THE INDIVIDUAL'S FUNDAMENTAL RIGHTS: THE RIGHT TO ONE'S IDENTITY

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1. The topic

The idea of an individual's right to his/her own identity and the question of its recognition as a personal fundamental right are nowadays coming rapidly to the fore in the evolution of constitutionalism in societies which belong to the Western political culture. Various conceptual difficulties are still evident in the reconstructive analysis of this specific subjective juridical situation, and even more so in the systematic setup of positive law.

These difficulties are undoubtedly due to the highly innovative character of the right to one's own identity, on both the theoretical and practical levels, and concern its actual and coherent establishment in the regulations of the State, in those of supranational organizations and of international law itself. The problems connected to it are therefore quite complex, as expected, if one agrees on the origins of the idea of one's right to an identity, which go back to the momentous change of politically organized societies in the West, which are in the process of becoming multi-ethnic communities, and which can also be traced back to the transformation of the relations between rich countries and under-developed countries.

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In this framework, which is barely mentioned here (the reader is implicitly referred to the ample bibliography on the topic), constitutionalism, having evolved from the great liberal revolution to the mature democratic style of government of Western countries, has to address topics which were previously unheard of, which influence directly the condition of the person in the system of public law. All this naturally has a structural relationship with the concept of a State that was dominant up to the Second World War: the national State, with characteristics of its identity which, if not exclusive to it, were certainly largely dominant.

The assertion of the person's right to his/her own identity, which is recognized to the citizen and to whoever has a relationship with the sovereignty of a State, derives from the crisis of such a notion, and in its establishment accelerates this crisis, and creates a deeply different concept. Consequently the right to an identity brings about a qualitative change in the fundamental rights of the human person, but it also determines an equally innovative effect on the concept of the State.

Given the definition of the concept of identity, it will be necessary to define the meaning of nature and content of the person's right to an identity, the concept of society to which the right refers, and finally the constitutional outlines of the system that governs such a right, not forgetting the constraints that public authorities derive from it.

The topic also influences aspects of the form of government, and therefore it is not confined to the boundaries of the form of the State and the individual's fundamental rights: in fact it involves aspects of representation which is the regulating principle of the form of government in Western democracies. A symptom of this has already been seen in Italy, regarding the protection of a number of linguistic minorities.

2. The concept of identity

Besides the intuitive definition of the concept of identity, it is necessary to focus on this concept from the formal juridical viewpoint, which is the only one that qualifies the subjective idea of the right to an identity.

The first step towards the solution of the problem comes from the cultural and political tradition of the concept of equality, which brings

together modern and contemporary theories about the constitutionalism of Western and European societies. The principle of equality, and of being treated equally, contains not only the prohibition of the *ius singulare* in favour of (a privilege) some against (all) others, but also the duty of equal treatment in equal juridical situations. On the strength of the principle of equality there cannot be a special *status* of the private subject, nor a differentiated system in identical situations.

Naturally, positive law reflects the history of the principle and the political and constitutional history of Europe, therefore it carries the events and the versions of its application more generally than the Western state systems: in this system's cultural heritage the roots of modern and contemporary thought keep the central core of the principle of equality more or less intact, as has been said in a brief formula of its definition.

The double edge of the principle of equality comes into contact with the increasing awareness of a datum, which more or less philologically, can be pinpointed on the central position occupied by the human person within the constitutional political system of a society which is organized as a State. The relationship in question, which is vital to understand both its terms, generates a number of elements which are fundamental to contemporary theory of constitutional law in Western democracies: as to the topic examined here, two of them are particularly significant, that is the principle of the people's sovereignty and the category of the person's fundamental rights.

One does not stand without the other: neither will the people's sovereignty make sense, from the point of view of the general concept and of positive law, without the assertion of the person's fundamental rights, nor will the contrary.

Given the above, one can better understand how the principle of equality implies, not that the identity of individuals be a presumption or the general aim, a pseudo concept that should be dismissed as a mystification, but that each person deserves to be given certain rights, described as fundamental, which include freedom, opportunities, claims, and, as one's first and unassailable of all the other fundamental rights, the ability of self-determination.

When this ability is lacking or limited, no other fundamental right can be said to be fully expressed or recognized: neither liberties, nor opportunities, nor claims. Moreover, on reflection, not even the

principle of the people's sovereignty can be held to be actually proclaimed and upheld in the positive system. This principle is very dear to the theory of the contemporary State in democratic systems (this term is rather ambiguous, but it is here adopted in its strictly etymological sense), so much so that it is considered the pivot of every political democracy; it presupposes that the individuals who make up the sovereign people fully enjoy the power of self-determination, without which nobody can truly exercise, directly or indirectly, political rights which constitute the living body of the people's sovereignty.

3. The individual's self-determination and the heritage of identity

The individual's self-determination implies the choice of one's own identity, and therefore its components: thought, faith, morality, culture, language, customs, professionalism, the physical form, intersubjective relations. When self-determination is full, as I have said, it is so only so that one can enjoy the freedom of choosing the elements of the desired identity.

Some elements pertain to a necessarily collective structure, and often (but not always) derive from a heritage that is common to other subjects, is historically defined and organized and can be provisionally called an identity-giving social group. These are collective bodies, cultural-linguistic (ethnic), and religious (confessional), ideological and political (parties, movements), and others as well.

The choice of one of these factors is the necessary way to satisfy the free determination of one's own identity, in the sense that it is the only way to achieve the cultivation of a creed, an idiom and a culture, a way of life, an ideological and political system.

The link between exercising one's freedom for self-determination and the individual's possession of his/her own identity is absolutely evident, and does not need to be checked: should it be lacking, primary factors of identity will not be present in subjective faculties, and even less so in the domains of one's rights, from religion to language, from practicing one's customs to culture. And this is true of liberties as well as of opportunities, and especially of claims, which obviously imply the (necessary) duties of public authorities as well as bonds with the organization of important public functions.

All in all, considering that the freedom of self-determination is indispensable for the theoretical recognition and positive safeguard of the person's fundamental rights, and certainly comprises the right to one's identity in its wider sense, and includes the right to choose, maintain and interpret the data of identity, whatever is achieved regarding the person's fundamental rights must be applicable to the right of identity.

4. The right to identity in the form of the State and in the form of government

As is well known, the theory of the individual's fundamental rights leads to outcomes that influence the form of the State and the form of government. In particular it provides elements for the qualification of sovereignty, both from the point of view of international order and of internal organization.

Under the first count, the recognition and the safeguard of the person's fundamental rights can be traced back, with increasing certainty, to the pre-eminent value of imperative regulations of international law: recently there has been increasing awareness that such rights can be upheld for any damages suffered through the action of individual governments, and even of individual States (i.e. the right of interference).

It is true that many margins of uncertainty persist regarding the effectiveness and the univocal nature of this trend: according to some it might be just a cluster of abstract daydreams which cannot be transformed into real provisions based on principles, or of make-believe principles which hide the continuation of the eternal rule of pure force in relations between States and other subjects of international order.

These objections are not baseless, and yet they do not forbid the assertion of a given fact, which is that, in international law, the absoluteness of the sovereignty of States is limited by the principle of the superior power of regulations that recognize and protect the fundamental rights of the human person. Every denial or compression of such rights on the part of the State are internationally illegal, even if they are adopted in due form in the exercise of their rights.

Because of the link that has been shown between the person's fundamental rights and the private individual's right to his/her own

identity, the statement that has just been expressed must be extended to the latter.

From the point of view of the internal law of States, and independently of what follows from examining international law, one sees that in many constitutions of States that are governed by political democracy (the principle of the people's sovereignty), it is accepted that the recognition and protection of the person's fundamental rights are as many limitations to that sovereignty itself.

Unlike what concerns the international legal system, in internal law and its influence on the system of the States, it is not a question of the sources' hierarchy, but of the absolute lack of legitimacy which weakens the position of every regulation that is in contrast to the recognition and protection of the individual's fundamental rights. A survey of the premises of these limitations of sovereignty in the internal law of the States would lead us out of the scope of this paper, because it would have to take into account the well-known differences between theories of natural law and positivist theories, as well as the idealistic concepts and even more.

In this paper it should suffice to limit the debate to the observation of the trend that concerns the concept of the form of the State on the basis of the relationship between the person and public power. In this respect the Italian case of the 1948 Charter can be mentioned which, in the first part devoted to fundamental principles, expressly ratifies the principle of the sovereignty of the people, admits in the same provision that sovereignty has its limitations, and significantly prescribes that the fundamental rights (and duties) of the individual are inviolable, in the following article 2.

This is a typical example of the trend, even regarding the form of government. In fact, it establishes the principle that sovereignty pertains exclusively to the people and dismisses all other sources of the legitimization of political power (the function of political direction that includes the power of regulatory predisposition) which are different to direct popular investiture (parliament), and indirectly through a relation of trust (government).

It is quite evident that the limits imposed on sovereign powers, on the principle of the people's sovereignty itself, of not compressing nor reducing the fullness of the recognition and protection of the fundamental rights of the individual cannot fail to pass on to the function of political direction, because of the system of government, when they are conferred on the organs entitled to them, parliament

and the government, to each of which the people cannot delegate powers which are greater than those that are enjoyed by itself as the body invested with these powers.

I have recalled that the relationship between sovereignty and the individual's fundamental rights is defined differently on the two levels of sovereignty in international law and sovereignty in the internal law of the State. I can now add that the two planes strengthen and support one another. That the principle of international law is founded on the special place of the individual's fundamental rights, and its increasingly imperative character, are structurally intertwined with the restraint placed on the constitutional system of the States which implement political democracy, that limits the sovereignty of internal law and imposes the recognition and protection of the individual's fundamental rights.

What derives from the system of internal law corroborates the legality of international regulations, and vice-versa, the principle of international law in its turn strengthens the pre-eminence of the principle of internal law in the legal system of the State.

5. From the national State to a multi-ethnic society

What has been considered up to now, in the framework of the progressive establishment of the contemporary theory of the form of the State, leads to a markedly innovative datum, which is currently summed up in the formula of the passage from the National State to a multi-ethnic society.

One must keep in mind that such a formula, like any other, sacrifices much of the precision of the definition and the single meaning of conventional communicative language: and yet it is a useful formula because it denotes the meaning and the significance of the change that has been brought about, and grasps its essence.

One speaks of a national State, and not a society, and rightly so, because in the so-called national States the community of members (subjects and then citizens) rarely reproduces the fixed profiles that are conventionally attributed to such a form of a State, in specific historical events. In the so-called national State the community is almost never mono-ethnic, or at least it is not always so, nor does it dispose of exclusive identity markers, particularly the most common ones (language, religion, culture). It follows that the community of members maintains the elements of pluralism in identity.

In the national State, dominant ethnic groups and identity factors establish themselves, and are officially recognized, while all others are placed on an inferior plane, in various grades (legality but with less esteem, tolerance, lack of recognition and prejudice, down to their exclusion or prohibition). To this form of the State corresponds a constitutional system that denies the principle of equality to subjects belonging to collective identities, sometimes going as far as their repression.

Historically, the so-called National State collides with the surging movement of a multiethnic society, and therefore enters into a crisis: according to what has been shown in the preceding paragraphs, this happens, on the level of the form of the State, when the principle of the people's sovereignty is linked to the principle of equality, widening its meaning and defining its legal content as it evolves.

One can therefore say that, on the strictly theoretical plane, a multi-ethnic society corresponds to the form of the fully democratic State, in which both the principle of the people's sovereignty (political democracy in the proper sense) and the principle of equality find their place and are actually provided for in the positive system.

The phenomenon is still undefined on the level of positive law, and the correspondence of a multi-ethnic society, or equal identity, and the democratic State is still incomplete and tendentious.

If, in actual fact, the pre-eminence of one or more ethnic groups over the others is nowadays not accepted, and therefore the idea that the so-called national State is a thing of the past is based on this common conviction, the same cannot be said of the disparity between the identity markers of the constitutional system of the individual States, in which the multi-ethnic structure of society has made and is making important progress in real community life (in the economy, customs, communications, coexistence, reciprocal recognition).

The official character of important markers of identity continues to be granted to some and denied to others, sometimes with explicit positive measures, sometimes unexpressed but in equally effective forms.

This is reflected both on the recognition and on the protection of self-determination and the right to an individual's own identity, as well as on the whole constitutional system of the individual's fundamental rights, which are consequently compressed and limited as a result of self-determination. Once more an Italian example can

be recalled and used as a symptom: one only has to remember what happens to the identity marker of one's religion, as was shown during the conference organized by the University of Malta, under the auspices of the Commission of the European Union (at Ischia, 1-2 December 2001; see the Proceedings in *Rassegna Parlamentare*, 2002, pp. 157 sgg, Papers).

6. Multi-ethnic society, equality of identity: contradictions and limitations

Contradictions and limitations, which still hamper the process of correlation between a society with many identities or multi-ethnic, and the democratic State, can take various forms, and are especially evident on two levels: the offer of services by public authorities, the place in the legal system of collective subjects, to whom the full enjoyment of specific identity markers is functionally connected. These are the major points of resistance of the culture and of the legal principles of the form of the so-called national State.

Self-determination, as regards the individual subject's free choice of his own identity markers, certainly includes his obtaining and maintaining them (if not all, at least most of them): consequently there is no real self-determination unless the public authorities offer the right services for their obtaining and maintaining the factors that depend on that (for example, language and culture, religious rites and doctrine: and the specific organization of certain administrative activities is equally necessary).

As to collective subjects with certain identity markers, their place in the system essentially conditions the self-determination of the private individual. This is evident in the case of religion, whose practice presupposes the freedom of each confession in relation to every other one. An analysis of the positive regulations of democratic constitutional systems shows how, without any doubt, the legal discipline of religious organizations is, in many cases, still far from these characteristics (absolute freedom, equal organization, exemption from the authorities' control).

7. The question of citizenship. Political rights

In every democratic system the principle is generally expressed by which each subject who is submitted to the sovereignty of the

State is guaranteed the enjoyment of the so-called civil rights which include the majority of the individual's fundamental rights, while the same does not apply to political rights, for which citizenship is considered a requisite (even though very recently the conviction that this requisite is not absolute nor unmodifiable).

In spite of this, the right to one's identity does not fit easily into the individual's fundamental rights for non citizens. This is probably the clearest case which distances itself from the principles that concern self-determination among democratic regulations, in relation to which there seems to be substantial continuity with the form of the so-called national State. One is especially struck by a fact, that is, when rules are made specifically to attribute claims for self-determination in the identity of the non-citizen, they are not formulated as the application of principles of the constitutional system, and therefore are shorn of their regulatory power.

It follows that in this case the area of the non-citizen's right to an identity appears as immune to the influence of the principles of international law, whose validity and effectiveness meet with difficulties when facing the sovereign power of the States towards its subjects who are not citizens.

The legal position of the question of citizenship is even more complex and incomplete. It's not only that the States maintain full powers regarding the concession of citizenship to the non citizen who aspires to it, bringing up elements that belong to the community of its citizens (work, family relationships, and other intersubjective relationships), but it generally excludes any independent value to the claim of citizenship which has been thus motivated (a claim that takes the form of a premise for sovereign concession, not as a right of the individual established in a different manner). In this way arises the figure of the subject who has duties but does not enjoy full rights, the figure of the person who has no papers: the concession of citizenship maintains its nature of a sovereign act, in the traditional meaning of the word that is essentially a "pardon".

Neither is changes being made to the legal system of rights and to active legal situations in general, which stem directly from the process of citizenship. This is evident regarding the political rights of active and passive voters, as well as for employment in public office, with some exceptions, which originated from the preceding regulations, before the new shape of the multi-ethnic society.

Rights and faculties that derive directly from the status of

citizenship, and are considered as its immediate expression, are denied to non citizens, who therefore lack an essential guarantee about their right to self-determination, the right to their own identity.

Finally I must remark on an item which does not necessarily pertain to the topic of this paper, but which has to be taken note of in the wider context of the theoretical and institutional aspects of the multi-ethnic society. It is the question of minorities that have been present for a long time in the territory of some States, and are deprived of the right to their own identity, independently of whether they possess citizenship or not. Some remarks are therefore necessary.

First of all one must deny that this form of the State is of the democratic type. The principles of this typological system exclude it from a system which is thus set up: it is certainly not enough to mention the principles of political representation in the establishment of the organs of the direction, whose competence it is to govern, to draw up laws and any other activity which leads to it, in order to affirm that it has the form of a democratic State, when anyway the principles of a system which comprises the individual's fundamental rights are absent.

It is important to emphasize that this assertion does not arise from ideological convictions, or from an idealistic culture or one based on natural law, but it coherently arises from the first principle of the form of the democratic State which, as I said before, is the principle of the people's sovereignty. There cannot exist a people in the proper sense, therefore there cannot be a sovereign people, if the individual's fundamental rights are not recognized in full, and if such recognition does not constitute the unmodifiable limit of sovereignty.

Secondly, if the situation remains that specific state systems deny the right of identity to minority groups within the respective community, the effectiveness of the international legal system is thrown into doubt, since in such cases the validity and effectiveness of the regulatory principles is not guaranteed, although they have been proclaimed as such in the legal system, and not as simple ethnic aspirations, having only an educational or exhortative value.

On the contrary, the case whereby a minority group refuses to belong to the community of a State, and invokes the right of self-determination, is outside the topic of this paper. It is actually a case which has been amply discussed in debates about the serious problems of international law, and not only on its own.

8. The right to an identity between persons and the collective identity group. A premise

It is necessary to dwell upon an aspect of this topic which concerns the place of the individual in the collective identity group, which he/she has joined freely, and by belonging to it he/she can fully satisfy his own self-determination, as to the effective possession of the chosen identity marker.

The definition of the individual's place in the identity group implies serious questions which may influence both the autonomy of the identity group and the fundamental rights of the individual himself.

It is proper to underline that the individual's belonging to the group can only come about from a voluntary act on the part of the individual himself. No external influence can be admitted on the subject's belonging to and his staying in the identity group, otherwise the self-determination which is the necessary premise for his enjoyment not only of this right but also of the individual's fundamental rights will be denied at its root.

Besides, the identity group, according to its rules, can expel the individual who is a member or refuse to admit him, since it has these powers due to its autonomy, which is indispensable for its existence and for its actions to guarantee its members' rights of identity, being their guardian.

On one side, therefore, the individual's freedom to be a member of and stay in an identity group is full and free of any constraint or authority exercised by whoever, including the public authorities and the group itself; on the other side one cannot deny the group's right to refuse the will of the individual becoming or staying a member, according to its rules (since the group exists through its self-government according to its statute, which it had freely adopted). The individual's will cannot prevail on the identity group, otherwise its autonomy will be denied, nor can the group force the individual to become a member against his will, because that would violate his self-determination: for the same reason the group cannot force the individual to remain a member against his will.

9. The legal system of the group

The identity group is necessarily formally established because this is the primary sign of its autonomy. Its ability to set itself up formally does

not only correspond to the basic needs of functionality and self-protection, it also guarantees the refusal of any interference from the public authorities.

This fact is essential to define the position of the identity group within the legal system. Historically, the first sign of the will to deny the existence of identity groups is the State's claim to dictate rules on the formation of the group and on the way it carries out is activities, apart from the extreme case when the group is declared illegal and the consequent measures of repression.

Occasionally the claim of the public authorities consisted of laying down constraints and requirements which, in substance, meant that they dictated rules governing activities and behaviour that were valid in general: on other occasions a system of authorizations and checks was established which in actual fact, having been extended to degrees of merit, was tantamount to the authoritarian prescription of internal regulations.

Particularly the legal history of the concept of public order, raised to the level of a parameter of the legality of identity groups and of their legal systems and activities, is the history of the submission of the groups to the political will of the government and public administration, which reassumes the dominant position of the official identity group above all the others.

The question must be analyzed in a concrete way, in the positive discipline as established and carried out, since the so-called recognition of the identity group: when the act of recognition is simply one of taking cognizance, and is only aimed at giving public notice of the group and its organization and structure, one may conclude that the identity group has an autonomous position and disposes of the necessary requisites for self-determination.

However, when the recognition is one of constitution, and a result of the discretional appreciation of the authorities regarding its possessing certain requisites that are prescribed in a willfully generic manner by the legislator, one arrives at the opposite conclusion. The most recent cases regarding the discipline of religious groups in Italy does not leave any doubt as to the institutional tradition of the so-called national State (see. *Proceedings*, above, cit., loc. cit.).

10. The rights and duties of the member of an identity group. The individual's fundamental rights

Given that the identity group necessarily enjoys the power of organizing itself, which comprises the power of establishing its

regulations, it follows that the individual who is a member is automatically endowed with rights and duties. In particular the identity group, once it is established and organized, begins to represent the interests of its members within the legal system of the State.

Representation does not however substitute the safeguard of the individual's fundamental rights but concerns essentially the faculties of the collective exercise of identity law. For example, concerning the teaching of the group's language and culture, where such language groups possess their own culture and social customs, or to perform their religious rites and learn the doctrine of their own religion.

The organization of the identity group contains the prescription of their members' rights and duties – depending on the nature of their identity marker, these have different forms and contents. The nature of such situations deserves a few reflections at the end of this paper.

In the first place one has to keep in mind what has been affirmed before, that is the absolutely voluntary character of the individual's membership of the identity group. Contrary to what characterizes one's belonging to a State, which usually cannot come to an end by means of a unilateral expression of the said member's will, nor does the cessation of membership automatically extinguish the rights and above all the duties of the individual, the individual's will to stop being a member of an identity group is vice-versa a sufficient reason, since one cannot be forced to remain a member contrary to one's will.

Secondly, an identity group's regulations that constitute rights and duties, guarantees and relative sanctions, do not have any external relevance if they actually derive from the group's statute. It is a different matter in the case when rights and obligations (not duties) arise from acts of autonomous discussions, which is independent of the status of membership of a group: in this possibility the rules of the State's legal system will be applied, not those of the statute of the identity group.

The third point is that all those situations which derive from the statute of the group, which influence the individual's fundamental rights, deserve special consideration. In this hypothesis one must make a distinction and give an explanation.

The question of the availability of the individual's fundamental

rights to those who are entitled to them must be clarified. If one is inclined towards their non availability, one has to admit that all cases that necessitate the compression or limitations of those rights are invalid: faculties and obligations which derive from such cases concerning the statutes of identity groups cannot receive any protection; on the contrary their relative prescription may lead to their being labeled as unlawful.

In the case where fundamental rights are considered available, certain issues remain open and require deeper investigation.

First of all, even if one is willing to admit the availability of the individual's fundamental rights, it appears rather doubtful whether such availability is unlimited, and one should be inclined towards a negative conclusion. One must keep in mind that the entitlement to fundamental rights necessarily implies their possession and their exercise, both so that it will not be reduced to a simple statement and because it is the outcome which is still imperfect, let alone irreversible, of a long process that has been going on for a thousand years, and is woven into the denial of the principle of the universal and equal attribution of such rights.

One of the limits of this availability is apparently unfailing, and it is the one by which the voluntary renunciation is not allowed when it excludes indefinitely the member's right to be reinstated, even when this is determined by events that concern the content of rights (the right to life, the right to physical or psychic integrity).

Lastly, there is the problem of the subject's will to enjoy the right: apparently it is not possible to admit any possibility of legal substitution of the will (the case of the minor, or of the handicapped in general).

These last considerations, about the prescriptions contained in the statutes of identity groups, are perfectly applicable to the place of the private individual in the State's legal system.