitutional Norms

Article 2 The Republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity.

Right to Life, Right to Physical and Mental Integrity, Human Dignity

Article 9 1) The Republic promotes cultural development and scientific and technical research.

Article 27 4) Death penalty is prohibited except by military law in time of war.

Article 32 1) The Republic protects individual health as a basic right and in the public interest; it provides free medical care to the poor.

2) Nobody may be forcefully submitted to medical treatment except as regulated by law. That law may in no case violate the limits imposed by the respect for the human being.

SECOND PART: RIGHT TO PHYSICAL AND MENTAL INTEGRITY, HUMAN DIGNITY*

1. Right to Human Dignity and to Physical and Mental Integrity

The Italian Constitution mentions ‘human dignity’ in two provisions. The first is the general principle of equality (Art. 3: ‘all citizens have equal social dignity’) and the second is the setting of the general limits of private economical initiative which can ‘not be carried out against the common good or in a way that may harm public security, liberty, or human dignity’ (Art. 41). Furthermore, workers have a right to wages ‘sufficient to ensure them and their families a free and dignified existence’ (Art. 36) and the protection of workers rights has been realised by the Law no. 300/1970 containing ‘Norms for the protection of worker’s freedom and dignity’. In cases of ‘moral unworthiness’ (*indegnità morale*), the right to vote can be excluded (Art. 48 Para. 3).

The concept of human dignity seems to be implied even by other guarantees of liberty such as the prevention of ‘acts of physical and moral violence against persons subjected to restrictions of personal liberty’ (Art. 13 Para. 4), of punishments repugnant to the ‘sense of humanity’ (Art. 27 Para. 3) and of sanitary treatments without respect to of the human person (Art. 32 Para. 2). The protection of human dignity also inspired the provision that ‘rules about armed forces must conform to the democratic spirit of the Republic’ (Art. 52 Para. 3) and is guaranteed by the rights of a person to ‘legal capacity, citizenship, or name’ (Art. 22).

The Constitutional Court has used human dignity mostly as an additional argument for the determination of economical rights and duties, for example the right to parental support (ruling no. 37/1985) or for the right to a pension allowance for the victims of rapes in war (ruling no. 561/1987). In these cases, dignity seems to be interpreted as the opposite of a ‘misery’ which is considered evident by social conscience.

A more recent ruling has focussed on the human dignity of the victim of a capital crime. The Court upheld the prohibition of publications illustrated by ‘shocking details’ harming the ‘common sense of moral’, an elastic concept which has to be interpreted as a reference to human dignity (sentence no.

* I. Jörg Luther, Professore ordinario di istituzioni di diritto pubblico, Università del Piemonte Orientale;
II. Gianpaolo Fontana, Ricercatore di diritto costituzionale, Università Roma Tre;
III. Ines Ciolli, Ricercatore di diritto costituzionale, Università La Sapienza, Roma.

293/2000, decree no. 92/2002). Even legislation on mobbing refers to the protection of human dignity (sentence 359/2003). Human dignity is now qualified as ‘the value which inspires’ the protection of human rights demanded by Article 2 of the Constitution and further legislation (for example Art. 1 Law no. 180/1978 regarding obligatory sanitary treatments which have to respect a ‘person’s dignity’).

1. Torture

Torture is prohibited in the code of criminal procedure (Art. 188), but not as a specific crime or aggravating circumstance in the penal code.³⁸ The Law no. 6 of 31 January 2002 created a specific provision for the martial law (Art. 185-bis c.p.m.g).

2. Prohibition of Cruel, Inhuman and Degrading Punishment

Punishments have to respect the ‘sense of humanity’ and must ‘aim at re-educating the convicted (Art. 27 Para. 3). The Constitutional Court has considered the scope of Article 3 ECHR included in this provision.³⁹ Every kind of detention has a moment of the ‘mortification of human dignity’⁴⁰ because it renders a person physically subject to the power of another.

Article 41 of Law no. 354/1974 on the legal order of prisons (*ordinamento penitenziario*) established that physical force can be applied to prisoners only if necessary to prevent violence and break-out or to eliminate active or passive resistance against the enforcement of orders which could include even forced feeding. The Constitutional Court has pointed out that prisoners can not be deprived of their fundamental rights and all decisions on related internal remedies have thus to be considered jurisdiction.⁴¹ This does not exclude the adoption of a specific measure of security (Art. 41-bis Law no. 354/1975) with the exclusion of dangerous social contacts.⁴² The punishments have more than one function, but they always have to serve to re-educate and can not be exclusively devoted to general prevention and to social defence.⁴³ The legislature has a large discretionary power in awarding less degrading alternative punishments for short

³⁸ Marchesi 1999, p. 463 ff.

³⁹ Sentence no. 168/1994.

⁴⁰ Sentence no. 105/2001.

⁴¹ Sentence no. 26/1999.

⁴² Sentence no. 349, 410/1993; 376/1997.

⁴³ Sentence no. 313/1990.

detention, but house arrest as an alternative punishment helpful to develop new familiar and social relationships⁴⁴ has to be granted to the mother of a totally disabled son.⁴⁵ However the real state of Italian prisons has often been considered critical.⁴⁶

3. *Life Imprisonment*

The Constitutional Court upheld for the first time the partial isolation of a lifelong prisoner not being contrary to the sense of humanity⁴⁷, but Law no. 1634/1962 granted to lifelong prisoners the right to conditional release. This was a way to give a chance for re-education and to avoid the unconstitutionality of lifelong imprisonment.⁴⁸ The Constitutional Court demanded a further guarantee⁴⁹ and Law no. 663/1986 provided for conditional release and detention with external working permission (*semilibertà*) after 20 years of imprisonment, granting furthermore a right to special leaves after ten years. The laws regulating lifelong imprisonment have therefore ‘abolished every sense of a sort of perpetuity which was the connotation of the original provision when the penal code was enacted’.⁵⁰

4. *Documentation*

4.1. RELEVANT LEGISLATION

Criminal Procedure Code (1989): Article 188

Law 25 November 1962, no. 1634 (Norms regarding lifelong prisonment)

Law 20 May 1970, no. 300 (‘Norms for the protection of worker’s freedom and dignity ...’), *Gazzetta Ufficiale* 25 May 1970, no. 131

Law 26 July 1975, no. 354 (‘Legal order of prisons’), *Gazzetta Ufficiale* 9 August 1975, no. 212

Law 13 May 1978 (‘Voluntary and obligatory sanitary checks and treatments’), *Gazzetta Ufficiale* 16 May 1978, no. 133

⁴⁴ Sentence no. 422/1999.

⁴⁵ Sentence no. 350/2003.

⁴⁶ Cassese 1994.

⁴⁷ Sentence no. 115/1964.

⁴⁸ Sentence no. 264/1974.

⁴⁹ Sentence no. 274/1983.

⁵⁰ Sentence no. 168/1994.

4.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale, rulings no. 115/1964, 264/1974, 37/1985, 561/1987, 349/1993, 168/1994, 26/1999, 293/2000, 350, 359/2003

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- A. Marchesi, 'L'attuazione in Italia degli obblighi internazionali di repressione della tortura', *Rivista di diritto internazionale* 1999, pp. 463 ss.

II. Forced Interventions

Article 32 of the Constitution establishes that no-one may be forcefully submitted to medical treatment except as regulated by law, adding that the law may in no case violate the limits imposed by respect for the person. Italian law broadly defines compulsory medical treatment – whose non-compliance incurs legal sanctions – as obligatory treatment which may be given with the use of force. While the guarantees given by Article 32 Para. 2 (relative and reinforced reserve of legislation) are considered sufficient for such treatment, forced interventions tend to be included under the protection of personal freedom covered by Article 13 of the Constitution, which is supported by far more comprehensive and provident guarantees (absolute reserve of legislation and reserves of jurisdiction).⁵¹

Moreover, the inviolable and social nature of the right to health has been deemed by the Constitutional Court to be appropriate to justify imposing a means of protection, for example, the use of safety belts when driving motor vehicles, due to the social costs incurred by the public health service when treating the harmful consequences of road accidents.⁵²

⁵¹ For academic doctrine on compulsory medical treatments see. M. Luciani, 'Salute (dir. cost.)', *Enciclopedia Giuridica*, XXVII, Roma 1991; S. Panunzio, 'Trattamenti sanitari obbligatori e Costituzione', *Diritto e Società* 1979; F. Modugno, 'Trattamenti sanitari "non obbligatori" e Costituzione', *Diritto e Società* 1982.

⁵² Corte Costituzionale, Ruling no. 180/1994.

1. Compulsory Sterilisation and Medical Treatment

The Constitutional Court has taken the opportunity to specify on several occasions that medical treatment, on the one hand, is dictated by the necessity to safeguard the health of the individual patient⁵³, and on the other hand, that medical treatment must be aimed exclusively at the health of the community as a whole and not in pursuing any other public interest.

In protecting individual health ‘as a basic right and in the public interest’, Article 32 of the Constitution states an individual right to the integrity of individuals as well as a social right to the protection of collective health. Consequently, the constitutional right to health, in the interpretation offered by the constitutional judge, assumes the necessary harmonisation of individual health with the co-existing and reciprocal right to collective health.⁵⁴

Forced medical treatment can only be legislatively imposed if its purpose is directed towards the safeguarding of collective health, as well as that of the person who is to be subjected to it, for example, in the event of contagious diseases such as leprosy or tuberculosis. It is believed that the imperative duty of respect for the person attributes a reinforced nature to the legal reserve of Article 32 of the Constitution. The legislative discipline governing compulsory medical treatment intends to safeguard, as well as the dignity of the individual, the ‘civil and political rights guaranteed by the Constitution, including as far as possible the right to a free choice of doctor and place of treatment.’ ‘... compulsory medical treatment ... must be accompanied by initiatives aimed at ensuring the consent and cooperation of the person under obligation.’⁵⁵ Compulsory medical treatment is authorised by a provision granted by the mayor pending a reasoned proposal issued by a doctor from a public health service hospital. In the event of mental illness, the proposed provision which foresees treatment in conditions of hospitalisation must be ratified by a second health service doctor and communicated within 48 hours of admission to the authorising judge, who, within the following 48 hours, must sanction the proposal, having carried out the necessary verifications, with a justified decree through which any interested parties may appeal to the relevant court. Based on this discipline, ‘medical treatment has been transformed from a problem of public safety to an essentially medical care problem, and one linked to the social reintegration of the patient’.⁵⁶

⁵³ Corte Costituzionale, Ruling no. 307/1990.

⁵⁴ Corte Costituzionale, Rulings no. 307/1990, 218/1994, 258/1994.

⁵⁵ Art. 33 Law no. 833/1978.

⁵⁶ Corte Costituzionale, Ruling no. 211/1988.

By virtue of a parent's duty to maintain the health of their children (Art. 30 Constitution), parents cannot, not even in view of certain religious beliefs, refuse urgent blood transfusions, and in such an event the relevant magistrate would be called upon to intervene (Art. 333 Civil code).⁵⁷

Compulsory sterilisation, which should be considered incompatible with Article 32 Para. 2, constitutes a felony of grievous bodily harm (Art. 583 Penal code). In 1978 Article 552 Penal code (procured impotence of procreation) which also prohibited the voluntary form of sterilisation, was revoked.

The compulsoriness of military service (Art. 52 of the Constitution) also justifies the coerciveness of the recruitment medical. In the absence of explicit legislative authorisation, the force-feeding of prisoners is considered illegal.⁵⁸

2. *Compulsory Vaccination*

The Italian law contains a number of different hypotheses on obligatory vaccination, aimed at the prophylaxis of infectious and contagious diseases. Some of them are only directed towards particular categories of people, others are imposed more generally.⁵⁹

The Constitutional Court has been able to specify that compulsory vaccinations are not, in principle, incompatible with Article 32 of the Constitution⁶⁰, provided that the disease in question is contagious and a vehicle for transmission, and therefore a danger to those in contact with the potential carrier. In the event that parents fail to meet their vaccination obligations, the judge can intervene to ensure their application with the aim of safeguarding the health of both the general public and the child.⁶¹

If a person's health is damaged following compulsory vaccination, the payment of appropriate compensation must be made in favour of the damaged party.⁶² Through another decision⁶³, the constitutional judge has also sanctioned

⁵⁷ R. Romboli, 'La libertà di disporre del proprio corpo', in: Scialoja-Branca (ed.), *Commentario del codice civile*, Art. 5, Bologna 1988, p. 352.

⁵⁸ R. Romboli (n. 57), pp. 347, 355 ss.

⁵⁹ Currently, vaccinations generally considered obligatory by Italian law are those aimed at the eradication (*profilassi*) of the following diseases: ditteritis, tetanus, poliomyelitis, hepatitis B.

⁶⁰ Corte Costituzionale, Ruling no. 142/1983.

⁶¹ Corte Costituzionale, Ruling no. 132/1992.

⁶² It was sentence Corte Costituzionale, 22 June 1990, no 207 that led Parliament to approve Law no. 210/1992 (modified by law no. 238/1997) which allows the payment of compensation in favour of those who, as a result of vaccinations imposed by law, suffer harm which produces irreversible psychological or physical

the indemnifiable nature of the consequences deriving from vaccinations promoted and encouraged by the public authorities (even if not compulsory) by virtue of the principle that ‘it is not constitutionally legitimate to compel an individual to risk his or her own health for the public good, unless the public is prepared to share, as far as possible, the weight of any resulting negative consequences.’ More recently, the constitutional judge has asked the legislature to approve a new discipline which in the concrete determination of indemnity takes into account all the components of the damage to health suffered with the aim of ensuring appropriate compensation according to its extent and seriousness.⁶⁴

3. Compulsory Taking of Blood Samples

The obligation to subject oneself to the taking of blood samples and blood tests is legislatively required, initially, for those that perform certain activities (e.g. medical professions) which carry the risk of infecting third parties, with the aim of eliminating the presence of diseases contractable during the performance of such activities. The Constitutional Court has, as such, declared the constitutional illegitimacy of Article 5 Paras. 3 and 5 of Law no. 135/1990, where it does not require medical checks for the absence of HIV as a condition for the performance of activities which carry risks to the health of third parties: ‘indeed, the safeguarding of health implies and includes the duty of the individual not to put the health of others at risk through his or her own behaviour’.⁶⁵ The said blood samples constitute, therefore, not so much an obligation as a burden for those who perform activities that can be a source of risk to those in their immediate environment.

A more complicated question is that regarding the possibility, on the part of the judge, of authorising judicial appraisals leading to the compulsory taking of blood samples. While in the past, under the old criminal law, the constitutional judge had deemed the compulsory taking of blood samples as compatible with the Constitution⁶⁶, he has more recently ratified the constitutional illegitimacy of Article 224 Para. 2 Criminal Procedure Code, where it ‘permits the judge, in the context of appraisal operations, to apply measures which nevertheless affect the

consequences and of those who, following blood or blood-product-(transfusion) (*‘emoderivati’*), become infected by HIV or who suffer irreversible damage from post-transfusion hepatitis.

⁶³ Corte Costituzionale, Rulings no. 27/1998, 118/1996.

⁶⁴ Corte Costituzionale, Ruling no. 38/2002.

⁶⁵ Corte Costituzionale, Ruling no. 218/1994.

⁶⁶ Corte Costituzionale, Ruling no. 54/1986.

personal liberty of the person under investigation, the defendant, or third parties, which are outside those explicitly stipulated by law'.⁶⁷ According to the constitutional judge, the compulsory taking of blood samples, affecting the inviolability of personal space guaranteed by Article 13 of the Constitution, requires legislative determination of the 'cases and ways' (*'casi e modi'*), in which the said liberty can be constrained as intervention at the judge's discretion is deemed to be insufficient in this regard.

The decision of the new Highway Code to impose specific analyses at certain public health centres, in order to ascertain the use of stupeficient or mind-affecting substances on the part of drivers, and also, with the aim of evaluating alcohol consumption levels, to retain the application of alveolar air analysis tools, considered 'less invasive but reliable'⁶⁸, has been judged 'not unreasonable'.

4. Lie Detector and Truth Serum

Under Italian law, instruments or methods such as the lie detector or the truth serum aimed at eliminating the defendant's or suspect's ability to lie are not permitted even with the consent of the person in question. Such methods are considered to violate the constitutional ban on applying physical and moral violence to people subjected to restricted freedom (Art. 13 Para. 4 Constitution) and in any case are sufficient to surpass the limits imposed by respect for the person (Art. 32 Para. 2 Constitution). Indeed, Article 64 Para. 2 Criminal Penal Code, which determines the general rules on the performing of interrogations, states that 'methods or techniques aimed at influencing the freedom of self-determination or at altering an individual's ability to remember or evaluate cannot be used'.⁶⁹

5. Documentation

5.1. RELEVANT LEGISLATION

Criminal Procedure Code (1989): Articles 188, 64

⁶⁷ Corte Costituzionale, Rulings no. 194 and 238 of 1996.

⁶⁸ Corte Costituzionale, Ruling no. 306/2001.

⁶⁹ See also Art. 188 Criminal Procedure Code.

5.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale, rulings no. 142/1983, 211/1988, 307/1990, 132/1992, 180, 218 and 258/1994, 54 and 118, 194 and 238/1996, 27/1998, 306/2001, 38/2002

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A. Pace, voce 'Libertà personale (dir. cost.)', *Enciclopedia del diritto XXIV*, Milano 1974, pp. 295 ss.
R. Romboli, 'La libertà di disporre del proprio corpo', in: Scialoja-Branca (ed.), *Commentario del codice civile*, Article 5, Bologna 1988

III. Right to Health

The Italian Republic 'protects individual health as a basic right and for the public interest; it provides free medical care to the poor' (Art. 32 of the Constitution).

1. Protection Against Emissions (Noise, Light, Smell)

Protection from pollutant emissions is included in the more general framework of health protection, governed by Article 32 of the Constitution. There is still no law that governs protection against light pollution on a national level, however there are various regional laws that deal with the prevention of such pollution (for example, the regional law of Tuscany, 21 March 2004, no. 37 which protects the ecological balance of the environment and allocates certain powers to provincial and municipal authorities).

As far as acoustic pollution is concerned, it is the responsibility of the State to set maximum noise emission limits in working, residential and outdoor

environments,⁷⁰ while inspection and prevention activities are in the domain of the regional and autonomous provincial authorities.⁷¹

With regard to the emission of pollutants, Article 844 of the civil code acknowledges that owners of land cannot prevent emissions of noise, fumes and heat if they are within the limits allowed by law. The maximum limits for the emission of pollutants are established by the Presidential Decree of 1 Mar. 1991, and those for acoustic pollution are dictated by Law 26 Oct. 1995, no. 441.

2. Ultra Hazardous Activities

With regard to ultra-hazardous activities, neither the Constitution nor the interpretations of the Constitutional Court have so far provided any specific guidance. The only legislative reference is that made in Article 2050 of the Civil Code, which allocates responsibility for the carrying out of hazardous activities. Whoever causes damage through such activities would be held liable and would have to pay compensation unless the said party could prove that all possible measures had been taken to avoid such damage. The Supreme Court⁷² has distinguished typical hazardous activities, this means those recognised by law and in regulations, from untypical ones, whose dangerousness is ascertained by a judge.

As far as ultra-hazardous activities performed on oneself are concerned, one should refer to Article 5 of the Civil Code which forbids the complete disposal of one's own body in the event that one performs acts which diminish one's own physical integrity or go against the principles of law, public order or sociable behaviour.

3. The Right to Health as an Actionable Fundamental Right

The right to health is now defined by the Constitutional Court as a fundamental inviolable right,⁷³ directly actionable against any harmful behaviour.⁷⁴ It is a fundamental right considered 'complete and comprehensive in as much as it is protected as an inviolable aspect of human dignity'.⁷⁵ Such a right is deemed to

⁷⁰ Article 4 Law 23 Dec. 1978, no. 833 and the recent framework-law on the protection from exposure to electric, magnetic and electromagnetic fields, Law 22 Feb. 2001, no. 36.

⁷¹ Ruling no. 517/91.

⁷² Cassazione civile, section 3 III, Ruling no. 3022/2001.

⁷³ Rulings no. 992/1988, 307 and 455 1990; ord. no. 40/1991.

⁷⁴ Sentences no. 79/1988 and 184/1986.

⁷⁵ Sentences no. 267/88, 416/95, 304 and 218/1994, 247/92 and 455/1990.

be subjective and inherent to the individual, and is extended to both national citizens and foreigners.⁷⁶

The right to health is a complicated one that contains both rights to freedom (the right to psycho-physical integrity, the right to a healthy environment) and rights to services (the right to health care, the right to be treated).

When intended as a right to freedom, such a right requires the non-intervention of third parties, who must as such abstain from any type of behaviour that could compromise such freedom.⁷⁷ The violation of psychophysical integrity can give right to an indemnity for 'biological damage', that suffered due to the detrimental effects on a person's physical well-being regardless of the consequences of such effects on the person's ability to earn. The Constitutional Court has recognised on more than one occasion the possibility of compensation for biological damages,⁷⁸ intended as an impairment of psychophysical integrity in itself and has thus considered the payment of damages as necessary regardless of the individual's ability to work and earn a living. This is not yet consolidated case law. In sentences no. 226, 423 and 522/2000, the Constitutional Court evaluated in a more restrictive manner the possibility of compensation for the said damages. In sentence no. 485/1991, it declared inadmissible the question of the constitutional legitimacy of Articles 2, 3 and 74 Presidential Decree no. 1124/1965, in the part where it does not allow compensation for biological damages suffered by a worker during the performance of his tasks and caused by the said tasks. The Court deemed it only right and proper, so as not to overstep its own authority, to limit itself to expressing a stern warning to the legislature, reminding it of its commitment to modify a regulation which evaluates damage to people considering them as a mere means of production (this means compensating only the income not earned due to the damage suffered).

As a right to services, the right to health includes free medical care for the poor who can not be obliged to pay specific 'tickets'.⁷⁹ In the case of the authorized testing of new therapies, even the poor have a right to access the tested cure.⁸⁰

⁷⁶ Ruling no. 104/1965.

⁷⁷ Rulings no. 184/1986 and 202/1991.

⁷⁸ Rulings no. 88/1979, 561/1987, 356/1991.

⁷⁹ Sentence no. 184/1993.

⁸⁰ Sentence no. 185/1998.

3.1. THE RIGHT TO AN ENVIRONMENT BEFITTING A HUMAN BEING

Academic doctrine and case law do not agree on the value of a right to a befitting environment, or on whether it can be considered a genuine fundamental right or simply an interest of constitutional relevance. Neither has sentence no. 641/1987 of the Constitutional Court clarified the question.

Reference to Article 32 of the Constitution, with regard to the protection of the natural environment, is owed, *in primis*, to an interpretation of the Corte di Cassazione,⁸¹ which referred the protection of health not only to the physical safety of the individual, but also to places where individuals come together. Subsequently, the Constitutional Court attributed even the maintaining of a healthy environment to the scope of Article 32 of the Constitution with sentences no. 210 and 641 of 1987.

With regard to protection from emissions that can cause risks to human beings, the Constitutional Court has allocated these powers between the State and the regional authorities. The latter have been awarded constitutionally guaranteed regional lawmaking powers.⁸² Much of the safeguarding of the environment has a functional connection with those issues that, in the old enumeration of Article 117 of the Constitution, have a more direct effect on the land and implied the preservation of soil, air and water quality.⁸³ The State, on the other hand, retains powers deemed to be of national importance, such as setting limits on pollutant emissions and minimum purifier quality objectives, as well as defining technical criteria and regulations to discipline the discharge of waste into the sea (Art. 80 Law no. 112/1998). With the reform of Title V of the Constitution, implemented by Constitutional Statute no. 3/2001, the protection of the environment and the ecosystem are considered matters subject to the exclusive legislation of the State (Art. 117 Para. 2 letter s), while the protection and safety of the workplace and the protection of health are deemed matters of concurrent legislation (Art. 117 Para. 3). In truth, the Constitutional Court inferred from the new Article 117 of the Constitution another concurrent power on environmental issues. It should, in fact, be the job of the ‘State to set uniform standards of protection throughout the national territory’, without actually eliminating those regional powers, which were called on to satisfy interests which were different from those of the State.⁸⁴

⁸¹ Cassazione civile, Section I, 6 Oct. 1979, no. 5172.

⁸² Ruling no. 53/1991.

⁸³ Sentences no. 183/1987, 53/1991 and 54/2000.

⁸⁴ Rulings no. 407/2002, 536/2002.

In the event that the protection of a healthy environment refers directly to the working environment, it is even more appropriate to speak of a subjective right, because in such a case damage to health is directed at certain specific workers.

The right to a healthy environment can nevertheless be considered a genuine subjective right where entitlement to compensation is foreseen by law. The injured party can stand up for such a right in front of an ordinary judge, as stated by the Constitutional Court in sentence no. 641/1987, where one can cite the civil responsibility and the entitlement to compensation for damages, or before an administrative judge, where matters relating to the protection of the territory, such as pollutant emissions for example, are involved.⁸⁵

The fact that the right to a healthy environment is a directly actionable right, even in the event of moral damage, was established by the sentence of 22 February 2002, no. 2512 of the Supreme Court.⁸⁶ It decreed that in the event of the compromising of the environment due to negligence, moral damage suffered by individuals subjected to care and treatment is automatically payable, even if they have not suffered physical damage, but simply the fear of having done so.

As far as Italian case law is concerned, with regard to the issue of a healthy environment, one should refer to sentence no. 281/2000 on the disposal of hazardous waste. The Court deemed that the 'imperative' need to safeguard the environment and public health is such that it justifies restrictive measures on the free circulation of goods. Indeed, for this particular type of waste, the only general criteria to be respected is that of 'assuring a high level of protection for the environment and for public health'.

3.2. THE RIGHT TO HEALTHY WORKING AND LIVING CONDITIONS

The protection of health in places of work is also included by academic doctrine and by case law in the right to health foreseen by Article 32 of the Constitution. Nevertheless, Articles 35 Paras. 1 and 3; 36 Paras. 1 and 2; 37, Paras. 1 and 2 and 38 Para. 2 of the Constitution can be considered indirect guarantees.

It is therefore the responsibility of national and European legislatures to regulate such activities and ensure healthy working conditions. The Legislative Decree no. 626/1994 (and subsequent modifications added by decrees 359/1999, 66/2000, and Law no. 422/2000) implemented the European directives relating to work safety. The regulations apply to all workers and include a specific discipline for those working in sectors considered to be of greater risk (listed in the said regulations which also define cancerous agents (Arts. 60 and 61) and other

⁸⁵ Law 21 July 2001, no. 205.

⁸⁶ Cassazione civile, united chambers.

biological agents that can cause damage to health). Moreover, Law no. 626/1994 obliges nuclear and thermoelectric power stations, explosive manufacturers and mining industries to equip themselves with protection and prevention facilities.

As far as safety in the work place is concerned, the Workers' Statute stipulates that it is the employer's responsibility to guarantee the necessary measures for the safeguarding of employees' health. The Constitutional Court has intervened twice⁸⁷ on the issue of passive smoking in the workplace, firstly to confirm the entitlement to compensation, including for biological damages, in the event of harm being caused by the violation of the right to health, and secondly to clarify the prevention of passive smoking, applicable through different measures. Current regulations, which implement various European directives⁸⁸ do not explicitly ban smoking in the workplace, but only in rest areas and areas of common use (canteens, cafés). Nevertheless, health protection can be obtained by adopting measures which minimise the risk of passive smoking to such a low level as to exclude that workers' health is put in jeopardy. One should also refer to Article 2087 of the Civil Code, which obliges the employer to adopt all measures necessary to safeguard the physical integrity and moral character of employees (as reiterated by both Article 9 of the Workers' Statute, implemented by Law no. 300/1970, and the legislative decree no. 626/1994). The recent Law no. 15/2003 (Art. 51) has definitely forbidden smoking in closed rooms, except private and authorized premises with specific protection measures.⁸⁹

Even if a little late, the legislature, accepting the invitation of the Constitutional Court, has introduced specific legal regulations governing biological damage suffered by employees in the workplace through Article 13 of the legislative decree no. 38/2000. The Constitutional Court had already dealt with the issue in its decision of 18 July 1991, no. 356, establishing the principle on the basis of which the employer is obliged to modify the responsibilities of a partially disabled worker if such tasks risk causing further damage. It has, as such, deemed unconstitutional that part of the law which does not foresee compensation for damages caused by the deterioration of a worker's health and has taken into consideration, in determining the amount of compensation, not only the loss of income caused by an enforced lay-off from work, but also the aforementioned biological damage.

⁸⁷ Sentences no. 202/1991 and 399/1996.

⁸⁸ Law no. 626/94 and subsequent modifications.

⁸⁹ See now ruling no. 361/2003.

4. Documentation

4.1. RELEVANT LEGISLATION

Civil Code (1942): Articles 5, 844, 2050
Law 23 December 1978, no. 833 ('Institution of the National Health Service')
Law 26 October 1995 ('Framework-Law on Acoustic Pollution')
Law 22 February 2001, no. 36 ('Framework-Law on Electric-smog')
Legislative Decree 11 May 1999, no. 152 ('Protection against Water Pollution')
Legislative Decree 4 August 1999, no. 351 ('Assessment and Management of the Air Environment')
Law 26 October 1995, no. 441 ('Framework-Law on Acoustic Pollution')

4.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale, rulings no. 88/1979, 184/1986, 561/1987, 183/1987, 992/1988, 307 and 455/1990, 40, 53, 202 and 356/1991, 184/1993, 399/1996, 185/1998, 54 and 281/2000, 407, 536/2002 and 361/2003.

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IV. Constitutional Norms

Article 2 The Republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity.

Article 3 1) All citizens have equal social dignity and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions.

Article 13

1) Personal liberty is inviolable. (...)

- 2) No one may be detained, inspected, or searched nor otherwise restricted in personal liberty except by order of the judiciary stating a reason and only in such cases and in such manner as provided by law. (...)
- 4) Acts of physical and moral violence against persons subjected to restrictions of personal liberty are to be punished.

Article 22 Nobody may be deprived of legal capacity, citizenship, or name for political reasons.

Article 32

- 1) The Republic protects individual health as a basic right and in the public interest; it provides free medical care to the poor.
- 2) Nobody may be forcefully submitted to medical treatment except as regulated by law. That law may in no case violate the limits imposed by the respect for the human being.

Article 36

- 1) Workers are entitled to remuneration commensurate with the quantity and quality of their work, and in any case sufficient to ensure to them and their families a free and honorable existence.

Article 41

- 1) Private economic enterprise is free.
- 2) It may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity.

Chapter 2

RIGHT TO LIBERTY AND SECURITY

Andricciola, Gentilini, Luther, Praduroux and Togna*

I. Protection Against Deprivation of Liberty

Article 13 of the Constitution guarantees personal freedom as an ‘inviolable’ right, establishing a reservation clause for legislation and a reservation clause for jurisdiction. Nobody can be arrested, imprisoned, deprived of their personal freedom if this deprivation is not imposed by an act of legislation and if there is not a regular trial and a judicial authority’s remedy. The Constitutional Court has not resolved doctrinal question of whether this means only a physical freedom of the body or also social dignity and moral freedom of the person, but there is no doubt that it did not follow the traditional model of personal freedom as a right not to be illegally arrested or to be transferred before a justice, similar to those of Article 26 Statuto Albertino 1848.¹ Several rulings confirm that Article 13 grants protection against so called juridical degradation, which means the imposition of specific duties if the violation thereof is a crime punishable with detention.² But

* I. by Jörg Luther, Università del Piemonte Orientale, and Avvto Maria Carmela Andricciola, Dottore di ricerca, Università La Sapienza, Roma;
II. by Avvto Massimo Togna, Dottore di ricerca, Università La Sapienza, Roma;
III. and VI. by Sabrina Praduroux, Dottore di ricerca, Searcher at Institute of International Economic Law, University of Helsinki;
IV. by Jörg Luther, Università del Piemonte Orientale;
V. by Alessandro Gentilini, Assegnista di ricerca in diritto costituzionale, Università La Sapienza, Roma.

¹ Rulings no. 2/1956; 49/1959; 45/1960.

² Rulings no. 11/1956; 30/1962; 68/1964, 144/1970, 23/1975.

not all restrictions of liberty have to be authorised by the judiciary, especially restrictions of a short duration.³

1. Measures Relating to Public Order and Criminal Law

Article 13 allows that restrictive measures of personal freedom can be executed by the police, but they have to inform the judicial authority within 48 hours. The judge has to validate it within the following 48 hours, otherwise the measure remains without effect. This provision is reproduced in the criminal procedure code: the police forces can adopt several restrictive measures but the warrant from the judicial authority is necessary. The warrant is not necessary only in the case of the flagrancy of a crime or in the case of escape but the search needs to be validated by the judge within the term provided by the law.

The legal system distinguishes the functions of the judicial police (*'polizia giudiziaria'*) subordinated to the judiciary (Art. 109 of the Constitution: The judiciary directly commands the judicial police) from the security police (*'polizia di sicurezza'*), as a guarantee of public order and prevention of crimes (Art. 1 Testo Unico delle Leggi di Pubblica Sicurezza, TULPS 1931) under the control of the Minister of Interior.

1.1. IDENTITY CONTROL. – 1.2. ESTABLISHMENT OF POLICE RECORDS

Article 349 of the Criminal Procedure Code provides that for the purpose of criminal procedures, persons who refuse identity control can be 'accompanied' to a police office and be 'retained' for the time necessary to identify them, but not more than 12 hours. The public prosecutor has to be informed immediately and can order the release.

Article 4 TULPS provided that agents of public security can take constraining measures for identification purposes (*'rilievi segnaletici, descrittivi e fotografici'*) on a person who is unable or refuses to prove his identity or is 'dangerous or suspect'. The Constitutional Court declared the provision (partially) unconstitutional insofar as it would have allowed an inspection of the body.⁴

Several other specific provisions are questionable, but have not been declared unconstitutional. For example, a foreign person who refuses to identify herself commits a specific crime.⁵ Military personnel are allowed to identity control and to retain persons until the arrival of police forces when they guard specific objects

³ Ruling no. 13/1972. Criticised by A. Pace, *Giurisprudenza costituzionale* 1972, p. 77.

⁴ Ruling no. 30/1962.

⁵ Art. 6 of Legislative Decree no. 286/1998.

such as public buildings.⁶ Antiterrorism legislation established in 1977 a general prohibition for the public use of helmets and all means that would render difficult the recognition of a person, if not requested or justified by other norms or cultural practices.⁷

1.3. SUMMONS TO APPEAR

The criminal procedure code provides a power for the judge to order the appearance of the accused and other persons before the court and a similar power of the public prosecutor with the consent of the judge (Arts. 131–133, 376). Article 15 TULPS establishes a duty to appear before the authorities of public security. Administrative sanctions and the power of coercion apply to violations of this duty. The Constitutional Court holds that the provision is an expression of the general duty of citizens ‘to collaborate with the authorities in preventing crimes and maintaining public security and tranquillity’, but it has to be applied only if necessary and urgent.⁸ The duty can be imposed as a measure of prevention (e.g. against hooligans), but needs in this case the confirmation of a judge (Law no. 401/1989).

1.4. REMOVAL OF PERSONS

The removal of persons can be ordered only in cases of criminal conduct. The criminal procedure code provides severe crimes with a maximum punishment superior of three years a power to the judge to make prohibition to leave the country (Art. 281), to impose a duty to appear periodically before police (Art. 282) and to stay in a specific local territory or not to enter specific places (Art. 283). By virtue of the criminal code, socially dangerous subjects who have committed crimes can be forbidden from frequenting pubs or to stay in a specific local territory or to stay in an agricultural colony or working place or in an institute of health care (Arts. 215 ff. Criminal Code). Such security measures against persons are only allowed as provided by law (Art. 25 Para. 3 Constitution).⁹ Article 157 TULPS, as interpreted in a restrictive manner by early Constitutional Court’s decisions, allows furthermore to order, for reasons of

⁶ Art. 19 of Law no. 128/2001.

⁷ Art. 2 of Law 8 Aug. 1977, no. 533.

⁸ Sentence no. 13/1972.

⁹ Sentence no. 139/1982 held the provisions on presumed social dangerousness but declared unconstitutional that the commitment to a mental hospital did not require a case by case control by the judge.

social prevention, that suspect individuals have to leave a local territory (*rimpatrio con foglio di via*).¹⁰ Similar measures – which affect mainly the freedom of movement (*infra*) – can be taken for foreigners, but the decision of the judge not to confirm the ‘retainment’ of a foreigner who received an order to leave the country can invalidate even this order.¹¹

1.5. TAKING INTO CUSTODY

The criminal procedure code authorizes judicial police forces to operate – and, in certain cases also the public prosecutor to order and private persons to execute – so called precautionary measures (*misure precautelari*, Art. 379 Criminal Procedure Code). An arrest is an absolute restriction on the personal freedom of whoever is discovered to have committed an offence of a certain seriousness identified by law. The arrest issued by the judicial police can be obligatory or optional, according to the seriousness of the offence, but presupposes that the accused has been caught while committing the crime (Arts. 380–382)¹² and is excluded when, considering the circumstances, it can be argued that the said illegal conduct was engaged in during the performance of a duty, in the exercising of a legitimate faculty or in the presence of a cause of non-liability (Art. 385)¹³. For a private individual, an arrest is always an optional performance of a duty of social solidarity¹⁴ and only allowed in the presence of flagrant offences for which prosecution is foreseen, with the obligation of immediate presentation to the judicial police (Art. 383). The custody of a crime suspect (Art. 384) on the other hand is imposed by the public prosecutor and is anticipated for particularly serious offences, punishable with a minimum imprisonment of two years and a maximum of six years, or regarding fire arms or explosives. A state of flagrancy is not necessary for custody to be ordered, but the presence of hard evidence and specific elements which lead one to believe that the fear of an escape attempt or manipulation of evidence is wellfounded.

Controls regarding the legitimacy of the provisions of arrest and custody, are initially referred to the public prosecutor, for which the accused is taken to a specially prepared detention centre for no longer than twenty-four hours. Where the public prosecutor finds that coercive provisions have been legitimately taken

¹⁰ Sentence no. 2/1956, 45/1960.

¹¹ Sentence no. 105/2001.

¹² For the legitimacy of this criterion see Corte Costituzionale, sentence no. 173/1971; 3/1972.

¹³ Art. 385 Criminal Procedure Code, see Ruling no. 54/1993.

¹⁴ Sentence no. 89/1970.

and that it is necessary to keep the accused in custody, he requests the validation of the arrest or custody within 48 hours of the so-called ‘judge of the preliminary investigations’.

The check that this judge performs ‘*ex post*’ on the conditions required by law for the removal of the ‘*status libertatis*’ does not regard the existence of serious evidence and cannot go beyond a verification of reasonable action on the part of the judicial police, that is to say, it cannot be extended to an evaluation including the use of different and further elements with respect to those indicated in the arrest report or refer to any subsequent provisions considered independent and autonomous¹⁵.

In the event that arrest or custody is imposed illegally on the part of a public official aware of a lack of the required conditions¹⁶, the offence of ‘illegal arrest’ is identified (Art. 606 Criminal Code). In the event of an illegal arrest on the part of a private individual, the offence is defined as ‘kidnapping’ (Art. 605 Criminal Code).

1.6. BODY SEARCH

The body search of the *corpus delicti* or other relevant objects (Art. 249 Civil Procedure Code), as well as the inspection of the body of a person for ‘evidence or other material effects of the crime’ (Art. 245), are included in the guarantees disposed by Article 13 of the Constitution. The criminal procedure code provides for both the respect of dignity and, as much as possible, of embarrassment. The Constitutional Court upheld the provision that the police should have no duty to inform the legal counsel of a body search, because – unlike an inspection – the search is characterized by an element of surprise.¹⁷ In the case of the distraint of possessions ordered by a judge, the court officer needs no further authorisation for a body search.¹⁸

1.7. SEARCH OF PROPERTY – 1.8. SEARCH OF HOME

In cases of the search of home and related property, the protection of Article 14 of the Constitution gives the same guarantees provided by Article 13. The rules of

¹⁵ Cassazione, sezione VI, 11 Dec. 2002, Fiorenza; Cassazione, sezione IV, 29 Oct. 2002, Flore; Cassazione, sezione II, 1 Jan. 2003, Randazzo; Cassazione, sezione 6 Nov. 2002, Zanone.

¹⁶ Cassazione, sezione VI, 18 Jan. 1996, Geracetano, Cassazione penale 1997, 1331.

¹⁷ Corte Costituzionale, Ruling no. 251/90.

¹⁸ Ruling no. 67/1967.

the search are provided by the criminal procedure code (Arts. 247 ss.) and specific court orders. Searches for fiscal purposes do not need specific court orders.

1.9. SEIZURE OF PROPERTY – 1.10. IMPOUNDING OF PROPERTY,
USE BY THE AUTHORITIES, DESTRUCTION

The judge can order the impounding of property as a measure for conserving evidence regarding the *corpus delicti* and all objects relevant for the proving of criminal facts (Art. 253 Criminal Procedure Code), as a guarantee for the payment of fines, the costs of the proceedings and damages for private complainants (conservative impounding, Art. 31 Civil Procedure Code) or as a means for the prevention of other crimes (preventive impounding, Art. 321 Criminal Procedure Code). The Court has stated that the term of 48 hours for the judge's validation of preventive seizure disposed by police is peremptory.¹⁹ Preventive impounding without the proof of a prisoner's guilt is not unconstitutional because the presumption of danger refers not to a person but to the goods themselves.²⁰

Furthermore, the criminal code establishes special 'patrimonial security measures', including the confiscation of the goods of the condemned which is obligatory if they are the price or a necessary means of the crime (Art. 240 Penal Code).²¹ Confiscation can also be a measure of 'patrimonial prevention' applied to individuals suspected to be part of a mafia organisation (Art. 2^{ter} law 31 May 1965, no. 575 [amended]).²² The Constitutional Court excluded and declared unconstitutional the obligatory confiscation of cars circulating without valid documents²³ and the confiscation of illegally exported cultural inheritance if the

¹⁹ Ruling no. 151/1993.

²⁰ Ruling no. 48/1994.

²¹ The Constitutional Court refused to extend the confiscation to objects which constitute the profit of a crime, including money earned by trafficking drugs: Rulings no. 334/1994; 88/2000.

²² Uphold by Corte Costituzionale, Ruling no. 465/1993. For the duration of seizure see European Court of Human Rights, *Raimondo v. Italy*, Ser A No 281-A. 22 Feb. 1994.

²³ Rulings no. 371/1994, 110/1996. Ruling no. 435/1997 confirmed confiscation of motorcycles with altered technical characteristics.

owner is not the author of the crime and did not receive any profit.²⁴ Special laws contain rules on use and destruction.²⁵

1.11. PRE-TRIAL CUSTODY

Pre-trial custody in a prison or in a place of health care, like other cautionary measures affecting an individual person can be ordered by the judge for specific needs pertaining to the trial fixed by law (Art. 274 Criminal Procedure Code). First of all to prevent the accused from twisting the events or the evidence²⁶ or from escaping, or to protect the community against other crimes. Pre-trial custody has been held consistent with the presumption of innocence because the pre-trial custody does not have probatory value and does not affect the extent of the penalty.²⁷

2. *Specific Limits*

The Italian legal system has no specific '*habeas corpus*', but some believe that it can be identified in the guarantees established by Article 13 and Article 111 of the Constitution ('against sentences and measures concerning personal freedom delivered by the ordinary or special courts, appeals to the court of cassation are always allowed regarding violations of the law'), as integrated by the remedy of appeal to the so called '*tribunale della libertà*' (court of freedom), created by Law no. 532/1982.

2.1. WRITTEN FORM OF SUMMONS

The law provides that all decisions of the judge have to be signed, dated and most of them motivated, including the summons to appear, because his participation at the procedure aimed at the issuing of a measure restricting personal freedom is not provided.²⁸

²⁴ Ruling no. 2/1987.

²⁵ Non returned impounded goods have to be sold, except those of scientific or cultural value (Art. 264 Criminal Procedure Code). For the law regulating the destruction of drugs see Ruling no. 1044/1988.

²⁶ Ruling no. 15/1982.

²⁷ Ruling no. 1/80.

²⁸ Ruling no. 63/1996.

2.2. NOTIFICATION OF RELATIVES

Notification of relatives is prescribed with regard to an arrest executed by the police because the relatives, with the prisoner's consent, can nominate a private counsel.

2.3. RIGHT TO COUNSEL

The right to counsel, private or assigned, is implied by the right to a defence by virtue of ex Article 24 of the Constitution. This includes the defendant's right to be assisted – if present – during the process, but not during the procedure aimed at the issuing of the restricting measure, which has to be characterized by surprise.²⁹ Furthermore the counsel has the right to participate in procedures aimed at renewing already issued measures.³⁰ The counsel can take a copy not only of the court order but also of the public prosecutor's request and of the deeds on which the application is founded.³¹

2.4. RIGHT TO AN INTERPRETER

The right to an interpreter is recognized with regard to both oral and written acts and it consists of the defendant's right to obtain the translation of the indictment and all acts he is participating in (Art. 143 Criminal Procedure Code). The right to an interpreter free of charge is necessary according to the constitutional right to participate in the trial³² and has to be recognized also by Italian speaking members of national minorities within their territories³³ and to a deaf-dumb person.³⁴

2.5. TIME LIMITS OF PRE-TRIAL CUSTODY, PREVENTIVE CUSTODY, ARREST

'The law establishes the maximum duration of preventive detention' (Art. 13 (5) of the Constitution). The Constitutional Court stated that time limits shall be predetermined and certain and cannot just be referred to the time necessary for

²⁹ Ruling no. 63/1996.

³⁰ Ruling no. 919/1994.

³¹ Ruling no. 192/1997.

³² Ruling no. 10/1993.

³³ See Art. 17 (6) Decree of the President of the Republic no. 574/1988 and Rulings no. 271/1994; 16/1995; 409/1999.

³⁴ Ruling no. 341/1999.

the proceedings.³⁵ The legislature can differentiate the time limits in relation to the various phases of proceedings, because the needs linked to the innocence presumption can diminish, but the pre-trial custody time has to be reasonable and not an anticipation of the final punishment. In times of emergency (terrorism), the Court holds prolongation determined by law not to be unreasonable.³⁶ The Court contributed furthermore by way interpreting of the provisions of the Criminal Procedure Code of 1989 to rationalize the various rules governing time limits³⁷, including suspension and prolongation.³⁸

In the event of arrest, the criminal procedure code provides that the police have to place the prisoner at the public prosecutor's disposal within 24 hours and that within the 96 hours following the arrest has to be validated by the judge who can turn the arrest into preventive custody.³⁹

3. Documentation

3.1. RELEVANT LEGISLATION (SECELECTED)

Royal Decree 18 June 1931, no. 773 'Unified Text of the Laws of Public Security' (= TULPS)
Criminal Procedure Code (1989)

3.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale, rulings no. 2, 11/1956; 49/1959; 45/1960, 30/1962; 68/1964, 67/1967, 64, 89, 144/1970, 173/1971, 3, 13/1972 23/1975, 1/1980, 15, 139/1982, 2/1987, 1044/1988, 251, 515/1990, 10, 54, 151, 465/1993, 48, 271, 334, 371/1994, 16, 515/1995, 63, 89 and 110/1996, 238, 353, 420 and 435/1997, 341, 409/1999, 88, 214, 397, 529/2000, 105/2001

Corte di Cassazione, sezione VI, 11 December 2002, Fiorenza; sezione IV, 29 October 2002, Flore; sezione II, 1 January 2003, Randazzo; Cassazione, sezione V, 6 November 2002, Zanone, sezione VI, 18 January 1996, Geracetano, Cassazione, sezione penale 1997, p. 1331

European Court of Human Rights, *Raimondo v. Italy*, Ser. A No 281-A. 22 February 1994

³⁵ Ruling no. 64/70.

³⁶ Ruling no. 15/1982.

³⁷ Rulings no. 89/1996; 353/1997, 292/1998 214/2000.

³⁸ Rulings no. 298/1994, 434/1995, 238 and 420/1997, 397 and 529/2000.

³⁹ See also Ruling no. 515/1990.

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L. Elia/M. Chiavario, *La libertà personale*, Torino 1977

II. Freedom of Movement

1. Freedom of Movement and Establishment

The Italian Constitution, unlike Article 26 of the previously effective Albertino Statute, does not safeguard freedom of movement as a specific aspect of the more general concept of personal freedom, but diversifies both disciplines, or more precisely the guarantees offered, the organisations endowed with the relevant powers, the limits posed and the criteria for such limitations. Furthermore, freedom of movement and settlement is guaranteed only to national citizens by Article 16 of the Constitution, while personal freedom, governed by Article 13, is a fundamental human right which also extends to foreigners.⁴⁰ The Constitutional Court has clarified, since its second announcement, that “the two constitutional precepts referred to different operational spheres, in the sense that freedom of movement and settlement does not merely constitute aspect of personal freedom, being perfectly able to establish institutions that sacrifice elements of the former but not necessarily the latter”.⁴¹

The Court resorted to various criteria, combining them in various measures, in order to establish in which of the two fields to create concrete institutions which significantly affect freedom of movement only, but which are also subject to the wider concept of personal freedom.⁴² First of all, it expressed a distinction based

⁴⁰ A question which has long been under animated discussion is that of prohibiting of access to the national territory, which the 13th of the transitory and final clauses of the Constitution imposed on the members of the ex-Royal Family, a clause whose effects are considered exhausted by virtue of the Constitutional Statute no. 2/2002.

⁴¹ Rulings no. 2/1956, 45/1960, 68/1964, and 384/1987, 419/1994. See A. Pace, *Problematica delle libertà fondamentali*, Bologna 1992, p. 268.

⁴² Indeed, there is no shortage of declarations in which the Court has failed to indicate the discriminating criteria: see, for example, sentence no. 109/1994, in which the ban on leaving the country is traced to the area of ‘measures which *in some way* affect personal freedom (as well as, obviously, the citizens’ freedom of movement)’, also

on the existence of a power of physical coercion, applicable by the judge, police or a private individual, establishing for example that the deportation order of a foreigner affects the freedom of movement and not personal freedom, in as much as it is distinct from the effective and material translation.⁴³ Moreover, the Court has based the distinction on the so-called criteria of juridical degradation, tracing back to the domain of Article 13 those measures which, although not amounting to physical coercion, imply a negative judgment on the character of those who are affected by it and have a negative consequence on the dignity of the individual.⁴⁴ Finally, the Court has referred to the quantitative substance of powers that limit the freedom of an individual, qualifying for example the compulsory accompaniment as a measure of public safety, which only brings limited and temporary restriction on the freedom of movement.⁴⁵

Article 16 paragraph 1 of the Constitution safeguards the freedom of the citizen to circulate and to settle, therefore to establish a temporary home or an actual residence in any part of the national territory.⁴⁶ The guarantees provided

for the Supreme Court case law which deems, in conformance with Art. 111 Para.1 of the Constitution (appeal to the supreme court for violation of the law against 'provisions affecting personal freedom'), subject to legal remedies the provision of the judicial authority denying the 'nulla-osta' for the issuing of passports. Sentence no. 105/2001, to the contrary, subjected the detaining of foreigners in so-called centres for assistance and holding to the broadest guarantees stated by Art. 13, referring to all three criteria which will subsequently be outlined.

⁴³ Sentences no. 45/1960 and no. 68/1964, *citt.*, where reference is made to the provision of Art. 16 of the Constitution regarding the order of repatriation by 'foglio di via' (not subject to compulsory execution). The same line is followed by sentence no. 210/1995.

⁴⁴ The Court has clarified that in order 'to be considered juridical degradation ... it is essential that such a provision provokes a reduction or depreciation of the dignity or prestige of the individual, such as to equal submission to other powers, in which the violation of the 'habeas corpus' principle occurs (ruling no. 68/1964, *cit.*).

⁴⁵ Ruling no. 13/1972. See and also sentence no. 193/1996, with regard to urgent measures to prevent violence before, during and after sports events, which distinguishes between 'two provisions with different weights and different consequences, affecting to differing extents the freedom of the individual and as such are reasonably differentiated with regard to the discipline of corrective measures'. The provision which imposes the obligation to appear at a police station 'is configured as an ideal directive to influence the personal freedom of the individual forced to appear, imposing his or her presence in the offices responsible for monitoring the observance of the provision and thus carrying a constraint on the freedom of movement during a predetermined time period'. The ban on stadium access is considered to have 'less effect on an individual's personal freedom'.

⁴⁶ G. Amato/A. Barbera, *Manuale di diritto pubblico*, Bologna 1997, pp. 259 s.

consist of an absolute and reinforced legal reserve, because the Constitution sets the objectives and criteria that the legislature will have to adhere to, allowing only limitations generally established for reasons of public health and security. While the expression 'reasons of health' should refer to any measure aimed at safeguarding the right to health (Art. 32 of the Constitution), starting from sentence no. 2/1956, the Court intended the concept of national security as a synonym of 'public order'. The best academic doctrine has specified that this must refer only to material public order, the 'ordered civil living' which prohibits limits on others' ability to exercise their freedom. It should not refer to so-called 'ideal public order', which can be jeopardised even by simple manifestations of thought contrary to those of the holders of political power, given the expressed exclusion of political beliefs as a motive for limitations, which can be traced back to the traumatic fascist regime of the past.

According to sentence no. 144/1970, the obligation of hoteliers to request identity documents from their guests, and to communicate their names to the authorities of public security is justified by reasons of public safety. The Constitutional Court considers the legislature to be free to adopt measures which affect the freedom of movement whenever requested by the public interest and supported by the Constitution, even if unrelated to reasons of public health and safety in the strictest sense of the term.⁴⁷

It has been discussed on the basis of precedent as to whether the right to freedom of movement implies a right to the means to exercise such freedom. In sentence no. 264/1996, the Court clarified that freedom of movement is not tantamount to absolute freedom to travel on all roads through private means, but rather it should be regulated with the aim of maximising the use of public resources. More specifically, the use of roads and means of transport can be regulated based on requirements which, although not specifically linked to the area of health and safety, contribute to the smooth functioning of public life, its conservation, and the discipline that users must observe and to subsequent services which they are required to perform.

2. The Free Movement of People and Things Between Regions

Article 120 of the Constitution establishes that the Regions are prohibited from charging duty or adopting other measures which impede the free movement of people or things in any way, constituting a kind of guarantee of unity for the

⁴⁷ Sentences no. 51/1991, 12/1965, 64/1963.

domestic market.⁴⁸ Starting with sentence no. 12/1963, the Court linked such a ban to ensuring the basic values of unity-indivisibility and autonomous pluralism, expressed by Article 5 of the Constitution. Under the interpretation of the Constitutional Court, Article 20 of the Constitution essentially forbids arbitrary and unreasonable measures which ‘without any constitutional foundation result in any kind of restriction on the free movement of people or things from one region to another’. While

‘in the extent to which Article 16 of the Constitution authorises regional intervention which limits the freedom of movement of people and to the extent to which other constitutional regulations, namely Articles 41 and 42 of the Constitution, allow the foreseen limitations on the free circulation of goods to be imposed by regional acts, it cannot be denied that regional authorities, for the part in which they legitimately concur to the application of constitutional values which go against those of freedom, can establish limits on the free movement of people and things’.⁴⁹

3. *Freedom to Enter the Country and to Immigrate*

Prevailing academic opinion excludes the possibility that the Constitution establishes in any of its Articles an actual right, on the part of foreigners, to enter national territory.⁵⁰ According to sentence no. 62/1994, the Constitutional Court agrees that

‘a foreigner’s lack of connections with the national community, and therefore of a juridical constitutional link with the Italian State, leads to the denial of any automatic freedom of entry into Italian territory, since a foreigner can

⁴⁸ According to sentence no. 362/1998, from a combined reading of Arts. 41 and 120 of the Constitution ‘a unitary notion of the market emerges which does not permit the creation of artificial territorial barriers to the expansion of enterprise’.

⁴⁹ Ruling no. 51/1991: the constitutional interest in the free movement of people and things protected by Art. 120 establishes a right for the regional bodies to go to Court for a constitutional conflict of competencies. Sentence no. 264/1996 preserved restrictive measures on movement between regions on the basis of their ‘non unreasonableness’ and temporary nature.

⁵⁰ According to the second paragraph of Art. 10 of the Constitution, the legal status of foreigners is governed in accordance with international rules and treaties, which implies the possibility for the legislature to limit the entrance and settlement of foreigners. Critical is G. Sirianni, *La polizia degli stranieri*, Torino 1999, p. 27, which maintains that it is possible to interpret the right of foreigners to enter and settle in the country as an inviolable right, or at least as an instrumental right to the exercising of inviolable rights.

only enter and stay in the country upon certain authorisations (which can be revoked at any time) and, generally speaking, for a limited period of time'.⁵¹

By virtue of Article 18 of the EU Treaty, given constitutional effectiveness by Article 11 of the Constitution, the situation regarding citizens of member states of the European Union (or those with equivalent status) is nevertheless similar to that of Italians. For citizens from outside the European Union, it is necessary to distinguish between holders of a residence permit (or card), issued on the basis of the Unified Text of the Immigration Laws⁵², who are free to reside in the national territory and to come and go without the need for a re-entry visa, and those non-European citizens who are in Italy illegally, who consequently enjoy no such freedom. A tendency towards greater guarantees for the freedom of movement for non-European 'foreigners' appears to come from constitutional rulings which appreciate the necessity to make an exception to general limitations with the aim of allowing foreigners to exercise inviolable rights. Sentence no. 28/1995 acknowledged the right of a foreigner, having entered the country illegally, to reside there for the time necessary for the implantation of a prosthesis. Sentence no. 203/1997 then ruled in favour of a non-European parent the right to reside in the country in order to rejoin his or her youngest child, legally residing in Italy with another parent not linked to the former by marriage: 'the guarantee of cohabitation for the family unit is rooted in the constitutional regulations that ensure the safeguarding of the family, and in particular, of underage children.' Nevertheless, according to sentence no. 376/2000, the necessity to protect the family unit, now established by the legislature on the basis of deportation and refusal bans for certain categories of foreigner⁵³ 'must give way to requirements of public order of state security', while the Home Secretary retains the power to order the deportation of the foreigner for such reasons.⁵⁴

⁵¹ See Rulings no. 104/1969; 144/1970; 244/1974; 503/1987.

⁵² Legislative Decree 25 July 1998, no. 286 'Unified text of rules on immigration and norms regarding the condition of the foreigner' (G.U. 18 Aug. 1998, no. 191, Ordinary Supplement) In sentence no. 31/2000, the Court declared inadmissible a request for a referendum to revoke the aforementioned Unified Text on immigration, partly because a revocation would have left an unacceptable regulatory gap in a subject in which the Treaties oblige Italy to ensure 'free circulation within the Union, rigorous admission controls of Union borders, the fight against illegal immigration, the exchange of information and data relevant to the immigration phenomenon between member states'.

⁵³ An underage foreigner, who can never be deported but who has the right to follow a parent or foster-person who has been deported; those who are married to and live with a citizen and those who live with Italian citizens, their relatives as far as fourth grade; pregnant women or those who have given birth within the last six months.

⁵⁴ See also Ruling no. 105, 140/2001, 22/2004, 224/2005.

4. Freedom to Leave the Country and to Emigrate

The second paragraph of Article 16 of the Constitution safeguards the freedom to emigrate and the right to freely return to Italian territory⁵⁵ by means of a reservation clause for legislation which, unlike that provided for the first paragraph, is not reinforced.⁵⁶ The 'legal obligations' remain unchanged, including the obligation to hold a passport⁵⁷, although this cannot be refused for political reasons⁵⁸. The Law of 21 November 1967, no. 1185 ('Rules on Passports')⁵⁹ ratified the right to obtain a passport as a subjective right, with only certain obligatory exceptions foreseen by the said law: the fulfilling of military service obligations, the lack of parental consent to emigration on the part of underage children, the need to ensure that legal action and the implementation of custodial, safety and preventative measures run their course. The Criminal Procedure Code of 1989 allows a ban on emigration only as a specific precautionary measure decreed by a judge (Art. 281 Para. 2). Sentence no. 109/1994 declared 'unconstitutional' the provision for a ban on leaving the country as a necessary consequence of other compulsory measures. According to sentence no. 464/1997, limits on the freedom to leave the country are possible in the light of a reasonable equilibrium of constitutional values. The obligation, for the parent of an underage child, to obtain the authorisation of the presiding judge for the issuing of a passport 'would mean imposing an unjustified and excessive limitation on the exercising of what is still a constitutionally guaranteed freedom, i.e. the freedom to leave the country'.

In accordance with the last paragraph of Article 35, the Republic recognises the freedom to emigrate within the framework of the protection and promotion of the right to work. This provision does not invalidate the obligations established by law in the general interest, due to the very character of the collective phenomenon which distinguishes emigration for reasons of work. The reference to the general interest, not foreseen for the general freedom to leave the country ex Article 16, seems to authorise the exceptions to the general rules here

⁵⁵ Ruling no. 278/1992 referred the right to leave the country to Art. 13 of the Universal Declaration of Human Rights of 1948.

⁵⁶ U. de Siervo, 'Circolazione, soggiorno, emigrazione (libertà di)', *Digesto delle Discipline Pubblicistiche*, Vol. III, Torino 1989, p. 84, holds therefore that the limitations for purposes of health care and public safety, as stated by the first paragraph of Art. 16 do not automatically apply to the freedom to leave the country.

⁵⁷ Ruling no. 34/1957.

⁵⁸ Ruling no. 9/1959.

⁵⁹ *Gazzetta Ufficiale*, 18 Dec. 1967, n. 314.

established, in a restrictive sense as much as in an extensive one.⁶⁰ The collective profile of exercising the freedom to emigrate has been adopted in the past to justify particularly strong measures, such as the obligation to take accommodation and meals in specific facilities. Article 9 of the Royal Decree no. 2205/1919 authorises the Foreign Minister, in accordance with the Home Secretary, to suspend emigration into certain regions for reasons of public order or endangerment to the life, freedom and property of emigrants or for the protection of their economic and moral interests.

5. *Documentation*

5.1. RELEVANT LEGISLATION

Law of 21 November 1967, no. 1185 ‘Rules on passports’, *Gazzetta Ufficiale* 18 December 1967, no. 314

Legislative Decree 25 July 1998, no. 286 ‘Unified text of rules on immigration and norms regarding the condition of the foreigner’ (*Gazzetta Ufficiale* 18 Aug. 1998, no. 191, Ordinary Supplement)
Criminal Procedure Code

5.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale, rulings no. 2/1956, 34/1957, 9/1959 45/1960, 64/1963, 12/1965, 68/1964, 104/1969; 144/1970, 13/1972, 244/1974, 384, 503, 561/1987, 51/1991, 278/1992, 13, 419/1994, 210/1995, 264/1996, 362/1998, 31/2000, 105, 140/2001, 22/2004, 224/2005

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⁶⁰ See C. Mortati, *Istituzioni di diritto pubblico*, II Vol., Padova 1976, p. 1056.

III. Droit au respect de la vie privée (*privacy*)

1. *Droit au respect de la vie privée strictu sensu*

Dans la jurisprudence constitutionnelle la protection du droit au respect de la vie privée est strictement liée aux principes inviolables de la tutelle de la dignité de la personne et du respect réciproque entre les individus (art. 2). En effet, en l'absence d'une expresse formulation dans la Constitution, l'existence dudit droit dans l'ordre juridique italien a été affirmée par la Cour Constitutionnelle sur le fondement des articles 2 de la Constitution et 8 de la Convention européenne des droits de l'homme (CEDH)⁶¹.

1.1. VIE SEXUELLE

Le droit à la liberté sexuelle, en tant que droit fondamental garanti par l'article 2 de la constitution, doit être protégée même en guerre.⁶² La Cour constitutionnelle a précisé que la liberté individuelle en matière de sexualité trouve sa première limite dans la liberté d'autrui à ne pas assister, contre la propre volonté, à des représentations obscènes.⁶³ Cette liberté succombe, ensuite, face à d'autres valeurs fondamentales, comme, par exemple, la famille. La Cour⁶⁴ a estimé légitime l'article 564 du code pénale, qui condamne, au titre de la morale familiale, les relations sexuelles entre parents en ligne directe, ainsi qu'entre frères et sœurs, dans la mesure où les faits provoquent un « *scandale public* », c'est-à-dire lorsque les intéressés se comportent de façon à rendre leurs relations notoires.

1.2. DETERMINATION DU SEXE; TRANSSEXUALISME

La prise en compte par le législateur ordinaire de l'exigence de garantir le droit au respect de la vie privée des transsexuels, a porté à l'adoption de la loi n° 164 du 14 avril 1982⁶⁵. L'article 5 prévoit que, lorsque le changement du sexe et la conséquente rectification de l'acte de naissance ont été autorisés par le tribunal, les officiers de l'état civil doivent délivrer les extraits relatifs aux personnes dont le sexe a été modifié avec la seule mention du nouveau sexe et du nouveau nom.

⁶¹ Corte Costituzionale, 12 avril 1973, n° 38.

⁶² Corte Costituzionale, 10 décembre 1987, n° 561.

⁶³ Corte Costituzionale, 27 juillet 1992, n° 368.

⁶⁴ Corte Costituzionale, 21 novembre 2000, n° 518.

⁶⁵ *Gazzetta Ufficiale* du 19 avril 1982, n° 106.

A l'occasion du contrôle de constitutionnalité de la loi en question, la Cour⁶⁶ a souligné que le droit de chacun à réaliser, dans la vie relationnelle, sa propre identité sexuelle est un aspect et un facteur d'épanouissement de la personnalité qui les autres membres de la collectivité sont tenus à reconnaître, en force du devoir de solidarité sociale proclamé à l'article 2 et en force du « droit à l'identité personnelle » garantie par le même article de la Constitution.

1.3. DOCUMENTS SANITAIRES

En matière de santé, la Cour Constitutionnelle⁶⁷ a censuré l'article 5 de la loi n° 135 du 5 juin 1990⁶⁸ (sur la prévention et la lutte contre le SIDA), où prévoyait que personne ne pût être soumis, contre son gré, à des analyses ayant pour but la vérification d'une infection du HIV, sauf pour des raisons de nécessité clinique et dans l'intérêt de la personne visée. A avis de la Cour, le droit au secret sur son propre état de santé – droit qui reconnaît être partie intégrante de la dignité de la personne humaine – doit être balancé avec le devoir de protection de la santé tel qu'il découle de l'article 32 de la Constitution qui protège la santé en tant que droit fondamental de l'individu et intérêt de la collectivité, comprenant le devoir de tous individus de ne pas attenter à la santé d'autrui. Il s'ensuit l'illégitimité de la disposition en question dans la mesure où elle ne prescrit pas la vérification de l'absence de séropositivité ou du SIDA, comme condition pour exercer toutes professionnelles qui entraînent des risques pour la santé d'autrui.

Le Conseil d'Etat⁶⁹, dans une affaire concernant la requête d'un employeur d'accéder aux documents sanitaires d'un de ses employés, a précisé que la primauté de l'intérêt à l'accès aux documents sur le droit de chacun au secret sur son propre état de santé doit être évalué sur la base des circonstances concrètes.

Enfin, le Code en matière de protection des données personnelles, dispose que l'accès aux données concernant l'état de santé ou la vie sexuelle d'autrui, est consenti seulement quand il vise à protéger un droit ou une liberté fondamentale et inviolable⁷⁰.

⁶⁶ Corte Costituzionale, 24 mai 1985, n° 161, 24 janvier 1994, n°. 13.

⁶⁷ Corte Costituzionale, 2 juin 1994, n° 218.

⁶⁸ *Gazzetta Ufficiale* du 8 juin 1990, n° 132.

⁶⁹ Conseil d'Etat, 9 mai 2002, n° 2542, *Foro amministrativo* 2002, 1299.

⁷⁰ Art. 60 Décret loi n° 196 du 30 juin 2003, *Gazzetta Ufficiale* du 29 juillet 2003, n° 174.

1.4. CONNAISSANCE DE SES ORIGINES

Excluant que l'art. 235 premier alinéa 2) du Code civil, qui discipline l'action en contestation de filiation dans le cas d'impuissance du mari, soit applicable à l'hypothèse de la procréation médicalement assistée et, notamment, à l'insémination hétérologue, la Cour constitutionnelle⁷¹ a souligné que dans ce dernier cas c'est au législateur de déterminer, sur la base en particulier de l'article 2 de la Constitution, les droits du nouveau né à l'encontre de ceux qui se sont engagé à l'accueillir.

En la matière, le législateur est intervenu prohibant la fécondation hétérologue et disposant que le consentement donné, par le mari ou le concubin, à une procréation médicalement assistée interdit toute action en contestation de filiation, comme l'exercice du droit la mère à ne pas révéler son identité⁷². Ce dernier a été reconnu par le législateur du 2000, qui, donnant juridique reconnaissance à la volonté de la mère à ne pas révéler son identité⁷³, a priorisé le droit au respect de la vie privée de la femme sur l'intérêt de l'enfant à connaître ses origines. Cette tutelle a ensuite été complétée par l'article 93 du Code en matière de protection des données personnelles, aux termes duquel l'accès à la documentation clinique relative l'accouchement contenant des données personnelles qui permettent l'identification de la mère est possible seulement après cent ans de la date de la formation du document concerné.

1.5. IDENTITE PERSONNELLE

Le droit à l'identité personnelle se situe parmi les droits qui constituent le patrimoine irrévocable de tout individu et, en tant que tel, il est directement reconnu par l'article 2 de la Constitution. Il s'agit du droit à être soi même, interprété dans les termes du respect de l'image que l'individu se construit dans la vie sociale. Parmi les éléments qui caractérisent l'identité personnelle le nom est le terme de distinction et d'identification de la personne dans sa vie de relation. Sur la base desdites considérations, la Cour Constitutionnelle⁷⁴, a reconnu l'exigence de protéger le nom, aussi dans des cas où il n'accomplit pas à sa

⁷¹ Corte Costituzionale, 26 septembre 1998, n° 347. Aussi décision n° 425/2005.

⁷² Articles 8 et 9 de la loi n° 40 du 19 février 2004, *Gazzetta Ufficiale* du 24 février 2004, n° 45.

⁷³ Article 30, alinéa 1 du décret du président de la République n° 396 du 3 novembre 2000, *Gazzetta Ufficiale* du 30 décembre 2000, n° 303. Confirmé par Corte Costituzionale, décision n° 50/2006.

⁷⁴ Corte Costituzionale, 3 février 1994, n° 13.

traditionnelle fonction de signe d'appartenance à un lignage. En particulier, elle a déclaré l'illégitimité de l'article 165 du Décret royal n° 1238 du 9 juillet 1939, qui ne prévoyait pas, dans l'hypothèse de rectification des actes de l'état civil – pour des raisons qui ne dépendent pas du sujet concerné – entraînant le changement du nom, la possibilité pour l'individu d'obtenir la reconnaissance du droit à garder le nom qui lui avait été originairement attribué, dans le cas où il devait désormais être considéré marque autonome d'identification de son identité personnelle.

2. Droit à l'image : Publication d'une photo

Sur la base des dispositions du droit national, l'image d'une personne ne peut pas être exposée, reproduite ou bien être commercialisée sans le consentement de la personne visée. Cependant le consentement de la personne n'est pas nécessaire lorsque la diffusion de l'image est justifiée par : a) la notoriété de la personne ou par ses fonctions ; b) des nécessités de justice ou de police ; c) des buts scientifiques, didactiques ou culturels ; ou si elle est liée à des faits, à des événements ou à des cérémonies d'intérêts publique ou qui ont eu lieu en publique (articles 96 et 97, loi n° 633 du 22 avril 1941⁷⁵). Lorsque l'image d'une personne, de ses parents, de son époux ou de ses enfants a été exposée ou publiée en dehors desdits cas, le juge peut, sans préjudice de la réparation du dommage subi, prescrire que l'abus cesse (art. 10 du Code civil).

Dans un affaire concernant la saisie de certaines photographies – pas encore publiées – destinées à la publication, étant dans la disponibilité d'une entreprise de presse, la Cour⁷⁶ a confirmé la légitimité des normes susvisées, qui protégeant le droit à l'image, visent à réaliser le but de l'article 2 de la Constitution.

La Cour européenne des droits de l'homme⁷⁷ a jugé s'analyser en une ingérence de la vie privée – notion qui comprend des éléments se rapportant au droit de tous individus à sa propre image – la publication d'une photographie d'une personne faisant l'objet des poursuites pénales, et a condamné l'Italie, après avoir constaté que ladite ingérence n'était pas prévue par la loi.

3. Liberté de communication

L'article 15 de la Constitution consacre le secret de la correspondance et de toute autre forme de communication (v. infra, V).

⁷⁵ *Gazzetta Ufficiale* du 16 juillet 1941, n° 166.

⁷⁶ Corte Costituzionale, 12 avril 1973, n° 38.

⁷⁷ Cour EDH, 11 janvier 2005, n° 50774/99, *Sciacca c. Italie*.

Dans une affaire concernant la captation des images dans le lieu d'habitation privée, la Cour constitutionnelle⁷⁸ a qualifié la liberté de communication comme expression fondamentale du droit à la vie privée, en tant que moment de contact, entre deux ou plus personnes, visant à la transmission des informations, caractérisé, au côté négatif, par l'exclusion des sujets non légitimés à la perception des données.

La Cour constitutionnelle⁷⁹, puis, analysant la liberté de communication – telle que partie nécessaire de l'espace vitale qui entoure chaque individu et qui est indispensable à son existence et son développement en harmonie avec les postulats de la dignité humaine – sous l'angle de l'article 2 de la Constitution, a formulé une particulière contrainte interprétative, mirant à accorder à ladite liberté une signification expansive. Elle a ainsi proclamé que la garantie de l'article 15 couvre non seulement le contenu de la communication, mais aussi l'identité des interlocuteurs, le lieu et la date de la communication⁸⁰.

4. Protection contre les ingérences d'autrui

Le Code civil, d'un côté, impose aux propriétaires des immeubles le respect d'une certaine distance pour avoir des vues sur le fond du voisin (articles 905 et 906), afin de protéger ce dernier des regards indiscret, et, de l'autre côté, prescrit que le droit des premiers à recevoir air et lumière, une fois acquis, ne peut pas être neutraliser par le second, qui ne pourra donc pas bâtir à une distance telle d'empêcher l'exercice du droit en question (art. 907).

Face à la question si les raisons de la propriété doivent l'emporter sur les exigences du droit à la vie privée, la Cour Constitutionnelle⁸¹ a jugé raisonnable et équitable la mitigation faite par le législateur aux articles susmentionnés.

5. Documentation

5.1. RELEVANT LEGISLATION

Code civil : articles 10, 235, 905 ss.

Code pénal : article 564

Loi n° 164 du 14 avril 1982 (« Normes en matière de rectification de l'attribution du sexe »), Gazzetta Ufficiale du 19 avril 1982, n° 106.

⁷⁸ Corte Costituzionale, 24 avril 2002, n° 135.

⁷⁹ Corte Costituzionale, 23 juillet 1991, n° 366.

⁸⁰ Corte Costituzionale, 11 mars 1993, n° 81.

⁸¹ Corte Costituzionale, 22 octobre 1999, n° 394.

5.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale, rulings no. 100/1968, 38/1973, 161/1985, 561/1987, 366/1991, 368/1992, 81/1993, 13 and 218/1994, 347/1998, 394/1999, 518/2000, 135/2002

Consiglio di Stato, ruling of 9 May 2002, no. 2542, *Foro amministrativo* 2002, p. 1299

Cour EDH, 11 January 2005, no. 50774/99, *Sciacca v. Italie*

5.3. SELECTED BIBLIOGRAPHY

V. Frosini, 'Il diritto alla riservatezza nella società tecnologica' (1974), in: *Il diritto nella società tecnologica*, Milano 1981, pp. 271 ss.

T. A. Auletta, *Riservatezza e tutela della personalità*, Milano 1978

IV. Right to the Protection of the Home

Article 14 of the Constitution declares domicile 'inviolable', extending the legal and judicial guarantees provided for personal freedom to 'inspections or searches or sequestrations', except the ascertainment or inspections for reasons of public health, public safety or for economic and fiscal aims governed by special laws.

Domicile does not only mean home. The civil, penal and fiscal legislation adopted several concepts of domicile such as 'the principal seat of affairs and interests of a person' (Art. 43 Civil Code) and 'the habitation or other place of private stay and appurtenances' for which a person has a *jus excludendi*, the right to exclude others (Arts. 614 ss. Criminal Code). The crimes against domicile of the Criminal Code also protect 'informatical and telematical systems' as an 'electronic domicile' (Art. 615ter, quarter, quinquies as amended by Law no. 547/1993). The constitutional concept seems to be construed in an elastic way to integrate them all, even if large parts of the doctrine tends to identify it with the criminal concept.⁸²

1.1. PRIVATE RESIDENCE

The protected good of domicile is 'the projection of a personality in a space'⁸³, thus the right to protection is also owned to foreigners, stateless persons and

⁸² P. Caretti, *I diritti fondamentali*, Torino 2002, p. 234; contra P. Barile, *Diritti dell'uomo e libertà fondamentali*, Bologna 1984, pp. 154 ss.

⁸³ Corte Costituzionale, Ruling no. 135/2002.

minors. Freedom of domicile and freedom of communication are both warranties of the right to privacy (*riservatezza*). However, most authors of doctrine hold that the protection makes no reference to legal titles (property, location) but only to the factual possession of a space.⁸⁴

If the home is domicile for more persons, a traditional but criticised jurisprudence holds that the *jus prohibendi* should prevail over the *jus admittendi*.⁸⁵

The Constitutional Court has struck down a provincial law authorizing ecological guards to view cars (but not other means of transport), as places of private stay under the domicile clause,⁸⁶ but the Corte di Cassazione holds that the typical function of a car is not that of a domicile.⁸⁷ The function of domicile can be recognised even in places wherein exists a temporarily protected area of privacy, such as a toilet within a public restaurant.⁸⁸

1.2. BUSINESS PREMISES

The penal concept of ‘private stay’ domicile is construed – probably in the light of Article 14 – in a way to also cover the seat of a political party⁸⁹ and commercial and industrial establishments⁹⁰, but not if open to public (for example: in a pub⁹¹). Controversial is whether the right to domicile has to be recognized not only by the owner but also by the workers of such places.

2. *Search of the Premises*

‘No one’s domicile may be inspected, searched, or seized save in cases and in the manner laid down by law conforming to the guarantee of personal liberty.’ (Art. 14 2nd period). In the course of criminal proceedings, inspections, searches and seizures are ruled by specific provisions of the criminal procedure code (Arts. 246, 250, 253 ss.). Even the defendant’s attorney, upon court order, has a right of

⁸⁴ P. Caretti (n. 82), p. 236.

⁸⁵ Cassazione, sezione penale V, 19 Apr. 1982; Corte Costituzionale, Ruling no. 176/1970.

⁸⁶ Ruling no. 88/1987.

⁸⁷ Cassazione, sezione penale VI, D.P.L. e altri.

⁸⁸ Cassazione, sezione penale IV, 15 June 2000, Alice.

⁸⁹ Cassazione, sezione penale V, 3 May 1979, Di Fazio, Corte Costituzionale, Ruling no. 58/2004.

⁹⁰ Cassazione, sezione penale I, 2 May 1978, Maida.

⁹¹ Corte Costituzionale, Ruling no. 332/2001.

access to a private domicile only to search for material effects of the crime (Art. 282-bis, as modified by Law no. 154/2001).

Outside of criminal proceedings, several specific laws provide authorisation for the search of premises without a court order such as public health and safety, or for economic and fiscal purposes' (Art. 14 Para. 3 of the Constitution). Public health includes the security of food (Art. 1 Law no. 283/1962). The economic purposes include inspections for the protection of workers rights.⁹² Fiscal police agents have access to business premises at any time and to private residences if they have notice or substantiated beliefs of fiscal crimes.⁹³ The prevailing doctrine holds that only the purposes specified in Article 14 co. 3 of the Constitution can justify the access by the authorities of public security to the premises of a business for which an authorisation is requested (Art. 16 T.U.L.P.S. 1931).⁹⁴

Private or public premises may furthermore be searched in the case of the suspected existence of arms, munitions and explosive materials. The Constitutional Court has pointed out that such suspicions have to be referred to objective facts which need to be controlled by the judge (rulings no. 173/1974; no. 110/1976).

The Constitutional Court has recently decided that the clause relating to inspections, searches and seizures was not to be interpreted in a restrictive sense, provided that even the international and European instruments of protection of domicile do not exclude other limitations.⁹⁵ Insofar as surveillance and monitoring by video devices is regarded, the Court held that the procedural safeguards for listening devices (*intercettazioni*) provided by the law (Art. 266 Para. 2 Criminal Procedure Code) do also apply to the monitoring of communications between persons present, meanwhile the monitoring of the domicile itself needs a specific law. On the other hand, the Corte di Cassazione has ruled that any film made for investigation purposes inside a domicile needs a specific court order.⁹⁶

⁹² Corte Costituzionale, Ruling no. 10/1971.

⁹³ For a restrictive interpretation Corte Costituzionale, Rulings no. 56/1973 and 122/1974.

⁹⁴ P. Barile (n. 82), loc. cit.

⁹⁵ Ruling no. 135/2002.

⁹⁶ Cassazione, sezione penale IV, 16 Mar. 2000.

3. *Specific Procedural Safeguards*

By virtue of Article 14, a Court order is requested for all searches of domicile which can be subsequent, if carried out by policemen in cases of flagrancy or escape (Arts. 352 ss. Criminal Procedure Code). The searches of domicile, if urgent, can be made in the absence of an advocate.⁹⁷

The Constitutional Court upheld Article 513 of the Code of Civil Procedure which authorises the access to a domicile in cases of seizures within the debtor's home without specific court orders.⁹⁸

The Constitutional Court has furthermore upheld those provisions – now generalised by Article 7 law decree no. 286/1998 – which state a duty to give notice to police for all foreigners one gives accommodation too, even at home. The protection under Article 14 does not exclude duties of information related to the uses of one's home.⁹⁹

4. *Documentation*

4.1. RELEVANT LEGISLATION

Civil Code: Article 43

Criminal Code: Articles 614 ss.

Criminal Procedure Code: Articles 246, 250, 253 ss., 266, 282, 352

Royal Decree 18 June 1931, no. 773 'Unique Text of the Laws of Public Security': Article 16

4.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale, rulings no. 67/1967; 104/1969; 144 and 176/1970; 10/1971; 56/1973; 122, 123 and 173/1974; 106/1975; 88/1987 135/2002; 58/2004

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G. Amato, 'Article 14', in: G. Branca/A. Pizzorusso (eds.), *Commentario alla Costituzione*, Bologna 1990, pp. 54 ss.

P. Barile/E. Cheli, voce 'Domicilio (libertà di)', *Enciclopedia del diritto*, Vol. XIII, Milano 1964, pp. 860 ss.

⁹⁷ Corte Costituzionale, Ruling no. 123/1974.

⁹⁸ Corte Costituzionale, Ruling no. 67/1967.

⁹⁹ Corte Costituzionale, Rulings no. 104/1969; 144/1970.

P. Caretti, voce 'Domicilio (libertà di)', *Digesto delle discipline pubblicistiche*, Vol. V, Torino 1990, pp. 320 ss.

V. Confidentiality of Mail and Telecommunications

In the Italian legal system, the laws governing mail and telecommunications¹⁰⁰ have their fundamental principles in Article 15 of the Constitution:

'Liberty and secrecy of correspondence and other forms of communication are inviolable.

(2) Limitations may only be imposed by a judicial decision stating the reasons and in accordance with guarantees defined by law.'

In the 1970's, it was possible to get a common interpretation of it from legal literature, the decisions of the courts and the laws, referring to the traditional ways of communication, mail, telegraph and telephone (Art. 616 Para. 4 Criminal Code 1942). At the end of the 1980's, the improvement in technology and new forms of communication created unexpected difficulties and the juridical discussion has been focused on four relevant and related issues:

- 1) the meaning of *secrecy* and *liberty*;
- 2) the special quality of the right to a confidential communication, as a right distinct from the freedom of opinion and expression;
- 3) the protection of confidentiality related to the medium used for communication;
- 4) the specific object of protection, or in other words, the proper meaning of *confidential communication*.

On the first point, it is widely thought that freedom and secrecy are inseparable. A citizen loses his right to free and confidential communication at all, if he is prevented from profiting by one of them. On the other hand, if we consider the limitations to this right, confidentiality and freedom of communication become different and show specific qualities.¹⁰¹ It is possible to deny someone the right to free communication, for example preventing him from using the telephone, and it is possible to break one's communication confidentiality. If there is no need of confidentiality, the case in issue will be of the right to free opinion and

¹⁰⁰ A. Pace, *Problematica delle libertà costituzionali* (parte speciale), Padova 1992, p. 241, calls it '*Libertà di comunicare riservatamente*' (freedom of confidential communication).

¹⁰¹ P. Caretti, 'Corrispondenza (libertà di)', *Enciclopedia del diritto* 1990, p. 201; A. Pace (n. 100), p. 245; P. Barile, *Diritti dell'uomo e libertà fondamentali*, Bologna 1984, p. 164

expression, not to communication. The choice of the medium establishes which right can be implemented.

Today, the immunity of private communications is considered a distinct freedom. Together with the freedom of home (Art. 14 of the Constitution) and personal freedom (Art. 13 of the Constitution) it has as its main purpose the protection of a human being's freedom, as the basic feature of the Italian legal system.¹⁰² The Constitutional Court's decision no. 366/1991, established that

‘the right to free and secret communication is inviolable, that means its essential substance can not be suppressed by constitutional amendment, because the right incorporates a value of the personality which is considered fundamental for the democratic system adopted by the Constitution’.¹⁰³

Insofar as the *medium* chosen for confidential communication is concerned, Article 15 does not apply to such media which cannot assure a confidential communication has been chosen. Article 15 protects the communication in the very moment it happens. In other words, Article 15's protection can be applied only while the message ‘is moving’ from the sender to the receiver, but not when the message has arrived yet.¹⁰⁴ This point is especially relevant when dealing with data banks collecting several pieces of information: is the unauthorized access to them a violation of the freedom of communication or is it a violation of another freedom?

1./2. Confidentiality of Letters, Mail and Postal Communications

As far as postal communications are concerned, specific rules have been stated by the Presidential Decree of 20 March 1973, no. 156 (*Codice postale*) and by some Articles of the Criminal Code and the Code of Criminal Procedure. The Criminal Code penalises anybody who unlawfully has a look, interferes with or destroys the correspondence addressed to someone else (Art. 616); if the individual is a postal service's clerk the penalty shall be stronger, as long as it is easier for him to make such a violation (Art. 619 Criminal Code).¹⁰⁵ The Code deals with

¹⁰² P. Barile/E. Cheli, ‘Corrispondenza (libertà di)’, *Enciclopedia del diritto* 1964, pp. 774 s.

¹⁰³ Corte Costituzionale, 23 July 1993, no. 366. See also Corte Costituzionale, 6 April 1973, no. 34: the freedom and secrecy of correspondence and of any other form of communication is a right of the individual inherent to the supreme constitutional values’.

¹⁰⁴ A. Pace (n. 100), pp. 241 s.

¹⁰⁵ A. Barbera/F. Coccozza/G. Corso, ‘Le situazioni soggettive. Le libertà dei singoli e delle formazioni sociali’, in: G. Amato/A. Barbera, *Manuale di diritto pubblico*, Bologna 1994, p. 234.

violations of freedom and violations of the confidentiality of correspondence in the same way, but if the contents of violated correspondence have been disclosed, the penalty shall increase reasonably (Arts. 618 and 620 Criminal Code); of course, there cannot be disclosure without interference. Articles 254 and 353 of the Code of Criminal Procedure provide for seizure that shall be authorized by a judge's decision according. Police officers are entitled to call for a stoppage of letters, packages or other mailing objects if they are questionable of bringing a threat to the state security or may cause damage to individuals or goods (Art. 11 Presidential Decree no. 156/1973), or according to the Penal Code whenever there is a well founded reason to suppose that the correspondence has any relationship with a defendant or a crime (Art. 353 Criminal Code).

3. Confidentiality of Telecommunications

The Constitutional Court has outlined the principles that the lawgiver has to implement when authorizing wire-tapping.¹⁰⁶ Before that decision, the law required a judge's authorization for wire-tapping without specifying the conditions regarding the if, when and how of such authorization and non substantial implementation was given to Article 15 of the Constitution, Para. 2 (by judicial decision stating the reasons and in accordance with guarantees defined by law. After the Court's decision, the Law 8 April 1974, no. 98) created such guarantees. Wire-tapping can be authorized only in criminal proceedings concerning specific kinds of crimes (Art. 266 Criminal Procedure Code), under serious *indicia* ('*gravi indizi di reato*') and limited to measures which would be 'absolutely unavoidable for investigating leads' (Art. 267 Criminal Procedure Code). Furthermore, a wire-tapping authorized for one proceeding cannot be used for a different one, unless it concerns crimes for which arrest is compulsory (Art. 270 Criminal Procedure Code). The Constitutional Court's¹⁰⁷ rejected any doubts of constitutionality concerning this exception. Using a wire-tapping in different proceedings can be a reasonable balancing between two conflicting principles: the individuals' right to free and confidential communication and the public interest to fight against crimes and bring offenders to justice.¹⁰⁸

The results of irregular wire-tapping can not be used for judicial proceedings (Art. 271 Civil Procedure Code). Article 268 para. 3 Criminal Procedure Code prescribes the use of equipment installed at the offices of the *Procura della Repubblica's* (Attorney's General) premises or, if impossible, other equipment

¹⁰⁶ Decision no. 34/1973.

¹⁰⁷ Decision no. 63/1994.

¹⁰⁸ Decision 23 July 1991, no. 366.

belonging to the public utility or to the Criminal Investigation Department. The Constitutional Court rejected the use of wire-tapping made without abiding by the previous provision.¹⁰⁹

A new issue is the treatment of *telephone records* (called number and holder; time, duration and place of the call), kept by service providers for accountancy. If freedom of communication means to grant confidentiality while communication is in progress, the treatment of telephone records does not refer to the contents but merely to the tools of communication, because the operator has to use them only in order to connect the users.¹¹⁰ Nevertheless, the Constitutional Court held that Article 15 prevents operators also from disclosing dates related to the authors, time and place of communications. The access to such records and the use of them as a means of evidence can be allowed only on condition the protection of the confidential and free communication is respected.¹¹¹ The Court stated that not only the judge but also the public prosecutor can be entitled to authorize the access to telephone records, because the criminal procedural code provision for the particular case of wire-tapping does not apply to such records.¹¹²

The Law 23 December 1993, no. 547 extended the above-said regulations to computer communications offences, introducing Article 615-ter (which sanctions the illegal access to a computer system), Article 615-quater (which sanctions illegal detention and disclosure of access codes to computer systems), Article 617-quater (which sanctions illegal endeavours of interfering or preventing computer communications), Article 617-sexies (which sanctions forgery or the destruction of contents of such communications) of the Criminal Code. Those guarantees have to be applied to any other transmission of dates (Art. 623-bis Criminal Code).¹¹³ The regulations on telephone tapping apply furthermore to

¹⁰⁹ Decision 19 July 2000, no. 304.

¹¹⁰ A. Pace (n. 100), p. 251; *idem*, 'Nuove frontiere della libertà di «comunicare riservatamente» (o, piuttosto, del diritto alla riservatezza)', *Giurisprudenza costituzionale* 1993, p. 742.

¹¹¹ Corte Costituzionale, 11 Mar. 1993, no. 81.

¹¹² Corte Costituzionale, 17 July 1998, no. 281. Anyway, the Court argues for specific legislative rules for the use of telephone records.

¹¹³ The term of 'telecommunication' has been defined by the *Convention internationale des télécommunications*, signed in Nairobi 6 Nov. 1982 (ratified in Italy by the Law 9 May 1986, no. 149): '*Télécommunication: toute transmission, émission ou réception de signes, de signaux, d'écrits, d'images, de sons ou de renseignements de toute nature, par fil, radioélectricité, optique ou autres systèmes électromagnétiques*'.

information and telematic interfering (Art. 266-bis Criminal Procedure Code, introduced by Art. 11 of Law 547/1993).¹¹⁴

4. Documentation

4.1. RELEVANT LEGISLATION

Criminal Code: Articles 616–623-bis
Criminal Procedure Code: Articles 254, 266–271, 353
Presidential Decree of 20 March 1973, no. 156 (*Codice postale*)

4.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale, rulings no. 34/1973, 366/1991, 81/1993, 63/1994, 281/1998, 304/2000.

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- A. Pace, ‘Nuove frontiere della libertà di “comunicare riservatamente” (o, piuttosto, del diritto alla riservatezza)’, *Giurisprudenza costituzionale* 1993, p. 742
- P. Caretti, ‘Corrispondenza (libertà di)’, *Enciclopedia del diritto* 1990
- A. Valastro, *Libertà di comunicazione e nuove tecnologie*, Milano 2001

VI. Protection des données à caractère personnel

La protection des données à caractère personnel n’est pas explicitement garantie par la Constitution.¹¹⁵ Au nom des « principes à protection de la privacy individuelle, répandus dans tous les ordres juridiques des nations les plus civilisées » la Cour Constitutionnelle a considéré légitimes les limitations et interdictions relatives au traitement et à la communication des données à

¹¹⁴ That law introduced also paragraph 3-bis to Art. 268 Criminal Procedure Code making an exception to the above-mentioned equal treatment: General Prosecutor can authorize the utilisation of private equipment for wire-tapping.

¹¹⁵ L’art. 117 de la Constitution réserve à l’Etat central la législation en matière de « coordination informationel, statistique et informatique des données de l’administration de l’Etat, des régions et des collectivités locales. »

caractère personnel collectées par l'Institut national de la statistique. Elle a observé qu'une telle garantie est nécessaire pour assurer le respect de biens individuels strictement liés à la jouissance de libertés constitutionnelles et de droits inviolables.¹¹⁶

Par la loi n° 675 du 31 décembre 1996, le législateur a attribué à chaque individu une protection contre l'enregistrement des données personnelles sans autorisation de l'intéressé ou du législateur, en cas de données sensibles aussi de l'autorité indépendante (« Garante per la protezione dei dati personali »).

Cette protection implique aussi le droit au refus de communiquer des données ou à l'effacement de données. Le législateur a corrigé la norme, retenue par l'Autorité incompatible avec la liberté d'information, qui prévoyait l'obligation aussi pour les journalistes de demander à l'autorité l'autorisation pour le traitement de données sensibles.¹¹⁷

La jurisprudence et la doctrine ont précisé que ledit pouvoir s'analyse en fonction de la protection de certains valeurs fondamentaux dans la structure juridique de la personne, dans le but d'empêcher que le traitement, dans l'abstrait légitime, de la donnée personnelle, soit effectué de façon à porter atteinte à certaines positions. Cependant, la loi en question n'établit pas un « statut général de la personne ». Il s'ensuit que son champ d'application n'est pas généralisé à chaque situation subjective énumérable parmi le droit de la personne.¹¹⁸

Enfin, le droit de toute personne à la protection des données à caractère personnel la concernant a été consacré, tel que droit autonome et fondamental de la personne, par l'article 1 du Code en matière de protection des données à caractère personnel.¹¹⁹

Documentation

1. Relevant Legislation

Décret législatif 30 juin 2003, n° 197 (Code en matière de protection des données à caractère personnel)

¹¹⁶ Décision du 26 mars 1990, n° 139.

¹¹⁷ U. De Siervo, 'La privacy' (2003), in : www.luiss.it/semcost/index.html?dirittifondamentali/resoconti/200307.html~right.

¹¹⁸ M. G. Losano (a cura di), A.A.V.V., *La legge italiana sulla privacy. Un bilancio dei primi cinque anni*, Roma 2001, E. Giannantonio/M. G. Losano/V. Zeno Zencovich (a cura di), *La tutela dei dati personali. Commentario alla legge 675/1996*, 2^{ème} ed., Padova 1999; S. Rodotà, *Tecnologie e diritti*, Bologna 1995.

¹¹⁹ Décret législatif 30 juin 2003, n° 197 (*Gazzetta Ufficiale* 29 juillet 2003, n° 174): « Chacun a le droit à la protection des données à caractère personnel de son intérêt. »

2. *Essential Constitutional Case-Law*

Corte Costituzionale, ruling no. 139/1990.

3. *Selected Bibliography*

M. G. Losano (a cura di), A.A.V.V., *La legge italiana sulla privacy. Un bilancio dei primi cinque anni*, Rome 2001

E. Giannantonio/M. G. Losano/V. Zeno Zencovich (a cura di), *La tutela dei dati personali. Commentario alla legge 675/1996*, 2nd ed., Padova 1999

S. Rodotà, *Tecnologie e diritti*, Bologna 1995

4. *Constitutional Norms*

Article 2 The Republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity.

Article 13 (1) Personal liberty is inviolable.

(2) No one may be detained, inspected, or searched nor otherwise restricted in personal liberty except by order of the judiciary stating a reason and only in such cases and in such manner as provided by law.

(3) As an exception, under the conditions of necessity and urgency strictly defined by law, the police may take provisional measures that must be reported within 48 hours to the judiciary and, if they are not ratified within another 48 hours, are considered revoked and remain without effect.

(4) Acts of physical and moral violence against persons subjected to restrictions of personal liberty are to be punished.

(5) The law establishes the maximum duration of preventive detention.

Article 14 (1) Personal domicile is inviolable.

(2) No one's domicile may be inspected, searched, or seized save in cases and in the manner laid down by law conforming to the guarantee of personal liberty.

(3) Verifications and inspections for public health and safety, or for economic and fiscal purposes are defined by law.

Article 15 (1) Liberty and secrecy of correspondence and other forms of communication are inviolable.

(2) Limitations may only be imposed by judicial decision stating the reasons and in accordance with guarantees defined by law.

Article 16 (1) Every citizen has the right to reside and travel freely in any part of the national territory except for limitations provided by general laws protecting health or security. No restriction may be imposed for political reasons.

(2) Every citizen is free to leave the territory of the Republic and return to it except for obligations defined by law.

Article 109 The judiciary directly commands the judicial police.

Article 111 (7) Against sentences and measures concerning personal freedom delivered by the ordinary or special courts, appeals to the Court of Cassation are always allowed regarding violations of the law. These provisions may be waived only in the case of sentences pronounced by military courts in time of war.

Final Provisions Article XIII: To the former kings of the House of Savoy, to their consorts and their male descendants shall be forbidden access and sojourn in the national territory.

Chapter 3

THE FUNDAMENTAL RIGHTS OF COMMUNICATION

Ciolfi, Pinelli, Rossi, Timarco*

I. Freedom of Information

Freedom of information is only indirectly protected by the freedom of speech clause (Art. 21 of the Constitution). Under Article 21, the freedom of speech is not considered sufficient condition for the freedom of information, therefore ‘the law may, by general provision, order the disclosure of financial sources of periodical publications’ (Para. 5). The Constitutional Court has highlighted the ‘fundamental value of pluralism in a democratic order’: ‘pluralism manifests itself in a concrete possibility of choice, for all citizens, between a plurality of sources of information’. The constitution of democracy thus requires an ‘effective protection of the pluralism of information’.¹ The freedom to express its own thought with any means of circulation ‘implies on the one hand the right to inform, on the other hand the right to be informed.’ This ‘right to information’ (*diritto all’informazione*)

‘has to be determined by referring to the fundamental principles of the form of the State delineated by the Constitution which require that our democracy shall be based on a free public opinion and shall be able to develop itself

* I. and II. by Maurizi Rossi, Dottore di ricerca, Università La Sapienza, Roma;
III. by Ines Ciolfi, Ricercatore di diritto costituzionale, Università La Sapienza, Roma;

IV. by Cesare Pinelli, Dottore di ricerca, Università di Pisa;
V. and IV. by Paola Timarco, Dottore di ricerca, Università La Sapienza, Roma.

¹ Rulings no. 826/1988, 420/1994.

through the equal concurrence of all in the formation of the general will. Therefore, the “right to information” has to be qualified and characterised by a) the pluralism of the sources from which it obtains knowledge and notice (...) in a way the citizen can be empowered to make its valuations taking into account different points of view and contrasting cultural orientations, b) the objectivity and impartiality of the data produced, c) the completeness, correctness and continuity of the activities of information served, d) the respect of human dignity, public order, public morality and the free psychological and moral development of minors.²

The profession of journalists and three independent authorities have the institutional duty to defend the freedom of information: the ‘Authority for Concurrence and Market’ (Law 10 Oct. 1990, no. 675), the ‘Authority for the Guarantees in Communications’ (Law no. 249/1997) and the ‘Authority for the Protection of Personal Data and Privacy’ (Law 31 Dec. 1996, no. 675).

II. Freedom of Opinion

Freedom of speech is protected by Article 21 of the Constitution: ‘all persons have the right to express freely thoughts in speech, writing, and by other means of communication’³. The protected thought is one’s own and not the thought of others: regulations, which protect the copyright, are permitted (Art. 2575 and following Articles of the Civil Code; Law dated 18 Aug. 2000 no. 248). The Constitutional Court, by decisions no. 1/1956 and no. 48/1964, has settled that Article 21 protects both the right to express freely one’s thought and the right of the free usage of means of communication. So ‘the link of indispensable instrumentality of the second one compared to the first one, excludes a distinction Article 21 does not consent at all’. That does not mean that everybody can accede to the means of communication. The Constitution assures only that there are no legal bars in the usage of means of communication to propagate one’s thought. The difference between the freedoms of Article 21 and of Article 15 of the Constitution (free confidential communication) consists in the addressees’ determination. That means the subjects, with whom we communicate in correspondence, are determined meanwhile we potentially address every body if we exercise the freedom of speech.

² Ruling no. 112/1993.

³ See also the guarantee of equal protection against discriminations on ground of ‘political opinions’ (Art. 3 of the Constitution) and the Law dated 20 May 1970 no. 300 which protected the freedom of workers’ speech at their work place: Art. 1 ‘freedom of opinion’, Art. 8 ‘prohibition of inquiries on opinions’, Art. 20 right of ‘meeting’, Art. 25 ‘right of bill-posting’.

1. Relevance of Freedom of Opinion in a Democratic Society

Italian doctrine worked out two different methodological approaches to reconstruct the sense of the freedom of expression of thought.

The first not dominant theory starts from some matters defined ‘privileged’⁴, which find special protection in other clauses of the Constitution, such as freedom of art and science (Art. 33), freedom of religion (Art. 19) and political opinions (Arts. 3, 49). These guarantees protect the manifestation of thought which should not be submitted to the general limits of Article 21, except the so called ‘logical limits’ which exclude protection for thought consisting of a direct incitement to action or in stirring up emotions.

The second and really dominant theory criticises this gradualist approach, affirming that no distinction between the erudite thought and the common one could be introduced and applying Article 21 also to the religious, political, and artistic subjects, even if interpreted in the light of Articles 19, 33, 49 of the Constitution.⁵ The dominant opinion considers protected not only the manifestation that solicits the pure thought⁶ but even any speech inciting it to action (except libel and the thought of others).⁷

The academic opinions are relevant for the so-called crime of opinion, determined by the Criminal Code. The Constitutional Court upheld the crime of an ‘apology for crime’ (Art. 414 Criminal Code), giving a restrictive interpretation which equalises the apology to the indirect incitement. A speech will only be punishable if it ‘includes, for its modalities, a behaviour really

⁴ The theory of the privileged status has been supported by S. Fois, *Principi costituzionali e libera manifestazione del pensiero*, Milano 1957. Then it has been taken, even if with different arguments, by A. Cerri, who added to the three above mentioned subjects, the right of news, the thought expressed in judgment and the thought expressed in the assertion of the representative functions, A. Cerri, voce ‘Arte e Scienza (libertà di)’, *Enciclopedia Giuridica*, Roma 1990; A. Bevere/A. Cerri, *Il diritto di informazione e il diritto di persona*, Milano 1995, p. 26.

⁵ See A. Pace, *Problematica delle libertà costituzionali*, Padova 1992, p. 393 and see M. Manetti, ‘La libertà di manifestazione del pensiero’, in: R. Nania/P. Ridola (eds.), *I diritti costituzionali*, Vol. II, Torino 2001, p. 573: the second doctrine follows a ‘defining method which tends to leave out all that must be considered as thought, from all that is not considered like this last one, and in turn it defines the limits of the first one.’

⁶ S. Fois (n. 4), p. 169.

⁷ See even if with different formulation A. Cerri, ‘Libertà di manifestazione del pensiero, propaganda, istigazione ad agire’, *Giurisprudenza costituzionale* 1969, p. 1178; also ‘Ordine pubblico’, voce *Enciclopedia Giuridica Treccani*, XIX, Roma 1990; A. Pace (n. 5), pp. 415 s.

suitable to provoke the commission of a crime⁸ Criminal laws protecting public order are thus constitutionally correct when they punish only the thought that turns into action. On the other hand, the Constitutional Court considered unconstitutional Article 507 of the Criminal Code (Boycotting) as far as it contains a prohibition of propaganda.⁹ Propaganda is a speech protected under Article 21, except the democratic method will be injured.¹⁰

2. *The Limit of Public Morality*

The only explicit limitation for the freedom of expression is the prohibition of publications, performances, and other exhibits offensive to public morality (Art. 21 Para. 6).

‘Public morality emerges from a group of rules which impose a determined behaviour in social life of relation. The inobservance of them involves in particular the transgression of sexual modesty both outside and within the family, the personal dignity that joins it, and young men’s moral feelings. This inobservance opens the way to the contrary of public morality, to immorality (...) and to the perversion of usage, that is to say the prevalence of rules and behaviours contrary and opposite’.¹¹

Academic doctrine and jurisprudence agree in this ‘narrow’ knowledge of public morality that can coincide with the criminal one of obscenity (Art. 529 Penal Code)¹², but also with *boni mores* of the civil law, that’s to say the common values. The Constitutional Court recently upheld the prohibition of printings ‘suitable’ to ‘disturb the common feeling of morality’: ‘all that is common among the different moralities of our times, but also to the variety of ethical concepts

⁸ Corte Costituzionale, Ruling 4 May 1970, no. 65. See also Corte di Cassazione section I, 5 May 1999, Oste; Court of Cassation, section I, 3 Nov. 1997, Galeotto; but situations where a large sense to the apology is given, do not lack: Corte di Cassazione, section I, 20 June 1994, Monopoli.

⁹ Ruling 17 Apr. 1969, no. 84. Critized by A. Cerri, ‘Libertà di manifestazione del pensiero, propaganda, istigazione ad agire’, *Giurisprudenza costituzionale* 1969, p. 1175.

¹⁰ Ruling 6 July 1966, no. 87.

¹¹ Ruling 19 Feb. 1965, no. 9.

¹² ‘Under the criminal law obscene acts and objects are considered those which offend what common sense holds for modesty. There shall not be considered as obscene the work of arts or the work of science, unless it is offered on sale or sold or however given to children under 18.’ In relation to the concept of art, refer to A. Cerri, Voce, ‘arte, scienza (libertà di)’, *Enciclopedia Giuridica Treccani*, III, Roma 1988; F. Rimoli, *La libertà dell’arte nell’ordinamento italiano*, Milano 1992.

which meet in contemporary society, to respect the human being.’¹³ Imposing a restrictive interpretation on Article 528 of the Criminal Code¹⁴, the Court has furthermore reminded¹⁵ that the ‘obscene’ is punishable only if it is ‘destined to reach the community perception, whose feeling of modesty can be put in jeopardy or can be offended’; therefore, the contrariety to the feeling of modesty does not depend on the obscenity of actions and objects themselves, but it depends on the offence that can result to the sexual modesty of the public. Acts or objects, which remain in the private sphere can not be prohibited.

The limit of public morality justifies also a set of preventive controls on cinematographic works. According to the Law dated 21 April 1962 no. 161, the distributor must obtain the permission from the presidency of the Council of Ministers, after consultation with special first grade and appeal commissions and appeal (Art. 1). The commissions ‘establish if children under 14 or under 18 can watch the projection of a film, in relation to the particular sensibility of the age of development and in relation to the exigencies of their moral protection (Art. 5) and shall consider if the work offends the good habit (Art. 6). The permission does not exclude the intervention of a criminal judge as far as the author’s work is concerned (Art. 14 Law 161/1962).

3. The Limit of Public Order

The Constitutional Court has affirmed that further limits to the freedom of speech can be founded on constitutional rules which protect determined values.¹⁶ This limit of public order is controversial, both in its content and in its admissibility. Academic doctrine distinguishes a ‘public material order’ from a ‘public ideal order’: public quietness and security is intended by the former (see Arts. 16, 17, 41 of the Constitution), a cluster of rules and principles, which constitute the

¹³ Ruling 17 July 2000, no. 293 regarding Art. 15 Law no. 47/1948.

¹⁴ Art. 528 punishes everybody who produces, introduces in the territory of the State, buys, detains, exports, or puts into circulation works, drawings, images or other obscene subjects of any sort, in order to do commerce or distribution of them, that is to expose them in public; those who put public and theatrical or cinematographic performances, which have obscenity as their characteristic, are subjected to the same punishment.

¹⁵ Ruling 27 July 1992, no. 368.

¹⁶ Ruling 19 Mar. 1962, no. 19. See also Ruling 16 July 1973, no. 133: ‘The freedom of speech, enunciated in Art. 21 of the Constitution (...) as any other right, found its limits in the concurrent rights (the same as the limit concerning the freedom of circulation; Art. 16 of the Constitution). And in general in the need of the protection of public interests (if protected by the Constitution).’

juridical system, by the latter (see Art. 8 of the Constitution). The doctrine tends to admit a general limit of material public order and to deny the admissibility of the ideal.¹⁷ The Constitutional Court in its decisions referred to both when it upheld Article 656 of the Criminal Code, which punishes the publication or circulation of false, exaggerated or tendentious news, able to disturb public order¹⁸ and even affirms the existence of a constitutional public order¹⁹. Criminal laws against blasphemy have been upheld as a legitimate protection of religious feeling, even if Article 402 of the Criminal Code (vilification of the catholic religion) has been struck down because it contrasts with the principle of the equality of religious confessions.²⁰ On the other hand, where the Court upheld Article 290 of the Criminal Code (vilification of the Republic), adducing the prestige of Government, of judicial order and armed forces, as a limit to the freedom of speech.²¹ The public order finally justifies State secrets²² and official secrets (as protected by Art. 54 and Art. 97 of the Constitution: efficiency of public administration).

4. Commercial Speech and Advertising

It is debated whether commercial speech is a form of the manifestation of thought protected by Article 21 of the Constitution. The Constitutional Court considers commercial speech included in the freedom of the economic enterprise (Art. 41 of the Constitution).²³ For the first time, the Court excluded that commercial speech is also protected by freedom of speech.²⁴ The Corte di Cassazione still follows the

¹⁷ A. Cerri, voce 'Ordine Pubblico', *Enciclopedia Giuridica*, XXII, Roma 1990; L. Paladin, voce 'Ordine Pubblico', *Novissimo Digesto*, Torino 1965.

¹⁸ Ruling 20 Mar. 1962, no. 19, criticized by C. Esposito, *Giurisprudenza costituzionale* 1962, p. 197; and Ruling 29 Dec. 1972, no. 199.

¹⁹ Ruling 8 July 1971, no. 168, criticized by A. Pace, 'Ordine pubblico, ordine pubblico costituzionale, ordine pubblico secondo la Corte Costituzionale', *Giurisprudenza costituzionale* 1971, p. 1777.

²⁰ Ruling 20 Sep. 2000, no. 293.

²¹ Ruling 30 Jan. 1974, no. 20. The Criminal Code protects the prestige of other national and foreign institutions (Art. 278: President; Art. 291: Italian Nation; Art. 292: flag; Art. 297: heads of foreign states; Art. 298: representatives of foreign states).

²² Arts. 114 ss. Code of Criminal Procedure; Arts. 256, 257, 258, 261, 262, 263 Criminal Code.

²³ Ruling 27 Oct. 1985, no. 231.

²⁴ Ruling 12 June 1965, no. 68.

same approach as far as the publicity of smoking products is concerned.²⁵ Nowadays, the Constitutional Court includes commercial speech as part of the ambit of Article 21 of the Constitution and justifies the limitations imposed on advertising by the necessity to protect other goods defended by the Constitution.²⁶ The dominant doctrine maintains, on the contrary, that commercial speech must be retraced to the guarantee of the freedom of speech, as the consumer has the right to be informed²⁷.

5. Documentation (I. and II.)

5.1. RELEVANT LEGISLATION

Civil Code: Articles 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583 (Copyright).

Criminal Code: Articles 326 (Revelation and Utilisation of Official Secrets), 414 (Inducement), 507 (Boycott), 528 (Publications and Obscene Spectacles), 529 (Obscene Acts and Objects: Notion), 656 (Publication or Diffusion of False, Exaggerated or Tendentious News, Able to Disturb Public Order)

Law of the 28 February 1948 no. 47 (Directions about press), *Gazzetta Ufficiale* 28 April 1962, no. 109

Law of the 21 April 1962, no. 161 (Revisione di film e lavori teatrali), *Gazzetta Ufficiale* 28 April 1962, no. 109

Law of the 20 May 1970, no. 300 (Rules about the protection of workers' freedom and dignity, about the freedom and activity of the union in work places and regulations about employment), *Gazzetta Ufficiale* 27 May 1970, no. 131): Articles 1, 8, 20, 25

Legislative decree of the 25 January 1992 no. 74 (Implementation of 84/450/CEE directives, as modified by the 97/55/CE directive about deceptive and comparative publicity), *Gazzetta Ufficiale*, 13 February 1992, no. 36, ord. suppl.

²⁵ Corte di Cassazione S.U., dated 23 Mar. 2001, no. 4183 declared clearly groundless the question of constitutional legitimacy of the law providing administrative sanctions related to the publicity of smoking products.

²⁶ Ruling 20 May 1976, no. 123 (*agiotage*).

²⁷ S. Fois, 'Censura e pubblicità economica', *Giurisprudenza costituzionale* 1995, p. 839; A. Cerri, 'La pubblicità commerciale tra libertà di manifestazione del pensiero, diritto di informazione, disciplina della concorrenza', *Il diritto dell'informazione e dell'informatica*, 1995, pp. 537 ss.; A. Pace, *Problematica della libertà costituzionale*, II, Padova 1992, p. 394. Contra, C. Chiola, 'Manifestazione del pensiero (libertà di)', *Enciclopedia Giuridica Treccani*, Roma 1990, p. 6.

5.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale nos. 1/1956, 19/1962, 48/1964, 9/1965, 68/1965, 87/1966, 84/1969, 20, 65/1970, 168/1971, 199/1972, 133/1973, 20/1974, 123/1976, 231/1985, 35/1986, 826/1988, 368/1992, 112/1993, 420/1994, 293, 508/2000
Corte di Cassazione S.U., decision 23 March 2001 no. 4183, *Foro Italiano* 2001, I, p. 2219 (Publicity about smoking products); Section III, decision 18 February 2000 no. 1862, *Massimario Foro italiano* 2000 (Publicity about smoking products); Section I, decision 27 February 2001 no. 2822, *Massimario Foro italiano* 2001 (Publicity about smoking products).

III. Freedom of the Press

Article 21 of the Constitution protects the freedom to express one's thoughts, and every means of communication considered useful for their diffusion. The Constitutional Court subsequently awarded the freedom of information the same limits and the same protection enjoyed by the freedom of personal expression.²⁸ All restrictions relative to the diffusion of the press must be removed and sentence no. 1/1956 therefore declared unconstitutional the rule that subjected the circulation and sale of printed material to a public licence.

1. Notion of the Press

Neither the Constitution (Paras 2–6 of Article 21 of the Constitution), nor the Court have supplied a precise definition of 'the press',²⁹ but the notion of the press includes 'mural' newspapers³⁰, posters fixed on walls (ruling no. 11/74), and even political propaganda.³¹ Excluded from this category, on the other hand, are commercial promotional publications, since they are more closely linked to the freedom of enterprise rather than the freedom of self-expression.³² The Law no. 62/2001 (New regulations on Editorial Publishing and Publications), which recognises internet magazines as publications, and as such, subject to the rules made by the Law governing the press.³³ In the event that the material is published regularly and under a fixed title, however 'virtual', it is considered to be an

²⁸ Sentences no. 122/1970, 172/1972, 1/1981, 194/1987.

²⁹ Sentence no. 38/1961.

³⁰ Ruling no. 15/1957.

³¹ Ruling no. 48/1964, 2/1971.

³² Rulings no. 231/1985; no. 68/1965.

³³ Law no. 47/1981.

editorial publication and is therefore subject to registration rules as well as those which publish the name of the owner and the editor of such a publication.

The freedom of the press, like other freedom rights, is a fundamental inviolable right, which is only limited by the requirement to respect parameters of public decency (*buon costume*). The Constitutional Court has on more than one occasion interpreted such a limit by identifying it with a violation of a sexual nature and not with wider more generic values such as common morality or 'national feeling' (as iterated by the Court in sentence no. 243/2001). Nevertheless, minimum requirements of public decency (foreseen by Art. 15 of the Law on the Press) have recently been interpreted in a broader sense, identifying it in respect of not only that which is at the core of the various morals of our time, but also to the range of ethical conceptions which coexist in contemporary society. In other words, restrictions imposed by public decency should coincide with respect for the personal human dignity.³⁴

As well as the specific imposition of public decency, the Constitutional Court has identified a series of implicit limitations, including general principles of the legal order³⁵, with the most important of public interests³⁶, constitutionally appreciable³⁷ and constitutionally protected interests³⁸ and, obviously, other constitutionally guaranteed rights³⁹ as well as fundamental rights. There are always specifically protected subjective interests with an implicit rule authorizing restrictions.

Other implicit limits are identified through the requirements of Court procedure⁴⁰, the right to honour and discretion, the interests of justice (which may override the right of reporting, sentences no. 1 and 18/1981 and 186/1987), the duty to defend one's country and institutions (sentences no. 87 and 100/66, which hold that the freedom to demonstrate should not be confused with propaganda inciting the disrespect of institutions (the most recent example being ruling no. 531/2000) or with propaganda with illicit aims). Further limits are represented by the protection of health and of underage children⁴¹, and by public order⁴², by the right to one's own image⁴³ and by religious sentiment⁴⁴.

³⁴ Ruling no. 293/2000.

³⁵ Ruling no. 25/65.

³⁶ Ruling no. 89/1979.

³⁷ Ruling no. 105/1972.

³⁸ Ruling no. 175/1971 and no. 133/1973.

³⁹ Ruling no. 121/1957.

⁴⁰ Ruling no. 25/65.

⁴¹ Sentence no. 112/1993.

⁴² Sentences no. 19/1962 and 199/1972.

⁴³ Sentence no. 38/1973.

2. Right to Access Information

The right to be informed (and thus to have access to news) has been recognised by the Constitutional Court as a practical and logical foundation of the active right to information⁴⁵. The Constitutional Court has recognised a general interest in everyone being informed.⁴⁶ Such general interest is in no way comparable to a subjective right, because it is not enforceable neither on the part of the State nor on the part of those responsible for the information. Moreover, the effectiveness of such interest is more or less incisive according to the relevance that the law confers to such a constitutionally recognised interest. The fact that Article 21 of the Constitution, paragraph 1, proclaims complete freedom of expression, therefore does not mean that an individual right to access and use means of information is guaranteed.⁴⁷

3. Right to Accurate Reporting

The freedom of the press is recognised as a complete right of freedom, and not a functional one,⁴⁸ which enjoys the same protection as freedom of personal expression. Journalists must respect the same limits as any other individual with regard to information retrieval. However, a special discipline takes effect as journalists must adhere to a series of rules established by a well-known sentence⁴⁹, which recognises and protects the ‘right’ to exercise the profession. The Constituent Assembly and subsequently the Court did not deem it necessary to recognise a journalist’s right to professional secrecy. This is because, according to the Court, professional secrecy can only be recognised in those professional categories (e.g. doctors, priests) which have a duty to maintain absolute confidentiality on such ‘communication’. The information in a journalist’s possession, however, for the very functions that the press by definition must perform, are destined to be divulged to the public.⁵⁰

As far as the issue of freedom of reporting is concerned, or rather the recounting of events without scientific method and on the basis of mere chronological order, it is recognised as a consequence of the freedom of the

⁴⁴ Ruling no. 188/1975.

⁴⁵ Ruling no. 1/81.

⁴⁶ Sentences no. 105/1972, 94/1977, 1/1981.

⁴⁷ Ruling no. 105/1982.

⁴⁸ Sentences no. 175/71, 105/72, 113/1974.

⁴⁹ Cassazione civile, sezione I, 5259, 18 Oct. 1984.

⁵⁰ Ruling no. 1/81.

press,⁵¹ and, in turn comprises the right to have access to information⁵², already illustrated, but also the right to reliable sources. The right to report must be balanced with the right to confidentiality, but the former prevails in the event that the events reported are in the public interest and can contribute to the formation of public opinion⁵³. Limits on the right to report coincide with the limits of the freedom of the press, especially those relating to pre-trial and State secrecy. Article 684 Criminal Code punishes the total or partial publication of acts and documents of criminal proceedings, whose divulgence is prohibited by law (Arts. 114 and 329 Criminal Procedure Code).

4. Right to Honour

The right to honour is protected above all as a form of social dignity (Art. 3 para. 1 Constitution). A journalist cannot under any circumstances violate an individual's right to honour, or indeed an individual's reputation, since such concepts enjoy constitutional protection thanks to Article 2 of the Constitution⁵⁴, which also constitutes a guarantee for the safeguarding of the right to image.

The right to honour and reputation is included in the concept of a free press.⁵⁵ The protection of such a right is articulated through a number of penal concepts, including libel (Art. 594 Criminal Code), slander (Art. 595 Criminal Code) as well as various other offences such as 'outrage to public decency' and 'defamation', which require a different form of protection for certain individuals with respect to others. The law governing the press recognises the violation of the right to honour as a specific offence. The divulgence by the press of pre-trial acts is also considered as damaging to the right to honour of both the defendant and to the witnesses.⁵⁶ In order that the divulgence of news through the press, though considered damaging to honour, can be considered a legitimate expression of the right to report, and can be excluded from the offence of slander through the press (libel), three conditions must be satisfied: social utility of the information, objective truth or the fact that such information is the fruit of diligent research, the exposition and evaluation of the facts which must not exceed the informative

⁵¹ Ruling no. 18/81.

⁵² Sentence no. 1/81.

⁵³ Cassazione, sezione V, 6 Feb. 1998, no. 1473.

⁵⁴ Sentences no. 86/74 and 38/73.

⁵⁵ Ruling no. 86/1974.

⁵⁶ Ruling no. 18/66.

aims being pursued.⁵⁷ In other words, the freedom of the press prevails in the event that the news in question is fairly divulged and if ‘public interest in the divulgence of such information’ exists.⁵⁸

In the past, violation of the right to honour of public figures and public officials was ‘outrage to public decency’ and punished more harshly than the offence of libel.⁵⁹ With sentence no. 341/1994 the Constitutional Court reduced the punishment to a minimum. Subsequently, Article 18 of Law no. 205/1999 has abrogated the crimes of ‘outrage to public decency’ towards a public official and towards a public sector worker and those offence to the honour of foreign Heads of State and representatives of foreign States (Arts. 341, 344, 297, 298 Criminal Code).

5. Right of Reply

The editor of a newspaper is obliged to insert free of charge corrections, apologies or the responses of those who have been the subject of images, articles, thoughts or statements and who consider them contrary to the truth or damaging to their dignity (Art. 42 Law 416/1981). The correction or apology must be swift and have the same prominence as the item which is to be corrected, subject to administrative sanctions and the possibility of the damaged party obtaining from a judge the obligatory publication of the said correction or apology. The correction of news or images published in newspapers must be requested in writing because otherwise the editor of a newspaper is not obliged to publish it.⁶⁰

6. Prohibition of Press Censorship

Section 2 Article 21 of the Constitution, prohibits any type of press authorisation or censorship.⁶¹ Sequestration is authorised and foreseen by the Constitution only in cases explicitly highlighted by Article 21 paragraph 3 (in the event of crimes for which the law governing the press authorises sequestration). The judicial authority can, nevertheless, order the sequestration of the copies of a newspaper or any other publication in the event that they violate penal law. In cases of

⁵⁷ Constitutional Court, sentences no. 175/1971, 103/1973; 86/1974; Cassazione civile, sezione I, 5259, 18 Oct. 1984; Cassazione, sezione IV penale, 9 Jan. 1978; Cassazione civile, sezione III, sentence no. 8284, 16 Sep. 1996.

⁵⁸ Ruling no. 175/1971.

⁵⁹ Sentences no. 109/1968 and 51/1980.

⁶⁰ Cassazione civile, sezione I, no. 2852, 5 Apr. 1990.

⁶¹ Ruling no. 38/1961.

absolute urgency, in which it is not possible for the judicial authority to intervene immediately, the forces of law and order may perform sequestration of the press in the event that such publications are considered obscene or offensive to public decency, but they are obliged to communicate the sequestration within 24 hours and if the judicial authority does not ratify it within the following 24 hours, the sequestration is considered null and void.

7. Protection of the Free Press as an Institutional Guarantee

The ban on authorisations and censorship foreseen by Article 21 of the Constitution and the provision of a reserve of law and of jurisdiction are genuine constitutional guarantees in favour of the freedom of the press. Paragraph 4 of the said Article leaves to the legislator the choice of making known the sources of funding for the periodical press known. This is aimed at discouraging the formation of monopolies and encouraging genuine pluralism in the realm of written information. Controversial is whether the duty of journalists to make part of a corporation (*ordine*) is still compatible with the freedom of press (as presumed by sentence no. 11/1968).

7.1. PLURALISM AND THE GUARANTEE OF AN OPEN MARKET OF IDEAS AND OPINIONS

The Constitutional Court has recognised the pluralism of information as a ‘fundamental constitutional value’ sanctioned by Article 21 of the Constitution⁶², and the Court itself has been called upon, from time to time, to verify adherence to it⁶³. It has also recognised that each phenomenon destined to reduce the plurality of information sources below a certain threshold must be combatted by the legislature in accordance with the right of citizens to pluralistic and differentiated information, guaranteeing informed participation in political and social life. To this end, economic aid and contributions for publishing companies have been conceived in order to create more enterprises in the market place.⁶⁴ The legislature, through Law no. 67/1987, attempted to develop an ‘antitrust’ discipline in order to protect the pluralism of the press defining the prohibited ‘dominant position’ on the basis of the total circulation of a particular group of newspapers controlled directly or indirectly by a single editor (calculated

⁶² Ruling no. 155/1990.

⁶³ Ruling no. 420/1994.

⁶⁴ For example, Laws no. 172/1975, 416/1981, 67/1987 and, more recently Law no. 62/2001.

distinctly on a national, regional and local level as determined by Article 3 of Law no. 67/1987). In the event that the limit is surpassed, the acts that led to its creation must be considered null and void (newspaper acquisitions, mergers etc.). Laws no. 67/1987 and 223/1990 have reinforced the role of the guardian of transparency and pluralism, attributed initially to the Guarantor for publishing and broadcasting, and subsequently to the Communication Guarantee Authority (to whom the functions of guarantor were transferred according to Law no. 249/1997), giving them powers of inspection and instruction as well as powers to intervene in order to counteract dominant positions.

7.2. CLAIMS AGAINST PRESS MONOPOLIES BASED ON FUNDAMENTAL RIGHTS

In order to guarantee the right to information, Law no. 416/1981, subsequently modified by Law no. 67/1987, foresees, in the event of an excessive concentration of ownership in the daily press (Art. 49), that the Court makes provisions for the sale of shares or stakes or ownership quotas through a stockbroker or a credit firm or agency upon the request of the authorities for communications or whoever holds an interest. In the event that a dominant position occurs, not only can the guaranteeing authority ask the judge for a declaration nullifying the act which constituted it, but users (individuals or groups) are also permitted to appeal directly to the judge.

IV. Freedom of the Audio-visual Media

1. Constitutional Guarantee of Public Radio and Television Broadcasting

In the history of the Italian constitution, public radio and television broadcasting can be said to have been guaranteed generally by the freedom of information implied by Article 21 of the Constitution. This article, evidently conceived at a time in which the press was considered the most socially significant medium, features, with its reference to ‘any other means of diffusion’ of thought, an open clause whose scope is subject to extension in accordance with subsequent technological developments and the creation of new media.

In 1960, with Sentence no. 59, the Constitutional Court underlined that the State, then monopolistic, was

‘... institutionally speaking in the most favourable conditions of objectivity and impartiality for overcoming difficult obstacles, from the natural limitations of a specific medium, to the realisation of the constitutional precept aimed at guaranteeing the opportunity of divulging one’s thoughts through every available means (...).’

Nevertheless, with Ruling no. 225/1974, the said Court was able to specify that, in the absence of legislative discipline governing public radio and television requiring it to create programmes in conformance with principles of objectivity and completeness of information, as well as to guarantee rights of access, the state broadcasting monopoly risked deteriorating into a ‘a ponderous instrument of biased service’.

An element which justifies the existence of a public broadcasting service today is represented by Article 9¹ of the Constitution, especially where it identifies the responsibility of the Republic to promote ‘the development of culture’, of which public broadcasting is currently an instrument. Consequently, the Constitutional Court has deemed the television licence constitutionally legitimate, as it is issued for the public benefit, for the ‘better respect of citizens’ rights to information and for the diffusion of culture⁶⁵’.

2. Freedom of Broadcasting of Private Broadcasters

The constitutional guarantees for private radio and television broadcasters are to be found in the concept of freedom of divulgence of thought (Art. 21), and in the freedom of economic initiative (Art. 41). In balancing such principles⁶⁶, the Court has always given the former greater importance: initially completely denying, in the absence of the technical conditions necessary to open up the broadcasting market to the private sector, the freedom of enterprise in the said sector.⁶⁷ Subsequently the Court declared a public monopoly at *local levels* unconstitutional, after having ascertained that in such a context there were sufficient broadcasting frequencies.⁶⁸ Furthermore, it subsequently recognised that the obligation of so-called internal pluralism, deduced from Article 21 of the Constitution and limited by the essential content of Article 41¹, also applies to private broadcasters.⁶⁹ The limitations derived for the freedom of the private broadcasting sector are established by Ruling no. 112/1993: ‘pluralism of sources’; ‘objectivity and impartiality of the information supplied’; ‘completeness, correctness and continuity of the information given’; ‘respect of

⁶⁵ Ruling no. 284/2002, using the wording of Art. 1 Law no. 103/1975.

⁶⁶ Ruling no. 826/1988, *cit.*

⁶⁷ Ruling no. 59/1960.

⁶⁸ Ruling no. 826/1988 and Ruling no. 202/1976.

⁶⁹ ‘...pluralism shows itself in the concrete possibility of choice, for all citizens, between multiple sources of information, a choice which would not be effective if the public at which audiovisual communications aim was not in a position to benefit from programmes that guarantee the expression of heterogeneous tendencies, as much in public as in the private sector’.

human dignity, public order, public decency and the free psychological and moral development of children⁷⁰.

Law no. 223/90, the first ‘system’ law to intervene and organically regulate the broadcasting sector, has identified further obligations governing the programming of public and private ‘broadcasting daily radio and TV news programmes’⁷¹. Such a rule, in the light of the applicability of the principle of pluralism, including the sub-species of internal pluralism, to the private broadcasting sector, is to be considered of a constitutionally constrained content.

3. Individual Claims to a Right to Broadcast

From the statement in Article 21 Paragraph 1 of the Constitution, it seems possible to deduce the existence of an individual right to broadcast as a way of exercising one’s right to express one’s opinion through radio or television. Actually, the Constitutional Court has consistently highlighted⁷² the limited amount of available frequencies as a principle obstacle to the idea that the right to free expression of thought translates to a right to the means. Moreover, it has been able to specify that although the right guaranteed by Article 21 Paragraph 1 is a subjective individual right of an absolute nature⁷³, it is not incompatible with the required licensing provision which allows it to be exercised⁷⁴, a provision that finds its ratio in the scarcity of frequencies, in the related need to avoid dangerous concentrations in the publishing market and in the will to subject the undertaking of broadcasting enterprises to a series of criteria of merit.⁷⁵ The juridical status of the subject awaiting a broadcasting licence can therefore be qualified in terms of the so-called legitimate interest which can be defended in an administrative court. Such a principle is deducible from Sentence no. 102/1990 of the Constitutional Court, where it is stated that ‘with regard to the activation of radio and television stations, a subjective right of the individual is not foreseen’, and confirmed by

⁷⁰ Ruling no. 112/1993.

⁷¹ Art. 20 Law no. 223/1990.

⁷² Rulings no. 59/1960, 225/1974, 112/1993.

⁷³ Ruling no. 112/1993.

⁷⁴ Corte Costituzionale, Ruling no. 112/1993, wherever the clarity of the distinction between concessions and authorizations is called into question with reference to radio and television broadcasting; from a theoretical point of view, it remains difficult to accept the possibility of conciliating a juridical situation of a subjective right which can be deemed as such on the basis of constitutional regulations with concessionary measures, which by definition expands the juridical sphere/scope of an individual, allocating faculties which were previously not foreseen for the said individual.

⁷⁵ Ruling no. 112/1993 regarding Law no. 223/1990, Arts. 17 and 18.

Sentence no. 112/1993, in which all the frequency concessions are defined, relative to which the private individual holds a position of legitimate interest ahead of the State which maintains control of the airwaves, and the authorisation to carry out broadcasting activities with respect to which a private individual is already the holder of a subjective right, given that such authorisation can only be requested by one who has already obtained a licence.

4. Guarantee of a Pluralistic Structure of the Audio-Visual Media

The notion of pluralism adopted by the Court in its case law in relation to radio and television broadcasting has two separate aspects, namely *external pluralism* and *internal pluralism*. The Court defines external pluralism as the possibility of ‘satisfying, through a plurality of concurrent elements, the right of the citizen to be informed’, while internal pluralism is considered as the possibility of ‘enjoying access, as much in the public sector as in the private sector, to programmes that guarantee the expression of tendencies of a heterogeneous nature’⁷⁶. After having called for intervention on the part of the legislature several times in order to safeguard pluralism and the freedom of information against trends towards a concentration of services on a national scale through *networks*⁷⁷, sentence no. 420/1994 declared unconstitutional the clause which allowed the awarding of three licences for television broadcasting to a single broadcaster (Art. 15 Para. 4 of Law no. 223/1990), maintaining however, for the same reasons for the need of pluralism, the transitory discipline expressed in the Legislative Decree no. 323/1993 which allowed broadcasters without such a licence to continue showing programmes. Sentence no. 466/2002, with specific regard to Article 3 paragraph 7 of the subsequent Law no. 249/1997, declares its unconstitutionality where it fails to stipulate a definite time period, which in any case should not go beyond 31 December 2003, by which time the programmes transmitted by the broadcasters which exceed the antitrust limit (a limit set by the law at two networks) must be shown exclusively via satellite or cable. The clause declared partially unconstitutional entrusted to the Authority for Communicational Guarantees the discretionary power to establish the date from which such an obligation to transfer programmes was to take effect, a date that that the said Authority had set at 31 December 2003, but reserving the right to assess, in the meantime, whether alternative systems of diffusion identified in Law no. 249/1997 (cable and satellite) had reached an adequate level of development: which, owing to the insufficient diffusion of such technologies, risked postponing

⁷⁶ Sentence no. 826/1988.

⁷⁷ Ruling no. 826/1988.

(*sine die*) indefinitely the termination of a market situation which had stalled in a genuine situation of duopoly.

The necessary respect for pluralism is also highlighted with reference to the field of political communication. The recent sentence no. 155/2002 of the Constitutional Court, which deems legitimate the ‘obligation imposed on single radio and television broadcasters to make available programmes featuring political opinions and evaluations during election campaigns, but also outside election periods, in which equality of access among participants is ensured’⁷⁸, states that ‘in any event, external pluralism can turn out to be insufficient – in a situation in which the substantial limitation of broadcasters prevails – to guarantee the possibility of expressing political opinion through television broadcasting’. The Court also affirms that obligations foreseen in relation to political communication by Law no. 28/2000 do not in any way constitute forms of ‘functionalisation’ of the television or radio, nor the expropriation of the political identity of the aforementioned private broadcasters.

5. *Independence from State Influence*

Independence from State influence has always been difficult to enforce, especially with regard to public radio and television. The need to safeguard the independence of public radio and television stations from the government was recognized by the Constitutional Court with sentence 226/1974⁷⁹, with a recommendation to the legislature to subject public broadcasting to the influence of powers different from those of the executive (Parliament *in primis*). The legislature attempted to pursue such a result with the Law no. 103/1975, which subjected the public broadcasting service to the control of a *Parliamentary Commission for the Monitoring and General Guidance of Broadcasting Services*, with the additional task of nominating the administration councillors of the concessionary body.

⁷⁸ Obligation defined by Law no. 28/2000 ‘Rules in favour of equal access to means of information during electoral campaigns end in favour of political communications’.

⁷⁹ This is the sentence in which the Court drafted the so-called *commandments* to which the legislator then adhered when reforming the public broadcasting service with Law no. 103/1975: independence of a public service from executive power; allocation to Parliament for the issue of guidelines and control on the public and private bodies granted the concession of the public service; institutional duty of objectivity for public service journalists; obligation to guarantee pluralism of information and culture; limitation of RAI’s advertising income; provisions for so-called *access programmes* on public TV and radio for political, religious, cultural and socially relevant organisations; effectiveness of the right to counter-representation.

Such a regulation, especially considering the nomination criteria for the said councillors, has not enjoyed positive results, culminating in a spoils system practised by the political parties (*lottizzazione partitica*) – Law no. 206/1993 has therefore tried to remedy such an inconvenience by assigning the powers of nomination to the President of the House of Deputies and of the Senate of the Republic. For that which concerns the private broadcasting networks, the issue of independence from State influence is put forward mainly with reference to the effect on their activities caused by the so-called *modal* limits governing their programming procedures. The aim of the limits is to ensure that objectives of public interest are also respected by private operators. These include the obligation of private broadcasters operating on a local level to dedicate a certain number of hours a week to providing information on social issues (Art. 5 of Law of 27Aug. 1993, no. 323); the obligation of private national broadcasters to broadcast news programmes on a daily basis and to remain on air for a minimum of twelve hours a day (Art. 20 of Law no. 223/1990); the obligation imposed on individual broadcasters to provide special programmes featuring *political opinions and evaluations* during election campaigns but also outside election periods, in which equality of access among participants is ensured⁸⁰. Nevertheless, as those limits ‘specifically affect entrepreneurial-organisational profiles of economic initiative, rather than the content of activities relating to the expression of thought’⁸¹, it is not possible to speak, in such a context, of a form of State influence on the private broadcasting sector.

Addendum: The new provisions of the new Law of 3 May 2004, no. 112 (so called Legge Gasparri) have been criticized by the Venice Commission, opinion no. 309/2004 and are under revision (1.8.2007).

6. Documentation (III. and IV.)

6.1. RELEVANT LEGISLATION

Criminal Code: Articles 57, 57bis, 663bis

Law of the 8 February 1948, no. 47 (‘Rules for the Press’)

Law of the 6 August 1990, no. 223 (‘Discipline of the Public and Private Broadcasting System’)

Law of the 22 February 2000, no. 28 ‘Rules in Favour of Equal Access to Means of Information During Electoral Campaigns and in Favour of Political Communications’

⁸⁰ Law no. 28/2000.

⁸¹ Ruling no. 155/2002.

- Law of the 7 March 2001, no. 62 (New Regulations on Editorial Publishing and Publications)
Law of the 6 November 2003, no. 313 (Rules for the Realisation of the Principle of Pluralism in the Programme Planning of Local Broadcasters)
Law of 3 May 2004, no. 112 (Principles Governing the Broadcasting System and RAI – Radiotelevisione Italiana SPA ...)

6.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

- Corte Costituzionale, rulings no. 1/1956, 15, 121/1957, 38/1961, 19/1962, 48/1964, 25, 68/1965, 87, 100/1966, 109/1968, 105, 122/1970, 11/1974, 175/1971, 105, 172, 199/1972, 38, 103, 133/1973, 86, 113/1974, 188/1975, 89/1979, 51/1980, 1, 18/1981, 231/1985, 186, 194/1987, 155/1990, 112/1993, 341/1994
Corte Costituzionale, rulings no. 59/1960, 224, 225, 226/1974, 826/1988, 112/1993, 420/1994, 155, 284 and 466/2002
Corte di Cassazione, sezione I, 18 October 1984, no. 5259; sezione V, 6 February 1998, no. 1473 sezione IV penale, 9 January 1978, sezione III, sentence no. 8284, 16 September 1996, sec. I civ., no. 2852, 5 April 1990

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F. Rimoli, *La libertà dell'arte nell'ordinamento italiano*, Milano 1992

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- A. Pace, *Stampa, giornalismo, radiotelevisione*, Padova 1983
- idem, Art. 21. 'La libertà di manifestazione del proprio pensiero', in: G. Branca/A. Pizzorusso, *Commentario alla Costituzione*, Bologna 2006

V. Freedom of Assembly

Article 17 of the Constitution guarantees the citizens the right to assemble 'peacefully and unarmed' (Para. 1). According to the Constitutional Court, assembled citizens 'can engage in lawful activities, including those for the purpose of common entertainment or pastimes', such as a 'dance' for example.⁸² Academic opinion is divided as to whether such an assembly is identified in legal terms by the activity (of worship, educational, cultural, political, economic, recreational, sporting etc.) which characterises it and is its objective⁸³, – though remaining outside the relative guarantee⁸⁴ –; or if the voluntary simultaneous presence of several people is sufficient, regardless of whether an aim, common or otherwise, is pursued by those gathered.⁸⁵

1.–2. Meetings in Closed Rooms and Open-air Meetings

In Article 17 of the Constitution, gatherings are distinguished on the basis of the location in which they are held: 'a public place' or 'a place open to the public' (paras. 2 and 3). Gatherings held in places open to the public, as those in a private

⁸² Sentences 15 Apr. 1970, no. 56, and 15 Dec. 1967, no. 142. On the other hand, in the sentence 10 June 1970, no. 90, the Court states that 'the constitutional guarantees of such a right' are 'primarily' referred to 'meetings whose aim is to express and exchange opinions'. See also C. Mortati, *Istituzioni di diritto pubblico*, Padova 1969, II, pp. 995 s.

⁸³ T. Martines, *Diritto costituzionale*, Milano 2000, p. 544, and C. Lavagna, *Istituzioni di diritto pubblico*, Torino 1982, p. 457.

⁸⁴ A. Pace, 'Art. 17', in: G. Branca/A. Pizzorusso (eds.), *Commentario della Costituzione*, Vol. II, Bologna 1977, p. 148. See also Corte Costituzionale, Ruling 18 Mar. 1957, no. 45.

⁸⁵ C. Mezzanotte, 'La riunione nella dinamica del fenomeno associativo e come valore costituzionale "autonomo"', *Giurisprudenza costituzionale* 1970, pp. 608 ss., and G. U. Rescigno, *Corso di diritto pubblico*, Bologna 2001, p. 604. Corte di Cassazione, sezione I penale, 4 July 1977, has defined as meeting, in accordance with Art. 18 of the Royal Decree 18 June 1931, no. 773 – United text of public safety laws –, "any gathering of people characterised by a general unity of intent".

location⁸⁶, are considered exempt from the obligation to give notice and from the hypothesis of prohibition provided for those held in a public place.⁸⁷ The Constitutional Court has yet to offer a general definition of a public place or of a place open to the public. On the contrary, it stated that ‘it is the responsibility of the penal judge, and not the Constitutional Court, to determine ... if functions of worship, election gatherings, sports meetings and the like are to be considered public gatherings’ as ruled by Article 5 of the Law of the 27 December 1956, no. 1423 (Preventative Measures towards People Being a Danger to Public Safety and Morality).⁸⁸ The notion of place open to the public has been interpreted as a place designed for ‘public use’ or a ‘public building’, as ‘hotels or other places where people are generally accommodated’, or a ‘theatre’.⁸⁹ According to prevailing academic opinion, it is the place intended to host such gatherings which differentiates the types of gathering indicated in Article 17 of the Constitution, regardless of the ownership of the place and of the number of people in attendance.⁹⁰ With regard to gatherings in a public place, the use of the place is ‘essentially and unequivocally destined’ for an undifferentiated collection of individuals who can freely obtain access to it⁹¹; while, for gatherings in private places, admission is reserved to personally identifiable individuals, on the part of those who are ‘in exclusive material control’ of the place.⁹² In places open to the

⁸⁶ Although not explicitly mentioned, it is evident that they are also covered by the general guarantee of Art. 17 of the Constitution.

⁸⁷ Corte Costituzionale, rulings 18 Mar. 1957, no. 45; 8 Apr. 1958, no. 27; 15 Dec. 1967, no. 142, and 15 Apr. 1970, no. 56. In the sentence 7 May 1975, no. 106, the Corte Costituzionale stated that the intervention of the police in premises open to the public and temporarily hosting a meeting of a ‘private nature’ does not contravene Art. 17 of the Constitution as long as such intervention is ‘primarily in the interests of protecting the gathering of people present’.

⁸⁸ See the sentence 5 May 1959, no. 27.

⁸⁹ Sentences 15 Dec. 1967, no. 142; 15 Apr. 1970, no. 56, 16 July 1970, no. 144, and 7 May 1975, no. 106.

⁹⁰ For Corte di Cassazione, sezione I penale, 6 Nov. 1981, the consideration of the ‘number of participants’ is in itself sufficient to establish whether ‘the meeting is a public one, or rather, a meeting of a non-private nature.’

⁹¹ The Corte di Cassazione has defined ‘public’, in accordance with Art. 4 Para. 4 of the Law 18 Apr. 1975, no. 110 (Supplementary Regulations for the Current Discipline Controlling Weapons, Ammunition and Explosive), the gathering in a disco or in a soccer arena open to an invited mass (sezione I penale, 23 Sep. 1986; 16 June 1982; 26 Jan. 1982 and 6 Nov. 1981).

⁹² R. Borrello, ‘Riunione (diritto di)’, *Enciclopedia del diritto*, XL, Milano 1989, p. 1427.

public⁹³, gatherings are only intended for an undifferentiated collection of individuals if such is the will of those with control over it; subject to the selection of aspiring participants, through the imposition of entrance conditions or the separation of the meeting area from the external environment.⁹⁴

No authorisation needs to be obtained for a gathering unless such a meeting is the result of an economic initiative, for which limitations are foreseen by Article 41 of the Constitution.⁹⁵ It is however obligatory for the organisers of gatherings in public places to inform the authorities in advance holding the power to, if need be, forbid it (Art. 17 Para. 3 of the Constitution and Art. 18 of the United Text of Public Security Laws). The said notice is an obligation, the lack of which leaves only the organisers liable to criminal charges.⁹⁶ Nevertheless, it is also considered a burden for those who promote the gathering.⁹⁷ According to the academic doctrine, the notice allows the assembled 'to be preferred to those exercising other rights (of gathering, of movement)'⁹⁸.

3. *Spontaneous Demonstrations*

For spontaneous demonstrations (so-called '*assembramento*'), the Corte di Cassazione has affirmed that the obligation of notice prevails, since 'even in such an event ... the concept of public interest still subsists, guaranteed by Article 17 paragraph 3 to perform a verification of the suitability of the gathering and the likelihood of endangering public safety and security'⁹⁹. Academic opinion

⁹³ The Corte di Cassazione has deemed a meeting in a place open to the public as one in which 'access is permitted to those who pay for a ticket' or a meeting in order to witness 'a cabaret or theatrical show given at a private club for which admission is also granted to non-members' or a 'trade union assembly which is held in the council chambers of the town hall.' (sezione VI penale, 6 Dec. 1978; sezione I penale, 3 Feb. 1978, sezione II penale, 25 Aug. 1994).

⁹⁴ Pace (n. 84), p. 171, Borrello (n. 92), p. 1428.

⁹⁵ Corte Costituzionale, rulings 15 Dec. 1967, no. 142; 15 Apr. 1970, no. 56 and 12 Mar. 1998, no. 50.

⁹⁶ Corte Costituzionale, ruling 10 May 1979, no. 11.

⁹⁷ Corte Costituzionale, ruling 10 June 1970, no. 90.

⁹⁸ A. Pace, 'Strumentalità del diritto di riunione e natura del preavviso nella giurisprudenza della Corte Costituzionale', *Giurisprudenza costituzionale*, Milano 1970, p. 1456. This opinion holds that the burden is stated 'only for the purpose of rendering more easily the task of the public authority to keep an assembly under watch, requiring the help of private promoters.' (Pace, 'Art. 17' [n. 84], pp. 151, 175 ss.).

⁹⁹ Sezione I penale, 7 Mar. 1977; 10 Feb. 1978; 30 Nov. 1977; 4 July 1977; sezione II penale, 25 Aug. 1994.

predominantly maintains that they are meetings in a public place, without the imposition of notice, given their intrinsically unplanned, though not involuntary, nature.¹⁰⁰ According to another school of thought¹⁰¹, ‘*assembramento*’ does not constitute a gathering, and as such, limits to the freedom of circulation can be applied, which ‘the law establishes in a general sense for reasons of health and safety (Art. 16 Para. 1 of the Constitution). The Constitutional Court appears to conceive no more the concept of notice as a condition of the legitimacy of the holding of a gathering in a public place, but deemed permissible the breaking up of gatherings not pre-announced – including spontaneous gatherings.¹⁰²

4. *Sit-in Blockades*

The Constitutional Court underlined how the concept of gathering, as stated in Article 17 of the Constitution, is all inclusive, and means ‘the genus of gathering, not a particular species of it’.¹⁰³ It applies therefore also to gathering with the intention of temporarily occupying public territory, according to sit-in procedures.¹⁰⁴ The Corte di Cassazione has stated that, with regard to the obligation of notice, ‘whether a number of people gather in a specific place or whether they wander through the streets of an inhabited area’ is not relevant.¹⁰⁵

5. *Limitations on Public Order or Traffic Grounds*

The Constitution, with the words ‘peacefully and unarmed’ (Art. 17 Para. 1 Constitution), defines the only general limit to the freedom of gathering and, with the expression ‘public security and safety’ (Art. 17 Para. 3 Constitution), foresees the only reasons that legitimate the imposition of a ban on gatherings in public places. The Constitutional Court stated that constitutional limitations on the freedom of gathering are set in order to protect ‘public order’ and ‘public

¹⁰⁰ Otherwise they would not be an assembly but a mere crowd, queue, or knot of people (see P. Barile, ‘Assembramento’, *Enciclopedia del diritto*, III, Milano 1958, p. 405; Pace, *op. ult. cit.*, pp. 149 ss.).

¹⁰¹ Lavagna (n. 83), p. 457.

¹⁰² See Rulings 19 June 1956, no. 9; 19 Feb. 1960, no. 10, the sentence 11 July 1961, no. 54, overruled since the sentence 10 May 1979, no. 11.

¹⁰³ Ruling 18 Mar. 1957, no. 45. Pace, *op. ult. cit.*, p. 153.

¹⁰⁴ A. Barbera, ‘Principi costituzionali e libertà di corteo’, in: *Studi in memoria di Carlo Esposito*, Padova 1974, p. 2741.

¹⁰⁵ Sezione I penale, 30 Nov. 1977.

security’ and has often freely interchanged the two expressions.¹⁰⁶ The restatement ‘unified text of public security laws’ foresees that the chief of police has the power to prevent or make conditions for the holding of meetings ‘for reasons of public order, morality and health’ (Art. 18 Para. 4) and the power to break up ‘meetings or assemblages in a public place or in a place open to the public’ when ‘demonstrations and proclamations occur which can compromise public order or threaten the safety of the public’, especially if they are used to commit crimes and ‘seditious or outrageous demonstrations against public authority’ (Arts. 20 ss). Public order has been defined by the Court – in the light of the current regime of democracy and rule of law¹⁰⁷ – as the ‘legal order on which social co-existence is founded’ or the ‘constitutional public order’, ‘which must be ensured in order to allow everyone to benefit from inviolable individual rights’.¹⁰⁸ In this sense, it has been considered a general limitation to constitutional rights to freedom, including the freedom to gather.¹⁰⁹ Prevailing academic opinion intends public order as a condition in which people can ‘go about their legitimate business without being threatened by offensive behaviour upon their person, in either a material or psychological sense’.¹¹⁰ Public order only limits those rights – like the freedom of gathering – in which the constitutional discipline makes at least implicit reference to.¹¹¹

The Corte di Cassazione holds that the ‘freedom of assembly ... cannot exceed, disregarding it, the penal precept contained in Article 1 of Legislative Decree no. 66/1948 (Rules to assure the free circulation on ordinary roads, railroads and free navigation) which is ‘set as a guarantee of the right to circulate, protected by

¹⁰⁶ Ruling 8 July 1971, no. 168. See also Ruling 5 May 1959, no. 27 (‘social security’) and Ruling 12 Jan. 1977, no. 4.

¹⁰⁷ Rulings 16 Mar. 1962, no. 19; 8 July 1971, no. 168.

¹⁰⁸ Sentence 8 July 1971, no. 168. Rulings 23 June 1956, no. 2, 2 July 1956, no. 8, 5 May 1959, no. 27; 27 May 1961, no. 26, 16 Mar. 1962, no. 19, 23 June 1956, no. 2, 8 July 1971, no. 168, 10 Dec. 1987, no. 503. More recently the Court referred only to ‘interests essential for maintaining a well ordered civil community life’ (Rulings 7 Apr. 1995, no. 115, 25 July 2001, no. 290, 26 July 2002, no. 407).

¹⁰⁹ Rulings 5 May 1959, no. 27; 16 Mar. 1962, no. 19; 21 June 1966, no. 75; 8 July 1971, no. 168; 23 Apr. 1974, no. 108, and 10 Dec. 1987, no. 503. Ruling 12 Jan. 1977, no. 4 construed ‘security’ in terms of ‘physical integrity and safety of persons’.

¹¹⁰ Boriello (n. 92), p. 1423. Barbera (n. 104), p. 2750, holds that the prevailing opinion defines the concept in an even more restrictive manner as the ‘absence of physical violence’.

¹¹¹ C. Esposito, ‘La libertà di manifestazione del pensiero e l’ordine pubblico’, *Giurisprudenza costituzionale*, Milano 1962, pp. 193 s., and Pace, ‘Ordine pubblico’ (n. 98), p. 1783. The Court referred to the concept of substantial public order in Rulings 5 May 1959, no. 27, 5 May 1983, no. 126.

Article 16 of the Constitution.’ The Court established that the ‘crime of blocking railway lines or roads’ may even recur in ‘the mere obstruction of the road system with any type of obstacle (including the assemblage of several people), with the result that it is sufficient to make circulation appreciably more difficult’.¹¹²

Every restriction on the freedom of assembly must be established ‘only by the law and by the motivated decision of the judicial authority’¹¹³, but ‘when necessity is accompanied by urgency, the implementation of provisional measures to limit such freedom can be allocated to the public security authorities’¹¹⁴. It is considered legitimate to intervene either in a repressive manner, by breaking up a non-peaceful or armed gathering, or in a preventative manner, with a ban on assembly in a public place in the event that public safety and security would be put at risk.¹¹⁵ The provision of banning such a gathering must be motivated on specific grounds (Art. 17 ult. co., of the Constitution) and, in any case, it is the judge’s responsibility to verify ‘that it has been made known through the correct legal channels; that it is founded on reasonable concerns for (...) security, public order (...) foreseen with “sufficient specification” by individual state laws’¹¹⁶.

6. *Other Examples*

6.1. ELECTORAL MEETINGS

An electoral meeting (*comizio*) is an assembly which takes place in a public place or in a place open to the public in anticipation of a forthcoming election and which has electoral consultation as its sole or partial aim. The law forbids

¹¹² Sezione I penale, 11 Apr. 1994, 31 Oct. 1986, 14 Oct. 1997, no. 10151.

¹¹³ Ruling 5 May 1959, no. 27: without ‘giving rise to an unlimited power of command on the part of the ordinary legislature, remaining subject to the authority of this Court in order to avoid the eventuality of, in imposing constraints on rights of freedom, violating the rules of the Constitution in any way.’ See Arts. 654 and 655 of the Penal Code – Royal Decree 19 Oct. 1930, no. 1398 –, which punish seditious demonstrations and gatherings; Art. 5 of the Law 22 May 1975, no. 152, which punishes ‘the use of protective helmets or any other means of preventing the identification of an individual ... in the event of demonstrations which take place in public places or in places open to the public’; the Law 24 Apr. 2003, no. 88 – Urgent directives for contrasting violent behaviour during sporting events –, which punishes those who, during sporting events, are found in possession of ‘instruments designed for the emission of smoke or visible gas’; prescribing the arrest in so-called flagrancy, even if thirty-six hours after the event.

¹¹⁴ Rulings 8 Mar. 1957, no. 45; 8 July 1971, no. 168, and 5 May 1983, no. 126.

¹¹⁵ Ruling 5 May 1959, no. 27. Pace, ‘Art. 17’ (n. 84), pp. 160 and 186 ss.

¹¹⁶ Corte Costituzionale, Ruling 8 July 1971, no. 168.

electoral meetings the day before and on the day of voting, but it excludes the necessity to give notice of such an event if it is destined to take place in a public place.¹¹⁷ The academic doctrine has justified such a privilege, based on Articles 48 and 49 of the Constitution, which is foreseen in order to ‘facilitate as much as possible those forms of interaction and communication between voters, which maximise the exercising of the functional right to vote and leads it to conform to the rules of the democratic system’¹¹⁸.

6.2. MILITARY ASSEMBLIES

The Constitutional Court has stated that ‘Article 17 of the Constitution does not prevent the military from being subject to limitations on the freedom of assembly in military venues’. A lack of limitations could compromise ‘the need to ensure the regular functioning of the military service’.¹¹⁹ Nevertheless, ‘penal sanctions are not legitimate in relation to meetings which do not have a subversive nature’.¹²⁰

6.3. WORKERS’ ASSEMBLY

The law¹²¹ recognises the right to assembly in the work place, both with respect to workers and to their union representatives, although the former may only gather outside normal working hours. The Constitutional Court has explicitly declared unfounded the question of the unconstitutionality of the regulation, in relation to Article 39 of the Constitution, which ‘guarantees workers and their representatives the right to call assemblies only outside of normal working hours to discuss matters pertaining to their professional or union interests and more generally to express their own opinions’.¹²²

¹¹⁷ The former rule was upheld by a ruling 8 Apr. 1958, no. 27.

¹¹⁸ Borrello (n. 92), p. 1432.

¹¹⁹ Sentence 24 Jan. 1989, no. 24.

¹²⁰ Ruling 11 Feb. 1982, no. 31.

¹²¹ Art. 20 Law 20 May 1970, no. 300 – *Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e della attività sindacale nei luoghi di lavoro e norme sul collocamento*. – *Statuto dei lavoratori (workers statute)*.

¹²² Ruling 16 May 1995, no. 170.

7. Documentation

7.1. RELEVANT LEGISLATION

Criminal Code: Articles 654–655 (Seditious Manifestations and Gathering)

Royal Decree of the 18 June 1931, no. 773 – United Text of Public Security Laws: Article 18

Law of the 20 May 1970, no. 300 – Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e della attività sindacale nei luoghi di lavoro e norme sul collocamento. – Statuto dei lavoratori (workers statute): Article 20

Law of the 24 April 2003, no. 88 – Urgent Directives for Contrasting Violent Behaviour During Sporting Events –

7.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale Rulings no. 2, 8, 9/1956, 45/1957, 27/1959, 19/1962, 142/1967, 56, 90 144/1970, 168/1971, 108/1874, 4/1977, 106/1975, 11/1979, 31/1982, 126/1983, 503/1987, 24/1989, 115/1995, 170/1995, 50/1998, 407/2002

Corte di Cassazione, sezione I penale, of the 7 March 1977, 30 November 1977, 3 February 1978, 7 March 1977, 10 February 1978, 6 November 1981, 26 January 1982, 16 June 1982, 23 September 1986, 11 April 1994, 14 October 1997, no. 10151, sezione II penale, 25 August 1994, sezione VI penale, 6 December 1978

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C. Mezzanotte, ‘La riunione nella dinamica del fenomeno associativo e come valore costituzionale “autonomo”’, *Giurisprudenza costituzionale*, 1970, pp. 608 ss.

A. Pace, ‘Article 17’, in: G. Branca/A. Pizzorusso (eds.), *Commentario della Costituzione*, Vol. II, Bologna 1977

idem, *La libertà di riunione nella Costituzione italiana*, Milano 1967

VI. Freedom of Association

Unlike the Albertino Statute of 1848 and against the practices of repressive vigilance propagated by the fascist regime, Article 18 of the Constitution

guarantees the citizen's right to 'freely and without authorisation form associations for those aims not forbidden to individuals by criminal law'.

According to the prevailing precedent, the principle expressed by the aforementioned provision is sufficient to configure the discipline of Article 18 of the Constitution 'as a general rule of the phenomenon of association'; with the consequence that, with respect to the special protection the Constitution itself provides elsewhere to certain forms of association (religious: Arts. 8, 19 and 20 of the Constitution; trade unions: Art. 39 of the Constitution; cooperatives of a mutual nature [*mutualità*]: Art. 45 of the Constitution; political parties: Art. 49 of the Constitution), the general discipline is not applied only with regard to that expressly repealed from special constitutional regulations.¹²³

1. Private Associations

The Constitutional Court has expressly excluded the guarantee of Article 18 of the Constitution from relating to public entities which nevertheless possess an associative structure¹²⁴ or 'associative phenomena in the context of public organisations under the control of the State'¹²⁵. The said guarantee, therefore, refers to private associations, including both recognised and unrecognised entities (Art. 36 Civil Code) and, according to the best academic opinion, other voluntary associations with social aims.

The institution of private associations must respect the constraints of the penal law which bans 'associations for criminal purposes' (particularly with aims such as terrorism or racial, ethnic or religious discrimination) and can be established without authorisation¹²⁶. The legislature, however, may subject the performance of activities deemed to be in the public interest to requirements of internal democracy, such as voluntary service associations (Law no. 266/1991), and consumer protection organisations (Law no. 281/1998).

A significant part of academic doctrine (Barile, Pace) has highlighted the distinction between individual (freedom to associate) and collective (freedom of associations) profiles of the constitutional guarantee, demonstrating how the associations themselves are guaranteed a certain level of normative and organisational autonomy, and the entitlement to other subjective rights that the

¹²³ Ruling no. 15/1975.

¹²⁴ Ruling no. 313/1988.

¹²⁵ Ruling no. 69/1962.

¹²⁶ Corte Costituzionale, Ruling no. 193/1985: illegitimacy of the ban on forming or participating in associations of an international nature without government authorisation.

Constitution guarantees to individuals.¹²⁷ Constraints on autonomy are controversial with regard to the powers of ‘intra-associative’ justice organisations, particularly those of sports governing bodies.

2. Compulsory Membership of Public Associations

The Constitutional Court has stated that the institution of public corporate bodies with an associative structure is compatible with the constitutional order, given the imposition of obligatory participation in the said organisations for certain categories of prospective members; as long as this does not violate liberty, rights and principles constitutionally guaranteed (but different from the so-called negative freedom of association) and provided that it is imposed by the necessity to better pursue public interests which also receives protection from the Constitution.¹²⁸ Participation in public associations can as such constitute a condition for the carrying out of certain activities which present profiles of significant public interest: such is the case of professional corporations for professional register.¹²⁹

Some areas of academic doctrine have maintained that obligatory associations enjoy the rights which Article 18 of the Constitution grants to associations (Barile). Others have specified that, although not directly or explicitly governed by the said article, such organisations are nevertheless influenced by it, given that the voluntary nature of the associative bond is something prescribed by Article 18 paragraph 1 of the Constitution (Pace). Others still have affirmed that the phenomenon is to be found beyond the scope of Article 18 of the Constitution, considering that the legitimacy of their institution with unmodifiable rules must be found in other parameters (Rescigno).

3. Right to Associate

The right to associate is specified in the rights to freely form associations, to become a member, to participate in the formation of collective will and not to be excluded. It has been argued (Pace, Ridola, Pizzorusso) that the individual profile of constitutional protection takes priority over the collective profile since ‘the freedom of a group owes its existence to the freedom of the individual to associate’ (Pace).

¹²⁷ Ruling no. 243/2001.

¹²⁸ Sentences no. 69/1962, 120/1973, 20/1975 and 40/1982.

¹²⁹ Rulings no. 11/1968 and no. 120/1973.

The Corte di Cassazione has, in fact, stated that ‘it is not feasible to oblige an association to accept admission applications presented by individuals even if they prove to be in possession of the required qualifications’.¹³⁰ Part of the academic opinion on this matter, contesting that the constitutional guarantee also extends to the issue of the autonomy of associations, is expressing doubts on the ‘adequacy of a guarantee which only ensures an expelled member the possibility of building his or her own separate association’ (Guzzetta).

4. Right to not Take Part in an Association

The Constitutional Court, ever since the sentence no. 69/1962 on the illegitimacy of the obligation to join the Italian Hunting Federation, has expressed a line – from which it does not appear to have deviated – according to which, apart from the freedom to associate, the freedom not to associate, although safeguarded by the Constitution, ‘endures greater constraints which are not promptly dealt with in the Constitutional charter’. Academic opinion has criticised the idea of ‘limits on the public right to associate’, interpreting the negative right of association as a right ‘to be granted the freedom to form associations and to pursue pre-established objectives’ (Pace, *contra* Guzzetta). Subsequently, the Court specified that the aims which legitimise, by the same standards as Article 18 of the Constitution, the restriction of the negative freedom of association must be ‘assumed unequivocally as public according to the Constitution’.¹³¹ The obligatory adherence of Jewish citizens to the Israelite Community was judged blatantly discriminatory.¹³²

5. Religious Associations, Sects

‘For associations or institutions, their religious character or religious or confessional aims do not justify special limitations or fiscal burdens regarding their establishment, legal capacity, or activities.’ (Art. 20). Religious associations cannot be treated any worse than others¹³³, but should obtain privileges, especially when operating in the area of social assistance.¹³⁴ By virtue of privileges

¹³⁰ Corte di Cassazione, sec. I, no. 3980/1997.

¹³¹ Ruling no. 40/1982, and with regard to assistance-related objectives see Art. 38 of the Constitution; sentence no. 239/1984 with reference to the professional corporation of journalists; lastly sentence no. 248/1997.

¹³² Ruling no. 239/1984.

¹³³ Ruling no. 45/1957.

¹³⁴ Ruling no. 39/1965.

recognised by the Lateran Pacts (Art. 7), catholic organisations can benefit from different treatment to that of other faiths.¹³⁵

6. *Prohibition of Associations Pursuing Aims which are Hostile to the Constitutional Order or Public International Law*

‘Secret associations and associations pursuing political aims by military organization, even if only indirectly, are forbidden. (Art. 18 Para. 2). Secret associations are considered to be ‘those which, even within apparently open associations, by concealing their existence, or keeping both their goals and social activities secret, or hiding, partially or completely, even reciprocally, the identity of their members, carry out activities aimed at interfering with the functioning of constitutional entities, public administrations, including autonomous ones, public and economic authorities, as well as public services of essential national interest.¹³⁶ Organisations of a military nature are considered to be those founded on the “the organisation of members into corps, divisions and nuclei according to an internal hierarchy analogous with the those in the military, with subsequent adoption of ranks and uniforms, and with an organisation suitable for collective deployment in violent and threatening actions (Art. 1 Legislative Decree no. 43/1948).

The Constitutional Court has declared unconstitutional the provisions which foresaw the dissolving, on the part of the prefect, of associations which carry out activities against the political orders constituted in the State or that propose the mutation of existing political orders.¹³⁷ Furthermore, the Court has declared unconstitutional a legal ban on associations whose aims are ‘activities intended to destroy or depress national feeling’.¹³⁸

7. *Documentation*

7.1. RELEVANT LEGISLATION

Civil Code: Articles 14–42 (On Associations and Foundations)

Criminal code: Article 270 (Subversive Association)

¹³⁵ Ruling no. 410/1988.

¹³⁶ Law no. 72/1982 for the purpose of prohibition of the ‘Loggia P2’.

¹³⁷ Ruling no. 114/1967.

¹³⁸ Ruling no. 243/2001.

7.2. ESSENTIAL CONSTITUTIONAL CASE-LAW

Corte Costituzionale, Rulings no. 45/1957, 69/1962, 39/1965, 114/1967, 11/1968, 120/1973, 15, 20/1975, 40/1982, 239/1984, 193/1985, 313, 410/1988, 248/1997, 243/2001

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U. Rescigno, *Corso di diritto pubblico*, 5th ed., Bologna 200/2001, pp. 604 ss.

P. Ridola, 'Associazione I) Libertà di associazione', *Enciclopedia Giuridica* III, Roma 1988

VII. Constitutional Norms

Article 9. (1) The Republic promotes cultural development and scientific and technical research.

(2) It safeguards natural beauty and the historical and artistic heritage of the nation.

Article 15. The freedom and confidentiality of correspondence and of every other form of communication is inviolable.

Restrictions thereto may be imposed only by a reasoned warrant issued by a judicial authority with the guarantees established by law.

Article 17. (1) All citizens have the right to assemble peaceably and unarmed.

(2) For meetings, including those held in places to which the general public has access, no previous notice is required.

(3) For meetings held in public places previous notice must be given to the authorities, who may prohibit them only on the ground of proven risks to security or public safety.

Article 18. (1) Citizens have the right freely and without authorization to form associations for those aims not forbidden by criminal law.

(2) Secret associations and associations pursuing political aims by military organization, even if only indirectly, are forbidden.

Article 20. For associations or institutions, their religious character or religious or confessional aims do not justify special limitations or fiscal burdens regarding their establishment, legal capacity, or activities.

Article 21. All persons have the right to express freely their ideas by word, in writing and by all other means of communication.

The press may not be subjected to authorisation or censorship.

Seizure is permitted only by a reasoned warrant, issued by the judicial authority, in the case of offences for which the law governing the press gives express authorisation, or in the case of a violation of its provisions concerning the disclosure of the identity of those holding responsibility.

In such cases, when there is absolute urgency and when timely intervention of the judicial authority is not possible, periodical publications may be seized by officers of the judicial police, who must promptly, and in any case within twenty-four hours, report the matter to the judicial authority. If the latter does not confirm the seizure order within the following twenty-four hours, the seizure is understood to be withdrawn and null and void.

The law may establish, by provisions of a general nature, that the financial sources of the periodical press be disclosed.

Printed publications, public performances and events contrary to public morality are forbidden. The law establishes appropriate means for the prevention and repression of all violations.

Article 33. (1) The arts and sciences as well as their teaching are free.

Article 41. (1) Private economic enterprise is free.

(2) It may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity.

(3) The law determines appropriate planning and controls so that public and private economic activities may be directed and coordinated towards social ends.

Article 39. (1) The organization of trade unions is free.

(2) No obligation may be imposed on trade unions except the duty to register at local or central offices as provided by law.

(3) Trade unions are only registered on condition that their bye-laws lead to an internal organization of democratic character.

Article 49. All citizens have the right to freely associate in political parties in order to contribute by democratic methods to determine national policy.

The Fundamental Rights of Communication

Chapter 4

FREEDOM OF CONSCIENCE, BELIEF AND RELIGION

Roberto Mazzola*

I. Freedom of Conscience

The rights of freedom of conscience apply even when they have not been specifically mentioned in the text of the Constitution. This can be seen in the Italian legal system where, although it does not guarantee an explicit and specific freedom of conscience, this in fact, in the final analysis, coincides with all the rights constitutionally guaranteed in Articles 2, 15, 17, 19, 20, 21 of the Constitution. The Constitutional Court has in fact declared with ruling 467/1991 that conscience is the ‘creative principle which renders possible and real the fundamental freedoms of the individual’.

1.-2. Conscientious Objection to Military Service and Alternative Civil Service

The broad field of the forms of legal conscientious objections includes those related to military service. On this subject the Constitutional Court safeguarded the general framework of the law of 1972 qualifying inviolable the duty of political solidarity for all citizens, not so much the obligation to give military service as the right to serve the country under Article 52 of the Constitution.

* Roberto Mazzola, Professore associato di diritto canonico e diritto ecclesiastico, Università del Piemonte Orientale.

Unarmed military service and alternative civil service therefore prove to be as much of a service of defence as that of armed military service insofar as the duty to defend is concerned: 'this represents for all citizens, without exception, an inviolable duty placed above all others in such a manner as to transcend and go beyond this duty of military service'¹. Thus the conscientious objection to conscription does not translate itself into a failure of the duty of obligation to defend the country as it can also be fulfilled through the provision of appropriate unarmed social commitment.

All the same, the lower protection provided for conscientious objection led the Court to highlight several aspects of unconstitutionality. In the first place the constitutional judge took care to strengthen the compulsory nature of the six months' term required for the decision on requests for admission to the civil service considering it valid for the formation of silent-refusal on the part of the Public Administration. This allowed objectors to obtain access to the jurisdictional safeguards in such a way as to oblige the Administration to decide on the admittance of them.

The push towards a more adequate regulation for the objector moreover allowed the court to declare unconstitutional the law of 1972 where it provided that conscientious objectors admitted to substitute civil service would be placed under the jurisdiction of the military tribunal.²

While considering admission to the civil service a sufficient condition to lose the *status* of soldier acquired with enlistment. The Court argued:

'the widening of the ordinary jurisdiction to include, no longer single cases in point, but the whole issue of conscientious objection is the work of the legislature, which has projected on the rule of the jurisdiction the principle of the protection of the rights of conscience, whose unitary configuration was affirmed, within the ambit of a substantial constitutional right, by some of the successive decisions of this Court especially [...] ruling no. 43 of 1997, in which this principle was deduced from the unambiguous convergence of Articles 2, 3, 19 and 21 Para. 1 of the Constitution''³.

The substitutive civil service was not a special way of the fulfilment of military service, but a *limit* to the fulfilment of the obligation of military service and as an alternative service of a profoundly different nature.

The constant effort of making conscientious objectors independent of the military law led the Court to intervene again, because of the excessive disparity between the length of unarmed service and the substitutive civil service,

¹ Ruling 24 May 1985, no. 164.

² Ruling 24 April 1986, no. 113.

³ Ruling 12 July 2000, no. 271.

compared with military service. The temporal difference was considered unreasonable and damaging to the rights of equality, from Article 3 and Article 8 Para. 1 of the Constitution in as much as the manifestation of ‘an unjustified disparity of treatment for reasons of religious faith or political conviction is a curb to the free expression of thought’⁴. This renders unconstitutional that young people admitted to substitutive civil service must carry out more than the eight months of military conscription.

Under the former legislation, the penalties imposed for those who refuse military service because of reasons of conscience, prison from two up to four years, became more unfavourable than those applied under the military penal code in peacetime for cases of refusal without reason, minimum of six months. This disparity of treatment was held by the Court to be arbitrary and disproportional insofar as the law did not take into account the fact that a person who

‘refuses to carry out the duties of constitutionally sanctioned social solidarity is not equal to those, who declare themselves against the personal use of arms for reasons of conscience which cannot be set aside but are legally controlled, and fulfils these duties of solidarity by asking to be admitted to unarmed military service or to alternative civil service’⁵.

The penalty, therefore, must be fixed between a minimum of six months and a maximum of two years.

The Constitutional Court also declared unconstitutional that exoneration from military service was not provided following the payment of the penalty inflicted on the total objector that military service could refuse after having started the service. In the reasoning of the Court the moment of manifestation of conscientious objection to military duties cannot be allowed to constitute reasons for discrimination, because of the need to take into account those whose convictions have formed in the period following their appointment within the armed forces.⁶

Finally⁷ the Court extended exoneration to the conscientious objectors who refuse totally to carry out their duties under Article 52 of the Constitution without adding any reason, or motivated on the basis of different reasons from those foreseen by the legislature. In this manner even those total objectors would have the benefit of exemption from military service once they have paid the penalty

⁴ Ruling 31 July 1989, no. 470.

⁵ Ruling 18 July 1989, no. 409.

⁶ Ruling 19 Dec. 1991, no. 467.

⁷ Rulings 28 July 1993, no. 343, 2 Feb. 1997, no. 43.

provided that altogether it amounts to a period not less than the length of the conscription.

The confirmation of this ruling has been established by the regulation in force since 1998. The Court has rejected any suspect of unconstitutionality, maintaining the questions unfounded as the controversial points represent a legislative tradition based on the difficult balance

‘between multiple needs such as the repression of behaviour detrimental to the performance of military service, the recognition of the relevance of the individual conscience; the intent of placing limits on the indiscriminate sequel of condemnations and penalties for the non fulfilment of military duties; the necessity, however, to apply to the crimes in questions the general rules of the conditional suspension of the penalty, the measures that impact its fulfilment execution or on its duration.’⁸

II. Freedom of Religious and Confessional Belief

1.–2. Right to Believe and not to Believe

The right of religious freedom in Article 19 of the Constitution has to be interpreted as the moment of synthesis of three distinct rights: the right to profess one’s own faith, to propagate these beliefs and to worship. There have been important statements in the Court of driven by the objective of emancipating the discipline of religious freedom from overwhelmingly jurisdictional regulations, especially on the subject of the criminal protection of religious feelings.

In 1958, on the issue of blasphemy, the Court redefined the legal value involved. The Catholic religion became no longer considered as the religion of the State, as a political organisation, but of the society. The particular legal protection was therefore justified on the basis of the relevance held by the Catholic faith ‘by reason of the ancient uninterrupted tradition of the Italian people, almost all of whom belong to this faith’.⁹ This rule was reinterpreted in 1973 when, in reference to the crime of blasphemy, a ruling upheld that the legal asset protected by the Italian penal system could no longer be the religion of the State, but the ‘religious feelings’ that the State recognises for everyone. Calling upon the constitutional principle of religious freedom the Court exhorted the legislature to arrange for the revision of the legal regulations ‘by extending penal protection for offences against the religious beliefs of individuals belonging to confessional beliefs different from the Catholic Church’¹⁰.

⁸ Ruling 22 June 2000, no. 223.

⁹ Ruling 30 Dec. 1958, no. 79 confirmed by Ruling 31 May 1965, no. 39.

¹⁰ Ruling 27 Feb. 1973, no. 14

In 1988, a new judgment abandoned the ‘numerical’ argument justifying differentiated legal protection of religious faiths. ‘The limitation of the legislative provision for offences against the Catholic religion can no longer continue to be justified by the fact that almost all Italian citizens belong to it nor by the need to protect the religious feelings of the major part of the Italian population’.¹¹ Therefore the current legal regulations were justified on the basis of exclusively ‘sociological’ reasons, maintaining blasphemy as a fact of indecency on which the regulation could not compromise to protect ‘good customs’. A new interpretation was made of the formula ‘state religion’, taking it as a simple linguistic artifice with which one indicated the Catholic faith.

The gradual reasoning of the Court on the subject of legal protection of religious faith came to maturity in the three successive rulings declared between 1995 and 2000. The first rejected the sociological criterion, considering blasphemy no more reducible to a mere phenomenon of immorality.¹² That which the Court insists on is now equality considered pre-eminent with respect to the values of decency and morality. It declared unconstitutional the blasphemy related to the references to symbols and venerated persons in the religion of the State but upheld blasphemy against divinity, inasmuch as the regulation protects from invective and offensive expressions all believers and all religious faiths, without distinction or discrimination in respect of the principle of equality.

The second sentence of 1997¹³ declared unconstitutional the prohibition of religious contempt, in so far as it provides for a mandatory penalty higher than those for the same crime if the act committed was damaging to persons or things belonging to a religious confession different from the Catholic faith. The foundation of this decision was the firm belief that violations which offend religious conscience should concern all religions in the same way, no longer giving validity to the point of view which informed the legislature of 1930. This line of interpretation was consolidated when the Court declared unconstitutional the crime of contempt of the religion of State referring the principles of equality and equal liberty of confessional belief. The State can be no other than equidistant and impartial with respect to religious beliefs ‘without assuming any relevance of the numbers of people belonging to this or that faith, be it more or less numerous and the greater or lesser amplitude of the social reactions that could follow the violation of the rights of one or another of its members, asserting equal protection

¹¹ Ruling 28 July 1988, no. 925.

¹² Ruling 18 Oct. 1995, no. 440.

¹³ Ruling 14 Nov. 1997, no. 329.

of the conscience of every person who professes membership of any specific faith'¹⁴.

Faced by the question relative to obligatory membership by a person of the Israelite community, by the sole fact of being Jewish, the Court declared unconstitutional such a law in contrast to the principle of equality, but above all it recognised a violation of the inviolable right freely to belong or not to belong to a religious faith.¹⁵ The freedom to belong or not to belong to a faith 'is rooted in the freedom of conscience, referring to the profession either of a religious faith or opinions on religious matters, which is guaranteed by Article 19 of the Constitution, and which is numbered among the inviolable rights of the individual.

3. Inward/Outward Aspects of Freedom of Religion

Freedom not to belong was recognized already by ruling 26 June 1962, no. 69.

The issue of religious testimony and of its diffusion across civil society involves the use of symbols and of religious images. A ruling of the Corte di Cassazione of 1 March 2000¹⁶ held that the manifestation of freedom of conscience, the exercise of which determines a conflict between personal adherence to the supreme principle of the laity of the State and the fulfilling of electoral responsibility, in relation to the presence of the crucifix or other religious images in the obligatory equipment for places designated as electoral seats, constitutes a justified reason for refusal of the office of president, scrutineer or secretary, where the agent did not request to be designated as such.

Another ruling of the Court regarding the building of places of worship¹⁷ held that the attribution of reserved areas and of financial contributions for the construction of places of worship cannot be made dependent on the conditions that a religious confession might have signed a general agreement with the state according to Article 8 Para. 3 of the Constitution or not or be without organisational statutes.

In declaring unconstitutional the duty to give notice for the functions, ceremonies or religious practices, even in places not open to the public, the

¹⁴ Ruling 13 Nov. 2000, no. 508.

¹⁵ Ruling 30 July 1984, no. 234.

¹⁶ Cassazione penale sezione IV, 1 Mar. 2000, no. 439, *Quaderni di diritto e politica ecclesiastica* 3/2000, p. 846. Constitutional Court decision no. 389/2004 left unresolved the question of constitutionality of a crucifix in the classroom.

¹⁷ Ruling 27 Apr. 1993, no. 195 (referring to a regional law). For similar question see also Tribunale civile di Lecce, sezione I, 5 Jan. 1999, *Quaderni di diritto e politica ecclesiastica* 3/2000, pp. 713 ss.

Constitutional Court stated that the freedom to propagate the faith can be limited only for specific constitutional purposes.¹⁸

The numerous problems connected with the regulations on the subject of teaching the Catholic religion in public schools¹⁹ have been faced by the Constitutional Court through three successive sentences.

With the first sentence of 1989 the Court introduced the principle of the non-obligation of the alternative subject.²⁰ Whoever does not avail themselves of the teachings of the Catholic religion would not have the contemporaneous obligation to choose an alternative teaching. For the Court, the provision of an obligatory alternative teaching would have the meaning of 'conditioning for that questioning of the conscience which should be kept focused on its sole object: the exercise of the constitutional freedom of religion'. Such a freedom is not reduced 'in its seriousness and commitment of conscience, to the option between equivalent scholastic disciplines'. A juridical status of non-obligation follows, therefore, for those who agreed not to avail themselves of this teaching. The only obligation, in fact, is that of the State which is bound to honour the teaching of the Catholic religion.

Nevertheless the problem remained unresolved of where to place the teaching of the Catholic faith within the school timetable, specially if those who have not chosen this teaching are required to remain in school. The sentence of 1991²¹ ruled that the state of non-obligation could have contained the right of not coming to school or leaving early in that it is worth separating the interrogation of conscience on the freedom of religion or from religion, from the free choice of the individual to stay at school for other purposes than teaching.

The fact then that the insertion of the teaching of the Catholic religion should be placed in the ordinary timetable of lessons, even not at the beginning or end of the lessons, caused further inconveniences that were nevertheless considered not a matter of judicial review of legislation by a further ruling of the Court on 1992.²²

The subject of religious festivals merits particular attention in the area of the external environment of religious freedom. The calendar commonly followed in Italy makes civil festivals coincide with Catholic festivals. Derived from this

¹⁸ Ruling 18 Mar. 1957, no. 45.

¹⁹ Arts. 9 and 10 of the Law 121/1985 and no. 5b and 6 of the Additional Protocol. The Presidential Decrees no. 751 and 202 respectively of 1985 and 1990 implemented in the successive agreements between CEI and the Ministry of Public Education.

²⁰ Ruling 21 Apr. 1989, no. 203.

²¹ Ruling 14 Jan. 1991, no. 13.

²² Ruling 22 June 1992, no. 290.

practice it can be seen that the religious festivals of the most widespread faith contribute to the fixing of the calendar which regulates the working of the public offices. A departure from this principle occurred for the political elections of March 1994. On this occasion the Union of the Jewish Community made a formal request to the Italian Government, that as the end of the Passover festival arrived only at sunset on 28 March, if the election date was not moved or postponed it would not have been possible for Italian Jews to vote, unless they violated this important religious day of obligation. The Cabinet of Ministers decided with a decree to extend the electoral period. Normally, the recognition of different calendars of religious origins is practised only for specific sectors such as the army, work and schools.

III. Institutional Aspects of the Freedom of Religion

1. Guarantees of Religious Organizations

The foregoing analysis has shown that individual religious freedom is intimately linked to the guarantees of confessional institutions. Emblematic is the jurisprudence on the reserve of ecclesiastical matrimonial jurisdiction and on the application of the judgments made by the ecclesiastical tribunals for the annulment of the canonical matrimony recorded on the civil register.²³

In the pronouncement of 1982, the Court declared constitutionally illegitimate the regulation of the Concordat of 1929 because it was not provided that the Appeal Court, when implementing the pronouncement of annulment of the marriage by the ecclesiastical courts, has duty to ascertain if in the proceedings before the ecclesiastical judge the rights of defense and fair trial were assured to the parties, and that the same sentence would not contain arrangements contrary to Italian public order. For the Court these requirements are linked to the supreme principles of the constitutional system and therefore the reported regulations cannot offer resistance to them.

Another question decided in 1982 regarded the recognition of the civil efficacy of the canonical provision of exemption for a marriage celebrated but not consummated. The Court declared constitutionally illegitimate the regulation of Concordat that authorized the Appeal Court to enforce the civil consequences of such ecclesiastical provisions. Indeed, it considers that as the dispensation does not have a jurisdictional character it could not meet the requirements of the protection of the rights of the parties dealing with a discretionary provision in which neither a judge nor proceedings are guaranteed to the parties.

²³ Rulings 2 Feb. 1982, no. 18, 1 Dec. 1993, no. 421.

The ruling no. 421/1993²⁴, on the basis of the presuppositions fixed by the Court in the preceding sentences, confirmed the reserve of jurisdiction in favour of the ecclesiastical courts for the case of the annulment of marriages canonically registered. In adhering to the principle of laicity it can be said that in the presence of a marriage which has begun in the canonical system and which remains governed by that law, the civil judge does not express his own jurisdiction on the formative moment of the matrimony, which remains the exclusive competency of the ecclesiastical judge. The State judge however expresses his own jurisdiction on the civil consequences of the ecclesiastical sentence of annulment of the matrimony, by means of the special proceedings of enforcement regulated by the same regulations of the Accord much more thoroughly than in the original discipline of the Concordat.

2. Support and Protection of Denominational Schools

The Italian law by Article 33 of the Constitution recognises for individuals and corporations the right to teach in schools and institutes of education ‘without burden on the State’. It establishes moreover that the ‘law in fixing the rights and obligations of the non state schools that ask for equality, should ensure their full freedom and equivalent scholastic treatment for their pupils to that of the pupils of the state schools’.

Regarding the courses held within the theological faculty and training institutes under ecclesiastical control, the State Auditors’ Court established in January of 1999²⁵ that the academic teaching diploma issued constituted an enabling qualification for the teaching of religion in secondary schools at the first and second level, as well as an entitlement to benefit from pension rights, always assuming that the other conditions required by law are met. The above-mentioned decision is connected to the workers’ rights governing those who teach about the Catholic religion within the state structure, or who carry out teaching activities within the private confessional structure.

As far as the first aspect is concerned, in most parts of Italy those who wish to teach the Catholic religion have to obtain qualifications from the diocesan authorities.

The employer-employee relationship for the teachers of religion in the state schools and for the teachers in general in confessional schools, officially recognised or not, requires the latter to respect the religious tendency of the

²⁴ Ruling 1 Dec. 1993, no. 421.

²⁵ Sezione giurisdizionale regionale della Corte dei Conti Molise, 20 Jan. 1999, *Quaderni di diritto e politica ecclesiastica* 3/2000, p. 764.

ecclesiastical authorities or of the confessional school and behave in a manner that does not contrast with the ethical principles that it holds. On this basis the law allows that the regulation of the appointment and the dismissal of workers can operate differently from that of workers in non-denominational schools. It follows from this that the teacher of religion in a state school or the teacher in a religious school can be relieved of their duties whenever the qualification by diocesan order is revoked or where the teacher may have behaved in a way which did not conform to the ethical principles of the school.

An application of these principles can be found in the juridical system of the Catholic University of the Sacred Heart. The regulations of Concordat of 1984 provide that the appointment of teachers and employees of the Catholic University which refers to the teachers included in the list of employees of the Ministry of University Education and of the research, scientific and technical staff, are subject to the approval, under the religious profile, of the competent ecclesiastical authorities.

3. Taxation of Religious Organisations

The fiscal treatment of religious associations has been faced first in 1992²⁶ when the Court specified that the transfer of goods and provision of services to the members and the payment in part of shares is governed by the common fiscal law applicable to all the associations. It follows from this that any possible relationship of the associations with the systems of churches or faiths is irrelevant. On the other hand the special law deriving from the pact between the State and churches does not allow the affirmation that the generally provided facilitations would not be due to the associated entities of the confessions party to the agreement.

The constitutional judge²⁷, five years later again confronted this issue between religious freedom and fiscal duties with regard to the laws that allow exemption from the ten-yearly or periodic INVIM tax on the added value of land to the ecclesiastical corporate bodies independently of their destination, including the Institutes for the maintenance of the clergy. There was the suspicion that these norms violated the principle of equality, given the disparity of treatment determined with respect to the fiscal system provided for the property belonging to bodies of religions different from the Catholic faith, specially the Jewish one.

The constitutional judge held the question of constitutional legitimacy to be unfounded, maintaining that the diocesan institutions, interdiocesan institutions

²⁶ Ruling 19 Nov. 1992, no. 467.

²⁷ Ruling 15 July 1997, no. 235.

and headquarters for the maintenance of the Catholic clergy have a nature substantially different from that of the individual Jewish communities. Therefore an extension of the regulations which allow a total exemption from INVIM would end up considering the buildings and land of the Jewish community aimed 'also at ends diverse from the maintenance of the ministers of Jewish worship'. The verifiable difference in the contents of the bilateral agreement of the relations of the State with the religious faiths justify, within the limits of reasonableness, further differences in the unilateral legislation of the State. Differences, affirms the Constitutional Court, 'which are destined to have to be reconstituted every time the norms governing the pact matrix take on similar characteristics by will of the parties'.

The constitutional judge in 1996²⁸ upheld the deductibility from income for the purposes of income taxation, of liberal allocations to members of congregations in favour only of the religious confessions which have made a general agreement with the State.

An examination of the financial systems of the religious organisations cannot leave out the system of financing from the '8 per mille' of the income tax.²⁹ The State pays to the CEI and to the religious confessions different to the Catholics which may benefit from it, a part of this quota.

On the basis of the choice expressed by the contributors in their annual income tax return. Lacking such a choice the quota unexpressed is allocated in proportion to the choices expressed. The constitutionality of the latter rule is controversial, but could not be challenged in court.

IV. Documentation

1. Constitutional Norms

Article 3 (1) All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions.

Article 7 (1) The State and the Catholic church are, each within their own reign, independent and sovereign.

²⁸ Ruling 31 May 1996, no.178.

²⁹ The '8 per mille' is the 0.008 percent of income tax allocated by the choice of the taxpayer to various religious organisations or for charitable projects of the State.

(2) Their relationship is regulated by the Lateran pacts. Amendments to these pacts which are accepted by both parties do not require the procedure of constitutional amendments.

Article 8 (1) Religious denominations are equally free before the law.

(2) Denominations other than Catholicism have the right to organize themselves according to their own bye-laws, provided they do not conflict with the Italian legal system.

(3) Their relationship with the State is regulated by law, based on agreements with their representatives.

Article 19 Everyone is entitled to freely profess religious beliefs in any form, individually or with others, to promote them, and to celebrate rites in public or in private, provided they are not offensive to public morality.

Article 20 For associations or institutions, their religious character or religious or confessional aims do not justify special limitations or fiscal burdens regarding their establishment, legal capacity, or activities.

Article 21 (1) Everyone has the right to freely express thoughts in speech, writing, and by other communication.

2. Relevant Legislation

Criminal Code: Articles 403–406, 519–544

Criminal Procedure Code: Article 251

Law of the 24 June 1929, no. 1159 (Rules for the Exercise of Admitted Worships)

Law of the 8 July 1998, no. 230 ('New Rules on Conscientious Objection')

3. Essential Constitutional Case-Law

Corte Costituzionale, Rulings no. 45/1957, 79/1958, 69/1962, 39/1965, 14/1973, 18/1982, 234/1984, 164/1985, 203, 409, 470/1989, 13, 467/1991, 290, 467/1992, 343, 421/1993, 440/1995, 178/1996, 235, 329/1997, 925/1998, 223, 271, 508/2000

Corte di Cassazione, sezione penale IV, 1 March 2000, no. 439, *Quaderni di diritto e politica ecclesiastica* 3/2000, p. 846

Sezione giurisdizionale regionale della Corte dei Conti Molise, 20 January 1999, *Quaderni di diritto e politica ecclesiastica* 3/2000, p. 764

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Freedom of Conscience, Belief and Religion

Chapter 5

PROTECTION OF MARRIAGE AND THE FAMILY

Laura Poggi Ernst*

I. Protection of Marriage

Article 29 of the Constitution sees marriage as the ‘foundation of a family as a natural society’, thus ratifying in Italian law the principle of *favor matrimonii*, which allows a legitimate family to enjoy privileged protection with respect to other types of social organisation that only benefit from the general protection offered by Article 2 of the Constitution.

1. Freedom to Marry

A direct consequence of the constitutional protection granted to the institution of marriage is the recognition on the part of the Constitutional Court of the freedom to marry both in a positive sense, i.e. the freedom to undertake matrimony and choose a partner, and in a negative sense, i.e. the freedom not to undertake matrimony. It is a fundamental right of personal freedom and autonomy guaranteed by Articles 2 and 29 of the Constitution and as such considered inviolable.¹ *De lege data*, on the other hand, the freedom to choose a contractual formula different from that governed by the civil code is not protected, and neither is that of providing for consequences different from those determined by legislation.

* Laura Poggi Ernst, dottore di ricerca, University of Pisa.

¹ Sentence no. 587/88, no. 123/90, no. 189/91, no. 450/91, no. 1/92, no. 392/92 and no. 110/99.

– HETEROSEXUAL COUPLES, HOMOSEXUAL COUPLES

The exclusion of two individuals of the same sex undertaking matrimony derives from the fact that the difference in sex of the two prospective spouses has so far constituted – despite the guideline adopted by the European Parliament of 8 February 1994 – an essential condition for the stipulation of marriage. For this reason, the discipline governing the phenomenon of transsexualism² foresees that the process rectifying of personal data which follows a sex-change procedure constitutes a cause for dissolving the previously valid marriage contract. Various declarations have furthermore rendered null and void municipal deliberations which had foreseen a register for the civil union of homosexual couples.³

2. *Marital Life*

Article 29 Para. 2 of the Constitution identifies in moral and juridical equality the founding principle of the relationship between husband and wife, subject only to limitations aimed at ‘safeguarding the unity of the family’. After having initially stated the supremacy of the ‘realisation of the unity of the family’⁴ over equality between spouses⁵, the Constitutional Court changed with interpretive modifications⁶ the rules aimed at subjecting the wife to the marital superiority of the *pater familias*. Arguing that ‘the system of the civil code does not adhere to the guiding spirit of the Republican Constitution, which has taken into consideration the transformation of the position of women in society’⁷, the Court urged legislature, with numerous recommendations, to reform the basis of family law, which eventually took place in 1975.

With specific regard to the act of adultery and faithfulness within marriage, the Court had initially justified the constitutionality of the penal code regulations which only penalise the unfaithfulness of the wife, with references to ‘values which occur, often pressingly, in social life’ and which are still linked to the ‘traditional concept of the family’.⁸ A few years later, however, the Court pronounced its constitutional illegitimacy, since the Constitution ‘proclaims the

² Law no. 164/1982.

³ Tribunale Amministrativo Regionale Toscana, sentence 9 Feb. 1996, no. 49. The Constitutional Court decision no. 204/2003 denied a constitutional duty to give legal protection to so called ‘factual families’.

⁴ Sentence no. 181/1976.

⁵ Sentences no. 64/1961, no. 102/1967, no. 4/1969 and no. 128/1970.

⁶ Sentences no. 64/1961 and no. 101/1967.

⁷ Sentences no. 143 and no. 144/1967.

⁸ Sentence no. 64/1961.

prevalence of unity above the principle of equality, but only if and when equal treatment between spouses puts such unity in danger ... by the same standards as today's society, discrimination, far from being useful, is seriously harmful to the harmony and unity of the family'.⁹

Furthermore, the Court also declared the unconstitutionality of the provisions which foresaw a wife's automatic loss of Italian citizenship in the event of marriage to a foreign citizen¹⁰, as well as those which command, with regard to patrimonial or non-patrimonial relations between spouses, the application of the law of the husband at the moment of the wedding if there is no law common to both spouses.¹¹

'The (moral) equality of spouses expresses its values directly in the equal dignity of both, indicating that this must be an objective of the legal structure of marriage institutions'¹², including, for example, the 'mezzadria (Metayer)' institute¹³ and the patrimonial regime between spouses¹⁴, given that

'the contribution obtained from the industry and self-sacrifice of a housewife to the family housekeeping and to the savings of the family business, often noteworthy yet difficult to evaluate in monetary terms, remains without effective protection, especially when the husband has invested savings, which are the fruit of common labours and sacrifice, in the purchase in his own name of goods or properties'.

The principle of equality has also been applied in favour of the husband, declaring¹⁵ as unconstitutional the discipline which obliged, after separation, the husband to provide maintenance payments to his ex-wife regardless of her financial situation, while it foresaw the wife's contribution of maintenance to her ex-husband only when he did not possess adequate financial means.¹⁶ The Court finally affirmed the equality of treatment of spouses also with respect to third parties declaring illegitimate the ban on donation made between husband and

⁹ Sentences no. 126/1968 and no. 127/1968.

¹⁰ Sentence no. 30/1983.

¹¹ Sentences no. 71/1987 and no. 477/1987.

¹² Sentence no. 127/1968.

¹³ Sentence no. 148/1973. The 'metayer' is a form of agricultural business in which the landlord and the metayer, as the head of a farming family, become partners in the cultivation of an estate with the aim of dividing the deriving profits in half (Art. 2141 Civil Code).

¹⁴ Sentence no. 187/1974.

¹⁵ Sentences no.46/1966 and no.144/1967.

¹⁶ Sentence no. 133/1970.

wife, because it is based on the flawed supposition that marriage determines a condition of inferiority and subordination between spouses.¹⁷

3. Non married Couples

The Constitutional Court retains that ‘the position of the common-law spouse ... is clearly distinct from that of husband or wife’, as if ‘it is true that Article 29 of the Constitution does not deny the dignity of forms of union different from the legal institution of marriage’, it is also ‘true that the Court recognises superior status of the legitimate family, due to qualities such as stability, certainty, and the reciprocal and corresponding nature of rights and duties which only exist in legal matrimony’.¹⁸

The Court subsequently refused to struck down as a violation of the equality principle (Art. 3 of the Constitution) ordinary legislation which does not extend a treatment designed for legitimate families to the so called ‘de factos’¹⁹, denying both the applicability to the common-law spouse of causes of ‘non-punishment’ foreseen in favour of the legal spouse with relation to certain offences²⁰, and the relevance of the period of cohabitation of a de facto married couple aspiring to adopt a child²¹.

Sentence no. 404/1988 is aimed more at the protection of the common-law spouse as an individual person, which considered the rule that does not recognise the right of the common-law spouse with children the right to inherit the tenancy contract in the event of separation or the death of the tenant partner, as a violation of the duty of social solidarity protected by Article 2 of the Constitution. With sentence no. 372/1994, the Court recognised the right to compensation for damages suffered due to the murder of the common-law spouse, referable ‘on the basis of a strict family or family-like relationship such as cohabitation *more uxorio*’.

4. Divorce

The practice of divorce, introduced with Law no. 898/70 and confirmed by the referendum of 1974, had been contested as being incompatible with the so-called

¹⁷ Sentences no. 91/1972 and no. 100/1993.

¹⁸ Sentence no. 45/1972.

¹⁹ Sentences no. 6/1977, no. 45/1980, no. 39/1981, no. 227/1986, no. 23/1997 and no. 2/1998.

²⁰ Sentence no. 319/1989.

²¹ Sentence no. 281/1994.

favor matrimonii expressed by Article 29 of the Constitution, despite the fact that during the debate of the Constituent Assembly, explicit reference to the indissolubility of marriage had been deleted from the constitutional text. The constitutional judge, vested with the question of the inapplicability of divorce to canonical marriage based on the constitutional guarantee of the Lateran pacts (Art. 7 of the Constitution), has, on the other hand, affirmed the principle that the State is 'free to regulate the civil consequences of a religious marriage', having assumed with the Concordat the exclusive commitment to recognise the civil effects of a registered religious marriage and not that of making a catholic marriage indissoluble.²² Nevertheless, once the constitutional legitimacy of the institution of divorce was admitted, the Constitutional Court accepted a restrictive notion, refuting, with sentence no. 181/1976, that a judge can automatically issue a declaration of divorce, without ascertaining the genuine impossibility of rebuilding a moral and material union.

5. Right to Use the Name of the Family

According to sentence no. 128/1970, 'the wife's assumption of her husband's surname is part of a series of obligations imposed on her which are connected to the "head of the family" position attributed to him and which intend to gather family unity around him'. As such, the rule which dictates that a son must take his father's surname was also upheld, but in some of the more recent pronouncements, there has been no shortage of warnings to the legislature urging the updating of the practice in line with 'altered social conscience'.²³

Promoting the right to a name as an individual right (Art. 22 of the Constitution), sentence no. 13/1994 recognized the right to keep one's own surname taken as an unacknowledged son, even if such a name is no longer expressive of his belonging to the paternal family, in fact the name is 'the first and most immediate element that characterises personal identity ... and that, as such, forms an essential and irreducible part of the individual in accordance with Article 2 of the Constitution'. The 'right to personal identity that also includes the right to a name as a distinctive sign of the individual' implies, according to sentence no. 297/1996, the right of the natural son to add, rather than replace his original surname, to the name of the parent that recognised him as a son.

²² Sentences no. 169/1971, nos. 121, 122 and 123/1975.

²³ Sentences no. 76/1987, no. 176/1988 and no. 586/1988. Decision no. 61/2006 finally urged a reform, recalling even international duties and recommendations of the Council of Europe.

II. Protection of the Family

The Constitution establishes that ‘the Republic recognises and guarantees the rights of the family as a natural society’ (Art. 29) and ‘favours through economic incentives and other measures the formation of the family and the fulfillment of related tasks, with special regard to large families (Art. 31)’²⁴. Article 30 also disciplines the duties of parents and entrusts the legislature to ensure that ‘children born outside of marriage are guaranteed full legal and social protection, consistent with the rights of the members of the legitimate family’ (par. 3) and to set ‘the rules and limits for paternity research’.

1. Definition of the Family

The Constitutional Court has adopted a restrictive notion of ‘legitimate family’, limiting it to the family nucleus formed by the ‘marriage of the natural father with the mother, composed of such a couple with legitimate children’, excluding the ancestors and the collateral line of the natural parent.²⁵ Nevertheless, it does not deny the so-called extended family the more generic protection of the principle of social solidarity (Art. 2 of the Constitution).

After having initially recognised the constitutional legitimacy of the rules that limit both inheritance rights and the allocation of a war pension to an individual’s natural children²⁶, the Constitutional Court then recognised that the constitution obliges to establish a ‘legal and social protection ... adequate for the position of the child, i.e. similar to such protection the law gives in all areas to legitimate children.’²⁷ Examining the ‘compatibility of the protection for children born outside marriage with the rights of the members of the legitimate family’²⁸, the Court has retained admissible the limitation of the rights of natural children only if directly aimed at protecting the life and harmony of the legitimate family.²⁹ The general ban on the legitimisation of natural children in the presence of legitimate

²⁴ Art. 31 I c. of the Constitution justifies the reunion of the natural child with his/her non-European mother resident in Italy (sentence no. 28/1995), as well as that of the non-European natural parent with his or her child legally resident in Italy (sentence no. 203/1997).

²⁵ Sentences no. 79/1969, no. 82/1974 and no. 97/1979. The precedent sentence no. 54/1960 was in favour of the extended family.

²⁶ Sentences no. 54/1960 and no. 92/1966.

²⁷ Sentences no. 79/1969, no. 50/1973, no. 82/1974, no. 55/1979, no. 214/1996 and no. 203/1997.

²⁸ Sentences no. 167/1992, no. 168/1994 and no. 99/1997.

²⁹ Sentences no. 82/1974 and no. 97/1979.

children³⁰ is therefore deemed unconstitutional, although the regulation that subjects the entry of the natural child into the legitimate family to the consent of the spouse (not separated) and the opinion of the legitimate children over the age of sixteen³¹ is considered justifiable.

Such an orientation sits rather difficultly with constitutional case law which maintains that it is not obligatory to render the position of natural children equal to that of legitimate children with regard to their relationship with relatives, especially in terms of inheritance rights.³²

The gradual reduction in the inequality of treatment of legitimate and natural children has induced the Court, in questions of paternity, to give prevalence to the principle of *favor veritatis* over that of *favor legitimationi*.³³ The time constraints on the attempted action of denying paternity were nevertheless deemed illegitimate in sentence no. 135/1985³⁴. Furthermore,

‘paternity research ... is not admitted where the child’s interest is contrary to the loss of the status of legitimate child, or ... contrary to the assumption of the status of natural child towards the individual against whom the action is to be undertaken: an interest that will have to be recognised by the judge, above all in consideration of the need to avoid a situation in which the subsequent modification of the child’s family status can compromise educational and emotional equilibrium’.³⁵

Nevertheless, the treatment reserved for children from incestuous relationship in non-patrimonial relationships is still based on an attitude of social condemnation, with only the obligation of maintenance payments declared by the Constitutional judge as the responsibility of the parent.³⁶

2. Married or Unmarried Parents

With regard to the ‘right and duty of parents to maintain, instruct and educate their children, including those born outside of marriage’ (Art. 30 Para. 1), the

³⁰ Sentence no. 237/1974.

³¹ Sentences no. 97/1979 and no. 229/1987.

³² Sentences no. 76/1977, no. 55/1979 no. 184/1990, no. 167/1992, no. 259/1993 and no. 377/1994.

³³ Sentences no. 70/1965 and no. 341/1990.

³⁴ Overruling sentences no. 249/1974 and no. 64/1982. Sentence no. 50/2006 struck down Art. 274 Civil Code.

³⁵ Sentence no. 249/1991. In the action of acknowledging the natural father, the judge must take into account the concrete interests of the child (sentence no. 341/1990). Action cannot be taken in case of heterologous insemination (sentence no. 347/1998).

³⁶ Sentence no. 118/1974.

Court has identified in the relationship between parents and children the principle of the so-called *favor minoris*, which obliges the former to act in the interests of the latter ‘taking into account their capabilities, natural inclinations and aspirations’ (Art. 147 cc). The right and duty to educate one’s offspring is equally applicable to both spouses³⁷ and to both legitimate and natural parents for their very act of procreation, with no distinction whatsoever between the legitimate and natural family.³⁸

3. Separation of the Child from the Family

The Constitutional Court has recognised absolute prevalence to the right of the child to grow up in his or her family of origin, with the Republic being obliged to ‘encourage, with economic incentives and other measures, the performance of family-related tasks’ in situations of difficulty.³⁹ The separation of the child from its family of origin is therefore considered to be an exceptional circumstance⁴⁰ which should be resorted to only if the spouses are absolutely incapable of performing the tasks entrusted to them, or in the event of moral and emotional negligence towards the child. Even in the special case of adoption, the severance of all links of the child being adopted with its family of origin⁴¹ presupposes that the ‘lack of assistance’ towards the child ‘is not due to ‘force majeure’, or rather, ‘reasons ... that exclude that the causes of abandonment can be traced to the will of the parents’.⁴² In conclusion, the protection of the prevalent interests of the child have led the Court to declare, on more than one occasion, that the practice relating to the obligatory maximum age limits of children available for adoption is constitutionally illegitimate, when the ‘adopting family is the only one able to satisfy such interests’.⁴³

³⁷ Sentence no. 97/1979. The subjection of the child to the authority of the *pater familias* in legislation prior to 1975 was deemed illegitimate (sentences no. 101/1965 and no. 71/1967) due to the fact that ‘the husband, in some respects, ... is the point of convergence for the family unit and of the position of the family in its social life’ (sentence no. 102/1967). Still today, Art. 316 cc. establishes that ‘in the event of disagreement on questions of particular importance,’ the father is given the power to adopt ‘urgent and undelayable measures’ ‘if an incumbent danger of serious prejudice exists against the child’.

³⁸ Sentence no. 121/1974 and no. 214/1996.

³⁹ Sentence no. 158/1971.

⁴⁰ Sentence no. 179/1976.

⁴¹ Sentences no. 11/1981 and no. 44/1994.

⁴² Sentence no. 76/1974.

⁴³ Sentences no. 303/1996, no. 349/1998 and no. 283/1999.

III. Parental Upbringing of the Children

Alongside the ban on ill-treating children (Art. 572 Criminal Code), the penal code seems to consider the use of forms of corporate punishment an ‘abuse of corrective or disciplinary means’ (ex Art. 571 Criminal Code), a minor offence punishable only if it provokes a ‘physical or mental ailment’, but does not render violent or oppressive conduct towards the child legitimate.⁴⁴

On the other hand, ‘the obligation to maintain, instruct and educate is not inseparable from a parent’s authority, though neither does it necessarily assume it’.⁴⁵ With the aim of ensuring effectiveness, according to constitutional case law⁴⁶, such an obligation requires real and personal guarantees as foreseen by Italian law in relation to the protection of children, whether natural or legitimate.

IV. Documentation

1. Constitutional Norms

Article 2 [Human Rights] The Republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity

Article 29 [Marriage] (1) The family is recognized by the Republic as a natural association founded on marriage.

(2) Marriage entails moral and legal equality of the spouses within legally defined limits to protect the unity of the family.

Article 30 (1) Parents have the duty and right to support, instruct, and educate their children, including those born out of wedlock.

(2) The law provides for the fulfillment of those duties should the parents prove incapable.

(3) Full legal and social protection for children born out of wedlock is guaranteed by law, consistent with the rights of other family members.

(4) Rules and limits to determine paternity are set by law.

⁴⁴ Corte di Cassazione penale, sezione XI, sentence 18 Mar. 1997: violent and vexatious conduct towards a minor can be considered in no way as a ‘means of correction and discipline’.

⁴⁵ Sentences no. 121/1974 and no. 185/1986.

⁴⁶ Sentence no. 99/1997.

Article 31 (1) The Republic furthers family formation and the fulfillment of related tasks by means of economic and other provisions with special regard to large families.

(2) The Republic protects maternity, infancy, and youth; it supports and encourages institutions needed for this purpose.

Article 36 (1) Workers are entitled to remuneration commensurate with the quantity and quality of their work, and in any case sufficient to ensure to them and their families a free and honorable existence.

2. Relevant Legislation

Civil Code: First Book. On persons and family (Articles 1–455)

Law of the 4 May 1983, no. 184 (Right of the Minor to have a Family)

Legislative Decree of the 26 March 2001, no. 151 (United Text of Legislative Norms Protecting and Supporting Motherhood and Fatherhood ...)

Law of the 4 April 2001, no. 154 (Measures against Violence in Family Relations)

3. Essential Constitutional Case-Law

Corte Costituzionale, Rulings no. 54/1960, 64/1961, 70/1965, 46, 92/1966, 102, 143, 144/1967, 126, 127/1968, 4, 79/1969, 128, 133/1970, 169/1971, 45, 82, 91/1972, 50, 148, 176/1973, 82, 118, 121, 187, 237/1974, 121, 122 and 123/1975, 179, 181/1976, 6/1977, 55, 97/1979, 45/1980, 11, 39/1981, 18/1982, 135/1985, 185, 227/1986, 71, 76, 229, 477/1987, 176, 404, 586, 587/1988, 319/1989, 123, 184, 341/1990, 189, 249, 450/1991, 1, 167, 392/92, 100, 259/1993, 13, 44, 281, 303, 372, 377/1994, 28/1995, 214, 297/1996, 99, 203/1997, 2, 349/1998, 110, 383/99

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Protection of Marriage and the Family

Chapter 6

FREEDOM OF EDUCATION AND TEACHING, SCIENCE AND RESEARCH

Anna Maria Poggi*

1. *Freedom of Teaching*

The Italian Constitution safeguards the freedom of teaching and links it directly to the overall freedom of art and science. Article 33 sub-section 1 of the Constitution states ‘The arts and sciences shall be free, and free shall be their teaching’.

The second sub-section of Article 33 also states in its first part ‘The Republic shall lay down general rules for education’, posing the first problem of interpretation regarding the content of and the relation between the two terms *education* and *teaching*.

Unlike other civil liberties, freedom of teaching is the exercise of a public function. It is not limited to imparting notions, but includes the development of the young generations and has, by its very nature, an educational element.

Its content is much wider and cannot be limited to the curriculum and the didactic methodology.

While on the one hand teaching has the right to express its own views, without being subject to limits of a religious, political or ideological nature, on the other hand teaching should not involve political or religious propaganda. Whereas it is true that state art or science are not admissible it is quite legitimate for the civil

* Anna Maria Poggi, Professore ordinario di Istituzioni di diritto pubblico, Università di Torino.

community to be guaranteed a suitable state scholastic organisation for the objectives proposed.¹

Within these precise limits not only education, but also teaching may be subject to regulation. Everything else belongs to the sphere of freedom of teaching, such as the possibility of following a given ideological course or a particular scientific concept or a given didactic method, without this affecting the teacher's employment.

The teaching of the Catholic religion in state schools has been guaranteed since the ratification on 25 March 1985, Law no. 121, of the new Concordat signed by Italy and the Vatican. On the basis of Article 9 the relative additional protocol states: a) 'the Italian Republic recognises the value of religious culture and considers the principles of the Catholic religion part of the historical patrimony of the Italian people, and will therefore continue to guarantee the teaching of the Catholic religion in public schools (except for universities) of all categories and levels; b) 'that in respect for the freedom of conscience and the educational responsibility of parents, the right to choose whether to accept this teaching or not is guaranteed'; c) 'that the teachers of religion must be judged to be suitable by the ecclesiastical authorities'; d) 'that the programmes and the organisational methods and the criteria for the choice of the texts to be used must be established on the basis of further consultation with the Italian Episcopal Conference'.

The Constitutional Court, with sentence no. 203/1989 stated that the State is obliged, in accordance with the agreement with the Vatican, to guarantee the teaching of the Catholic religion. For students and their families it is optional: only if the right to attend is exercised is there a scholastic obligation for attendance. For those who decide to attend alternative lessons it is not compulsory (see Chapter 5).

2. Freedom of the Student

Freedom of teaching is subject to limits inasmuch as other Constitutional values are involved. Teaching and education cannot be carried out, according to the general content of Article 41, second sub-section of the Constitution, 'in a way that may harm public security, liberty, and human dignity'.

A specific limit can be seen here from the point of view of those who are to take part in these activities. While on the one hand the teachers are guaranteed freedom of teaching, on the other hand it is necessary to guarantee freedom of

¹ But for the freedom to give private teaching in dance without any state examination ruling no. 240/1974.

learning: the learner, must be allowed to freely develop his/her personality. This corresponds to the intention of the content of Article 31 sub-section 2 of the Constitution, which attributes to the Republic the duty of protecting infancy and youth.

The decision to accept or not the religious teaching is a particularly delicate problem. As far as younger children are concerned the additional protocol states that on the one hand it is necessary to carry out the teaching in respect of the student's liberty of conscience and, on the other hand, it specifies that the right to choose lies with the parents. Law no. 281 of 1986 recognised that students in secondary schools, as from the first year (fourteen years of age) have the exclusive right to make the decision and parents have the right to know what their children have decided.

3. Right to Education

The first sub-section of Article 34 states: 'Schools shall be open to everyone'. From this rule comes the recognition of the right to education for all and not a privilege for some.

The right to education described in Article 34 should not be considered the right to educate oneself or not: it is stated as a guarantee not for the individual but for the community and therefore assumes the two-fold configuration of right and duty. For this reason the Constitution establishes the obligation of primary education for at least eight years and this obligation is backed by the law, even by penalties.

The right-duty of education for individuals is guaranteed by the fact that the Constitution imposes two fundamental obligations on the State.

The first obligation is that the State must set up its own schools of all kinds and levels: the state school is a necessary and mandatory institutional structure in the framework described by the Constitution. The Republic is obliged to set up a general system of education in order to render school truly 'open to everyone'.

It is also compulsory for the State to define the kinds and levels of schools, for admission to which, and for the conclusion of which, state examinations are foreseen (Art. 33 sub-section 5). Diplomas and qualifications for professional activities are also acquired by passing state examinations.

Finally, the State is obliged to establish the laws which discipline the institution of parity of private schools with state schools.

The second Constitutional obligation for the state consists of the duty to guarantee to the capable and worthy, 'even if lacking financial resources', access to the highest degrees of education (Art. 34 third sub-section).

The right to education therefore has to be protected from economic and social obstacles. This right is constitutionally guaranteed by the assumption of the relative obligations by the State; primary education is free (Art. 34 sub-section two) and for higher levels the Republic is obliged to render this right effective by offering scholarships, contributions to the family and other subsidies which, may be granted by examination (Art. 34, last sub-section).

The need to foresee examinations is born of the need to assure equality: the possibility to access the various forms of financial support foreseen by law must be offered to all and they must be assigned on the basis of an objective comparison of the individual positions.

In this prospective the pupils of private schools have the right to obtain the same legacies as the pupils of state schools.

The Constitutional Court emphasised that the right to study must be considered a right of individual access to education, through which the principle of substantial equality – which requires obstacles to be removed which may impede the complete development of the individual and his social formation in which his personality and therefore the school is expressed – becomes significant and unailing.²

II. Freedom of Education and Teaching in Private Schools

1.–2. Freedom of Teaching and Freedom of Education

The Constitutional principle of the freedom of teaching is particularly significant with regard to the private school and must be evaluated in the light of the constitutional rule which guarantees institutions and private individuals the right to set up and manage schools.

The private school is normally characterised (above all in those set up by religious orders) by a specific educational project which, on the one hand guarantees the pluralistic function that the Constitution intends to guarantee, and on the other may contrast with the freedom of teaching.

In a previous sentence³ the Constitutional Court, with regard to a situation of contrast between the management of a private university (a religious order) and an individual lecturer with regard to the ideological and methodology of the teaching, stated that in accordance with the Constitution the management has the

² See sentences nos. 7/1967 and 215/1987 on the principle that primary education is free of tuition.

³ Sentence no. 195/1972.

right to annul a lecturer's contract if he takes up a position which is in conflict with the ideological foundation of the university.

This distant precedent can hardly be applied to the school and above all to the compulsory primary school because the freedom of teaching lies at the roots of certain fundamental principles of the Constitution (Arts. 2, 4).

3. Freedom to Found Private Schools

The right to set up schools and educational institutes is recognised by the Constitution: 'Public and private bodies shall be entitled to establish schools and educational institutions without financial burdens on the State'.

The freedom to set up schools and educational institutes is subject to various limits which differ according to the educational level.⁴

The non-state institutes in which a university education is offered must be recognised by the State and are governed by regulations which are very similar to those of the State universities. The degrees and diplomas they issue are recognised as having the same value and the teaching staff enjoy legal and economic status similar to that of the staff of a state university.

The non-state schools in which primary and secondary education is offered can apply for parity with state schools which allows them to issue diplomas recognised by the State.

The private schools that do not apply for parity with state schools may be founded with State authorisation and are subject to supervision by the State of their activities. As far as the recruitment of teaching staff, access to users and the choice of the curriculum are concerned these schools are completely free to make their own decisions.

Parity is recognised for applying non-state schools if they present an educational project in accordance with the principles of the Constitution and a curriculum which conforms to the current regulations and legislation; public balance sheets; availability of classrooms, didactic furniture and fittings appropriate for the type of school and conforming to the current legislation; collegial bodies organised for democratic participation; willingness to enrol in the school all the students whose parents apply; observance of current legislation concerning the enrolment of disabled students or students in disadvantageous situations; teaching staff with appropriate qualifications; individual contracts for management and teachers who respect the collective national contracts for the sector.

⁴ See rulings no. 36/1958, 180/1988.

Recognised private schools are guaranteed full liberty as far as the cultural orientation and the pedagogical-didactic decisions are concerned. However, since they are providing a public service, they must accept anyone who applies, including disabled students.

They are also subject to the same inspections as state schools and to the supervision of the Ministry of Education which ascertains the original possession and the continuation of the requisites for recognition of parity.

4. Subsidies to Private Schools

The freedom to found schools and educational institutes is subject to the condition that this happens without ‘financial burdens on the State’ (Art. 33 sub-section 3).

The sub-section which foresees that the said institution does not involve costs for the State can be interpreted in two different ways: in the sense that it prevents the State (and regions) from offering subsidies of any kind to non-state schools and in the sense that while no obligation for offering subsidies exists, neither is the issue of such funds forbidden. There is currently a heated debate on the matter, while the Constitutional Court has not yet issued a sentence.

Other questions concern the issue by the State of sums relating to the right to education (transport, school meals, etc.). On this point the court has changed its ruling. After having refuted that these subsidies should be given to pupils of non-state schools⁵ it has since considered it legitimate to issue these subsidies.⁶

III. Freedom of Science and Research

The first paragraph of Article 33, sub-section 1 states the principle of freedom of science and art even if not necessarily finalised in teaching activities.

The said Constitutional safeguards do not resolve the interpretative question of what is intended by ‘Arts’ and ‘Sciences’: are we to consider only objectively artistic or scientific activities to be safeguarded, or also those which are subjectively considered such by those who carry them out?

Here it is necessary to distinguish between art and science. It is difficult to reach an objective definition of the former. On the contrary the concept of science is considered clearer referring to those human activities which are carried out using scientific methods.

⁵ Sentence no. 668/1988.

⁶ Sentence no. 454/1994.

The question is not merely theoretical since the Constitution does not restrict the manifestations of thought with artistic or scientific content to the limits of good taste with the consequence that they are better safeguarded than the freedom of the press for which the limit of 'within the bounds of good taste' exists. Article 21 states that 'Printed publications, performances, and all other exhibits offensive to public morality shall be forbidden.'

The Constitutional discipline of scientific research and cultural activities clearly distinguishes them from scholastic instruction as far as financial intervention by the State is concerned.

In the field of scientific research and cultural activities there is a constitutional tenet that obliges the State (and the other public subjects) to intervene, above all financially. Public investment is an essential condition for the existence of scientific research and for its cultural expression.

The principle of freedom of science and that of public financing in the field of research are expressly provided for in Articles 9 and 33 of the Constitution. The former states, 'The Republic shall promote the development of culture, and scientific and technical research' and the second also states that 'The arts and sciences shall be free, and free shall be their teaching'.

These two Constitutional rules must be interpreted in the light of certain Constitutional principles. The subordination of the values of science and technology to primary values of mankind and social formation descend from the individualist principle contained in Article 2 of the Constitution. The Republic therefore recognises the priority of the cultural freedom of persons and the autonomy of the cultural institutions (schools, universities, museums, libraries...).⁷

The principle of the laity of the State requires the absolute prohibition of official sciences or of State sciences. Science and research must not be finalised in a State culture: the interventions of the State in the sector are therefore expressly subordinated to the development of scientific research in the principal interests of the civil community.

The principle of equality mentioned in Article 3 requires that scientific research also be addressed to realising objectives of substantial equality and of social solidarity. The development of scientific research, from this point of view, should be mainly directed to those sectors (welfare, health, employment) in which the State agrees to remove obstacles of an economic and social nature which prevent effective equality.

The development of scientific research presupposes and strengthens the freedom of scientists and the autonomy of the universities (Art. 33), but may also

⁷ For universities see ruling no. 383/1998.

serve education (Art. 34) and professional training (Art. 35). Technical research should also be directed towards the recognition of economic and social rights of the self-employed and independent workers and, in the first place, to their safety; to the recognition of freedom of enterprise and the development of small industry (Art. 44). The pluralist inspiration of the Constitution calls for an effective multiplicity of research institutes, but public research gives no right to accede use another's property.⁸

IV. Documentation

1. Constitutional Norms

Article 9 (1) The Republic promotes cultural development and scientific and technical research.

(2) It safeguards natural beauty and the historical and artistic heritage of the nation.

Article 33 (1) The arts and sciences as well as their teaching are free.

(2) The Republic adopts general norms for education and establishes public schools of all kinds and grades.

(3) Public and private bodies have the right to establish schools and educational institutes without financial obligations to the State.

(4) The law defining rights and obligations of those private schools requesting recognition has to guarantee full liberty to them and equal treatment with pupils of public schools.

(5) Exams are defined for admission to various types and grades of schools, as final course exams, and for professional qualification.

(6) Institutions of higher learning, universities, and academies have the autonomy to establish bye-laws within the limits of State law.

Article 34 (1) Schools are open to everyone.

(2) Primary education, given for at least eight years, is compulsory and free of tuition.

(3) Pupils of ability and merit, even if lacking financial resources, have the right to attain the highest grades of studies.

(4) The Republic furthers the realization of this right by scholarships, allowances to families, and other provisions, to be assigned through competitive examinations.

⁸ Ruling no. 57/1976.

Article 117 (2) The State has exclusive legislative power in the following matters:

lit. n) general rules on education;

(3) The following matters are subject to concurrent legislation of both the State and regions: ... education, without infringement of the autonomy of schools and other institutions, and with the exception of vocational training; professions; scientific and technological research and support for innovation in the productive sectors.

2. Relevant Legislation

Law of the 2 December 1991, no. 390 ('Norms on the Right to Universitarian Studies')

Law of the 9 May 1989, no. 168 (Institution of the Ministry of University and Scientific Research and Rules on Academic Autonomy)

Law of the 10 March 2000, no. 62 ('Norms Regarding Recognition of Schools and the Right to Study and Learning')

3. Essential Constitutional Case-Law

Constitutional Court rulings no. 36/1958, 7/1967, 195/1972, 240/1974, 57/1976, 215/1987, 180, 668/1988, 203/1989, 13/1991, 290/1992, 454/1994, 383/1998

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Chapter 7

THE RIGHT TO SEEK REFUGE AND ASYLUM

Alessandra Algostino*

I. The Right not to be Refused Entry

1. *International Legal Obligations as a Minimal Constitutional Guarantee? (Article 31 of the Geneva Convention)*

The Italian Constitution expressly recognises the right of asylum in Article 10 Paragraph 3: ‘The foreigner, who is prevented in his own country from effectively exercising the democratic freedom guaranteed by the Italian Constitution, has the right of asylum in the territory of the Republic, according to the conditions established by the law’. However, no law has yet been promulgated or adopted which governs such conditions in a systematic manner; whatever the case, the constitutional guarantee of the right of asylum is inserted among the fundamental principles of the Constitution and represents a limit to constitutional revisions.

Partial implementation was given by Article 20 of the Legislative Decree of the 25 July 1998, no. 286 (Unique Text on Immigration and on the Status of the Foreigner), which authorised the Government to adopt ‘measures of temporary protection (...) for relevant humanitarian needs, on the occasion of conflicts, natural disasters or other events of particular gravity in countries not belonging to the European Union’: the so-called humanitarian asylum, applied, for example, on the occasion of the international emergency in Kosovo.⁴³⁰

Alongside the right of asylum guaranteed by Article 10 Paragraph 3 of the Constitution, Italy recognised the right to obtain the status of refugee in the International Conventional Right, ratifying with the Law of the 24 July 1954, no. 772, the Convention on the Status of Refugees adopted in Geneva on the 28 July 1951. The procedure for the recognition of the status of a refugee has been legislatively regulated (only partly) by Article 1 of the Law of the 28 February 1990, no. 39.

In compliance with Article 31 of the Geneva Convention, therefore, penal sanctions are not provided for in the case of refugees requesting entry and residence. The principle of *non-refoulement* in Article 33 of the Convention has now been renewed and extended by the Unique Text on Immigration and the Status of the Foreigner.⁴³¹ Article 19 provides that in no case may the foreigner be refused entry or expelled to a country in which he/she may be the subject of persecution, including sexual discrimination, or may risk being sent to a State in which he/she would not be protected from persecution.

The courts and the authorities have not definitively resolved the question whether the arrangements of the Geneva Convention (and of the law of ratification) and the Unique Text on Immigration and the Status of the Foreigner come together to form a minimum constitutional guarantee, even if only implicitly. Such a constitutionalisation of the right to refuge, however, could be deduced: a) from Article 10 Paragraph 3 of the Constitution, interpreting the right to refuge as a minimum guarantee even if this is not sufficient for the right of asylum; b) from Article 10 Paragraph 2 of the Constitution, according to which ‘the legal status of the foreigner is regulated by the law in conformity with the regulations and with international treaties’; c) from Article 2 of the Constitution, which establishes that ‘the Republic recognises and guarantees the inviolable rights of the human being...’; d) from Article 11 of the Constitution, where Italy agrees limitations of sovereignty, in an ‘order which assures peace and justice among Nations’.

With the recent sentence no. 31 in 2000, the Constitutional Court declared constitutionally inadmissible a request for a referendum for the abrogation of the Unique Text on Immigration and the Status of the Foreigner, which contained the already cited Article 19. The judgment affirms that ‘the fundamental values of our constitutional Charter are reflected in

* Alessandra Algostino, Professore associato di diritto pubblico comparato, Università di Torino.

⁴³⁰ The provision deals with a necessarily temporary form of asylum, recognised from time to time, by decree from the Prime Minister, and which ceases as soon as the situation in the country of origin is considered back to normality (with consequent repatriation of refugees).

⁴³¹ Legislative Decree no. 286/1998.

several orders' and underlines the international constraints which come from the instituting Treaty of the European Union, particularly where it proposes appropriate measures concerning asylum⁴³².

2. A Right to Refuge or to Asylum Status?

In Italian sources of law, the right of asylum *ex* Article 10 Paragraph 3 of the Constitution is distinct from the right to recognition of the status of refugee, the former being ratified by the Constitution, the other by a rule of ordinary executive law ratifying an international treaty. The procedures for obtaining recognition are different, and the presuppositions of the two rights are also different.

The differences, in particular, concern: a) the presupposition of individual persecution, proscribed for the right to refuge, but not imposed for the right to asylum; b) the provision of appropriate administrative procedures, currently set up only for the recognition of the status of refugee, and not for the right of asylum.

As for the qualification of the respective subjective legal situations, there have never been particular doubts about the fact that the right to asylum is a subjective right, protected before an ordinary judge. Only recently, however, the right to refuge has been recognised as a subjective right, for which, in case of controversy, one has recourse to an ordinary judge (and no longer to an administrative judge)⁴³³.

The constitutional right of asylum is no longer a 'right' of the State, nor simply a 'duty' of the State based on its international obligations, but a directly actionable right of the individual.⁴³⁴ Article 10 Paragraph 3 of the Constitution is binding.⁴³⁵

As for the procedure for obtaining asylum and refuge, in the first case, this has not yet been recognised as leading to an administrative procedure; it may, therefore, be verified only (and directly) by a judge. The request for recognition of the *status* of refugee, however, are made to an administrative body (the Central Commission for the recognition of the status of refugee)⁴³⁶.

The act of verification of the right of asylum can be presented at any time, by any foreigner, with or without legal permission to remain. For the request of recognition of the status of the refugee, no time limit is prescribed, except when presentation is made at the police office at the border, where interpretations are generally rather elastic, where the request must be made at the police headquarters within eight days of entry into Italian territory.

To those requesting refuge there is a guarantee of a temporary permission to remain.⁴³⁷ The law provides, however, for the rejection at the border of those who intend to request refuge who come from a third secure country and of those who have been condemned for serious crimes, or those 'likely to prejudice the security of the State or those belonging to an association of a criminal nature or dedicated to the traffic of drugs or terrorist organisations'.⁴³⁸

Controversial is Article 32 (1) b of Law no. 189/2002 which provided that the foreigner who evades the 'centre of identification' is considered renouncing to asylum.

Where the procedure has a positive outcome, the refugee has the right to a renewable permit to remain and, on the basis of the most recent law of merit, even the foreigner whose right to asylum has been recognised must now be allowed a permit to remain for an indeterminate time.⁴³⁹

The Constitutional Court has clarified that foreigners entitled to the right of asylum may enjoy 'all those fundamental democratic rights that are not strictly inherent to *status civitatis*'.⁴⁴⁰

⁴³² Corte Costituzionale, sentence 7 Feb. 2000, no. 31.

⁴³³ See Appeal Court of Milan, civil section, sentence 8 Oct. 1999, est. Carbone, *Diritto Immigrazione e Cittadinanza* 1/2000, pp. 98 ss.

⁴³⁴ Cf., first Appeal Court of Milan, 27 Nov. 1964, *Foro italiano* 1965, II, pp. 122 ss., now Appeal Court, civil section, sentence 12 Dec. 1996, no. 4674; Appeal Court, civil section, sentence of the 8 Oct. 1999, cit.; and lastly, Tribunale of Roma, 2. civil section, sentence of the 1 Oct. 1999, *Ocalan case* (from now, Tribunale, *Ocalan*), in *Diritto Immigrazione e Cittadinanza* 3/1999, pp. 101 ss.

⁴³⁵ On the immediate mandatory implications and on the nature of the subjective right of asylum, cf., in support of the doctrine, almost immediately C. Esposito, 'Asilo (diritto di)', *Enciclopedia del diritto* III, Milan 1958, pp. 222 ss.).

⁴³⁶ With possible recourse to an ordinary judge.

⁴³⁷ Art. 11 Para. 1a of the Law activating the Unique Text on immigration and the status of the foreigner (Decreto del Presidente della Repubblica, 31 Aug. 1999, no. 394) provides for the issuance of permits also 'for asylum seekers, for the duration of the current procedure, and for asylum'.

⁴³⁸ Art. 1 Para. 4 of the Law no. 39/1990.

⁴³⁹ Tribunale, *Ocalan*, op. cit., p. 114.

⁴⁴⁰ Corte Costituzionale, sentence 23 Mar. 1968, no. 11. Sentence no. 5/2004 precised that protection against discriminations has to be given against expulsion, but can differ for asylum and refugee seekers on the one hand and merely economic migrants on the other.

II. Substantive Principles of Refugee and Asylum Law

1. Political Persecution

Article 10 Paragraph 3 of the Constitution establishes the presuppositions for the right of asylum, leaving to the legislature only the regulation of practice and not allowing the imposition of further substantial requirements. In the provision which allows foreigners to enjoy the right of asylum ‘to those denied in their own country the effective exercise of the democratic freedom guaranteed by the Italian Constitution’, Article 10 Paragraph 3 chooses a formula which, according to the doctrine of law, leaves out the element of ‘persecution’⁴⁴¹, required however both by the international regulations for the status of refugee⁴⁴² and by other national Constitutions.

The only presuppositions requested by the Constitution for the recognition of the status of asylum seeker are on the one hand ‘the effective impediment to the exercise of freedom’ and, on the other, that such effective impediment concerns the ‘democratic freedom guaranteed by the Italian Constitution’.

As for the notion of ‘democratic freedom’, the doctrine of law includes in this the classic civil liberties, as well as political rights⁴⁴³, while it tends to exclude socio-economic rights (with the exception of the right to strike).

In the *Ocalan* case it was, moreover, affirmed that the right of asylum must be extended to all those who may be legally prosecuted in their country for their political activity, if they have fought (even in a violent manner) to overthrow the system of a non-democratic state⁴⁴⁴.

As then for the first element, the ‘impediment’ is not covered by one specific violation, nor does it presuppose individual persecution, nor can the activities of the asylum seeker be regarded as the cause of the said impediment.

The reference to the ‘effectivity’, finally, precludes any exception or restrictions based on the formal consecration of the rights of freedom in the basic charter or in the law of their country of origin, on the self-qualification of the foreign State as ‘democratic’ or on their adhesion to international conventions for the protection of human rights and fundamental liberties.

As far as the recognition of the status of refugee is concerned, the administrative law has, up until now, held it insufficient that the interested party supply proof of a situation of collective persecution, requiring the demonstration that those requesting refuge have undergone or risk individual persecution.⁴⁴⁵

In relation to the motives for persecution, Italian law and practice, in line with the political summits of the European Union, have affirmed the principle that the recognition of the status of refugee is justified only on the basis of persecution by the governing authorities, that family or social persecution is insufficient, as is any action on the part of forces of opposition for which there are other methods of escape.⁴⁴⁶

It is not a requirement, however, that the refugees illegally flee their own country, nor that they leave because of fear of undergoing persecution. They may, in fact, already reside abroad and ask for the recognition of the status of refugee after verifiable events in the country of origin after their departure (for example changes following a revolution or a situation of civil war) that justify fear of being subjected to persecution in the case of return.⁴⁴⁷

2. Safe Country of Origin

In the case of refugee status, the doctrine excludes presumptions by which a country of origin may be declared ‘safe’ by law, such that it excludes what may become an impediment to the effective exercise of democratic freedom. Those who find themselves in the situation indicated in Article 10 Paragraph 3 of the Constitution, moreover, enjoy the subjective

⁴⁴¹ In the Constituent Assembly, moreover, all the proposals aimed to insert the element of ‘persecution’ as a justifying cause for asylum were rejected.

⁴⁴² With regard to the status of refugee, it should also be remembered that beyond the request of ‘persecution’, until 1989 Italy maintained the so called ‘geographical reserve’, applying the Convention only to refugees from European countries (substantially from the Soviet bloc).

⁴⁴³ Cf., amongst others, C. Mortati, *Istituzioni di diritto pubblico*, II, Padova 1976, p. 1157; one might consider, however, that as far as political rights are concerned, much is said to be true only when the expression ‘democratic freedom’ is interpreted from the point of view of the individuation of these freedoms whose impediment establishes a right of entry and residence in Italy, while, when dealing with identifying the ‘democratic freedom’ which an asylum seeker enjoys in Italy – paradoxically – political rights are excluded precisely because they are political rights.

⁴⁴⁴ Tribunale, *Ocalan*, cit. In the doctrine, amongst others, cf. A. Cassese, ‘Il diritto di asilo territoriale degli stranieri’, in: G. Branca (ed.), *Commentario della Costituzione*, I, Bologna-Roma 1975, pp. 526 ss.

⁴⁴⁵ See, amongst others, Consiglio di Stato, sezione IV, sentence of the 15 Dec. 1998–12 Jan. 1999, *Diritto Immigrazione e Cittadinanza* 3/1999, pp. 115 ss. (‘the generic seriousness of the political and economic situation and the same lack of exercise of these democratic freedoms, are not of themselves sufficient ... it being necessary that the specific subjective situation of the claimant, in relation to the objective characteristics existing in his/her country, may be such to lead one to consider the existence of a grave danger for the safety of the person’); Tribunale Amministrativo Regionale (TAR) Friuli-Venezia Giulia, sentence of the 22 Oct. 1998, rec. Ramatani, *Diritto Immigrazione e Cittadinanza* 2/1999, pp. 79 ss.

⁴⁴⁶ TAR Lombardia, Milano, sentence of the 5 Nov. 1998, no. 2536, *Diritto Immigrazione e Cittadinanza* 1/1999, p. 84.

⁴⁴⁷ So called refugees *sur place*.

right to asylum, independently of the possibility of being able to request and obtain a similar protection in other countries to that which they can have on the basis of the provisions of the Italian Constitution. Until there is no specific legislation, Italy must therefore concede asylum to those who have a right to it, even if the interested party is in transit or has lived, before asking for asylum in Italy, in a democratic country in which he/she would have been able to ask for protection.

The solution is slightly different for those requesting recognition of the status of refugee. For the ‘third secure countries’ the provision allowing entry into Italy to make a request for refuge may be denied to those coming from a country different from their country of origin, where they have spent a period of residence (excluding mere transit)⁴⁴⁸.

3. Family

Article 29 of the Unique Text on Immigration and the Status of the Foreigner, provides in a general manner the right to family reunification for all foreigners, and introduces, in the case of refugees, a dispensation of the necessity to demonstrate the availability of housing and a minimum annual income.

As far as the right of asylum or refuge for minors is concerned, there is a unique requirement, in the case of unaccompanied minors⁴⁴⁹, to inform the Juvenile Court so that subsequently a guardian may be nominated; in the case where the minor reaches Italy with parents, their asylum or refuge status follows that of their parents.⁴⁵⁰

III. Protection Against Expulsion

1. Refugee Claimants whose Claim has not been Finally Rejected

Firstly, during the time between the lodging of the request and the decision about it, beyond reference to the previously mentioned principle of *non-refoulement* and the permits to remain for the period necessary for the examination of the request, it must be borne in mind that the person requesting refuge cannot be expelled except for reasons of national security or of public order.

If that asylum or refugee status is denied, while waiting for the pronouncement on appeal against the sentence or the provision of denial, the judge may be asked to suspend the sentence or the provisions under discussion.

In the case, then, that, in waiting for the definitive judgment, an expulsion order is served, the interested party would be able to ask the judge ‘of expulsion’ for the suspension of the same, until there has been a resolution by the judge of his/her status as asylum holder or refugee. In such a case, the law does not provide for the issue of a permit to remain, even if, in coherence with the *ratio* of the Unique Text on Immigration and the Status of the Foreigner, a permit to remain should be issued to the interested party (it being impossible to allow a foreigner to stay in Italy – expulsion being prohibited –, but not to issue a permit to remain).

2. Refugee Claimants and Asylum Seekers whose Claim has Been Finally Rejected

The seekers of asylum or refuge whose claims have been rejected with a sentence or a provision with no further appeal for the status requested may be expelled if they have no other type of residence permit (and an appeal must be made – as occurs, more generally, against any decree of administrative expulsion – within five days, to the Court).⁴⁵¹

Article 19 of the Unique Text on Immigration and the Status of the Foreigner (already noted) provides, however, for a guarantee to every foreigner –independently of the fact that he/she may have his claim for asylum or refuge recognised – that the foreigner him/herself cannot be expelled or sent back to another State in which he risks undergoing persecution or of being sent on further to another State where he/she would not be protected from persecution.

It is important to note that at times, the Central Commission, while refusing the request for recognition of the status of refugee, ‘suggests’ the issue of a permit to remain ‘for humanitarian reasons’, when the foreigner’s rights of re-entry into his country of origin may be clearly seen to have been violated.⁴⁵²

⁴⁴⁸ Art. 1 Para. 4b, of Law no. 39/1990.

⁴⁴⁹ Art. 1 Para. 5 of the Law no. 39/1990.

⁴⁵⁰ Finally, in the case of a minor accompanied not by a parent, but by a relative up to the fourth level, there is no precise solution, in that it does not always seem appropriate that the status of the minor should follow that of the accompanying adult.

⁴⁵¹ Art. 13 Para. 8 of the Unique Text on Immigration and the Status of the Foreigner.

⁴⁵² Applying Art. 5 Para. 6 of the Unique Text on immigration and the status of the foreigner, in which the permit to remain must be refused if the right conditions are lacking ‘unless there are strong reasons, in particular of a humanitarian nature or because of constitutional or international obligations of the Italian State’.

IV. Documentation

1. *Constitutional Norms*

Article 10. (1) The legal system of Italy conforms to the generally recognized principles of international law.

(2) Legal regulation of the status of foreigners conforms to international rules and treaties.

(3) Foreigners who are, in their own country, denied the actual exercise of those democratic freedoms guaranteed by the Italian Constitution, are entitled to the right to asylum under those conditions provided by law.

(4) Foreigners may not be extradited for political offences.

2. *Relevant Legislation*

Legislative Decree of the 25 July 1998, no. 286 (Unique Text on Immigration and the Status of the Foreigner)

Law of the 24 July 1954, no. 772 (Ratification of the Convention on the Status of Refugees adopted in Geneva on the 28 July 1951)

3. *Essential Constitutional Case-Law*

Constitutional Court, rulings no. 11/1968, 353/1997, 31, 105/2001

Consiglio di Stato, sect. IV, Sentence of the 15 December 1998–12 January 1999, *Diritto Immigrazione e Cittadinanza* 3/1999, pp. 115 ss.

Tribunale of Roma, 2nd civil section, Sentence of the 1 October 1999, *Ocalan*, *Diritto Immigrazione e Cittadinanza*, 1999, pp. 101 ss.

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ITALY

National Co-ordinator:

Prof. Jörg Luther,
Università del Piemonte Orientale, Italy

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Chapter 1

LE DROIT A LA PROPRIETE PRIVEE

Sabrina Praduroux – Doris Cavallari*

I. La protection constitutionnelle de la propriété

La réglementation de la propriété est comprise dans le Titre III dédié aux « Rapports économiques », placée dans la première partie de la Constitution intitulée aux « Droits et devoirs des citoyens ». La propriété privée et publique sont garanties, inclus le droit de succession (art. 42), sauf les entreprises concernant des services publics essentiels (arrêt n° 225/1975), des sources d'énergie (arrêt n° 59/1960) ou des situations de monopole (art. 43). Une protection particulière est prévue pour la propriété foncière privée (art. 44) et pour la propriété du logement (art. 47). Couverte par la garantie constitutionnelle est, enfin, la propriété perçue comme instrument essentiel à l'exercice concret de la liberté d'initiative économique privée (art. 41).

Les majeures problèmes interprétatives abordés par la jurisprudence ont pour objet:

- 1) la signification de la notion de *fonction sociale* qui figure dans le deuxième alinéa de l'article 42, et,
- 2) la distinction entre les hypothèses d'expropriation prévues par la loi et garanties par la prévision d'une indemnisation, et les limitations au droit de propriété privée imposées en accord à sa fonction sociale et au but de la rendre accessible à toute personne, en définitive il s'agit du rapport entre le deuxième et le troisième alinéa de l'article 42 de la Constitution.

* 1. and 2 by Sabrina Praduroux, Dottore di ricerca, Searcher at Institute of International Economic Law, University of Helsinki;
3. by Dario Cavallari, Dottore di ricerca, Università La Sapienza, Roma.

1. La notion de droit de propriété

Point de départ de la conception constitutionnelle du droit de propriété est le principe de la maîtrise la plus absolue sur le bien, de sorte que les modes d'acquisition ou de jouissance et les limites au droit même, doivent être établis par loi, en conformité avec l'intérêt général. La suppression du titulariat formel de la propriété, et son attribution à un autre sujet privé ou public, est prévue pour le cas de contraste le plus profond entre l'intérêt général et l'intérêt individuel¹.

Des exemples de restrictions au droit de propriété déterminées par la loi sont: l'obligation d'observer certaines distances pour les constructions² et pour l'ouverture des vues sur la propriété du voisin³; le passage coactif sur un fonds non enclavé à la faveur des personnes handicapées⁴.

La Cour Constitutionnelle⁵ a jugé que l'interdiction faite au propriétaire de mettre à exécution des oeuvres d'entretien sur son immeuble, au seul but d'en assurer l'intégrité et la fonctionnalité, sans en altérer le profil et la volumétrie, constitue une atteinte au « contenu minimum » du droit de propriété. L'article 42,2 de la Constitution garanti, ainsi, au titulaire du droit de propriété, l'usage le plus fonctionnel de l'immeuble. Le *ius utendi*, attribut essentiel du droit de propriété sur les immeubles, se traduit, donc, dans le droit de jouir du bien de la manière la plus absolue, pour en tirer le maximum profit économique, et, pour en assurer – en particulière dans l'hypothèse de bâtiment à usage d'habitation – la fonction primaire de lieu dans lequel s'exerce la personnalité humaine.

1.1. LES BIENS INCORPORELS

Quelques biens incorporels, comme l'espace radiotélévisé⁶ et l'œuvre intellectuelle, sont garantis par l'article 42. En se référant à l'interdiction de nolisier le compact-disc légitimement acheté (articles 19, 61, 68 et 109 de la loi n° 633 du 22 avril 1941), la Cour Constitutionnelle⁷ a remarqué que, en reconnaissant à l'auteur la propriété de l'œuvre et le droit à son exploitation économique, le législateur a abouti à un correct arrangement des opposés intérêts et valeurs constitutionnels, en matière de tutelle de la liberté de l'art et de la

¹ G. Salerno, 'Article 42', in: V. Crisafulli/L. Paladin, *Commentario breve alla Costituzione*, Padova 1990, p. 297.

² Corte Costituzionale, 15/04/1996, n° 120.

³ Corte Costituzionale, 22/10/1999, n° 394.

⁴ Corte Costituzionale, 10/05/1999, n° 167.

⁵ Corte Costituzionale, 23/06/2000, n° 238.

⁶ Corte Costituzionale, 07/05/2002, n° 155.

⁷ Corte Costituzionale, 06/04/1995, n° 108.

science (art. 33), de la propriété, qui concerne aussi l'œuvre intellectuelle, (art. 42) et du travail sous toutes ses formes et dans toutes ses applications (art. 35).

1.2. LES INTERETS ECONOMIQUES PATRIMONIAUX

La notion constitutionnelle de droit de propriété, bien qu'elle ait un sens plus large par rapport à la notion du droit civil, ne porte pas sur les créances⁸. L'article 42 concerne, en effet, exclusivement la tutelle de la propriété privée et il ne peut pas être utilement rapporté à un hypothétique sacrifice des obligations contractuelles⁹.

Cependant, la Constitution prévoit des garanties particulières pour favoriser l'épargne (art. 47,1) et l'investissement sous forme d'actions dans les grandes entreprises de production du Pays (art. 47,2). En tout cas, la Cour Constitutionnelle¹⁰ a précisé que l'article 47 ne contient que un principe programmatique au quel le législateur ordinaire doit s'inspirer.

2. *La dimension sociale de la propriété*

La Constitution consacre la propriété comme un droit et au même temps comme un « bien » investi d'une fonction sociale à la faveur des citoyens économiquement faibles: le législateur doit poursuivre l'égalité sociale dans l'accès à la propriété, pour atteindre à une distribution plus équitable de la richesse (art. 3,2). La fonction sociale exprime, à côté de l'ensemble des pouvoirs attribués au propriétaire dans son intérêt, le devoir de participer à la satisfaction des intérêts généraux¹¹.

2.1. LES LIMITATIONS AU DROIT DE PROPRIETE SANS INDEMNISATION

L'article 42 de la Constitution n'exige pas la prévision d'une indemnisation quand les restrictions à la propriété privée se réfèrent aux modes de jouissance de toute une catégorie de biens et visent à l'actuation de la fonction sociale du droit de propriété¹², ni quand la loi réglemente la situation que les biens même ont par rapport à des intérêts de l'administration, pourvu que la loi ait pour destinataire la

⁸ Corte Costituzionale, 29/06/1995, n° 288.

⁹ Corte Costituzionale, 17/03/2000, n° 70.

¹⁰ Corte Costituzionale, 04/05/1995, n° 143.

¹¹ Corte Costituzionale, 22/04/1986, n° 108.

¹² Corte Costituzionale, 13/07/1990, n° 328.

généralité des sujets¹³. Par exemple, la prévision de publicité des eaux (art. 1,1, loi n° 36 du 1994) concerne le régime d'usage d'un bien devenu limité, il s'agit pourtant d'une limitation à la propriété due à l'intrinsèque importance de la ressource hydrique et, donc, on est en dehors de l'obligation d'indemnisation¹⁴.

Des limitations qui privent la propriété de certaines utilité économiques peuvent être établies en vertu de la fonction sociale de la propriété, pourvu qu'elles n'aient pas au fond l'effet d'une expropriation et respectent le critère du raisonnable rapport de proportionnalité entre les moyens employés et le but visé¹⁵. Il s'agit, en particulier, de: règlements d'urbanisme (i), règlements du paysage (ii), régime de contrôle des biens d'intérêt historique-artistique (iii), réglementation de la location (iv), réglementation de baux agricoles (v).

(i) La Cour Constitutionnelle¹⁶ considère que la fonction sociale de la propriété exige, entre autre, une réglementation de l'aménagement du territoire, des plans de construction et, plus en général, du développement urbaniste¹⁷. Les limitations normalement établies par les plans d'urbanisme et les correspondantes règles d'exécution, telles que les limites d'hauteur, de cubature ou de superficie, les distances entre les constructions, les diverses critères générales pour bâtir, doivent être considérées comme consubstantielles à la propriété.

En dehors du schéma de l'expropriation, le juge constitutionnel place aussi les réglementations qui entraînent une destination (même de contenu spécifique) réalisable sur l'initiative économique particulière ou mixte publique-particulière, sans qu'une préalable expropriation du bien soit nécessaire. On fait allusion, par exemple, aux parkings, aux centres sportifs, aux complexes commerciales, bref, à toutes ces initiatives qui sont susceptibles de opérer en libre régime d'économie de marché¹⁸.

(ii) La notion de « paysage » désigne une partie homogène du territoire, dont les caractéristiques dérivent de la nature, de l'histoire ou des réciproques interrelations¹⁹.

L'intérêt public des biens immobiliers protégés (*beni paesaggistici*) découle des certaines qualités, indiquées par la loi, originaires du bien, qui

¹³ Corte Costituzionale, 20/12/1976, n° 245.

¹⁴ Corte Costituzionale 27/12/1996, n° 419.

¹⁵ Corte Costituzionale, 11/07/1989, n° 391.

¹⁶ Corte Costituzionale, 10/05/1963, n° 64.

¹⁷ Gambaro A., *Il diritto di proprietà*, Milano 1995, pp. 235 ss.

¹⁸ Corte Costituzionale, 20/05/1999, n° 179.

¹⁹ Art. 131 *Decreto Legislativo* 22/01/2004 n° 41 Codice dei beni culturali e del paesaggio.

l'administration se limite à mettre en évidence; il s'ensuit que aucune indemnisation est due au propriétaire²⁰.

La fonction de réglementation du paysage et celle de réglementation d'urbanisme sont ontologiquement distincts, en poursuivant, la première, la tutelle des valeurs esthétique-culturels, alors que la deuxième a pour but la gestion du territoire aux fins économique-socials²¹.

(iii) La notion de « patrimoine culturel » comprend: les biens immobiliers et mobiliers d'intérêt historique, artistique, archéologique, ethno-anthropologique, archivistique et bibliographique; les biens immobiliers et les sites qui sont expression des valeurs historiques, culturelles, naturelles, morphologiques et esthétiques du territoire²².

Le but de sauvegarder des biens aux quels sont liés des intérêts essentiels de la vie culturelle du Pays et l'exigence de garder et garantir la jouissance de par de la collectivité des choses présentant un intérêt historique et artistique, justifient, pour tels biens, l'adoption des mesures de protection particulières. Des mesures cohérentes à l'actuation des susdites obligations de conservation sont, par exemple, l'obligation d'inalienabilité du contenu des ateliers et de stabilité de leur destination d'usage²³; tandis que l'affranchissement des ateliers des dispositions de dessaisissement prévus en matière de location des immeubles urbains est une mesure absolument exubérant par rapport à la finalité de tutelle poursuivie²⁴.

En matière de droit de préemption sur la vente des oeuvres d'art²⁵, la Cour Constitutionnelle²⁶ a considéré qu'une irrégularité ou une omission de part du propriétaire quant à la déclaration de la vente du bien, entraîne la nullité de celle-ci et le caractère permanent du droit de préemption de l'Etat. La nullité en question a valeur de sanction, et, il ne s'agissant cependant pas d'une véritable sanction pénale ou administrative, l'administration a le pouvoir discrétionnaire d'exercer le droit de préemption à tout moment.

²⁰ Corte Costituzionale, 23/07/1997, n° 262.

²¹ Corte Costituzionale, 07/11/1994, n° 379.

²² Art. 2 *Decreto Legislativo 22/01/2004 n. 41 Codice dei beni culturali e del paesaggio*.

²³ Art. 51 *Decreto Legislativo 22/01/2004 n. 41 Codice dei beni culturali e del paesaggio*.

²⁴ Corte Costituzionale, 04/06/2003, n° 185.

²⁵ Arts. 60, 61, 62 *Decreto Legislativo 22/01/2004 n. 41 Codice dei beni culturali e del paesaggio*.

²⁶ Corte Costituzionale, 20/06/1995, n° 269.

Selon la Cour européenne des droits de l'homme²⁷ le caractère permanent du droit de préemption de l'administration entraîne une incertitude permanente sur la situation juridique du bien, incompatible avec le principe du « juste équilibre » inhérent à l'article 1 du Protocole n° 1.

(iv) Un statut autonome du droit de propriété peut être relevé aussi en matière de location des immeubles urbains²⁸. La première mesure pertinente fut la loi n° 392 du 27 juillet 1978, qui mit en place un système de « loyers équitables » (*equo canone*) reposant sur un certain nombre de critères tels que la superficie et les frais de construction de l'appartement.

Une deuxième mesure fut adoptée par le législateur en 1992 (loi n° 359), aux fins d'une libéralisation progressive du marché de la location. Entra alors en vigueur une législation qui atténuait les restrictions frappant le montant des loyers (*patti in deroga*), en vertu de laquelle les propriétaires et les locataires pouvaient en principe s'écarter du loyer fixé par la loi en convenant d'un montant différent. Enfin, la loi n° 431 du 9 décembre 1998 a réformé le régime des locations et libéralisé les loyers.

Sous le profil de l'article 42, des questions de légitimité constitutionnelle ont été posé par rapport à la suspension de l'exécution forcée des ordonnances d'expulsion (*ordinanze di sfratto*) et aux obligations du locataire en cas de restitution tardive.

Quant au premier sujet, la Cour Constitutionnelle a remarqué le caractère exceptionnel de la mesure, qui trouve sa justification dans la phase transitoire de passage du précédent régime de contrôle au nouveau système des locations, et a considéré entrer dans susdite période transitoire les prolongations de durée de la mesure transitoire jusqu'à aujourd'hui mises en place²⁹ par le législateur. Tout à fait différent est l'avis de la Cour européenne des droits de l'homme que, après avoir estimé conforme à l'article 1 Protocole n° 1 les mesures législatives qui ont suspendu les expulsions durant la période 1984–1988 (car, dictées par la nécessité de faire face au nombre élevé de baux venus à échéance en 1982 et 1983, ainsi que par le souci de permettre aux locataires concernés de se reloger dans des conditions adéquates ou d'obtenir des logements sociaux)³⁰, a jugé une charge spéciale et excessive le prolongement dans les années de la suspension législative de l'exécution forcée des expulsions³¹.

²⁷ *Beyeler c. Italia*, 05/01/2000, ricorso n° 33202/96.

²⁸ Breccia U., « Gli interessi tutelati », in: Cuffaro V. (a cura di), *Le locazioni urbane (Vent'anni di disciplina speciale)*, Torino 1999, pp. 15 ss.

²⁹ Corte Costituzionale, 07/10/2003, n° 310.

³⁰ *Spadea e Scalabrino c. Italia*, 28/09/1995, ricorso n° 12868/87.

³¹ *Immobiliare Saffi c. Italia*, 28/07/1999, ricorso n° 22774/93.

En ce qui concerne la seconde question, la loi n° 61 de 1989 avait plafonné l'indemnisation que pouvait réclamer le propriétaire à une somme égale au loyer versé par le locataire au moment de l'expiration du bail, indexée sur la hausse du coût de la vie (article 24 de la loi n° 392 du 27 juillet 1978) et majorée de 20 %, pour toute la période pendant laquelle le propriétaire n'avait pu jouir de son appartement. La Cour Constitutionnelle³² a souligné la corrélation qui doit exister entre la limitation au dédommagement et les périodes de suspension *ex lege* des expulsions et a déclaré, par conséquent, non raisonnable la prolongation *sine die* de l'exemption pour le locataire de l'obligation de réparer les préjudices selon les règles ordinaires (à savoir, l'art. 1591 du code civil).

(v) L'article 44 de la Constitution donne au législateur la directive de réaliser l'exploitation rationnelle du sol et d'établir des rapports sociaux équitables. À ces fins, un « loyer équitable », qui puisse assurer une « équitable rémunération » du travail du fermier et de sa famille, a été introduit par la loi 567/62.

La Cour Constitutionnelle³³ a censuré le mécanisme de détermination du « loyer équitable » prévu par la loi 203/82, la où faisait référence au revenu foncier résultant du cadastre rural du 1939, réévalué sur la base de coefficients de multiplication; tout en soulignant l'exigence de prendre en considération l'effectives et diverses caractéristiques des terrains agricoles.

2.2. LES LIMITATIONS AU DROIT DE PROPRIÉTÉ SOUS RÉSERVE D'INDEMNISATION

La pluralité des statuts propriétaires, en relation à la multiplicité des intérêts généraux qui gravent sur des particulières catégories des biens, est la prémisse logique dont la jurisprudence constitutionnelle s'est servie pour différencier les limitations relatives aux modes de jouissance et d'acquisition du droit de propriété, des limitations qui ont la substance d'une expropriation.

Pour tracer le « limite des limitations » au droit de propriété la Cour Constitutionnelle a utilisé essentiellement les deux suivants critères:

- a) l'objectivité de l'assujettissement à la réglementation;
- b) l'intensité du sacrifice produit³⁴.

Sur le plan constitutionnel, la question de l'indemnisation se pose en présence de limitations au droit de disposer de la propriété qui:

- visent à une expropriation, ou qui vident, *de facto*, le droit de propriété de sa substance;
- dépassent le délai prévu par le législateur;

³² Corte Costituzionale, 09/11/2000, n° 482.

³³ Corte Costituzionale, 05/07/2002, n° 318.

³⁴ Marini F.S., *Il « private » e la Costituzione*, Milano 2002, pp. 21 ss.

– dépassent, du point de vue quantitatif, le normal marge de tolérance³⁵.

Des hypothèses particulières de limitation sont: l'inclusion coactive des fonds dans le périmètre d'une entreprise faunique (i), l'occupation temporaire (ii), l'expropriation indirecte – *occupazione acquisitiva* ou *accessione invertita* – (iii), l'*occupazione usurpativa* (iv).

(i) D'après la loi, il est possible constituer des entreprises fauniques, dans le but de conservation et rétablissement environnemental, quand il y a le consentement des propriétaires et des exploitants agricoles qui représentent le 95 % de la superficie totale, en étant prévue l'inclusion coactive des terrains restants. La charge (devoir supporter la présence, l'établissement et le passage de la faune) dont se trouve gravée le fonds, en n'étant pas un limite inhérent à des caractéristiques objectives du bien, fait surgir l'obligation d'indemniser: le concessionnaire de l'entreprise doit correspondre une indemnisation, au propriétaire ou au exploitant de la propriété foncière, à compensation de la restriction à son droit de jouir et disposer du fonds et, éventuellement, les dommages-intérêts pour les dommages à cause d'animaux sauvages³⁶.

(ii) Il s'agit d'une mesure spéciale de réglementation des biens d'intérêt historique-artistique, qui a pour effet d'interdire au propriétaire d'un fonds de jouir de son bien pour le temps nécessaire à y effectuer des recherches archéologiques. La loi prévoit une indemnité à réparation des dommages causés par les travaux de recherche³⁷.

(iii) La Cour de Cassation³⁸ a élaboré le principe en vertu duquel la puissance publique acquiert *ab origine* la propriété d'un terrain sans procéder à une expropriation formelle lorsque, après l'occupation du terrain, et indépendamment de la légalité de l'occupation, un ouvrage public a été réalisé: lorsque l'occupation est *ab initio* sans titre, le transfert de propriété a lieu au moment de l'achèvement de l'ouvrage public; lorsque l'occupation du terrain a initialement été autorisée, le transfert de propriété a lieu à l'échéance de la période d'occupation autorisée. La propriété du bien doit donc être déterminé en raison de l'intérêt économique et social qu'il peut satisfaire³⁹.

Le législateur a étendu l'efficacité dudit principe jurisprudentiel au secteur des logements résidentiels publics⁴⁰. Le sacrifice de l'intérêt individuel à la restitution du fonds illégitimement exproprié au nom de l'intérêt public à la réalisation des

³⁵ Corte Costituzionale, 20/05/1999, n° 179.

³⁶ Corte Costituzionale, 31/05/2000, n° 164.

³⁷ Corte Costituzionale, 19/12/1961, n° 72.

³⁸ Cassazione, Sezione Unite, 26/02/1983, n° 1464, *Foro amministrativo* 1984, p. 322.

³⁹ F. Cintoli/M. R. San Giorgio, *Proprietà e costituzione*, Milano 2002, pp. 251 ss.

⁴⁰ Art. 3, loi 27 octobre 1988, n° 458.

logements résidentiels publics, est, à avis de la Cour Constitutionnelle⁴¹, compatible avec l'article 42,2 et 42,3 de la Constitution, en représentant une concrète actualisation de la fonction social de la propriété. Le fait que l'administration devienne propriétaire d'un terrain en tirant bénéfice de son comportement illégal ne pose, dans la jurisprudence nationale, aucun problème sur le plan constitutionnel⁴², tandis que la Cour européenne des droits de l'homme⁴³ émet des réserves sur la compatibilité avec le principe de légalité d'un mécanisme qui, de manière générale, permet à l'administration de tirer bénéfice d'une situation illégale et par l'effet duquel le particulier se trouve devant le fait accompli.

Le législateur⁴⁴ avait disposé que le montant dû à l'intéressé, en contrepartie de la perte du droit de propriété, ne pût dépasser le montant de l'indemnité prévue pour le cas d'expropriation formelle. Cette disposition a été déclarée inconstitutionnelle⁴⁵. Après avoir considéré que le montant de l'indemnité – obligation *ex lege* – représente le point mort entre l'intérêt public à la réalisation de l'œuvre et l'intérêt individuel à la conservation du bien, alors que le montant des dommages intérêts – obligation *ex delicto* – doit réaliser l'équilibre entre l'intérêt public à la conservation de l'œuvre déjà existante et la réponse de l'Etat à protection de la légalité violée en conséquence de la illicite manipulation-destruction de la propriété privé, la Cour Constitutionnelle estime qu'il y a une violation de l'article 3 de la Constitution (principe d'égalité), puisque mettre sur le même rang, dans le cas de l'expropriation indirecte, le montant des dommages-intérêts et le montant de l'indemnité d'expropriation entraîne un faveur excessif pour l'intérêt public (déjà essentiellement satisfait par la prévision de non restitution du terrain) au détriment de l'intérêt individuel, et une violation de l'article 42,2 de la Constitution, en raison de la perte de garantie qui provient d'une si faible réponse à la violation du droit de propriété.

La législation actuelle prévoit que l'indemnisation ne peut pas dépasser le montant de l'indemnité prévue dans l'hypothèse d'une expropriation formelle (somme divisée par deux de la valeur vénale et du revenu foncier, de laquelle on déduit 40 %), sans cet abattement de 40 % et moyennant une augmentation de 10 %.

⁴¹ Corte Costituzionale, 31/07/1990, n° 384.

⁴² Corte Costituzionale, 23/05/1995, n° 188.

⁴³ *Belvedere Alberghiera S.r.l. c. Italia*, 30/05/2000, ricorso n° 31524/96.

⁴⁴ Arts. 5^{bis}, 6, decret-loi n° 333/92, converti en loi n° 359/92, incorporé par Decreto del Presidente della Repubblica 8 juin 2001, n° 327 « Testo unico delle disposizioni legislative e regolamentari in materia di espropriazione di pubblica utilità ».

⁴⁵ Corte Costituzionale, 02/11/1996, n° 369.

(iv) Dans la jurisprudence constitutionnelle⁴⁶, un des éléments essentiels de l'expropriation indirecte est la déclaration d'utilité publique (à savoir, la disposition administrative qui attribue au fonds une destination d'intérêt public), qui justifie la non restitution du terrain et la réduction du montant des dommages-intérêts.

Dans le cas où une déclaration d'utilité publique manque, la concrète réalisation d'un ouvrage public sur un fonds privé ne suffit pas à transformer en exercice de pouvoir administratif l'occupation du terrain et, pourtant, le propriétaire pourra demander la restitution du bien ou les dommages-intérêts (intégrale, selon les principes de la responsabilité civile)⁴⁷. En tout cas aucune acquisition *ab origine* de la propriété, en faveur de la puissance publique, n'a lieu.

3. *Expropriation*

3.1. PURPOSE OF THE EXPROPRIATION:

STATUTORY AND ADMINISTRATIVE EXPROPRIATION

Expropriation has its constitutional basis mainly in Article 42,3 of the Constitution that provides private property can be expropriated for reasons of general interest in the cases provided for by law and with compensation. Article 42,3 mentions only private property, but undoubtedly concerns also the public property⁴⁸ and other rights *in rem*⁴⁹.

The expropriation is included in the category of the Public Authority's ablatory acts through which a right or a power concerning generally lands (but also goods or rights) are compulsorily conveyed from a subject to another one to allow the conveyance's beneficiary to satisfy a general interest with or without changing the land⁵⁰. The deprivation of the property cannot be included in the category of the expropriation if it follows from a punitive sanction.

It's an often debated problem if the laws provide the expropriation of a power or establish only a public restriction to the private property which should not be

⁴⁶ Corte Costituzionale, 04/02/2000, n° 24.

⁴⁷ Cassazione civile, Sezione I, 18/02/2000, n° 1814.

⁴⁸ Coviello N., « Contributo allo studio dell'espropriazione per motivi di interesse generale », *Consiglio di Stato* 1984, II, p. 329; Giannini M. S., *Diritto pubblico dell'economia*, Bologna 1977, pp. 77 ss.

⁴⁹ L. Bigliazzi Geri/U. Breccia/F. D. Busnelli/U. Natoli, *Diritto Civile*, 2, *I diritti reali*, Torino 1995, pp. 43 ss.

⁵⁰ Vignale M., *Espropriazione per pubblica utilità e occupazione illegittima*, Napoli 1998, p. 1.

compensated. In this regard, the Constitutional Court⁵¹ stated every act restricting and depriving of its contents the property until making it useless is an expropriation to compensate (so called latent expropriations). Owing to these conclusions it's not possible to consider the expropriation only as a compulsory purchase⁵². The Constitutional Court⁵³ distinguished therefore the simple conforming acts, that are limitations in the strict sense of the word, and the expropriating limitations because, even if similar, only the former link up with the land's objective features and so do not have acquisitive but only privative characteristics and weigh upon homogeneous categories of lands. If the limitation concerns only specific lands there is instead a substantial expropriation to compensate⁵⁴. Moreover, scholars and courts stressed out that the city planning legislation restricting the power to build cannot last unlimitedly until their realization with the necessary expropriations, so after a reasonable time they must end or be compensated⁵⁵.

Expropriation can happen only in the cases provided for by law. However, this legislative reserve must be interpreted in a relative meaning, that is to say the law must provide the authorities with the power to expropriate, the proceedings to follow, the general interests to realize, the lands to expropriate, the beneficiaries and people sustaining the expropriation.

Besides, the expropriation can be for reasons of general and not personal interest and only with compensation. Originally, the expropriation was employed to realize certain works necessary for the common interest, but, especially after the last world war, there was the need to find new lands to provide for the housing problem and the public services essential for people of every country⁵⁶. The expropriation of land today has to realize a purpose of territorial programming and planning⁵⁷. The scholars and the courts have come thus to the conclusion the expropriation does not find any more its reason in the simple

⁵¹ Ruling 20 Jan. 1966, no. 6.

⁵² G. Alpa/M. Bessone/G. Rolla, *Il privato e l'espropriazione*, Milano 1998, pp. 3 ss.

⁵³ Corte Costituzionale, 29 May 1968, no. 55.

⁵⁴ R. Galli, *Corso di diritto amministrativo*, Padova 1996, pp. 602 ss.

⁵⁵ Corte Costituzionale, 22 Dec. 1989, no. 575.

⁵⁶ A. Mirabelli Centurione, *Lineamenti dell'espropriazione per causa di pubblica utilità*, Milano 1992, p. 48.

⁵⁷ U. Pototschnig, 'L'espropriazione per pubblica utilità', in: *Atti del congresso celebrativo del centenario delle leggi amministrative di unificazione*, pt. IV: *Le opere pubbliche*, II: *L'espropriazione per pubblica utilità*, Vicenza 1967, p. 9.

public interest, but directly in the territorial planning, duly coordinated with its various purposes⁵⁸.

The expropriation gives rise to a complex contentious administrative proceeding⁵⁹ divided in some necessary phases, as the public interest statement, the compulsory purchase order and the reckoning of the compensation, and in a theoretically only possible phase (but actually it's often an other essential phase), the provisional occupancy⁶⁰. The property's compulsory purchase follows, however, only the public authority order. Generally, this order is an administrative order, but sometimes the expropriation is legislative. In this regard, we can remember the nationalization of the electricity companies or the agrarian reform⁶¹ ex Article 43 and 44 of the Constitution.

Many scholars said only these two Articles can justify a legislative expropriation for the indicated therein purposes, while Article 42,3 provides a reserve of administrative provision⁶², but other scholars assert an opposite opinion, according to which Article 42,3 would admit without limits the legislative expropriation⁶³. In these cases, not only the law locates the lands to expropriate and contains the public interest statement, but it also provides the purchase is realized by legislative decree⁶⁴. The only reason of this particular proceeding is to exclude the cognisance of the ordinary and administrative magistracy⁶⁵.

The scholars wondered if, using directly Article 42,3, the public authority can discretionally expropriate for any general interest. The answer was negative,

⁵⁸ G. Abbamonte, 'Espropriazione, pianificazione e coordinamento nell'amministrazione del territorio', in: *Studi in memoria di Vittorio Bachelet*, III, Milano 1987, pp. 3 ss.

⁵⁹ M. S. Giannini, *Diritto amministrativo*, Milano 1970, p. 1181; E. Casetta/G. Garrone, 'Espropriazione per pubblico interesse', *Enciclopedia Giuridica Treccani*, XIII, 1989, p. 3.

⁶⁰ F. Volpe, 'Aspetti problematici delle occupazioni preliminari d'urgenza', I-II, *Rivista di Diritto Urbanistico* 1997, pp. 1, 4, 191 ss.

⁶¹ E. Romagnoli, 'Riforma fondiaria', *Novissimo Digesto Italiano*, XV, 1968, pp. 1072 ss.

⁶² V. Crisafulli, 'Dichiarazione di manifesta infondatezza e limiti al giudizio della Corte. Interrogativi in tema di leggi singolari di espropriazione', *Giurisprudenza costituzionale*, 1966, pp. 1138 ss.

⁶³ F. Bartolomei, *L'espropriazione nel diritto pubblico*, II, *L'espropriazione ope legis*, Giuffrè, Milano 1968, pp. 92 ss.

⁶⁴ A. Carrozza, 'Riforma agraria e fondiaria', *Enciclopedia del Diritto*, XL, Milano 1989, pp. 852 ss.

⁶⁵ G. Landi, 'Energia elettrica (nazionalizzazione)', *Enciclopedia del diritto*, XIV, Milano 1965, p. 900.

because it is necessary a law that, however, can discretionally weigh the public interest (but it must respect the other constitutional rights and pursue a general interest). Sometimes, the law can generically indicate the public interest and entrust its identification to the public authority with the public interest statement (the same situation happens when this statement is implied by law in another administrative act). In other cases, the same law identifies the public interest in an indeterminate series of similar cases, even if the Public Authority must verify if the case in point is included in the general category. Finally, the same law recognizes sometimes the general interest in a specific case.

Recently, a new acquisition's way of the Public Authority imposed itself in Italy, the so-called appropriative occupancy⁶⁶. This happens when the Public Authority takes possession *sine titulo* and unlawfully of a land and builds a public work changing irreversibly the real estate, so purchasing it with an original acquisition⁶⁷. In this regard, the Courts traced back this particular occupancy to the tort liability provided by the Article 2043 Civil Code⁶⁸ and distinguished the appropriative from the usurpatory⁶⁹ occupancy that presupposes the lack of the public interest statement⁷⁰, so that the Public Authority does not purchase the property⁷¹. The Constitutional Court recognized the legitimacy of this occupancy⁷².

3.2. DUTY TO COMPENSATE:

PRIOR, SUBSEQUENT, JUST AND REASONABLE COMPENSATION

The Article 42,3 considers the compensation a requirement of legitimacy for the expropriation⁷³. Otherwise the expropriation, however, is not automatically

⁶⁶ C. Guglielmello, 'La c.d. accessione invertita a favore della pubblica amministrazione', *Giustizia civile* 8/1998, II, pp. 331 ss.

⁶⁷ Cassazione Sezione Unite, 26 Feb. 1983, no. 1464, *Foro italiano* 1983, I, p. 626. Consiglio di Stato, Adunanza Plenaria, 7 Feb. 1996, no. 1, *Foro italiano* 1996, III, p. 137.

⁶⁸ Cassazione, Sezioni Unite, 25 Nov. 1992, no. 12546, *Foro italiano* 1993, I, p. 87.

⁶⁹ S. Salvago, 'L'occupazione "usurpativa" non può essere espropriazione', *Foro italiano* 2000, pp. 1860 ss.

⁷⁰ Cassazione, Sezione I, 18 Feb. 2000, no. 1814, *Foro italiano* 2000, I, p. 1857.

⁷¹ Cassazione, Sezione I, 20 June 2000, no. 8367, *Massimario Cassazione* 2000.

⁷² Corte Costituzionale, 23 May 1995, no. 188; 4 Feb. 2000, no. 24.

⁷³ Consiglio di Stato, Sezione IV, 13 Nov. 1973, no. 1003, *Consiglio di Stato* 1973, I, p. 1573. N. Assini, *Pianificazione urbanistica e governo del territorio*, Padova 2000, pp. 261 ss.; A. M. Sandulli, *Manuale di diritto amministrativo*, Napoli 1989, p. 850.

vitiated by virtue of an implicit reference to the clauses of the fundamental law no. 2359/1865 about the compensation⁷⁴.

With regard to the legal nature of the compensation, a first opinion asserts the law can provide discretionally the criteria to determine the compensation, that must only correspond to the right value⁷⁵. Another theory says the lonely parameter to use is that of the selling value of the land. In every case the compensation is not a reparation for damages, but only an indemnity⁷⁶. The dispossessed landowner suffers for the general interest a sacrifice greater than that of the other members of the community and he must be compensated in a way to recreate *par condicio*.

The compensation has the nature of an *jus in rem*, not *in personam*⁷⁷. This is a credit rising when the expropriation begins. There is not any constitutional principle imposing to pay or to determine the compensation before the expropriation, unlike the former Article 438 of the 1865's Italian civil code and the Constitutions of 1848 in the non-unified Italian States provided⁷⁸. The Constitutional Court excluded the liquidation of the compensation has to be before the purchase⁷⁹.

The fundamental law about the expropriation provides, anyway, that compensation is preventively determined, even if provisionally. In this case, the dispossessed landowner can accept the compensation or find a different agreement with the expropriating authority⁸⁰. If he refuses the laws on this matter provide many different criteria for determining the compensation.

3.3. QUANTUM AND VALUE OF THE COMPENSATION

Fundamental law no. 2359/1865 provided the compensation should be referred to the selling value, but the laws often do not follow this criterion. Arguing with the formal and substantial equal protection principle (Art. 3 of the Constitution),

⁷⁴ G. Landi, 'Espropriazione per p.u. (principi)', *Enciclopedia del diritto*, Milano 1996, pp. 819 ss.

⁷⁵ G. Motzo/A. Piras, 'Espropriazione e "pubblica utilità"', *Giurisprudenza costituzionale* 1959, pp. 151 ss.

⁷⁶ Corte Costituzionale, 25 May 1957, no. 61.

⁷⁷ N. Centofanti, 'L'espropriazione per pubblica utilità e l'occupazione d'urgenza', Viareggio 1996, p. 85.

⁷⁸ G. Landi, 'L'espropriazione delle imprese elettriche', *Rivista delle società* 1963, I, pp. 842 ss.

⁷⁹ Corte Costituzionale, 6 Dec. 1977, no. 138.

⁸⁰ S. Fantini, 'Gli accordi in materia di espropriazione', *Giustizia civile* 2/1999, pp. 53 ss.

scholars retain rightful to differ the compensation according to the kind of land purchased⁸¹ and suggested even a so called personalized compensation, taking into consideration the personal income of the dispossessed landowner⁸². The criterion was not adopted by the law.

An effort to create a new criterion was made with law no. 10/77. This law substantially determined the compensation using only the average agricultural value of the land, even if it was a building area, because the *ius aedificandi* was theoretically parcelled out and transferred to the Italian State.

The Constitutional Court's judgement no. 5/80 hold this criterion was arbitrary.

The Constitutional court case law established that law cannot provide a compensation only symbolic⁸³, but must grant a serious relief⁸⁴ for the dispossessed landowner. The compensation has to be a just and reasonable consideration, consisting in the greatest contribution the Public Authority can give the person damaged in favour of the community⁸⁵. The compensation cannot set aside the essential features of the land as the potential economic utilization, especially edificatory⁸⁶.

At any case, the Court considers necessary to determine the compensation starting from the selling value, even if they cannot coincide, reducing it above all to eliminate the incomes⁸⁷.

Compensation was then regulated by Article 5bis of the law no. 359/92 on the basis of the so-called double track.⁸⁸ The compensation for building areas must conform with the average of the selling value and the income from an estate for the last decade revalued with a 40 % reduction⁸⁹, while for the not building areas it is applied a different criterion, the so called average agricultural value, provided in law no. 865/71⁹⁰. Compensation for ready built areas, instead, are regulated, by

⁸¹ Mercogliano, 'Indennità di espropriazione e ridefinizione del contenuto economico riconosciuto ai diritti della proprietà immobiliare', *Rivista giuridica dell'edilizia* 1982, I, pp. 296 ss.

⁸² Assini-Nistri, 'L'"indennizzo personalizzato" come giusto indennizzo', *Rivista giuridica dell'edilizia* 1976, II, p. 135.

⁸³ Corte Costituzionale, 29 Dec. 1959, no. 67.

⁸⁴ G. U. Rescigno, *Corso di diritto pubblico*, Bologna 2000, p. 668.

⁸⁵ Corte Costituzionale, 12 Feb. 1960, no. 5.

⁸⁶ Corte Costituzionale, 30 Jan. 1980, no. 5.

⁸⁷ Corte Costituzionale, 12 May 1988, no. 530.

⁸⁸ S. Salvago, *Occupazione acquisitiva nelle espropriazioni per pubblica utilità*, Milano 1997.

⁸⁹ Cassazione, Sezione I, 20 June 2000, no. 8388, *Massimario Cassazione* 2000.

⁹⁰ Cassazione, Sezioni Unite, 24 Oct. 1984, no. 5401, *Foro italiano* 1985, I, 1, pp. 47 ss.

law no. 2359/1865.⁹¹ The new law excludes the existence of a *tertium genus* of areas⁹², equalizing the agricultural and the not agricultural ineligible for building lands.⁹³

The Constitutional Court declared the law no. 359/1992⁹⁴ constitutionally legitimate, especially the voluntary conveyance when is provided a 40 % compensation's reduction and even if the purchase is stopped for the inadequate proposal⁹⁵.

The law no. 549/95 extended the Article 5bis of the law no. 359/92 also for the appropriative occupancy⁹⁶, but the Constitutional Court said this equalizing about the compensation between an illicit occupancy and a lawful expropriation is illegitimate⁹⁷.

Afterwards, this law was reproduced in the law no. 662/96, with some little change in favour of the dispossessed owner and only about the occupancies before 30 September 1996, and this time the Constitutional Court recognized its legitimacy⁹⁸.

II. Documentation

1. Relevant Legislation

Civil Code: Articles 810–1172 (Libro Terzo: Della proprietà)

Legislative Decree 8 June 2001, no. 327 (Unique Text of Legislative and Governmental Rules regarding Expropriation for Public Interest)

Legislative Decree 22 January 2004, no. 41 (Code of the Cultural Goods and Landscape)

⁹¹ Cassazione sezione civile I, no. 8095/96.

⁹² Corte Costituzionale, 23 July 1997, no. 261.

⁹³ M. Vignale, *L'espropriazione per pubblica utilità e le ultime leggi di modifica*, Napoli 1994.

⁹⁴ Corte Costituzionale, 16 June 1993, no. 283.

⁹⁵ Corte Costituzionale, 6 July 2000, no. 262.

⁹⁶ Benini, 'Occupazione appropriativa ed espropriazione rituale: non c'è più differenza?', *Foro italiano* 1996, I, p. 5.

⁹⁷ Corte Costituzionale, 2 Nov. 1996, no. 369, F. Volpe, 'Espropriazioni amministrative senza potere e criteri di determinazione del c.d. risarcimento del danno', *Rivista di diritto urbanistico* 3/1996, pp. 299 ss.

⁹⁸ Corte Costituzionale, 30 Apr. 1999, no. 148, *Foro italiano* 1999, I, 2, pp. 1715 ss.

2. *Essential Constitutional Case-law*

Cour européenne des droits de l'homme, *Belvedere Alberghiera S.r.l. c. Italia*, 30 mai 2000, ricorso n° 31524/96, *Beyeler c. Italia*, 5 janvier 2000, ricorso n° 33202/96, *Spadea e Scalabrino c. Italia*, 28 septembre 1995, ricorso n° 12868/87, *Immobiliare Saffi c. Italia*, 28 juillet 1999, ricorso n° 22774/93

Corte costituzionale, rulings no. 61/1957; 67/1959; 5/1960; 72/1961; 64/1963; 6/1966; 55/1968; 245/1976; 138/1977; 108/1986; 391, 575/1989; 328, 384/1990; 379/1994; 108, 143, 188, 269/1995; 120, 369, 419/1996; 262/1997; 167, 179, 394/1999; 24, 70, 164, 238, 482/2000; 155, 318/2002; 185, 310/2003

Corte di Cassazione, Sezione Unite, 26 February 1983, no. 1464, *Foro amministrativo* 1984, p. 322, Sezione Unite, 25 November 1992, no. 12546, *Foro italiano* 1993, I, p. 87, Cassazione civile, Sezione I, 18 February 2000, no. 1814, *Foro italiano* 2000, I, p. 1857, Cassazione civile, Sezione I, 20 June 2000, no. 8367, *Massimo Cassazione* 2000

Consiglio di Stato, Adunanza Plenaria, 7 February 1996, no. 1, *Foro italiano* 1996, III, p. 137, Sezione IV, 13 November 1973, no. 1003, *Consiglio di Stato* 1973, I, p. 1573

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Cintioli F./San Giorgio M. R., *Proprietà e costituzione*, Milano: Giuffrè, 2002

Rodotà S./Galgano F., Articles 42–44, in: G. Branca/A. Pizzorusso (eds.), *Commentario della Costituzione*, Bologna 1982

Chapter 2

LA LIBERTE DE PROFESSION ET D'ETABLISSEMENT

Sabrina Praduroux*

I. Liberté de l'activité professionnelle

Le travail est la valeur constitutionnelle posée à fondement du système sociale de l'Etat (art. 1), en tant que outil principal de réalisation de la personnalité individuelle et instrument de intégration sociale¹. Les articles 4 et 35 de la Constitution imposent de promouvoir les conditions pour donner effectivité au droit au travail, mais ils n'assurent pas l'obtention ou la conservation d'un emploi ou la stabilité du poste². La reconnaissance du droit au travail se résout donc dans la constitutionnalisation de la prétention des citoyens à l'égard des pouvoirs publics, afin qu'ils poursuivent une politique visant à assurer le plein emploi et à ne pas poser des obstacles au libre accès au marché de travail³.

1. *Choix de la profession*

Le droit au travail, reconnu à tous les citoyens (art. 4), est un droit fondamental de liberté de l'individu, qui s'exprime dans le choix et dans le mode d'exercice de

* Sabrina Praduroux, Dottore di ricerca, Searcher at Institute of International Economic Law, University of Helsinki.

¹ Corte Costituzionale, 18/07/1997, n° 246.

² Corte Costituzionale, 22/10/1999, n° 390.

³ Salazar C., *Dal riconoscimento alla garanzia dei diritti sociali – Orientamenti e tecniche della Corte costituzionale a confronto* –, Torino 2000, p. 44.

l'activité professionnelle⁴. En ce qui concerne la liberté de choix, l'article 33 de la Constitution prescrit d'abord un examen de l'Etat pour l'habilitation à l'exercice d'une profession. Cette règle s'applique surtout aux professions libres et est une garantie de la préparation technique et culturelle à un travail responsable.⁵ La Cour Constitutionnelle⁶ a, par exemple, estimé raisonnable que l'exercice de la profession de psychologue et l'activité de psychothérapeute soient réservés à personnes qui ont spécifiques qualités attitudinales (loi n° 56, du 18 février 1989). Les examens universitaires et autres titres peuvent être déclarés équipollents.⁷

D'après l'interprétation de la Cour Constitutionnelle, l'article 4 concerne principalement « l'accès au marché du travail » et il ne peut donc être invoqué en se référant à la question des limitations d'âge pour la résolution de la relation du travail⁸. La Cour a déclaré conforme à l'article 4 les normes sur le monopole public du placement en tant qu'instrument d'une politique de pleine occupation et garantie de la personnalité et dignité du travailleur dépendant contre les discriminations et contre l'exploitation de sa condition de chômage.⁹

1.1. DOUBLE EMPLOI: PROFESSION PRINCIPALE ET PROFESSION ACCESSOIRE

À avis de la Cour Constitutionnelle¹⁰, l'activité de fonctionnaire public *part-time* est compatible avec l'exercice de toutes professions libérales (loi n° 662 du 23 décembre 1996).

1.2. FONCTIONS PUBLIQUES

La Constitution établit que tous les citoyens de l'un ou de l'autre sexe peuvent accéder aux fonctions publiques et aux charges électives dans des conditions d'égalité selon les qualités requises fixées par la loi (art. 51, 1) et que l'accès aux emplois des administrations publiques a lieu par concours, sauf dans les cas fixés par la loi (art. 97,3).

Un aspect particulier du droit au travail est donc la générale liberté dans l'accès au travail, en sorte que la prévision (loi n° 53 du 10 février 1989; décret royal n° 12 du 30 janvier 1941) de subordination à l'appartenance à une famille

⁴ Corte Costituzionale, 09/06/1965, n° 45.

⁵ Corte Costituzionale, 77/1964, 111/1973 (« ragioniere »), 100/1989 (« odontoiatra »), 240/1974 (non: maître de danse), 127/1985 (« patrocinatore legale »).

⁶ Corte Costituzionale, 27/07/1995, n° 412.

⁷ Corte Costituzionale, 43/1972, 174, 175/1980, 207/1983.

⁸ Corte Costituzionale, 30/07/1997, n° 293.

⁹ Corte costituzionale, 25 /11/1986, n° 248

¹⁰ Corte Costituzionale, 11/06/2001, n° 189.

de indiscuté – selon l'appréciation incontestable, respectivement du Ministre compétent ou du Conseil Supérieur de la Magistrature – estimation morale, pour accéder aux rôles du personnel de la Police et aux concours de la magistrature, est constitutionnellement illégitime¹¹.

D'une manière analogue, la Cour Constitutionnelle¹² a censuré la prescription qui plaçait l'être célibataire ou veuf parmi les qualités requises pour être recruté dans le corps militaire chargé de la police financière du territoire (loi n° 64 du 29 janvier 1942) et pour participer aux concours pour l'admission aux cours de l'école militaire (décret législatif n° 24 du 31 janvier 2000), en soulignant que le pouvoir discrétionnaire du législateur dans la détermination des qualités requises pour l'accès aux fonctions publiques doit être assujettie à un contrôle de constitutionnalité plus étroit quand il s'agit d'évaluer la légitimité d'une prévision qui vient à constituer, d'une manière indirecte, une restriction à l'exercice de droits fondamentaux: tels que, dans le cas d'espèce, le droit au mariage et celui au respect de la vie privée.

2. Choix du lieu de la formation professionnelle

La formation professionnelle est une matière de compétence concurrente des Régions (art. 117 (3) de la Constitution), mais les lois et activités des Régions en ce champ ne peuvent pas créer des obstacles à la libre circulation des citoyens (art. 120 de la Constitution) et doivent respecter les principes de la loi cadre n. 845 du 1978. La Cour constitutionnelle a censuré l'omission d'une protection de l'apprenti contre les licenciements.¹³

3. Exercice d'une profession

La garantie du droit au travail, impliquant une liberté de travailler, entraîne une générale et indistincte liberté d'exercer une activité professionnelle, mais c'est au législateur de fixer les conditions et les limitations visant à la protection des autres valeurs pareillement dignes de considération¹⁴, aussi en encourageant certains modèles de relations de travail¹⁵.

De nombreuses activités professionnelles font donc l'objet d'une réglementation particulière. Il est fréquent que l'exercice d'une profession

¹¹ Corte Costituzionale, 31/03/1994, n° 108.

¹² Corte Costituzionale, 12/11/2002, n° 445.

¹³ Corte costituzionale, n° 169/1973.

¹⁴ Corte Costituzionale, 26/10/2000, n° 441.

¹⁵ Corte Costituzionale, 20/07/1999, n° 330.

suppose l'obtention d'une autorisation administrative préalable, à ce sujet la Cour Constitutionnelle¹⁶ a précisé que une disposition de la loi qui impose, à compter d'une certaine date, en tant que condition pour l'inscription dans le relatif registre, la réussite d'un examen visant à la vérification de l'aptitude professionnelle, ne viole pas le droit à l'exercice d'une activité professionnelle de nouvelle réglementation.

La liberté de travailler quand-même implique la prohibition de telles interventions des autorités publiques que pourraient créer des obstacles au choix des modalités de l'exercice d'une profession libre où d'un métier.¹⁷ La Cour Constitutionnelle a déclaré conforme à la constitution les limitations territoriales à l'exercice de certaines professions libres.¹⁸

II. Documentation

1. Relevant Legislation

Civil code: Articles 2060–2246 (Libro quinto. Del Lavoro, Titoli I.-IV.)

Law 24 June 1997, no. 196 (Rules regarding the promotion of the employment)

2. Essential Constitutional Case-Law

Corte costituzionale, rulings no. 77/1964; 45/1965; 54/1966; 102/1968; 43/1972; 111, 169/1973; 240/1974; 94/1976; 174, 175/1980; 207/1983; 127/1985; 248/1996; 100/1989; 108/1994; 412/1995; 246, 293/1997; 330, 390/1999; 441/2000; 189/2001; 35/2004

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T. Treu/M. Napoli, 'Article 35', in: G. Branca/A. Pizzorusso (eds.), *Commentario della Costituzione*, Bologna 1979

¹⁶ Corte Costituzionale, 26/01/2004, n° 35.

¹⁷ Corte Costituzionale, n° 45/1965, 102/1968, 94/1976.

¹⁸ Corte Costituzionale, n° 54/1966

La liberté de profession et d'établissement

Chapitre 3

LA LIBERTE DU COMMERCE ET DE LA CONCURRENCE

Sabrina Praduroux*

Le Constituant a placé à sauvegarde des droits fondamentaux de la personne dans l'exercice des activités productives l'article 41¹. La doctrine et la jurisprudence ont vu dans cet article, qui garanti la liberté d'initiative économique privée, la source constitutionnelle de la liberté de concurrence, « l'une est un aspect de l'autre: la liberté d'initiative économique du particulier se présente, par rapport à la liberté d'initiative économique des autres, en tant que liberté de concurrence »².

De l'analyse de la jurisprudence émerge que la Cour Constitutionnelle est en train d'hiberner, par voie interprétative, le troisième alinéa –qui réserve au législateur le pouvoir de déterminer les programmes et les contrôles opportuns pour que l'activité économique et publique puisse être orientée et coordonnée vers de fins sociales- et, simultanément, de réveiller le premier alinéa de l'article 41, c'est-à-dire le droit d'initiative privée au quel se rattache, en tant que tête de chapitre de la discipline *antitrust*, l'article 1 de la loi n° 287 du 10 octobre 1990. Autrement dit, un progressif changement des critères d'appréciation dans le sens de la reconnaissance d'une pleine, mais pas absolue, liberté de concurrence est en cours.

* Sabrina Praduroux, Dottore di ricerca, Searcher at Institute of International Economic Law, University of Helsinki.

¹ Corte Costituzionale, 13/12/2000, n° 419.

² F. Galgano, « Article 41 », in : Branca G. (a cura di), *Commentario della Costituzione*, Bologna–Roma 1982, p. 11.

I. La liberté du commerce

1. Possibles interventions de l'État

Bien que la liberté du commerce et de l'industrie soient reconnues telles que valeurs fondamentales, l'autorité publique intervient dans l'activité économique, puisque la liberté du commerce est soumise aux limites connexes à l'utilité sociale, comme à ses exigences est subordonnée la liberté de la concurrence³. Poursuivant des buts fort variés, elle organise des entreprises, en déterminant la manière dont elles peuvent être exercées, voire entamées. Il est fréquent que l'exercice d'une entreprise suppose l'obtention d'une autorisation administrative préalable. De la même manière, son maintien est subordonné au respect d'un certain nombre de conditions. Par exemple, la loi n° 1002 du 31 juillet 1956 (art. 2), conditionne l'ouverture de nouvelles boulangeries à l'autorisation de la Chambre de commerce, de l'industrie et de l'agriculture de la Province sur la prémisses de l'estimé opportunité de la nouvelle installation par rapport au nombre des boulangeries existantes et au chiffre de la production dans la localité où l'autorisation est demandée. La Cour Constitutionnelle⁴ a déclaré la légitimité dudit article, sur la base de la considération qu'il vise à protéger l'équilibre local du marché.

La Cour Constitutionnelle⁵, a, au contraire, censuré la prétention du législateur régional (art. 21, loi n° 15 de la Région Ligurie, du 21 juillet 1986) d'assujettir à l'autorisation administrative les activités d'organisation de voyages, exercer de manière épisodique et sans finalité de profit, puisqu'en contraste avec le principe de liberté sociale.

1.1. REGLEMENTATION DU COMMERCE

La jurisprudence constitutionnelle sur l'article 41 confirme la légitimité de certaines barrières administratives à l'accès au marché, fondées sur des raisons de caractère pas directement économique et compatibles, en principe, avec la liberté de la concurrence.

Par exemple, en ce qui concerne l'activité de commerce des choses anciennes ou usagées, la Cour Constitutionnelle⁶ a estimé raisonnable le système de contrôles esquissé par le décret royal n° 773 du 18 juin 1931 – qui impose une

³ Corte Costituzionale, 30/07/1992, n° 388.

⁴ Corte Costituzionale, 08/02/1991, n° 63.

⁵ Corte Costituzionale, 12/03/1998, n° 50.

⁶ Corte Costituzionale, 29/91/1996, n° 13.

préalable déclaration à l'autorité locale de sécurité publique, un registre obligatoire des opérations –, puisqu'il poursuit une finalité de sécurité publique: la prévention des délits contre le patrimoine.

La Cour Constitutionnelle⁷ a jugé conforme aux principes constitutionnels la prévision de limitations à l'horaire d'ouverture et de garde des pharmacies prévus par la loi n° 21 de la Région Lombardie, du 3 avril 2000, en considérant que l'accentuation d'une forme de concurrence entre les pharmacies fondée sur la prolongation des horaires de fermeture pourrait contribuer à la disparition des établissements mineurs et altérer ainsi le, soi-disant, « réseau capillaire » (*rete capillare*) des pharmacies. En d'autres termes, selon la Cour, l'appréciation du législateur doit être considérée raisonnable, car concourt à la meilleure réalisation du service public.

Dans un autre arrêt⁸, le juge constitutionnel a considéré que l'article 5 de la loi n° 19 de la Région Marche du 15 octobre 2002, qui subordonne la délivrance de l'autorisation pour l'ouverture d'un centre commercial à la préventive réglementation d'urbanisme, introduit des limitations raisonnables à l'initiative économique privée pour défendre un intérêt d'importance constitutionnelle, tel qu'est l'aménagement du territoire.

1.2. PROTECTION DE L'ENVIRONNEMENT ET DU PATRIMOINE CULTUREL

L'environnement est une valeur fondamentale et primaire de l'ordre juridique, l'exercice des libertés constitutionnelles peut donc être limité en faveur des exigences qui découlent de sa protection.

Par exemple, la Cour Constitutionnelle⁹ a jugé que la lecture coordonnée des lois de la Région Friuli-Venezia Giulia n° 65 du 28 novembre 1988 et n° 22 du 14 juin 1996, qui établit que dans les installations de décharge des ordures, autorisés aux termes de la susdite loi n° 65, ne peuvent pas être traitées les ordures qui viennent des autres régions, apporte à la liberté d'initiative économique une limitation légitime, puisqu'elle vise à protéger la santé et l'environnement.

1.3. INTERVENTIONS SUR LE SYSTEME ECONOMIQUE

La liberté d'initiative économique privée, consacrée au premier alinéa de l'article 41, est d'une part balancée par la limite de l'utilité sociale et du respect de la sécurité, liberté et dignité humaine (deuxième alinéa), de l'autre elle est orientée

⁷ Corte Costituzionale, 04/02/2003, n° 27.

⁸ Corte Costituzionale, 22/06/2004, n° 176.

⁹ Corte Costituzionale, 03/06/1998, n° 196.

et coordonnée vers de fins sociales qui légitiment la prévision par le législateur ordinaire de programmes et contrôles (troisième alinéa). Elle peut parfois être complètement comprimée dans les cas où – en ayant par objet des services publics essentiels ou des sources d'énergie ou des situations de monopole, qui ont un caractère d'intérêt général prééminent – le législateur ordinaire la réserve originellement ou en transfère l'exercice à l'Etat, à des personnes publiques ou à des communautés de travailleurs ou d'usagers (art. 43). Entre les deux extrêmes représentés par la reconnaissance pleine et absolue de la liberté de l'initiative économique privée et par la réserve d'exercer des entreprises déterminées, des différentes possibles modelés de rapports économiques, caractérisés en fonction de l'intensité de l'intervention publique dans l'économie, trouvent place.

Par exemple, l'article 16, alinéa 5, de la loi de la Région Emilia-Romagna n° 16, du 17 mai 1986, interdit aux Communes de renouveler les concessions relatives aux installations de distribution des carburants pour autotraction, considérées – d'après les critères dictés par la même loi – marginales. Face à cette programmation publique dirigée à créer d'autorité une majeure concentration du marché, la Cour Constitutionnelle¹⁰, a considéré que la susdite norme, en individuant dans la faible productivité le limite au renouvellement des concessions, poursuit une finalité de rationalisation du réseau de distribution capable de favoriser une réduction des coûts connexes à la distribution. Telle finalité est donc, à avis de la Cour, tout à fait raisonnable et représente, sur le plan de l'utilité sociale, une approprié justification à la restriction de la liberté d'initiative économique privée.

2. Limitations à l'ingérence de l'État

La Cour Constitutionnelle¹¹ a précisé que la notion unitaire de marché qui émerge des articles 41 et 120 de la Constitution, ne permet pas la création de barrières territoriales artificielles à l'expansion de l'entreprise, et, par conséquent, elle a déclaré l'inconstitutionnalité de l'article 4,1 de la loi n° 27 de la Région Lombardie du 16 septembre 1996 qui subordonnait à l'autorisation régionale l'ouverture de filiales.

II. La liberté de la concurrence

Lors de la révision du Titre V de la deuxième partie de la Constitution par la loi constitutionnelle n° 3 du 18 octobre 2001, c'est-à-dire dans le contexte d'une

¹⁰ Corte Costituzionale, 24/06/1992, n° 301.

¹¹ Corte Costituzionale, 06/11/1998, n° 362.

reconsidération générale des rapports entre l'État, les Régions et les collectivités locales sous le signe du principe de subsidiarité, « la protection de la concurrence » est entrée dans l'article 117, alinéa 2, lettre e), parmi les matières expressément réservées à la législation exclusive de l'État. La concurrence a, ainsi, acquis une autonome dignité constitutionnelle.

Dans la jurisprudence sur ledit article, la Cour Constitutionnelle¹² a précisé que, du point de vue du droit national, la notion de concurrence ne peut ne pas refléter celle en vigueur dans le cadre communautaire, laquelle, liée à une idée de développement économique sociale, comprend les interventions de régulation, la discipline *antitrust* et les mesures visant à promouvoir un marché ouvert et en libre concurrence. L'article 117 réserve à la législation de l'État la monnaie, la protection de l'épargne et des marchés financiers, le système de change, le système fiscal et comptable de l'État, la péréquation des ressources financières et, justement, la protection de la concurrence, à signifier que la concurrence est une des leviers de la politique économique de l'État et, donc, elle ne peut pas être considérée seulement dans son acception statique, en tant que garantie des interventions de régulation et de rétablissement d'un équilibre perdu, mais aussi dans l'acception dynamique, qui justifie l'adoption de mesures publiques visant à réduire les déséquilibres, à favoriser les conditions d'un suffisant développement du marché ou à instaurer un aménagement de la concurrence. La volonté du législateur constitutionnel du 2001 a été de unifier en faveur de l'État les outils de politique économique concernant au développement de la nation entière. L'intervention de l'État se justifie, donc, en fonction de son importance macro-économique.

1. Pouvoirs de contrôle de l'État

1.1. DISCIPLINE DE LA CONCURRENCE

La Cour Constitutionnelle¹³ attribue une double finalité à la liberté de la concurrence: d'une part, elle est expression concrète de l'aspect pluraliste de la liberté d'initiative économique, et, de l'autre, elle vise à la protection de la collectivité, puisque l'existence d'une pluralité d'entrepreneurs, qui concourent entre eux, sert à améliorer la qualité des produits et à limiter les prix.

L'article 2596 du Code Civil prescrit que la clause de non-concurrence doit être prouvée par écrit, doit être limitée dans le temps (pas plus de cinq ans), dans

¹² Corte Costituzionale, 13/01/2004, n° 14.

¹³ Corte Costituzionale, 16/12/1982, n° 223.

l'espace ou quant à la nature de l'activité concernée. La Cour Constitutionnelle¹⁴ a déclaré tout à fait légitime ledit article, en statuant que la possibilité de autolimitation fait partie de la liberté de la concurrence, mais elle ne peut pas dépasser les limites que l'ordre juridique établit en faveur de l'intérêt individuel ou de la collectivité.

1.2. INTERVENTION DIRECTE DE L'ÉTAT SUR LE MARCHÉ

La Constitution italienne a érigé des défenses très faibles contre l'intervention publique dans l'économie. Les services publics nationaux ont été, le plus souvent, exercés en régime de monopole légal (*privativa* ou *riserva di attività*) ex article 43. En outre, sous l'aspect de l'organisation, l'activité était exercée quelquefois directement par l'État ou par les collectivités locales (*gestioni interne* ou *in economia*), parfois par des entreprises-organe (*aziende-organo*) de l'État et municipalisées, parfois par des entités publiques séparées de l'État mais assujetti aux pouvoirs d'orientation et de contrôle direct (*enti pubblici economici*), certaines fois par des sujets privés en régime de concession administrative. Dans beaucoup d'hypothèses les concessionnaires, étaient choisis en dehors de tous mécanismes de concurrence pour le marché, c'est-à-dire, directement par loi ou sur base fiduciaire et ils avaient eux même nature de entité publique ou ils étaient des sujets privés du point de vue formel (société par actions), mais publics du point de vue substantiel, puisque les paquets d'actions de majorité étaient contrôlés de manière directe ou indirecte par le ministère de référence¹⁵.

La Cour Constitutionnelle a suivi, dans les années '90, une orientation de progressive élimination des privilèges contractuels en faveur des gérant des services publics en concession, en contribuant, de cette manière, à la *dérégulation*. Par exemple, lors du contrôle de la légitimité constitutionnelle des dispositions qui limitent la responsabilité de l'Administration de poste pour les dommages causés aux usagers, la Cour Constitutionnelle a relevé, l'impossibilité de rapporter lesdites limitations de responsabilité au pouvoir discrétionnaire de l'Administration, puisqu'il s'agit de l'organisation d'un service public qui, géré en régime de monopole, constitue une forme de participation de l'État à l'activité économique¹⁶.

¹⁴ Corte Costituzionale, 16/12/1982, n° 223

¹⁵ M. Clarich, « Servizi pubblici e diritto europeo della concorrenza: l'esperienza italiana e tedesca a confronto », *Rivista trimestrale di diritto pubblico* 2003, pp. 102–103.

¹⁶ Corte Costituzionale, 30/12/1997, n° 463.

III. Documentation

1. Relevant Legislation

Civil code: Articles 2595–2620 (Conurrence and consortium)

Law 10 October 1990, no. 287 (Rules for the protection of the concurrence and the market)

Law 30 July 1998, no. 281 (Consumer's rights)

Law 12 December 2002, no. 273 (Measure for promotion of private initiative and developpment of concurrence)

2. Essential Constitutional Case-Law

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Chapter 4

RIGHT TO FORM TRADE ASSOCIATIONS, BARGAINING AUTONOMY, RIGHT TO STRIKE AND LOCKOUT

Gianpaolo Fontana*

I. The right to form trade associations

1. Trade Unions

Consistently with the leading role assigned to the principle of labour (Arts. 1, 4)¹, the Constitution grants special and autonomous protection to the freedom to form trade unions, differentiated from the common right of association stated in Article 18 of the Constitution. The constitution intended to state, in blatant contrast with previous corporate experience, the principle of trade union pluralism which translates into the possibility of achieving the spontaneous and free formation of associations for the defence and promotion of collective rights and interests of the

* Gianpaolo Fontana, Ricercatore di Diritto Costituzionale, Università Roma Tre.

¹ For the general principle of labour see C. Mortati, 'Article 1', in: *Commentario alla Costituzione*, Bologna–Roma 1975. For the general aspects of the freedom of workers' unions see Carinci/de Luca Tamajo/Tosi/Treu, *Diritto del Lavoro*, Vol. I, Torino 1994; Persiani, *Diritto sindacale*, Padova 1992; Giugni, *Diritto sindacale*, Bari 1991; Mazzoni, *Manuale di diritto del lavoro*, Vol. II, Milano 1990; Ghezzi/Romagnoli, *Il diritto sindacale*, Bologna 1987; F. Santoro Passarelli, *Nozioni di diritto del lavoro*, Napoli 1987, pp. 30 ss.; Pera, *Diritto del lavoro*, Padova 1988; Riva Sanseverino, *Diritto sindacale*, 4th ed., Torino 1982; Prosperetti, voce 'Libertà sindacale (premesse generali)', *Enciclopedia del diritto*, XXIV, 1974, pp. 498 ff.; Mazzoni, *La conquista della libertà sindacale*, Roma 1947.

workforce. Article 39 proclaims the freedom of trade union organisation, being careful to establish the conditions which, if respected, allow the unions, acquiring the status of a legal subject, to stipulate *collective employment contracts with obligatory effectiveness for all those belonging to the categories the contract refers to* (registration and endowment of a democratically based internal order).

In the absence of the prescribed registration by public authorities, a necessary requisite in order to obtain the status of a legal entity, trade unions still assume the form of associations. The legislation has continuously privileged those unions which are ‘more extensively represented’ on a national scale (CGIL, CISL and UIL), to the detriment of other lesser represented and younger trade unions pursuing sector-specific and highly independent policies in comparison to the three major national unions (COBAS and so-called autonomous unions). The Constitutional Court, while deeming such provisions not unreasonable, has reminded the necessity of ‘effective consensus as a parameter of guarantees’², not being allowed to disregard the real representation of union trends and opinions among the labour force without violating the principles of trade union pluralism and freedom.

The freedom to form and organise trade union associations is guaranteed by a law of particular historical importance, the 1970 Statute of Workers, which states the penal illegitimacy and invalidity of any pact or act aimed at subjecting the employment of a worker to the condition of enrolment, or non-enrolment, with a trade union (Art. 15).

Certain limitations to the freedom of trade union organisation are founded in the necessity to safeguard the concepts of autonomy and efficiency of union operations, while others are functional with respect to concurrent constitutional principles. The first category includes the ban on the creation of mixed unions and so-called ‘yellow’ unions³, which are supported and financed by their corporate counterpart. The second category includes limitations on the exercising of union liberty regarding certain categories of public sector employees including, for example, the military or the police force. The Constitutional Court, while recognising the fundamental rights held by individual members of the military, has deemed ‘not constitutionally illegitimate’ that ban imposed on the formation of union-like associations in the military. The removal of such a ban ‘would inevitably open the way for organisations whose activities may prove to be

² Ruling of 26 Jan. 1990, no. 30.

³ See Art. 17 Law 300/1970 (*Statuto dei lavoratori*).

incompatible with principles of internal cohesion and with the neutrality of the military order.⁴

Article 28 of the Workers' Statute guarantees the repression of anti-union behaviour. Such a mechanism allows, in a fairly short space of time, and upon appeal made by the local representatives of the national unions, a judicial order prohibiting specific corporate conduct aimed at preventing or constraining the exercising of union activities and freedoms, as well as the right to strike.

2. *Employer Associations*⁵

The majority of academic doctrine and constitutional case law⁶ maintains that the principles relating to union freedom refer not only to workers' associations but also to those of employers. In the new political and social climate induced by the republican constitution (where the values of pluralism and fundamental freedoms are clearly stated), the view that union organisations historically owe their origins to the working class is not considered sufficient to deny employers the right to form organisations or associations to protect their own interests. In the area of public sector employment, the stipulation of collective contracts on a national scale is entrusted to a specially created 'Agency for negotiating representation of public administrations'(ARAN), which is placed under the vigilance of the Presidency of the Council of Ministers.

3. *Autonomy of Social Partners, Equality of Arms, Collective Agreements*⁷

Since no trade union of any kind has applied for registration, probably so as to avoid state intervention or inspections into their organisational autonomy,

⁴ Ruling of 17 Dec. 1999, no. 449. Art. 83 para. 2 of the Law no. 121/1981 allows trade unions among police agents, but forbids any link of them with other unions, prohibition which is considered to be questionable under Art. 39.

⁵ See Pera, *Diritto del lavoro* (note 1), pp. 92 ss.; Ghezzi/Romagnoli, *Il diritto sindacale* (note 1), especially pp. 46 and 83 ss.

⁶ Ruling of 26 Jan. 1960, no. 1.

⁷ On collective bargaining see: Mariucci, *La contrattazione collettiva*, Bologna 1985, pp. 64 ss.; Persiani, *Diritto sindacale* (note 1), pp. 62 ss.; Pera, *Diritto del lavoro* (note 1), pp. 98 ss.; Santoro Passarelli, *Nozioni di diritto del lavoro* (note 1), pp. 29 ss.; G. M. Salerno, 'Article 39', Crisafulli-Paladin (a cura di), *Commentario breve alla Costituzione*, Padova 1990, pp. 272 ss.; Riva Sanseverino, *Il diritto sindacale* (note 1), pp. 102 ss. On the relationship between collective agreement and statutes see: Ghera, *Diritto del lavoro*, Bari 2000, pp. 8 ss.; Modugno, *Appunti dalle lezioni sulle fonti del diritto*, Torino 1998, pp. 81 ss.; Raveraira, *Legge e contratto collettivo*, Milano 1985, pp. 72 ss.

collective employment contracts cannot boast any kind of effectiveness *erga omnes*, but they exclusively limit individual members of trade unions and employers' associations. The alternative choice to delegate to the government the power to transform collective employment contracts in legislative decrees (with legal force and rank) was, initially, seconded by the Constitutional Court as a temporary measure to be used in exceptional circumstances, but was subsequently declared illegitimate in sentence no. 106/1962.⁸

Although not considered part of the 'sources of law', collective national employment contracts (CCNL) are, nevertheless, often assumed as a parameter for determining payment terms. They have to be paid in proportion to the quantity and quality of the work carried out in conformance with Article 36 of the Constitution even in sectors which are not endowed with negotiation disciplines.

The power to stipulate collective employment contracts, although carrying no effectiveness 'erga omnes', is based on the recognition, guaranteed by Article 39 of the Constitution, of collective autonomy and the faculty of the parties in conflict to self-regulate in terms of both salary and the rules governing their professional relationships.

Furthermore, under discussion is the existence of a genuine reserve of power in favour of collective negotiations which could be invoked even against state regulations. The contractual source is able, integrating legislative provisions, to extend the benefits and the protection foreseen for the working party with derogations *in melius*, rather than *in pejus*.

There have been, on the other hand, moments of economic crisis in which the legislation – with the consent of the Constitutional Court – has limited the scope of collective negotiation, or authorised unfavourable contractual clauses with respect to the legislative rules.⁹

Beyond the traditional area of collective autonomy, trade unions are also required to perform public functions. There are many public social security and assistance bodies and the National Committee of the Economy and Employment (CNEL), wherein the representatives of the 'social parties' assume roles of some responsibility. Moreover, parliament and the government are increasingly negotiating with social parties over the regulatory content of laws and economic and social policy guidelines, above all in the area of so-called *governance* and concerted action policies.

⁸ Ruling of 19 Dec. 1962, no. 102.

⁹ Rulings of 30 July 1980, nos. 141 and 142 ; 7 Feb. 1985, no. 34.

II. The Right to Strike¹⁰

Article 40 of the Constitution ('the right to strike is exercised within the scope of the laws that regulate it'), has identified striking as a genuine right of the individual and of collective exercise, considering it an ideal tool for re-establishing a certain balance between the opposing parties of the union struggle. This clause, despite the reluctance of Parliament to dictate a general implementation discipline, was immediately deemed as preceptive.¹¹ Indeed, the Constitutional Court assumed the responsibility of gradually aligning the obsolete provisions of the 1930 penal code – which considered collective absence from work as an offence against the corporative order of the State – with the new constitutional guarantee of the right to strike.¹² With sentence no. 1 of 1974, the Constitutional Court has ratified the legitimacy of striking 'not only for salary issues but also when, more generally, it is proclaimed in favour of all demands regarding workers' interests as a whole'.¹³ Subsequently, with sentences no. 290/1974¹⁴, the Court explicitly extended the constitutional guarantee stated in Article 40 of the Constitution to cover strikes dictated by political circumstances. Such strikes, however, must make reference to 'demands regarding the interests of workers as a whole which are governed by the regulations imposed under the third title of the first part of the Constitution'. Though confirming the illegitimacy 'of a strike held in order to subvert constitutional order or to prevent or impede the free exercising of legitimate powers through which the public will is expressed', sentence no. 165/1983¹⁵ has sanctioned the illegitimacy of Article 504 codice penale in the part which punishes a strike whose aim is to force the authorities to give or issue provisions, or to influence related deliberations.

¹⁰ On the right to strike see R. Nania, *Sciopero e sistema costituzionale*, Torino 1995; G. M. Salerno, 'Article 40', in: Crisafulli-Paladin (a cura di), *Commentario breve alla Costituzione*, Padova 1990, pp. 281 ss.; Scognamiglio, voce 'Lavoro (disciplina costituzionale)', *Enciclopedia Giuridica*, Roma, XVII, 1990, pp. 20 ss.; Pera, voce 'Sciopero (dir. cost e lav.)', *Enciclopedia del diritto*, XLI, 1989, pp. 699 ss. *Id.*, *Diritto del lavoro*, Padova 1988, pp. 196 ss.; Santoro Passarelli, *Nozioni di diritto del lavoro* (n. 1), pp. 59 ss. For the public service see Pascucci (ed.), *La nuova disciplina dello sciopero nei servizi essenziali*, Milano 2000; A. D'Atena, voce 'Sciopero nei servizi pubblici', *Enciclopedia del diritto*, III aggiornamenti, Milano 1999, pp. 949 ss.

¹¹ Rulings of 4 Mar. 1960, no. 29; 15 Dec. 1967, no. 141.

¹² Rulings of 4 Mar. 1960, no. 29; 10 June 1993, no. 276.

¹³ Anticipated by ruling of 28 Dec. 1962, nos. 123 and 124.

¹⁴ Ruling of 27 Dec. 1974, no. 290.

¹⁵ Ruling of 13 June 1983, no. 165.

Strikes for exclusively political reasons are covered by the freedom of union action stated in Article 39 of the Constitution and are not within the scope of the right to strike guaranteed by Article 40 of the Constitution.¹⁶ Unconventional forms of strikes (e.g. crippling strikes, rolling strikes, single duty strikes) are not completely covered by constitutional provisions, namely those whose aim is to maximise damage to the company and minimise reductions in the salary received by workers. While for some, such strikes produce unjust damaging effects which render them illegitimate, the Constitutional Court nevertheless holds that the strikers are obliged to avoid damage to people or the property of the employer 'being inadmissible and contrary to the interests which the self-protection of the category tends towards, for the strike to produce effects compromising the future resuming of work' (sentence no. 124/1962).

The question of the right to strike in essential public services deserves separate consideration, as it was the first type of strike to be subject to detailed legislation¹⁷, after several recommendations issued by the constitutional judge to the legislature¹⁸.

Such legislative discipline aims at the moderation of the right to strike on the one hand, and the rights, also constitutionally safeguarded, to education, safety and a pension on the other (Art. 1, Law no. 146/1990). The said discipline, apart from offering preventative conciliation procedures and rules on the obligation of notice and duration, entrusts social parties with the obligation to establish a system of self-regulation regarding minimum guaranteed services during a strike, with respect to the principles and limits established by law. Conciliation and vigilance is the responsibility of a special Guarantee Commission, as well as sanctions in the event of illegitimate behaviour.

The Constitutional Court declared unconstitutional Article 2 Paras. 1 and 5 of Law no. 146/1990 in the part which did not foresee, in the event of a collective absence of lawyers, an obligation of notice and a guarantee of essential services.¹⁹ Law no. 83/2000 rendered rules governing strikes in essential public services applicable even to autonomous workers and small enterprises.

¹⁶ Ruling no. 290/1974.

¹⁷ Law no. 146/1990, as amended by Law no. 83/2000 and upheld by ruling of 17 Jan. 1991, no. 32.

¹⁸ Rulings of 28 Dec. 1962, no. 124; 17 Mar. 1969, no. 31; 23 July 1980, no. 125.

¹⁹ Ruling of 27 May 1996, no. 171.

III. The Right to Lockout²⁰

While Article 40 of the Constitution recognises the right to strike, it does not say anything with regard to lockouts, which, therefore, is to be interpreted as a mere freedom which should be exercised in conformance with the limits imposed on private economic initiative and by the safeguarding of trade union freedoms. A lockout staged for contractual reasons is not subject to criminal charges since the Constitutional Court declared the constitutional illegitimacy of Article 502 codice penale with sentence no. 29/1960. Although the penal illegality of the lockout has been removed, the employer is consequently held liable for any damage suffered by the worker, due to the corporate contravention of obligations deriving from the employment contract. Thus the workers' right to be paid, even during a lockout, remains unaltered.

According to sentence no. 141/1967, the so-called 'protest lockout' would however be subject to penal sanctions, as its imposition occurs for reasons outside of those of professional conflict. The legitimacy of the so-called 'retaliatory lockout', staged by the employer as a response to irregular strikes, has been much debated. Indeed, some interpretations consider it to constitute harmful behaviour towards trade union freedom. The different treatment reserved for the right to strike and the right to lockout highlights the privileged protection afforded by the constituent assembly to the principle of labour and its many applications, preclusive of any balanced imposition and parity of ethics between the rights of workers and those of employers.

IV. Documentation

1. Relevant Legislation

Criminal Code: Articles 503–507 (strike)

Civil Code: Articles 2067–2077 (Collective agreements)

Law 20 May 1970, no. 300 (Workers Statute)

Law 12 June 1990, no. 146 (Rules for the exercise of the right to strike in public services considered essential)

Legislative Decree 30 March 2001, no. 165 (Unique Text regarding the public servants)

²⁰ See Ghezzi, voce 'Serrata', *Digesto delle Discipline Privatistiche, sezione commerciale*, XIII, Torino 1996, pp. 376 ss.; Persiani, *Diritto sindacale* (note 1), pp. 142 ss.; La Cute, voce 'Serrata', *Enciclopedia del diritto*, XLII, Milano 1990, pp. 230 ss.; Riva Sanseverino, *Diritto sindacale* (note 1), pp. 418 ss.

2. *Essential Constitutional Case-Law*

Corte costituzionale, rulings no. 1, 29/1960; 102, 123, 124/1962; 141/1967; 31/1969; 290/1974; 125, 141, 142/1980; 165/1983; 34/1985; 30/1990, 32/1991; 276/1993; 171/1996; 449/1999

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M. D'Antona, 'Il diritto al lavoro nella Costituzione e nell'ordinamento comunitario', in: *Opere*, Milano 2000, pp. 272 ss.

O. Roselli, *La dimensione costituzionale del diritto de sciopero*, Torino 2005

Annex

Constitutional Norms

Article 1 (1) Italy is a democratic republic based on labour.

Article 3 (2) It is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country.

Article 4 (1) The republic recognizes the right of all citizens to work and promotes conditions to fulfil this right.

(2) According to capability and choice, every citizen has the duty to undertake an activity or a function that will contribute to the material and moral progress of society

Article 33 (5) Exams are defined for admission to various types and grades of schools, as final course exams, and for professional qualification.

Title III Economic Relations

Article 35 (1) The republic protects labour in all its forms.

(2) It provides for the training and professional enhancement of workers.

(3) It promotes and encourages international treaties and institutions aiming to assert and regulate labour rights.

(4) It recognizes the freedom to emigrate, except for legal limitations for the common good, and protects Italian labour abroad.

Article 36 (1) Workers are entitled to remuneration commensurate with the quantity and quality of their work, and in any case sufficient to ensure to them and their families a free and honourable existence.

(2) The law establishes limits to the length of the working day.

(3) Workers are entitled to a weekly day of rest and to annual paid holidays; they cannot relinquish this right.

Article 37 (1) Working women are entitled to equal rights and, for comparable jobs, equal pay as men. Working conditions have to be such as to allow women to fulfil their essential family duties and ensure an adequate protection of mothers and children.

(2) The law defines a minimal age for paid labour.

(3) The republic establishes special measures protecting juvenile labour and guarantees equal pay for comparable work.

Article 38 (1) All citizens unable to work and lacking the resources necessary for their existence are entitled to private and social assistance.

(2) Workers are entitled to adequate insurance for their needs in case of accident, illness, disability, old age, and involuntary unemployment.

(3) Disabled and handicapped persons are entitled to education and vocational training.

(4) These responsibilities are entrusted to public bodies and institutions established or supplemented by the state.

(5) Private welfare work is free.

Article 39 (1) The organization of trade unions is free.

(2) No obligation may be imposed on trade unions except the duty to register at local or central offices as provided by law.

(3) Trade unions are only registered on condition that their by-laws lead to internal organization of democratic character.

(4) Registered trade unions are legal persons. Being represented in proportion to their registered members, they may jointly enter into collective labour contracts which are mandatory for all who belong to the respective industry of these contracts.

Article 40 The right to strike is exercised according to the law.

Article 41 (1) Private economic enterprise is free.

(2) It may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity.

(3) The law determines appropriate planning and controls so that public and private economic activities may be directed and coordinated towards social ends.

Article 42 (1) Property is public or private. Economic goods may belong to the state, to public bodies, or to private persons.

(2) Private ownership is recognized and guaranteed by laws determining the manner of acquisition and enjoyment and its limits, in order to ensure its social function and to make it accessible to all.

(3) Private property, in cases determined by law and with compensation, may be expropriated for reasons of common interest.

(4) The law establishes the rules of legitimate and testamentary succession and its limits and the state's right to the heritage.

Article 43 To the end of the general good, the law may reserve establishment or transfer, by expropriation with compensation, to the state, public bodies, or workers or consumer communities, specific enterprises or categories of enterprises of primary common interest for essential public services or energy sources, or act as monopolies in the prior public interest.

Article 44 (1) For the purpose of ensuring rational utilization of land and establishing equitable social relations, the law imposes obligations on and limitations to private ownership of land, defines its limits depending on the regions and the various agricultural areas, encourages and imposes land cultivation, transformation of large estates, and the reorganization of productive units; it assists small and medium sized farms.

(2) The law favours mountainous areas.

Article 45 (1) The republic recognizes the social function of cooperation for mutual benefit free of private speculation. The law promotes and encourages its implementation with suitable provisions and ensures its character and purposes through proper controls.

(2) The law protects and promotes the development of handicrafts.

Article 46 In order to achieve the economic and social enhancement of labour and in accordance with the requirements of production, the republic recognizes the right of workers to collaborate, within the forms and limits defined by law, in the management of companies.

Article 47 (1) The republic encourages and protects savings in all its forms, regulates, coordinates and controls the provision of credit.

(2) It favours access savings for the purchase of homes, for worker-owned farms, and for direct or indirect investment in shares of the country's large productive enterprises.

Article 51 (1) Citizens of one or the other sex are eligible for public office and for elective positions under equal conditions, according to the rules established by law. To this end, the republic adopts specific measures in order to promote equal chances for men and women.

(2) The law may, regarding their right to be selected for public positions and elective offices, grant to those Italians who do not belong to the republic the same opportunities as citizens.

(3) Anyone elected to public office is entitled to the time necessary for the fulfilment of the respective duties while keeping his or her job.

Article 97 (1) The organization of public offices is determined by law ensuring the proper and fair operation of public affairs.

(2) Areas of competence, duties, and responsibilities of public officials must be defined in regulations on public offices.

(3) Appointments for public administration are determined by public competition unless otherwise specified by law.

Article 98 (1) The duty of public officials is only to service the Nation.

(2) Officials who are members of parliament may not be promoted except for seniority.

(3) The right to become a registered member of political parties may be limited by law for members of the judiciary, professional members of the armed forces on active duty, police officials and officers, and diplomatic and consular representatives abroad.

Article 117 (2) The state has exclusive legislative power in the following matters:

r) (...) intellectual property; s) protection of the environment, of the ecosystem and of the cultural heritage.

(3) The following matters are subject to concurrent legislation of both the state and regions: foreign trade; protection and safety of labor; education, ... with the exception of vocational training; professions; scientific and technological research and support for innovation in the productive sectors; land-use regulation and planning;... production,

transportation and national distribution of energy; ... harmonization of the budgetary rules of the public sector and coordination of the public finance and the taxation system; promotion of the environmental and cultural heritage, ...; savings banks, rural co-operative banks, regional banks; regional institutions for credit to agriculture and land development.

Article 118 (4) State, regions, metropolitan cities, provinces and municipalities support autonomous initiatives promoted by citizens, individually or in associations, in order to carry out activities of general interest; this is based on the principle of subsidiarity.

Article 120 (1) Regions may not charge import or export duties, nor duties on transit between regions, nor adopt provisions which may hinder in any way the free movements of persons and goods between regions, nor limit the right to work in any part of the national territory.

ITALY

National Co-ordinator:

Prof. Jörg Luther,
Università del Piemonte Orientale, Italy

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ITALY

DUE PROCESS OF LAW

The Italian Constitution does not establish a general clause in favour of ‘rule of law’¹ or of ‘due process of law’. There is a principle of fair trial or ‘*giusto processo*’ (Art. 111 Const.) that could be integrated further by a principle of fair administrative proceeding (‘*giusto procedimento*’) under the guarantee of ‘good performance’ (‘*buon andamento*’) of public administration (Art. 97 Const.) and by the general principle of ‘legality’ that has been construed as a rule of ‘fair and reasonable legislation’ and as the *ratio* of the reservation of statute laws within the system of sources of law, first of all in criminal law matters (Art. 25 co. 2). The protection of fundamental rights through fair trial has been developed in two periods, prior and subsequent to the amendment of Article 111 of the Constitution in 1999. In the first period, the protection of rights was offered mostly by ordinary legislation, specifically the Criminal Procedure Code and the European Convention of Human Rights, meanwhile the constitutional jurisprudence tried to develop gradually from some constitutional provision a *corpus* of principles – and sometimes even of rules – qualified by the academic doctrine and then even by the Court itself with the elliptic expression of ‘*giusto processo*’. In a form that has been criticized by some authors, the new Article 111 of the Constitution aims to strengthen the complexity of those fundamental rights that need guarantees in the judicial process, especially in criminal trials.² From an analytical point of view, the Italian scholars distinguish the right to have a process (‘*al processo*’) from the rights during the process (‘*nel processo*’)³. Both the right of access to justice (infra X) and rights that have to be respected by the judge are rights common to

¹ The concept has been elaborated by Constitutional Court ruling no. 24/2004.

² V. P. Ferrua, ‘Il “giusto processo” tra modelli, regole e principi’, in: *Dir. Pen. Proc.* 2004, pp. 401 ss.; S. Fois, ‘Il modello costituzionale del giusto processo’, in: *Rass. Parl.* 2000, pp. 569 ss.; G. Ubertis, *Principi di procedura penale europea: le regole del giusto processo*, Torino 2000. On civil procedure V. Vigoriti, *Garanzie costituzionali del processo civile*, Milano 1970; M. G. Civinini/C. Verardi (eds.), *Il nuovo articolo 111 della Costituzione e il giusto processo civile*, Milano 2001, S. Cecchetti, ‘Giusto processo’, *Ec. Dir.*, Appendice V; Milano 2001, pp. 595 ss. For the principle of ‘giusto procedimento’ as a general principle of administrative law – still not recognized as a constitutional principle: rulings no. 103/1993, 210/1995 – see R. Caranta, ‘Art. 97’, in: R. Bifulco/A. Celotto/M. Olivetti (eds.), *Commentario alla Costituzione*, Torino 2006, vol. II, pp. 182 ss.

³ M. Chiavario, *Processo e garanzie della persona*, vol. I, Milano 1982; id., *Garanzie ed efficienza della giustizia penale*, Torino 1998; id. (a cura di), *Procedure penali d’Europa*, Padova 1998, pp. 467 ss.

Due Process of Law

all parties, including the accused and the victims. Such rights are implied in what the Constitution calls the right to action and the right to defence (Art. 24).

ITALY

National Co-ordinator:

Prof. Jörg Luther,
Università del Piemonte Orientale, Italy

I. RIGHT TO AUDIENCE

Luca Geninatti*

Among the specific rights relating to *legal proceedings (processo)*, particular importance has been given to the rights of participation connected to the principle of cross-examination (*audiatur et altera pars*), particularly in the formation of evidence. The principle emerges in the jurisprudence of the Constitutional Court starting with sentence no. 46/1957 according to which the defence (Art. 24 Const.) must hold effective power ‘so that cross-examination is ensured and that all obstacles preventing the parties from expressing their reasons are minimised’. The right to defence effectively implies a ‘right’ to cross-examination, which should not be confused with the right to audience and oral defence which has been returned to the discretion of the legislator.

From the very beginning, the Constitutional Court has recognised a right to defend oneself personally as well as the professional, technical defence provided during a criminal trial (*infra VII.*).¹ Provided that this is a right to defend oneself and not an obligation, Article 365, paras. 1 and 2, of the military penal code for peace time was declared unconstitutional (sent. no. 301/1994). Being legal proceedings of military trials a case of justice of a commander that has to establish an “example”, the judgment demanded the presence of the accused at the hearing. In sentence no. 267/1994, the Court also classified the principle of *nemo tenetur se detegere* as part of the right to defence, recognising the freedom of the co-accused not to respond or to lend his or her service.

1. Right to Comment on the Facts/on the Legal Situation/on Evidence

With regard to the right to cross-examination on evidence (Art. 6.3 CEDU and now Art. 111 Const.), the Constitutional Court reaffirmed its essential status in sentence no. 361/1998, holding unconstitutional the unreasonableness of a reform – on legislation that had already been censured² – which precluded the inclusion

* Luca Geninatti, Ricercatore di Istituzioni di Diritto Pubblico, Università del Piemonte Orientale.

¹ Rulings no. 186/1973, 99/1975.

² Ruling no. 255/1992.

of evidence gathered legitimately in the course of preliminary investigations or in the preliminary hearing, contradicting the principle against ‘the dispersion of evidence’.

The Court declared, moreover, the constitutional illegitimacy of

- a) Article 210 c.p.p. (examination of the accused in a related trial), insofar as its application was not foreseen in the case of examination of the accused in the same trial on facts concerning the responsibility of others and which have already being object of his or her previous declarations given to the judicial authority or to the judicial police delegated by the public prosecutor,
- b) Article 513, para. 2, last sentence c.p.p., insofar as it failed to foresee that, in the case the accused refuses or omits entirely or partially to respond in reference to facts concerning the responsibility of other persons which have already been object of his or her previous declarations, if there is no agreement between the parties that such declarations could be introduced through reading, should be applied the rules regarding the examination of a witness that refuses to respond (Art. 500, paras. 2^{bis} and 4, c.p.p.).

Also judged as substantially unreasonable was a regulation according to which defendants who, during the investigation phase, have already put on record certain declarations, often so-called ‘turncoats’, could stand parallel trials and exercise the right not to respond, with a consequent reading of the proceedings of previous declarations being permitted only with the consent of the prosecution and the defence. According to the Court, the legislation which required examination should allow to bring the content of previous declarations directly before the judge, and the opposing parties to submit them to critical examination, pressing for and encouraging subsequent retractions, corrections and clarifications. The sentence therefore permitted the judicial authority to legitimately gather statements in the course of preliminary investigations which would then be discussed in the hearing according to the discretion of those who had previously and freely made such statements, safeguarding the right to defence of the accused declarant and the other defendant, subject of the aforementioned statements. The right to silence was not restricted when the declarant was subjected to objections with regard to previous declarations; the right of the accused to cross-examination, moreover, could not be identified with a power of veto, but with a right to contest such declarations in cross-examination with the other parties and before a judge.

This set of rules resulting from a multitude of manipulative measures implemented by the Court and from a *labor limae* on the part of a less than shrewd legislator, has been in part surpassed and in part supplemented by the guarantee introduced by the amended Article 111 of the Constitution, insofar as it states that ‘the guilt of the accused cannot be proved on the basis of statements

made by those who, of their own free will, have always voluntarily shirked questioning on the part of the accused or the counsel for the defence', as well as in the provision that the formation of evidence does not occur in cross-examination by consent of the accused or due to proven impossibility of an objective nature or due to proven illegitimate conduct'.

In sentence no. 440/2000, the Court, taking into consideration the different regulatory context, concluded that the reform framed cross-examination as an objective method in the formation of evidence. Therefore could no longer be allowed the acquisition of earlier declarations. The extensive interpretation of the exception to the principle of cross-examination for 'proven impossibility of an objective nature' was no longer feasible. Specially the exercise of the right to abstain from testifying, recognized to the next of kin of the accused, could no longer be considered as a case of impossibility of an objective nature.³

Regardless of this question, the right to cross-examination necessarily demands a legislative conformation which should be interpreted in the light of constitutional principles, both those that specifically regard a trial as the inviolable right of the defence, and those

'that must be realised in the trial too, like the principle of equality, which, according to the specification made by the amendment to Article 111 of the Constitution, in current juridical language, is expressed by the idiom "principle of the parity of arms"; a parity which refers to the jurisdiction that this Court has defined as one of the essential principles at the heart of the Rule of Law (sent. no. 24/2004).'⁴

2. Judicial Obligation of Information

Article 369 c.p.p., which has been reformed several times, currently orders that information on the existence of a criminal trial against a given defendant must be issued only when the public prosecutor has to perform an action which the defence has the right to witness, even though the present formulation of Article 111 of the Constitution requires that 'the person accused of an offence, in as short a time as possible, be confidentially informed of the nature and motives of the accusation made against him or her'.⁵

The right to be informed *during* the trial has been taken into consideration in the Constitutional Court's decision that hold unconstitutional because unreasonable all exceptional regulations that do not provide – in case the expiry

³ Furthermore rulings no. 32, 36/2002.

⁴ Ruling no. 321/2007.

⁵ For the right to information prior to the reform of Art. 111 based on the right to defence (Art. 24) see rulings no. 14, 15/1977; 120/1986.

of a term produces extinction of judgment due to the non fulfilment of a new charge made to the parties – procedural guarantee adjustments with the aim of ensuring a minimum awareness of the obligation of fulfilment, such as a notice to the parties (sent. no. 111/1998).⁶

Examining, under the profile of Article 24 of the Constitution, the regulations regarding notification by post, the Constitutional Court declared the second paragraph of Article 8 of the Law of 20. 11. 1982, no. 890, unconstitutional in the part in the which it did not foresee, in the event of the absence of the addressee (and of the refusal, lack, unsuitability or absence of other people qualified to receive the act), that news be given to the said addressee by registered post with a notice of receipt (sent. no. 346/1998). The discipline of notification being subject to the legislator's power of discretion, a binding limit of such discretion is represented by the right to defence of the notified party. Therefore it must be excluded that the diversity of procedure between postal notifications and those performed personally by bailiffs may lead to an impairment of the addressee's guarantees.

With regard to the new Article 111 of the Constitution, the Court subsequently specified that

‘the constitutional wording, on the one hand, does not impose that the cross-examination be performed according to same method in all types of trial, and above all, that it must always be inserted in the initial phase of the said trial; on the other hand, it does not exclude the possibility that the right of the suspect to be informed as soon as possible of the motives of the accusations against him or her be modulated in various ways depending on the unique structure of the individual alternative procedures’ (ruling no. 352/2003).

3. Right to Consideration

One can speak of a ‘right to consideration’ as a consequence of the principle of cross-examination in an objective sense. It is guaranteed only indirectly by the duty to state reasons and by the right to appeal to the Court of Cassation (Art. 111 paras. 6 and 7), which can also be done as a result of flaws in the said reasons. A right to ‘re-consideration’ is institutionalised in the procedures guaranteeing personal freedom ahead of the so-called ‘court of freedom’ (*tribunale della libertà*).

⁶ Ruling no. 413/1994 indicates in appeal to cassation the means of imposing the invalidity deriving from omitting to inform the aggrieved party of the filing request on the part of the public prosecutor in the magistrate trial.

4. Right to Participation

The ‘right to cross-examination’ implies a ‘right to participation’ of the parties, including the injured party in a criminal trial. As far as the discipline of the so-called proceedings *in absentia* is concerned, ruling no. 9/1982 declared that it is possible to proceed in the absence of the accused only in the event that his or her absence is due to his or her free choice. Ruling no. 399/98, on the other hand, judged that Articles 159 and 160 of the penal code for the procedure relating to untraceables were in accordance to the constitution.

The Constitutional Court initially observed that no one could expect, even in relation to the European Convention of Human Rights’ principle of a fair trial, a trial system in which the principle of knowledge of the trial would be realised totally and without exception. The innovations introduced by the new code of penal procedure of 1991 nevertheless were driven by the legislators will to adjust the discipline referred to untraceables (*in contumacia*) in order to conform both to international conventions and to Article 24 of the Constitution, whose guarantees include the right of a person to be informed of proceedings which regard him or her, and to be given the time and opportunity to formulate his or her defence.

The fact that the new discipline does not go as far as completely restoring the accused with all his or her legal rights in the event that he or she has not been made aware of the trial may raise further questions of constitutional legitimacy. However, the Court excluded the possibility that the denounced lack of foreseen remedies could redound negatively on the constitutional legitimacy of penal procedure relating to untraceables.

It should be added that the Court has also observed that Article 6 of the European Convention of Human Rights does not impose the adoption of a single and irreplaceable trial procedure: in order to make sure that their judicial systems are compatible with the principle of a fair trial, the contracting States, as the European Court of Human Rights accepted, enjoy the widest possible margin of appreciation in the selection of the most appropriate means.

5. Preclusive Periods

The right to cross-examination demands congruent terms of trial (ruling no. 139/1967). With regard to the limits set on the right to defence by terms which produce effects of preclusion, the Constitutional Court hold that

‘the system of preclusions in civil law (which constitutes the cornerstone and founding tract of the 1990 reform) is configured as a functional rule for the implementation of the constitutional principle of reasonable trial duration, which found specific and prompt affirmation in the new formulation of

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Article 111 of the Constitution'
(ruling no. 155/2005).

II. RIGHT TO NATURAL JUDGE

Filippo Caporilli*

1. Appointment of the Competent Judge by Law

The right to a competent judge is recognised in Article 25, para. 1, of the Constitution: ‘no-one can be withdrawn from the so called “natural judge” as “pre-established by law” and is today strengthened by the new Article 111, para. 2, of the Constitution according to which all trials must be held in front of an independent and impartial judge. Ever since ruling no. 29/1958, the Constitutional Court has recognised that this guarantee intends to safeguard both the individual and the autonomy of the said judge, as well as the interests of justice. The ruling no. 88/1962 clarified that such a directive imposes that at the moment in which the case to be judged is put under examination, the judge that will preside over the case has been allocated by law. The competence can not be subsequently transferred to other judicial entities, even if pre-existent. Given the absolute nature of the ‘reserve de loi’ in question, the law cannot permit alternative resolvable choices ‘*a posteriori*, with a single provision, in relation to a given trial’. As such, Article 20, para. 2, c.p.p. was declared partially unconstitutional insofar as it established the power of the public prosecutor to issue, with a discretionary and definitive provision, before the opening of debate, a remittal to the magistrate of court proceedings.

Within the framework of this reconstruction, subsequent case law began to develop, striving to specify many problematic issues, including for example, the substantial identity between the expression ‘natural judge’ and ‘pre-constituted judge’ (rulings no. 340 and 641/1987), and the ratio of Article 25 of the Constitution as a guarantee of impartiality and objectivity of judgment for the citizen involved (ruling no. 272/1998).

With regard to the “reserve de loi”, the Court nevertheless has not judged unconstitutional certain laws that conferred to the said judicial authority extensive discretionary powers in relation to the transfer of responsibility, for example, for ‘legitimate suspicion’ or ‘serious reasons of public order’, or the choice of the judge in the event of adjournment on the part of the supreme court. Such powers

* Filippo Caporilli, Dottore di Ricerca, Università di Pisa.

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are justifiable on the basis of the necessity to guarantee the efficient administration of justice for ‘objective and inextricable service requirements’ and for the ‘promptness of judgment’ (for example, rulings no. 51/1970, 173/1970 and 174/1975). They can not be justified, on the other hand, with a generic reference to unspecified ‘reasons of public order, service or discipline’ (ruling no. 82/1971 with reference to military trials). The transfer of competence, subsequently to the beginning of the trial, due to a modification of the legislation, can be considered not unconstitutional in the case that,

‘based on general criteria, valid for all judgments (...) and not in reference to individual disputes (...) the judge is assigned in a way which is neither arbitrary nor subsequent, or directly by the legislator in conformance with the general rules, or through the actions of individuals who have been allocated relative power with respect to the reserve of statutory law established by Article 25, para. 1, of the Constitution’ (ruling no. 152/2001, but see also rulings no. 159/2000 and 176/1998, as well as sent. no. 419/1998).

It seems difficult to prove, in reality, the will of the legislator to interfere with the concrete outcome of a judgment, even when its effect is that of impeding someone’s misfortune in Court through retroactive intervention (sent. no. 419/2000). As far as the term ‘judge’ is concerned, sentence no. 70/1996 clarified that the guarantee of a competent judge does not extend to the public prosecutor. With sentence no. 272/1998 the Court seems to have definitively adopted the interpretation according to which the pre-constitution of a judge must also refer the identification of the components of judicial collegial organisation. Although not declaring unconstitutional the law in question, as it did not impose an arbitrary choice, the Court requested that the designation occur according to ‘objective and predetermined criteria’, suggesting that also the administration of justice be organised according to the so-called tabular system prescribed for ordinary jurisdiction based on the collaboration of the heads of the judiciary offices with the Superior Council of the Magistrate responsible for ‘attributions and transfers, promotions and disciplinary measures with regard to magistrates’ (Art. 105 Const.). According to the subsequent sentence no. 419/1998, the identification of the judging entity must

‘answer to rules and criteria that exclude the possibility of an arbitrary decision even in the specification of the internal structure of the authority to which the judgment is assigned, as even in the organisation of jurisdiction, the guarantee of impartiality must be evident’ (also sentences no. 467 and 392/2000 with respect to the military magistrate).

When it is incontrovertible that the said legislative discipline contributes to the determination of rules, governing the composition of the college, weakening such

impartiality, the Court has not hesitated to declare its unconstitutionality. As such, for example, in sentence no. 83/98, it has erased from law the discipline which foresaw that the judge called upon to deliberate on the legitimacy of the decisions of a professional college (namely the national council of the order of geologists) had to be supplemented by two members of the said order designated by the said college. Furthermore, the Court has notably contributed to the redefinition of the regime of a guarantee of impartiality of penal judgment, to guarantee that the right to a competent judge is effective. Other decisions with which it was established that any magistrate, who in penal judgment, in view of preliminary investigations, has rejected the filing petition ordering the reformulation of the charges, or who has rejected a request for the emission of a criminal conviction decree, cannot participate in the subsequent proceedings, should be remembered (see sentences no. 496/90, 401/1991 and 502/1991). The Constitution imposes the exclusion of the possibility that the same judge can pass judgment on the accused or evaluate the merits of the accusation when he or she has received information on the matter, for example, even if only of a personal, precautionary nature (see nos. 432/1995, 155/1996), unless it can be considered merely a formal verification of legitimacy (see, for example, sent. no. 410/1996, and 97 and 311/1997).

Decision no. 232/1999 specified that ‘the impartiality of the judge cannot be considered to have been tarnished by an evaluation, even well-founded, made within the same phase of the trial’. Consequently the Court uphold the constitutionality of a provision of the code of penal procedure that did not order the incompatibility of a judge who issued a sentence after having already rejected, in the preliminary phase of the debate, a petition for oblation. Even the judge who, in the preliminary phases of debate, has already passed judgment on restrictions on personal freedom of the accused, is not necessarily incompatible (ord. no. 413/1999).

2. Obligation of Presence of the Judge

3. Instruments of Objection to a Judge

The Court has specified that the regime of incompatibilities regards only the ‘intra-procedural activities’. If evaluations regarding this particular question are expressed outside the trial,

‘it will be up to the judicial authority to ascertain the existence of a situation of prejudice for the impartiality of the judge, a concept which can be traced back to certain earlier theories of abstention or objection adopted by Italian law, or rather if the principle of impartiality can be ensured only through the intervention of the Court on Article 36 of the criminal procedure code, in

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order to guarantee the essential need for the function of the judge to be performed by an independent and impartial judge.’
(sent. no. 351/1997).

The Court itself has deemed it necessary, with an additional declaration of unconstitutionality, to introduce hypotheses of causes of objection not foreseen by the legislator. Sentence no. 283/2000 declared the constitutional illegitimacy of Article 37, para. 1, of the code of penal procedure is declared, insofar as it did not order that a judge can be refused by the parties involved if he has expressed in another trial, even not criminal, a relevant evaluation on the same fact with regard to the same accused person.

In the event that rules on the competence of judges are violated, the general principle according to which the defect of jurisdiction can be argued at any stage or level of the trial prevails. It is also possible to appeal to the Supreme Court against the decisions of the Council of State and of the Court of Audit, ‘only for reasons inherent to jurisdiction’ (Art. 111, final paragraph). With sentence no. 419/1998, the Court has denied that ‘the violation of the criteria of allocation of court competence is deemed insignificant and that there are not, *or that there shouldn’t be* appropriate remedies made available of which the parties involved can benefit.’

4. Inadmissibility of Extraordinary Courts

Article 102 para. 2 of the Constitution forbids the institution of extraordinary judges. So far, the organisation of military wartime courts has remained unchanged, and even extraordinary military wartime courts are still foreseen (Arts. 283 ss. military wartime penal code 1941).

III. NE BIS IN IDEM

Alberto di Martino*

1. Multiple Imposition of Penalties

The Italian legal system distinguishes between complicity of crimes (Arts. 71–81, 84 penal code)¹ and so-called ‘apparent’ complicity of rules (Art. 15 c.p.). In the second case, in several penal rules that regulate the ‘same subject’, the special law is applied in derogation of the general law, unless otherwise stipulated (Art. 15 penal code).² The application of just one of the converging rules is justified with the generic reference to a logic of equity, according to which no-one can be punished more than once for the same offence to the same goods protected by law (*c.d. ne bis in idem in a substantial sense*). There is no constitutional reference expressed in relation to such a principle, but according to part of academic doctrine, it can nevertheless be deduced implicitly from the reference to the ‘personality’ of penal responsibility and to the rehabilitative aim of the punishment (Art. 27.1 and 3 Const.). Responsibility does not necessarily be identical to guilt, neither is it proportionate to rehabilitative requirements if an individual should suffer sanctions deriving from the application of more than one regulation to the same event, if there is a lack of sufficient heterogeneity between the regulations to legitimise a double qualification. Still controversial, however, is the positive foundation and the specific content of the principle of *ne bis in idem*

* Alberto di Martino, Professore associato di diritto penale, Scuola Superiore Sant’Anna, Pisa.

¹ The rules governing complicity of crimes are applied when a particular question combines the constituent elements of more than one rule, whose relationship can be considered to be one of heterogeneity. In this case of non apparent complicity of norms there is no reason to fear multiple judgments of the same event. Therefore, the ‘integral juridical evaluation of the event’ should not be applied. S. Prosdocimi, section ‘Concorso di reati e di pene’ (‘Complicity of Crimes and of Punishments’), in: *Dig. Disc. pen.*, Vol. II, Torino 1988, pp. 508 ss.

² See B. Romano, in: Tullio Padovani (ed.), *Codice Penale*, 2nd ed., Milano 2000, sub Art. 15, p. 86; A. Bassi, in: G. Marinucci/E. Dolcini (eds.), *Codice penale*, Milano 1999, sub art. 15, pp. 167 ss.; G. De Francesco, section ‘Concorso apparente di norme’ (‘Apparent Complicity of Norms’), *Dig. disc. pen.*, Vol. II, Torino 1988.

in a substantial sense which, according to part of the doctrine, includes the criterion of subsidiarity (when two norms defend the same thing, but standardise different degrees of offence, if the principle norm is not applicable, subsidiarity will always be applied) and the criterion of ‘consumption’ (which carries the prevalence of the norm which foresees the more serious crime, even if the actual event presented the grounds for a less serious crime. As such, there is an absorption of the less serious case in point, except in the event of residual effects in an extra (non) penal context, e.g. when seeking compensation for damages).³

2. Penalty Regardless of Previous Acquittal

Article 649.1 c.p.p. stipulates that

‘An acquitted defendant, or one convicted with a penal writ or sentence rendered irrevocable cannot be subjected again to criminal proceedings for the same event, even if the said event is considered differently in terms of title, degree or circumstances’.

Such a rule, not expressly sanctioned on a constitutional level, expresses a principle of ‘juridical civilisation, as well as extremely general application’⁴. Such a principle carries, in a certain sense, a function of certainty regarding judicial decisions and economy of trial⁵, with the result that practical conflicts between final judgments are avoided⁶. From another perspective, it is considered to have an essential function which provides a guarantee for the defendant and, indirectly, for the whole of society⁷, against ‘unconditional abuse on the part of the punitive authority’⁸.

The adoption of the amendment (Arts. 629 ss. c.p.p.) as such does not constitute an exception to the *ne bis in idem* of trial. The only legal hypotheses of *contra reum* revision are foreseen in the fields of terrorism and organised crime at the expense of those who have obtained acquittal or reductions in sentence with false or reticent statements, iniquitously profiting from the favourable treatment foreseen for turncoats.⁹ The Constitutional Court has recently stressed that the

³ M. Papa, *Le qualificazioni giuridiche multiple nel diritto penale*, Torino 1997.

⁴ Constitutional Court, ruling no. 150/1995.

⁵ G. Conso, *I fatti giuridici processuali penali*, Milano 1955, p. 101.

⁶ G. Lozzi, *Lezioni di procedura penale*, 3rd ed., Torino 2000, pp. 619 ss.

⁷ F. Cordero, *Procedura penale*, 5th ed., Milano 2000.

⁸ G. De Luca, *I limiti soggettivi della cosa giudicata penale*, Milano 1963.

⁹ Art. 10, law 29 May 1982 no. 304; G.U. 2 June 1982 no. 149; 8, D.-L. 13 May 1991 no. 152 conv. in law 12 July 1991, no. 203, G.U. 13 May 1991 no. 110.

violation of the *ne bis in idem* of trial must grant the right to reparation for unjust detention according to Article 24 para. 4 of the Constitution.¹⁰

3. Institution of Multiple Proceedings

The undertaking of more than one criminal proceeding against the same person is not subject to any particular restrictions, except the provisions with reference to final sentencing and the passing of a subsequent plurality of final sentences for the same offence and against the same person (Art. 669 c.p.p.). As far as international relations are concerned, in the event of a crime committed in Italian territory and judged/sentenced abroad as well as, on the request of the Ministry of Justice, in certain cases of penal code offences committed abroad, the rules require the renewal of judgment (Art. 11.1 penal code) with full computation of the sentenced served abroad (Art. 138 c.p.p.).

The *ne bis in idem* with regard to the recognition of foreign sentences, on the other hand, is codified with two different functions: that of impeding the recognition of foreign sentences in the event of a previous national sentence (Art. 733 c.p.p.), and that, specifically foreseen in relation to the enforcement of the sentence, of precluding not only the ‘final judgment’, but above all, the establishment of new criminal proceedings in the Italian State. Article 739 c.p.p. stipulates that, for the question of the recognition of a foreign sentence for the purpose of enforcement, ‘the offender can neither be extradited nor subjected to new criminal proceedings in that state for the same offence, even if such an offence is deemed to be different in terms of title, degree or circumstances’. This represents the codification of the *ne bis in idem* principle, which moreover – according to the Constitutional Court¹¹ – does not constitute a rule of general international law, but only a tendential value by which international regulations are inspired.

Article 705.1 c.p.p. ratifies the principles of subsidiarity and *ne bis in idem* with regard to extradition, prohibiting extradition if in the Italian State is already pending a criminal trial or pronounced a final sentence for the same event and against the same person whose extradition has been requested. With regard to the first aspect, the Constitutional Court has specified that the rule in question is perfectly compatible with Article 8 of the European Extradition Convention (Paris, 13 Dec. 1957, implemented with the law of 30 Jan. 1963 no. 300).¹²

¹⁰ Rulings no. 284/2003; 230/2004.

¹¹ Rulings no. 48/1967; nos. 48; 69/1976; 58/1997. See N. Galantini, *Il principio del ‘ne bis in idem’ internazionale nel processo penale*, Milano 1984.

¹² Ruling no. 58/1997.

4. Exemptions for Administrative Offences / Disciplinary Law

The general law defining administrative offences (law of 24 Nov. 1981 no. 689)¹³ regulates the apparent and formal complicity of administrative sanctions, the former to be resolved with the application of a special provision (even in the event of complicity between penal and administrative sanctions), the latter with the application of the more serious sanction, increased up to threefold (Arts. 8 and 9).

The law of 27 March 2001 no. 97 also establishes the binding effectiveness, in the judgment of disciplinary responsibility, of the irrevocable criminal sentence (also the plea bargain).

In such a regard, the Constitutional Court has declared as unconstitutional the automatic dismissal of a civil servant as a consequence of a definitive criminal conviction for specific offences without the P.A. being able to evaluate the relevant case from a disciplinary point of view and certainly without being able to cross-examine the said civil servant.¹⁴ The same rule must also be valid for officials held responsible for serious crimes such as that of association for mafia or criminal conspiracy.¹⁵ Having declared Article 4 of law 97/2001 to be unconstitutional, the Court also declared unconstitutional that the preventive suspension of a public official/civil servant should lose effectiveness after a period of time equal to that of the prescription of the offence rather than after five years.¹⁶ The Constitutional Court has not yet decided whether corporal disciplinary sanctions like confinement or *close arrest* against military personnel can concur with criminal sanctions or not.¹⁷

¹³ G.U. 30 Nov. 1981 no. 329.

¹⁴ Ruling no. 971/1988.

¹⁵ Ruling no. 197/1993.

¹⁶ Ruling no. 145/2002. See also no. 394/2002.

¹⁷ Ruling no. 406/2000.

IV. NULLA POENA SINE LEGE

Alberto di Martino*

1. Notion of Criminal Liability

As far as the identification of crimes and their differentiation from other types of offence is concerned, the quality of ‘crime’ is not an ontological term which structurally connotes human behaviour, rather it is the product of a legislative choice, discretionary in itself and therefore undeniably free.¹ The Italian Constitution, although containing significant provisions that identify general principles of criminal law, does not outline a specific physiognomy of criminal punishment. One sanction is outlined as ‘structurally’ criminal whenever it is designed to repress socially damaging acts, exercising a function of general prevention and is implemented in a coercive manner by means of a trial in whose context the judgment of the offender’s responsibility is extended to his or her person, with a rehabilitative function (Art. 27.3 Const.).²

Article 25.2 of the Constitution, establishing that no-one can be punished unless it is for a ‘committed act’, demands materially commendable conduct (principle of materiality). Italian criminal law has a marked ‘objectivistic’ nature: it must not sanction mere opinions or internal attitudes or approaches, neither, generally speaking, can it punish attitudes which are not concretely offensive to the concept being protected. Moreover, an act can only be legitimately incriminated if it is offensive (detrimental or dangerous) to particularly significant legal goods or concepts (principle of ‘offensiveness’). Such a requisite is a ‘limit of constitutional value at the discretion of the legislator’, functioning from the lawmaking moment to that of its application,³ ‘the task of the judge to firmly ascertain ... whether the behaviour in question effectively harms interests protected by law’.⁴

* Alberto di Martino, Professore associato di diritto penale, Scuola Superiore Sant’Anna, Pisa.

¹ Constitutional Court, ruling no. 71/1978.

² F. Palazzo, *Introduzione ai principi del diritto penale*, Torino 1999, pp. 18 ss., 119 ss.

³ Constitutional Court, ruling no. 263/2000.

⁴ Constitutional Court, rulings no. 360/1995; 519/2000.

Constitutional jurisprudence does not maintain that only good or concepts of constitutional relevance are legitimately ‘worthy’ of penal protection⁵, but uses parameters which can be traced to the control of ‘reasonableness’, sometimes the criterion of the (reasonable) balancing of interests⁶, and other times the criterion of the adequacy of the means with respect to the scope of protection (instrumental rationality)⁷, or the principle of proportion between the seriousness of the violation and the extent of the sanction, taken from Articles 3 and 27.3 of the Constitution.⁸ The legislator is prohibited from incriminating the exercise of rights to freedom⁹, which are constitutionally guaranteed, or aggravating them¹⁰, but it is possible to expressly impose the punishment of, for example, ‘all physical or moral violence on persons already subjected to restrictions of freedom’ (Art. 13 para. 4 Const.)¹¹.

Perhaps currently residing in the distinctly personal nature of penal offences is the most significant criterion for differentiating penal sanctions from other sanctions which are only punitive *lato sensu*. The law of 24 November 1981 no. 689 established analogous principles for pecuniary sanctions (legal reserve, non-retroactivity and determination: Article 1; subjective responsibility: Article 3; non heritable obligation: Article 7), but the Constitutional Court¹² excluded the applicability of the constitutional principles in criminal matters to less harsh sanctions, ‘considering that administrative offences and administrative sanctions are characterised by distinct and autonomous rules with respect to the criminal punitive system’¹³. Fiscal offences and disciplinary offences are excluded and distinct from the general discipline of criminal and administrative offences, both with their own guarantee systems. Principles such as legal reserve and the non-retroactivity of the law, trials with a more or less ordinary standard of proceeding, and the typicality and proportionality of sanctions, are all applied to disciplinary

⁵ Rulings no. 62/1986; 333/1991.

⁶ Rulings no. 126/1985 (excessive protection of military discipline), 62/1986, 4/1997.

⁷ Rulings no. 296/1996 (free drugs transfer), 370/1996 (possession values without justification).

⁸ Rulings no. 519/1995 (non invasive mendicity) and 49, 409/1989; 298/1995; 247/11997; 47/1998.

⁹ Rulings no. 29/1960 (strike for economic interests); 165/1983 (strike for political interests); 508/2000 (blasphemy).

¹⁰ Constitutional Court, rulings no. 45/1957; 27/1958 (religious ceremony outside); 56/1970 (public party).

¹¹ This duty of the legislator cannot be enforced, but if it has already been implemented by a penal regulation, the said regulation cannot be revoked or decriminalised.

¹² Constitutional Court, rulings no. 68/1984; 159/1994.

¹³ Constitutional Court, ord. 159/1994.

sanctions. For military disciplinary sanctions that restrict freedom (e.g. confinement to barracks, either simple or strict), Article 13 of the Constitution can be considered applicable, according to which, ‘all physical and moral violence on persons whose freedom is already restricted is to be punished’.

In order to provide guidance to the legislator in ascertaining illicit behaviour and in the decision regarding the appropriate sanction (penal or administrative), the circular of the Presidency of the Council of Ministers of 19 December 1983¹⁴ recalls the principles of proportion and subsidiarity. It is only necessary to resort to a penal sanction in the event that the administrative sanction seems inadequate with respect to the value requiring protection, or substantially unsuitable for such protection for reasons of likely ineffectiveness.¹⁵ Among the sanctions of a pecuniary nature only, an administrative sanction must be preferred for reasons of effectiveness, in as much as its application is normally, on a practical level, more easily and firmly ensured.

Articles 25.2 and 3 of the Constitution, which operate alongside Articles 3, 13, 23 and 101 of the Constitution as well as Article 1 of the penal code¹⁶, indicates the principle of legality as one of the cornerstones of the Rule of Law, carrying double significance. One, the certainty of the position of freedom of the individual against the possible abuse on the part of executive and judicial authorities, the other, the guarantee that an act leading to the restriction of individual rights to freedom originates from Parliament, which ensures *in abstract* reconciliation between the society’s requirement for punishment and the rights of the individual. Given the fact that it is the law which determines both criminally significant behaviour (the precept of the incriminating regulation) and the disciplinary consequence (punishment and security measure), the three fundamental principles of the penal system can be deduced: the reserve of law, from the point of view of the ‘source’ of the penal regulation; determination and imperativeness, with regard to the ‘content’ of the regulation, in its formulation and its application (*infra*, §§ 2 and 3); non-retroactivity, from the perspective of ‘effectiveness’ (*infra*, § 4).

By virtue of the principle of the ‘reserve of law’, for historical reasons¹⁷, only the law of the State [and acts of government adapted to it: law by decree and

¹⁴ G.U. 23 Jan. 1984 no. 22.

¹⁵ See F. Mantovani, *Diritto penale, parte generale*, 4th ed., Padova 2001, §§ 7, 257.

¹⁶ ‘No-one can be punished for an act that is not expressly indicated as an offence by law, and no-one can be subjected to punishment which is not expressly foreseen by the said law.’

¹⁷ Constitutional Court, ruling no. 487/1989 explains why regions have no legislation over penal matters.

delegated legislative decree (Arts. 76 and 77 Const.)) can be the source of penal law (so-called absolute reserve). Such a principle has an absolute value as far as the statutory punishment¹⁸ is concerned, which cannot in any way be determined or complemented by a source different from the law (principle of the reserve of law regarding disciplinary measures), even if the extent to which it fits the crime is the responsibility of the judge.¹⁹ The principle of legality of the punishment is translated essentially, as such, in the prohibition of indeterminate punishments, as well as of imprecise or excessively broad statutory frameworks.²⁰

The possibility for secondary sources to intervene, to varying extents of supplementary function, in the configuration of the precept, on the other hand, is particularly controversial. According to the Constitutional Court, the intervention of the secondary source is legitimate provided that the law establishes with 'sufficient determination' the suppositions, dispositions, content and limits of the provisions of the non-legislative authority.²¹ The law can refer to the secondary source for the mere technical specification of elements of the case in point, indicating the technical criteria for that specification²², to be deduced 'with the aid of the suggestions that the specialist science in question can give at a certain moment in time'²³. The Court has indicated three models, the first two considered legitimate, the third on the other hand illegitimate²⁴:

- a) the law refers to the regulation for the specification of the essential elements of an offence, for the purpose of a simple technical specification;
- b) the law can call upon administrative provisions not qualified by abstractness and generality, provided that there is sufficient legal specification of the precept;
- c) the law calls upon administrative sources of general scope, both existing or yet to be issued.

Article 27 of the Constitution establishes that 'penal responsibility is personal' and that 'punishments may not consist of treatment contrary to a sense of humanity and must tend towards the rehabilitation of the convicted'. Such

¹⁸ Constitutional Court, rulings no. 15/1962; 203 and 285/1991, 299/1992. For the case law of the Court of Cassation, see L. Picotti, in: F. Bricola/V. Zagrebelsky (eds.), *Giurisprudenza sistematica di diritto penale. Codice penale, Parte generale*, Vol. I, 2nd ed., Torino 1996, pp. 79 s.

¹⁹ Constitutional Court, rulings no. 26/1966; 25/1967; 131/1970; 50/1980.

²⁰ Constitutional Court, no. 299/1992.

²¹ Rulings no. 26/1966 (forest order); 113/1972 (betting); 132/1986 (arms).

²² Constitutional Court, ruling no. 61/1969.

²³ Constitutional Court, ruling no. 333/1991 (drugs).

²⁴ Ruling no. 282/1990 (fire-fighting certificate), criticized by F. Palazzo, 'voce Legge penale', *Dig.Disc.Pen.*, VII, pp. 338 (355).

provisions attribute a constitutional dignity to the so-called principle of guilt (*culpability*) (*nullum crimen, nulla poena sine culpa*), which expresses the necessity that the offence be traceable to the offender, not only because he or she caused it (responsibility ‘for one’s own actions’), but also because he or she is personally reproachable for it (responsibility for one’s ‘culpable’ actions). The first paragraph can be interpreted as a prohibition of responsibility for the actions of others, the rehabilitative purpose of the punishment imposed by the third paragraph itself contains the necessity to personalise the sanction applied. This would not be possible if the punishment was imposed in the absence of criminal intent or guilt, and only on the basis of a causative relationship or for the simple fact of possessing a certain quality. Therefore, the Constitutional Court declared Article 5 of the penal code to be unconstitutional to the extent in which it established the absolute *inexcusability* of the ignorance of (and error regarding) criminal law, even if this is objectively (e.g. obscure legal texts, unpredictable and fluctuating interpretations, institutional assurances etc.) inevitable:

‘however the rehabilitative function may be intended, it at least requests the guilt of the agent in relation to the most significant elements of the typical case in point. It would not make any sense to “rehabilitate” those who, not being at “fault” or “guilty” (with respect to the event), do not (...) “need” to be “rehabilitated”. Only in the event that the function of deterrent is exclusively assigned to the punishment (but that is certainly to be excluded in the Italian constitutional system, given the grave exploitation that human beings would be subject to) could a penal responsibility for actions not traceable (...) to the aforementioned guilt of the agent be configured as legitimate’²⁵.

These principles do not give rise to a general prohibition of ‘objective responsibility’ (regardless of guilt), but only that guilt must be extended to the qualifying elements of the case in point. The elements extraneous to the ‘subject of prohibition’, however, subtract themselves from the rule of reproachability (e.g. objective conditions of punishability)²⁶. The aforementioned penal code contains a series of hypotheses (e.g., crimes aggravated by the event, error in the execution of the crime, both by a single person [Arts. 82.2 and 83] and with an accomplice [Art. 116]) in which the principle of culpability cannot be said to be entirely respected, and whose correction and renewal has been proposed in recent years with comprehensive legal reform projects.

²⁵ Constitutional Court, ruling no. 364/1988 followed by Law 7 Feb. 1990, no. 19, and Constitutional Court, ruling no. 61/1995 (military penal code).

²⁶ Constitutional Court, rulings no. 1085/1988; 247/1989.

2. Requirements for the Precision of Criminal Law

Today, lawfulness is generally intended as ‘accessibility’²⁷ of the penal precepts, in the sense that they must be known in a way that they can exercise the function of providing guidelines for human behaviour. The principle of determination/imperativeness expresses the requirement for the penal regulation to provide a description of the punishable fact which is so clear that it renders immediately perceptible the correspondence of certain conduct to the abstract case in point, otherwise sanctioned with punishment. This should be intended, first of all, as much with respect to the regulations considered on an individual level as to the penal system as a whole. Secondly, it expresses the requirement that regulations are formulated by the legislator so as to permit the identification of a clear line between the lawful and the illicit (principle of determination in the strictest, or most precise, sense), as well as the prohibition of analogy (principle of imperativeness) and, according to part of academic doctrine, also the specific need for incrimination to refer to facts which can be proved in court.²⁸ For a consolidated interpretation it is held that the principle of determination – specified by Articles 1 and 199 of the penal code, 14 disp. prel. of the civil code and by Article 25.3 of the Constitution for security measures – is rendered constitutional by the same Article 25 para. 2, as well as indirectly by Articles 24.2 (right to defence, which would be damaged by an imprecise identification of the charge), and 112 (compulsoriness of the penal action, which would be frustrated in the event that the boundary of the criminally significant act was uncertain) of the Constitution.

The legislator ‘is obliged to formulate conceptually precise regulations from the semantic perspective of the clarity and intelligibility of the terms employed’²⁹. The criteria of the Constitutional Court seem to indicate sufficient determination:

- a) when it is possible to recognise the linguistic significance of the expressions used³⁰;
- b) if the content of the regulation is adequately clarified by current law, i.e. by jurisprudence with constant guidance³¹;
- c) (only) in the event that the content of the case in point can be empirically verified³²;

²⁷ Palazzo, *Introduzione* (note 2), pp. 202 ss.

²⁸ Marinucci/Dolcini, *Corso* (note 1), pp. 163 ss.

²⁹ Constitutional Court, ruling no. 96/1981.

³⁰ Constitutional Court, rulings no. 195/1983 and 131/1970.

³¹ Constitutional Court, ruling no. 11/1989 (toy weapons).

³² Constitutional Court, ruling no. 96/1991 (plagiarism offences).

d) if the elements of the case in point qualify the criminal ‘type’ and combine to constitute the significance of the criminal disvalue of the standardised act³³. Only over the last twenty years³⁴ has the Court allowed exceptions (so far, five)³⁵ of unconstitutionality due to a lack of determination:

‘in imperative prescriptions ... an individual must be able to find ... what is lawful and what is prohibited, and to this end it is necessary to introduce laws that are precise, clear, and which contain recognisable directives for behaviour’³⁶.

3. Prohibition of Analogy

The principle of imperativeness, rendered constitutional by Article 25 of the Constitution, also expresses the prohibition of extending the discipline contained in the incriminating (or unfavourable) regulation beyond the cases expressly foreseen by it. Such a prohibition of analogy is directed at both the judge and the legislator.³⁷ The latter is prohibited on the one hand, from eliminating the provisions (Arts. 1 penal code, 14 disp. prel. of the civil code) that prevent the judge from offering analogical interpretation, and on the other hand, from creating cases in point with explicit analogy.³⁸ With regard to the prohibition of analogical interpretation, the results of its application are often controversial (since at times what is a blatant analogical application is passed off as an extensive interpretation).³⁹ Also controversial is the possibility of analogically applying criminal laws favourable to a defendant pleading guilty. According to the majority of doctrine there should be, in principle, no obstacles to the analogical extension of favourable regulations provided that they are not exceptional (Art. 14 disp. prel. of the civil code prohibits the analogical extension of exceptional laws including, for example, those regarding immunity). According to another doctrine, the analogical identification of, for example,

³³ Constitutional Court, rulings no. 247/1989, 35/1991 (tax fraud).

³⁴ An earlier interpretative decision is ruling n. 15/1973.

³⁵ Rulings no. 177/1980 (preventative measures); 96/1981 (plagiarism); 185/1992 (atmospheric pollution); 35/1991 (non-constitutionality in the part in which the regulation incriminated the alteration ‘in significant measure’ of the result of an income declaration); 34/1995 (deportation of a foreigner).

³⁶ Constitutional Court, ruling no. 364/1988.

³⁷ See Marinucci/Dolcini, *Corso* (note 1), pp. 167 ss.

³⁸ Constitutional Court, ruling no. 120/1963.

³⁹ Constitutional Court, ruling no. 27/1961 (travelling professions and ‘similar’).

justifications, would subtract from the legislator the task of balancing conflicting interests⁴⁰.

4. Retroactive Criminal Laws

Article 25.2 renders constitutional the principle of the non-retroactivity of incriminating laws (cf. Art. 2 penal code).⁴¹ The fundamental principle is traditionally recognised through its intrinsic link with the principle of culpability: if the individual, at the moment of the act, was unable to understand the unlawfulness of his or her actions, then his or her behaviour would never be considered criminally 'reproachable'. The most recent doctrine states that the 'calculability' of the juridical consequences expresses the degree of civilisation in relations between the state and its citizens, even 'regardless of the real psychical/mental state in which the individual approaches the regulation'.⁴²

Article 2 penal code expressly states that penal repealer laws are applied retroactively, and if there has been a conviction, their execution and the penal consequences cease. If the succession of laws is only modificatory⁴³, the most favourable law in practice is applied, but in this case, if an irrevocable sentence has been passed, the 'final judgment' cannot be modified applying the law considered more favourable. The Constitutional Court has specified that, on the basis of Article 25.2 of the Constitution, 'only the principle of the non-retroactivity of the indicting criminal law has acquired constitutional value, but not that of the retroactivity of the most favourable law for those who plead guilty'.⁴⁴ From this derives the constitutional legitimacy of a law which provides the non-retroactivity of favourable criminal regulations, except for the possibility of a syndicate for violation of the principle of equality/reasonableness.⁴⁵

⁴⁰ See G. Vassalli, 'Analogia', *Dig. Disc. Pen.*, Vol. I, Torino 1987, p. 158.

⁴¹ An analogous principle is established by Art. 1, Law 24 Nov. 1981 no. 689, administrative offences, but it is not of constitutional rank, Constitutional Court, ruling no. 68/1984.

⁴² F. Palazzo, *Introduzione* (note 2), partic. pp. 291 s.

⁴³ On this distinction, T. Padovani, *Diritto penale*, 5th ed., Milano 1999, pp. 52 ss.

⁴⁴ Constitutional Court, ruling no. 80/1995.

⁴⁵ Constitutional Court, ruling no. 74/1980. In the financial area, the ultra-activity of criminal-financial laws (Art. 20, Law 7 Jan. 1929 no. 4) has been argued with the particular interest of the state on the fiscal burden. This regulation was repealed by Art. 24 Law Decree 30 Dec. 1999, no. 507 (G.U. 31 Dec. 1999 no. 306).

Projecting the principle of lawfulness not only on criminal ‘law’ (substantial) but also on the penal ‘system’, of which the trial is an essential part⁴⁶, doctrine and jurisprudence also support the non-retroactivity of a law that establishes the punishability by law of an offence which, at the time it was committed, was liable to prosecution. According to a similar logic, part of doctrine and jurisprudence hold that it is able to resolve the problem of the lengthening of the maximum terms of custody (non-retroactivity where the terms for release have already expired).⁴⁷ Constitutional jurisprudence, nevertheless, reiterates on the other hand the application of the *tempus regit actum* rule, rather than the *tempus commissi delicti*⁴⁸ rule, to trial laws.

5. Limitation Periods

The passage of time may affect both the crime and the punishment. The offence ‘is extinguished’ if, after a certain length of time has past after it was committed – variable in a measure which is directly proportionate to the seriousness of the offence, Article 157 penal code – an irrevocable conviction is not attained. However, in consideration of their particular seriousness, offences punishable with a life sentence are imprescriptible. Therefore, since the person accused of a crime may wish to formally demonstrate his or her innocence, the Constitutional Court has established that the prescription is renounceable.⁴⁹ In the event that a punishment has already been imposed (so-called extinction of the punishment), the term of extinction comes into effect from the day in which the sentence became irrevocable or from the day in which the convicted party voluntarily escaped himself or herself from the execution (already begun) of the punishment. The time of extinction is, in the case of temporary imprisonment for a serious crime, equal to double that of the punishment imposed, but in any case has a minimum limit of 10 years and a maximum of 30 years; in the case of imprisonment for contravention, 5 years. The problem of the retroactivity of an extension of the terms of prescription is particularly controversial.⁵⁰

⁴⁶ M. Nobili, ‘Nuovi modelli e connessioni: Processo – Teoria dello Stato – Epistemologia’, in: *Indice peneale*. 1999, pp. 27 ss.; T. Padovani, ‘Il crepuscolo della legalità nel processo penale. Riflessioni antistoriche sulle dimensioni processuali della legalità penale’, *ibidem*, pp. 527 ss.

⁴⁷ Marinucci/Dolcini, *Corso* (note 1), pp. 261–262, 266.

⁴⁸ Constitutional Court, ruling no. 15/1982.

⁴⁹ Constitutional Court, ruling no. 275/1990.

⁵⁰ Marinucci/Dolcini, *Corso* (note 1), pp. 261 ss. and especially pp. 263 e nt. 31.

V. PRINCIPLE OF PRECISION AND FORESEEABILITY OF LEGAL NORMS

Luca Geninatti

1. General Requirements (Purpose, Extent, Contents, etc.)

The so-called principle of ‘imperativeness’ or ‘determination’ of normative rulings is not only valid in a penal context, being the expression of the more general principle of ‘lawfulness’, on the basis of which the public can claim the right to be able to trust in the certainty of the law against any abuse of judicial power. The Constitutional Court has nevertheless adopted a rather restrictive stance, gaining leverage from, for the majority of penal regulations brought to its attention, the concept of ‘living law’ identified from time to time in the constant or prevalent guidelines followed by jurisprudence in the interpretation of a given regulation.¹ Furthermore, the principle of non-retroactivity, established by Article 11 of the *pre-laws* (‘The law only provides for the future: it does not have a retroactive effect’) is only considered constitutional for criminal law (Art. 25) and, by virtue of the principle of so-called ‘*relevance* of contributory capability’, also in part for fiscal law (Art. 53).² Further protection is offered only by the general constitutional principle of equality and the criterion of reasonableness, at least for certain types of law. Such principles are put into practice in the so-called protection of the legitimate trust of the public and of ‘juridical security’,³ a kind of *bona fides* in public law which according to part of the doctrine would also be deducible from the duty of solidarity (Art. 2).⁴

In general, the inadequacy and/or scarce efficiency of a law with respect to the aims established by the constitution does not necessarily lead to it being

¹ Interpretative dialectics whose lack of homogeneity does not exceed the normal ‘physiological’ threshold have been mentioned, sent. no. 21/1990. But see also rulings no. 96/81 (‘total state of subjection’), 177/1980 (‘tendency to offend’), 247/1989 (tax fraud), 282/1990 (fire prevention).

² Ruling no. 45/1964.

³ Ruling no. 397/1994.

⁴ S. Rodotà, *Le fonti di integrazione del contratto*, Milano 1969, pp. 112 ss.; F. Merusi, *L’affidamento del cittadino*, Milano 1970, p. 272.

recognised as contrary to the constitution'.⁵ This is also in consideration of the discretion of the legislator in the choice of times and methods according to which constitutional principles are implemented.⁶ A flaw of absolute incompetence and diversion of the legislative function can nevertheless be verified in the event that the law is used mainly with the aim of interfering in judgments on cases in progress or to preclude the passing of final sentences.⁷

2. Differences Regarding Type and Matter of the Law

Outside the so-called 'strict legality' of criminal law (*nullum crimen...*), the precision of legal rules is also an issue of the more general principle of the lawfulness of administrative actions and norms. This is faced for example in constitutional jurisprudence regarding the general requisites of abrogating referenda (Art. 75 Const.) and of delegated lawmaking (Art. 76 Const.).⁸ The drafting of an 'abrogation' law to be adopted by way of referendum has to face specific tests of 'clarity, homogeneity and non-contradiction' regarding its objectives⁹ and delegation acts need well established 'principles and guiding criteria'. Administrative action has to be inspired by administrative legislation insofar as 'public offices are organised according to the provisions of law, so as to ensure efficiency and the impartiality of administration' (Art. 97 para. 1 Const.). But the value of the predictability of administrative law is underlined mainly by the regulations of the offices which have to 'lay down the areas of competence, duties and responsibilities of their functionaries' (Art. 97 para. 2). On the other hand, administrative regulations can even supplement criminal laws, for example those defining drugs as non-tradable or chemical agents as detrimental to the environment.

The laws for the so called "authentic" interpretation for statutory instruments which are often used as retroactively binding instruments in order to change jurisprudence for pending cases are of a special type. The constitutional control over such legislation is based on the rule of reasonableness, distinguishing normal cases of legitimate law and framing policies from abnormal cases 'where the intent is to bind the judge to a certain decision on specific controversies, being

⁵ Ruling no. 149/1983.

⁶ Art. 28 Law no. 87/1953 states a prohibition for the Court to 'make valuations of a political nature and to review the exercise of the discretionary power of the parliament.'

⁷ Ruling no. 187/1981, 374/2000.

⁸ The scrutiny of such delegation differs in consideration of the rights involved, ruling no. 134/2003.

⁹ Constitutional Court, rulings no. 41, 42/2003.

clear that in such cases the use of the instrument of interpretation is vitiated by the abuse of power.¹⁰ Such legal interpretations can be declared unconstitutional insofar as they produce an unreasonable retroactivity.¹¹

Laws providing individual measures (legal regulations), on the other hand have specific legitimacy as instruments of the social state and its constitutional principles. The control over the reasonableness of such laws can refer to (and demand) laws containing general principles for such matters, especially if regional legislation is challenged.¹²

Nevertheless, a legislative act of expropriation could be unconstitutional in cases of ‘manifest erroneous or arbitrary decisions’:

‘to be able to affirm that the denounced law does not fulfil the aims of general utility in conformance with Article 43 of the Constitution, the following would need to be true: the legislative body has not carried out an appraisal of such aims and of the means of achieving them, or such an appraisal has been invalidated by illogical, arbitrary or contradictory criteria, or rather the appraisal proves to be in blatant contrast with the suppositions in point. Legitimacy would also be compromised if it was ascertained that the law had provided means which were clearly unsuitable or in contrast with the aim it was supposed to achieve or rather if it turned out that the legislative bodies had taken advantage of the law to achieve an objective other than that of general utility’.¹³

3. Interpretation Methods

Article 12 of the preliminary provisions for the civil code of 1942 contains specific rules guiding the interpretation of statutes that allow analogy, excluded for penal laws (Art. 14). The same provision commands the respect of the original intent of the law, but can be interpreted in a more subjective (*voluntas*) or objective version (*ratio*). The second seems to be necessitated at least in cases of interpretation of older laws within the new context of the constitution of 1947. As the uniformity of interpretation and ‘*nomofilachia*’ is the responsibility of the Court of Cassation (Art. 11 Const.), the Constitutional Court has never entered into a scrutiny or interpretation of such rules and considers itself bound by the consolidated and generally accepted jurisprudence of that Court (so called ‘living law’).¹⁴ The question regarding whether judges who offer interpretations which

¹⁰ Rulings no. 155/1990, 240, 397/1994; 321/1998, 374/2000. See A. Anzon (ed.), *Le leggi di interpretazione autentica tra Corte costituzionale e legislatore*, Torino 2001.

¹¹ Ruling no. 525/2000.

¹² Ruling no. 47/2003.

¹³ Ruling no. 14/1964.

¹⁴ Ruling no. 161/1967.

are incompatible with the original intent and philological criteria could be subject through statute law to specific disciplinary measures applied by the High Council of the Judiciary remains controversial.

4. Admissibility of General Clauses/Indeterminate Legal Terms

The Italian Constitution uses general clauses and indeterminate legal terms such as ‘morality’ (Art. 21), ‘security’ (measures, Art. 13), ‘democratic spirit’ (Art. 52), ‘smooth running’ (of administration, Art. 97) etc.

Furthermore, general clauses can be used in order to define the object matter and guiding principles of delegated law making, for example, if the parliament delegates to government the task of ‘reviewing’ or ‘ruling’ specific sectors of legislation or if the state delegates to the regions administrative functions related to the promotion of regional and local communities.¹⁵

Insofar as reserves for statutory legislation affecting fundamental rights are involved, Article 23 of the Constitution (‘Nobody may be forced to perform personal services or payments without legal provision’) has been construed in such a way that it does not apply either to the quantification of the services or to ‘secondary and supplementary elements such as the formal qualification of services, the negotiation of the sources of the duty, the way inclusion of such obligation *ex lege* in private contracts is empirically done, the greater or lesser value such services have in the contractual relations.’¹⁶

For penal laws, more precision is demanded and can be obtained even through specific constitutional judgments.¹⁷ On the other hand so-called ‘*leggi penali in bianco*’ (‘white penal laws’) are still controversial. A penal law can provide the sanction for a precept which is further supplemented by a source even of secondary ranking or decisions of public authorities. For example, in the penal code, there are regulations that, with the aim of guaranteeing ‘public function’, hold legally liable the ‘military officer or police officer that unreasonably refuses to carry out, or delays the carrying out of, a request/order on the part of their relevant authority, in the forms established by law’ (Art. 329 c.p.), or ‘anyone (that) does not observe a directive legally issued for reasons of justice, public safety, public order or hygiene’ (Art. 650 c.p.).

¹⁵ Ruling no. 125/2003.

¹⁶ Ruling no. 236/1994.

¹⁷ So called ‘*sentenze manipulative*’, for example ruling no. 34/1995.

V. Principle of Precision and Foreseeability of Legal Norms

VI. PRESUMPTION OF INNOCENCE

Matteo Losana*

Article 27, para. 2, of the Constitution establishes the principle currently in force that ‘the accused is not considered to be guilty until a final conviction is made’. The constitutional formulation of the principle in negative (presumption of not being guilty) rather than positive (presumption of innocence) terms has been highlighted by constitutional jurisprudence in order to justify certain penal institutions, particularly pre-emptive imprisonment – today called ‘preventive detention’ – allowed by Article 13, para. 5, of the Constitution. ‘Not guilty’, in this context, represents the status of the accused during the trial, while ‘innocent’ is a separate status applied to those who have been acquitted in final judgment. The Constitutional Court, with ruling no. 124/1972, rejected the question of legitimacy posed with reference to the ‘acquittal for insufficient evidence’ foreseen by the old penal procedure code, further stating that also Article 6, no. 2, of the European Convention of Human Rights ‘contains rules on preventive detention [...] which appear to be incompatible with the presumption of innocence, but consistent with the presumption of not being guilty’. Heeding the warning of an *obiter dictum* of the sentence, the new Article 530, para. 3, of the code of penal procedure states that the judge must find the defendant not guilty also when there are doubts surrounding the existence of the acts allegedly committed.

The ‘presumption of not being guilty’ can be interpreted as

- a) a rule regarding the treatment of the defendant, and
- b) a rule of judgment.

In the former case, such a presumption implies that the accused retains his or her original personal status during the trial, and whose rights can be only be restricted for reasons of specific necessity relating to the smooth running of the penal action. In the latter context, it establishes that the accused can only be found guilty when his or her guilt has been (entirely) proved, while his or her innocence, the subject of the prescriptive content of the presumption, does not need to be proved.

* Matteo Losana, Doctor of Research in Constitutional Law, University of Turin.

a) Intended as a rule regarding the treatment of the accused, the principle is specified in the ban to anticipate the application of the sanction. Since from a perspective of the effects on personal freedom it is not possible to distinguish preventive detention from a pre-emptive/advance application of a sanction, a criterion of distinction has been sought between the two concepts in the 'typical' purposes of the preventive measure. According to such a framework, restrictions of personal freedom imposed on the accused during the trial and, therefore, before the ascertainment of responsibility, would be compatible with the 'presumption of not being guilty' only if they serve purposes strictly linked to trial itself. The Constitutional Court – judging with ruling no. 64/1970 the now repealed Article 253 of the code of penal procedure that governed the mandate of obligatory arrest – stated that 'in no circumstances can preventive detention carry the function of pre-empting the punishment, which is only to be inflicted after the determination of guilt: therefore, it can only be applied in order to satisfy requirements of a precautionary nature or strictly inherent to the trial'. Nevertheless, 'the law [may] presume that the person accused of a particularly serious crime and whose guilt is suggested by a sufficient amount of evidence is in a position to endanger those principles that the preventive detention is intended to protect'.

Subsequently, the Court, called upon to express judgment on certain provisions of penal legislation aimed at combating the phenomenon of terrorism, explicitly indicated collective security requirements as specific objectives of the preventive institute. With sentence no. 1/1980, the Court declared unconstitutional the regulation that obliged the judge, in granting release on bail/temporary release, to conclude that there is no probability, in relation to the seriousness of the offence and to the personality of the defendant, that he or she once released will 'again' commit offences which would pose a threat to public security. Preventive detention, a coercive measure also founded on sufficient evidence of guilt, would be a necessary measure for the safeguarding 'of an interest – the protection of society from serious crime – of undoubted constitutional importance'. With ruling no. 15/1982, the Court then deemed a regulation that extended by one third, for certain crimes related to the phenomenon of terrorism, the maximum duration of *ante judicium* detention to be in conformance with the constitution, as it was considered an urgent (and temporary) action for the protection of democratic order and public safety. A state of 'emergency', given that it is 'certainly an anomalous and serious condition, but also essentially temporary, can legitimate unusual measures which, however, lose the legitimacy if they are protracted over time without justification.

The ordinary legislator that, approving the new code of penal procedure, has therefore redefined those 'precautionary requirements' which must necessarily exist in order for a personal precautionary measure to be applied, indicating not

only requirements which can be traced to the progress of the trial (risks regarding tampering with evidence and the escape of the accused), but also the protection of society as a whole from the risk that the accused, during the trial, might commit certain offences. The latter must be deduced – in conformance with the amended Article 274, letter c), c.p.p. – from specific forms of the criminal act and from the dangerous nature of its perpetrator, which can be ascertained from ‘criminal records’ or from ‘specific behaviour or conduct’. According to the Court of Cassation, the judge can also take ‘penal suits pending’ (Cass. Pen. Sec. I, sent. no. 4878 of 15 July 1997) into consideration, because the principle of being ‘not guilty’ ‘does not prevent in any way the forming of evaluations of the defendant’s personality from the objective fact of a suit pending, against him or her, of other criminal proceedings’.

- b) Intended as a rule of judgment, the principle is expressed first of all,
 - aa) in the rule that puts the burden of proof (of guilt) on the prosecution; secondly,
 - bb) in the rule that the accused can be ‘acquitted’ not only when his or her innocence is proved (or possible to prove), but also when it is not possible to entirely prove his or her guilt;
 - cc) finally, in the rule that guarantees the right of the accused to get a judgment (*pronuncia nel merito*), even in the presence of causes for the extinction of the offence.
- aa) Those incriminating cases in point that impose on those possessing certain objects (including, for example, according to Art. 707 c.p., counterfeit keys or tools designed to force open locks) the burden of justifying where they came from has caused a great deal of perplexity. Constitutional jurisprudence, even though with justifications partly in disagreement, has always held that the said cases in point do not lead to a direct violation of the ‘presumption of being not guilty’. With ruling no. 110/1968 (confirmed by no. 464/1992), the Court stated that an individual need only provide a ‘satisfactory explanation’ of why such objects are in his or her possession and that the guarantee of the ‘presumption of innocence’ does not invest ‘the way of proving criminal actions’. Subsequently, ruling no. 236/1975 observed that in the event that the accused refuses to respond during interrogation, thus failing to provide any ‘justification’, the judge will be able to evaluate the situation in the light of other evidence. Otherwise, ruling no. 48/1994 declared unconstitutional a regulation that punished the possession of goods of a disproportionate value to one’s income or to the economic activity carried out, when such availability is not justified by its legitimate provenance on the part of those who are the subject of pending penal procedures for certain offences. A legal case in point is one that deduces from the simple status of suspect for certain (mafia related) crimes the suspicion that the disproportion between the valuables

VI. Presumption of Innocence

possessed and the income declared may be the result of illegal activities and as such in contrast with the presumption sanctioned by Article 27, para. 2, of the Constitution.

bb) The old code of penal procedure contemplated a formula of dubitative acquittal ‘for lack of evidence’, considered by doctrine to be incompatible with the principle of ‘non guilt’. The controversial formula was eliminated by the new code of penal procedure which, in the amended Article 530, para. 2, states that full acquittal can also be granted by the judge in the event of insufficient or contradictory evidence.

cc) The code of penal procedure also rules that the judge must declare immediately, at any stage or level of the trial, the so called “extinction” of the crime unless the proceedings already clearly indicate that the offence does not subsist or that the accused did not commit it or, that the conduct is not considered by law to be a crime’ (Art. 129 c.p.p.). According to some, this provision does not sufficiently guarantee the constitutionally protected right of the defendant to obtain a full ‘not guilty’ verdict. The Constitutional Court has already declared, with ruling no. 175/1972, the partial constitutional illegitimacy of the (repealed) Article 151 c.p.p., para. 1, insofar as it excluded the renunciation of the application of amnesty, affirming ‘the constitutionally protected relevance of the interest of those facing criminal prosecution to obtain not only any kind of sentence which allows them to avoid the imposition of punishment, but precisely that sentence whose formulation documents their status of being not-guilty’. With ruling no. 275/1990, it also declared the constitutional illegitimacy of Article 157 c.p. because it does not rule that the prescription of the crime can be renounced by the accused.

VII. RIGHT TO COUNSEL

Susi Campanella*

Article 24 paras. 2 and 3 of the Constitution provide that ‘defence is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defence in all courts’.

In the transition from a model of inquisition to a substantially ‘accusatory’ (or adversarial) model of criminal trial with the code of penal procedure of 1989, the legislator has strengthened the function of the defence – although modifiable to varying degrees according to the characteristics of the individual act to be carried out within the various stages of the trial.¹ The defence has to offer all the faculties and rights which the accused is entitled to expect (Art. 99 c.p.p.).² The idea of a new ‘antagonistic’ defence put forward by the public ministry was perfected with the approval of law no. 397/2000 in the area of defensive investigations, which has finally disciplined the power of the criminal defence to actively seek elements of evidence which serve for the exercising of the right of defence in view of their utilisation in the context of a trial³.

1. Free Choice of Defending Counsel

The formula of the right to defence, unlike Article 6 of the European Convention of Human Rights, failed to specify the type of structure which would be ideal to safeguard the defence, neither did it confront the subject of the individual guarantees that constitute it⁴. Nevertheless, the historical suppositions and the

* Susi Campanella, Ricercatore in formazione presso il Dipartimento di Diritto Pubblico, Pisa.

¹ Rulings no. 48/1994, 175/1996.

² See P. Ferrua, *Studi sul processo penale*, Torino 1990, p. 40; furthermore G. Frigo, ‘Difensore’, in: *Commentario del nuovo codice di procedura penale*, diretto da E. Amodio/O. Dominioni, I, Milano 1989, p. 570.

³ See Law 7/12/2000 no. 397 (‘Disposizioni in materia di indagini difensive’), in: G.U. uff. 3. 1. 2001 no. 2. and L. Filippi (a cura di), *Processo penale: il nuovo ruolo del difensore*, Padova 2001.

⁴ On Art. 24 para. 2 Const., inter alia, G. Vassalli, ‘Sul diritto di difesa giudiziaria nell’istruzione penale’, in: *Scritti in onore della CEDAM*, II, Padova 1953; A. Carli Giardino, *Il diritto di difesa nell’istruttoria penale*, Milano 1983.

ratio of the provision emerge, with clarity, from the work of the Constituent Assembly: the intention was, with the principle of the inviolability of the defence, ‘to outline a precise directive to the legislator’⁵, forcing it to make available all the tools necessary in order to ensure the effectiveness of the value proclaimed in the intention to eliminate uncertainty and deficiencies, which had been wounded in the passed totalitarian regime⁶. According to the Constitutional Court, Art. 24 para. 2 Constitution safeguards, in the area of penal procedure, the position not only of the accused, but of any individual who is the subject of legal action and even those who present themselves as civil parties in order to obtain restitution and compensation of damages provoked by the offence.⁷

According to precedent and case law, the right to defence implies the right of the accused to be informed of the opening of a legal action against him or her, of the accusations levelled at him or her by the prosecution, the right to prepare and enunciate his or her own line of defence and to obtain evidence which supports him or her, as well as the (fundamental) right to be assisted by a defence lawyer for the duration of the trial⁸. Article 24 para. 2 therefore guarantees both material defence, intended as a form of self-assistance for the interested party, but also in a formal sense, intended as the presence of a trusted defence lawyer.

Also following the intervention of the Constitutional Court⁹, the new code of penal procedure facilitates methods of the communicating such a choice, allowing the intervention of a next of kin. The accused has the right to nominate no more than two defensive representatives (Art. 96 c.p.p.). In any case, the accused has the right to be present in order to be able to fulfil all the activities of the defence which are deemed useful to the aims of judgement based on the accusations that have been made¹⁰.

The role of the defence lawyer is therefore inextricably linked – as well as to the personal interests of the accused to defend themselves – to the fair exercising of jurisdictional power, and its activity is presented as the ‘exercising of a public function’, which is the ‘superior interest’ of justice.¹¹

⁵ G. P. Voena, ‘voce Difesa penale’, in: *Enciclopedia giuridica*, X, Roma 1988, p. 3.

⁶ L. P. Comoglio, sub art. 24 co. 2 Cost., in: *Commentario della Costituzione*, a cura di G. Branca, Bologna–Roma 1981, p. 54.

⁷ Sentences no. 5/1965, 55/1971, 99/1973.

⁸ M. Scaparone, *Evoluzione ed involuzione del diritto di difesa*, Milano 1980, p. 21; M. Cappelletti, ‘Diritto di azione e di difesa e funzione concretizzatrice della giurisprudenza costituzionale’, in: *Giurisprudenza Costituzionale* 1961, p. 1287ss.

⁹ Sentence no. 588/1988.

¹⁰ Sentences no. 186/1973; 99/1975; 188/1982; 301/1994.

¹¹ Sentence no. 59/1959; 162/1975. See P. Ferrua, ‘voce Difesa (diritto di)’, in: *Digesto delle discipline penali*, III, Torino 1989, p. 466.

2. Appointed Defending Counsel

Initially, the Constitutional Court limited itself to stating that ‘the right to defence is not always identified with the necessity of defensive assistance’¹² – leaving room in a certain sense for the concept of ‘availability’, in the sense of ‘freedom of choice’ of the defence counsel on the part of the accused.¹³ Subsequently, the Court has not hesitated to consider implicit the provision of ‘the technical assistance of a defence counsel, to be rendered, above all, obligatory and not optional’.¹⁴

‘the right to defence, in the context of a criminal trial, includes by definition, apart from the right of individuals to defend themselves, also, when this right is not exercised, the obligation on the part of the State to provide for their defence with the nomination of defence counsel.’¹⁵

Thus, if technical defence is above all a right which presents itself essentially as a freedom of choice of a fiduciary defence lawyer, a system which does not admit ‘self-defence’ exclusively but recognises the inevitability of the presence of defensive counsel, could not avoid confronting the lack of trusted assistance through the designation of the so-called ‘assigned counsel’,¹⁶ maintaining the right of the accused to nominate a trusted defence lawyer, able to assume the functions of the one nominated by the state (Art. 97 clause 7 c.p.p.)¹⁷.

Even if, in the past, there was no shortage of declarations of unconstitutionality in relation to directives limiting the obligation of assigning counsel,¹⁸ such an obligation was not generalised¹⁹ and therefore it remains unclear whether the right to defence is simply inviolable, or also one which also cannot be renounced.

The aforementioned Article 111 Constitution also had a propulsive effect for law no. 60/2001 which has finally guaranteed the maximum effectiveness of the

¹² Sentence no. 29/1962, 108/1963.

¹³ For the theory of availability of technical defence on the part of the accused, v. N. Carulli, *La difesa dell'imputato*, Napoli 1967, pp. 59 ss.

¹⁴ Sentence no. 53/1968.

¹⁵ Sentence no. 69 /1970.

¹⁶ See G. Tranchina, ‘Soggetti’, in: D. Siracusano/A. Galati/G. Tranchina/E. Zappala, *Diritto processuale penale*⁴, II, Milano 2001, p. 229.

¹⁷ See. A. Cristinai, ‘sub art. 97 c.p.p.’, in: *Commento al nuovo codice di procedura penale*, coordinato da M. Chiavario, I, Torino 1989, p. 456.

¹⁸ Sentence no. 69/1970.

¹⁹ Sentences no. 29/1962; no. 160/1982.

VII. Right to Counsel

institution of the assigned counsel²⁰. New legal developments have predominantly concentrated on the greater professionalism of operators and the real guarantee of their salary. The first is ensured by means of a rigid selection from those members of the assigned counsel register, together with the concession of more time for the preparation of the defence. The second is linked to the drafting of new rules for the recovery of the salary owed to the defence counsel, foreseeing the subrogation of the State in the credit towards the insolvent defendant in measures foreseen by laws governing the assistance of the economically disadvantaged.

²⁰ Law 6/3/2001 no. 60 ('Disposizioni in materia di difesa d'ufficio'), G.U. 21. 3. 2001 no. 67.

VIII. RIGHT TO AN INTERPRETER

Luca Geninatti*

With regard to the right to linguistic and cognitive assistance (cf. Art. 6.3. CEDU European Convention of Human Rights), the Constitutional Court had stressed that the hard core of the guarantee given by Article 24 of the Constitution from the point of view of self-defence is the possibility of conscious participation in the trial. It was therefore declared that Article 119 c.p.p. was partially unconstitutional because it did not rule that a deaf, dumb or deaf-and-dumb defendant, regardless of his or her ability to read and write, had the right to the services, free of charge, of an interpreter, freely chosen from people who habitually deal with the accused, with the aim of being able to understand the accusations being made against him or her and to follow the progress of the proceedings he or she is participating in (sent. no. 341/1999)²¹.

In such regard, the current formulation of Article 111 of the Constitution expressly provides that a person accused of a crime ‘must be assisted by an interpreter if that person that does not understand or speak the language being used in the trial’, guaranteeing the gratuitousness sanctioned by Article 6 of the European Convention of Human Rights (CEDU).

Those belonging to linguistic minorities also have the right to be interrogated or examined in their native tongue (Art. 109, para. 2, c.p.p.), a right to the judicial authorities located within a specific region. The Constitutional Court excluded that the applicability of the said guarantee should be extended to other authorities which have jurisdiction non referred territories where the said linguistic minority is mostly settled (ruling no. 213/1998).

* Luca Geninatti, Ricercatore di Istituzioni di Diritto Pubblico, Università del Piemonte Orientale.

²¹ On the right to an interpreter under art. 143 c.p.p. see also ruling no. 10/1993.

VIII. Right to an Interpreter

IX. FAIR TRIAL

Luca Geninatti*

1. Other Specific Procedural Rights

The principle of a ‘fair trial’ can be considered to be largely absorbed by that of ‘just proceedings’, which implies, apart from the rights of the defence, rights which can be traced to the wider principle of equality, such as the ‘parity between the parties’ and the principle of externality and impartiality of the judge (Art. 111 Const.).

2. Equivalence of Procedural Positions of the Parties

According to the Court, the new accusatory model of the criminal trial means that the cross-examination intended as an expression of the constitutional guarantee of defence is established during the trial, and not during the preceding stages, and the primary interlocutor is the judge, not the public prosecutor (ord. no. 326/1999). Such a model comprises an equilibrium between the parties, and brings with it, among other things, the possibility for poorer people to benefit from technical consultants at the state’s expense, even when a report has not formally recommended such action (Art. 4, para. 2, part one, law of 30 July 1990, no. 217: sent. no. 33/1999).

Nevertheless, this does not imply that a defendant unjustly brought to trial can always charge the expenses of his or her defence to the state, because the

‘principle of parity of the parties finds its expression in the equal right to evidence and in the rule that this must be formed in cross-examination, but it does not mean that the powers and means with which the parties are equipped must be the same, given that, in this regard, the criminal trial presents a natural asymmetry which can be reduced but not entirely eliminated, connected, as it is, to the *jus puniendi* which only the state can be responsible for’
(ord. no. 286/2003).

* Luca Geninatti, Ricercatore di Istituzioni di Diritto Pubblico, Università del Piemonte Orientale.

With regard to the right to evidence, parity between parties has to be respected even in the case of an expansion of the *thema decidendum*. Art. 519, para. 2, c.p.p. was declared unconstitutional insofar as, in the event of a new objection made in accordance with Article 517 of the same code, it did not allow the public prosecutor or parties other than the accused to request the admission of new evidence (ruling no. 50/1995). Nevertheless, it is in the very lack of equality between the main parties of the criminal trial and the plaintiff for damages, whose presence in a criminal trial is only eventual, that the different treatment with regard to the admission of evidence can be justified *ex* Article 495, c. 2, c.p.p. (ruling no. 532/1995).

The reform of Article 111 of the Constitution gave rise to the law of 7 December 2000, no. 397, entitled 'Provisions regarding investigations of the defence', on the basis of which the defence is attributed extensive powers to search for evidence in favour of the defendant, as well as the documentation and utilisation of the results of the investigations carried out during the trial.

3. Protection from Surprise Procedural Motions

The necessity of protecting the parties from 'surprise' motions is now addressed in Article 111 of the Constitution which prescribes the cross-examination in respect of evidence as the fundamental principle governing the criminal trial (para. 4). In ruling no. 16/1999, the Court had already interpreted Article 419, para. 3, c.p.p. in the sense that, where the public prosecutor transmits and deposits investigation proceedings and documentation following the request for indictment, producing an element of 'surprise' for the party, the deferment of the preliminary hearing can be provided. In this case the judge has the duty to govern the procedures according to which the said hearing is carried out, so as to reconcile the need for swiftness with the guarantee of cross-examination.

4. Publicity of the Court Hearing

The general rule of the publicity of court hearings has been deemed as implicit within the constitutional principles that govern the exercising of jurisdiction, although it can be subject to exceptions with reference to certain proceedings where there is an objective and rational justification. Justification is considered sufficient, for example, for tax-related trials (ruling no. 141/1998), whose chamber procedure is framed by the legislator, both from a probative and defensive point of view, as a 'documental' trial, in the sense that it is carried out according to written proceedings through which the parties outline their claims or

explain their relative defences, while the admissibility of both testimonial and oath evidence (Art. 7, para. 4, d. lgs. no. 546/1992) is still excluded.

Ruling no. 251/1991 with regard to ‘plea bargaining’ declared the provision that excludes the publicity of such a procedure as ‘not unconstitutional’, and that is both because the sentence applying the punishment agreed in the plea bargain is not a real conviction, and because the absence of publicity can sometimes represent one of the incentives for requesting such a procedure.

5. Protection of Secrets in the Trial

Beyond the protection of private secrets (Art. 15), that of public secrets (of state and of the court, including those of preliminary proceedings) finds constitutional justification in the functional requirements of public authorities, especially parliament and government.¹ The necessary balancing of the right to defence *ex* Article 24 of the Constitution was highlighted, for example, by ruling no. 460/2000 which gave an innovative interpretation of the regulation that imposes official secrecy on documentation produced by the Stock Exchange Authority (CONSOB) in the exercising of its powers of inspection and supervision. The right to defence requires the regulation in question to be interpreted in a way that the official secret can not be opposed to the accused, when the documentation subject to secrecy was already used for the issuing of an administrative sanction.

6. Regulation of Time Limits (Protection of Confidence)

With ruling no. 241/1992, the Court decided that, in a penal trial system hinging on a wide acknowledgement of the *right to evidence* for all parties, the preclusion of such a right for certain parties or its containment within the restricted limits of ‘absolute necessity’, in the event of new objections during the hearing, is not permitted. New objections do not re-open, on the other hand, the terms for special proceedings, being eventualities which could have been foreseen by the accused, who must therefore take this into account when exercising his or her faculty to request a plea bargain or ‘shortened’ sentencing (ord. no. 213/1992, ruling no. 316/1992).

With regard to the *right to evidence* one should also remember ruling no. 203/1993 with which the Court stated that from the connection of the various provisions inserted in the discipline of hearings, it follows that the right of each

¹ Rulings no. 231/1975 (functional secret of the acts of an enquiry commission), 86/12977 (political discretion of the government in the decision to oppose secrecy). From the latest ord. 125/2007 (conflict of attribution to government initiative).

party to the counter-evidence must be exercisable within a reasonable length of time, and linked to an adequate examination of the evidence indicated by the other parties, even when the evidence has been introduced, where it is permitted, during the course of the trial.

7. Handling of Regulations of Burden of Proof

The problem of the compatibility of disciplines that introduce absolute presumptions, with the exclusion of the chance to provide evidence to the contrary, with the right to defence merits particular attention. Ruling no. 144/2005 declared the constitutional illegitimacy of a regulation that provided administrative sanctions to those who employed workers that did not appear on any obligatory documentation, ‘in the part in which it does not consider the possibility of proving that the illegal working relationship began after 1 January of the year in which the violation was ascertained’.

8. Particular Characteristics for Criminal Trials

Criminal proceedings are distinguished from other types of trial not only because of the fact that they potentially decide on the personal freedom of the accused, but also due to the obligatory exercising of penal action on the part of the public prosecutor who benefits from institutional guarantees of independence similar to those of judges (Art. 112).

The characterisation of the new criminal procedure as a ‘trial of parties’ does not imply a principle which would make the *res iudicanda* indirectly available. The principle of the free search for the truth on the part of the judge was therefore highlighted by ruling no. 111/1993, according to which the new regime permits the introduction of new evidence on the initiative of the judge, evidence with respect to which the parties have remained motionless or which they have declined to use.

On the issue of cross-examination in situations of duress, ruling no. 32/1999 of the Constitutional Court confirmed, with a decision that added a principle to the rule under question, the need of an interrogation for guarantee purposes in the phase lasting from the conclusion of the preliminary investigations to the opening of the trial/hearing itself.

This is a fulfilment which had already been deemed as essential by ruling no. 77/1997, with which the Court had declared unconstitutional Articles 294, para. 1, and 302 c.p.p., given that they did not impose to the judge to proceed immediately with the interrogation of the accused if he is held in a state of preventive detention, and in any case not more than five days from the beginning

of the implementation of the measure. According to the Court, since such an interrogation is directly connected to the *Habeas corpus*, the cessation of the effectiveness of the said detention derives from the non-fulfilment of such a duty.

8.1. Refusal to Give Evidence

The accused has the right to participate personally in the trial, but the law ‘can do nothing, however, to force the accused to participate personally’ (ruling no. 125/1979). Even the rule for the formation of evidence in cross-examination (Art. 111 para. 4 Const.) ‘cannot overcome the right to silence’ of the accused (rulings no. 291/2002; 202/2004). With regard to the position of the accused against whom a proceeding is pending or has been carried out separately, and that is examined in the context of a hearing against someone charged with a related offence, the Court, with ruling no. 254/1992, decided that the declarations made during the investigation can not be used, being the refusal to respond of that person similar to the behaviour of the accused who, in the proceedings against himself, refuses to subject himself (or herself) to examination.

As far as the refusal to repeat testimonies already given, the amendment of Article 111, para. 4, period 2, of the Constitution, establishes that

‘no defendant may be proven guilty on the basis of testimony given by witnesses who freely and purposely avoided cross-examination by the defence’².

8.2. Regulation for the Principal Witness

With regard to turncoats, the Constitutional Court’s jurisprudence has already been indicated in relation to the utilisation of incriminating declarations made by witnesses as well as those made by the accused or jointly accused in related criminal trials (supra IX.1).

8.3. Cutting off Detainees

Article 104 para. 3 c.p.p. has established that in the course of the preliminary investigations, the judge, upon the request of the public prosecutor, can, with a well-founded decree, defer for up to five days the right of the accused to confer with his/her own defence team.

² European Court of Human Rights, sent. 8 Feb. 1996, *John Murray c. United Kingdom*, and 17 Dec. 1996, *Saunders c. United Kingdom*. R. E. Kostoris (ed), *Il giusto processo tra contraddittorio e diritto al silenzio*, Torino 2002.

8.4. Right of the Defending Counsel to Inspect Files

According to the provisions of the law, complete knowledge of the documentation in the public prosecutor's file is guaranteed to defending counsel at the end of the investigative phase (Art. 419, para. 2, c.p.p.); before this total *discovery*, the defence has the right (Art. 364 c.p.p.) to assist to certain acts (including, at least according to regulations, the interrogation of the person subjected to investigation), as well as being made aware of the relative transcripts (Art. 366 c.p.p.).

With regard to the presence of defending counsel during investigation, the Court decided with ruling no. 198/1994 that Article 238, para. 1, c.p.p., insofar as it allows to obtain the expert opinion assumed in other proceedings by way of a so called "probative incident", can be applied only in the event that the evidence is used towards individuals which had not assumed and could not have assumed the status of persons subjected to investigation.

The right in question is today implied, as academic doctrine pointed out, in the provision contained in the amended Article 111 of the Constitution according to which every defendant has the right to 'the necessary conditions for the preparation of his or her defence'.

8.5. Appropriate Period of Time for Preparations of the Accused

Article 111 of the Constitution, retracing Article 6.3 of the European Convention of Human Rights and Article 14.3 of the International Pact on Human Rights, provides that each defendant has the right to 'the time necessary to prepare his or her defence'.

The Constitutional Court (ruling no. 399/1998) has revealed that Article 24 of the Constitution, in proclaiming defence an inviolable right at every stage and level of proceedings, provides in favour of the accused guarantees that include the right to have the opportunity and time to prepare his or her defence.

Ruling no. 219/2004 upheld Article 5, para. 2, of law no. 134/2003 that obliges the judge, upon request of the defendant to suspend the hearing for a period of at least forty-five days to allow the said defendant to evaluate the opportunity to formulate a so called "request for the application of a punishment" (with mitigation), granting to the defence *spatium deliberandi* of 'uncommon amplitude', because

'the request of the application of a punishment on the part of the defendant constitutes a way of exercising the right of defence [...] and the principle of the reasonable duration of the trial must be reconciled with the protection of other constitutionally guaranteed rights, starting with the right of defence'.

8.6. Utilisation of Unlawfully Obtained Evidence

Italian law establishes the general sanction of the uselessness of evidence obtained in violation of specific prohibitions established by law (Art. 191 c.p.p.).

In relation to the activities of the judicial police, sentence no. 259/1991 is particularly worthy of mention. The Court declared unconstitutional Article 350, para. 7, c.p.p., insofar as it permitted an albeit limited utilisation in hearings of spontaneous declarations made by the suspect to the judicial police without the attendance of the defence counsel.

On the theme of ‘indirect testimony’, Italian law presents an intermediate solution. When a witness refers to other people as a source of their own knowledge, they have to be summoned and be heard if one of the parties requests it. The non-observance of such a precept makes the declarations of the indirect witness unusable, except in the event that the interrogation of the source has become impossible due to death, illness or untraceableness (Art. 195 c.p.p.).³

8.7. Deals Between Judge/Prosecution and Defending Counsel

The criminal procedure code of 1988 established two legal institutes that are founded on the legal recognition of certain effects on an agreement between the public prosecutor and the accused: ‘plea bargaining’ (patteggiamento) and ‘accelerated sentencing’ (giudizio abbreviato). The agreement does not concern the decision to proceed, but only the degree of the punishment and/or the trial procedures to be adopted, with the main aim of accelerating proceedings.

The judge is not allowed to refuse the application of the punishment agreed in plea bargaining unless (a) the request of the parties exceeds the limits established by law or (b) he or she does not deem the punishment ‘congruent’ in relation to its rehabilitative aims sanctioned by Article 27, para. 3, of the Constitution (ruling no. 313/1990).

As far as accelerated sentencing is concerned, the Court (ruling no. 92/1992) held unconstitutional the lack of the provision for a probative supplement within the framework of the preliminary hearing.⁴

Following the amendment of Article 111 of the Constitution the limits to the cross-examination grounded in proceedings inspired by the so-called ‘negotiated justice’ find a justification in the provision according to which ‘the law defines in which cases evidence may be established without confrontation between the

³ On this theme, and with regard to the unreasonableness of such exceptions, see. sent. no. 24/1992.

⁴ Law of 16 Dec. 1999, no.479 has dealt with this point.

parties, either by consent of the accused or when it is proven to be impossible for objective reasons, or as an effect of proven misdemeanor' (Art. 111, para. 5, Const.). The Constitutional Court has clarified that the latter alternative refers to illicit behaviour aimed at inducing the someone to withdraw from cross-examination, legitimately availing himself, or herself, of the right to not respond, or committing perjury by reticence (ruling no. 453/2002).

X. EFFECTIVE JUDICIAL PROTECTION

Jörg Luther*

1. Guaranteed Recourse to the Courts

With regard to the right ‘to a trial’ (Art. 24 Const.; Art. 6.1 CEDU), the Constitution sanctions the right to ‘go to court for the protection of one’s own legitimate interests and rights’, tracing it from constitutional jurisprudence back to the supreme principles of constitutional law.⁷²³

In particular, with regard to the jurisdictional guarantee connected to restrictions of personal freedom (Arts. 13, para. 2, and 24, para. 2, Const.), it has been specified that it does not only rule that restrictive measures should be adopted by a judicial authority, but it also requires the establishment, to such an end, of a regular trial (ruling no. 419/1994). The intervention of a plaintiff in a criminal trial then finds justification, as well as in the necessity to protect the interests of the person damaged by the offence, in the uniqueness of a historical fact which can be evaluated both from the point of view of criminal and civil unlawfulness (sent. no. 532/1995). Military criminal trials prevented on the other hand, without any reasonable motive, the exercising of the right to go to court, and even the possibility of immediately initiating court action for reimbursement and compensation for damages (ruling no. 60/1996).

The right to the protection of one’s rights has also given rise to the necessity to grant full jurisdictional control over the formal and substantial legitimacy of the provisions of the penitentiary authority that affect the position of the detainee (ruling no. 26/1999).

1.1. Against Executive Power

The Constitution specifies that civil rights and interests protected by administrative laws (‘legitimate interest’) can be defended against executive power in civil and administrative courts (Art. 113). Such judicial protection may not be excluded or restricted to specific forms of action or to specific categories of claims, but has to be focussed on legally binding ‘acts of public administration’ (Art. 113), which means not just preparatory acts or such other generalised decisions as have still to be implemented by subsequent administrative decisions. The administrative court has the power to annul administrative acts, the ordinary judge can decide not to apply them for all kinds of defects (“vizi”), including abuse of discretionary power (‘excess of power’), and such control can not be unreasonably restricted.⁷²⁴

Whether merely political acts have been correctly excluded (implicitly accepted by sent. no. 103/1993) is still a controversial question.

The Constitutional Court has deemed unconstitutional the ‘solve et repete’ rule that obliged one to make payments ordered by fiscal administrations prior to any recourse and petition for restitution (sent. no. 21, 79/1961). The same applied to the rule of paying half of a penalty prior to any recourse to a justice of the peace (sent. no. 114/2004). On the other hand, the Court has upheld the rule that administrative and judicial review can only be alternated, not cumulated at the choice of the citizen (sent. no. 78/1966, the rule was abolished in 1971).

The distinction between subjective rights to be defended and legitimate interests protected by administrative laws can be relevant for the grant of damage relief. The Constitutional Court decided that

‘the competence conferred to the jurisdiction of the administrative judge for compensation claims [...] is founded on the need, consistent with the constitutional principles outlined in Articles 24 and 111 of the Constitution, to gather before a single judge the comprehensive legal protection of the citizen regarding the modalities of exercise of a public function [...], but it is not justified when the public administration has not exerted in a concrete way, even indirectly, the power attributed to it by law in order to protect public interests’.

(sent. no. 191/2006).

1.2. Against Legislation

The State can demand a full constitutional review of regional laws. Meanwhile the regions can challenge state laws only if they violate their autonomy, not if they are in contrast with fundamental rights (Art. 127). Private subjects can only petition incidentally, during a jurisdictional procedure, to raise questions of constitutional review regarding primary

* Jörg Luther, Tenured Professor of Institutions of Public Law, University of Eastern Piedmont.

⁷²³ Ruling no. 18/1982. For the academic doctrine see L. Comoglio, *La garanzia costituzionale dell’azione*, Padova 1970; A. Pizzorusso, ‘Garanzia costituzionale dell’azione’, in: *Dig. Disc. Priv. Sez. Civ.*, VIII Torino 1993.

⁷²⁴ Consiglio di Stato, Adunanza Plenaria, 10 June 1980, no. 22 decided that the decision of the President of the Republic over extraordinary recourses has been correctly limited to defects of form and procedure.

sources of law, if the judge holds them relevant for judgment and does not deem the question to be blatantly groundless. In such cases, the procedure will be suspended and the Constitutional Court will decide (Art. 134). If the decision declares the law unconstitutional, it will be considered unconstitutional *ab initio*, but administrative acts and judicial decisions based upon the unconstitutional law will no longer be annulled if terms for recourse against executive and judicial decision have not expired. Only the enforcement of penal sanctions based on unconstitutional laws must cease.

1.3. Against Judicial Power

Judicial power is subject to the law and, insofar as the laws protect fundamental rights, also to such rights. Article 111 of the Constitution grants recourse to the court of cassation ‘against sentences and measures concerning personal freedom delivered by the ordinary or special courts’ for any violation of law. The right to a second judge is explicitly guaranteed only for administrative courts under Article 125 (*infra* X.7).

1.4. Against Private Persons

The right to action and defence is an inviolable right directed not only against public powers, but also against all those private subjects that can be affected by the judicial decision (Art. 24).

This right can be restricted but not completely excluded by arbitration obligations even if established through legislation (see ruling no. 221/2005).

2. Punctuality of the Judicial Protection

The right to action does not require either immediate, or perpetual protection. Nevertheless, temporal restrictions should not preclude or hinder the effectiveness of judicial protection. The deadline terms must not be unreasonably brief (ruling no. 159/1969), while extension of time-limits should not be unreasonably long (ruling no. 125/1969). The Court specified that as far as the so called ‘conditional jurisdiction’ is concerned, i.e. subject to the burden of prior implementation of other remedies, largely administrative, the deferral of jurisdictional protection must be justified by the pursuit of adequate aims of justice and in any case must not make jurisdictional protection excessively difficult (nos. 360/1994 and 366/1994).

Ruling no. 251/2003 upheld therefore the regulation according to which legal action for damages caused by the circulation of vehicles and of watercrafts, for which there is an obligation to obtain insurance, can only be proposed sixty days after a claim for damages has been sent to the insurer by the damaged party by registered post and with an acknowledgement of receipt (Art. 22 law 990/1969). On the one hand, ‘Article 24 of the Constitution does not necessarily carry the absolute immediateness of the possibility to accomplish the right to carry out legal action’. On the other hand, ‘the principle of the maximum possible promptness of trials’ guaranteed by Article 111 para. 2 of the Constitution –

‘must, nevertheless, still lean towards a duration considered to be “reasonable”, also in relation to other relevant constitutional protection ..., starting with that relating to the right to defence guaranteed by Article 24 of the Constitution, also including the right not to be unnecessarily taken to court’.

3. Guaranteed Legal Positions (I.-IX.)

The Italian Legal System provides judicial protection for ‘subjective rights’ and “legitimate interests” protected by administrative laws (*supra* X.1.1.). Collective interests can be protected on the basis of specific laws (Arts. 1469^{sexies}, 2601 c.c.), but no person can yet defend the rights of others (representative, group or class action) in Italian courts (Art. 81 c.p.c.).

4. Protection Against Accomplished Facts

See X.7.

5. Precept of Acceleration of Proceedings

The Italian Judiciary Proceedings have been censured several times for unreasonable delays by the European Court of Human Rights. Several reforms tried to tackle the problem. For example, the new criminal procedure code introduced the deals between prosecutor and defendant in order to accelerate proceedings (*supra* IX, 8.7).

Under Article 111 clause (2) sub-clause (2) of the Constitution the law guarantees the ‘reasonable duration’ of any trial. The Constitutional Court pointed out that the principle has to be counterbalanced with the need for protection of other rights and interests under constitutional protection. The creation of an unreasonable procedure of deliberation over

the admission of petitions for judicial declaration of paternity was considered a violation of the rights of access to justice and for reasonable duration (sent. no. 50/2006).

A specific principle of promptness characterises military justice. The Court, nevertheless, declared as unconstitutional the failure to provide for the suspension of trials during holiday periods (ruling no. 278/1987) and the exclusion of any intervention by the damaged party (ruling no. 60/1996).

The law 89/2001 (the so called ‘Pinto’ law) created a special mechanism in order to grant damages for the violation of Article 6 clause 1 of the Bill of Human Rights, which is identical to the aforementioned clause of Article 111.

6. Legal Aid

According to Article 24 para. 3 of the Constitution ‘the less well-off are ensured, with specially designed measures, the means to act and defend themselves ahead of any jurisdiction’. Reforming on several occasions the institution of the so-called ‘free legal aid’ along the lines of the French model, the legislator opted for legal aid at the expense of the state. Ruling no. 13/1960 also applied the relative guarantees to the judges ahead of constitutional jurisdiction. Ruling no. 243/1994 declared, on the other hand, that a disparity of treatment between those accused of serious crime and those accused of contraventions was ‘not unjustified’, but such a disparity was subsequently abolished by the legislator. Ruling no. 33/1999 extended the admission of technical consultants to include those cases in which expert reports have not been commissioned, and this is a consequence of the Court’s recognition of the probative value of consultancy other than that ordered by the court. Ruling no. 257/2007 deemed the law unconstitutional insofar as it did not allow to the foreigner, if beneficiary of legal aid at the expense of the state and unable to speak the Italian language, to obtain his or her own interpreter. Nevertheless the Italian system of legal aid remains structurally different to that of many other countries, because it does not ensure the provision of a technical defence to the less well-off through the institution of ‘public legal assistance offices’.

7. Guarantee of Remedies/Instructions About the Right to Appeal

The Constitution provides recourse to the Court of Cassation ‘against sentences and measures concerning personal freedom delivered by the ordinary or special courts’ (Art. 111 para. 7) except for the decisions of the Council of State that can be reviewed only for motives of competence (Art. 111, para. 8). This guarantee of recourse has been extended even to judicial ordinances⁷²⁵. It doesn’t imply a double grade of judicial relief on questions of facts (double level of jurisdiction),⁷²⁶ It is still controversial as to whether the provision grants a subject effectively the right to remedy.

Such a double grade of judicial relief is guaranteed only for decisions of regional administrative courts (Art. 125) that can be revised by the Council of State. As far as the jurisdiction of the Court of Accounts in pension matters is concerned, the Court upheld the exclusion of a remedy on questions of fact, because facts already have to be cleared through the administrative procedure (ruling no. 84/2003). Instructions about the right to appeal are the duty of legal counsel.

8. Temporary Judicial Relief

The Constitutional Court declared unconstitutional the law regulating administrative courts because it did not provide the judge with the power to issue such urgent orders as might be most useful in order to ensure in advance effects to the final decision of a judge (sent. no. 190/1985). On the other hand, the Court considered that it was not unconstitutional that temporary relief was not provided prior to the trial (ruling no. 179/2002). Temporary relief is not considered an essential element of proceedings of fiscal justice (sent. no. 63/1982).

9. Sanctions in Case of Denial of Justice

An ‘unfair’ trial can give rise to a redress of judicial error (Art. 24 para. 4). The Court held that redress for unfair detention is based of specific reasons of solidarity and is to be considered an inviolable right (sent. no. 109/1999: Art. 314, para. 1, c.p.p.).

10. Enforceability of Judicial Decisions

To the extent to which the right to action for jurisdictional protection guarantees its own effectiveness, compulsory enforcement can also be considered as guaranteed by the constitution, while still respecting the principle of a ‘fair trial’ according to Article 111 of the Constitution and other concurrent constitutional guarantees (sent. no. 321/1998). Among

⁷²⁵ Cass. Sezioni Unite, 30 July 1953, no. 2593, in: *Foro italiano* 1953, I, 1240.

⁷²⁶ G. Serges, *Il principio di ‘doppio grado di giurisdizione’ nel sistema costituzionale italiano*, Milano 1993.

the various procedural questions addressed by constitutional jurisprudence, those relating to the limits of compulsory enforcement are worthy of particular attention. For example, the Constitutional Court declared unconstitutional a regulation that subordinated the issue of the original or a copy of the sentence or of any other jurisdictional provision serving compulsory enforcement to the prior payment of register fees (sent. no. 522/2002).

On the other hand, the legislator is not prohibited from granting to state administrations and local authorities of a non-economic nature, through the deferral of enforcement, a margin for fulfilment in order to prepare the financial resources necessary for the payment of activated credits. In such a way can be avoided blocks on administrative activities deriving from the repeated foreclosures of funds, reconciling the individual interests in being able to defend one's own rights with that general interest to expect the ordered, sensible management of public financial resources' (sent. no. 142/1998).⁷²⁷

The Constitutional Court declared a provision from 1925 regarding 'acts of enforcement over the assets of foreign states' unconstitutional because it subordinated to the authorisation of the Ministry of Justice the performance of conservative or executive acts different from those that, according to the regulations of generally recognised international law, cannot be subjected to coercive measures'. It was held that 'an unwritten international law banning all coercive measures on assets belonging to foreign countries is no longer recognisable today' (ruling no. 329/1992).

⁷²⁷ For a partially unconstitutional exemption of public health care funds, ruling no. 285/1995.

APPENDIX

Essential Constitutional Norms

Article 23 No services of a personal or a capital nature may be imposed except on the basis of law.

Article 24 (1) Everyone can take judicial action in order to protect its own rights and legitimate interests.

(2) The right to defence is inviolable at every stage and moment of the proceedings.

(3) The indigent are assured, through appropriate institutions, the means for action and defence before all levels of jurisdiction.

(4) The law determines the conditions and the means for the reparation for judicial errors.

Article 25 (1) No one may be moved from the natural judge as pre-established by law.

(2) No one may be punished except on the basis of a law already in force before the offence was committed.

(3) No one may be subjected to security measures except in those cases provided for by law.

Article 26 (1) Extradition of a citizen is permitted only in cases expressly provided for in international conventions.

(2) In no case may it be permitted for political crimes.

Article 27 (1) Criminal responsibility is personal.

(2) The defendant is not considered guilty until a final judgment is passed.

(3) Punishment cannot consist of treatment contrary to human dignity and must aim at rehabilitating the condemned.

(4) The death penalty is not permitted, except in cases provided for in martial law.

Article 100 (1) The Council of State is a legal-administrative consultative body and ensures the legality of public administration.

(2) The Court of Accounts exercises preventative control on the legitimacy of government measures, and also subsequent control on the management of the State Budget. It participates, in those cases and in ways established by law, in control of the financial management of those bodies to which the State contributes in the ordinary way. It reports directly to the Houses of Parliament on the results of audits performed.

(3) The law ensures the independence from the government of the two aforesaid bodies and of their members.

Article 101 (1) Justice is administered in the name of the people.

(2) Judges are subject only to the law.

Article 102 (1) Judicial proceedings are exercised by ordinary magistrates empowered and regulated by rules of judicial regulations.

(2) Extraordinary or special judges may not be established. Only specialized sections for specific issues within the ordinary judicial bodies can be established, and include the participation of qualified citizens who are not members of the judiciary.

(3) The law regulates those cases and the forms of the direct participation of the people in the administration of justice.

Article 103 (1) The Council of State and the other organs of judicial administration have jurisdiction for safeguarding before the public administration legitimate interests (interessi legittimi) and, in particular matters laid out by law, also subjective legal rights.

(2) The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law.

(3) Military tribunals in time of war have the jurisdiction established by law. In time of peace they have jurisdiction only for military crimes committed by members of the armed forces.

Article 104 (1) The judiciary is an order that is autonomous and independent of all other powers.

(2) The High Council of the Judiciary is presided over by the President of the Republic.

(3) Members by right are the first president and the procurator general of the Court of Cassation.

(4) Two thirds of the other members are elected by all the ordinary judges belonging to the various categories, and one third by Parliament in joint session from among full university professors of law and lawyers after fifteen years of practice.

(5) The Council elects a vice-president from among those members designated by Parliament.

(6) Elected members of the Council remain in office for four years and are not immediately re-eligible.

(7) They may not, while in office, be registered in professional rolls, nor serve in parliament or on a regional council.

Article 105 The High Council of the Judiciary, in accordance with the regulations of the judiciary, has jurisdiction for employment, assignments and transfers, promotions and disciplinary measures of judges.

Article 106 (1) Judges are appointed by means of competitive examinations.

(2) The law on the regulations of the judiciary allows the appointment, even by election, of honorary judges for all the functions performed by single judges.

(3) Following a proposal of the High Council of the Judiciary it is possible for their outstanding merits to appoint as councillors in cassation, full university professors of law and lawyers with fifteen years of practice and registered in the special professional lists for the higher courts.

Article 107 (1) Judges may not be removed from office. Neither may they be dismissed or removed from office nor assigned to other courts or functions unless following a decision of the High Council of the Judiciary, taken either for the motives and with the guarantees of defence established by the rules of the judiciary or with their consent.

(2) The Minister of Justice has power to originate disciplinary action.

(3) Judges are distinguished only by their different functions.

(4) The state prosecutor enjoys the guarantees established in his favour by the rules of the judiciary.

Article 108 (1) The rules governing the judiciary and the judges are laid out by law.

(2) The law ensures the independence of judges of special courts, of state prosecutors of those courts, and of other persons participating in the administration of justice.

Article 109 The legal authorities have direct use of the judicial police.

Article 110 Without prejudice to the authority of the High Council of the Judiciary, it is the Minister of Justice who has responsibility for the organisation and functioning of those services involved with justice.

Article 111 (1) Jurisdiction has to be put in action through fair trials regulated by law.

(2) Any trial is based on equal confrontation of the parties before an independent and impartial judge. The legislation has to ensure that it is of a reasonable length.

(3) In criminal trials, the law provides for timely and confidential information of the accused regarding the nature and reasons of charges brought against them; they are granted the time and means for their defence; they have the right to question those who testify against them or to have them questioned; those who may testify in favour of the accused must be summoned and examined under the same conditions granted to the prosecution; any evidence in favour of the accused must be acknowledged; the accused may rely on the help of an interpreter if they do not understand or speak the language of the proceedings.

(4) In criminal trials, evidence may only be established according to the principle of confrontation between parties. No defendant may be proven guilty on the basis of testimony given by witnesses who freely and purposely avoided cross-examination by the defence.

(5) The law defines in which cases evidence may be established without confrontation between the parties, either by consent of the accused or when it is proven to be impossible for objective reasons, or as an effect of proven misdemeanor.

(6) Reasons must be stated for all judicial decisions.

(7) Against sentences and measures concerning personal freedom delivered by the ordinary or special courts, appeals to the court of cassation are always allowed regarding violations of the law. These provisions may be waived only in the case of sentences pronounced by military courts in time of war.

(8) Against decisions of the council of state and of the court of accounts, appeals to the court of cassation are only admissible for reasons of jurisdiction.

Article 112 The public prosecutor has the duty to exercise criminal proceedings.

Article 113 (1) Against acts of the public administration the judicial safeguarding of rights and legitimate interests before the organs of ordinary or administrative justice is always permitted.

(2) Such judicial protection may not be excluded or limited in particular kinds of appeal or for particular categories of acts.

(3) The law determines which judicial bodies are empowered to annul acts of public administration in the cases and with the consequences provided for in the law itself.

Article 125 Administrative tribunals of the first instance shall be established in the Region, in accordance with the rules established by the law of the Republic. Sections may be established in places other than the regional capital.

Article 127 (1) The Government may submit the constitutional legitimacy of a regional law to the Constitutional Court within sixty days from its publication, when it deems that the regional law exceeds the competence of the Region.

(2) A Region may submit the constitutional legitimacy of a State or regional law or measure having the force of law to the Constitutional Court within sixty days from its publication, when it deems that said law or measure infringes upon its competence.

Article 134 The Constitutional Court shall pass judgment on:

Controversies on the constitutional legitimacy of laws and enactments having the force of law issued by the State and the regions;

Conflicts arising from allocation of powers of the State and those allocated to State and regions, and between regions;

Accusations made against the President of the Republic, according to the provisions of the Constitution.

Article 135 (1) The Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme courts.

(7) On impeachment of the President of the Republic, apart from the ordinary judges of the Court, there shall also be sixteen members chosen by lot from among a list of citizens having the qualification necessary for election to the Senate, which the Parliament prepares every nine years through election using the same procedures as those in appointing ordinary judges.

Article 136 When the Court declares the constitutional illegitimacy of the norm of a law or an enactment having the force of law, the norm ceases to have effect from the day following the publication of the decision.

The decision of the Court shall be published and communicated to the Houses of Parliament and to the regional councils concerned, so that, wherever they deem it necessary, they shall act in conformity with constitutional procedures.

Article 137 (1) Constitutional law shall establish the conditions, the forms, the terms of the possibility to propound judgments on constitutional legitimacy, and the guarantees of the independence of the constitutional judges.

(2) Ordinary laws shall establish the other provisions necessary for the constitution and the functioning of the Court.

(3) Against the decision of the Constitutional Court no appeals are allowed.

Relevant Legislation

Codice di procedura penale (d.P.R. 22 Sep. 1988, no. 447)

Codice di procedura civile

Law 24 March 2001, no. 89. Provision of fair indemnity in cases of violation of the reasonable duration rule and modification of Article 375 c.p.c.

Essential Constitutional Case-law

I. Corte costituzionale, rulings no. 46/1957, 139/1967; 186/1973, 99/1975, 9/1982; 254, 255/1992; 261, 301/1994; 361, 399/1998; 440/2000; 24/2004; 155/2005

II. Corte costituzionale, rulings no. 88/1962, 51, 173/1970; 82/1971; 174/1975; 340/641/1987; 496/1990; 401, 502/1991; 432/1995; 70, 155, 410/1996; 97, 311, 351/1997; 176, 272, 419/1998; 232, 413/1999; 159, 283, 392, 419, 467/2000; 152/2001

III.-IV. Corte costituzionale, rulings no. 45/1957; 27/1958; 29/1960; 27/1961; 15/1962; 120, 1963; 26/1966; 25, 48/1967; 61/1969; 56, 131/1970; 113/1972; 15/1973; 48, 69/1976; 71/1978; 50, 74, 177/1980; 96/1981; 15/1982; 165, 195/1983; 9, 68/1984; 126/1985; 62, 132/1986; 364, 971, 1085/1988; 11, 49, 247, 409, 487/1989; 275, 282/1990; 35,

96, 285, 333/1991; 185, 299/1992; 197/1993; 159/1994; 34, 61, 80, 298, 360, 519/1995; 296, 370/1996; 4, 58, 247, 296, 87/1997; 47/1998; 263, 406, 508, 519/2000; 145, 394/2002; 284/2003; 230/2004

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