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Human Rights and Fundamental Freedoms: the Relationship of International, Transnational and National Catalogues in the 21st century

Questionnaire for Participating Courts

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I.I International catalogues of human rights (ECHR, UDHR and ICCPR)

In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights? What mechanism is used to invoke the international treaties in national court decision-making?

In keeping with the dualist tradition that governs the relationship between the Italian system and the international one, the Constitutional Court has, for decades, considered the ECHR and the other treaties intended to protect human rights to be classic international treaties, endowed with the same status as the domestic provisions that implements them within our legal system (Judgments no. 188 of 1980, 15 of 1982, and 315 of 1990). Because they were incorporated through ordinary primary legislation, the ECHR and the other applicable treaties were considered to be endowed, as a matter of principle, with the value of ordinary primary legislation. Their relationship with other ordinary primary laws, therefore, was governed chiefly by the chronological principle: the substantive provisions of the ECHR and the other treaties prevailed over prior laws, while they were made to yield to later laws. A corollary of this arrangement was that the provisions of the ECHR or of other treaties on the protection of human rights could not serve as a constitutional benchmark against which to assess national legislation. This approach, however, left significant margins of uncertainty, due to the difficulty of determining the precise reach of ECHR provisions, which, on the one hand, involved the protection of fundamental rights and, therefore, supplemented the values and fundamental principles protected by the Italian Constitution, but, on the other hand, remained formally classified as ordinary laws. The situation changed with the 2001 constitutional reform, which introduced a new Article 117(1) of the Constitution, which states that domestic legislation must comply, *inter alia*, with international obligations. Still, the Constitutional Court rejected the idea "that Article 117(1) of the Constitution can be used to grant constitutional status to the rules contained in international agreements and implemented by ordinary legislation, as is the case for the ECHR" (Judgment no. 349 of 2007). The conventional provisions that may apply from time to time are classified, rather, as "interposed rules." In the hierarchy of sources, such interposed rules "have a lower status than the Constitution, but higher than ordinary legislation" (Judgment no. 348 of 2007). As a result, since ECHR rules "supplement" (in the form of "interposed rules") the criterion of constitutionality, while nevertheless ranking lower than it, "it is necessary that they respect the Constitution" (Judgment no. 348 of 2007). Therefore, international convention rules are subjected to a preliminary review of their constitutionality that cannot be limited "to the possible violation of fundamental principles and rights" (as in the case of European Union law) or of "supreme principles," but must "extend to any contrast between 'interposed rules' and the Constitution" (Judgment no. 348 of 2007). On the other hand, given the fact that the fundamental principles of the constitutional system and inalienable human rights constitute a "bar on the entry […] of generally recognized international rules with which the Italian legal system complies under Article 10(1) of the Constitution" (Judgments no. 48 of 1979 and 73 of 2001), in case of conflict between the rules of general international law and those fundamental principles, reference to international rules is to be rejected (Judgment no. 311 of 2009). In other words, in such a scenario, the incorporation, and, thus, the application of the international rule would inevitably be precluded "insofar as it conflicts with inviolable principles and rights" (Judgment no. 238 of 2014). To return to the ECHR (Judgment no. 236 of 2011), in the event of a presumed conflict between its provisions and national law, an ordinary court must, as a preliminary matter, determine whether it is possible to interpret the latter in a way compatible with the Convention "as interpreted by the Strasbourg Court" (Judgment no. 348 of 2007), which "has the last word" in the interpretation of ECHR rules under Article 32 of the Convention (Judgment no. 349 of 2007). In making this attempt, domestic courts are to use all the normal tools of interpretation (Judgments no. 239 and 311 of 2009, 93 of 2010, and 113 of 2011). If the attempt fails, and the conflict cannot be resolved through interpretation, the ordinary courts, which can neither set aside nor apply the domestic provision if they consider it to conflict with the ECHR and/or other international treaties, and thus, as an interposed rule, with the Constitution, are required to raise a question of constitutionality in reference to Article 117(1) of the Constitution. Once the question of constitutionality has been raised, it falls to the Constitutional Court to verify, first of all, if a contradiction does, indeed, exist between the national provision and the international treaties, and if this conflict cannot be effectively resolved through interpretation. Then, the Court must verify whether the provision of the Convention (which remains subordinate to the Constitution hierarchically speaking) conflicts with any provision of the Constitution itself. Whenever this kind of conflict, albeit unusual, is present, the provision of the Convention may not be considered to supplement the constitutional provision under consideration (Judgments no. 348 and 349 of 2007, 311 of 2009, 93 of 2010, and 113 of 2011). Aside from the ECHR, the Court has used other national treaties protecting human rights as "interposed

provisions" in its recent constitutional case law: for example, the United Nations Convention on the Rights of the Child of 1989 (Judgment no. 7 of 2013), the United Nations Convention on the Rights of Persons with Disabilities of 2006 (Judgment no. 236 of 2012), and the European Social Charter (Judgments no. 120 and 194 of 2018). On the other hand, it bears keeping in mind that the Constitution and the ECHR contain provisions that frequently (although not always) overlap within the ambit of the protection offered. It is, therefore, not surprising that each of these instruments tends to have an influence on how the other is interpreted. As mentioned above, the Constitutional Court has consistently held that ordinary laws must be interpreted in compliance with the ECHR, and that it is even prohibited for courts to raise a question of constitutionality if a conflict may be resolved by interpreting domestic laws in conformity with the ECHR. Although the Court reiterated these indications in the case law that followed its "twin" decisions of 2007 (Judgments no. 348 and 349), rather than exclusively emphasize the existence of a formal hierarchy, the Court has placed a degree of emphasis on the interconnectedness of the guarantees established by the Constitution and the ECHR, respectively. Moreover, the Court's approach toward the ECHR and other human rights treaties is also guided by the goal of achieving greater interaction between the various levels of protection of fundamental rights. Furthering this approach, in Judgment no. 317 of 2009, the Court explained, in the first place, that when fundamental rights are at issue, respect for the international obligations laid down by Article 117(1) of the Constitution cannot constitute a reason to effect "a lower level of protection compared to that already existing under internal law," although it is equally unacceptable "that a higher level of protection which it is possible to introduce through the same mechanism should be denied to the holders of a fundamental right." Second, and consequently, "the comparison between the Convention protection and constitutional protection of fundamental rights must be carried out seeking to obtain the *greatest expansion of guarantees*" (emphasis added). What is meant by "greatest expansion of guarantees?" According to the Constitutional Court, the concept of greatest expansion of protections must include "a requirement to weigh up the right with other constitutionally protected interests, that is with other constitutional rules, which in turn guarantee the fundamental rights which may be affected by the expansion of one individual protection" (Judgment no. 317 of 2009). Moreover, when it comes to the protection of fundamental rights, the Constitutional Court draws an important distinction between the mandate entrusted to the European Court of Human Rights, "which is required to protect the various values in play in a sectoralised manner, that is with reference to individual rights," and the task proper to the Constitutional Court, to carry out "a systemic and not an isolated assessment of the values affected by the provisions reviewed from time to time" (Judgments no. 264 of 2012 and 85 of 2013). This distinction suggests that it falls to the Constitutional Court to effect a balancing operation among the different values and interests that are all simultaneously protected by the constitutional system. As a result, as the Court stated in Judgment no. 317 of 2009, "[t]he overall result of the supplementation of the guarantees under national law must be positive, in the sense that the impact of individual ECHR rules on Italian law must result in an increase in protection *for the entire system* of fundamental rights" (emphasis added). If it were otherwise, "the result would be an unlimited expansion of one of the rights, which would 'tyrannise' other legal interests recognised and protected under constitutional law, which constitute as a whole an expression of human dignity" (Judgment no. 85 of 2013). Finally, since the European Court of Human Rights considers the ECHR to be a "living instrument," and, therefore, continues to develop new interpretations of conventional provisions, without considering itself to be formally bound by its own precedent, nothing prevents the elaboration of new interpretations of ECHR provisions, including as the outcome of dialogue with national courts. This gives rise to case law that is dynamic, but also changeable, and which, together with the corresponding provisions of the Convention, and in keeping with the constitutional case law mentioned previously, may be used by Italian courts to determine whether it is possible to interpret national law in ways compatible with ECHR provisions and, if this is impossible, obliges ordinary courts to raise a question of constitutionality in reference to Article 117(1) of the Constitution, as supplemented by the "interposed" ECHR provision. In this context, with Judgment no. 49 of 2015, the Constitutional Court explained the role Italian courts should attribute to the dynamic case law of the European Court of Human Rights, holding that it is "only 'consolidated law' resulting from the case law of the European Court on which the national courts are required to base their interpretation, whilst there is no obligation to do so in cases involving rulings that do not express a position that has not become final". In practice, however, it may not be obvious if a given interpretation of ECHR rules has become sufficiently consolidated in European case law, particularly in cases which concern legal systems other than the Italian one, or where the cases are based upon highly unusual sets of facts. For this reason, the Constitutional Court, still in its Judgment no. 49 of 2015, indicated a set of criteria able to provide guidance for domestic courts in their assessment of whether or not Strasbourg case law is consolidated, that is: "the creativity of the principle asserted compared to the traditional approach of European case law; the potential for points of distinction or even contrast from other rulings of the

Strasbourg Court; the existence of dissenting opinions, especially if fuelled by robust arguments; the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber; the fact that, in the case before it, the European court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member states which, in terms of those characteristics, by contrast prove to be little suited to Italy. When all or some of these signs are apparent, as established in a judgment which cannot disregard the specific features of each individual case, there is no reason to require the ordinary courts to use the interpretation chosen by the Strasbourg Court in order to resolve a particular dispute, unless it relates to a 'pilot judgment' in a strict sense." Thus, the duty to interpret national laws in conformity with ECHR rules and to implement the conventional provision as interpreted by the European Court of Human Rights only exists in cases of "consolidated law" deriving from ECHR case law or from "pilot judgments". Obviously, a domestic court is also bound by a judgment of the Strasbourg Court in cases of specific, individual disputes that are remitted to that domestic court.

Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

ECHR rules do not have direct effect in the Italian system, in the sense that domestic judges may not directly apply them in place of domestic laws that conflict with them. The same is true of judgments of the European Court of Human Rights that "are directed to the legislating member state and call for specific action to be taken by it" (Judgment no. 349 of 2007). Thus, a presumed incompatibility between domestic rules and conventional rules gives rise to a question of constitutionality based on the potential violation of Article 117(1) of the Constitution, which falls under the exclusive jurisdiction of the Constitutional Court. However, the absence of direct effect does not preclude the immediate applicability (that is, the self-executing character) of the ECHR and other treaty provisions within the national system, when there is no conflict with national legislation. It bears mentioning further that the Constitutional Court has reiterated that there is no direct effect, including in reference to the European Social Charter (Judgment no. 120 of 2018). Finally, when it comes to "decisions" adopted by the control bodies established on the basis of human rights treaties (and, more specifically, the decisions adopted by the European Committee on Social Rights), the Constitutional Court has held that "the decisions of the Committee, whilst being authoritative, are not binding on the national courts when interpreting the Charter, especially if − as in the case at issue here − the expansive interpretation proposed is not confirmed by our principles of constitutional law" (Judgment no. 120 of 2018; see also Judgment no. 194 of 2018).

I.II Supranational catalogues of human rights (the Charter)

Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by "radiating" through the national catalogues (a substantive point of reference in other states)?

Since the proclamation of the Charter of Fundamental Rights of the European Union, and, to an even greater extent, since it became binding, the Constitutional Court has referred to the rights guaranteed therein chiefly as a tool for enriching the meaning of our internal constitutional guarantees (see e.g. Judgments no. 182 of 2008 on due process in administrative proceedings ; 438 of 2008 on informed consent to medical treatment; 93 of 2010 on the public nature of hearings; 82 of 2011 on the dignity of the person; 236 of 2011 on *lex mitior*; 31 of 2012 and 339 of 2014 on the best interests of minors; 168 of 2014 on the right of indigents to a dignified life; 178 of 2015 on autonomy in collective bargaining; 95 of 2016 on the right to vacations; and 236 of 2016 on the proportionality of punishment). In its more recent decisions, the Court has also referred to the case law of the Court of Justice, for purposes of defining the contents of the rights protected by the Charter (Judgments no. 99 of 2018, on the ownership rights, under Article 17 of the Charter, of shareholders and creditors of banks, and 194 of 2018, on the scope of application of Article 30 of the Charter), or to bolster the reasoning underlying its own decisions, even those based upon domestic constitutional provisions, which it determines to be "supplemented by the principles of European extraction" (Judgment no. 20 of 2019 on the protection of personal data). The Charter may serve not only as an interpretive tool, but also as an interposed rule in a judgment on constitutionality (Judgment no. 269 of 2017), but naturally only in relation to the specific cases in which Union rights apply (Judgments no. 80 of 2011, 303 of 2011, and 210 of 2013). Indeed, the Constitutional Court has taken note of the fact that the principles and rights described in the Charter "largely intersect with the principles and rights guaranteed by the Italian Constitution […]. It may therefore occur that the violation of an individual right infringes, at once, upon the guarantees enshrined in the Italian Constitution and those codified by the European Charter" ("double preliminary ruling") (Judgment no. 269 of 2017), and has held that it is competent to assess whether internal rules comply not

only with constitutional provisions, but also with those of the Charter, through the mechanism of "interposed rules" (see Judgments no. 269 of 2017, and 20 and 63 of 2019). In particular, when an internal rule conflicts with the Charter, a violation arises, subject to review by the Constitutional Court, of the constitutional provisions that respectively allow for Italy's participation in the European Union (Article 11 of the Constitution) and bind it with respect to the obligations that derive from its membership (Article 117 of the Constitution) (Judgment no. 269 of 2017; see also, for the practical application of said principles, Judgment no. 112 of 2019, on the disproportionateness of seizure for administrative offences of market abuse). This differs partly from the approach that constitutional case law has taken to the rules of European Union Law *other* than those of the Charter, which may only be reviewed by the Court when they are *not* endowed with direct effect, applying the mechanism of "interposed rules." On the contrary, when rules of European Union law are endowed with direct effect, the Court has held that "it is for the ordinary national court to assess the compatibility with Community law of the contested national legislation by making – if appropriate – a preliminary reference to the Court of Justice, and in the event that they are incompatible to rule itself that the provision of Community law should apply in place of the national provision" (Order no. 207 of 2013; see also Judgments no. 170 of 1984, 284 of 2007, 28 and 227 of 2010, and 75 of 2012). Upholding the full competence of the Constitutional Court to evaluate the compliance of internal laws with the Charter is justified inasmuch as the latter "is a part of Union law that is endowed with particular characteristics due to the typically constitutional stamp of its contents," and, for this reason, the appropriate response to alleged violations of the rights of the person is an "*erga omnes* intervention by this Court, including under the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution)" (Judgment no. 269 of 2017). The legal underpinnings of the case law trend initiated with Judgment no. 269 of 2017 are that "[i]n general, the supervening value of the guarantees set down by the CFR with respect to those of the Italian Constitution generates [multiple] legal remedies, enriches the tools for protecting fundamental rights, and, by definition, denies any restriction" (Judgment no. 20 of 2019). This multiplicity of legal remedies effectively allows the Constitutional Court "to make its own contribution to rendering effective the possibility, discussed in Article 6 of the Treaty on European Union (TEU) […] that the corresponding fundamental rights guaranteed by European law, and in particular by the [Charter], be interpreted in harmony with the constitutional traditions common to the Member States, also mentioned by Article 52(4) of the [Charter] as relevant sources" (Judgment no. 20 of 2019; see also Judgment no. 63 of 2019). The Court's intention is to foster "a framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ (see, most recently, Order no. 24 of 2017), in order that the maximum protection of rights is assured at the system-wide level (Article 53 of the [Charter])" (Judgment no. 269 of 2017; Order no. 117 of 2019).

Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?

The provisions of the Charter of Fundamental Rights are used by the ordinary courts and by the Court of Cassation (which decides only legal issues), chiefly as an instrument for interpreting domestic law, even beyond the scope of application of European Union law. In such cases, referring to the Charter serves to reinforce the reasoning underlying decisions that are essentially founded upon domestic provisions (be they constitutional or of ordinary laws) (see, for example, Supreme Court of Cassation, Labor Division, Judgment no. 9272 of 3 April 2019, on the right of enjoyment of services provided by the national health service, which refers to Article 35 of the Charter; Supreme Court of Cassation, First Civil Division, Judgment no. 12998 of 15 May 2019, on the right of self-determination and the right to refuse medical treatment, which refers to Articles 2, 3, and 35 of the Charter). Within the scope of application of Union law, ordinary courts also proceed to evaluate whether the domestic law complies with the Charter, as interpreted by the Court of Justice. This assessment has sometimes led them to rule out potential areas of conflict (see, for example, Supreme Court of Cassation, Labor Division, Judgment no. 4223 of 19 February 2018, on the non-contradiction between the domestic rules governing intermittent work contracts and the prohibition of age discrimination under Article 21 of the Charter, as interpreted by the Court of Justice in its Judgment in Case C-143/16, Abercrombie & Fitch Italia Srl). In other situations, the ordinary courts have held that there was a conflict between domestic regulatory schemes and provisions of the Charter recognized by the Court of Justice as having direct effect, and they have applied the latter, not applying the incompatible domestic law (see, for example, Supreme Court of Cassation, Fifth Criminal Division, Judgment no. 49869 of 31 October 2018, and Second Civil Division, Judgment no. 31632 of 6 December 2018, on the compliance of the regulatory scheme concerning market abuse with the principle of *ne bis in idem* enshrined in Article 50 of the Charter, as

delineated by the Court of Justice in its Judgments of 20 March 2018 in Cases C-596/16 and C-597/16, Di Puma and Zecca, and Case C-537/16, Garlsson Real Estate SA). After all, the Constitutional Court recognizes that ordinary judges are subject to the "duty – where the conditions are met – not to apply the national provision that conflicts with the rights enshrined in the Charter in the concrete case before them" (Judgment no. 63 of 2019). Here it has proven true, once again, that, in the face of disputes giving rise to questions of constitutionality and, simultaneously, questions of compliance with Union law ("double preliminary ruling"), the ordinary courts have turned first to the Constitutional Court (see, for example, Supreme Court of Cassation, Second Civil Division, Order no. 3831 of 16 February 2018, on the potential contradiction between the domestic regulatory scheme on market abuse and the principle *nemo tenetur se ipsum accusare*, attributable both to Article 24 of the Constitution and to Article 47 of the Charter).

Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is it conditioned by making a request for preliminary ruling with the Court of Justice of the EU?

The application of the Charter, as described above, is not conditioned by prior reference for a preliminary ruling to the Court of Justice. Indeed, such a reference could be unnecessary where there is consolidated and uniform case law of the Court of Justice in the limits of the field of application of the Charter for a given case. On the contrary, where it is necessary to clarify the contents or the scope of application of the rights and principles recognized by the Charter, a reference for a preliminary ruling may be made, and has been used, effectively, both by the Constitutional Court (see Order no. 117 of 2019, on the extent of Articles 47 and 48 of the Charter in relationship to the right not to incriminate oneself) and by the ordinary courts (see, for example, the Supreme Court of Cassation, Tax Division, Order no. 20675 of 13 October 2016 and Second Civil Division, Order no. 23232 of 15 November 2016 on the *bis in idem* prohibition guaranteed by Article 50 of the Charter; Labor Division, Order no. 13678 of 30 May 2018 on the prohibition of age discrimination under Article 21 of the Charter; and Order no. 451 of 10 January 2019 on the right to vacations recognized by Article 31 of the Charter). Moreover, the Constitutional Court has explained that, in the event of "double preliminary ruling", ordinary courts which have raised a question of constitutionality concerning a domestic rule that clashes, simultaneously, with a constitutional provision and a guarantee enshrined in the Charter, remain free to "refer any question they deem necessary concerning the same object to the Court of Justice of the European Union for a preliminary ruling" (Judgment no. 20 of 2019), even upon completion of incidental proceedings of constitutional review (Judgment no. 63 of 2019; see also Judgments no. 269 of 2017 and 20 of 2019). In the "dialogical" system so described, one limit on the application of the Charter derives from whether the rights and principles enshrined therein, as interpreted by the Court of Justice, comply with the supreme principles of the Italian constitutional system and with the inalienable rights of the person guaranteed by the Constitution (so-called counter-limits). Indeed, one fixed point in constitutional case law is that Union Law – which, therefore, includes the Charter – may be applied only on the condition that it respect these "counter-limits". The Court has explained that "[i]n the highly unlikely event that specific legislation were not so compliant, it would be necessary to rule unconstitutional the national law authorising the ratification and implementation of the Treaties, solely insofar as it permits such a legislative scenario to arise (see Judgments no. 232 of 1989, no. 170 of 1984 and no. 183 of 1973)" (Order no. 24 of 2017). When it comes to potential discrepancies between standards of protection of fundamental rights, the Court has, nonetheless, demonstrated a desire to express itself in dialogical and non-confrontational terms. In the well-known "Taricco affair", it recalled the national standards of protection of the same fundamental rights recognized by the Charter to submit to the Court of Justice a question of the non-compliance of direct application, in the Italian system, of a Union provision (Article 325 TFEU on combatting fraud) with the principle of legal certainty of criminal law, enshrined in Article 25 of the Constitution (Order no. 24 of 2017). Furthering the dialogue on the catalogue of rights, the Court thus led the Court of Justice to recognize the need, for ordinary judges, to derogate from directly applying Article 325 TFEU in the event this would entail a violation of a constitutional principle (the legality of crimes and punishments). This principle is, moreover, also recognized by Article 49 of the Charter (Judgment of the Court of Justice of 5 December 2017, Case C-42/17, M.A.S. and M.B.).

I.III National human rights catalogues

Is the catalogue of human rights part of the Constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?

The Italian Constitution contains a broad catalogue of fundamental rights,[1] divided between "Fundamental Principles" (Articles 1-12) and Part I, which is dedicated to the "Rights and Duties of Citizens" (Articles 13-54). The governance of fundamental rights is only seemingly limited to the first 54 articles of the Constitution, however; indeed, there is a significant link between Part I and Part II of the Constitution, and Articles 55-139 constitute the unavoidable organizational corollary, without which the protection of fundamental rights would be neither full nor effective. Not by chance, it is precisely from the organizational part of the Constitution (Part II, "Organisation of the Republic") that some scholars infer a list of rights that are "instrumental" to those of Part I (consider, for example, the so-called right to Parliament, the so-called right to constitutional justice, or the so-called rights to a judge and to a fair trial). The drafters of the Constitution (1946-1947) chose, therefore, to insert into the text of the Constitution (in particular, into Part I) a recognition of the inviolable rights of the person (according to the formula found in Article 2 of the Constitution), regulating the forms and the methods used for their protection as well as the limits on their exercise. This recognition is articulated in a general provision (Article 2 of the Constitution), which states that, "[t]he Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed […]", and in provisions related to individual rights, contained both in the "Fundamental Principles" (e.g. Article 4 of the Constitution), and in the "Rights and Duties of Citizens". The provisions contained in Part I ("Rights and Duties of Citizens") are, in turn, divided into four Titles, dedicated, respectively, to "Civil Relations" (which include, among others, personal liberty, liberty of the home, of correspondence, of movement and residence, of assembly, of association, and of religion and the expression of ideas, and the right to defense), "Ethical and Social Relations" (including the rights of the family, the right to support, raise and educate one's children, the right to health, the freedom of arts and sciences, and the right to education), "Economic Relations" (including the protection of work, the right to remuneration, the right to maintenance and social assistance, the rights of trade unions, the right to strike, the right to free private-sector economic initiative, and the right to own property), and "Political Rights and Duties" (including the right to vote, the right to freely associate into political parties, and the right of eligibility for public offices). Here it is worth noting the different regulatory technique employed by the drafters of the Constitution, who wished to distinguish, even from a merely linguistic point of view, between the so-called negative liberties and the so-called positive liberties or social rights. In particular, the provisions related to the former use the specific right or freedom as the principal subject of the sentence (e.g. "personal liberty" under Article 13, "the home" under Article 14, and "the freedom and confidentiality of correspondence" under Article 15). The provisions related to the latter, however, use "[t]he Republic" as the subject (e.g. Articles 4, 32, 34, and 35), placing the burden on the Republic to provide for the effective protection of the right in question.

What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?

Explicit recognition of a catalogue of fundamental rights constitutes one of the most relevant novelty of the Italian Constitution, both with respect to Italy's experience of authoritarianism under the fascist regime, which immediately preceded the establishment of the Constitution, and with respect to the liberal experience that characterized the history of the Kingdom of Italy from 1861 until the early 1920s. During this time period, Italy did have a fundamental Statute, which was conceded in 1848 by King Charles Albert of Sardinia and became the constitution of the unified Kingdom of Italy in 1861. However, aside from the fact that it was substantially set aside during the twenty years of fascism (1925-1943), that document was a fundamental charter conceded by the sovereign: it lacked the rigidity more typical of contemporary Constitutions, and reflected the approach of the liberal State based on the rule of law insofar as the relations between the individual and the authorities were concerned. In particular, there were few provisions that recognized individual liberty (Article 26), liberty of the

[1] In the language of constitutionalists, it is typical to talk about "fundamental rights," while international law scholars prefer the formula "human rights". These expressions are used, in most cases, as synonyms, although it is possible to discern some differences. In particular, the formula "fundamental rights" seems to suggest the nucleus of rights which underlie a liberal-democratic constitutional system, while the formula "human rights" appears to have a broader semantic reach, irrespective of any specific system, but inevitably linked to that particular type of constitutional system that is usually defined as liberal-democratic. The text of the Italian Constitution does not contain the expression "human rights," and, only with specific reference to health does it speak of a "fundamental right of the individual".

home (Article 27), the freedom of the press (Article 28), the right to own property (Article 29), and the right of assembly (Article 32). However, aside from the small number of recognized liberties, the Albertine Statute assured neither full nor effective protection, and, as a consequence, it fell to the legislator to place limits on the exercise of these freedoms. It is not possible to point to a single model that was taken as a reference by the drafters of the Constitution in drafting the text, although certain charters and declarations of rights exerted a very strong influence. The first reference is to the Declaration of the Rights of Man and the Citizen of 1789 (which was, in turn, based upon the 1776 Declaration of Independence of Philadelphia), which was laid out over the course of the French Revolution, and to the Bill of Rights, made up of the first ten Amendments that were added in 1791 to the text of the 1787 Constitution of the United States of America. Equally important for the drafters of the Constitution was the cultural influence of the Weimar Constitution of 1919, Part II of which was dedicated to the fundamental rights and duties of Germans, and the contents of which were referred to many times throughout the working sessions as a reference model. Important parallels can also be drawn between the Italian Constitution approved in December 1947 and the Constitution of the Roman Republic of 3 July 1849, although the cultural, social, and political context was profoundly different. In addition to these undeniable influences, it bears noting that the Constitutional framework created in 1946-7 has distinct marks of originality, which, over the following decades, have made the Italian fundamental charter a model of reference for so-called new democracies. The originality of the Italian constitutional framework becomes all the more evident if an examination of the provisions intended to protect fundamental rights is coupled with an examination of the tools intended to guarantee the effectiveness of these rights and, first and foremost, the creation of a constitutional justice body. Indeed this was the most relevant novelty introduced in 1946-7, and later with Constitutional Law no. 1 of 1948: a constitutional court which, unlike some of the models studied by the Constituent Assembly, was not configured to be a sort of "human rights adjudicator," but rather to serve as a true "judge of the laws," called upon to review the constitutionality of laws, before ever ensuring the protection of fundamental rights. This means that an intervention by the Court presupposes the existence of a law or an act having the force of law, or, at the very least, a legislative omission that can be "filled" by means of an additive ruling. One choice that turned out to be crucial – and which was made after the conclusion of the Constituent Assembly's working sessions – was to provide for a non-direct, but merely incidental, form of access to the Court; that is, access is available only through an ordinary court. This decision essentially assured the Court's good "fortune" (Cartabia, Pizzorusso), preventing it from being potentially swamped by direct appeals and ensuring rapid proceedings (for several decades now, settled at a length of one year from the date a claim is filed). This last consideration may seem to be unrelated to the topic of the catalogue of fundamental rights, but it is not, because the effectiveness of their protection depends, in large part, on the speed of intervention by the body charged with assuring that protection.

What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

The evolution of the catalogue of fundamental rights contained in the Constitution has, thus far, occurred through courts and case law, although it is theoretically possible to modify the constitutional provisions that deal with fundamental rights. In this regard, it bears mentioning that, according to the most accepted scholarly view, the procedure to amend the Constitution (governed by Article 138 of the Constitution), is limited not only by the express limitation found in Article 139 of the Constitution, but also by the limitation implied by the fundamental principles of the Constitution, which also constitute an impassable barrier for the legislator in amending the Constitution (see, in particular, Judgment no. 1146 of 1988). In any case, a constitutional revision *in melius* of the provisions relating to fundamental rights cannot be precluded, this being understood as a modification which expands the protection of a right or which produces the same effect by reducing the limits on its exercise. The evolution of the catalogue of rights has, therefore, occurred thanks to the action of the Constitutional Court which, by leveraging either the canon of systemic interpretation or that of evolutive interpretation, has progressively expanded the list of rights that have a constitutional basis. In carrying out this work, the Court has been facilitated by certain precious indications provided in scholarship, which, at various times and with a variety of emphases, have: *a*) highlighted the "open" nature of the clause under Article 2 of the Constitution (Barbera), so as to allow for the "constitutional coverage" of questions of protection relative to legal situations that were not foreseen by the text of the Constitution; *b*) maintained the need to interpret constitutional provisions concerning rights *magis ut valeant* (Crisafulli and, albeit with a different tone, Modugno); *c*) highlighted the expansive vocation of rights, even while underscoring the need for "an anchorage in positive law", deducing from the constitutional framework a principle of maximum expansion of their guarantees (Barile, recently reiterated by Silvestri). Moreover, even those (like Pace) who have taken a critical view of these approaches have discussed the opportunity of a "tempered

(or critical) positivistic legal method". The Court, after an early phase (ending around the mid 1980s) of being substantially closed to the recognition of "new" rights, has come to adopt the most advanced academic approaches, opening the doors of constitutional protection to a broad spectrum of rights. The right to a healthy environment is illustrative – it began to make headway in the case law of the Supreme Court of Cassation in the late 1970s, and only ten years later came to be explicitly acknowledged in the Constitutional Court rulings that categorized the environmental and natural heritage as a "constitutional value" (Judgments no. 94 of 1985, and 167 and 641 of 1987). Consider, too, the right to "sexual identity" (Judgment no. 161 of 1985 and, more recently, Judgments no. 221 of 2015 and 180 of 2017), the "right to sexual freedom" (Judgment no. 561 of 1987), the right to housing (Judgment no. 404 of 1988 and, more recently, Judgments 166 of 2008 and 36 and 161 of 2013), the right to personal identity and the correlated right to a name (Judgments no. 13 of 1994, 297 of 1996, 120 of 2001, and, more recently, Judgments no. 286 of 2016 and 212 of 2018), and the right to one's own cultural formation (Judgment no. 383 of 1998). At the same time, there was a progressive expansion of the addressees of certain "old" rights, for example through the recognition of rights (above all social rights) in connection with so-called vulnerable subjects, like, for example, persons with disabilities (see, among many, Judgments no. 215 of 1987, 80 of 2010, and 275 of 2016) and foreigners (see, among many, Judgments no. 120 of 1967, 11 of 1968, 104 of 1969, 144 of 1970, 177 and 244 of 1974, 199 of 1986, and – among the most recent cases – Judgments no. 252 of 2001, 432 of 2005, 306 of 2008, 11 of 2009, 187 of 2010, 329 of 2011, 40 of 2013, and 22 and 230 of 2015). Moreover, in recent times, a series of so-called bio-rights have been acknowledged, that is, rights or freedoms connected with the most intimate sphere of the human person. Consider the general right of self-determination (Judgment no. 438 of 2008), the right of two persons of the same sex "to live out their situation as a couple freely" (Judgment no. 138 of 2010), the right of adoptive children to learn about their origins (Judgment no. 278 of 2013), the freedom "to establish a family with children" (Judgment no. 162 of 2014), the "freedom of self-determination of sick persons in choosing treatments, including those intended to free them from suffering" (Order no. 207 of 2018), and the freedom of sexual self-determination (Judgment no. 141 of 2019).

I.IV The mutual relationship between different catalogues of human rights

Can you give examples from the case law of your Court related to the use of any of the international catalogues?

References to supranational and international catalogues in the cases and decisions of the Court (which attest to the Italian system's openness and sensitivity to the protection of human rights) grew more frequent after Judgment no. 80 of 2011 recognized the fact that the Charter of Fundamental Rights of the European Union (CFR) had become equal to the Treaties and Judgments no. 348 and 349 of 2007 framed the rules of the European Convention on Human Rights (ECHR) as interposed provisions that can supplement Article 117(1) of the Constitution. The catalogues have been used by courts in a wide variety of ways. Alongside citing them *ad adiuvandum* for purposes of making a convincing argument and lending support to the reasoning behind decisions made on the basis of purely domestic provisions, there is also the weightier usage of taking a single catalogue as the criterion for decision-making, albeit a merely interposed one. Important references to the CFR can be found in judgments striking down laws in violation of constitutional provisions, which are "reinforced" by revealing the conflict with corresponding Charter provisions (Judgment no. 236 of 2016 on the sentencing range for the crime of alteration of civil status through falsehood). In other rulings, particularly those rejecting questions or declaring them inadmissible, the Charter figures as a criterion (Judgment no. 23 of 2016 on the criminal punishment of drug-related crimes). Recently (Judgment no. 112 of 2019 on the seizure of the product and assets used to commit crimes related to market abuse), the ruling of unconstitutionality resulted from the verified violation of a right simultaneously protected by the Constitution, the ECHR, and the Charter. The Charter's potential remains partly untapped, since there are no rulings of unconstitutionality based solely upon the violation of one of its provisions; and the rulings that have dealt most extensively with it (Judgments no. 279 of 2017 and 63 of 2016) ended up denying that it can be invoked, due to the cases' irrelevance at the European level. Endorsing the ECHR as a criterion has sometimes led to the Court to accept questions previously rejected on the basis of domestic criteria. This was the case with Judgment no. 120 of 2018, which struck down the total ban on unionization by military personnel, for coming into conflict with Articles 11 ECHR and 5 of the European Social Charter. The first provision does not exclude any category from freedom of association in trade unions and allows States to make lawful restrictions concerning members of the armed forces, provided that the essential elements of the right are not compromised. The latter reproduces the contents of the first and is able to supplement Article 117(1) of the Constitution, even though it is contained in an act without direct effect and articulated in principles of progressive implementation. Prior to the recognition of the right, Judgment no. 449 of 1999, which rejected the questions brought before the Court based upon domestic provisions, had underscored the requirements of internal cohesion

and neutrality specific to the armed forces to justify the restrictions placed on the freedom to unionize. Reference has, at times, been made to other international sources. Judgment no. 275 of 2016 struck down a regional regulatory scheme that failed to guarantee coverage of transportation expenses for students with disabilities, holding that it violated the fundamental right to education of persons with disabilities, which is also protected by the 2006 UN Convention on the Rights of Persons with Disabilities. Judgments no. 31 of 2012 and 7 of 2013 held that the automatic loss of parental rights as an ancillary punishment for certain crimes was unconstitutional, and stated that the court in each case must make a concrete evaluation of the best interests of the child, which is also recognized by the 1989 UN Convention on the Rights of the Child and by the 1996 European Convention on the Exercise of Children's Rights.

Has your Court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?

The multitude of catalogues protecting human rights has become a given in constitutional case law, and has its basis in the need (about which there is a consensus across Europe) to ensure higher levels of protection. This is a consistent approach, well-established with regard to the relationship between the Constitution, the CFR, and the ECHR. The Court referred to the CRF in its reasoning in a reference for a preliminary ruling made to the Court of Justice concerning the compatibility of the "Taricco rule" with the supreme constitutional principle of legality in criminal matters, in a case relating to the limitation period for value-added tax fraud. The Court maintained that Article 53 of the Charter required the Union to respect the higher level of protection of the rights of the person recognized by national constitutions. Otherwise, "the process of European integration would have the effect of undermining national conquests in the area of fundamental freedoms and would depart from its path of unification whilst guaranteeing respect for human rights" (Order no. 24 of 2017). This approach represents a departure from the Court of Justice's 2013 judgment in the Melloni case, which held that Article 53 does not undermine the national standards of protection provided that there is no prejudice to the primacy, unity, and effectiveness of European law. Indeed, "In general, the supervening value of the guarantees set down by the CFR with respect to those of the Italian Constitution generates [multiple] legal remedies, enriches the tools for protecting fundamental rights, and, by definition, denies any restriction" (Judgment no. 20 of 2019). As for the ECHR, its reception "is marked by an increase in individual rights, and never by any detriment to them" (Judgment no. 68 of 2017) and corresponds to its purpose as the guarantee of "a minimum threshold of common protection, in a subsidiarian relationship to the guarantees assured by the national Constitutions" (Judgment no. 43 of 2017). Article 53 ECHR specifies that the interpretation of conventional rules cannot entail levels of protection lower than those assured by the national sources. Thus, the course charted in the field of fundamental rights aims toward the elevation of guarantees. This is an objective to pursue with respect both for the shared heritage of rights, codified in the supranational and international charters, and for the individual national systems, which receive recognition and legitimization from European law to the extent to which they raise the levels of protection. The relations between the Union and the Member States "are defined according to the principle of loyal cooperation, which implies mutual respect and assistance. This entails that the parties are united in diversity. There would be no respect if the requirements of unity were to demand the cancellation of the very core of values on which the Member State is founded. And there would also be no respect if the defence of diversity were to extend beyond that core and end up hampering the construction of a peaceful future, based on common values, referred to in the preamble to the Nice Charter" (Order no. 24 of 2017). All the actors must participate in the affirmation of rights. The Court has envisaged a "framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ […] in order that the maximum protection of rights is assured at the system-wide level" (Judgment no. 269 of 2017). A collaborative and dialogue-based approach can be seen in Orders no. 103 of 2008, 207 of 2013, 24 of 2017, and 117 of 2019, which made referrals for preliminary rulings to the Court of Justice for the interpretation of European rules relevant for the constitutional judgment. In the same way, for "all courts required to apply the ECHR, including the Constitutional Court", there is a necessary dialogue inherent in the "progressive nature of the formation of case law" (Judgment no. 49 of 2015). Protocol no. 16, which introduced the option to request an advisory opinion from the Strasbourg Court "confirms an option that favours an initial engagement based on argumentation within a perspective of cooperation and dialogue between the courts rather than the hierarchical imposition of a particular interpretation concerning questions of principle which have not yet become established within case law and thus have questionable resolutive status." In the case law of the Court, the polestars of the maximization of protections and of dialogue exist alongside the safeguarding of the distinctive features of the Italian system. Among these are the principle that situates the centralized review of the constitutionality of laws underlying the constitutional

architecture and that allows for rulings with *erga omnes* effects (Judgments no. 63 and 20 of 2019, and 269 of 2017); together with the Court's role as supreme guardian of the entire Constitution, on the premise that "the protection of fundamental rights must be systemic, and not fractured into a series of uncoordinated and potentially conflicting rules". Accordingly, the increase in protective guarantees, which is the aim of the intersection between conventional and constitutional protection of rights, must include the necessary balancing (within the margin of appreciation that the ECHR recognizes for the individual Member States) with other constitutional rules that protect fundamental interests that could be impacted by the expansion of an individual area of protection (Judgment no. 264 of 2012). Moreover, the duty of national courts to comply with the rulings of the Strasbourg Court, the case law of which fuels and defines the conventional guarantees, arises when there is a consolidated approach (Judgment no. 49 of 2015). This is because the irrevocable effects of rulings of unconstitutionality cannot be based upon interpretations that are isolated or or tied to features unique to a given case, but rather presuppose the existence of consolidated interpretive outcomes.

Is there an established procedure for choosing a specific catalogue of human rights in case where the right is protected under more catalogues?

Incidental review of constitutionality is the natural forum for the protection of rights. The requirement that an ordinary judge initiate proceedings, and the principle of correspondence between the query and the ruling entrust to the referring court the choice of which catalogue to invoke as the criterion for judgment. Moreover, a not uncommon occurrence is that a right is called into question with a simultaneous reference to domestic, supranational, and international provisions. In the absence of standardized procedures, the indications of the Court, which has defined the relationship between the Constitution, the CFR, and the ECHR, provide assistance. Italy's membership in the European Union entailed, in deference to Article 11 of the Constitution, divestments of sovereignty that legitimize the supranational institutions to emit rules that may have direct effect within the domestic legal systems and require courts to guarantee the primacy of European law, even not applying contradictory domestic laws (barring review by the Constitutional Court under Articles 11 and 117(1) of the Constitution in cases of European laws lacking in direct effect). Italy's participation in the ECHR system, however, did not carry with it divestments of sovereignty; courts cannot disapply laws that conflict with the Convention, but instead must submit a claim that they are unconstitutional for violating the duties flowing from international obligations, under Article 117(1) of the Constitution. The Court has allowed the CFR to be invoked if "the matter that is the object of the domestic legislation to be governed by European law – insofar as it concerns acts of the Union and national acts and conduct implementing Union law or justifications adopted by a Member State for a national measure which would otherwise be incompatible with Union law – and not simply national legislation with no link with Union law" (Judgments no. 63 of 2016 and 80 of 2011). Judgment no. 269 of 2017, confirmed by Judgments no. 63 and 20 of 2019 and by Order no. 117 of 2019, underscored the particular "typically constitutional stamp of [the Charter's] contents", the rights and principles of which "largely intersect with the principles and rights guaranteed by the Italian Constitution". The violation of a right of the person may infringe, at once, both upon the guarantees protected by the Constitution and upon those codified by the Charter in areas relevant at the European level. In this case of "double preliminary ruling", "violations of individual rights posit the need for an *erga omnes* intervention" by the Court, which "will make a judgment in light of internal parameters and, potentially, European ones as well […], in the order that is appropriate to the specific case", including for purposes of ensuring that the rights in the Charter are interpreted in harmony with constitutional traditions. It is an approach that conforms with the instructions of the Court of Justice, according to which European law shall not prejudice the overriding nature of constitutional review, leaving the courts free to formulate questions for preliminary rulings and to not apply, at the conclusion of the incidental review, the national provision that has passed constitutional muster in the event that they find, on other grounds, that it conflicts with Union law. As concerns the ECHR, starting with Judgments no. 348 and 349 of 2007, its provisions, with the meaning attributed to them by the consistent case law of the Strasbourg Court, are deemed to supplement Article 117(1) of the Constitution as interposed rules. Courts have the duty to avoid violations of the Convention, and to apply its provisions, on the basis of the principles of law expressed by the European Court of Human Rights. Nonetheless, the courts encounter a threshold in the event of a domestic law that conflicts with the ECHR: "having verified the impracticability of an interpretation that conforms with the Convention, and being unable either to apply or not apply the domestic rule, which [they have] held to conflict with the Convention and, thus, with the Constitution", judges must raise a question of constitutionality concerning the domestic rule (Judgment no. 109 of 2017). Conventional rights "do not suffer limitations based on spheres of competence", and the Court is tasked with adjudicating whether they are complied with, these being questions that entail the potential violation of the

Constitution (Judgment no. 240 of 2018). The Court uses provisions flexibly, sometimes accepting questions on grounds that they violate the Constitution and declaring that the conventional grounds are absorbed (Judgment no. 96 of 2015), at other times striking down a rule for violating the Convention and holding that the domestic-law challenges are absorbed (Judgment no. 25 of 2019), and at still others accepting all of the grounds for challenging the rule (Judgment no. 194 of 2018).

II SPECIAL PART - SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

II.I Right to life

What is the original wording of the provision protecting this right in your national catalogue? Is it possible to restrict the right? If so, how and under what conditions? Has your Court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. Is there a difference between the case law of your Court and the case law of international courts with respect to the protection of this right?

1. The Italian Constitution does not explicitly protect the right to life. Nevertheless, constitutional case law, ordinary case law, and the unanimous conclusion of legal scholars maintain that the Constitution contains an implicit guarantee of the right to life. The same is true, moreover, for human dignity itself, which is not expressly protected in the text of the Italian Constitution, but which is considered nonetheless to have a sure constitutional foundation on the basis of a holistic reading of constitutional provisions. The constitutional provisions relied upon to infer the constitutional protection of the right to life are as follows:

▪ Article 2 of the Constitution, understood as an "open" formula, which, as mentioned above at paragraph I.III., requires the interpreter, among other things, to extend recognition and constitutional protection at least to those rights that are already recognized at the supranational and international level. The right to life is explicitly guaranteed both in international declarations of an exclusively political nature, like Article 3 of the Universal Declaration of Human Rights, as well as in numerous bills of rights that are legally binding upon Italy, the compliance with which is a condition for the constitutionality of national laws under Articles 11 and/or 117(1) of the Constitution, such as Article 2 ECHR and Article 2 of the EU Charter. In a ruling concerning a request for a referendum to repeal certain articles of Law no. 194 of 1978 regulating abortion, the Court held that, first, the principle that human life must be protected from its inception, "*has gained increasing recognition over the years, including at the international and global levels*" (here the Court referred to the preamble of the 1989 United Nations Convention on the Rights of the Child), and also that, "*the conception, inherent in the Italian Constitution and, in particular, in Article 2 [has grown stronger], according to which the right to life, understood in its broadest sense, should be categorized as an inviolable right, that is, as one of the rights which occupy a privileged position, so to speak, in the legal system, in that they belong […] 'to the essence of the supreme values upon which the Italian Constitution is founded'"* (Judgment no. 35 of 1997).

▪ Article 13, first and fourth paragraphs, of the Constitution, under which "*Personal liberty is inviolable. […] Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished"*. In Judgment no. 238 of 1996, which dealt with the legislator's exclusive power to place limitations on personal liberty, the Court foreshadowed in an *obiter dictum* what it would hold with more extensive reasoning in later Judgment no. 35 of 1997, mentioned above, because it places the right to life, understood as tightly connected to the right to liberty and physical integrity of the person, among the "*supreme values*" of the Italian constitutional system, and defines it, always in conjunction with the other two rights, as "*the inviolable essential nucleus of the individual"* and the "*foremost matrix of all rights*".

▪ Article 27(3) ("*Punishments may not be inhuman and shall aim at re-educating the convicted*"), and above all paragraph (4) (the "*death penalty is prohibited*"). The Italian constitutional system entirely forbides the death penalty with the reform of the fourth paragraph of Article 27 of the Constitution, introduced by Constitutional Law no. 1 of 2007. Even before this, the original text of the 1948 Constitution allowed for capital punishment only "in the cases provided by the military laws of war," and it was never even theoretically applied (since 1994, moreover, the military wartime criminal code itself has ceased to allow for the death penalty). The Constitutional Court used Article 27(4) of the Constitution, in conjunction with Article 2 of the Constitution, to declare unconstitutional the law ratifying and executing the extradition treaty between the Government of the Italian Republic and the Government of the United States of America, in the part in which it established that extradition would be denied in the event of crimes punishable by the death penalty, unless the requesting Party committed to

"guarantees considered sufficient by the petitioned Party to refrain from inflicting the death penalty, or, if inflicted, to refrain from executing it". The Court observed that the formula "sufficient assurances" is not constitutionally permissible because "*the prohibition contained in Article 27(4) of the Constitution, and the values which underlie it – the foremost among which being the essential good of life – demand an absolute guarantee*" (Judgment no. 223 of 1996; for an earlier case, see Judgment no. 54 of 1979);

▪ Article 32 of the Constitution, which states that "*The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person*".

2. The Constitutional Court has had to address the right to life only on rare occasions, and almost exclusively in connection with references to ethically delicate issues related to the start of life (abortion, in the past, and, more recently, medically assisted reproduction) and the end of life. Moreover, in the Italian system, references to the right to life appear in these same contexts, and not in others, in the decisions of the ordinary courts as well (among the most important rulings, see Supreme Court of Cassation, First Civil Division, 16 October 2007, no. 21748, on the cessation of forced feeding and hydration of a person in a permanent vegetative coma; Supreme Court of Cassation, Joint Divisions, 22 July 2015, no. 15350 on so-called wrongful death suits; Supreme Court of Cassation, Third Civil Division, 4 October 2018, no. 24189, on the non-existence of a right to not be born in case of poor health). The only constitutional ruling that invokes the right to life in the form of a positive duty to act on the part of the public authorities is Judgment no. 309 of 1999, in which the Constitutional Court declared that certain provisions of the law establishing the National Health Service were unconstitutional "in the part in which, for the benefit of Italian citizens temporarily living abroad […] and in impoverished financial circumstances, they fail to provide free forms of health care to be established by the legislator" (Judgment no. 309 of 1999). Indeed, in its reasoning in that case, the Court held that, "*the borderline between the right to immediate care and the right to the integrity of the person may turn out to be a very fine line in the concrete case, and, in extreme cases, the contents of one right may become confused with the contents of another, even to the point of implicating the right to life. In such cases, State support must never be absent*".

3. When it comes to start-of-life issues, alongside Judgment no. 35 of 1997, discussed above, two other historic, abortion-related cases bear mentioning. The earlier case declared the criminal law that punished anyone who procured an abortion unconstitutional "in the part in which it fail[ed] to provide that pregnancy c[ould] be interrupted when continuing the pregnancy [would entail] injury or serious risk that is medically verified in the sense described in the reasoning section, which is not otherwise avoidable, for the health of the mother" (Judgment no. 27 of 1975). That judgment was handed down some years prior to the passage of Law no. 194 of 1978, which remains in force today, and which introduced the legal framework on abortion in the Italian legal system and laid down what would become the principle-based coordinates of the law. According to the Court, "*the protection of the fetus [has] a constitutional basis. Article 31(2) of the Constitution recognizes and guarantees the inviolable rights of the person, among whom the legal status of the fetus must be included, albeit with the particular characteristics belonging to it*". The Court specified, however, that, in balancing the various rights and values in play, "*there is no equivalency between the right not only to life but also to health of someone who is already a person, like the mother, and the protection of the embryo, which has yet to become a person*". The same principles were repeated in a more recent judgment, in which the Constitutional Court held that it was unconstitutional to request to submit the provision of Law no. 194 of 1978 that provided for access to therapeutic abortions in cases of "serious risk to the life" of the woman to a referendum to repeal it (Judgment no. 26 of 1981). According to the Court, the provision that provides for therapeutic abortion "represents, in its essential contents, a rule that is constitutionally required by Article 32" of the Constitution on the right to health, "in that it protects not only the life [of the embryo] but also the health [of the woman]".

4. Concerning end-of-life issues, some very recent constitutional rulings bear mentioning. First of all, Order no. 207 of 2018, concerning the so-called Cappato case, named after the Italian politician and activist Marco Cappato, who was charged with the crime of inciting and assisting suicide after he transported someone by car from Milan to Switzerland for the purpose of allowing him to access assisted suicide in an authorized Swiss facility. The person transported by the accused in order to attain assisted suicide was, as the Order summarizes: *"(a) affected by an illness that is incurable and (b) causes physical or psychological suffering, which they find absolutely intolerable, and who are (c) kept alive by means of life support treatments, but remain (d) capable of making free and informed decisions*". This was an unusual step, in which the Constitutional Court outlined the framework of constitutional and international values and principles that have a bearing in resolving the area of constitutional doubt, but did not immediately rule on the matter, holding that it was "*appropriate – in a spirit of faithful and*

dialogical institutional cooperation – to allow Parliament, in this case, every appropriate reflection and initiative". To this end, the Order, handed down on 16 November 2018, postponed its consideration of the question until the public hearing of 24 September 2019. Two particularly important sections of the Order, which is expansive and thorough, are reproduced here below.

- "*Article 2 of the Constitution – not unlike Article 2 of the ECHR – gives rise to the duty of the State to protect the life of every individual, and not the diametrically opposed right to ensure that each individual may obtain assistance to die, from the State or from third parties. The European Court of Human Rights has long since affirmed that the right to life, guaranteed by Article 2 of the ECHR, cannot give rise to a right to refuse to live and, therefore, a true right to die, precisely in relation to assisted suicide*".

- "*[C]riminalizing the provision of assistance to suicide cannot be considered incompatible with the Constitution*" because it is "*effectively works to protect the right to life, particularly that of the weakest and most vulnerable members of society, which the legal system intends to protect from the extreme and irreversible choice of suicide. It fulfills the perennially important purpose of protecting people in painful and difficult circumstances, not least of all by protecting the people deciding to carry out the extreme and irreversible act of suicide from facing pressure of any kind*". Even while it held that criminalizing assisting suicide is compatible with the Constitution, the Court nonetheless concluded by holding that, in extreme cases like the one described in the referral order, the absolute ban on assistance to suicide ends up "limiting the freedom of self-determination of sick persons in choosing treatments, including those intended to free them from suffering, which flows from Articles 2, 13, and 32(2) of the Constitution, by, in the final analysis, imposing upon them one single way to take their leave of life. This limitation cannot be assumed to be intended to protect another constitutionally relevant interest, and thus results in the violation of the principle of human dignity, as well as of the principles of reasonableness and equality in relation to different subjective situations (Article 3 of the Constitution: this last parameter is not mentioned by the referring court with respect to the principal question, but in any case it is relevant as the foundation of the protection of human dignity)". In the absence of the action it urged on the part of the legislator, the Court has given notice of the contents of its yet-unpublished decision by means of a press statement on its deliberations, released on 25 September 2019. The Court decided to hold that a person who, under certain conditions, facilitates the execution of a decision to commit suicide is not punishable under Article 580 of the Criminal Code if that decision has been freely and autonomously made by a patient kept alive by life support treatment and affected by an irreversible pathology that causes physical or psychological suffering considered, by the patient, to be intolerable, when that patient is fully capable of making free and informed decisions. Without prejudice to the need for legislative action, the fact that assistance to suicide cannot be punishable was made subordinate to compliance with the provisions regulating informed consent, palliative care, and heavy and constant sedation, as well as to verification both of the required conditions and the means of execution of the procedure by a public health facility after hearing the opinion of the competent ethics committee. The identification of the specific conditions and procedures, derived from rules already present in the legal system, was rendered necessary to avoid risks of abuse concerning particularly vulnerable persons, as previously highlighted in Order no. 207 of 2018. Still on the topic of end-of-life issues, it is worth mentioning a still more recent judgment, in which the case of a person in a permanent vegetative state, who had a court-appointed guardian, was at issue. The Constitutional Court affirmed that the transferal to the guardian of exclusive representation of the disabled person for health matters does not also and necessarily carry with it the power to refuse life-sustaining medical care. Rather, it falls to the overseeing court to determine, from time to time, whether or not to attribute this power to the steward (Judgment no. 144 of 2019).

5. In reference to the protection of human life, the chief difference between the Italian constitutional system and that of the ECHR lies in the aforementioned fact that the Constitution does not contain a specific provision on the right to life, whereas Article 2 of the ECHR stipulates the legal protection of the right and establishes the cases in which denying it cannot be considered a violation of the conventional guarantee. As noted above at paragraph 1, the Constitutional Court considers the right to life to be a guarantee implicitly derived from Articles 2, 13, and 27(3) of the Constitution, as well the necessary premise for the enjoyment of all the other inviolable rights of the human person that are explicitly laid out in the text of the Constitution. In considering the right to life as a "presupposed right" we can see a first, important parallel with respect to the case law of the ECtHR, according to which, "*the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights*" (Judgment of 22 March 2001, Streletz, Kessler and Krenz v. Germany). Moreover, the case law of the Constitutional Court converges on multiple points with that of the ECtHR concerning the contents of the protection of the right to life. In reference to the death penalty, both courts have concluded that it does not comply with the guarantee of the fundamental good of life, and both have held that prisoners cannot be extradited to a

requesting state if that state seeks the death penalty against them. The ECtHR, however, reached this conclusion by interpreting the death penalty as inhumane treatment, prohibited by ECHR Article 3 (Judgment of 2 March 2010, Al-Saadoon and Mufdhi v. United Kingdom). It is interesting to note that both courts anticipated the modifications that were later made both to the Italian Constitution (Constitutional Law no. 1 of 2007) and to the ECHR (Protocol no. 13), which banned the death penalty under all circumstances. Likewise, in relation to beginning- and end-of-life matters, despite the differences in the specific reasoning adduced, the courts agree on many concluding points or, at least, on the type of balancing they use. With regard to abortion, for example, the ECtHR has declined to state whether embryos are entitled to the right to life guaranteed by Article 2 of the ECHR (Judgment of 8 July 2004, Vo v. France). Nevertheless, both courts have held that balancing between the need to protect the unborn and the rights of the mother, accomplished in Italy by Law no. 194 of 1978 (see Judgments no. 26 of 1981 and 35 of 1997 of the Constitutional Court, and the ECtHR Judgment of 5 September 1999, Boso v. Italy) is sufficient. In end-of-life matters, one interpretive premise shared by the Constitutional Court and the European Court is that a right to die cannot be inferred from the guarantee of the right to live (Constitutional Court, Order no. 207 of 2018; ECtHR, Judgment of 29 April 2002, Pretty v. United Kingdom). On the basis of this premise, the ECtHR has acknowledged that Member States have a broad margin of appreciation when it comes to the choice to criminalize assisted suicide, underscoring how Article 2 of the ECHR gives rise to a duty to protect vulnerable persons (Judgment of 20 January 2011, Haas v. Switzerland), and how, conversely, laws that allow for forms of assisted suicide can be considered compatible with the Convention only when they provide for rigorous procedural oversight concerning the validity of the decision to end one's life, expressed by the interested party (Judgment in Haas v. Switzerland; see also Judgment of 19 July 2012, Koch v. Switzerland). The case law of the ECtHR was duly cited by the Constitutional Court in its aforementioned Order no. 207 of 2018. Again, the emphasis the Constitutional Court placed on the requirement that a court be the one to decide whether a guardian may have the power to refuse vital care for a person in a coma (in Judgment no. 144 of 2019) echoes ECtHR decisions concerning the cessation of artificial feeding and hydration (although without mentioning them explicitly). Indeed, those cases hold that interrupting such care only complies with the positive duty of the State to protect life when rigorous procedures are in place to verify the health condition of the interested party, and also where a court acts to ensure sufficient consideration of all the rights and interests at stake (ECtHR, Judgment of 5 June 2015, Lambert v. France; decisions of 27 June 2017, Gard and others v. United Kingdom, and 23 January 2018, Afiri and Biddarri v. France). We may conclude, therefore, that in matters concerning the death penalty and the beginning and end of life, the contents of constitutional case law do not differ significantly from those of the ECtHR's judgments. Moreover, the ECtHR recognizes a broad margin of appreciation for Member States in relation to ethically delicate areas, holding that even systems with vastly different characteristics are compatible with the framework guaranteeing the right to life offered by the ECHR. In contrast, the extensive case law of the ECtHR on the right to life and the use of force (for all, see Judgment of 27 September 1995, McCann and others v. United Kingdom) does not fully correspond to constitutional case law, essentially because of the aforementioned absence in the Italian Constitution of a provision analogous to that found at Article 2 of the ECHR. Some similarities may be gleaned, however, between the centrality granted to the reservation of jurisdiction concerning limitations on personal liberty by Judgment no. 238 of 1996, and the emphasis the ECtHR has placed on the positive procedural duties that flow from Article 2 of the ECHR (for all, see the aforementioned McCann judgment).

6. As far as the relations between the case law of the Constitutional Court and that of the Court of Justice where the right to life is concerned, it bears noting, first of all, that the Court of Justice of the European Union has handed down very few decisions concerning it. Although the right to life is the focus of Article 2 of the Charter of Fundamental Rights of the European Union, there are few matters attributed to the competence of the Union that are able to raise questions relative to the right to life. The Court of Justice, although it has outlined a notion of "human embryo" for purposes of interpreting Directive 98/44/EC on the legal protection of biotechnological inventions, has declined to explain whether an embryo may be considered entitled to the right to life (see Judgments of 9 October 2001 in Case C-377/98, Kingdom of the Netherlands v. European Parliament and Council of the European Union; 18 October 2001, Case C-34/10, Brüstle; and 18 December 2014, Case C-364/13, International Stem Cell Corporation). Even in the well-known Grogan decision, which dealt with whether the interruption of pregnancy could be categorized as a service under then-Article 60 TEC, the Court of Justice did not take a position on whether a fetus is entitled to the right to life, suggesting that the Member States are free to allow or prohibit abortion in compliance with Union law. These rulings, which are tightly bound to the interpretation of the primary and secondary law of the Union, and only incidentally related to the right to life, do not correspond to any specific cases of the Constitutional Court.

II.II Freedom of expression

What is the original wording of the provision protecting this right in your national catalogue? Is it possible to restrict the right? If so, how and under what conditions? Has your Court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. Is there a difference between the case law of your Court and the case law of international court with respect to the protection of this right?

The right to the free expression of thought is recognized by Article 21 of the Constitution, which is made of up six paragraphs. The first protects the substantive contents of the freedom, and establishes that "[a]nyone has the right to freely express their thoughts in speech, writing, or any other form of communication." This pronouncement must be taken together with paragraph six, which provides the only *explicit* limit on the freedom of expression: indeed, "[p]ublications, performances, and other exhibits offensive to public morality shall be prohibited. Measures of preventive and repressive measure against such violations shall be established by law". The second, third, and fourth paragraphs are concerned with the free press, which "may not be subjected to any authorisation or censorship" (paragraph 2). Seizure is possible, however, "by judicial order stating the reason and only for offenses expressly determined by the law on the press or in case of violation of the obligation to identify the person responsible for such offenses" (paragraph 3). Only "when there is absolute urgency and timely intervention of the Judiciary is not possible, a periodical may be confiscated by the criminal police, which shall immediately and in no case later than 24 hours refer the matter to the Judiciary for validation. In default of such validation in the following 24 hours, the measure shall be revoked and considered null and void" (paragraph 4). The fifth paragraph contains the only provision concerning the freedom *of the* press; in this provision the press is not considered in its subjective situation, but rather as an information source to be regulated in light of the protection of information pluralism. The provision states that, "[t]he law may introduce general provisions for the disclosure of financial sources of periodical publications". The first, historic decision of the Constitutional Court, immediately after it began its functions, involved the freedom of expression. In that case, the Court struck down a law introduced by the previous fascist regime, which required prior police authorization in order to distribute announcements or printed materials in public streets, display posters or newspapers, or use amplifiers in order to address the public. In the Court's view, the required authorization granted the authorities "unlimited discretional powers, such that, independent of the specific purpose of protecting the peace and preventing crimes, the concession or denial of authorization may, in practical terms, amount to permitting or blocking the expression of thought on a case-by-case basis" (Judgment no. 1 of 1956). As for the type of limitations on the contents of the right to freedom, the Constitutional Court has, for one, offered a narrow reading of the explicit limit of public morality, understood as the common sense of decency according to the average sentiment of the collectivity (see, in particular Judgment no. 49 of 1971). At the same time, it has found a set of *implied limits*: interests with constitutional standing not explicitly provided for in connection with limits on the freedom of expression, but in any case able to grant legitimacy to restrictive rules (public order, the protection of minors, the interest in prosecuting crimes, the prestige of institutions, etc.). Here the decisions adopted by the Constitutional Court that worked to limit the scope of certain opinion-based crimes inherited from the earlier, fascist regime are emblematic. In some cases, the Court opted for a simple declaration of unconstitutionality (like, for example, in Judgment no. 87 of 1966, which struck down the ban on anti-nationalist propaganda, together with the attached criminal sanctions). In others, it added a danger clause, which diminished the criminal relevance of conduct (Judgment no. 108 of 1974, on inciting hatred between social classes, struck down the relevant legal provision in the part in which it failed to provide that criminal punishment was conditional upon the existence of danger for public order), or it limited the criminal offense through interpretation (so, for example, condoning a crime is only punishable when it translates into indirectly instigating the commission of a crime, according to Judgment no. 65 of 1970). The questions brought before the Court by referring courts have not always led to declarations of unconstitutionality. For example, false, exaggerated, and misleading news, the distribution of which is punished as a minor crime under Article 656 of the Criminal Code, is "a form of hendiadys" which concerns "every kind of news that, in some way, represents reality in an altered manner", and is, for this reason, able to disturb the public order. This legal good, collective in nature, is not "[…] outdone by the right to the free expression of thought" and reproduces "the living institutional order", geared toward "the preservation of the legal structures of social cohabitation" (Judgment no. 19 of 1962). Analogously, defamation of the Government, of the Judiciary, and of the armed forces of the State, punishable under Article 290 of the Criminal Code, is not an expression of thought protected by Article 21 of the Constitution, but rather consists in "insulting, in holding in contempt any ethical or social or political value associated with the entity targeted by the manifestation, denying it any prestige,

respect, or trust, in a way capable of inducing the manifestation's addressees […] to disdain for the institutions or even to unjustified disobedience. This with clear and unacceptable disruption of the socio-political order, which is provided for and governed by the Constitution in force" (Judgment no. 20 of 1974). If we omit certain emphatic proclamations concerning the freedom of expression ("cornerstone" of the liberal democratic order, according to Judgment no. 84 of 1969), the Constitutional Court has not afforded it a privileged position in the system of constitutional freedoms, considering limitations of it to be constitutional whenever they have entailed a not unreasonable way of defending an interest worthy of protection. It bears specifying, however, that constitutional case law on the contents of Article 21 of the Constitution must be supplemented by the rulings of the ordinary courts, which, beginning with two decisions by the Supreme Court of Cassation in the mid-1980s (Supreme Court of Cassation, Joint Criminal Divisions, 20 June 1984; Supreme Court of Cassation, First Civil Division, Judgment no. 5259/1984, the so-called "decalogue" judgment), judges derived specific "conditioned preference rules" from Article 21 of the Constitution, that is, individual subjective situations connected with the freedom of expression of thought, which must prevail, when given conditions concerning the related legal goods are met (first among these being personality rights). Thus, special protection was extended to the right to freedom of reporting, where the requirements of veracity, restraint, and the social usefulness of the reported news are met; the right of criticism, provided that it is not lacking in restraint and is, in any case, of public interest; the right of satire, which, although not conditioned upon veracity and restraint, given the necessarily hyperbolic and/or exaggerated tones of satire, must nonetheless be addressed to persons occupying a public role or somehow connected to matters of public interest. Even in reference to freedom of the press, protected by paragraph 2 of Article 21 of the Constitution, the Court has recognized room for regulation by the legislator. Thus, for example, Article 57 of the Criminal Code, which requires editors or assistant editors to exercise the necessary oversight to prevent the commission of crimes through the press, is not a form of censorship or prior authorization of the kind forbidden by Article 21 of the Constitution. This consists particularly in "[…] precautionary provisions that the public administration could be authorized to adopt to control the written expression of thought and that could lead to a prohibition to publish". It would, thus, be arbitrary to equate these administrative solutions, through which "[…] the 'censorship' from which the Constitution wished to insulate the press, is manifested and exercised," with oversight exercised by the editor of the paper "by the very nature of [his or her] functions" (Judgment no. 44 of 1960, to be grouped with the constitutional case law on liability for failed oversight by an editor in charge). Moreover, in Judgment no. 3 of 1956, the Court not only held that the duty of instruction of the editor in charge under Article 3 of Law no. 47 of 1948 was constitutional, a rule implicitly permitted by Article 21(3) of the Constitution, but also offered a restrictive interpretation of the offense, requiring a *mens rea* of intent to commit a crime in order for the conduct to be punishable. In the case law (which is old, but from which the Court has never deviated) the concept of "censorship" that has constitutional relevance has only been used to refer to action taken by the public authorities, in reference to Articles 725 and 528 of the Criminal Code, intended to punish the circulation and commercial distribution of obscene publications (Article 528) or that, in any case, go against public decency (Article 725). The Constitutional Court has held that, "[…] the sorting imposed upon sellers of newspapers, for purposes of excluding from circulation those publications that go counter to public decency, certainly does not amount to a form of unconstitutional censorship," in that the preventive power deferred to by the constitutional provision must be considered "[…] a typical public law institution, under which State bodies, and only State bodies, authoritatively exercise preventive oversight over the press, adopted with measures containing a judgment on the expression of thought referred to the public administration" (Judgment no. 159 of 1970). With reference to the means of disseminating thought other than the press (which, as we have seen, comprises the object of a subjective right provided for explicitly by the Constitution), constitutional case law has essentially focused on legislative measures concerning television and radio, helping, first of all, to chip away at the state monopoly and open it up to the presence of private subjects, first through cable broadcasting (Judgment no. 226 of 1974), and later via airwaves. When the television and radio market develops two major business poles (one public, the other private), the Court has reiterated the fundamental role played by the principle of pluralism, both external (consisting, that is, in the necessary presence of a plurality of business subjects on the radio-television market) and internal (given by the entry "[…] into the sphere of public and private broadcasting, of as many voices as the technology permits" (Judgment no. 826 of 1988)). Through its case law on radio-television media, the Court has recognized subjective situations not explicitly mentioned by Article 21 of the Constitution, like the right to inform and the right to be informed (Judgment no. 112 of 1993; in this vein, see also Judgments no. 202 of 1976, 148 of 1981, 826 of 1988, and 420 of 1994). This case law thus aligned the Italian system with the international declarations of rights that recognize the various dimensions of freedom of expression: consider not only the Universal Declaration of Human Rights (which lacks, as we know, any immediate binding value), which provides at Article 19, that: "[e]veryone

has the right to freedom of opinion and expression; this right includes […] to seek, receive and impart information and ideas through any media and regardless of frontiers", but also Article 10 ECHR, paragraph 1 of which provides that: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". The Constitutional Court has not yet had the occasion to adjudicate on broadcast media other than television and radio. In fact, the Court declared a question of constitutionality raised by an administrative court concerning the legislative scheme on the regulatory powers of the Authority for Guarantees in the Communications (AGCOM) inadmissible due to procedural defects in the referral order. That question involved the deletion of content that was disseminated online in violation of copyright laws (Judgment no. 247 of 2015). In the same decision, the Court also declared that a request to extend, to the new forms of online communication, the guarantees reserved for the printed press under Article 21(3) and (4) of the Constitution was inadmissible, again for procedural defects. In this sector, as well, the assistance of the ordinary courts bears mentioning (in particular the Supreme Court of Cassation, Joint Criminal Divisions, Judgment no. 31022 of 2015), which has held that said guarantees may be extended (together with the corresponding duties, prescribed by law) only to the online press, and, that is, to the information media, published online, which present the structural characteristics and purposes of the traditional press (the former including a characteristic header and regular timing of publication, and the latter including the collection, commentary, and critical analysis of news tied to current events and addressed to the public). The Court of Justice has also returned numerous times to the need to assure the right to be informed, guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union, which expressly regulates a legal scenario which the Constitutional Court has developed through its case law. As concerns the European Convention on Human Rights, the different formulation of Article 10 ECHR compared with Article 21 of the Constitution cannot go unmentioned. Since the earliest pronouncements of the European Court of Human Rights, Article 10 ECHR has been held to work to affirm democratic pluralism (see, in particular, the decision handed down on 7 December 1976 by the ECtHR, plenary Court, in the case *Handyside v. the United Kingdom*, Application no. 5493/72, paragraph 49, in which the Strasbourg judges include this freedom among the "essential foundations" of a democratic society). Article 21 of the Constitution, on the contrary, at least in the earliest decisions of the Constitutional Court, is geared more toward the protection of individual expression of thought. Also different were the limits that could be placed on the freedom of expression: only public morality in the case of Article 21, while a much broader catalogue may be imposed in the case of Article 10(2) ECHR. These differences, however, have been substantially scaled down by the Constitutional Court, which has, on the one hand, recognized the existence of a tight bond between the freedom of information and pluralist democracy (Judgments no. 84 of 1969, 172 of 1972, and the cases mentioned above) and, on the other, allowed that the free expression of thought may be subjected to limits other than respect for public morality, due to the need to grant protection to goods and interests that have equal constitutional dignity, and always on condition that the freedom in question is not entirely distorted or its exercise rendered more difficult or impossible (see, for example, Judgments no. 20 of 1974 and 126 of 1985). In the cases that followed the 2001 constitutional reform, which introduced the obligation for the national legislator to comply with international obligations, and particularly those which followed after the "twin" Judgments no. 348 and 349 of 2007, which recognized the ECHR as an interposed rule in the adjudication of the constitutionality of laws, there have been no important examples of divergence between constitutional case law and that of the ECtHR on the topic of freedom of expression. Among the most important decisions of the Strasbourg Court are the Judgment handed down on 24 November 1993 in the *Informationsverein Lentia and Others v. Austria* case (Applications no. 13914/88, 15041/89, 15717/89, 15779/89, and 17207/90), which recognized a positive duty, binding for the Member States of the ECHR, to promote pluralism and diversity in the audiovisual media sphere. The decision concerned the public sector monopoly on television channels in the country in question. The principle of pluralism was later reiterated by the ECtHR in the decision handed down on 17 September 2009 in the *Manole and Others v. Moldova* case (Application no. 13936/02). Finally, the positive duty to promote effective pluralism and diversity was reaffirmed in the decision handed down by the Grand Chamber of the ECtHR on 7 June 2012 in the *Centro Europa 7 Srl and Di Stefano v. Italy* case (Application no. 38433/09).

II.III Right to privacy/right to respect for private life/right to private life

What is the original wording of the provision protecting this right in your national catalogue? Is it possible to restrict the right? If so, how and under what conditions? Has your Court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. Is there a difference between the case law of your Court and the case law of international courts with respect to the protection of this right?

1. The text of the Italian Constitution of 1948 does not contain a formula analogous to that of Article 8 ECHR and Article 7 of the EU Charter. However, on the topic of "*private life*," the Constitution contains a provision that acts similarly to Article 8 ECHR, on private life. That is, it acts as a "multiplier" of rights, because it provides Italian courts – both the Constitutional Court and the ordinary courts – with the legal basis for recognizing a constitutional-level protection for fundamental rights that are not explicitly listed in the Constitution (Part I of which is dedicated to the "rights and duties of citizens," contained in Articles 13-54, which have never been modified from 1948 to present, except as concerns the death penalty, on which see paragraph II.I above, and the right to vote). This provision is found in Article 2 of the Constitution, described above at paragraph I.III. Likewise, the Constitution does not contain a provision analogous to the ECHR concerning "*family life*," although it dedicates an entire article to the relationship between spouses (Article 29 of the Constitution: "[t]he Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family") and another to the relationship between parents and children (Article 30 of the Constitution: "[i]t is the duty and right of parents to support, raise and educate their children, even if born out of wedlock. In the case of incapacity of the parents, the law provides for the fulfilment of their duties. The law ensures such legal and social protection measures as are compatible with the rights of the members of the legitimate family to any children born out of wedlock. The law shall establish rules and constraints for the determination of paternity").

2. It is also necessary to underscore that the Constitution contains an absolutely original feature, which distinguishes it (in the area of "*private life*") from both the ECHR and the EU Charter. When the Constitution refers to "the person" in Article 2, and "the human person" in other articles (see, in particular, Article 3(2), on substantive equality, which requires the Republic "to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person"), it does not mean the individual in the abstract, but the "social person", who is inserted concretely in the context of society, in the fabric of relationships in which his or her life develops and unfolds. The Constitution assigns logical precedence to the "full development" of this person and to his or her rights, and places it above any public power, placing it in a position of absolute centrality in the Italian legal system. In this sense, we refer to the "personalist principle". Another unique feature of the Italian Constitution is the inseparable link between the primacy of the human person, understood in this way, as deeply connected to his or her social dimension, and the duties of social solidarity.

3. The Court has often applied Article 2 of the Constitution to a sphere that corresponds to that of "*private life*" covered by Article 8 ECHR and Article 7 of the EU Charter, and in cases that have touched upon a variety of aspects of the issue. Here we may only mention some of the most important rulings. Concerning the right to gender identity as a constitutive element of personal identity, and the resulting right of transsexual individuals to correct their sexual attribution in official records, in an early ruling concerning a 1982 Italian law, which introduced the correction of records significantly earlier than the other European legal systems, the Court held that the law was framed by "the context of a legal civilization in evolution, which is ever more attentive to the values, of freedom and dignity, of the human person" (Judgment no. 161 of 1985). More recently, the Court held that the same Italian law must be "interpreted in light of the rights of the person" – the right to personal identity guaranteed under Article 2 of the Constitution and Article 8 ECHR, for one, as well as the right to health – in the sense that it is not necessary for a person to undergo surgery prior to being able to correct their records (Judgment no. 221 of 2015). Judgment no. 141 of 2019 held that the crime of recruitment for and aiding and abetting prostitution was not contrary to the Constitution, rejecting the referring court's theory that the exercise of prostitution was an expression of the freedom of self-determination of the person in the sexual sphere, and, therefore, that activities supporting the exercise of prostitution should likewise not be punishable. The Court relied on Article 2 of the Constitution, and the personalist principle it contains, as the starting point for its reasoning: after recalling that it had already held, in Judgment no. 561 of 1987, that the catalogue of inviolable rights evoked by Article 2 of the Constitution includes "sexual freedom", understood as "one of the essential means of expression of the human person", the Court goes on to say: "[i]f it is the link with the development of the person that characterises the guarantee given by Article 2 of the Constitution, it is not possible to maintain that voluntary prostitution constitutes

an inviolable right – the exercise of which should accordingly not only be unhindered but even, if necessary, facilitated by the Republic – on the basis of the mere fact that it involves the sexual sphere of those who engage in it. […] The offer of sexual services for valuable consideration is not at all an instrument of protection and development of the human person but constitutes – much more simply – a particular form of economic activity. The sexuality of the individual is nothing else in this case than a means to attain a profit: a 'provision of services' within the framework of a synallagmatic exchange". In some of its decisions, the Constitutional Court has had the chance to refer to the principle of individual autonomy as well, or to self-determination, always patterning it in a way consistent with the personalist principle. For example, Judgment no. 114 of 2019 affirmed that the ability to choose of a disabled person with a court-appointed guardian, when not compromised by their physical, psychological, or sensorial disability, must be honored to the full extent possible, and thus, as a matter of principle, the disabled individual fully retains his or her capacity to give. This conclusion "also responds to the personalist principle, affirmed above all by Article 2 of the Constitution, which protects the person not only in his or her individual dimension, but also in the sphere of the relationships in which his or her personality develops: relationships that absolutely require mutual respect for rights, but which are also nurtured by gestures of solidarity" (Judgment no. 119 of 2015). In the architecture of Article 2 of the Constitution, fulfilling the duties of solidarity constitutes an essential element, "on equal footing with the recognition of each person's inviolable rights, so that constricting a person's freedom to gratuitously give of their time, their energy, or, as in the present case, their belongings, without an objective necessity, constitutes an unjustified obstacle to the development of his or her personality and a violation of human dignity". Judgment no. 438 of 2008 held that, "informed consent, understood as an expression of the informed acceptance of the medical treatment proposed by the doctor, has the status of a full-scale right of the person and is grounded in the principles expressed in Article 2 of the Constitution, which protects and promotes fundamental rights, and Articles 13 and 32 of the Constitution, which provide, respectively, that 'personal freedom is inviolable,' and that 'nobody may be forcefully submitted to medical treatment except as provided by law'. […] The fact that informed consent is grounded in Articles 2, 13 and 32 of the Constitution gives prominence to its role as a synthesis of two fundamental rights of the person – the right to self determination and the right to healthcare". In an even earlier case, the Court had declared unconstitutional a law that made childlessness a prerequisite for recruitment into the *Guardia di Finanza* military corps, holding that, "[s]o severe an interference in the private and family sphere of the person […] cannot be held to be justified at the level of constitutional principles […] Such a prohibition conflicts with the fundamental rights of the person, both as an individual, and in the social formations in which his or her personality unfolds; Article 2 of the Constitution safeguards the integrity of the personal sphere of the individual and his or her freedom to self-determination in private life" (Judgment no. 332 of 2000).

4. Again relying on Article 2 of the Constitution, the Constitutional Court has also spoken many times to "*family life*". Two examples are illustrative. On unions between same-sex couples, Judgment no. 138 of 2010, handed down before the legislator introduced the Italian law on civil unions, held that, "social grouping [as intended by Article 2 of the Constitution] must be deemed to include all forms of simple or complex communities that are capable of permitting and favouring the free development of the person through relationships, within a context that promotes a pluralist model. This concept must also include homosexual unions, understood as the stable cohabitation of two individuals of the same sex, who are granted the fundamental right to live out their situation as a couple freely and to obtain legal recognition thereof along with the associated rights and duties, according to the time-scales, procedures and limits specified by law. However, the Court finds that the aspiration to this recognition – which necessarily postulates legislation of a general nature, aimed at regulating the rights and duties of the members of the couple – cannot solely be achieved by rendering homosexual unions equivalent to marriage". As for family reunification and the renewal of residency permits for foreign nationals with minor children in Italy, Judgment no. 202 of 2013 held that, "the fact that the Constitution guarantees protection to families and minors implies that all decisions relating to the issue or renewal of residence permits for persons with family ties in Italy must be based on a careful consideration of the specific and current dangerousness of the convicted foreign national, whereby residence permits cannot be refused automatically owing solely to a conviction for certain offences. In fact, in matters concerning interpersonal relations, any decision that affects one individual ends up having ramifications also on other family members and the removal of a person from his immediate family – especially in cases involving minors – is a decision which is too serious to be left in a general and automatic fashion to presumptions of absolute dangerousness provided for by law and to automatically applicable procedures, without leaving scope for a circumstantiated examination of the specific circumstances of the foreign national concerned and his family members". On that occasion, the Court also explained that: "[a]n examination of Article 8 ECHR […] results in a similar conclusion. […Article 8] is an expression of a level of

protection for family relations which is equivalent, insofar as is relevant in the case under examination, to the protection granted to the family under Italian constitutional law".

5. Despite their analogous way of functioning as "multipliers of rights", Article 2 of the Constitution and Article 8 ECHR are profoundly different, because they are the fruits of cultural and legal conceptions that do not overlap: in the first case, the personalist principle (see paragraph 2 above), and in the second, the centrality of the right of self-determination and the right to personal autonomy, informed by individualism (for all, see the ECtHR Judgments of 29 April 2002, Pretty v. United Kingdom, 3 November 2011, S.H. and Others v. Austria [Grand Chamber]; and 27 August 2015, Parrillo v. Italy [Grand Chamber]). The differences in the cultural backgrounds underlying these provisions are still firmly in place today, and have a perceptible influence on the case law trends of the Italian Constitutional Court and the Strasbourg Court, despite the fact that the concrete solutions reached by the two courts nearly always overlap, although the two start from different cultural premises. For example, on the topic of transsexuality, the judgments of the Constitutional Court no. 161 of 1985 and 221 of 2015 (see paragraph 3 above) are entirely comparable, and were even ahead of the ECtHR in recognizing, first, the right of transgender persons to modify the information in state-held records to conform with their acquired sex (ECtHR Judgments of 11 July 2002, Goodwin v. United Kingdom [Grand Chamber] and I v. United Kingdom [Grand Chamber]) and, later, the right to correct records even in the absence of any surgical alteration of sexual attributes (ECtHR, Judgment of 6 April 2017, A.P., Garçon and Nicot v. France). Even the case law of the Constitutional Court that categorizes informed consent to medical treatment as a right of the person (Judgment no. 438 of 2008, above at paragraph 2) finds correspondence in the central place accorded informed consent by the case law of the ECtHR, despite the fact that the latter starts from a different perspective, under which it is the *absence* of informed consent that amounts to interference in the private life of the individual (see ECtHR, Judgment of 9 June 2004, Glass v. United Kingdom, paragraphs 70-83). In addition, the requirement (affirmed by Constitutional Court Judgment no. 202 of 2013) of carrying out a concrete examination of the dangerousness of a foreign national convicted of crimes, who has family ties in Italy, for purposes of granting or renewing their residency permit, corresponds to the case law of the ECtHR, according to which the deportation of foreign nationals must take place following a case-by-case balancing between the needs relating to the protection of the public order of the host State and the interests of the foreign national in the maintenance of his or her family ties (as well as social and cultural ones) with the host country (ECtHR, Judgments of 2 August 2001, Boultif v. Switzerland; 5 July 2005, Üner v. Netherlands; and 18 December 2018, Saber and Boughassal v. Spain). Concerning unions between persons of the same sex, a slight difference in perspective may be noted between the two courts, in that the Constitutional Court categorizes such unions as "social groupings" protected by Article 2 of the Constitution (Judgment no. 138 of 2010, paragraph 3 above), while the ECtHR recognizes their "family" quality under Article 8 ECHR (Judgments of 24 June 2010, Schalk and Kopf v. Austria; 7 November 2013, Vallianatos v. Greece [Grand Chamber]; and 14 December 2017, Orlandi and Others v. Italy). Both Courts, however, deny the existence of a right of same-sex couples to have access to marriage, despite recognizing the need for legal regulation of the rights and duties of the couple, including in forms different from marriage (so-called civil unions) (see Constitutional Court, Judgment no. 138 of 2010, and ECtHR, Judgment of 21 July 2015, Oliari and Others v. Italy, and 14 December 2017, Orlandi and Others v. Italy).

6. In comparing the case law of the Constitutional Court with that of the Court of Justice of the European Union, it bears underscoring the latter's unique approach, which has generally promoted the right to respect for private and family life (first as a general principle of EU law derived from Article 8 of the ECHR, and later as a guarantee established by Article 7 of the EU Charter) as a corollary of the freedom of movement of EU citizens (Article 18 TEC, today Article 21 of the TFEU) or of the ban on discrimination on the basis of nationality (Article 12 TEC, today Article 18 TFEU), sex (Article 141 TEC, today Article 157 TFEU), or sexual orientation (Article 13 TEC, today Article 19 TFEU). Because of this, the case law of the two Courts does not entirely overlap, both in terms of the topics addressed and the method of argument applied. When, however, the topics brought before the Constitutional Court and the Court of Justice coincide, often the concrete solutions they adopt do as well, despite the fact that they rely on different conceptual frameworks and legal arguments. This has occurred, for example, in the area of management of migratory flows, in which the Constitutional Court's concern for the family ties formed by foreign nationals in Italy (Judgment no. 202 of 2013) is no different from the privileged consideration given to family relationships in the case law of the Court of Justice concerning the free movement of EU citizens (see, most recently, the Judgment of 26 March 2019 in Case C-129/18, SM, concerning the right to residency, as a family member of an EU citizen, of a minor child under *kafala*), asylum (Judgment of 23 January 2019, Case C-661/17, M.A., on the need for a joint examination of the asylum requests of a minor child and the child's parents), and immigration (Judgment of 27 June 2006, Case C-540/03 European Parliament v. Council, on the

interpretation of Directive 2003/86 on family reunification of third country nationals in light of Article 8 ECHR). The Constitutional Court has also referred to and taken into consideration the case law of the Court of Justice, including in cases in which the cultural background of the European Court's decisions has greatly differed from that of the Constitutional Court. This was the case with Judgment no. 141 of 2019, on prostitution (paragraph 3 above), in which the Court considered the Court of Justice's view that classified voluntary prostitution as the "provision of services for remuneration" (Judgment of 20 November 2001, Case C-268/99, Jany and Others), but went on to conclude that this form of economic activity does not amount to a tool of protection and development of the human person, enjoying protection under Article 2 of the Constitution. Some discrepancies can be found in the judicial approaches of the two courts in reference to topics related to family life. For example, the Court of Justice, starting from the unusual paradigm of the interpretation of the regulatory scheme derived from the Union on the equal treatment of men and women by social services, condemned a national legal framework that required the annulment of marriages (formed prior to sexual transition) for transgender individuals married to persons of a sex opposite their original sex and the same as their acquired sex, as a precondition for the enjoyment of state pensions (Judgment of 26 June 2018, Case C-451/16, MB). Unlike the Court of Justice, the Constitutional Court struck down the Italian legal framework on the correction of one's sexual attribution only to the extent that it failed to stipulate the possibility for transgender people to keep their relationship as a couple with a partner whose sex was the same as the acquired sex, in the form of an official union, denying that the inability to remain united in marriage violated the Constitution (Judgment no. 170 of 2014). The difference in the two solutions is justified in that, according to the Constitutional Court, marriage under Italian law, enshrined in Article 29 of the Constitution, is reserved for couples of opposite sexes. The concepts of "marriage" and of "spouses" inscribed in the Italian Constitution (Article 29) are different from those embraced by the European legislator in the area of freedom of movement for Union citizens, which are "gender neutral," and may, therefore, include spouses of the same sex (Court of Justice, Judgment of 5 June 2018, Case C-673/16, Coman). This difference, which corresponds to a feature of Italian constitutional identity, is, moreover, accepted and even presumed by Article 9 of the EU Charter, which acknowledges the right to marry and the right to found a family "in accordance with the national laws governing the exercise of these rights". This provision, according to the attached Explanations, includes homosexual individuals, but neither forbids nor requires Member States to confer marital status upon unions between persons of the same sex.

II. IV Freedom of religion

What is the original wording of the provision protecting this right in your national catalogue? Is it possible to restrict the right? If so, how and under what conditions?

Freedom of religion is one aspect of the dignity of the human person, recognized and declared inviolable by Article 2 of the Constitution, and it is one of the fundamental, distinctive features of the secular and pluralist State designed by the Constitution. Article 3 enshrines the equal social dignity and equality before the law of all citizens without distinction based on religion, among other things. Under Article 7, the State and the Catholic Church are independent and sovereign, each within its own sphere, and their relations are regulated by the Lateran Pacts. Article 8 asserts the equal freedom of all religious denominations before the law and recognizes that denominations other than Catholicism have the right to self-organization according to their own statutes, provided these do not conflict with Italian law, and entrusts the regulation of their relations with the State to laws adopted on the basis of agreements with their respective representatives. The aforementioned set of pacts is a characteristic feature of the Italian system, which uses a bilateral configuration as a tool intended to recognize the particular needs of each religious group, but does not condition their enjoyment of either freedom of organization and action or of religious freedom itself upon the stipulation of such agreements, as these freedoms are guaranteed equally to all denominations and all their members. Article 19 guarantees anyone the right to freely profess their religious beliefs in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality. Article 20 states that no special limitation or tax burden may be imposed on any organization on the ground of its religious nature or its religious or confessional aims. These provisions carve out the principle of the secular State, to be understood not as indifference but rather as equidistance and impartiality with regard to the protection of the freedom of religion under a system of religious and cultural pluralism (Judgment no. 203 of 1989). This is one of the supreme principles of the Italian system, not subject to constitutional amendment, and characterizes the form of the Italian State, within which different faiths, cultures, and traditions coexist. The constitutional State thus rejected the religious character of the Kingdom of Italy, the fundamental law of which proclaimed Catholicism as the sole religion of the State and established a principle of mere tolerance with respect to other religions. Like every fundamental right, freedom of religion is

proclaimed together with its limit: religious practices, if they run counter to public morality, fall outside of the guarantee of Article 19, and any denominations organized in a way incompatible with Italian law may not invoke Article 8. In general, all constitutional rights are subject to the balancing necessary to ensure their unitary and non-fragmentary protection, for purposes of avoiding that any one of them receive absolute and unlimited protection, making it a "tyrant". When it comes to freedom of religion, competing or opposing interests which nonetheless merit consideration in the balancing operation entrusted to the legislator and subject to review by the Court include security, public order, and peaceful coexistence, as well as respect for the fundamental freedoms that cannot be limited on religious grounds.

Has your Court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The Court has dealt with matters of religion since the start of its activities, at which time there was a pressing need to cleanse the laws of holdover provisions based on the earlier religious principle. The case law trajectory may be described in terms of abandonment of the original concept, which favored taking a different approach toward Catholicism with respect to other religions, and promotion of the secular principle, to the point of acknowledging total equality among religions. The decisions adjudicating on criminal provisions that banned conduct offensive to religious sentiment are emblematic. The provisions provided harsher punishments or specific charges for crimes committed against the Catholic religion, the official State religion at the time the provisions were adopted. The original line of cases (Judgments no. 14 of 1973, 39 of 1965, 79 of 1958, and 125 of 1957) rejected challenges on the grounds that Articles 7 and 8 of the Constitution do not establish equality between the Catholic Church and other religions, but differentiate between their respective legal positions, marked by equal liberty but not uniformity in how their relations with the State are regulated. The Catholic religion, moreover, as the religion of nearly all, or a majority of Italian citizens, was seen to be worthy of enhanced criminal protection, "due to the larger scale and greater intensity of the social reactions naturally aroused by offensive behavior directed at it". The shift beyond the majoritarian principle and toward the full affirmation of the secular principle may be seen in Judgments no. 117 of 1979 and 203 of 1989. The first, which traced the freedom of conscience of nonbelievers to negative religious freedom, denied that the majoritarian principle could justify discrimination, since the Constitution protects the religious opinion of the person, and it is "indifferent whether he or she ascribes to that of a minority". The second explained that the supreme principle of secularism is one of the contours of the form of the State outlined by the Constitution. Later case law, which returned to address the same criminal provisions, applied the principles of equality and secularism to reach holdings of unconstitutionality, which struck down criminal offenses that were radically unconstitutional (Judgments no. 440 of 1995 and 508 of 2000, concerning blasphemy against symbols or persons venerated in the State religion and insulting said religion), or else equalized punishments that differed on the basis of religion (Judgments no. 329 of 1997, 327 of 2002, and 168 of 2005, concerning offenses against the State religion by means of insulting religious things or ministers and disrupting Catholic religious functions). These rulings express the conviction, now well-established, that "the attitude of the State must be one of equidistance and impartiality", "without giving any importance to the quantitative fact that membership in this or that denomination is more or less widespread" and "taking on the duty of equal protection of the conscience of each person who identifies with a religion no matter what denomination they belong to". Recently the Court has reviewed regional rules on territorial governance that touched on freedom of religion. Judgment no. 63 of 2016 struck down certain provisions adopted by the Lombardy Region which laid down different and more stringent requirements for the construction of places of worship and facilities for religious services that applied only to religions that had not entered into agreements with the State. The free practice of religion represents an essential element of freedom of religion, and it is recognized equally for all persons and denominations, regardless of whether they have stipulated an agreement, which does not amount to a *condicio sine qua non* for the exercise of religious freedom, but merely a tool for the pact-based regulation of specific aspects of the relationship between religions and the State (in the same vein, see also the contemporary Judgment no. 52 of 2016, handed down in the context of a dispute between branches of the State, containing, moreover, the repeal of a Judgment by the Supreme Court of Cassation, which, in an act of undue overstepping into the Executive branch's area of political discretion, had held that the Government's refusal to initiate negotiations for the stipulation of an agreement with the Union of Atheists and Rationalist Agnostics was subject to judicial review). The regional legislator, therefore, could not discriminate between denominations on the basis of whether or not they had formalized their relations with the State through agreements. The decision also struck down other provisions, which required that the opinions of organizations, citizens committees, and law enforcement representatives be heard, as well as those of the provincial offices of the police and prefecture, concerning the

planning procedure for religious facilities, as well as the installation of an external video surveillance system at each place of worship. This scheme unduly pursued public order and security goals, which belong to the exclusive competence of the State. Judgment no. 67 of 2017 held that a Veneto regional provision was unconstitutional in the part in which it established that urban planning agreements between an applicant and the city could stipulate the requirement that the Italian language be used for all activities carried out at facilities of shared interest for religious services, not strictly connected with ritual practices. The Region exceeded its competences by introducing a requirement entirely unrelated to the protection of urban planning interests. Alongside the importance of language, an "element of individual and collective identity" as well as a "vehicle for transmitting culture and expression of the relational dimension of the personality", the rule had the potential to "effect broad limitations of fundamental rights". These judgments consistently rely upon Articles 3, 8, and 19 of the Constitution (equality and religious freedom). They have occasionally also brought to bear Articles 2 (inviolable rights), 7 (relations between Church and State), 20 (religious organizations), 21 (freedom of thought), and 25 (legality in criminal matters) of the Constitution. The review of these regional rules touched upon competence-related provisions, including Articles 117(2)(c) and (h) (the exclusive State competence to govern relations with religious denominations as well as matters of public order and security), and Article 117(3) (concurrent competence concerning governance of the territory), as well as Article 118(3) of the Constitution (coordination between the State and the Region in the area of security). International and supranational rights catalogues, however, played no role.

Is there a difference between the case law of your Court and the case law of international courts with the respect to the protection of this right?

Concerning religious freedom, a substantial overlap of both principles and overall approaches may be observed in the case law of the Constitutional Court and that of the European courts. Based on Article 9 of the ECHR, the Strasbourg Court has stated that, on the basis of the principles of neutrality and religious pluralism, the States must ensure equality of legal treatment to minority denominations and refrain from unjustified interference in the organization and lives of religious communities as well as the choices of their religious ministers (Judgments of 22 November 2010, Jehovah's Witnesses of Moscow v. Russia; 31 July 2008, Jehovah's Witnesses v. Austria; and 14 December 1999, Serif v. Greece). The broad margin of appreciation granted to States, including in order to regulate their relations with religious denominations through agreements, even justifying within the same agreement-based context varying definitions of the principle of secularism itself (as the Judgments of 1 July 2014, Grand Chamber, S.A.S. v. France, and 18 March 2011, Lautsi v. Italy attest, since they allow, respectively, for both the elimination and the retention of religious symbols in public places), has not precluded the Court from using its power to review the proportionality of the limits imposed within the various systems (Judgments of 23 February 2010, Arslan v. Turkey, and 4 December 2008, Dogru and Kevranci v. France). In a democratic society, in which many religions coexist within the same population, the State must assume the role of a neutral and impartial organizer of the exercise of the various religions, for purposes of ensuring public order, religious peace, and tolerance (Judgment of 10 November 2005, Grand Chamber, Leyla Sahin v. Turkey). Sometimes, provisions that have given rise to discriminatory practices by predicating access to the regulatory scheme in place for religious associations upon public recognition, or establishing detailed regulatory structures, have been held to violate Articles 9 and 14 of the ECHR (Judgments of 25 September 2012, Jehovah's Witnesses v. Austria; 9 December 2010, Savez crkava "Riječ života" v. Croatia; and 12 March 2009, Gütl, Löffelmann and Lang v. Austria). The Court of Justice has reviewed the use of religious symbols and the status of religious organizations with regard to the principle of non-discrimination. The Achbita and Bougnaoui judgments of 14 March 2017 dealt with religious discrimination at the workplace. The first held that a general ban on wearing religious symbols, justified by the company's desire to present a neutral image, gives rise to indirect discrimination if it is not balanced by the assignment of tasks by the employer which, since they do not involve contact with the public, do not impact the religious beliefs of the worker. The second held that requiring the removal of the Islamic veil in compliance with the wishes of a client amounts to direct discrimination, because prejudice against a religion cannot justify a violation of freedom of belief. The Egenberger and JQ rulings of 17 April and 11 September 2018 considered cases of discrimination by non-profit organizations of a religious character, and involved the decision not to hire or to terminate a worker due to their failure to meet a religious requirement, either from the beginning, or after hiring (the requirements being belonging to a certain denomination or avoiding conduct that went contrary to its ethical teaching). On the premise that States must refrain from evaluating the legitimacy of any denomination's ethical teaching, and that the religious requirement must be an essential, legitimate, and justified

matter, difference in treatment may be considered permissible if there is an objective, direct link between the requirement for carrying out the activity assigned by the manager and the activity itself.

II.V Prohibition of discrimination

What is the original wording of the provision protecting this right in your national catalogue?

The prohibition of discrimination in the Italian Constitution is formulated, together with the principle of formal equality, in Article 3(1), and is one of the twelve fundamental principles with which the Constitution begins. It states: "[a]ll citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions". While the first paragraph of Article 3 of the Constitution is dedicated to formal equality and the related prohibition on arbitrary legal distinctions, the second paragraph is dedicated to substantive equality and to the related duty of all public institutions (state, regional, local, etc.) to "to remove the economic and social obstacles which by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country". In Judgment no. 109 of 1993, the Constitutional Court held that this was a duty of the Republic intended to "ensure an effective status of equal opportunity for social, economic, and political integration to socially disadvantaged classes of persons," through "the adoption of differentiated legal schemes […], even if this derogates from the general principle of formal equality of treatment established by Article 3(1)" (so-called "positive actions"). There are also constitutional provisions that, in specific areas, decline the principle of equality between: religious denominations (Article 8(1)); associations or institutions of a religious or non-religious character (Article 20); spouses (Article 29(2)); legitimate and biological children (Article 30); attendees of private schools rather than public schools (Article 33(4)); and male and female workers, as well as workers who are minors, with regard to wages (Article 37). Concerning access to public office and elected positions, Article 51 explicitly reinforces the ban on discrimination on the basis of sex, imposing the duty on the Republic to "adopt specific measures to promote equal opportunities between women and men." Concerning linguistic minorities, Article 6 requires that appropriate measures be implemented to protect them, while for religious minorities, Article 8 provides the opportunity for them to negotiate particular agreements to be approved by law. With regard to persons with disabilities, Article 38(3) guarantees their right to education and professional training. There are many legislative rules intended to counter discrimination, both in private relationships and in the relations between individuals and the public administrations: they provide a distinction between direct and indirect discrimination, as well as providing specific civil actions to provide speedy protection for victims of discrimination (see Articles 43 and 44 of the Consolidated Text on Foreign Nationals, Legislative Decree no. 286 of 1998; Legislative Decree no. 215 of 2003, implementing Directive 2000/43/EC on the equal treatment of persons irrespective of race or ethnic origin; Legislative Decree no. 216 of 2003, implementing Directive 2000/78/EC on equal treatment in employment and occupation; Legislative Decree no. 198 of 2006 on equal opportunities between men and women, and Legislative Decree no. 196 of 2007, implementing Directive 2004/113/EC on equality between men and women in the access to and supply of goods and services; and Law no. 67 of 2006 on the legal protection of persons with disabilities who are victims of discrimination).

Is it possible to restrict the right? If so, how and under what conditions?

The legislator is not forbidden from ever, under any circumstances, enacting distinctions based on one of the characteristics contained in Article 3(1) of the Constitution (with the exception of the distinctive basis of "race", except in the case of laws making reparations for violations committed under fascism: Judgment no. 268 of 1998). Such distinctions may pass the threshold of reasonableness where there is an appropriate reason, that is, a purpose legitimately pursued by the legislator in order to benefit another constitutionally relevant right or interest, by appropriate and proportionate means. They are subject to "strict scrutiny" in proceedings concerning equality, triggered by one of the distinctions listed in Article 3(1) (Judgment no. 249 of 2010 makes explicit reference to "strict scrutiny", and held that it was discriminatory to connect a greater degree of dangerousness in the commission of a crime with the fact that a perpetrator is an illegal immigrant – the so-called "aggravating circumstance of unlawful immigration"; concerning ethno-religious characteristics, as a distinctive criterion that may not be legally considered by laws, see Judgment no. 239 of 1984, on the unconstitutionality of the automatic enrollment of Jewish citizens in the Israelite Communities established by royal decree in 1930). In rare cases, the Constitution itself establishes the conditions under which an exception to equal treatment may be made. Article 29(2) establishes, for example, that "[m]arriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family"; Article 30(3) stipulates that, "[t]he law ensures such legal and social protection measures as are compatible with the rights of the members of the legitimate family to

any children born out of wedlock". These provisions are the outcome of the compromises reached by the Constituent Assembly at a time when the traditional vision of the patriarchal family was still deep-seated and strong. The Constitutional Court, in part taking its cue from the ECHR and other international rights charters, now tends to interpret these provisions narrowly (see Judgments no. 286 of 2016 on the right of spouses to pass on the mother's surname to their children, and 494 of 2002, holding it unconstitutional to forbid legal recognition of paternity and maternity on behalf of children of incest). Precisely because of the spirit of Article 29 of the Constitution on marriage and the clear will of the Italian Constituent Assembly to reserve that institution exclusively for heterosexual couples, the Constitutional Court has not held that homosexual couples who wish to be married are comparable to heterosexual couples, despite holding that they constitute social groupings whose rights must be recognized under Article 2 of the Constitution (Judgment no. 138 of 2010). Nevertheless, here, as in other similar cases, it was not a question of making an exception to the prohibition on discrimination, but rather of grounding, in the same constitutional text, the impossibility of considering *legally comparable* situations that are different on the basis of characteristics (like homosexuality) that, in different contexts, cannot constitute lawful criteria for distinction (as Judgment no. 138 of 2010 explicitly acknowledged). In matters concerning the right to remove economic and physical barriers to the full enjoyment of freedom and equality (under Article 3(2) of the Constitution), as in the case of the legislation on the removal of architectural barriers in order to provide persons with disabilities with access to places that host cultural events, the legislator may be permitted some degree of gradualness in taking action, in order to mitigate competing interests, including financial concerns (Judgment no. 251 of 2008). However, the Court has also held that the rights of disabled persons to special treatment may not be balanced against economic and organizational concerns when said treatment is necessary for the fundamental right to education explicitly recognized for persons with disabilities by Article 38(3) of the Constitution (Judgments no. 215 of 1987, 80 of 2010, and 275 of 2016).

Has your Court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Despite the fact that Article 3 of the Constitution refers only to "citizens", and that there are specific provisions (in Article 10) on the legal status of foreigners, it is undisputed that the prohibition on discrimination applies to them as well, at least with respect to the enjoyment of the inviolable rights of the person. Article 2 of the Constitution, moreover, guarantees these rights to all without distinction (Judgment no. 252 of 2001, see *infra*). The prohibition on discrimination, understood as a principle of equality, applies to both physical and legal persons, and to collective subjects in general (Judgments no. 25 of 1966 and 87 of 1992). The list of distinctions in Article 3(1) is an open one, given the concluding reference to "personal and social conditions". This has allowed the Court to include both illegal immigrants (Judgment no. 249 of 2010, above, as well as Judgment no. 78 of 2007), and homosexual persons (Judgment no. 138 of 2010, cit.) in it. The prohibition on discrimination laid out in Article 3(1) of the Constitution has an autonomous character, unlike Article 14 ECHR: it follows that the catalogue of rights under which the Constitutional Court applies this prohibition has never received a great deal of attention. One exception is where discrimination is based on non-citizen (extra-EU) status. In such cases, the Court tends to guarantee full equality of treatment with citizens only when it comes to the inviolable rights of the person (Judgment no. 50 of 2019). The catalogue of these rights, however, is open and influenced by the evolution of general international law itself (see Judgment no. 306 of 2008) and, above all, by the case law of the ECtHR (see Judgments no. 230 of 2015; 40 of 2013; 239 of 2011; and 187 of 2010). In any case, it is true that the nature of the right impacted by the alleged disparity of treatment may impact the outcome of the judgment (see aforementioned Judgments no. 251 of 2008 and 80 of 2010, on integrating persons with disabilities; concerning religious discrimination, while the Court has affirmed, in Judgment no. 63 of 2016, that all religious denominations are equal as far as the construction of new places of worship are concerned, regardless of whether they have formed an agreement with the State, in Judgment no. 178 of 1996, it held that it was not arbitrary to deny religious groups without any such agreement access to the public funding guaranteed to the Catholic Church and the other denominations party to such agreements).

Is there a difference between the case law of your court and the case law of international Courts with respect to the protection of this right?

At least starting from the *Thlimmenos v. Greece* case (6 April 2000), in which the ECtHR included applying the same treatment to categories of persons who merit differentiated treatment within the concept of discrimination forbidden by Article 14 of the ECHR, there are no ontological differences between the approach of the Constitutional Court and that of the ECtHR concerning the prohibition on discrimination. The remaining

differences are often linked to the different types of proceedings. The invocation of certain protocols by the ECtHR (like, for example, the burden of proof concerning the potential reasons for differentiation of treatment) mirrors the nature of that court's adjudicating "only predetermined parts" and its focus on the individual concrete case, features that do not define the Italian Constitutional Court's incidental procedure of review. In addition to not being limited to predetermined parts, the Constitutional Court's review does not focus on a concrete case (in Italy individual parties cannot make direct constitutional appeals, unlike in Germany, Austria, or Spain), but rather on the law in general terms. Unlike Article 14 ECHR, Article 3(1) of the Constitution is not subsidiarian in nature, and, consequently, there is no need to preemptively demonstrate that the case falls under at least one of the rights autonomously guaranteed by the Constitution. Thus, the Constitutional Court may exercise judicial review with respect to any discrepancy in treatment, something that, for the ECtHR, is only possible with regard to the signatory States of Protocol no. 12. In addition to this difference, it is not uncommon to this day for the ECtHR to settle for reviewing a violation of the "principal" right (like the protection of private and family life under Article 8 ECHR), and, in case of rejection, to hold that review of the additional violation of Article 14 is essentially absorbed by the outcome of the review on the "principal" right (*S.H. v. Austria*, Grand Chamber, 2011; *Lautsi v. Italy*, Grand Chamber, 2011). Inversely, in Italian constitutional case law, once the Court has verified that a violation of the general principle of equality has taken place, the Court often holds that the other alleged violation of constitutional and/or fundamental rights is absorbed by it. As far as the Court of Justice of the European Union (CJEU) is concerned, it, unlike the Constitutional Court, regularly invokes the concept of "indirect discrimination" (one isolated mention of it was made in the Constitutional Court's Judgment no. 163 of 1993). This does not prevent the two courts, however, from reaching substantially equivalent rulings concerning laws which, despite their seeming neutrality, effect arbitrary distinctions to the detriment of one category or group of persons (see, for example, Judgments no. 107 of 2018 and 236 of 2012). Moreover, the Constitutional Court, unlike the CJEU, is not tasked with providing binding interpretations of the derived law of non-discrimination (like the Directives from 2000 mentioned above), a function that presumes the development of even very complex legal tests. CJEU review carried out under Article 21(1) CFR is more comparable to the functioning of the Constitutional Court: despite the fact that the CJEU tends to consider the prohibition on discrimination established as a fundamental right, applying the general clause on permissible limitations found in Article 52 CFR to it, the concrete outcome of the different approaches does not appear to diverge much: even where direct discrimination has taken place based on one of the expressly forbidden distinguishing characteristics, balancing against other "constitutionally" relevant interest is not precluded *a priori* (CJEU C-528/13, Judgment of 29 April 2015, *Léger*). As this last judgment reiterated (at § 48), moreover, the prohibition on discrimination, on par with its status in the Italian system, "is a particular expression of the principle of equal treatment".

II.VI Right to liberty

What is the original wording of the provision protecting this right in your national catalogue? Is it possible to restrict the right? If so, how and under what conditions? Has your Court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied. ls there a difference between the case law of your Court and the case law of international courts with respect to the protection of this right?

The Constitution, after having raised "the recognition of those rights that form the undeniable heritage of the human personality" to the level of "a fundamental rule of the State, for whatever regards the relations between the collectivity and individuals", and having held that they "belong to the human person understood as a free being", provides a specific instruction concerning individual inviolable rights, among which it stipulates, first, the "right to personal liberty" (Judgment no. 11 of 1956). The Constitution provides that certain institutions are to guarantee personal liberty against potential unlawful interference on the part of the public authorities, including the absolute reservation to the legislator and the reservation to the judiciary. Indeed, restrictions on personal liberty are only permitted "by order of the Judiciary stating a reason and only in such cases and in such a manner as provided by law" except in "exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by law" in which "the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours shall be revoked and considered null and void". Article 13 of the Constitution, in defending personal liberty, declares that it is inviolable without giving it an explicit and complete definition. One dimension reveals it as the liberty that is sacrificed by acts that cause forms of physical coercion, whether at the hands of the courts, the police, or private parties. In a variety of rulings, the Court has excluded from the scope of Article 13 of the Constitution, among other things, the mere imposition of a duty, even in the case that it is criminally punishable

(Judgment no. 49 of 1959); repatriation orders (Judgments no. 45 of 1960, 68 of 1964, and 210 of 1995); and license revocation (Judgment no. 6 of 1962). Another dimension of the same liberty is that which is violated in the case of acts of coercion degrading to human dignity: for example, the adoption of certain police rules involving a series of duties or prohibitions, particularly the preventive measures adopted in relation to persons who pose a danger to society (Judgments no. 11 of 1956 concerning admonitions and 27 of 1959 concerning the duties imposed on persons under special surveillance). Finally, under well-established case law, coercive powers of minimal substance, gaged based on a quantitative evaluation of their invasiveness, are not able to violate personal liberty. Here, Judgment no. 30 of 1962 is particularly important. That case, referring to the collection of descriptive, photographic, and anthropometric data, explained that "Article 13 does not refer to any limitation on personal liberty, but rather to those limitations that violate the traditional principle of *habeas corpus*" (Judgments no. 2 and 11 of 1956, 27 of 1959, and 12 and 45 of 1960). Nonetheless, "the guarantee of *habeas corpus* must not be understood only in relation to the physical coercion of the person, but also to the impairment of moral liberty when such impairment entails the total subjugation of the person to the power of another". As a result, the sphere protected by Article 13 of the Constitution is not violated in the case of coercive powers of minimal substance. With regard to the reservation to the judiciary, this consists in the ancient guarantee of *habeas corpus*, that is, in the order that a court imparts to the police authorities to bring before it, within a set time period, all detainees, together with the reasons for their arrest. Here we may refer to Judgment no. 105 of 2001, which held that the question of constitutionality concerning Article 14 of Legislative Decree no. 286 of 1998 was unfounded. That provision stipulated that, in the event it was impossible to immediately carry out an administrative deportation order by means of accompanying the person in question to the border or refusing them entry, a foreign national could be detained for a strictly necessary period of time at the nearest temporary residence and assistance center by order of the police commissioner. It further stipulated that this order be transmitted to the court without delay and, in any case, within 48 hours after its adoption, for validation in the following 48 hours, or else lose any effect. Disregarding the different interpretation offered by the referring court, the Constitutional Court (adopting a solution with more significant guarantees and greater compliance with the provisions of Article 13 of the Constitution, which cannot be tempered with respect to foreign nationals in light of the protection of constitutionally relevant goods) held that "the oversight of the court concerns not only detention, but also administrative deportation in the specific way it is carried out consisting in accompaniment to the border by means of public force". More recently, the Court, considering questions related to preventive measures against persons under special surveillance, reconstructed the related guarantees at both the constitutional and ECHR level, underscoring that "the fact that the measures in question are classified within the scope of Article 13 of the Constitution means that the guarantees (which are also required under the ECHR framework) [be] a) of a suitable basis in law for the measures in question and b) that the measure must be proportionate with legitimate crime prevention aims (a requirement of proportionality applies systematically within Italian constitutional law in relation to any act by the authorities that is liable to impinge upon the fundamental rights of the individual) must be supplemented by the further guarantee c) of the reservation of jurisdiction to the courts, which is not required at European level for restrictive measures that are considered by the ECtHR to merely restrict freedom of movement, which as such fall within the scope of the guarantees under Article 2 of Protocol no. 4 to the ECHR" (Judgment no. 24 of 2019). Concerning the other guarantee institution, that of the reservation to the legislator, it bears noting that, despite the fact that Article 13 of the Constitution is silent as to the requirements, interests, and purposes that authorize the legislator to adopt restrictions on personal liberty, these can be gleaned from the constitutional system as a whole, and first of all from the principles contained in Articles 25 and 27 of the Constitution, which deal with crimes and punishments. Thus, the allowable instances of restrictions being placed on personal freedom are primarily those connected with the commission of criminal offenses, built so as to comply with the principle of personal responsibility (Article 27 of the Constitution) and the principle of legality (Article 25 of the Constitution) in its three corollaries of the reservation to the legislator, the certainty/preciseness of the provisions criminalizing the conduct, and their non-retroactive scope. The inextricable interconnectedness between the guarantees enshrined in Articles 13 and 25 of the Constitution is revealed by the recent, well-known "Taricco" case, which has important implications for the question of interference between the case law of the Constitutional Court and that of the Court of Justice of the European Union, and which can be taken as a model of constructive dialogue among courts in the area of the protection of fundamental rights and, in particular, of personal liberty (on the relations between the various legal systems and their respective charters of rights, please see Part I). In particular, the Court – in consideration of the retroactive application *in peius* in the area of the criminal law that flowed from a rule established by the Luxembourg Court, held that the "Taricco rule", established by the Court of Justice concerning the limitation period for value added tax fraud, conflicted with the

principle of legality in criminal matters, which includes limitation periods as a substantive institution, due to both its retroactive scope and its lack of precision. Nonetheless, the Court opted for a dialogue-based solution, referring the question for a preliminary ruling by the Court of Justice in order to obtain a constitutionally compliant reading of the Taricco judgment (Order no. 24 of 2017). With its Judgment M.A.S. and M.B. of 5 December 2017, the Court of Justice, conceding the Constitutional Court's view, acknowledged the substantive character of limitation periods in our legal system and (in addition to directly precluding its application to sets of facts occurring prior to 8 September 2015) consequently allowed national courts to avoid applying the "Taricco rule". The Constitutional Court conclusively closed the matter with Judgment no. 115 of 2018, in which, having pointed to the conflict between Article 325 TFEU, as interpreted in the "Taricco" decision, and the supreme principle of legality in criminal matters, declared the questions of constitutionality to be unfounded due to the inability of the rule in question to enter into the domestic legal system. It also bears noting that the Constitution contains various provisions dedicated to substantive aspects of the criminal law, which work together to define the prerequisites, contents, and limits of punitive authority. In particular, other than the general principles of the system (like the principle of equality under Article 3 of the Constitution) and the aforementioned principle of legality under Article 25 of the Constitution, these include the principle of the personal nature of criminal responsibility, established by Article 27(1) of the Constitution, and the prohibition of punishments consisting in inhumane treatment and the principle of the re-educational purpose of punishment, found in Article 27(3) of the Constitution. In keeping with these principles, the re-educational purpose of punishment applies not only during the phase in which a punishment is being carried out, but also at the moment of the legislative choice to criminalize conduct, and at the moment of judicial oversight, and it has, for some time now, become part of the "heritage of European legal culture, particularly for its connection with the principle of proportionality between the quality and the quantity of a punishment, on the one hand, and the offense, on the other" (Judgment no. 313 of 1990; more recently see Judgment no. 233 of 2018). The re-educational quality of punishment manifests itself, moreover, in all interventions intended to promote the rehabilitation of prisoners for life in society, and the regulation of the execution/prison phase is particularly important. The first step to ensure compliance with the re-educational purpose of punishment is represented by the guarantee that punishments will be "individualized". So that the punishment imposed upon an individual convicted person "is not disproportionate with the specific objective and subjective seriousness of his or her conduct, the legislator normally stipulates that the penalty must be set by the courts between certain minimum and a maximum levels, taking account in particular of the vast range of circumstances mentioned in Articles 133 and 133-bis of the Criminal Code, in order also to ensure that the penalty appears as a response that is – not only not disproportionate but also – as "individually tailored" as possible, and thus set according to the circumstances of the individual convicted person, thus giving effect to the constitutional requirement of the "personal nature" of criminal responsibility […T]he requirement for the 'mobility' (Judgment no. 67 of 1963), or the 'individualized determination' (Judgment no. 104 of 1968) of punishment – and the resulting vesting in the courts of a certain level of discretion when specifically setting the penalty between a minimum and a maximum level prescribed by law – amounts to the 'natural implementation and development of constitutional principles, including both general principles (principle of equality) and principles relating specifically to criminal law' (Judgment no. 50 of 1980), in the light of which 'the implementation of a restorative distributive justice calls for differentiation more than uniformity'" (Judgment no. 222 of 2018). From this follows, as a matter of principle, the trend of prohibiting provisions stipulating a fixed punishment, which, *per se* raise a presumption of unconstitutionality, which can only be belied following a review of the specific facts of the crime, by means of a precise demonstration that the particular structure of the punishment is proportionate to the entire range of listed conduct. The prohibition on automatic punishments, moreover, was affirmed in reference to alternative measures to detention, like, for example, in Judgment no. 186 of 1995, which accepted challenges to Article 54 of Law no. 354 of 1975, which stipulated the automatic revocation of parole in the event of a conviction for an unintentional offense committed during the execution of a sentence and after the conferral of the benefit. The prohibition was reiterated recently, in reference to prison benefits, by Judgment no. 149 of 2018, which states: "That automatic mechanism – and the related fact that it is impossible for the courts to carry out any individual assessments – is however at odds with the role of re-educating the inmate which the enforcement of the sentence must be recognised as having. This goal cannot be disregarded (Judgment no. 189 of 2010), and must always be guaranteed, even for the perpetrators of the most serious offences, who have received the maximum sentence provided for under our legal order, namely life imprisonment (Judgment no. 274 of 1983). This is also the view taken within the settled case law of this Court, which has mentioned inter alia as a 'constitutionally binding' criterion the requirement to exclude 'rigid automatic mechanisms and the need, by contrast, to allow for an individual assessment' of prison benefits 'on a case-by-case basis' (Judgment no. 436 of 1999). This is called for

in particular where the automatic mechanism is related to non-rebuttable presumptions that the inmate is more dangerous due solely to the type of offence committed (Judgment no. 90 of 2017) since, where it not permitted to have recourse to criteria based on the individual circumstances, 'the punitive option would end up overshadowing the re-educational aspect' (Judgment no. 257 of 2006), consequently giving rise to an automatic mechanism 'which is certainly at odds with the proportionality principle and the requirement of punishment based on individual circumstances' (Judgment no. 255 of 2006; followed by Judgments no. 189 of 2010, no. 78 of 2007, no. 445 of 1997, no. 504 of 1995)". Finally, in reference to the re-educational function of punishment and the prohibition of inhumane punishments (Article 27 of the Constitution), Judgment no. 186 of 2018 declared Article 41-*bis*(2-*quater*)(f) of Law no. 354 of 1975 to be unconstitutional in the part in which it prohibited prisoners subject to the special regime to cook food.