Angela COSSIRI,
Dr., Associate Professor of Constitutional Law, University of Macerata,
Macerata, Italy

THE PRINCIPLE OF NON-DISCRIMINATION IN THE ITALIAN CONSTITUTIONAL SYSTEM: HERMENEUTICAL DIMENSION AND APPLICATION IN THE RECENT CASE OF THE REGISTRATION OF ASYLUM SEEKERS

In a historical moment of deep democratic crisis, affecting both mature and emerging democracies, the choice of the subject arises from the desire to contribute, illustrating Italian constitutional experience in its strengths and weaknesses, to build or revitalize constitutional democracies in general terms. It is necessary to face the new challenges (i.e. new phenomena such as the crisis of political representation, populism, effectiveness of the protections affirmed in the Fundamental Charter, economic post-pandemic difficulties and social inequalities, future generation rights and environmental crisis, etc.), by preparing new answers, but also without losing sight of the foundation pillars of constitutionalism and rule of law.

The Italian Constitution entered into force in 1948, after the Second World War and was one of the first contemporary Constitution, that was written in Europe. With the expression "contemporary Constitution", I mean a Constitution which has the characteristic of rigidity, placing itself at the top of the hierarchy of the sources of law. Contemporary Constitutions, written in the Twentieth Century, conditions the validity of the subordinate sources of law and requires the presence of a centralized or widespread judicial system, in any case independent from the political power, which is capable of guaranteeing the effectiveness of constitutional legality. In the Italian constitutional system, the constitutional legitimacy of laws is ensured by the Constitutional Court, which in most case acts incidentally with respect to a trial, at the request of the judge called to deal with a concrete litigation[50].

The principle of non-discrimination is located in the Article 3 of the Italian Constitution, among the Fundamental Principles. This fundamental principle is the bases of a series of subsequent more specific provisions concerning, for example, religious equality, equality between spouses in the family, gender equality in access to public offices and representative roles, wages between men and women, equality in the right of

[50] To learn more about the topic, you can see Barsotti, Carrozza, Cartabia, Simoncini, *Italian Constitutional Justice in Global Context*, Oxford University Press, Oxford, 2016. On the English version of the website cortecostituzionale.it, it is possible to find some information about the composition of the Court, a Handbook on its functions (https://www.cortecostituzionale.it/documenti/ download/pdf/ The_Italian_ Constitutional_Court.pdf), a selected of translated sentences, annual reports and press releases. In this website it is possible also to read the English translation of the Constitution of the Italian Republic in the actual text in force.

access in education systems, including the disabled, universalism of social rights such as health protection, assistance and welfare, etc.

In its first paragraph, Article 3 states:

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

In the second part, it estabilishes that it is a duty of the Republic to remove natural, social or economic obstacles, which constrain the freedom and equality of citizens, impeding the full development of the human being.

With this second part, Constitution conforms the Italian Republic to the model of welfare State, which intervenes to remove the naturally existing dis-advantageous conditions. This scope is pursued through positive normative measures, redistributive measures of wealth and universal social rights.

Instead, the content of the first part of the Article concerns the traditional liberal principle of non-discrimination.

With regard to the first paragraph of the constitutional provision, three considerations should be made.

1) First of all, it should be clarified that the Italian Constitutional Court has extended the subjective ambit of the principle also to non-citizens, despite the text of the Article. I do not elaborate on this point. I just remember that this implication, highlighted by the Constitutional Court in the 1960s, derives also from Italian subscription of various international conventions on the protection of human rights.
2) Secondly, I point out that the article mentions seven distinguishing criteria: "sex, race, language, religion, political opinion, personal and social conditions".

As we know, the Constitutions, in the phase of the exercise of constituent power, tend to look to the past and intends to avoid the recurrens of situations that people want to overcome by placing a new legal order. Italy emerged from a twenty-year period of totalitarian regime, in which these criteria had been tragically used. So Constituent Fathers and Mothers wanted to emphasize the need not to use these criteria as in the past. Obviously, this does not imply an absolute prohibition of differentiation on the basis of these *rationes*: for example, differentiations to facilitate a starting disadvantage are generally admitted.

A recent debate arose in Italy on whether to keep or not the word "race": in fact, according to current scientific knoledge, the human race is only one. The opinion of keeping the original text prevailed, emphasizing its function as a memory and a warning.

3) Reaching the core of my speech, what does it mean that everyone is equal before the law in theoretical terms?

According to the interpretation furnished by Constitutional Court, the positive principle of equality and the negative principle of non-discrimination are two sides of the same coin: as all human beings are formally equal before the law, any kind of discrimination must be considered as a violation of the principle of equality. In other words, the recipient of the constitutional prohibition of non-discrimination is the political legislator.

The constitutional principle imposes to legislator reasonableness on choices and coherence. The principle of reasonableness represents the most important arrival on the interpretation of the non-discrimination principle; it is also the most used legitimacy parameter that the Court uses when it comes to a declaration of unconstitutionality. "All individuals are equal before the law" involves that the Court operates a control over the logic of the legislator's choices in differentiating legal treatments of situations and over their coherence as a whole.

Of course, Italian Parliament can adopt laws containing different treatments for different *de facto* situations, but these decisions must be based on justified reasons.

According with the constitutional case-law, "principle is violated when the law, without a reasonable justification, introduces differences of treatment directed to individuals which are in the same *de facto* conditions"[51], or provides the same legal treatments for different situations.

Therefore, the principle of reasonableness stands out as a general, negative, limit to the legislator's discretion in his normative choice.

In cannot here explain in details the technical points elaborated by the constitutional judge to verify the reasonableness of legislative choices. Essentially in the so called "judgment of reasonableness", the principle of non-discrimination (Article 3, par. 1, Const.) is invoked as a parameter of the legislative legitimacy. A *tertium comparationis* must be indicated: it is law used as a standard of comparison with respect to which the unreasonable discriminatory effect is deemed to have been produced by the censored norm.

The latest Court's decisions addressing the non-discrimination principle show that the evaluation about violation of Article 3 requires the adoption of a specific jurisdictional method, which requires to distinguish legislative discretion and arbitrariness.

It is not sufficient to verify that the legislator uses arbitrariness instead of discretion if he differently treats situations that he considers to be equal. The legislator could have a reason in introducing different legal treatments: for example, if he is trying to protect another fundamental interest considered by the legal constitutional system as worthy of protection. See, case n. 212/2019, where the Court, referring to the determination of

[51] Judgement No. 15 Year 1960.

administrative sanctions, stated that: "the determination of penalties for specific violations is object of a wide legislative discretion, whose exercise can be syndicated only when it results in manifestly unreasonable or disproportionate choices".

This means that when the Court must decide if a law is against the non-discrimination principle, it must apply the fundamental judgement parameter of reasonability.

The judgement of reasonability can be read as a broader application of the so called "balancing principle". First of all, the Court must evaluate, at first sight, if the contested rule sacrifices the juridical positions of specific categories of subjects among an entire group of subjects. But the Court must consider also if the contested rule has or not reasonable justifications: the legislator must pursue a legitimate purpose by a rational use of juridical tools, which must be connected with the pursued scope. Finally, the Court control if the involved interest receives a correspondent or alternative protection or, in particular cases, if it does not produce a complete suppression of a concurrent right, interest or value of Constitutional level. In the judgements No. 226/2000, No. 342/2006, No. 293/2016 and No. 55/2019, the Court has reiterated that "the discretional choices by the legislator […] must not be affected by a manifest arbitrariness or irrationality and, in particular, they must not create a complete sacrifice of the essential core of a guarantee".

Coming to the conclusion of my speech, I will illustrate a recent emblematic case of the current *trend* on application and interpretation of the principle of non-discrimination. It concerns asylum seekers.

In 2018, Italian legislator adopted one of the so called "Safety Decree" (Decree-Law No. 113/2018[52], adopted by the Government and subsequently confirmed by the Parliament). The censured provision bars asylum-seeking foreigners from registering with the Italian Registry Office, during the period of pending the decision on their application for asylum. Italian constitutional judge declared uncostitutional this provision in 2020[53].

Infact, excluding asylum seekers from civil registration and from the consequent rights does not improve public safety, but rather limits the public authorities' ability to control and monitor individuals, who legally reside in the national territory, potentially for a long period of time. In addition, denying such registration to persons who habitually reside in Italy amounts to according different, and certainly worse, treatment to a specific category of foreigners, without any reasonable justification. So, according to

[52] "Urgent provisions on international protection and immigration, public security, and measures concerning the operation of the Ministry of Interior and the organisation and functioning of the National Agency for the Administration and Allocation of Assets Seized from Criminal Organisations"/

[53] Judgement No. 186 Year 2020 available in English here: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_sentenza_186_2020_DePretis.pdf9/

the core of the argumentation of the Court, the provision violates Article 3 of the Constitution in two separate respects: 1) firstly, the challenged provision is intrinsically irrational. By making it difficult even to identify the foreigners excluded from registration, it is inconsistent with the overall purposes of the decree, which seeks to improve public safety; 2) secondly, the provision accords unreasonably different treatment to foreigners seeking asylum, compared to other categories of foreigners who legally reside in the national territory and to Italian citizens.

The exclusion gives rise to an unreasonable difference in treatment, because it unjustifiably hinders asylum seekers' access to the services to which they are entitled.

Specifically, according to the official summary of the sentence, "in this case, the Court considered various referral orders concerning the constitutionality of a rule providing that "a residence permit… shall not constitute grounds for registration in the residents' register" of the relevant municipality of residence for lawfully resident asylum applicants, along with various other provisions incidental to this rule. The Court first considered a number of documents and statements relating to the enactment of the legislation, and satisfied itself that the referring courts' interpretation was correct (as opposed to a different interpretation, according to which the desired outcome could be achieved without having to declare the legislation unconstitutional)". The main problem so is the inherently irrational.

"Whilst the legislation had the effect of "limiting the capacity of the public authorities to control and monitor the population that is actually resident within its local territory", this was not offset by any notional benefit associated with the saving of the administrative effort required to register foreign nationals. Indeed, the legislation in actual fact complicated the task of public authorities as it "increases, rather than reduces, the problems associated with the monitoring of foreign nationals who are lawfully resident within the national territory".

The Court also ruled that the legislation was discriminatory in that it treated different classes of resident persons (e.g. Italian nationals, foreign national asylum applicants and other foreign nationals) differently without any objective reason. Specifically, if the fact that the period of residence was set to be short were a genuine reason for the refusal of registration, then it would also be necessary to extend the same rule to all foreign nationals residing in Italy under a residence permit of limited duration. "Whilst the legislator is free to stipulate particular consequences for any factual differences existing between Italian nationals and foreign nationals..., it cannot place foreign nationals... in a condition of social 'subordination' without any appropriate justification [since] ...status as a foreign national cannot be considered in itself 'as an admissible reason for different and less favourable treatment'".