

The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights

GIORGIO PINO

1. THE RIGHT TO PERSONAL IDENTITY: A DEFINITION

According to relatively wide-spread opinion in Italian legal culture, the right to personal identity can be described as the right everybody has to appear and to be represented in social life (especially by the mass media) in a way that fits with, or at least does not falsify or distort, his or her personal history.

In the Italian debate, the right to personal identity is often considered a “new” personal right. This means that: (A) it is a right that belongs to the person, in the sense that it is an entitlement or claim of human beings as constitutional subjects in contradistinction to, for instance, juristic persons (however, the question will be discussed in due course if and in what cases, a similar right can be recognised also to juristic persons); (B) it is a somewhat “new” right, in the sense that it has only recently been recognised by judges, legal theorists, and (finally) by the legislator, in a period that can be restricted to the last two decades.

Nevertheless, the concept itself of “personal identity” was not unknown to Italian legal culture even in less recent times. In a rather obsolete conception, personal identity was understood as the whole of the official personal data resulting in public records, and important mainly for the public purpose of making the citizen identifiable by the public administration: name, pseudonym, date of birth, address, status, and so on.¹ Later, a civil law relevance of personal identity arose, in relation to the right one has to be identified and distinguishable from other subjects; to this purpose, the

¹ See for instance Falco, “Identità personale”, *Nuovo Digesto Italiano*, UTET, Torino, IV, 1938.

protection of this right was necessarily implied in the protection of the main distinctive features of the person, such as name and likeness.²

The new concept of “personal identity” adds to the traditional concept a sort of “abstract”, “moral” or “ideal” feature that can be expressed as the interest everybody has to be represented with his/her real identity, i.e., with the identity that appears in concrete and unequivocal circumstances of social life. In other words, it is the claim that one’s (ascertainable) cultural, professional, religious, political, social experiences should not be distorted, misrepresented, falsified, confused, contested, or the like, by means of the ascription of false (even if not necessarily defamatory) statements or acts.³

The shift towards this “ideal” conception of personal identity is related to two important cultural and social factors: first, the growing interest in the legal protection of the various aspects of human personality, which characterises the evolution of almost every European legal system in the second half of this century (on this point, see sec. 2.1 below); second, the striking diffusion of the mass media, whose intrusive power and technological development can cause serious (and sometimes irremovable) damage to the moral integrity of the person. These two factors can be considered as the origin of many “new” personal rights (new to the Italian legal system at least), such as the right to personal identity and the right to privacy.⁴

Before proceeding with a more precise definition of the right to personal identity, it is important to clarify that in Italian private law this right has little in common with such fashionable topics such as the “right to group identity” or “community rights”. These rights, indeed, are usually defined as political rather than legal claims advanced by a minority group against the government, in order to obtain the protection or the recognition of cultural or religious demands.⁵

² This view is expressed by A. De Cupis, *Il diritto all'identità personale*, Milano, Giuffrè, 1949, and by G. Bavetta, “Identità (diritto alla)” *Enciclopedia del diritto*, XIX, 1970.

³ This is the commonest definition of the right to personal identity, which can be read the decision of the *Corte di Cassazione*, I, 22.6.1985, n. 3769, in *Nuova giurisprudenza civile commentata*, I, 1985, pp. 647-654.

⁴ In this sense, see V. Zeno-Zencovich, “Identità personale”, *Digesto delle Discipline Privatistiche*, UTET, Torino, vol. IX, 1993.

⁵ The debate on the relations between personal identity and community is vast; the interested reader will find many useful remarks on this point in W. Kymlicka, *Liberalism, Community and Culture*, Clarendon, Oxford, 1989; Id., *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Oxford U.P., Oxford, 1995; C. Taylor, *Multiculturalism and “the Politics of Recognition”*, Princeton U.P., Princeton (NJ), 1992; M. Toraldo di Francia, “Valori costituzionali e diritto all'identità personale”, in F. Cerutti (ed. by), *Identità e politica*, Laterza, Roma-Bari, 1996, pp. 113-129.

Rather differently, the right to personal identity means the protection of individual personality against false representations elaborated by the mass media, or displayed in data bases, and the like (more examples will be shown in sec. 3.2 below).

2. PERSONAL RIGHTS IN GENERAL

The general category of “personal rights” (*diritti della personalità, droits de la personnalité, Persönlichkeitsrecht*) is quite a new field of analysis for European continental legal dogmatics. The lack of interest that legal science used to show in this topic, until two decades ago, was justified by the scarce provisions concerning the protection of “moral personality” in positive law.

In the Italian Civil Code (1942), for instance, the only explicitly recognised personality rights were (and still are): the right to one’s own name and pseudonym (art. 6-9), the right to one’s own likeness (art. 10), and the so-called “moral” copyright (art. 2577).

The reason for this somewhat limited consideration of the moral profiles of the human personality in the Civil Code, is to be found in an ideological stance common to European continental legal culture; according to this position, which dates from the last century, the legal system has to protect two basic values: liberty and property.

The value of “liberty” concerns the relations between citizen and State, in the sense that liberty is the result of the delimitation of the political sphere, and at the same time the right to participate in political power: “liberty rights” are essentially a matter of constitutional law. “Property”, on the other hand, is the fundamental model of legal interaction between private subjects. In this sense, it has been repeatedly noted that in the primary and traditional structure of Italian private law, every model of legal right (*diritto soggettivo*) is based on the “property” scheme.

It is easy to conclude, then, that according to this traditional position, the Civil Code regulates only patrimonial-economic relations, while the moral development of the human being is committed to constitutional law, and protected only by penal law.⁶

⁶ This distinction is common to nearly all the civil codes elaborated between the last century and the first half of this century. About the French Code Napoléon, for instance, it has been said that the Code “se présentait plutôt comme le droit du patrimoine que comme le droit des personnes”: Nerson, ‘De la protection de la personnalité en droit privé français’, in *Travaux de l’Association Henri Capitant*, XII, I, 1963, pp. 60 ff (at p. 63).

This situation has radically changed in the second half of the 20th century. Among other factors, the need for a different way of conceiving of, and giving protection to, personal rights in the Italian legal system was clear in the context of the new Italian Constitution (1948), and also after the ratification in 1955 of the European Convention on Human Rights (1950). Many authors have remarked on this deep change in legal culture, which has replaced the traditional “liberty and property” formula with that of “liberty and personality”. This “paradigm shift” brings, on the one hand, a weakening of economic liberties, which are not recognised as fundamental rights; and, on the other, a strengthening of personal rights and freedoms.⁷

2.1. The “Personalistic Principle” in the Italian Constitution

The Italian Constitution, like the constitutions of the large majority of contemporary western legal systems, is based on the concept of the intrinsic value of the human being. In this regard, it has been said that the most important substantive principle in the Italian Constitution is the “personalistic principle”.

The key-norm to this concern is considered to be art. 2, according to which Italy “acknowledges and protects the fundamental rights of the human being, both as an individual and as a member of social groups”.⁸ Compared to other contemporary constitutions, the Italian constitution is probably less explicit in recognising a right to the development of the person (which could represent a direct constitutional foundation for personal rights).⁹ Nevertheless, an overall view reveals that the autonomous development of the person, and the related concept of “human dignity”, are implied in the structure of the first two parts of the constitution (“*Principi Fondamentali*” and “*Diritti e Doveri dei Cittadini?*”).

Indeed, several Constitutional provisions concern the development and the protection of the human personality; these provisions are not only

⁷ In this sense, see F. Modugno, *I “nuovi diritti” nella Giurisprudenza Costituzionale*, Giappichelli, Torino, 1995, at p. 11.

⁸ The complete formulation of art. 2 is: “La Repubblica riconosce e garantisce i diritti inviolabili dell’uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l’adempimento dei doveri inderogabili di solidarietà politica, economica e sociale”.

⁹ An explicit right to the development of human personality can be read in the German *Grundgesetz*, art. 2(1); in the Spanish Constitution, art. 10(1); in the Greek Constitution, art. 5(1); and in the Swedish Constitution, art. 1(2).

concerned with strengthening the “liberty” sphere in the traditional sense, but also regard the defence and promotion of human dignity in different social contexts. For instance, art. 3(1) recognises “equal social dignity” (“*pari dignità sociale*”) to every citizen; art. 29(2) recognises “legal and moral equality” (“*eguaglianza giuridica e morale*”) to husband and wife; art. 32(2) states that compulsory health treatment shall not infringe human dignity; art. 36(1) regards wages as a means to assure the worker and his family of a decent existence (“*esistenza libera e dignitosa*”); human dignity is also a limit to economic enterprise (art. 41(2)).¹⁰

In legal dogmatics there has been (and still is) a radical opposition regarding the interpretation of art. 2. The question is whether it is to be regarded as an “open clause” or, on the contrary, a “recapitulatory provision”. According to the first approach, art. 2 is considered a necessary technical tool by which the legal system recognises general moral or social needs.¹¹ The opposite conception regards this constitutional norm only as a strengthening of the fundamental rights and liberties specifically stated in other constitutional provisions (particularly at artt. 13-54).¹²

Both conceptions are based on policy arguments (and on ideological presuppositions) rather than on logical or conceptual reasons.

The “open clause” approach, for instance, aims to keep the Constitution in a dynamic and vivid correspondence with society, by way of the possible introduction of “unenumerated rights”, and seems to be inspired by a “jusnaturalistic” attitude.

The “recapitulatory” conception, on the other hand, is more “positivistic” in character, and is intended to prevent the concentration of an excessive discretionary power in the hands of the jurists (judges in the first place), also considering that the introduction of new rights in favour of certain categories of citizens requires the imposition of correlative duties and costs upon other subjects.¹³

¹⁰ For more examples, and an analysis of the use of the concept of human dignity by the *Corte costituzionale*, see A. Ruggeri, A. Spadaro, “Dignità dell’uomo e giurisprudenza costituzionale (prime notazioni)”, *Politica del diritto*, 3, 1991, pp. 343-377.

¹¹ In this sense, A. Barbera, “Commento all’art. 2”, in G. Branca (a cura di), *Commentario alla Costituzione. Principi Fondamentali*, Zanichelli, Bologna-Roma, 1975.

¹² See for instance P. Grossi, *Introduzione ad uno studio sui diritti inviolabili nella Costituzione italiana*, CEDAM, Padova, 1972, p. 159 ff.; A. Pace, *Problematica delle libertà costituzionali. Parte generale*, CEDAM, Padova, 1990, p 4 ff.

¹³ For an evaluation of the use of jusnaturalistic and positivistic arguments in constitutional interpretation, see G. Pino, “The Place of Legal Positivism in Contemporary Constitutional States”, in *Law and Philosophy*, European Special Issue 1999, ed. by N. MacCormick.

The *Corte costituzionale*, in a first period (more or less until the first half of the 1980s), embraced the restrictive, “recapitulatory” interpretation of art. 2.¹⁴ Then, in a series of important decisions concerning fundamental rights, it explicitly accepted the “open clause” conception, thus granting constitutional foundations to many “unenumerated” rights.¹⁵

Indeed, it has been noted that the adoption of the “open clause” approach by the *Corte costituzionale* is not clearly defined. Rather, the Court holds a more moderate, middle-way approach, according to which the open catalogue of art. 2 can be filled only with values and principles that are already *inside* the system of the Constitution. Moreover, the introduction of a “new” right should never cause the erasing of an explicit constitutional right (even if a comparison between the two is possible). In this sense, the function of art. 2 is not merely that of a summary of the other specifically declared constitutional rights, but on the other hand the introduction of new rights cannot be radically discretionary, or merely dependent on “social morality”.

In these cases, for instance, the expanded protection of human dignity and of the development of human personality can be obtained by considering art. 2 in conjunction with art. 3(2)¹⁶: new rights, then, are considered to be constitutional fundamental rights insofar as their content is intended to ensure a full development of the human personality, by removing economic, social (or even physical, as we will see) obstacles. The result is that even if the Court apparently says that art. 2 makes possible the entrance of “new rights” into the system, as a matter of fact such new rights are often new means of protection of traditional rights against new assaults, or the extension of the entitlement of traditional rights to new subjects.¹⁷

¹⁴ See for instance Corte cost. 11/1956 (in *Foro italiano* 1956, I, 1038; and *Giurisprudenza costituzionale*, 1956, 612); 53/1957; 30/1958; 81/1958; 29/1962 (in *Foro italiano*, 1962, I, 603; and *Giustizia penale*, 1962, I, 164); 98/1968; 1/1969; 84/1969; 101/1971; 42/1972; 77/1972; 14/1973; 147/1973; 159/1973; 33/1974; 102/1975; 106/1975; 238/1975; 57/1976 (in *Giurisprudenza costituzionale*, 1976, I, 396); 181/1976; 98/1979; 125/1979; 188/1980; and so on.

¹⁵ In this sense, see Corte cost. 54/1986, on the inviolable right to life, health, and physical integrity; 561/1987, on the right to sexuality; 139/1990, on the right to privacy; 278/1992, on the right to leave one’s own country; 13/1994, on the right to keep one’s own name as an aspect of personal identity.

¹⁶ Art. 3(2): “E’ compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l’eguaglianza dei cittadini, impediscono di fatto il pieno sviluppo della persona umana e l’effettiva partecipazione di tutti i lavoratori all’organizzazione politica, economica e sociale del paese”.

¹⁷ On this matter, see M.C. Ponthoreau, *La reconnaissance des droits non-écrits par les Cours constitutionnelles Italienne et Française. Essai sur le pouvoir créateur du juge constitutionnel*, Economica, Paris, 1994, pp. 87-115; A. Bevere, A. Cerri, *Il diritto di informazione e i diritti della persona*, Giuffrè, Milano, 1995, pp. 43-49.

The most evident example of this technique of “moderate self-integration” of the constitutional text is represented precisely by the introduction of new personal rights into the Italian system (such as the right to privacy, or the right to personal identity), or by the consideration under private law of aspects of human personality formerly protected only by penal law (such as honour and reputation).

The tendency towards an expansive protection of personal rights is echoed by a similar attitude of the organs of the European Convention on Human Rights, i.e., the Commission and the Court, as to the protection of private life under art. 8 of the Convention. The Commission has held that the right to respect for private life “comprises also, to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one’s own personality”.¹⁸ Commentators have suggested that this norm of the Convention has to be interpreted so as to protect the individual against attacks on physical or mental integrity or moral or intellectual freedom, attacks on honour and reputation and similar torts, the use of a person’s name, identity, and the disclosure of information protected by the duty of professional secrecy.¹⁹

2.2. Personal Rights, or the General Right to Personality?

The debate on the interpretation of art. 2 is paralleled, in the specific field of the civilian consideration of personal rights, by a similar debate on the conceptual alternative between a “pluralistic” and a “monistic” approach.

According to the “pluralistic” conception, there are different and distinct personal rights, such as the right to one’s own name, the right to one’s own likeness, the right to personal identity, the right to privacy, and so on. According to the “monistic” conception there is just one single right of personality, or rather *to* personality, i.e., to the autonomous development of one’s own personality, which is articulated in several “faculties” or aspects.

¹⁸ App. 6825/74, X v. Ireland, 18 May 1976, *Decisions and Report of the Commission*, 5, 1976, p. 86 ff.

¹⁹ See F. Jacobs, R. White, *The European Convention on Human Rights*, Clarendon, Oxford, 1996 (2nd edition), p. 172 ff.; Doswald-Beck, “The Meaning of the ‘Right to Respect for Private Life’ under the European Convention on Human Rights”, *Human Rights Law Journal*, 4, 1983, p. 283 ff.; Loucaides, “Personality and Privacy under the European Convention on Human Rights”, *British Yearbook of International Law*, 61, 1990, p. 175 ff.

Apart from the above-mentioned “constitutional” argument, this debate is influenced by other technical factors and, again, by relevant policy arguments.

The pluralistic approach seems to be based on a more traditional attitude that recognises personal rights only as far as they are structured as precise rights (*diritti soggettivi*), and explicitly situated in a positive provision (of course, the use of analogy is possible, in order to extend legal protection to cases similar to those regulated). This approach has fitted quite well with a more general tendency in the field of civil liability, which used to apply this remedy only in cases of violation of explicitly recognised rights (*diritti soggettivi perfetti*). As regards the constitutional foundation, moreover, this view is linked to a restrictive interpretation of Art. 2 as a “recapitulatory provision”.²⁰

The monistic conception, on the other hand, is related to a more flexible consideration of civil liability that covers any damage to legally protected interests. This evolution popularized the monistic conception, which is considered also more in line with the “personalistic” stance of the Constitution and with the concept itself of human personality. In this sense, the main argument is that human personality is unitary in character, and therefore legal protection concerning only some pre-determined and fixed aspects (name, likeness...) would be incomplete and distorted. Human personality, in this view, is not the object of *diritti soggettivi*; it is rather a value, whose primary legal relevance is testified by art. 2 of the Constitution, and which deserves protection in all its relevant aspects.²¹ The monistic approach seems to be based on an “open”, “liberal” interpretation of art. 2 that makes possible the constitutional legitimacy and protection of new personal rights.²² Moreover, it has been suggested that the adoption of a monistic approach to personal rights encourages the recourse to a common-law attitude in the courts, because it

²⁰ The pluralistic conception was shared by the first theorists to deal with personal rights, such as A. De Cupis, *I diritti della personalità*, Giuffrè, Milano, 1959; for a more recent restatement of this theory, see P. Rescigno, “I diritti della personalità e la loro rilevanza costituzionale (a proposito di un recente libro)”, *Il Diritto dell’informazione e dell’informatica*, 1986, pp. 333-341; Id., “Personalità (diritti della)”, *Enciclopedia Giuridica*, XXIV, 1991.

²¹ The monistic approach is consolidated in the courts, and shared by the majority of writers. See for instance D. Messinetti, “Personalità (diritti della)”, *Enciclopedia del diritto*, XXXIII, 1983.

²² This point is not always sufficiently clear, especially in judges’ legal reasoning; indeed, the *Corte di Cassazione*, in a very important decision for our present concern (n. 3769, 22.6.1985, quoted *supra*, fn. 3), explicitly held a pluralistic approach, but claimed on the other hand that the rights of the personality must be based on an “open clause” interpretation of art. 2. To my mind, this view is radically contradictory.

attributes to the judges the task of protecting (and, indeed, creating) rights that lack a precise and specific legislative foundation: “remedies precede rights”.²³

For simplicity’s sake, the differences between the two approaches can be expressed as follows: according to the pluralistic approach, every sort of intrusion in the personal sphere is allowed, except for those that are explicitly prohibited; according to the monistic approach, every sort of intrusion in the personal sphere is prohibited, except for those that are explicitly allowed.²⁴

3. A RIGHT IN THE MAKING

The right to personal identity is essentially a judge-created right. Indeed, it is possible to regard the introduction of the right to personal identity as an interesting example of a common-law technique in a civil-law system, such as that in Italy.

The “landmark case” is usually considered *Pretura Roma* 6-5-1974 (Pangrazi and Silveti *v.* Comitato Referendum).²⁵ The facts of the case are quite interesting. In the days of the referendum propaganda about the abrogation of divorce in Italy, the anti-divorce committee, for the purpose of its campaign, used the picture of a man and a woman working in the country. The picture was meant to evoke a “traditionalist” atmosphere (an old-style family) and was of course associated with an anti-divorce message. The problem was that, first of all, the picture was taken without the consent of the people portrayed; in the second place, they were not married; finally, and what is more, they were in favour of the existing divorce legislation.

The *Pretore* accepted the complaint of the two plaintiffs, on the assumption that the use of the picture was first of all a violation of their right to their own likeness, as explicitly protected by art. 10 of the Civil Code. However, the judge added that the picture damaged another relevant interest of the plaintiffs, i.e., their right to personal identity. On this point, the judge stated that the law protects one’s right to the acknowledgement of one’s own acts, and conversely the right to repudiate acts that one has never done: in other words, the right to personal identity.

²³ Curiously enough, English judges seem to show an extreme self-restraint in the field of personal rights; see V. Zeno-Zencovich, “Personalità (diritti della)”, *Digesto Discipline Privatistiche*, XIII, 1995, p. 433.

For a comparative analysis of the English and German experiences, see B. Markesinis, “The Right to be Let Alone Versus Freedom of Speech”, *Public Law*, 1986, 67.

²⁴ In this sense, see M. Dogliotti, “Le persone fisiche”, in P. Rescigno (ed. by), *Trattato di diritto privato*, vol. 2, t. I, pp. 5-188, UTET, Torino, 1982.

²⁵ In *Giurisprudenza Italiana*, 1975, I, 2, pp. 514 ff.

The way was open for the judicial recognition of the new right. Many other decisions in the following years use the “personal identity” paradigm in order to offer a new protection of the person from the misrepresentations of the mass media. In this sense, it is possible to say that the right to personal identity shows a considerable “elasticity”, because it covers a wide, and not *a priori*, determinable range of assaults on the integrity of one’s personal history, perpetrated by the mass media.

3.1. The Object of the Right to Personal Identity

Since the earliest judgements on the matter, personal identity has been perceived as an autonomous right, and not merely as a kind of extension of the protection of more traditional and consolidated *biens de la personnalité*, such as name and personal likeness.

Of course, name and likeness are fundamental attributes of the personality, and attacks on personal identity can easily involve their misuse (indeed, we have seen *supra* that the very first case about the right to personal identity dealt also with a violation of the right to likeness). Whatever the case, the conceptual differences between those aspects of the personality are clear. To put it crudely, both name and likeness identify the subject only with reference to his/her material existence and corporeal appearance. The right to personal identity, on the other hand, expresses the global and concrete individual personality of the subject, in the sense that we have seen above.²⁶

The positive discipline of name and likeness, then, could be used only by means of analogy (as far as relevant resemblances with personal identity are envisaged), but it could not work as a proper normative foundation for the new right. To this purpose, instead, the courts have repeatedly referred to the legislative provisions on the so-called “right of reply”, i.e., the right to obtain the rectification of a false statement concerning personal facts that have appeared in a newspaper²⁷ or a TV broadcast.²⁸

The higher courts, more than ten years after the first judgement, have developed a different way of reasoning, in the direction of the recognition of the right to personal identity as an autonomous right. The *Corte di Cassazione*, in 1985 (n. 3769), explicitly recognised the autonomy of this right, and rooted its

²⁶ A more detailed distinction between name, likeness, and personal identity is in V. Zeno-Zencovich, “Identità personale”, quoted.

²⁷ See art. 8, l. 47/1948 (“*Legge sulla stampa*”).

²⁸ See art. 10, l. 223/90: “Chiunque si ritenga leso, nei suoi interessi morali o materiali da trasmissioni contrarie a verità, ha il diritto di chiedere che sia trasmessa apposita rettifica”.

normative foundation directly in art. 2 of the Constitution, in conjunction with art. 3(2). The *Corte Costituzionale* in 1994 (n. 13) followed the same line of argument.²⁹

Also, in the field of legal doctrine, the first comments showed a reductionistic attitude: some commentators assumed that the “new” right to personal identity was empty and useless, because its scope was almost the same as that of honour and reputation. In other words, there is no need to talk about a new right, because the relevant interest falls entirely within an already protected field.³⁰ According to other writers, there is no such right to personal identity; personal identity is not an autonomous right but rather an intrinsic limit on the freedom of the press that reflects the need for exact and accurate information.³¹

In favour of the autonomous relevance of the right to personal identity, on the other hand, it can be noted that the right to personal identity has some important distinctive features, in consideration of which it is necessary to distinguish it from other personal rights.

The first feature of the right to personal identity is that its protection can be invoked only if a false representation of the personality has been offered to the public eye. This feature makes it possible to distinguish the right to personal identity from both reputation and privacy. In the first case, indeed, it can be noted that the false statements must not be necessarily defaming: personal identity can be violated also by the attribution of (false) merits. In the case of privacy, instead, legal protection does not concern the correct exposure of the personality to the public eye, but rather the interest of the subject not to be exposed. The conceptual distinction between privacy and personal identity, anyway, is not always clear; in American jurisprudence, for instance, the tort of “false light in the public eye” is often considered a specific aspect of general privacy torts.³²

²⁹ In *Giurisprudenza costituzionale*, 1994, 95. See also *Corte di Cassazione*, I, 7.2.1996, n. 978 (in *Foro italiano*, 1996, I, 1253-1262).

³⁰ This view has been expressed for instance by G. Visintini Tarello, “Il c.d. diritto alla identità personale e le reazioni della dottrina di fronte alla attività creatrice di un diritto della giurisprudenza”, in G. Alpa, M. Bessone, L. Boneschi (eds.), *Il diritto all'identità personale*, Cedam, Padova, 1981, pp. 70-77; and F. Macioce, *Tutela civile della persona e identità personale*, Cedam, Padova, 1984.

³¹ In this sense, A. Pace, “Il c.d. diritto all'identità personale e gli artt. 2 e 21 della Costituzione”, in Alpa, M. Bessone, L. Boneschi (eds.), *Il diritto all'identità personale*, quoted, pp. 36-41.

³² According to W.L. Prosser, “Privacy”, *California Law Review*, 48, 1960, pp. 383-422, the “right to privacy” refers, individually and collectively, to four distinguishable rights, that apply in the following situations: 1) intrusion into seclusion; 2) publication of private or

A second feature of the right to personal identity is that the concept of personal history it refers to must be interpreted only in a factually-objective way. This means that this right does not cover all those personal ideas and thoughts that have never been publicly exposed or actually revealed in concrete acts. The object of the right is the social projection of the personality, as can be ascertained using an ordinary duty of (professional) care.³³

The third feature is that this right is “relational” in character: it protects the interest to preserve the social image one has concretely revealed.

3.2. Cases and Legislation

The “relational” or “social” dimension of the right to personal identity is the reason why this remedy has been invoked in many different contexts. Indeed, personal identity is a complex entity that can be displayed in a variety of social circumstances, depending on the personal concerns or the professional activity of the person involved.

The analysis of the different cases in which the protection of personal identity is recognised suggests an articulated conception of the concept of personal identity, the core of which can be configured in some recurrent groups of hypotheses; we will see also that some specific articulations of personal identity have found an *a posteriori* recognition in legislation.³⁴

Political identity: this can be defined as the sum total of publicly adopted positions, statements, traditions, and attitudes that have been shown by the subject in respect of political and social matters.³⁵ For instance, a politician was reported to have assumed a certain position in the parliamentary debate, which was disproved by the Parliamentary Reports.³⁶ In this field there is the more recurrent and complex conflict between personal identity and freedom of the press (some remarks on this point will be developed in the conclusion of the paper). An (implicit) legislative recognition of political identity can be found in the already mentioned provisions on the right to reply.

embarrassing facts; 3) publicity placing another in a false light; 4) commercial use of another's name, likeness, or identity. This view has been recently contested by R. Gavison, “Privacy and the Limits of Law”, *Yale Law Journal*, 1980, p. 421 ff.

³³ This point has been clearly expressed by *Tribunale Roma*, 27.3.1984 (in *Giurisprudenza italiana*, 1985, I, 2, p. 13 ff.), and *Corte di Cassazione* n. 3769, quoted. On this point, see A. Bevere, A. Cerri, *Il diritto di informazione e i diritti della persona*, quoted, p. 164.

³⁴ For a more detailed case study, see B. Iannolo, G. Verga, “Il diritto all'identità personale”, *Nuova giurisprudenza civile commentata*, II, 1987, pp. 453-470.

³⁵ In this sense, see *Tribunale Roma*, 15.9.1984 (in *Foro italiano*, 1984, I, 2592 ff.).

³⁶ *Pretura Roma*, 2.6.1980 (in *Foro italiano*, 1980, I, 2046)

Intellectual patrimony: this refers to the results of an individual's intellectual and professional activities. For instance, some propositions made in an interview by a famous surgeon (who devoted all his research to combating cancer) were used in a cigarette advertisement, thus suggesting his (false) medical approval for a particular kind of cigarettes.³⁷

Ethical and moral attitudes: these are the ideas and beliefs that everybody has in the moral field; as seen *supra*, the very first case on personal identity concerned a misrepresentation of the plaintiffs' moral attitudes. A specific recognition of this aspect of personal identity against public administration can be found in the new law on conscientious objection to military service (l. n. 230/1998).

Sexual identity: sexual identity can be regarded as a specific aspect of personal identity. The main problem involved, is the possibility for those wishing to do so, to change sex by surgical means, and to obtain the consequent rectification of sexual data in the Public Registry. The *Corte Costituzionale*,³⁸ at first, denied the existence of a fundamental right to sexual identity, with rather weak arguments (the European Court of Justice shared a similar undecided attitude in a number of cases between 1986 and 1992).³⁹ Later, when the Italian law on sex changes was passed (l. 14.4.1982, n. 164), the *Corte* explicitly recognised constitutional relevance to the right to sexual identity, as an essential feature of the principle of the full development of human personality, under artt. 2 and 3 Cost.⁴⁰ From a conceptual point of view, this specific articulation and the preceding one of the right to personal identity, are probably the only cases in which a "subjective" concept of personality is accepted for legal purposes.

Publicity: the so-called "right of publicity", i.e., the right one has to profit by one's fame, finds its first formulations in the U.S. courts. The *ratio* can be expressed as follows: if somebody gains a certain degree of fame (as an actor, an artist, a sportsman, or the like), then it is not fair that somebody else should take economic advantage of this publicity without consent. In Italian law, there is no autonomous relevance to the right of publicity; rather, the unauthorised

³⁷ *Corte di Cassazione*, I, 22.6.1985, n. 3769 (quoted *supra*, fn. 3).

³⁸ *Corte costituzionale* 1.8.1979, n. 98 (in *Giurisprudenza costituzionale*, 1979, I, 719); on this point, see the comment by S. Bartole, "Transessualismo e diritti inviolabili dell'uomo", *Giurisprudenza costituzionale*, 1979, I, 1178-1197.

³⁹ See the references in F. Jacobs, R. White, *The European Convention on Human Rights*, quoted, at pp. 192-194.

⁴⁰ *Corte costituzionale* 6.5.1985, n. 161 (in *Giurisprudenza italiana*, 1987, I, 235).

use of one's celebrity is prohibited insofar as it causes a distortion to personal identity.⁴¹

Right to oblivion: this is, in a certain sense, the opposite of the right to publicity. This figure was first formulated in French jurisprudence, under the name of *droit à l'oubli*.⁴² It is the right to silence on past events in life that are no longer occurring. For instance, after a conviction for murder, a man was granted a pardon and made a brand-new social and family life; then, after thirty years, his vicissitude was used in a prize-game in a newspaper; the court ruled that the disclosure of this information was not justified by any actual public interest, and shed "false light in the public eye" about the actual personality of the subject.⁴³

Right over personal data: explicit reference to personal identity is made in the new Italian law on personal data;⁴⁴ under the new law, any sort of systematic collection and treatment of personal data must be guided by such criteria as exactness, pertinence, and completeness (art. 9); moreover, under art. 13, the interested person has a right to amendment of inexact data, similar to the right of reply seen above.⁴⁵

4. CONCLUDING REMARKS

The preceding analysis of the right to personal identity, as a new personal right, leads to some concluding considerations.

1. The first consideration is that the right to personal identity is a multiform, adaptable right: the consolidated definition of personal identity is flexible enough to grant legal protection to different situations.
2. This makes it possible to take into consideration a plurality of possible legislative institutes in which this right finds a normative rooting.

⁴¹ *Pretura Roma*, 15.11.1986 (in *Foro italiano*, 1987, I, 973). On this point, see C. Scognamiglio, "Il diritto all'utilizzazione economica del nome e dell'immagine delle persone celebri", *Il diritto dell'informazione e dell'informatica*, 1988, pp. 1-40.

⁴² See for instance R. Lindon, *Les droits de la personnalité*, Paris, 1983, p. 90 ff.

⁴³ *Tribunale Roma* 15.5.1995 (in *Il diritto dell'informazione e dell'informatica*, 1996, p. 422 ff., with a comment by G. Napolitano, "Il diritto all'oblio esiste (ma non si dice)", *ibidem*). A more explicit recognition of the right to oblivion is in *Corte di Cassazione*, III, 9.4.1998, n. 3679 (in *Foro italiano*, I, 1998, 1834-1840, with a comment by P. Laghezza, "Il diritto all'oblio esiste (e si vede)", *ibidem*).

⁴⁴ L. 675/1996, art. 1: "La presente legge garantisce che il trattamento dei dati personali si svolga nel rispetto dei diritti, delle libertà fondamentali, nonché della dignità delle persone fisiche, con particolare riferimento alla riservatezza e alla identità personale; garantisce altresì i diritti delle persone giuridiche e di ogni altro ente o associazione."

⁴⁵ See V. Zeno-Zencovich, "I diritti della personalità dopo la legge sulla tutela dei dati personali", *Studium Iuris*, 5, 1997, pp. 466-469.

Moreover, this makes it quite hard to apply to the right of personal identity, the traditional distinction between a monistic and a pluralistic approach to personal rights.

3. However, the normative foundation of the right to personal identity finds a unitary aspect in art. 2 of the Constitution, interpreted as an open clause, in conjunction with art. 3(2) and art. 21 (freedom of expression clause): in fact, if the violation of personal identity is made, for instance, by attributing false statements or political attitudes (which is the more recurrent case), then the subject is harmed in his/her freedom of professing openly and explicitly his/her own ideas.⁴⁶
4. The need for a constitutional foundation of the right to personal identity depends on the source itself of the most recurrent attacks it receives: i.e., the mass media. Given that the activities related to the mass media are in most cases covered by the constitutional clause of free expression (explicitly), it is necessary to find a constitutional foundation for personal rights (especially unwritten ones), in order to reach a suitable compromise between the two.⁴⁷
5. Insofar as personal identity conflicts with freedom of expression, it can be protected only in its objective features: to put it crudely, respect for personal identity can be required in a news reporting activity, but it does not apply to evaluative or critical exercises.
6. The right to personal identity is recognised also to juristic persons, but it is preferable to limit it only to private ones. Indeed, if this kind of protection were granted also to public juristic persons (States or the like), it could be used as an easy instrument for the repression of dissent.⁴⁸

⁴⁶ Of course, art. 21 Cost. cannot be invoked in the case of sexual identity.

⁴⁷ As pointed out by Esposito, only a situation endowed with constitutional relevance can limit the exercise of a constitutional right; see Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano*, Giuffrè, Milano, 1958.

⁴⁸ In this sense, see A. Cerri, "Identità personale", *Enciclopedia Giuridica*, XV, 1995.