Interuniversity Center for Bioethics Research

Bioethical issues

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INTRODUCTION

Lorenzo Chieffi [*]

The Interuniversity Centre for Bioethics Research is an organism that devotes itself, with particular care, to the debate related to the application of the newest technologies to human being. The Centre includes the majority of Campania Region University, that is: Federico II, Second University of Naples, Suor Orsola Benincasa, Parthenope, L'Orientale, the Theological Faculty of Southern Italy-Section St. Thomas, all situated in Naples, with the addition of Salerno's University.

The objective is primarily to allow a fruitful dialogue between scholars of different cultural backgrounds in order to discover the balance between the multiple values involved.

The noble exercise of the medical art, and generally of life sciences, need to be adapted to axiological catalogues, which are contained in the constitutions of countries with a longer democratic tradition, belonging to the Old Continent.

The practice to use ample liberty of science and research, which obviously expresses an innate desire for knowledge, in order to contribute to the cultural and economic progress of the community of individuals, while being guaranteed to be wide in its speculative phase, will inevitably be subjected, in concrete practices, restrictions aimed at safeguarding the

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physical and psychological integrity of the individual keeping his dignity.

In the light of these fundamental principles which are placed on top of any legal system therefore it is since its foundation, in 1996, that the C.I.R.B. main aim is the spreading, in side covered Universities, of a correct information on the most debated bioethical controversies such as in the field of procreation, transplantation, genetic engineering and of life treatment as well as the development of significant research projects which should be carried on following interdisciplinary procedures which necessitate a close collaboration with prestigious academic institutions of other countries.

With the intention of ensuring ample information on the most recent investigations carried out by scholars belonging to the CIRB, including those participating in the 9th World Conference on "Bioethics, Medical Ethics & Health Law towards the 21st Century", its governing bodies have decided to extend as a tribute this volume containing a series of essays concerning issues some of which are at the center of the bioethical debate in Italy.

Despite the undoubted opening offered by the legal system of our Country, situated in the Mediterranean, starting from the propensity of the 1948 Constitution towards the promotion of personal values, the legislator has sometimes failed in succeeding to meet the many expectations of those who were expecting a regulation on the crucial stages concerning human existence.

Irreconcilable conflicts between the political forces within the legislative assemblies have led to a radicalization of the multiple positions, religious or secular ones, that in so doing have prevented a discipline still satisfying the relevant field that relates to the protection of so-called rights of the new generation.

So, in case of limiting, in a few words, our attention to the topics covered in the work contained in this volume, in spite of the requests contained in the Oviedo Convention of 1997 and the safe space allowed by our Constitution, there is still a law degree value of the right to self-determination of the terminally ill, through the regulation of advance of existence on the example of what is already provided in most European countries.

A similar gap in the law affects the regulation concerning relations between individuals of same sex in view of the persistent prejudices that continue to be a veil in view of an evolutionary interpretation of the constitutional provision, which takes mainly – but not exclusively – into consideration the family context based on marriage for reasons related to the historical moment (between 1946 and 1947) of its compilation. An increasing revaluation of social groups in which each individual expresses his personality and the same spaces are left to its self-determination, are permitted by this legal text could certainly facilitate together with an equal foreign experience a greater openness to the preservation of these new emotional relationships.

Not less problematic has been the gestation of the existing laws on fertility treatment that led, much later than other European states, to the law no. 40 of 2004. Once again, the radicalization of positions, related to the discussion on the alleged legal "subjectivity" of the embryo, has led to a prohibition of law [contrary to the artificial insemination by donor (AID), the surrogate one, but especially to any pre-implantation genetic selection, also to ward off the use of stem cells or experimentation on embryos themselves] that, just five years after its entry into force, has forced our constitutional Court (judgment no. 151 of 2009) to delete the most significant parts, consistent with the fundamental principles of our basic legislation.

This persistent or pervasive incompleteness, linked to a clear imprint of prohibition, the regulatory framework under consideration, has gradually called for a greater role of the judge-made law. In areas allowed by the existing legal order, the judge has tried to give answers to the many expectations, linked to the different moments of human existence, deriving from the community of individuals, with all the drawbacks that inevitably result from a system of civil law, which is not characterized by the iron rule of the judicial "precedent" typical of common law legal systems. The destination of the rulings, which are designed to address only the case submitted to the court, the possible differences between them, despite the similarity of the cases, with the inevitable discrimination

that could result from it, may give vent to some unsurpassed limits in the legal system, such as the Italian one, which continues to give special emphasis to the role of the law, considering the effects of "general" and "abstract" produced by them, as an expression of the organ embodying popular representation.

In view of this interpretation, the essays that follow are intended to provide a concise reading of ethically sensitive issues still unresolved in Italy, for a variety of the foregoing reasons, hoping that a more careful comparison with the experience of other political contexts and cultural rights may certainly be helpful to the maturation of a greater awareness of issues which are undoubtedly central for life, especially for the expression of every human being dignity.

Naples, 14 October 2013

The rights of the terminally ill

THERAPEUTIC OBSTINACY. NOTES FOR AN ANALYSIS OF END-OF-LIFE BIOETHICAL ISSUES

Emilia D'Antuono[*]

Abstract

Therapeutic obstinacy is currently a crucial topic in ethical, bioethical, legal and, also, specifically "philosophical" research. Philosophy and the medical sciences are inextricably interconnected. Since their beginnings in Classical Greece, philosophical reasoning and medical knowledge are linked to each other by a genealogical nexus, relevant to their capacity to produce values and rules of behavior which constitute a therapeutic praxis in which knowledge and ethics intertwine.

My paper aims at highlighting, in a properly ethical-philosophical perspective, some end-of-life issues by investigating particularly the bioethical implications of the transition from the "commitment" to preserving life, which has always been binding in medical deontology, to "therapeutic obstinacy".

By the term "therapeutic obstinacy", which was adopted in medical terminology in the second half of the twentieth century, is meant the use of various therapies and technological means aimed at merely preserving the survival of a human being in critical conditions and without any hope of improvement. However, the identification of "therapeutic obstinacy" is all but unambiguous. There is indeed an urgent need for a fundamentally shared definition of the opportunities, limitations and legitimacy of medical interventions in light of

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the current availability of medical and pharmaceutical technologies. My paper aims at analyzing the following issues:

1. *the contentious aspects of such controversial practices as artificial nutrition and hydration;*
2. *the overcoming of the absolute and meta-historical dimension of the medical ethos, which should take into account the patient's subjectivity and capacity of self-determination in concrete existential situations.*

Premise

Therapeutic obstinacy is currently a crucial topic in ethical, bioethical, legal and also specifically "philosophical" research. Indeed, the fresh elements which urge the debate on such a question are due not only to the extraordinary progress made in the last few decades in the field of survival technologies and of pharmaceutical sciences, but above all to a different consideration of the patients' subjectivity and of their self-determination in concrete existential situations, thus also in the more extreme situations of pain and death. And right in this regard the ancient link connecting philosophy and medicine proves to be inevitably apparent. Since their beginnings in classical Greece, philosophical reasoning and medical knowledge have appeared to be linked to each other by a genealogical nexus, relevant to their capacity to produce values and rules of behaviour which constitute a therapeutic praxis in which knowledge and ethics intertwine.

Medical knowledge is self-defined, at least starting from the Hippocratic *Corpus* and the well-known *Oath* traditionally associated with Hippocrates, as oriented to benefit man in any condition. The patient, aware or unaware, is always and merely a bearer of multiple and painful symptoms, and necessarily has to rely on the doctor, the only one who is capable of leading to a causal unity those multiple signs which show the suffering of a sick body. And so a way of "taking care" is started. And also a certain knowledge is started, which is committed to the practice of this "care" and

thus regulates itself by featuring medical ethics and the intertwining of knowledge and duty.

Actually the crucial point of the lasting of this reciprocal intertwining is based on the common and shared idea of nature and human nature by philosophical tradition and traditional medicine, whose convergence, indisputable for centuries, before resulting in an idea of disease and therapeutic intervention, results in an idea of man and human condition.

Therefore, since its Greek origins, medicine has been connected to both a theoretical and ethical dimension of philosophy. Nowadays the closeness and distance between philosophy and medicine have acquired a new sense due to the development of bioethics, which features thoughts of experiences such as birth and death in which the borders between "nature" and "history", spontaneous and artificial, become more and more complex.

My paper aims at highlighting, in a properly ethical-philosophical perspective, some end-of-life issues by particularly investigating the bioethical implications of the transition from the "commitment" to preserving life, which has always been binding in medical deontology, to "therapeutic obstinacy".

1. Obstinacy between techno-sciences and bioethics

The term obstinacy was adopted in medical terminology in the late twentieth century. Such term is immediately associated with some negative aspect of meaning: according to the Italian equivalent "accanimento" from "cane" (dog), it intentionally recalls the obstinacy of a dog that is not willing to leave its prey. There is a shared and almost easy response of rejection toward "obstinacy" in itself. In a medical context, obstinacy is referred to the practice of therapies and techno-medical interventions of any kind aimed at merely preserving the survival of a human being in critical conditions, and without any hope of improvement.

In order to identify "obstinate" medical practices, what is needed is a fundamentally shared definition of the opportunities, limita-

tions and legitimacy of medical interventions in light of the current availability of medical and pharmaceutical technologies. It is yet essential that ethics and medical deontology face the changed historical and existential conditions currently shared by the medical staff and those who need medical treatment.

The moral and juridical duty of treatment, which binds the doctor, and the duty of fighting death at any cost, which are the signs of a Hippocrates-inspired deontology, must overcome the absolute and meta-historical dimension that they have featured for ages. The dismissing of the absolut point of view and the choice of "historicity" mean, for the medical *ethos*, taking into account, besides deontological moral guidelines and one's own conscience, both the patient's human condition – which is also "civil" and "political" – and the relational context which belongs to everyone, sick or sane, accompanied or not accompanied by conscience; it also means taking into account the different cognition of pain developed in the 1900s and 2000s.

As I briefly said before, the issue of obstinacy regards, in different ways, the beginning-of-life and end-of-life bioethics, as a result of the progress made by the survival technologies and the pharmaceutical sciences, which are capable of affecting the whole lifetime. I will briefly focus on the end-of-life issues, but I would like to make an introduction personally intended as a methodological option: the *limen* that marks the beginning and the end of life, separating being from not being, is only full of dangers if not subject to adequate consideration and protection. Cardinal Carlo Maria Martini has rightly underlined how the issues regarding the beginning and the end of life belong to «grey bordering areas where real good is not immediately apparent», deducing from this view that «it is a good rule to carry on a serene debate and thus to avoid over-fast judgement and useless divisions».[1]

The elusiveness of beginning and end seems to remind the man of our time, with his burden of knowledge and misfortunes, to keep cautious and respectful, and to keep open the dialogue between different points of view.

[1] Martini CM. *Dialogo sulla vita*. L'Espresso. 2006; 16 (http://speciali.espresso.repubblica.it/interattivi/martini/index.html).

2. The theological-moral debate starting from the Modern Age

When did the ethically binding duty to fight death for the patient's protection become obstinacy? The passage of sense and value from "commitment" to "obstinacy" is "historical" and regards a context made of multiple elements.

The ethical, bioethical and juridical relevance of obstinacy is surely a twentieth century issue; since the sixteenth century, however, the ethical debate has been based on "ordinary" and "extraordinary" means, a constant topic in the bioethical debate on the various forms of obstinacy of intervention on patients. Undoubtedly important is the documentation of the Catholic Church over the years, both for its actual influence on the formation and conservation of *ethos* in mainly catholic countries and for the promotion of debates in multiple cultural contexts, either religious or lay.

The theological-moral debate since the early Modern Age – at least since the sixteenth century – in the commentaries on St. Thomas Aquinas, has formulated reasoning and directions about the ordinary and extraordinary means, urged by the progress of medicine.[2]

The context is not the contemporary issue of obstinacy, of course, but that of the range of "guilt" in performing or omitting intervention, that is to say the clarification of the moral duty of preserving health and life by means of medical devices. The question of possible guilt involves doctors and patients in a different way: it is mainly referred to the patient's decision and the guilt that it might cause.

An issue strangely discussed is that of the moral legitimacy to refuse the amputation of a limb, in a context so far – not only in time – from that, in the bioethics era, in the background of the tragic "Maria's case" (reported in bioethics literature as the case of a patient who, in 2004, refused the amputation of her limb though

[2] Taboada P. *Mezzi ordinari e straordinari di conservazione della vita: l'insegnamento della tradizione morale*, in Sgreccia E, Laffitte J (ed.). *Accanto al malato inguaribile e al morente: orientamenti etici ed operativi. Atti della quattordicesima assemblea della pontificia accademia per la vita*. Città del Vaticano; 2008: 67-88 (http://www.academiavita.org/_pdf/assemblies/14/accanto_al_malato_inguaribile.pdf).

she was aware that it would result in her death). The Dominican theologian Domingo de Soto (1494 - 1570) expressed his view in his treaty *De iustitia et iure*: «a priest could actually oblige his clerks, because of the particular kind of obedience he is promised to, to take the drugs that they can easily take. Yet, without any doubts, nobody can be obliged to whatever causes very bad pain, as in the case of the amputation of a limb or the cutting of the flesh: indeed, nobody is obliged to preserve their lives at the cost of such a bad torture. Moreover, they are not to be considered suicides. In this regard it is right to quote a famous statement by a Roman who was about to have his leg amputated: health is not worth such a bad pain!».[3]

In the late 1500s, a further clear case was the claim of legitimacy to refuse nutrition expressed by another illustrious Spanish Dominican priest, Francisco de Vitoria; in 1587 he wrote «if a sick person can have food of any kind, it shall be had as long as there is hope of survival […]. In case the patient is so depressed and so little appetent that can be fed only by big efforts and almost by torture, a certain kind of impossibility is surely to be recognised, and the sick person will be excused, at least from mortal sin, especially when there is little hope of survival, if at all».[4]

A long tradition is shown, which is in some sense prehistory to the twentieth century debate.

With the potentialities resulting from the development of resuscitation techniques in the mid 1900s, the distinction between ordinary and extraordinary means in obstinate forms of survival begins to matter meaningfully.

The turning point of this debate is the *Speech to anaesthetists and resuscitators* delivered by Pope Pio XII in 1957. The pope's reference to the "situation" is quite remarkable, as well as his attention to "historicity", to the necessity to avoid means which involve

[3] DE SOTO D. *Theologia Moralis.Tractatus de Justitia et Jure*, Lib. V, q. 2, art. 1; quoted in CALIPARI M. *Curarsi e farsi curare: tra abbandono del paziente e accanimento terapeutico*. Cinisello Balsamo: Edizioni San Paolo; 2006: p. 43.

[4] VITORIA F. *Relectiones Theologicae*. Lugduni; 1587; quoted in CALIPARI. *Curarsi e farsi curare…*, p. 40.

oppression by imposing such hard duties that make it difficult to achieve the greater good. In the last few decades the awareness that the rejection of obstinacy is not against the principle of sacredness of life has been expressed by the Catholic Church in several official documents; exemplary among them are those by the Sacred Congregation for the Doctrine of Faith.

3. «Proportionate» and «disproportionate» means

The insufficiency of the reference to ordinary and extraordinary, which is gradually shown by practice, results in a terminology refinement that is functional to provide more adequate answers to emergent questions. The declaration on euthanasia *Iura et bona*, published by the Sacred Congregation for the Doctrine of Faith in 1980, marks a remarkable step: «In the past, moralists replied that one is never obliged to use "extraordinary" means. This reply, which as a principle still holds good, is perhaps less clear today, by reason of the imprecision of the term and the rapid progress made in the treatment of sickness. Thus some people prefer to speak of "proportionate" and "disproportionate" means. In any case, it will be possible to make a correct judgment as to the means by studying the type of treatment to be used, its degree of complexity or risk, its cost and the possibilities of using it, and comparing these elements with the result that can be expected, taking into account the state of the sick person and his or her physical and moral resources».[5] The reference to the patients' «physical and moral resources» does not affect the primary role of the "objective" dimension and of the doctors' judgement in this document.

The use of "disproportionate" means produces the obstinacy rejected by the Catechism of Catholic Church in 1992, in article 2278, which entitles the patients' will to the role of making decisions.

[5] Sacred Congregation for the Doctrine of the Faith. *Declaration on Euthanasia* (May 5, 1980). Rome; 1980 (http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_eutanasia_en.html).

A constant attention to the issue of obstinacy and its implications was shown by Pope John Paul II. In his 1995 encyclical letter *Evangelium vitae* the pontiff explains how different is the practice of euthanasia from «the decision to forego so-called "aggressive medical treatment", in other words, medical procedures which no longer correspond to the real situation of the patient, either because they are by now disproportionate to any expected results or because they impose an excessive burden on the patient and his family. In such situations, when death is clearly imminent and inevitable, one can in conscience "refuse forms of treatment that would only secure a precarious and burdensome prolongation of life, so long as the normal care due to the sick person in similar cases is not interrupted". Certainly there is a moral obligation to care for oneself and to allow oneself to be cared for, but this duty must take account of concrete circumstances. It needs to be determined whether the means of treatment available are objectively proportionate to the prospects for improvement. To forego extraordinary or disproportionate means is not the equivalent of suicide or euthanasia; it rather expresses acceptance of the human condition in the face of death».[6]

This doctrine concerning obstinacy, seen as a practice to avoid, provides the background for the explicit and strong position of the Catholic Church in considering artificial nutrition and hydration (ANH) as belonging to the paradigm of «ordinary and proportionate».

The incompatibility of this position with that of the many, catholic or not, who consider ANH as a medical prerogative, and therefore a practice involving obstinacy if not interrupted at the moment assessed as right, is one of the most discussed topics in the bioethical and juridical debate on end-of-life issues.

The 2005 document by the National Committee of Bioethics in Italy fully agrees with the view by the Catholic Church: «the decision not to start or to interrupt artificial nutrition and hydration is not disciplined by principles that regulate the medical activity with reference to other vital

[6] John Paul II. *Encyclical Letter Evangelium Vitae* (March 25, 1995). Rome; 1995 (http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html).

supports». The ANH practice, thus, according to this text, does not involve obstinacy: «artificial nutrition and hydration are forms of basic and proportionate assistance (successful, inexpensive, easily accessible and practicable, not requiring sophisticated equipment and being generally well tolerated)». The interruption of ANH, instead, produces abandonment and leads to forms of euthanasia: «The interruption of such practices is not to be assessed as the due interruption of therapeutic obstinacy, but rather as a form of *abandonment* of the patient, seen from a very cruel human and symbolic point of view: not accidentally, indeed, the immediate and coherently intended abolition of euthanasia is requested by many for those patients in permanent vegetative state (PVS) whose nutrition and hydration has been interrupted, in order to avoid that, after a process which can last for two weeks, they will eventually die from *starvation*».[7]

In some countries the gap between the different views on such *punctum dolens* is so wide that it makes it extremely difficult to achieve compatibility and agreement on the passing of a shared law concerning the "advance health care directive" (also know as "living will"), in which it is possible to indicate the option, expressed by the patient and binding doctors and sanitary institutions, to reject ANH. This debate is particularly hot in Italy, especially after some very impressive and tragic facts such as the Welby case or the Englaro case, solved by appealing to the magistrates' judgement, and it has involved the parliament, repeatedly and so far uselessly called to legislate on the "advance health care directive", in an atmosphere of very hard conflicts of interpretation which are at the same time philosophical, ethical, juridical and political options.

4. «Vagueness» of the term *obstinacy:* a technical or ethical problem?

Assembling from fundamental documents the definitions of obstinacy leads us to the clarification of a polysemic term. It re-

[7] Comitato Nazionale per la Bioetica (CNB). *L'alimentazione e l'idratazione di pazienti in stato vegetativo persistente* (settembre 2005). Roma: Presidenza del Consiglio dei Ministri, Dipartimento per l'Informazione e l'Editoria; 2005.

mains essential, however, to set the issue in our present context, its *ethos*, whose historical dimension cannot be omitted without causing misunderstanding.

In order to make this statement clear I would like to start from the guidelines of the Italian Medical Deontological Code of 2006: «Doctors must avoid obstinacy in those treatments where benefits for the patients' health or improvements in their quality of living are not reasonably expectable».[8]

The key word to start a debate with is the adverb "reasonably". Who is in charge of making those expectations of benefits for patients reasonable? And how? Do only technical-scientific criteria play a part in it, or the subjective assessment as well? How important is the comparative assessment between the ethical view of medical "paternalism" (however benign), still active and operative, and the ethical view of the inalienability of patients' autonomy?

Answering in a way or another is defining an ethical, bioethical view with possible legal consequences.

The most troublesome point is then the uncertainty hidden behind the meaning of the adverb "reasonably". It is clearly the "knowledge" achieved over time that has to provide some foundation to such assessment; technical-medical knowledge of previous cases, acquisition of the patients' opinions and of the ways in which they and their families and hospitals dealt with situations of possible obstinacy.

First of all, it is essential to know their "story". Neither philosophy nor religion can "reasonably" grant the legitimacy of intervention or non-intervention once and for all, but the knowledge (as widely intended) assembled through individual and collective experiences. Doctors, patients and institutions live in the real world; their relationships involve some context. The horizon of our present is marked by the indisputable achievement of the principle of autonomy and "ethical competence" which gives shape to human identity.

[8] Federazione Nazionale degli Ordini dei Medici Chirurghi e degli Odontoiatri. *Codice di deontologia medica* (16 dicembre 2006). Roma; 2006 (http://www.salute.gov.it/imgs/C_17_pubblicazioni_1165_allegato.pdf).

It is worth remembering that being an adult, that is to say capable of autonomy and ethical and legal "competence", does not mean the cancelling of the factual conditions (related to circumstances) of asymmetry between patients and those in charge of health and disease. What greater asymmetry than that between the sick and the healthy, and above all between the person in need of medical knowledge and care and the one who owns that knowledge and manages that care, therapeutic or not? The disparity of condition resulting from contingence does not cancel autonomy, it does not automatically lead to the ethical regression towards a renewed hierarchization of mankind. It would be ethical regression, apart from autonomy and respect, to set up a hierarchical scale concerning those who hold the power – however scientific – and those who need that power. Asymmetry does not cancel the equal dignity of referring to the doctors' and patients' conscience, as well as the factual diversity in a broad social context does not cancel the principle of equality and dignity.

Of course, considering disparity is functional to the achievement of actual autonomy, and thus it must be carefully accounted. Ignoring asymmetry and claiming to dialogue with patients pretending equality of condition between them and their doctors is leading to deceit and to the cheating of their autonomous will.

The debate on the possibility of a "reasonable" prevision requires further enquiry on the "vagueness" associated with the term *obstinacy*. It is a really central question to clarify if the latter involves a technical problem or rather a problem of ethical view.

This issue, discussed even at a juridical level starting from the Welby case, deserves a philosophical approach. There is no such thing as an only rule to define a plurality of human situations and conditions. The generally shared rule – the rejection of obstinacy is such – has to deal with «*circumstantia*»[9]: the above mentioned moralist theologians, who have discussed the ordinary and ex-

[9] Pizzuti GM. *Natura, implicazioni e limiti del concetto di «circumstantia» in Tommaso d'Aquino*, in Piovani P. (ed). *L'etica della situazione*. Napoli: Guida Editori; 1974: pp. 57-72.

traordinary means in modern times, reason by taking into account the *situation*.

It is not possible to equalize ethics and mathematic truth: it is absurd to claim the formulation of an only definition or rule, ever and wherever binding and claiming to be "objective". An issue that bioethics has surely made clear is that of the failure of relying on the "objectivity" of science as «*auctoritas*» to solve ethical and legal questions. Moreover, the conflicts of interpretation among scientists are widely known because of the relevance of bioethical issues in the media.

In my opinion obstinacy retains its vague terminology as long as it keeps its prejudice excluding the "subjective" dimension, that is to say the patients' opinion on which treatments are experienced and considered disproportionate, and the "historicity", the here and now, of the *situation*.

The "objective requisites" mentioned in *Evangelium vitae*, for instance, are those whose objectivity could be intended only as technical-scientific (even if we have read about its reference, though fugacious, to subjectivity). The impossibility of an only "objectivity" is apparent, as well as that of a principle which, in the moving horizon of life and death, is ever and however valid.

The occurrence of obstinacy, of a practice of "extreme" intervention (unanimously refused in its principle), is not due to the use of drugs and techniques that cause obstinacy in themselves. What features obstinacy can only be defined case after case, in "situation". There is no such thing as a fixed parameter, a "list" on which doctors can ever and however rely, to find out if their intervention is "obstinate". «Ordinary, extraordinary, proportionate, disproportionate» are adjectives which define interventions without specifying them, they are terms which acquire a useful meaning when orienting the intervention «in a context». Such context is that of the patients' condition, interpreted by doctors from a technical-scientific point of view, and communicated (according to the obligation to information that allows informed agreement or disagreement), and also that of the patients' assessment, starting from their own beliefs, their own close relationships. Just because

it is necessary to consider the «subjective, objective, inter-subjective» context, an only definition is not conceivable, and neither is one «by law».

A normative framework openly "addressing" intervention, the option of a "soft law" – to mention some remarkable proposals from Italian philosophers and lawyers[10] – may lead to shared pathways.

Then, the impossibility of "objective requisites" to define obstinacy in that sense is not bound to result in arbitrary action, not at all. I personally believe that it contributes to «objectivity»[11], wanted by doctors to grant themselves the rightness of their intervention, the request by the subject-patients who "suffer" and "act" their very personal events.

«Objectivity» features another connotation: it is the result of a relational story, psychologically asymmetric but not ethically or politically "hierarchic". The solution is not to be found in a more «objective» definition, comprehensive of the highest number of possible conditions. It requires a change of point of view, and not of language.

The concern that the refraining from obstinacy means to doctors the abandonment and betrayal of their ethical and professional commitment deserves some attention. This issue moves beyond the limited area of the so-called defensive medicine, even if the latter is to be carefully considered. I would rather focus, however, on a certain aspect of the question which has a peculiar ethical relevance.

I would like to recall the morally relevant tone associated with the nightmare that life, which is "obstinately" kept alive, deprived of "adequate commitment", might take the horrible identity of «unworthy life», with the burden of misfortunes which is historically associated with the use of such expression.[12]

[10] Rodotà S. *Repertorio di fine secolo*. Roma-Bari: Laterza; 1999; Id. *La vita e le regole*. Milano: Feltrinelli; 2009.

[11] Canguilhem G. *Le normal et le pathologique* (1966); *The Normal and the Pathological* (trans. Fawcett CR and Cohen RS). New York: Zone Books; 1991.

[12] Jens W. *Si vis vitam para mortem. Die Literatur über Würde und Würdelosigkeit des Sterbens*, in Küng H, Jens W. *Menschenwürdig sterben: ein Plädoyer fuer Selbstverantwortung*. München; Piper; 1995: pp. 87-129.

The only antidote against the uncontrolled effects resulting from a subliminal pressure exercised by the memory of the horrors of Nazism is the clear awareness that the use of terms such as "dignity" and "indignity" referred to a life to be "dominated" was the result of a programmed deceit. The mark "worthy or unworthy of living" was given according to the parameter of a racist ideology, the "philosophy of hitlerism"[13] which structurally does not take into any account the individual human beings, their will, their evaluation of life and of its goods. What made life "unworthy" was then a criminal ideology which entitled itself to the right to life and death and to their definition. This view has nothing to do with individual opinions about the unsustainability of living due to extreme and irreversible suffering.

What might be enough to turn anguish into vigilance that does not paralyze action is the consideration that the "philosophy of hitlerism" has been historically defeated, relegated in the wreckage of the past by the victory of a different philosophy, a different conception of man and common life, a "philosophy" even published in Declarations, Constitutions and Charters, thus shared and protected, at least in its principles. Surely part of it is the belief that a suffering and dying life is peculiarly "worthy": worthy of supporting care.

What is a "worthy life" cannot be defined in general terms, valid for all and in all circumstances. All the criteria functioning as universal measures must be rejected as impossible. The personal judgement on one's own life, of course not that on somebody else's, must remain imprescindible. Life surely cannot be defined worthy by a law proposing "objective criteria". A possible "juridical" definition, ever and however binding, might reassure some health care operators, but would inevitably lead to the risk of obscuring the relevance of the decisions that shape the "lives" and death of everyone, as well as the risk of refusing to acknowledge

[13] Levinas E. *Quelques réflexions sur la philosophie de l'hitlérisme*, in Esprit, 1934; trans. *Reflections on the philosophy of hitlerism*. Critical Inquiry. Chicago: Chicago University Press, 1990 (vol.17), pp. 63-71.

the proper plurality of the human condition and of the different individual assessments of good and suffering. It would thus violate substantial justice and mankind.

It was law that removed the "vagueness" from the principle of dignity by historizising its content. The connection by law, as the term widely intends, between dignity, self determination, autonomy – a more meaningful term than simple "determination" to start from the self – reveals the deepest sense of this principle, making it into a guideline that may be used as a reference for the solution of ethical and bioethical questions.

Autonomy remodels the ancient and polysemic notion of "dignity", tying it to liberty which has become inalienable dimension of a finally "adult" mankind; law "historicizes" dignity, makes it "effectual" dimension of the human by protecting it and giving it a recognizable content. Let's go back, then, to the even symbolic centrality of the Nuremberg trial and Code, which can be regarded as a location of the definition of human subjectivity identified in its being by autonomy, ethical and juridical competence, intangibility. The premises are set so that the binominal "science and conscience", a guiding star of medical intervention, involves all those who rely on medical science. "Science" becomes a word which recalls both medical knowledge and information due to patients so that they can express autonomous evaluations and decisions. "Conscience" does not merely recall the doctors' coherence to ethical, personal and professional principles, but also the awareness and the "ethical competence" of the addressee of medical knowledge, never again "infant", unable to make speeches and decisions.

A special attention is deserved to the attribution of "speech" to patients, who must be listened to in order to entitle them to a relational dimension. It is "relation" what allows to overcome, by relegating it to the past, the ancient hierarchical *status* concerning scientists and common people, the injustice involved in the deprivation of subjectivity for the many who need "care", the burden of making unshared decisions. And more: maybe only relation can finally solve those cases made inextricable over time by the development of techno-sciences and medicine, including the obstina-

cy issue among the most "inextricable" ones. If anyone could say what "excess of intervention" means to them, we would have a reliable track to walk along the "*dis-crimen*" between ethical bond to treatment and equally ethical bond to avoid obstinacy.

AREAS OF CONSTITUTIONAL PROTECTION AND DEVELOPMENT OF INTERPRETATION OF THE RIGHT OF THE PATIENT TO THE GOVERNMENT OF HIS OWN BODY

Lorenzo Chieffi [*]

Abstract

The analysis which concerns "end of life decisions", allows the individual to dispose of his body freely. Although through the "planning ahead" of its existence, in the presence of a persistent vegetative state, does not exclude the use of interpretive techniques apt to verify the effective aim of constitutional provisions which often tend to attribute opposite meanings (freedom versus dutifulness) upon this topic.
In opposition to those who declare their willingness in drawing from the constitutional foundation about the theory on the unavailability or the inability of human life, others seem to incline towards different directions. They believe they may get the reasons for the recognition of a wide autonomy and self-determination, leading to an effect of dangerous radicalization of the positions, that in some European countries (starting from Italy) has so far been prevented, so to achieve a balanced regulation of the terminal stages.
Many are the reasons by which patients have freedom over their own body in consideration of the fact that human dignity has its prevailing value.
Taking into view the historical reasons that led the founding fathers (in Italy, France, Germany) to consecrate the self-determination of the person, reduced by the Nazi medicine as a guinea pig, today other considerations, have to be added in relation to the presence of life-sustaining technologies.

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Especially in the field of fundamental rights this interpretative progress, in favor of an affirmation of the freedom of treatment, is also the result of strong pressure up / bottom from the transnational law (ECHR, Oviedo Convention, the Charter of Nice, Declarations UNESCO), developed by supranational bodies, also of legal origin. The development of a movement of legal models, the outcome of such interpretative stimuli, is therefore able to determine the progressive expansion of the exegetical aim of the fundamental principles and, consequently, our living Constitution.

1. The progressive technologization of the therapeutic approach

One of the paradoxes of contemporary medicine should certainly include the effects caused by the use of sophisticated technological applications that, despite the potential benefits for the health of the individual, would be able to determine an undesirable life extension, even in the presence of existential states that in the past were not to be predicted.

This is a threat to the areas inside the individual autonomy, because he is not in the position to adapt a free choice therapy, the result being a widespread use of innovative remedies to life support, starting from those used by the emergency medicine. In extending beyond measure the patient's agony, subjected to resuscitation therapies, of unquestionable burden for the state coffers, such practices may clash with the legitimate expectations expressed by the person concerned, while not encroaching in unacceptable expressions of aggressive treatment.

In view of the benefits to the individual and collective health, insured by the numerous discoveries introduced by the biomedical research could then counteract an excessive reduction in the degree of autonomy of the patient, even in the absence of a difficult recovery among relational skills and the improvement of any of its state of health.

It may be assumed if it is possible to improve health conditions and achieve a life worth living as the wise analysis conducted by Hans Jonas[1] who maintains an unbearable prolongation of existence, in extending of the "end beyond the point at which life

[1] Jonas H. *Il diritto di morire*. Genova: il Melangolo; 1991: p. 11.

still has value for the patient itself, even beyond the point at which he is still able to give value."

In consideration of the dangers of the prolonged use of life-sustaining therapies, especially if carried out in a defensive way it is therefore possible to establish (in the development of the therapeutic relationship) an increasingly recognizable claim in favor of the patient capacity to decide on the type of care and on the duration of its existence, which, under certain conditions, could also be exercised in a state of unconsciousness and in a persistent vegetative state.

The anguish and concern to remain in a state of suspended life, however, held by a person not worthy of being continued, could therefore lead to invoke the randomness of natural and human events in the full exercise of the right to self-determination, to be understood as right of any individual to dispose fully of himself, even through the re-appropriation of the same capacity to manage the final phase of its existence.

Therefore the need for a greater appreciation of individual autonomy sphere, limits the scope which justifies the imposition of an Obligatory Health Treatment (OHT), only in the presence of other fundamental goods of similar thickness [2], in application of the principle dear to the contemporary Western constitutionalism which identifies the extent of the freedom of each individual within the spaces that do not affect the exercise of the freedom of others.

2. The constitutional protection of the right to the self-determination of terminally ill patients

The recognition of individual autonomy against the use of technological applications can compress the scope of authority, found safe hooks arranged in the same constitutional exegesis which, as we will attempt to show, overturn the different approach, prevalent during the past dictatorial regimes which affirmed itself in

[2] Veronesi P., *Il corpo e la Costituzione. Concretezza dei "casi" e astrattezza della norma.* Milano: Giuffrè; 2007: p. 11.

Europe during the first part of the twentieth century, informed of the duty to provide at that taking care of the body and, consequently, the prolongation of human existence.

Taking into consideration the relation between the State which seems to assume an authoritarian and paternalistic attitude towards the individual who is not able to dispose of its own existence, post-war constitutionalism has promoted an extended view of life thanks to the encouragement of a liberalism aimed at promoting the rights of individuals in various areas of social life, even compared to the state's claim to circumscribe the master of autonomy of the person, in order to promote the advancement of medical or economic growth (which requires efficient labor force) and the "colonial expansion (ensured by the presence of fighters) in the same community.

The chief attention paid to individual rights by the Constituent Assembly of European countries, emerged from a dark dictatorial period, intended to put an insurmountable barrier to the use of science, which were particularly inclined to Nazi doctors, exclusively aimed at the welfare of others or pure desire of knowledge, which led to the sacrifice of their most fragile, reduced to the level of guinea pigs for experiments, generally found entirely useless.

The exercise of the noble art of medicine, while expressing a due sense of solidarity with those who suffer from a condition of extreme weakness, is going to face, just as a result of this evolution brought by the protective nature of European legal systems, an insuperable limit to the right of everyone as to dispose of its own being.

Freedom in science, is guaranteed in a large way, at a theoretical stage, in numerous constitutional provisions[3] but meets, however, an unsurpassed limit in its practical application, having to conform itself to the personal values, emerging from these fundamental charters, starting from the b autonomy of the patient, his dignity, privacy, and, of course, the respect for his psycho / physical integrity.

[3] Articles 9 and 33 of the Italian Constitution, art. 9 of the French Constitution, art. 5, par. 3 of the Constitution of Bonn, art. 44, n. 2 of the Spanish Constitution.

No application in medicine, used in the interest of the patient[4], could then be imposed by the treating doctors and the same health facility for hospitalization in the absence of the collection of previous informed consent of the sick, provided of course by its full capacity to understand and willingness, that in spite of the persistent difficulties in implementation, is a mandatory "prerequisite for the lawfulness of treatment."[5]

And so, next to a claim in the aspect of the State and its ramifications for autonomy to receive health benefits for one's own well-being, consistent with therapeutic choices allowed by the patient, from the constitutional text[6] can also be derived directly and immediately by a negative declination of freedom that allows the individual to autonomously and responsibly dispose of its own body, protected from the interferences of others to the power to renounce the treatment deemed unbearable, even if not comparable to unjustified forms of aggressive treatment.

Therefore it follows that, apart from the cases expressly provided by the law of prescription of a OHT[7], in order to "preserve the health of others" next to that associates "of those who are subject,"[8] it will be up to the individual's decision to undergo the treatment he wants, not being obliged to any treatment, even if qualified as a life support.

Any manifested refusal by the patient, freely expressed, aware and present, should immediately lead to a discontinuation of the treatment, even if it might lead to an "aggravation" of his "state of health (...), and even death."[9] This behavior is not to be config-

[4] Cass. civ. , sez. I, 16 ottobre 2007, n. 21748, in *http://www.altalex.com/index.php?idnot=38683*.

[5] Cass. pen. , sez. IV, 30 settembre 2008, n. 37077, in *http://www.altalex.com/index.php?idnot=43636*.

[6] Article 32, in conjunction with art. 13 Italian Constitution, art. 2 German Constitution, art. 49 Spanish Constitution.

[7] Interpreted strictly in accordance with the law reinforced the reserve contemplated in paragraph 2 of Art. 32 of the Constitution.

[8] Corte Cost. sent. 22 giugno 1990, n. 307, in *www.giurcost.org*.

[9] Cass. pen., sez. I, 11 luglio 2002, n. 26446 (Volterrani case), in Rivista diritto penale, 2002, II, p. 754.

ured as an hypothesis of suicide[10], or a form of active euthanasia, and prohibited by our legal system, and even passive euthanasia which would require, however, a state of disrepair by the physician, in the absolute unawareness of the infirm.

This chief promotion of individual autonomy and absolute constitutional significance, has consistently represented the theme of a significant case-law developed in the presence of a technologically advanced medicine, clearly invasive, precisely to allow an extraordinary extension of human existence.

And so, for example, although it was highlighted the possible utility, statistically proven, of therapy refused, the judge of the legitimacy came to the conclusion that the doctor can only stop its assistance, even if he considered to be appropriate and proportionate to the evil to cure, the health of the individual cannot "be subject to taxation authoritative / coercive."[11]

According to this address in favor of a subjectification of the right to life belongs to the sphere of each patient the decision to allow the disease to run its course "to the extreme,"[12] In deference to the randomness of human existence and its quality consistently held acceptable with respect to their expectations literature, the "feedback" and "perceptions that each has of himself,"[13] the "way of life"[14], such as to involve even the most intimate aspects of "personal and absolute life expectancy."[15]

Despite the "sacrifice of the good life," the right to self-therapy could not meet, for the judge of legitimacy, no limit, implying a negative implication that is: "the right to lose health, to be ill and

[10] Corte d'Assise di Firenze, 18 ottobre 1990, in Foro italiano, 1991, II, c. 239, confirmed by the judgment of Cass. pen., sent. 21 aprile 1992, n. 699 (Massimo case), in Foro italiano, 1992, II, 236.

[11] Cass. civ. , sez. I, 16 ottobre 2007, n. 21748, *cit.*.

[12] Corte d'Assise di Firenze 18 ottobre 1990 (Massimo case), *cit*.

[13] Cass. civ. , sez. I, 16 ottobre 2007, n. 21748, *cit*.

[14] Veronesi U. *Il diritto di morire. La libertà del laico di fronte alla sofferenza*. Milano: Mondadori; 2005: p. 101.

[15] Trib. Milano, sez. VII, 14 maggio 1998, n. 5510, in Nuova giurisprudenza civile commentata, 2000, I, p. 98.

living the final stages of life according to its own human standards is the final human scope in defense of personal dignity."[16]

The recognition of a range of therapeutic decision, would in this way satisfy the inexorable "biological fate" of every human being that leads to recognize the presence of a claim to a natural continuation of the course of human existence, regardless of "artificial outsiders interventions that might be judged by the person as intolerable or out of proportion".[17]

3. The suggestions offered by transnational law

A judicial development in the sphere of autonomy of the patient has been initiated especially when the principal issue is "terminal stage" which in constitutional terms has gained an interpretative evolution thanks to significant suggestions risen from transnational law which has therefore favored the "circulation of legal models".

It has been frequent the appeal to the examined jurisdiction in order to adapt biomedical research as a defense of the patient to an increase of collaboration among European courts (the Luxembourg and Strasbourg) and other national Courts, reflecting a growing interplay between different legal cultures, even in deference to many safeguards which, for example, the use by the Italian constitutional Judge, of the application of the theory of counter-limits[18] or so-called "national margin of appreciation".[19]

No doubt are the stimuli of interpretation, raised in this case, numerous declarations, conventions, Cards, adopted in recent years in the field of bioethics, with regard to the protection of human rights and dignity in the presence of applications by biology and Medicine

[16] Cass. civ., sez. I, 16 ottobre 2007, n. 21748, *cit*.

[17] In this way he expressed himself, the Corte d'Appello di Milano, sez. I civ., decr. 9 luglio 2008, in *http:// www. altalex.com/ index.php?idnot=42429*.

[18] Cfr. Corte Cost. sentt. 24 giugno 2010, n. 227 e 8 ottobre 2010, n. 288, in *www.giurcost.org.*

[19] Corte Cost. sentt. 24 ottobre 2007, n. 348 e n. 349; 5 aprile 2012, n. 78, in *www.giurcost.org.*

(Council of Europe, 1997; UNESCO, 2005 [20]), confirming their apparent pervasive ability in the processing of the sentence, even in the presence of a reduced binding force of the rules contained in them.

The worthy dedication of these international documents for the promotion of universal respect for human rights, and more specifically for the protection of the autonomy of decision-making on issues that concern the government of the body, has certainly contributed to the success of a medical culture which is ever more respectful of the rights of the patient, his freedom in the choice of treatment, allowed right by a valid informed consent which is the main core of this important international legislation.

4. Informed consent as an expression of the right to self-determination

In deference to the therapeutic alliance that has to characterize all the developments of "shared care pathway"[21], no health benefit, even as life support, assessment or inspection on the body of the person, the individual may be imposed in the absence of a valid informed consent that represents a "fundamental principle in the field of health protection", a "genuine right of the person."[22] This is a privilege which, in the opinion of the judge of the law, finds its application on a personal setting of reference, in particular the principles contained in articles. 2, 13 and 32 of the Constitution which "shape" even in the light of supranational legislation has to be[23], left to the state legislature[24].

[20] Convention on Human Rights and Biomedicine of the Council of Europe, signed at Oviedo in 1995; UNESCO Universal Declaration on Bioethics and Human Rights of 2005.

[21] Veronesi U. *Il diritto di non soffrire. Cure palliative, testamento biologico, eutanasia.* Milano: Mondadori; 2011: p. 89.

[22] Corte Cost. sent. 15 dicembre 2008, n. 438, in *www.giurcost.org.*

[23] From the Nuremberg Code of 1946, to the Oviedo Convention of 1997 (art. 5), to the Charter of Fundamental Rights of the European Union of 2000 (art. 3).

[24] Corte Cost. sent. 15 dicembre 2008, n. 438, in *www.giurcost.org*.

The clear derivation of the constitutional right of the individual to decide which treatment to undergo is also evidenced by its ability, according to this judge, to represent a "synthesis of two fundamental human rights", a further indication of a chief focus of the fundamental text for the promotion of the latter. And so, to the definition of this space of freedom for the individual it competes the right to self-determination as well as the right to health, "because if it is true that every individual has the right to be cared for, he has also" – according to the Court – "the right to receive adequate information on the nature and possible developments in the course of treatment which may be submitted, as well as possible alternative therapies."[25]

Once abandoned an unilateral and paternalistic vision of the relationship of care, all biased in favor of the decision taken by the doctor, this oriented constitutional reading has gradually led to the case law, and to a constitutional committee responsible for the development of a therapeutic choice "as a result of a dialectical process "between the latter and the patient[26].

This "relational dialogue"[27], realizes a continuous comparison between knowledge and suffering, in a soothing blend of therapeutic goals (to cure) and pushed solidarity (to care), which favor a therapeutic relationship being a form of despotism that provides for a selfish individualism and antisocial individualism, as very well described by Emmanuel Mounier[28], who condemns the denial of any dialogue.

A correct action of information on the part of those who have the responsibility of assisting the patient, especially in the terminal phase of the disease, could certainly avoid the isolation in which the latter is often obliged to, at the very moment in which he is forced to make the most significant choices.

[25] Corte Cost. sent. 15 dicembre 2008, n. 438, *cit.*

[26] Ferrando G., *Stato vegetativo permanente e sospensione dei trattamenti medici* in Fondazione U. Veronesi. *Testamento biologico. Riflessioni di dieci giuristi.* Borgaro Torinese (TO): ed. Il Sole 24 ore; 2006: p. 144.

[27] Piana G., *Testamento biologico. Nodi critici e prospettive.* Assisi: Cittadella; 2010*:* p. 34.

[28] Mounier E. *Che cos'è il personalismo?.* Tr. it. Torino: Einaudi; 1975: p. 61.

A possible cultural asymmetry, between those who are bearers of knowledge and those who have merely a perception of one's corporeal and personal perspectives on life, could certainly lead to a depreciation in the active work of previous information that "is a form of respect for the freedom of the individual and a means to attain its best interests."[29]

Not being able to conceive in any way an "invasion" one-sided of the human body, which would even be configured as a criminal offense, the informed consent would possible render the spontaneous "participation" of the person concerned to the development of the therapeutic relationship that will, for that reason, correspond "to the idea of well being that fully realizes personality."[30]

Any refusal by the patient to receive treatment, as well as a result of information ensured by the attending physician about therapies which seem appropriate to the pathology observed, could certainly lead to coercive forms of taxation, but more conveniently to care interventions, including those palliative ones, able to cope, coherently with the instance of solidarity contained in the fundamental text so to overcome all conditions of extreme suffering and fragility.

The doctor faced with an "authentic and genuine" declaration of intention by the patient, is compelled to interrupt his work, although it may derive a confirmation of death.[31]

5. Jurisprudential uncertainties in the definition of medical responsibility in the absence of a valid informed consent

In deference to the areas which are recognized by the individual who freely self-determines his own body it will be therefore the doctor's responsibility who has made an intervention in the absence of a

[29] Cass. civ., sez. I, 16 ottobre 2007, n. 21748, *cit*.

[30] Pioggia A., *Il disegno di legge in materia di dichiarazioni anticipate di trattamento: esempi di fallimenti e di molte occasioni perdute nell'attuazione della Costituzione*, 14 aprile 2009, in *www.costituzionalismo.it.*

[31] Cass. pen., sez. I, 11 luglio 2002, n. 26446 (Volterrani case), in Rivista penale, 2002, II, p. 754.

valid informed consent, or in the presence of an explicit dissent. It is an omission, done in disregard to the areas of security guaranteed by the Constitution, the result being an offence under the guise of "the interest in favor of the patient"[32], which should be given the form of a crime considering the violation of personal integrity as well as individual liberty, unless it is demonstrated the weight of arguments of social or ethical value (art. 62, no. 1 Criminal Code) or the presence of a "state of necessity" (Article 54 of the Criminal Code), which rise when the patient has not the opportunity, in urgency cases, to express himself freely on the therapies he urges.

As regards to the disrespectful conduct of the proceeding doctor who denies the limits of the patient autonomy included in the area of his personality, the conclusions attained by the judges on this point are not unanimous

Next to a contractual liability (art. 2043 Civil Code), which concerns the provision of professional, for non-disclosure[33], and non-pecuniary damage (art. 2059 Civ. Code), "resulting from injury of values related to the individual,"[34] the health care was, in fact, called to account, as appropriate, for crimes of domestic violence (art. 610 Crim. Code)[35], induction in a state of incapacity and will (art. 613 Crim. Code), personal injury, negligence (art. 590 Crim. Code)[36], or even of manslaughter (Article 584 Crim. Code)[37].

This varied type of conclusions which the courts have reached involve the shaping of the criminal law, even in the presence of

[32] Cass. civ. , sez. I, 16 ottobre 2007 n. 21748, *cit.*

[33] Trib. Milano 8 giugno 2007, in Responsabilità civile e previdenza, 2008, p. 402.

[34] Trib. Milano, 29 marzo 2005, in Responsabilità civile e previdenza, 2005, p. 756.

[35] Cass. pen., sez. IV, 10 ottobre 2001, n. 36519, in *http://pluris-cedam.utetgiuridica.it*.

[36] Cass. pen., sez. IV, 9 marzo 2001, n. 586 (Barese case), in Cassazione penale, 2002, 1, p. 517 ss.

[37] Cass. pen., sez. V, 21 aprile 1992, n. 5639 (Massimo case), *Cassazione penale*, 1992, 34 ss. Although there are pronunciations of opposite sign that exclude instead of ascribing the doctor's behavior to the case of the murder manslaughter: Cass. pen., sez. IV, 9 marzo 2001, n. 585 (Barese case), in Cassazione penale, 2002, 1, p. 525 and Cass. pen., sez. IV, 14 marzo 2008, n. 11335, Huscer, in Giurisprudenza italiana, 2008, fasc. 10, p. 2283 ss.

similar omissions, testifies to the continuing uncertainty of definition of the offence, as to prevent the formation of a stable and well-established case-law, proof of difficulty on the part of the performers to discover the right balance, in the light of a correct reading of the constitutional provision, including the right to self-determination of the patient and care duties by the physician.

Represent further confirmation of this instability exegetical, on the relevance and traceability, the offense of medical behavior, those judgments that, despite the lack of an unequivocal manifestation of dissent of the patient to receive the given treatment or in the absence of explicit consent, receives, to the contrary, to legitimize the decision of the health of "subjecting the patient under his care, therapeutic treatment, which considers it necessary to safeguard the health of the same, even in the absence of an explicit consensus"[38] or to believe, indeed, "irrelevant "research of previous" consent of the patient intervention or any act preparatory intervention "itself".[39]

In a similar direction, to exclude the medical liability, a recent ruling of the judge of legitimacy is submitted that, despite the presence of a "surgical treatment other than that for which it was submitted informed consent" and, in the absence of "otherwise indicated by the patient himself, "from which he had emerged as a result of" intervention carried out in accordance with the protocols and *legis artis* "a positive outcome, however, ruled out the" criminal "in the conduct of the doctor" so under the profile of the case pursuant to art. 582 Crim. Code "[personal injury that could result in a disease in the body and mind]," and below that of the crime of domestic violence in art. 610 Crim. Code."[40]

Next to cases, related to the absence and to a lack of consent from the outset, the responsibility of the researcher, who had made an extraordinary intervention involving solutions to techni-

[38] Cass. pen., sez. I, 11 luglio 2002, n. 26446 (Volterrani case), *cit.*

[39] Casonato C. *Il malato preso sul serio: consenso e rifiuto delle cure in una recente sentenza della Corte di Cassazione*. Quaderni Costituzionali 2008, p. 536.

[40] Cass., sez. un., 21 gennaio 2009, n. 2437, in Guida al diritto, 2009, fasc. 7, 54 ss.

cal problems of particular difficulty (ex art. 2236 Civil Code), not carefully examined by medical science, can only be eased.

At presence of these cases of exemption, the doctor would be, therefore, to respond to the patient (art. 2236 Civil Code) only for damage caused by his conduct in which it might be experienced willful misconduct or great negligence.

Excluding any liability of the doctor, to the presence of a slight negligence (art. 1176 cc), the court could not, however, neglect to determine, in the light of the recently established by art. 3, n. 1 of Decree Law no. 158 of 2012, converted with amendments by Law no. 189 of 2012[41], compliance in each particular case, guidelines and best practices accredited by national and international scientific community.

It would, then, be proved the "faulty or inadequate professional service"[42], that is, the presence of damage and random support which would lead to the conduct of the so called "incauto professionale" that is the "incautious professional" that proves to be responsible, with an obligation act, for the patient's wish (art. 1218 Civil Code).

Besides, the abstention to initiate or continue the medical treatment as a result of an express refusal of the patient, would not cause any responsibility for the doctor[43] taking into account the provisions of art. 40, 2nd co. Crim. Code under which "an event

[41] With the Order of Trib. Milano del 21 marzo 2013, in *http://www.personaedanno.it/attachments/article/42283/ordinanza%20Trib%20MILANO%20colpa%20lieve.pdf*, was raised the question of the constitutionality of Article. 3, n. 1, of the Decree Law September 13, 2012, n. 158, in so far seems to introduce a "standard *ad professionem*" that would outline "an area of non-punishment" for members of the health profession who have committed "any offense slightly negligent in compliance with the guidelines and best practices". It follows then a "irresponsibility" that would have the effect of "atrophy and inhibit the freedom of scientific thought, freedom of research and medical experimentation, therapeutic freedom", from the moment he "borders every choice diagnostic and / or therapeutic within what has already been consecrated and crystallized by the guidelines or good practices".

[42] Cass. civ, sez. II, 24 novembre 2003, n. 17871. *cit*.

[43] Villone M. *Costituzione liberale vs legislazione illiberale. Il caso del testamento biologico.* 1 maggio 2011, in *www.costituzionalismo.it*.

that cannot be prevented but has a legal obligation, is equivalent to the determination of it"

In such circumstances, the doctor who tries to persuade the patient to be healed, to the extent permitted by law and by the rules of professional conduct, is not liable for any adverse effects that could arise in case of interruption of therapy.

6. The interruption of life-saving therapies as a result of the withdrawal of consent

The undisputed right of constitutional significance, to dispose freely and independently of the body, in addition to contemplate the refusal to initiate a therapy, indeed of vital support, can also legitimize the decision, consciously assumed, to terminate a cure already started, at every stage of life[44], even if terminal, although it might lead to the "sacrifice" of the asset's life itself[45].

Just like the refusal to undertake any course of treatment, the right to revoke the consent given from the start can easily be derived either from the constitutional provision as well as the Oviedo Convention (art. 5, par. 3), where the absence of an explicit legislative provision imposes a particular prophylaxis.

This legitimate revision of the original intention to receive a treatment, as a manifestation of the individual's right to self-determination, could not even exclude Those who, though capable of discernment, suffer from a severe disabling disease That will completely reduce movements therefore enabling the patient to refuse the therapy already started.

In opposition to this correct reading of the areas of autonomy allowed by the provisions of the Constitution and the law on consent, and its legitimate revocation. A new and hostile interpretation has been developed, on the occasion of the famous story

[44] Cass. pen., sez. IV, 30 settembre 2008, n. 37077, in *http://www.altalex.com/index.php?idnot=43636*.

[45] Cass. civ., sez. I, 16 ottobre 2007, n. 21748, *cit*.

that has affected Piergiorgio Welby, to an intervention by a third party, designed to meet the demand of the patient to discontinue the use of life support (pharmacological or instrument type, such as the nose/gastric or respirator). According to this argument, in such circumstance the typical offences would be configure, with the effect of a "concealment that operates a contributory cause deadly"[46], introduced by the Criminal Code of 1940, in Articles. 579 (murder of consent) and 580 (incitement or assisted suicide), relating to behaviors still able to arouse particular social alarm.

For this orientation, certainly elusive of the potentialities recognized by the constitutional provision on the right to self-determination, any "interruption of treatments through an action (turn off and unplug machines, remove pipes and drainage...)" would result a doctor's responsibility that proceeding with interrupting his intervention, would contribute to subtract the patient his "means to live."[47]

Although the performance of this active behavior (disconnect "plug"), by a third party, is not able to directly and immediately cause the patient's death, equal to the administration of a poison, the effects that would result, in following the interruption of the supports for the survival, would lead, in each case, as an inevitable consequence, at a shutdown of the vital functions.

The analogy of the unfortunate outcomes that would result, in spite of the clear difference in the actions of the doctor (it is certainly not comparable to the administration of a poisonous substance with the posting of a life support, which would only reduce the capacity of the body's resistance, allowing the existence its own inexorable natural course), this doctrine leads to doubt the legality of the withdrawal of consent, previously lent to receive this care in the absence of an explicit legislative provision that can remove the impediments contained in articles. 579 and 580 Criminal Code.

[46] Giunta F. *Eutanasia e diritto di rifiutare le cure*, in (newspaper) *Il Denaro-Spia al diritto*, 25 giugno 2008.

[47] Tripodina C. *Il diritto nell'età della tecnica. Il caso dell'eutanasia*. Napoli: Jovene; 2004: p. 52, which expresses concern in regard to this address doctrine contrary to the interruption of the operation of tools for life support.

Proceeding on this way[48], rigidly anchored to the prediction of the code (introduced during the Fascist period), little attention must be paid to developments towards the interpretation of individual autonomy, as permitted by the subsequent constitutional text, not even the explicit consent of the person concerned cold lead the doctor to put an end to health treatments in progress, "each time as an effect of a medical practice as such" - that is even equalized by this doctrine to a "real practice of active euthanasia" - "should be determined for a safe, serious and irreparable harm to the health of the patient, even more so if it were to occur the outcome of the immediate and certain death."[49]

Anyway, although it cannot certainly be underestimated the opinion of those who believe it to be suitable for the introduction of a specific legislative provision derogation of the limits contained in the criminal law, with the intent to justify the exercise of an "action by omission" and to remove the persistent doubts of interpretation, which would continue to affect the medical practice, certainly it seems more reasonable the position of those who, on the contrary, feel more correct when taking the necessary guidelines on the interpretation of the rule in the code, right from the axiological point of view introduced by the Republican Constitution.

In rejecting an equivocal assimilation of the act in active euthanasia to an interruption of life-sustaining therapy, which interferes with the natural continuation of human existence, which seems to lead the prohibitionist address recalled, in Italy, things seem to have had the best, despite initial uncertainties, a jurisprudence that has considered the prevailing right to withdrawal of consent to medical treatment, as allowed by art. 32 Cost, compared to the prohibitions imposed by the criminal standard (Articles 579 and 580), instead to pursue the behavior of active euthanasia intended.

[48] Ruggeri A., *Le dichiarazioni di fine vita tra rigore e "pietas" costituzionale (2009)*, in *http:/ / www. forum costituzionale.it/site/images/stories/pdf/documenti_forum/paper/0156_ruggeri.pdf*, p. 9.

[49] Ruggeri A., *ibidem*.

According to a constitutionally reading of these provisions of the Code, "which ensures' a sphere of freedom impassable, precisely marked by the relationship of man with himself"[50], "from our legal force can arise" a general rule "that will provide for a direct punishment as regards to a range of behaviors that could still cause deep disapproval, as for active euthanasia, with the exception of the "case of interruption or non-commencement of medical treatment (always at the patients request)."[51]

Moreover, it is a widely believed opinion in jurisprudence by which the physician's responsibility for failing in the therapy exists, as there is for him a legal obligation to practice or continue a therapy and it ceases when such obligation fails: and the obligation, based on the patient's consent ends, and it intervenes the legal duty of the physician who has to respect the wishes of the patient contrary to the care-when consent forfeits as a consequence of refusal of therapies by himself.[52]

But next to the provisions (Articles 2, 13 and 32 of the Constitution), designed to enhance the autonomy of decision-making, further support for the right of withdrawal of consent would also be obtainable by art. 3, 2 ° of the Constitution, as a guarantee to substantive equality, in order to avoid unjustified discrimination between those who, having the ability to move, could avoid the remedy of life support and those, who on the contrary being prevented, because of disability, would be forced to suffer, despite their wish.

Once again, however, the interruption of life-sustaining procedures could certainly not exempt the physician proceeding and the health facility at which the patient is terminally ill, to remedy the conditions of suffering that may occur using the opportunities offered by palliative medicine.

Despite the presence of unequivocal support in favor of the constitutional and ethical[53] the possibility of abandoning to continue in

[50] Palermo Fabris E. *Diritto alla salute e trattamenti sanitari nel sistema penale. Profili problematici del diritto all'autodeterminazione.* Padova: Cedam; 2000: p. 191.

[51] Rescigno G.U. *Dal diritto di rifiutare un determinato trattamento sanitario secondo l'art. 32, co. 2, Cost., al principio di autodeterminazione intorno alla propria vita,* in Diritto pubblico, 2008, 1, p. 95.

[52] Cass. civ, sez. I, 16 ottobre 2007, n. 21748, *cit.*

[53] Art. 35.

the treatment of life-sustaining, capable of directing the same interpretation the provisions of the code, could not however be ruled out, as an obstacle to a careful implementation of the wishes of the patient's withdrawal , the arrival of a refusal by the doctor who decides not to initiate procedures contrary to his own ethical / professional convictions, as also admitted by the case law that has been received, proof of continuing uncertainties of interpretation (relatively, for example, to cases Nuvoli and Welby[54]), to different solutions.

The need, however, confirmed by the National Bioethics Committee[55], however, to grant the request of the patient to stop treatment in the presence of a refusal by health and his team, could then induce our lawgiver, the example of the provisions in France[56], to introduce proper regulation which, in full respect of the constitutional framework, fully regulate all developments in the therapeutic relationship, in order to ensure ample protection to the will (to continue or discontinue treatment) manifested by the patient.

[54] In the John Nuvoli case, who suffers from muscular dystrophy and amyotrophic bedridden, the Public Prosecutor of Sassari excluded the possibility that the doctor, albeit indirectly, could turn off the fan reservoir which would have implied a "business interests" (in newspaper *La Repubblica*, 13 febbraio 2007). For Piergiorgio Welby, instead, the Trib. Roma, GUP, 23 luglio-11 ottobre 2007, n. 2049, in *Bioetica,* 2008, p. 146, while recognizing "the act of detachment of the respirator an undeniable interventionist conduct, which cannot be assimilated, and not only from the point of view of nature, conduct, if yes, omission of the doctor who merely does not start a therapy if not desired by the patient, "was received by the finding of the existence of the provisions contained in article. 51 Criminal Code, which allows to accommodate the patient's request to discontinue medical treatment, as also by the very constitutional provision.

[55] CNB, *Rifiuto e rinuncia consapevole al trattamento sanitario nella relazione paziente-medico,* 24 ottobre 2008, in *http://www.governo.it/bioetica/pareri_abstract/rifiuto_rinuncia_consapevole_ paziente_medico_24102008. pdf*.

[56] Where was the Law no. 2005-370 of 22 April 2005 relating to patients' rights and end of life (so-called loi Leonetti) which, in recognizing the right to "let die", has - even in the presence of advance directives "concernant les conditions de la limitation ou l'arrêt de traitement" (art. 7, introduces the art. L. 1111-11 of *Code de la santé publique*) - the abstention by the medical care that may result in a "obstination déraisonnable" in quanto "inutiles, disproportionnés ou n'ayant d'autre effet que le seul maintien artificiel de la vie" (art. 1, that integrates the art. L. 1110-5 del *Code de la santé publique*).

7. Conclusive comments

The persistent prescriptive uncertainties over the operative range of "given consent" by the patient, especially when directed to plan the subsequent medical treatment (throughout the preventive subscription of declarations given in advance) that should our legislators towards the introduction of corrective actions in order to reduce the misunderstandings that could inexorably follow the development of the therapeutic relationship.

As an evidence of the fact that judges examining similar cases, have come to different conclusions, relating to the manifestation of a valid informed consent and by consequence to the definition of the doctor's responsibility, more reforms, on the basis of a clearer legal framework, are needed so to regulate the relationship between doctor and patient.

A new set of reference standards[57], in line with the areas of warranty obviously allowed by the constitutional provision and the conspicuous discipline brought about by international charters on the collection for preliminary consent, free and informed of the involved person would have the important benefit of brightening the development of the therapeutic relationship, and also reduce the potential prejudices especially for the sustainability of health care spending, which could result from the effects of a inappropriate medicine, which workers could use with the intention to escape from unwanted and unpredictable liability actions.

[57] Moreover, relied on by the associations representing them (in newspaper *La Repubblica* del 23 giugno 2013) that, in denouncing the deterioration of the relationship between the physician and the patient, due to an exponential increase in complaints of medical negligence and claims, the hope 'adoption of "precise rules on medical liability", given the inadequacy of the reforms contained in the decree law "Balduzzi" of 2012, next to a legal recognition of medical procedures. The foregoing also in order to "prevent the escape of the young" by specialization (such as surgery, orthopedics) considered excessively risky.

Discussion on birth and beginning of life

TRUTH AND MEANING OF THE HUMAN EMBRYO'S LIFE: FROM ANCIENT GREECE TO THE CONTEMPORARY BIOETHICAL DEBATE

Emilia D'Antuono[*]

Abstract

Science describes the stages of embryogenesis and delineates the embryo's biological identity. This paper draws on scientific conclusions in dealing with the representation of the human embryo in history and with the interpretation of its reality and meaning in relation to some critical aspects of western culture. The question of prenatal human life is long lasting. There are different answers to this question, depending on particular eras and on the motivations that have inspired the researches of philosophers, scientists, jurists and, recently, bioethicists. A wider historical-philosophical perspective can, perhaps, help us to appreciate that "new" and "old" are interdependent, with continuity as well as discontinuity, and that not only the present era has faced crucial questions, whose solution involves ethics, law and politics too.

The paper focuses on the following points:

1: the question of knowledge that triggered research on prenatal life in the pagan world.

2: the "great turn" following the advent of Christianity and the predominance of the quest for salvation as the main motivation for the search for knowledge.

3: the modern era: the twofold nature of the quest for knowledge and meaning. The momentous turn produced by the Scientific Revolution.

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4: the twentieth and twenty-first century: A: the significance of the Italian as well as international debate on the voluntary termination of pregnancy in the 1970s; B: the historical emergence of bioethics and the changes in the view of the embryo, following the relocation of the issue of prenatal life into the wider context of the defense of life; C: the current renewed attention to the embryo as a form of "otherness". The wide agreement on its value and on specific forms of protection.

Among the problems which offer thinking matter, elaboration and critical production of bioethics, issues relevant to "nascent life" are definitely crucial. Crucial in a literal sense: from this problematic core multiple routes depart as from a crossroad, the dilemmas coming from them are as heavy as a cross, by reason of the suffering connected to giving birth, for the burden of conflicting values deriving from the goods at stake. It is difficult to hypothesize today the budding of the rose of reason in the midst of this reality, to use a Hegelian image.[1] This budding requires assistance from scientists, philosophers, theologians, jurists, common men and women who elaborate and actually practice ethical knowledge in their life choices.

An especially obscure issue, due to the dilemma it poses and the conflicting interpretations it has produced, is certainly the identity, meaning and value of a life travelling towards birth. If we consider the high duration of our questioning about the embryo and the multiple answers to this questioning, which are never univocal, we are tempted to define it as the most enigmatical of human creatures, whose mystery, far from being solved, becomes deeper and deeper as our knowledge about it increases. What is true in the case of many modern conquests also seems to be true especially for the embryo: once an enigma has been solved, new ones crop up, as Goethe would say.[2] The truth is that the human

[1] Hegel GWF. *Grundlinien der Philosophie des Rechts* (ed. G. Lasson, 1920) tr. it. *Lineamenti di Filosofia del diritto*. (ed. Franco Messineo) Bari: Laterza; 1965: p.16.

[2] Goethe JW. *Faust*. vv. 4040-4041.

embryo is different from any other living being. It acquires a specific meaning, which is questioned whenever our knowledge illuminates it and the ethical and normative choices concerning a nascent life become obligatory for both the individual and society. The fact that both ethical and normative decisions are not as cogent as scientific discoveries adds a further difficulty: they emerge from a context which is not merely based on knowledge and they need to be considered in their complex and delicate elements. An issue that poses strong questions is whether the right to life should be extended to the embryo as well – that very right to life which is universally recognized as being unalienable in those who are born, whatever his/her juridical (citizenship, nationality) or physical status, a right which is legally protected by human will.

The first important subject for discussion breaks in: "right to life" is a term that immediately entails the polysemy of the word "life" and the historical processes that have led to the centrality of this abstract concept, which can defeat and send back into darkness the reality of individual lives, marked by the irreversible historicity of one's biography in its connection to the history of the world. The risk of an "abuse of the concept of life"[3] has been authoritatively denounced: this risk consists of a speculative abstraction able to produce a denial of the history and biography of existing humans.

The most complex and delicate problem is still the status of the embryo. This subject raises questions for believers of different religious confessions as well as laymen from a variety of cultural and ethical contexts, but it does so in different ways, coming up with different answers. To delineate the legal status of the embryo implies answering the question whether the embryo is or must be a legal subject or otherwise protected in a variety of ways. A definition of the ethical or bioethical status of the embryo involves us in finding an answer to the question as to whether the embryo has an absolute value or its value must be related to and measured in

[3] See Duden B. *Der Frauenleib als öffentlicher Ort. Vom Mißbrauch des Begriffs Leben* (1991), trans. *Il corpo della donna come luogo pubblico. Sull'abuso del concetto di vita*. Torino: Bollati Boringhieri; 2004.

connection with other values, in the historical-cultural context we use as a point of reference, by taking into account a relevant reflection involving nowadays culturally-different countries. Conversely, the ontological status of the embryo is the very definition of the embryo's identity in itself: human living being, person, thing, or another kind of entity. On the one hand, there is wide disagreement about the thesis defining the embryo's identity on the basis of its belonging to so-called human nature, and thus requiring for it the consideration due to a person. On the other hand, there are stances which define its sense and value through the historicity which allows life to define itself as human. In one case, nature presents itself as a safe and all-embracing place, such as the "terra mater" in Antheo's myth, where energies are regenerated and man finds sure ways to assess good and evil by coming back to it. Conversely, the consideration of historicity implies a different evaluation of meanings and values, which requires us to take responsibility and define goods adequate to each and every occasion, also taking into account the different contexts of individual and collective life. In both cases, the recourse to science, which remains a condition to understand what we intend to evaluate, reveals itself as inadequate and undetermined. Science provides us with a description of the embryo's biological identity, of the temporal timing of its birth and development, but it cannot and it must not give us any information about the person, nor give us any assessments, which are part of ethics' domain. The thesis expressed in the Declaration of the Holy Congregation for the Doctrine of Faith *De abortu procurato* is authoritative and we can certainly agree with it. Against all those who try to define abortion as legitimate through scientific evidence, according to which the embryo is not a person, this Declaration rightly states: «It is not biology's prerogative to give a decisive judgment on philosophical or moral matters, such as the issue of the moment when a human person is constituted or the legitimation of abortion».[4] The bioethical perspective that originates in a consideration of the historicity of life – and, hence, in a

[4] *De abortu procurato* in *Enchiridion Vaticanum*. Bologna: EDB; 1979: vol. 5, p. 431.

"specification" of it as life of actual human beings – cannot but subscribe to this thesis: it is not the biological evolution of the embryo's development as described by science that can immediately produce value and meaning. The danger of biologizing the ethical discourse, inscribed in the recourse to science as a normative authority, has already produced moral bankruptcy in the past and brought disgrace to human beings in tragic experiences of scientism.

1. Is time the embryo's being? Between Paganism and Christianity

Today, science is perfectly able to reconstruct and describe the timing of the biological development of pre-natal life, that is, the embryo's temporality.

I would like to reconstruct, albeit very succinctly, what the embryo was to men in the course of history, namely how its reality and its meaning were interpreted in some crucial stages of our culture. I would like to shed some light on the embryo's temporality, which is its peculiar historicity, on its belonging to the horizon of truth and meaning opened up by human action and thinking, and on its being within such a horizon.

A wider historical perspective might perhaps help us to understand that ancient and new are interrelated, and that not only our time has had to face crucial issues and the burden of the responsibility to find answers. Often this silent creature, this being whose shadow, sounds, health and diseases (which have a high emotional impact) have been made visible only by the latest developments of technoscience, has changed its configuration in accordance with the different formulations about its identity.

This long-lasting question, nevertheless, is not always the same, even in the reasons that give rise to it. The ways we reach an answer, and answers themselves, change according to the context within which the problem arises.

The ancient pagans preferred a question leading to knowledge.

In the horizon opened up by philosophical and scientific interest, hypotheses aimed at dissipating ignorance about the initial stages of

life emerged in the ancient world. Theses about the delayed ensoulment of the embryo are counterbalanced by those about its immediate ensoulment, starting from the hypotheses gradually labeled over the centuries as "preformism" and "epigenesis". This alternation has no equivalent, but is enough to lead us to understand the impossibility to reach unambiguous conclusions.

The *Corpus Hippocraticum*, attributed to Hippocrates, but consisting of heterogeneous texts from different eras, presents the earliest theories on the embryo, namely the oldest elaborations of the so-called "preformism": man is contained *in nuce* in a tiny, primigenius living being.

This theme is also present in the wide context of Plato's thought, with the thesis of the original animal whose soul exists before it, as reported in *Timaeus*.[5] Aristotle maintained that the vegetative, sensitive and rational souls follow one another in the embryo's development: in other words, this is the doctrine of progressive formation which was later called epigenesis.[6]

With the advent of Christianity, the emergence of the theological question, which has the primacy in comparison with the gnoseological, changes the scenario: the gnoseological quest was then undertaken to attain ultimate meaning. The quest for pure knowledge was then turned into the great drama of the origin of the soul, of the ways in which the original sin is passed on, and of the possibility of eternal salvation. A problem that could not be neglected, in that context, is the detection of the exact time when the soul became united to the body. In Christian thought, this problem is perceived as ineludible because an answer to it requires us to make decisions about when and whether to christen the fetus and how to judge and punish abortion in connection with earthly life, which requires rules. Should we compare abortion to murder?

[5] See Plato. *Timaeus*. In particular, Plato mentions (*ibid.* 91, 92 d) the planting of «animalcules that are invisible for smallness and unshapen; and these, again, they mold into shape and nourish to a great size within the body».

[6] See Aristotle. *De generation animalium*, II, 3 736 a-b. trans. *Riproduzione degli animali* in Id. *Opere*. Bari: Laterza; 1973: vol. V, p. 206 ss.

Themes such as the soul, the ensoulment of the not-yet-born, and the transmission of sin are extremely cogent as they have to do with the ultimate destiny of men, namely their possible (or impossible) salvation.

The responsibility weighing on men's shoulders is significant. In many respects, it is not different from the disquieting doubt about the survival of human life and the biosphere, which is the subject of many questions in today's world.

The interpretation of the identity of the embryo is intertwined with the great history of the formation of Christian doctrines and heresies.

At the time of the Church Fathers, the issue of the origin of the human soul could not but call into question the moment of its union with the body and, thus, the ensoulment of the embryo. Tertullian's and Lactantius's views exemplify the connection between the identity of the embryo and these important philosophical and theological questions. Although differing significantly in their approach, these two authors indeed share a common engagement in formulating Christian theology.

Tertullian argued for the original coexistence of body and soul, by putting forward the thesis that the soul, not directly created by God, shares the same destiny as the body from the beginning to the end. Tertullian's traducianism, namely the theological thesis that the original sin infects the soul and is transmitted *per traducem* – a thesis that was eventually condemned by the Church as heretical –sheds light on the mystery of the embryo.[7]

Lactantius' creationist thesis opens up a different perspective about the identity of the embryo: the transmission of the flesh belongs to man's domain, but it is God that creates the soul, which is not united to the body after birth but "*post conceptum protinus, cum fetum in utero necessitas divina formavit*."[8]

According to Augustine, who also leaned towards traducianism, it is virtually impossible to provide a certain and unambigu-

[7] See Tertullian. *De testimonio animae* in Migne (ed.). *Patrologia latina*, I, pp. 607-618.

[8] Lactantius. *De opificio Dei*. in Migne (ed.). *Patrologia latina*, VII, p. 69.

ous answer to the question of the origin of the soul, which implies interesting problems about the embryo. The only certainty for him is that the beginning of life is to be placed before birth, while he doubts that human inquiry, albeit learned and careful, can really solve the mystery.[9] Augustine's attention to the legal consequences of doctrinal theses led him to point out – in his commentary to the text of *Exodus* 21, 22 s. concerning the punishment for the crime of abortion to be assessed according to whether the fetus is already formed or not – that Mosaic law does not define the fetus as a human being, since it does not compare the punishment for abortion with that for murder.

Over the centuries, the thesis of the delayed ensoulment came to play a fundamental role in ecclesiastical law about the crime of abortion. Meanwhile, the Penitentials highlighted the need for different assessments of this crime by means of their imposing different penalties.

When it comes to the philosophical-theological aspects of the debate, one cannot avoid referring to Albertus Magnus, who defended the doctrine of the delayed ensoulment by differentiating the period of the completion of the embryo according to its gender (the 40th day for the male, the 90th day for the female). Also, in this respect, one cannot but make reference to St. Thomas Aquinas, the great creator of the doctrinal structure of the Church. In his *Summa Theologiae*,[10] he explicitly appropriated Aristotle's thesis that the body is formed and prepared to receive the soul in successive times. It is not at the moment of the conception that the soul enters the body: instead, the ensoulment of a bodily matter already formed and prepared to receive the soul takes places on the 40th day. There is first a living entity, the *vivum*, then an animal entity, the *animal*, and lastly a human entity, the *homo*, which absorbs, includes and overcomes the preceding ones. As regards

[9] See Augustine, *Enchiridion and Laurentium sive de Fide, Spe et Charitate* in Migne (ed.), *Patrologia Latina*. XL, p. 272.

[10] St. Thomas adopts the Aristotelian theory, which he quotes in: *Summa Theologiae*. III, 33, ob. 3.

these dynamics, the *Summa contra Gentiles* is illuminating: the formation and corruption of the vegetative soul first, and then of the sensitive one, act as a premise to the insertion of the rational soul from outside.[11]

While being a doctrinal thesis, delayed ensoulment is also invested with the charm of poetry. Dante makes Stazio describe the process of conception and birth, and of delayed ensoulment as well: "as soon as in the phoetus the articulation of the brain is perfect", God "turns to it well pleased at so great art of nature, and inspires a spirit new with virtue all replete, which what it finds there active doth attract into its substance, and becomes one soul which lives, and feels, and on itself revolves", like the "the sun's heat, which becometh wine joined to the juice that from the vine distils" (Dante, *Purgatory*, canto XXV, Longman's translation). [12]

The thirteenth century witnessed the consolidation, not without controversy, of the thesis of the delayed ensoulment.

2. From meaning to truth: paths of modernity

For centuries, scientific knowledge about life did not undergo radical changes. As we have said, for long the quest for knowledge was subjected to a search for meaning, functional to an expectation of salvation, and it was undertaken in the light of the Christian revelation and of the consequent doctrine. In fact, the modern era inherited in its own way the duplicity of the quest for knowledge and of the search for meaning, which makes investigation both complex and difficult, not only because of censorship, but also because of the scientist's conscience, since the modern scientists are still the heirs of a great tradition, whether they accept or refuse the issue of meaning.

His situation is not that of the "innocence of science", where by innocence is meant the absence of moral doubt. In the modern

[11] See St. Thomas. *Summa contra Gentiles*. II, 89.
[12] Dante. *Divine Comedy. Purgatory*. XXV, vv. 37ff.

era, science can no longer be innocent. The possibility of ethical transgression, with a different degree of intensity, is indeed its companion.

Important technical achievements played a critical role in the transformations at the basis of modernity. In *Vita activa, the human condition* Hannah Arendt makes some extraordinary remarks on the telescope and its power to transform the idea men had of Earth and of their relation to it.[13] A new technical instrument, pointed to an infinitely big universe, brought about a change of unprecedented importance in the cultural horizon of the time. I would like to add that, with regard to the subject we are currently investigating, we may say the same about the transformation involving the embryo. The visibility of tiny things, of germs, which the microscope makes possible transmutes the meaning and value of this mysterious agent. Studies on microbes made possible by the new magnifying instruments also influence the question of the beginning of human life and open up different views. Knowledge and assessment are interconnected. The doctrine of epigenesis is contrasted with the preformist theory, that is, with the thesis of the development and differentiation of the existing parts of the embryo since the beginning. Opting for one doctrine rather than the other implies hypothesizing a different time for the ensoulment of the embryo and, thus, a different value for it. We can simplify this by summarizing the two different versions of preformism, naming them respectively "ovism", that is the thesis that the ovule comprises the whole organism while the spermatozoon acts as a stimulating activator of the process, and "animalculism" or "spermism", according to which the spermatozoon contains a fully formed and tiny animal (*animalculus*) which, in the case of the human spermatozoon, is called *homunculus*. The preformist theory consolidated itself over time and was strengthened by the tale, which sounds surreal to us, of a direct view, through a microscope centered on a spermatozoon, of *homunculi* provided with limbs.

[13] See Arendt H. *The human Condition* (1958), trans. *Vita activa. La condizione umana*. Milano: Bompiani; 1989: pp. 184ff.

3. The hands on the procreating body: women and the "unborn" in the 19th and 20th centuries

In the 19th and the 20th centuries, science highlighted the processes leading to fecundation, to the development of life since conception. In philosophical and theological thought, attention was constantly paid to prenatal life and the assessment of its value.

In the second half of the 19th century, a century of remarkable scientific advancements on the subject of the origin and development of life, a historical situation emerged that saw the Church and science facing each other, even in the field of obstetrics and gynecology. This confrontation produced the essential lines of debates that, articulated in a complex way, still affect our time. After the Porta Pia breach, which led to the end of the Church's temporal power, and with the spread of Darwin's theories and the science of evolution, and hence with the dissolution of the Christian interpretive horizon to understand the development of life, the Catholic Church, keeping to its creationist views, redefined its role as depositary of an ethics of life drawing on a traditional and rigidly natural law perspective. In that context, the paradigm of a radical dualism between woman and embryo was set up, which consolidated through a dissymmetry between the two parties involved in the procreation process to the advantage of the embryo, to such an extent that the safeguard of the soon-to-be-born baby's life was given priority over the mother's, and a disproportionate analogy between abortion and infanticide was argued for. The legitimacy of sacrificing the mother on the scene of a difficult birth, by forbidding any potentially dangerous intervention on the soon-to-be-born baby, is rooted in that context. Thus a paradoxical symmetry was produced between the stances of science, which arrogates, as is evident in Nagle's work,[14] the decision about life and death on the scene of birth, and the views of the Church, which

[14] On Carl Nägle's *De iure vitae et necis quod competit medico in partu,* see Betta E. *Tra il non-nato e la donna* in GUARNIERI P (ed.). *In scienza e coscienza*. Roma: Carocci; 2009: p. 107.

elaborates doctrines that no longer draw on the old debates about immediate or delayed ensoulment, but focus on the central role of the soon-to-be-born baby. The roots of this paradoxical symmetry are unique: they consist of the deduction of an ethics of "truth", however we conceive of it. The philosophical horizon, if we may say so, is common to both science and religion: the possibility to immediately deduce the rules of action, and therefore of morality and ethics, from metaphysical or scientific assertions, posited as absolutely true, is indeed argued for.

Finally, without any recourse to Science, Catholic theology asserts the intangibility of the conceived embryo since the moment a spermatozoon enters the ovule, thus considering the fecundated ovule as the carrier of a person's value. Any hypothesis of intervention is considered unacceptable.[15]

4. Autonomy, female habeas corpus, re-signification of the embryo

A crucial time for the discussion of the status of the embryo, and therefore in the history of the views adopted in the reflection on prenatal life and its meaning, occurred in the 1970s, when the national and international debate focused on the voluntary interruption of pregnancy (VIP). That debate witnessed a harsh confrontation between the opponents of the legalization of this practice and many people who demanded that abortion be regulated by law or no longer considered a crime. For the opponents of any legalization of the VIP, the embryo ought to be considered as "one of us": this view entails the equivalence, which has a significant emotional appeal, of the fetus and the baby, abortion and infanticide. Diametrically contrary to that was the view demanding the

[15] Besides the above quoted text *De abortu procurato*, the entry "ensoulment" in the *Catholic Encyclopedia* is also exemplary: "A Catholic person is free to accept the hypothesis they most like. The Church considers as guilty of the crime of abortion all those who assist in procuring the expulsion of the human embryo in whatever stage of its development, but this is not to be taken as a theoretical definition of the old problem".

mere cancellation of the crime of abortion from the penal code. Those who reduced abortion to the "private" sphere simply disregarded the embryo as an entity worth considering and, hence, they regarded it as not subjected to any regulation whatsoever.

Finally, we cannot avoid making reference to the proponents of legalization, who asserted the need for regulations by promoting the legal discussion of something that was considered a crime until then, a crime practiced in a secret and clandestine way. Many have maintained that those in favor of the passing of a law about the VIP considered a discussion on the safeguard of nascent life to be secondary. But I do not share this point of view.

In order to understand this issue, we need to keep in mind the importance of the social problem of clandestine abortion, with the risks of illness and even death it implies, which at the time had an urgency that has now been all too easily forgotten, an urgency which our laws have now partly solved.

We also need to consider, in a historical perspective, how strong and heartfelt was the need for women to advocate self-determination, namely a decisional capability which had not been fully recognized yet. This was a decisive step in the century-old struggle to free the female body from the ties imposed on it, the most hateful of which was the obligation to go on with pregnancy until childbirth, even when pregnancy was experienced as unacceptable for various reasons. The struggle for the legalization of the VIP required the removal of a big obstacle to the full enjoyment of *habeas corpus*, particularly of the right to the intangibility of one's body by external powers that might infringe on the principle of autonomy. Therefore, this was also an attempt to fully achieve female citizenship, which in the public debate came to acquire the same importance and significance as the right to vote.

Nevertheless, we cannot say that the question of the identity and protection of the embryo was merely disregarded by those who strongly asserted the need for a law. It was not like that. We ought to take into account, besides some extreme positions which identified the embryo as an irrelevant mass of cells, the ethical suffering of those who, although persuaded of the ethical rele-

vance of the problem of the embryo, considered law n. 194 as morally binding and thus decided to vote for it in the referendum. By voting in favor of that law, they did not consider the embryo as a worthless thing, as "nothing": in the conflict about goods and values involving the embryo and the woman, they deem it right to give precedence to those who, as maintained in a famous pronouncement by the Constitutional Court of Law, were already persons, that is to say, to women. Fully aware of the conflicting values at stake, they made a situational decision about the "good" that should take priority. We should point out that the ethical reasons for human decisions are important and they should not be overlooked or done away with. It is indeed from the ability to face and solve dilemmas by making responsible decisions that new horizons of value and meaning arise.

The issue of freedom is unavoidable, for it involves the question of the legitimacy of the VIP and the acknowledgement of the peculiar condition of "two in one" which characterizes the procreation process, whose unifying scene is and remains the woman's body and soul, since the woman is to be regarded as ethically and legally competent and, thus, as a citizen, fully and rightfully.

So many closely connected issues require us to reconsider the principle of autonomy, which has become key in the bioethical debate about various subjects and is strongly advocated for by women's thought and action, with special regard to the issue of the relation between the woman and the embryo.

Women's claims to self-determination have acquired different meanings over time. No doubt, the important theme of autonomy is the common thread across modernity and is still an unachieved aspiration of human beings and peoples. In the difficult history of the gradual affirmation of self-determination, the turning point was the assertion of the public nature of autonomy, along with the acknowledgement of ethical capability in all human beings.[16] Both terms refer back to Kant. Self-determination, as advocated

[16] See Koselleck R. *Begriffsgeschichte* (2006), trans. *Il vocabolario della modernità*. Bologna: il Mulino; 2009: p. 75.

by the movements for women's emancipation and by 20th century feminism, is a concrete specification of autonomy, the affirmation of the actual exercise of it in the context of common life.

In the 1970s, women's advocacy of self-determination, in its many articulations, was a request for self-government by a subjectivity that had transformed the body into an integrated part of human identity, by then characterized by a freedom which ought to be protected against any attempt of control.

By using the term "self-determination", the feminist movements of the 1970s, despite their diversity, started new identities, new ways of living one's body and self, freed from powers that, in both visible and invisible ways, had burdened it with heavy chains.

The evocation of patriarchal power and ties acted as the delineation of the power to fight, of an *Ancien régime* to bury.

The legitimation of the VIP meant the coming together of a deep desire for freedom and the construction of an identity.

In Italy, self-determination, which was advocated for in order to achieve the de-penalization or at least the regulation of abortion, was also relevant to the drama of women enslaved by the threat of unwanted pregnancies, of an "honorable crime" or of a "marriage for reparation", which erased the crime of rape and consigned women to the life imprisonment of a conjugal life to be lived with their rapists. It was relevant to the social drama of clandestine abortion. The deprivation of woman's identity as a "person" also entailed the arbitrary attribution of the fetus' legal subjectivity (arbitrary if we consider Article 1 of the Civil Code).

After the passing of the law, something has changed over time.

The truth is that the achievement of legally acknowledged self-determination for women opens up new ethical scenarios. Whereas in our time there are the conditions for procreation to be a responsible choice, thanks to the permissibility of contraceptive methods and the regulation by law of the VIP, and whereas abortion is therefore devoid of any clandestine character because it has become legal, recourse to abortion remains a great failure, not only psychological but also ethical. Today abortion is a failure in the management of one's adult age and autonomy. More clearly,

it denotes a failure in the acquisition of responsibility, precisely of that kind of responsibility that law n. 194 referred to in its very first article, when dealing with responsible procreation.[17] In fact, responsibility entails considering the "other" whom we are answerable for. And the "other" we talk about is also the embryo, as Anna Bravo, the historian who started a complex debate on the relationship between the woman and the embryo, has observed, while never omitting the need to consider that the development of the dual relationship has the female body and soul – a subjectivity burdened by freedom and responsibility – as its precondition.[18]

The acknowledgement of the dimension of "otherness" in the embryo while respecting female subjectivity, thus opposing the thesis of a dualism that compares the woman and the embryo and makes the "two in one" of pregnancy conflicting to the extent of reaching *polemos*, denotes the maturation of a different and deeper sensibility.

Many factors have contributed to this new sensibility. Moving the discussion about the embryo from the controversial context of the VIP to the wider horizon of bioethics, with its primary and fundamental focus of interest on life, has certainly played a crucial role – an interest which, despite divergent interpretations, has had the great merit of leading to new questions about the possibilities and limits of the concept of life, thus forcing thought to face the historicity of life in a new and problematic context.

5. The contemporary debate

Despite the extension and seriousness of the international debate, it is a fact that questions about the embryo, its identity and its meaning do not have common answers. In particular, there remains a distance between the views of the Catholic Church, which

[17] Article 1 of the law n. 194/78 on the voluntary interruption of pregnancy states: "The State guarantees the right to a responsible and fully aware procreation".

[18] See Bravo A. *Noi e la violenza. Trent'anni per pensarci*. "Genesis". 2004; III (1): 17-56.

maintains that life must be considered as the life of a person since conception, and the lay perspective, which has gradually adopted the so-called doctrine of gradualism, that is, the acknowledgement of a different value according to the different stages of the embryo's life – an acknowledgement that, while rejecting the identification of the embryo with the newborn, admits some legal protections. It is easily understandable that the gradualist perspective has required more and more detailed information about the chronology of the embryo's biological development. But there are no significant doubts to solve about its biological development, as science has already described it. The crucial point is to reach an agreement about the meaning and the ethical value to be given to the different moments of the embryo's development, which we cannot expect science to do.

An important point in the bioethical debate is the final document of the Warnock Commission,[19] which, significantly enough, received only a majority of votes. It established a difference between pre-embryo and embryo, by proposing a threshold of fourteen days since conception as the criterion to establish the limits and possibilities of intervention.

An interesting contribution provided by science to the bioethical debate on the embryo is the identification of the "ootide", by which term is meant the egg cell after the spermatozoon has entered it, in the phase preceding the fusion of the two pronuclei.

The conference *From Oocyte to Blastocystis: The Generational Passage in the Human Being*, held in Rome on 28 September 2004[20], defined the duration of the presyngamic phase, namely of the period of 30 to 40 hours when the mother's and father's genetic kits are not joined yet, and accordingly the living being's genome, which comes from syngamy, is not formed yet.

[19] As regards Mary Warnock, who chaired the Committee of Inquiry into Human Fertilisation and Embryology, see Warnock M. *Making Babies* (2002), trans. *Fare bambini*. Torino: Einaudi; 2004.

[20] On this topic, see the document issued by the CNB, *Considerazioni bioetiche in merito al c.d. "ootide"*, at: http://www.palazzochigi.it/bioetica/testi/Ootide.pdf

Some bioethicists, including some Catholic ones, have used the data provided by the symposium to posit that the "ootide" could be considered in an ethically different way, in comparison with the next phases of the embryo's development.

The Catholic view in this respect is clear: as I have said above, since the beginning of the process of fecundation, that is, since the spermatozoon's penetration in the ovule's membrane, the conceived embryo should be considered intangible as a "person".

The truth is that the problem of the embryo's ontological identity, its nature as person or non-person is technically irresolvable, as the answer to the question concerning which moment of the prenatal process can be identified as the beginning of a person's life cannot be given through acceptable or verified scientific truths, notwithstanding the efforts made by the mass-media to maintain the opposite view, thus constricting science in conceptual frames where it does not belong and which result in a violation of its identity. What the embryo is (i.e. person, non-person, not-yet-person, an entity to protect in various forms) derives from decisions, made in full awareness, which have become ethical choices, for the obvious reason that being a person is an axiological dimension, which has historically entered man's self-awareness and his values. It does not result from biology, but it is a legal and ethical attainment.[21]

Bioethical thought, a structured form of knowledge since the 1970s, has led to a displacement of the issue of the embryo from the debate on the VIP to a wider context of critical interrogation which has also had to cope with an extraordinary novelty brought about by technoscience – the creation of embryos outside the female body. Medically-assisted procreation techniques started a debate about the possibilities and limits of an intervention on the embryo in the phase preceding its transfer to the mother's uterus. Ethical and legal knowledge acquired thanks to the debate about the VIP offers some points of reference for assessing the new questions. Nevertheless, the novelty of an embryo outside the mother's

[21] "*Persona iuris vocabulum est*" (Vico G. *De Constantia jurisprudentis liber 2* in Id. *Opere 2* a cura di F. Nicolini. Bari: Laterza; 1936).

body and the decisional responsibility that the laws on the VIP grant to women, with some differences at the international level, requires the elaboration of different interpretive categories to assess the issue. The international debate caused by Habermas's volume[22] unmistakably proves it.

The re-signification of the embryo's life and meaning cannot be neglected by bioethics in its continual relation with the novelties achieved by technoscience and it marks an historical turning point of no little value, which also denotes, in my opinion, the "historicity" of the embryo.

At present, the question of the creation of life, which falls within the domain of bioethics, is part of the debate about life, the competences that give life a conceptual form, and the meanings inscribed in it by man's century-old ethical, legal and political commitment. But it is also part of the philosophical reflection about the historicity of life, the historicity that acknowledges and signifies the unavoidable individuality of every single human being. Every human being is responsible for assessing and deciding, in the context of the relationships that give substance to their living in time, about those segments of existence which have been relegated to the haziness of what precedes birth and, paradoxically, to the vagueness of the final phases of life. Those are fractions of time that belong to life and therefore to the assessing dimension of human existence.

That is why the nascent life and dying life are linked in one question, in a cultural context committed to combining the meanings and values transmitted by history through new conceptual frameworks.

[22] See Habermas J. *Die Zukunft der menschlichen Natur. Auf dem Weg zur liberalen Eugenetik?* (2001), trans. *Il futuro della natura umana. I rischi di una genetica liberale*. Torino: Einaudi; 2002.

THE HUMAN EMBRYO BETWEEN *RES* AND PERSON: AN ONTOLOGICAL PERSPECTIVE INSPIRED FROM THE LEGAL DEBATE OF THE ANCIENT WORLD

*Osvaldo Sacchi**

Abstract

In a recent article published in the Journal of Medical Ethics (After–birth abortion: why should the baby live?) Andrea Giubilini and Francesca Minerva support the thesis, really surprising, that the fetus and a newborn would be deprived alike of the moral status of personhood. The ontological human embryo statement leads me to reflect on the theme of the person in relation to the figure of the unborn child, a theme that actually touches a raw nerve of the contemporary debate on human rights. It seems incredible but it is still difficult to say exactly what is a person and what is a human embryo. One reason for the delay in a correct definition of these concepts is certainly that the former has had to deal in the West with, at least, two major anthropological mutations of the true idea of human being. Primarily the notion of the person built on the basis of the Aristotelian principle of non-contradiction (with Roman law and theology of the Nicene fathers) and the subsequent discovery of the notion of the individual (principium individuationis) by the medieval scholastics (with Boethius, Thomas and Duns Scotus). Then the modern notion of the individual as a bare unit according to Hegel. My work will aim to provide a definition of the human embryo by an historical and legal perspective. A definition built by comparing the theological, religious, philosophical and scientific inquiry in order to arrive at a formulation of an epistemological status (res or person?) that it could be useful for a definition of the the current legal framework.

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1. The human embryo: *res*, person or individual?

In a recent article A. Giubilini and F. Minerva support the thesis, really surprising, that the fetus and a newborn would be deprived alike of the moral status of personhood[1].

The problem of the ontological human embryo foundation leads me to reflect on the theme of the person in relation to the figure of the unborn child, a question that actually touches a raw nerve of the contemporary debate on human rights. It seems incredible but it is still difficult to say exactly what is a person and what is a human embryo[2].

One reason of this delay in a correct definition of these concepts is certainly the history. Throughout the ancient experience up to Boethius the word person is served to indicate: a) the role of a subject (*pars*), i.e. the celebrant of sacred rites, the theatrical actor, the parties to the case in a trial; the cives of the *res publica* (as private), with respect to its position in society, in legal procedure and as public official; b) a material object (*res*), i.e. the mask of the actor, of the pagan god or of the deceased; c) the *pars subiectiva* in grammar and in the logical discourse; d) the subjective part (*figura personae*) in a strictly philosophical sense and in the legal relationship (hence the discipline of legal persons of the legal systems of Roman tradition[3]); e) the individual, i.e. the human being, declined as a unity of soul and body in the Orphic-Neoplatonic sense (Augustine) and then as a hypostatic unit similar to the atom of Democritus as a unique and unrepeatable being into the Universe (Gregory of Nyssa and Boethius); f) finally, the Christian God as Jesus Christ and the Holy Spirit, as the Supreme Being equal only to itself (the *persona divina*)[4].

[1] Giubilini A, Minerva F. *After-birth abortion: why should the baby live?*. Journal of Medical Ethics. 2012 (but 2011); 23 of february: 1-4 (on web: http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full).

[2] Gallinaro R. *L'enigma dell'embrione umano* in Giustiniani P. (ed.). *Sulla procreazione assistita*. Napoli: ESI; 2005: 91-107.

[3] Galgano F. *Le insidie del linguaggio giuridico*. Bologna: il Mulino; 2010: 31 ff.

[4] Sacchi O. *Antica Persona. Alle radici della soggettività in diritto romano tra costruzione retorica e pensiero patristico*. Napoli: Satura Editrice; 2012: 231-241 and *passim*.

Person proposes in this framework at least two paradoxes. First. An ability to represent at the same time the "part" and the "totality" and vice versa according to the rhetorical scheme based on the relation *genus-species*. Second. An ability to represent the human being and at the same time to transcend it. Downward, indicating non-human animals, the things and abstractions. Upwards, being able to represent also the divine being.

The issue is that concepts such as individual, person, as well as truth and nature, can be rebuilt so genealogically correct only remembering that are understandable only in a holistic meaning. That is, they belong to a class of concepts that lose sense out of their natural context reference[5].

On the question of the ontological importance of the human embryo today it seems that we can not yet say whether this is *res* or "person" and enters into this debate also a recent ruling by the Italian Supreme Court, commented recently by Antonio Palma, an eminent Italian scholar of Roman law, which states the protection of the right to health of the unborn qualified *portio rei*, as part of the body of the mother «without limitations of effectiveness that may result from the problematic recognition of his legal subjectivity»[6].

2. The principle of self-determination and the notion of unborn child of Roman law

The unborn child has for each of us without a doubt an archetypal meaning because the unborn is on the border with life and is therefore more contiguous to his mystery. It is the

[5] Eco U. *Relativismo* in Eco. *A passo di gambero. Guerre calde e populismo mediatico*. Milano: Bompiani; 2006: 282-283, p. 282.

[6] Palma A. *«Diritto a non nascere» e diritto alla salute del nascituro: soggetto o oggetto di tutela. A proposito di Corte di Cassazione, sez. III, 2.10.2012, n. 16574* in AAVV. *In honorem Felicis Wubbe antecessoris nonagenarii*, Fribourg; 2013: 97-108, p. 104 (on web: http://www.unifr.ch/dpr/images/stories/File/Compilation_final_29_1_13.pdf).

paradox of *a life that exists without being yet born*. This paradox becomes juridical if we think about an individual that is not yet *individuus*, because "indivisible" from the mother who generated him; but at the same time, for the Italian legal system can not be considered to be still a person because, according to a recent judgment of the Italian Constitutional Court (the n. 438 of 2008), he would still *be incapable of self-determination* why not able to manifest a *written informed consent, free, aware, present and manifest*; and since the mother, the other parent or the guardian can not legitimately express this consent[7]. This position reflects the orientation of those who start from the idea that "person" is a predicate ontological self-sufficient, that is, an exclusive synonym for "individual" as a *rational human being* and thus able of self-determination. In this perspective, the normative fate of the embryo as *res*, appear already marked. The De Monticelli writes that "a human embryo, at least until it can be affected by events of this world (and maybe it can already in the womb, but not already certain before being biologically identified) can not initiate the process of individuation, that since the first his response to the world will allow us instead of asking who is this new born that already responds so differently from that of the cot beside"[8].

The Roman jurists, instead, consider the unborn child as a *persona*. Gaius (2.242) expressly says that the *postumus alienus* is *incerta persona* ("uncertain person"): *Ac ne heres quidem potest institui postumus alienus; est enim incerta persona*. A consideration of the unborn (*qui in utero est*) as *person* within the more general classification of Gaius (D. 1.5.1: *Omne ius quo utimur vel ad personas pertinet vel ad res vel ad actiones*) responds fully to the conception of the jurists of the ancient Rome who, in the process of *interpretatio*, have considered this classification as an expression of *ius naturae* (D. 1.5.26: *Qui in utero sunt, in toto paene iure civili intelleguntur*

[7] See on web: http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2008&numero=438 .

[8] De Monticelli R. *La novità di ognuno. Persona e libertà* (2009). Milano: Garzanti; 2012: 363a.

in rerum natura esse)[9]. What is this *ius naturae* it has to be studied in detail elsewhere[10].

However, it is emblematic Ulpian, in D. 37.9.1.15, where the recognition of the unborn child as a *person* is perfectly compatible with an idea not individualistic of the society: «*Et generaliter ex quibus causis Carbonianam bonorum possessionem puero praetor dare solitus est, ex hisdem causis ventri quoque subvenire praetorem debere non dubitamus, eo facilius, quod favorabilior est causa partus quam pueri: partui enim in hoc favetur, ut in lucem producatur, puero, ut in familiam inducatur: partus enim iste alendus est, qui et si non tantum parenti, cuius esse dicitur, verum etiam rei publicae nascitur*»[11].

3. Profiles of present legislation

Returning to the present, on the subject of assisted fecundation, another judgment of the Italian Constitutional Court (the n. 151 of 2009) has established the principle that the mother must decide the fate of unborn with the support of the best knowledge medical and scientific.

The question is very delicate because is not possible define the conceived an individual even if is right to consider it an embryo (as a part of the mother or not yet affected by the process of identifi-

[9] See now with bibl. Ferretti P. *In rerum natura esse in rebus humanis nondum esse. L'identità del concepito nel pensiero giurisprudenziale classico*. Milano: Giuffrè; 2008: 185 ff.

[10] See particularly La Torre M.A. *Procreazione assistita: ritorna il mito della «natura»* in Giustiniani P (ed.). *Sulla procreazione assistita*. Napoli: ESI; 2005: 109-122; Chieffi G. *Breve commento alla legge 40/2004 sulla procreazione medicalmente assistita* in Giustiniani. *Sulla procreazione assistita*, …: 55-68, part. pp. 56-61; Giustiniani P. *Verso un nuovo compromesso tra visioni scientifiche e prospettive «altre»? Postfazione* in Giustiniani. *Sulla procreazione assistita*, …: 173-202, part. pp. 186-193.

[11] Baccari MP. *Quando i bimbi erano patrimonio della società*. il Foglio. 2004; 1 of february; Id. *Concepito oggi è parola tabù, ma lo ius romano non la pensava così*. il Foglio. 2005; 6 of january.

cation). While, in the case of heterologous in vitro fertilization, he has to be inclused in the category of embryo (understood in the widest sense of the situation that determines in each case the fertilization of the ovum), he can be strictly defined as *individuus* (since it is not part of the mother), but can not have the rights that the law grants to the individuals already born, that for this reason, are holders of legal personality as a result of the principle of individuation. This alone demonstrates the insufficiency of the word individual to effectively describe the situation.

It's not all, because stating the unconstitutionality of the *ban on cryopreservation of ovules and suppression in a number not exceeding three* established by art. 14 of Law 40/2004 (which banned artificial insemination in Italy), the Italian Constitutional Court, has opened to the possibility that the doctor and the mother *in itinere* can decide the fate of these embryonic forms of life. But, in this way, the Court confirmed also the principle of *non-humanity* (and therefore the non-recognition of the requirement of "person") of all that can not be able to have a self-awareness. Hence the consequential downgrading of the embryo to *res* independently of the question of his individuality[12]. One effect of this decision is the possibility that a homosexual couple can lead to a full development (and then generate a legitimate son) an embryo who is not a natural result of a union between a man and a woman. So a lesbian couple can become *de jure* a omoparentale family fully legitimate. Is necessary for this that the law considers legitimate for a woman to face implanting an embryo procured *ab externo* into herself (though this would not possible for a pair of male homosexuals, with all due respect for the principle of equality). Today in the Netherlands happens.

[12] About the negative implications of this approach see Giustiniani P. *Verso un nuovo compromesso* …, p. 189 f.

4. The philosophical debate

All this is fully acceptable from the point of view of the principles of freedom of speech and thought, but it can lead to serious consequences. Leaving aside the problem of gay adoptions on which it will be necessary to return on another occasion, this position can also lead to the extreme of determinations as that of Alberto Giubilini and Francesca Minerva, mentioned in the opening, that have had good play in supporting, in base of the criterion of self-determination, the claim that the fetus and a newborn would be deprived alike of the moral status of a person[13].

Starting from the premise: «The moral status of an infant is equivalent to that of a fetus, that is, neither can be considered a 'person' in a morality rilevant». The Italian researchers (busy with their activities abroad and of philosophical formation) arrive at the disconcerting conclusion: «If criteria such as the costs (social, psycological, economic) for the potential parents are good enough reasons for having an abortion even when the fetus is healty, if the moral status of the newborn is the same as that of the infant and if neither has any moral value by virtue of being a potential person, then the same reasons which justify abortion should also justify the killing of the potential person when it is at the stage of a newborn»[14]. This would lead, at least, to the possibility that the baby, like the unborn, may be regarded as "non-persons".

These are the devastating effects of a conception of the person who has been called functionalist and stipulative, based on the empirical evidence of certain functional characteristics that are crucially dependents from what for a functionalist are the qualifying requirements of a person. We observe in this connection a variation of opinions that goes from the reductionist sensism (extreme): *are person those individuals capable to feel pleasure or*

[13] Giubilini, Minerva. *After-birth abortion…,* p. 1 ff.

[14] On the debate caused by this article see also Meldolesi A. *Attenti al mostro filosofico di chi giustifica l'infanticidio*. la Lettura del Corriere della Sera. 2012; 11 of march.

pain (so, the adults animals that are able to enjoy and suffer can be "persons", but not the human embryo until it is devoid of the nervous system[15]); up to to the radical empiricism of those who recognize the attribute of person based on the detection of high functions of the subject such as freedom, self-awareness, self-determination, the possession of a moral sense or of rationality: *it is a person since it behaves as a person*.

Derek Parfit demans that the person possesses conscious mental states or psychological[16]; others that it is capable of self-awareness and reasoning[17]; Giubilini and Minerva compare the condition (the *moral status*) of the fetus to that of a newborn. From here the De Monticelli starts for arrive to the concept of "inizialità" that is "what gives birth to something" considered by the scholar, one of the three conditions that constitute the person (along with *creativity* and *self-determination*)[18].

On the other hand, I do not even know if he's right Umberto Eco when accuses the Catholic thinking of neo-fundamentalism, assimilating the Catholic Church's position to that of materialistic evolutionists of a time, which defended life at all costs and arrived to equate beings vegetable, the animals and the humans[19]. To give substance to his thesis, Eco, quotes an intervention of Giovanni Sartori that on the pages of the *Corriere della Sera* asked himself «if you do not face some confusion between the defense of life and the defense of human life, because the defend at all costs the life wherever it occurs, would lead to define as murder not only the spread of own seed for not fecundative purpose, but also eat chickens and kill mosquitoes, not to mention the respect due to plants»[20].

[15] Singer P. *Etica pratica*. Napoli: Liguori; 1989; Id. *La vita come si dovrebbe*. Milano: Il Saggiatore; 2001.

[16] Parfit D. *Ragioni e persone*. Milano: Il Saggiatore; 1989. Particularly, for a configuration of the embryo that becomes a person *slowly*, see p. 410.

[17] Sartori G. *Ma l'anima non ha certezze*. Corriere della Sera. 2005; 16 of april.

[18] De Monticelli. *La novità di ognuno…*, p. 366 ff.

[19] Eco U. *Sull'anima degli embrioni* in Eco. *A passo di gambero…*: 252-254, p. 254.

[20] *Ibid*.

I am not agree. If human life is worth more than that of plants and animals "inferior", it is not possible to speak to "discontinuity" within the same training embryo. The embryo or is "human", or it is not, *tertium non datur*. It not passes from one state of vegetal, at that of animal and then to yet another of an human-rational. This transformation from *res* to "person" is only an apodictic presumption and not supported by scientific evidence, if it is true that in the genome there is already the past, the present and the future of a human being.

On the inconsistency of these arguments and about the limits of these speculative positions is possible to read the criticism of Vittorio Possenti, while on the De Monticelli we shall return[21].

It is possible however ask to ourself. If it can be considered in compliance to the jus naturae that about the fruit of conception that is implanted in the woman's body has to decide the mother, the same can be said when the fruit of conception is matured against nature, in a test tube, maybe with surreptitious means and in any case, even more, not in the body of a woman who is his natural locus? And then, as we have to consider the human embryo? Individual, person, *res*, something else?

5. The embryo for science and for scientists

First of all it is necessary to clarify of what we're talking about (I say at first to myself because obviously I am not a specialist in the field)[22]. It all began in 1978 when medical science has been able to apply the cd. techniques of artificial insemination, or extracorporeal, to the man. From this moment it became

[21] The broad and exhaustive exposure from which I draw is in Possenti, 2006, p. 122-148. But see also Gallinaro. *L'enigma dell'embrione umano*…, p. 99 ff. and *passim.*

[22] On the media fallout see Villa R. *Un bimbo «in provetta» rischia più malformazioni?*. Corriere della Sera. 2012; 3 of june: 48; Natali D. *Fecondazione assistita. Non tutto è possibile e non è possibile sempre*. Corriere della Sera. 2013; 27 of january: 42.

possible to have a child even outside of the natural way and the conjunction of the *scientism* (only science can have access to knowledge) and of the *utilitarian ethics* (it is morally right to take all actions available to produce the best possible consequences[23]), powered by a massive propaganda of the media, has created a new growth industry[24].

Technically we talk about (in Italian) of FIVET or IVF (in English), which stands for "in vitro fertilization and embryo transfer" which describes the process by which it is possible create artificially in a test tube a human embryo. Then the embryo is transferred mechanically into the womb of a future mother. We are speaking about artificial reproduction techniques that are implemented outside the woman's body (so a omoparentale IVF for a couple of males is impossible) and the effect of the birth of a human being is determined by the technical competence of third persons. The *politically correct* language uses phrases such as *fertilization* or *medically assisted procreation*, the *sperm donation*, to sweeten a reality that is instead that of human procreation made with laboratory techniques rather than in a natural manner[25].

[23] Bentham J. *An Introduction to the Principles of Morals and Legislation* (1781), Batoche Book, Kitchener; 2000: p. 14: «By the principle of utility is meant that principle which approves or disapproves of every action whatsoever. According to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question». See on web: http://socserv.mcmaster.ca/econ/ugcm/3ll3/bentham/morals.pdf (made access on 25.10.2013).

[24] Possenti V. *Il principio-persona*. Roma: Armando; 2006: 141.

[25] Is fully realized the Faustian myth of the manufacture of an artificial man. See Goethe WG. *Faust Urfaust*: it. ed. by Amoretti GV. *Faust e Urfaust.* Milano: Feltrinelli; 1987: II 398 (*Laboratorium*): [Wagner] «*Es wird ein Mensch gemacht* (Being manufactured a man)» – Wagner announces cautious to Mephistopheles his wicked plane. The outcome of the prophetic scene is known, the *Homunculus* in a test tube leaves Wagner, its creator, to follow Mephistopheles greeting him with honeyed and prophetic words: II 406 (*Laboratorium*): [Homunculus] «*Solch einen Lohn verdient ein solches Streben: Gold, Ehre, Ruhm, gesundes, langes Leben, Und Wissenschaft und Tugend – auch vielleicht. Leb wohl!* (An effort like this deserves reward: gold, honor, glory,

In addition you must consider that the technique of in vitro fertilization also involves the freezing of human embryos, which can also be seen as a practice aimed at blocking the natural growth of the embryo that is deprived of the opportunity to indulge its nature that is to become a fetus and after a newborn[26]. It is clear that if we intend the embryo as a person, and this person as a human being, this same technique could configure a grave violation of the moral principle, even before juridical, of the *neminem laedere*. Out of this formulation we would have a consideration of the embryo as an object (i.e. *res*) in the availability of anyone who is interested.

Let's see now shortly what happens with the fertilization. Very briefly, we can say that fertilization takes place when two gametes (sex cells, called haploids, that have this aim with a set of halved chromosomes) - carrying the genetic makeup of the parents, i.e. 23 chromosomes by father's side and 23 by mother -, blend in a single cell that is equipped with a kit of 46 chromosomes. It thus constitutes the genetic heritage of human beings which is given by one of the combinations that can result by the union of the approximately 30,000 genes that make up the genetic heritage of each gamete. The zygote is so formed, which is the new cell formed by the fusion of the two cells of the parents, from which begins the life of the new human being.

Thus begins the cell multiplication that will lead to further division in about 100,000 billion cells forming a body adult male or female. Among the first 20/24 hours the genome organizes itself. It could be defined as the propulsive center for the informations necessary to complete the development of the new human being. It configures so the karyotype, formed by the merger of the two male and female pronuclei, which has been defined «the nature of the human embryo, of its vital system, *informational, self-referential, auto-adaptive, autopoietic*,

long life and, perhaps, even knowledge and virtue. Goodbye!)». Also refers to Faust: POSSENTI. *Il principio-persona...*, p. 141.

[26] POSSENTI. *Il principio-persona...*, p. 141 f.

the structural opening of its bio-psychic and energy»[27]. The supporters of the principle of freedom of scientific research insist, for their part, by pointing out that with the pre-compaction of the genome, called morulare - where a cluster of a few totipotent cells, each of which would be able to produce an individual clone (a couple of twins) full of all the characteristics genetically equal to the matrix - you would only have the pre-embryo, i.e. an addition of possibilities biochemical completely comparable to a *res*[28]. And so have no qualms in considering that the embryo can be fully used for therapeutic purposes, to the research and experimentation[29]. Conceding that in each cell of the phase morulare there is already *the systemic project-autopoietic individual who will*, it could be said

[27] Gallinaro. *L'enigma dell'embrione umano*…, p. 98.

[28] According to the *European Science Foundation* (London 5 and 6 of june 1985) "the name pre-embryo describes the clusters of cells before the appearance of the primitive streak. It would be invisible to the naked eye". See for this Possenti. *Il principio-persona*..., p. 145. The *Warnock Committee* redacted the *Report of Inquiry into Human Fertilisation and Embriology*. This commission, appointed by the British government to respond to the problems posed by extracorporeal fertilization in vitro, in particular, describes the beginnings of the development of the pre-embryo: p. 59: «Once fertilisation has occurred, the subsequent developmental processes follow one another in a systematic and succured order, leading in turn through cleavage, to the morula, the blastocyst, development of the embryonic disc, and then to identifiable features within the embryonic disc such as the primitive streak, neural folds and neural tube. Until the blastocyst stage has been reached the embryo in vivo is unattached, floating first in the fallopian tube and then in the uterine cavity. From the sixth to the twelfth or thirteenth day internal development proceeds within the blastocyst while during the same period implantation is taking place. Both the internal and external processes of development are crucial to the future of the embryo». The Report recognices that has placed the limit of fourtheen days to *alleviate public concern* and *give scientists the time needed to continue the research on the embryo*. See Possenti. *Il principio-persona*..., p. 146. See the *Warnock Report* of the *Committee of Inquiry into Human Fertilisation and Embryo* on web http://www.educationengland.org.uk/documents/warnock/warnock1978.html (made access on 25.10.2013)

[29] Coughlan MG. *The Vatican, the Law and the Human embryo*. Basingstoke: Press University; 1991: 69-70.

that if the embryo coincides with the genome, and then you can qualify this entity as a "person" (for what shall we say), only *what comes before* it should be called *res*. The science, however, should tell us what happens, in this additional cluster of biochemical possibilities, between the fertilization and compaction of the genome[30].

6. The theological approach

Let us now return to the basic question. The Catholic doctrine, as is known, move from a position very clearly characterized. In the *Catechism of the Catholic Church*, in the part devoted to the fifth commandment (*Ex*. 20.13: «Thou shalt not kill»), abortion (and euthanasia) are considered acts gravely contrary to the moral law. The first, in particular, because of the idea that life since the conception must be guarded with the greatest care[31].

[30] So the *Warnock Committee* …, p. 90: «Public concern about the embryo which led to the establishment of this Inquiry is often expressed in the form of the question, "When does life begin?" This cannot be answered in a simple fashion. An ovum is a living cell as is a spermatozoon; both can be properly described as alive. The cluster of cells which is the embryo is likewise alive. But this is not what people are really asking. Their real question is "When does the human person come into existence?". This cannot be answered in a simple fashion either. The beginning of a person is not a question of fact but of decision made in the light of moral principles. The question must therefore be refined still further. It thus becomes "At what stage of development should the status of a person be accorded to an embryo of the human species?". Different people answer this question in different ways. Some say at fertilisation, others at implantation, yet others at a still later stage of development. Scientific observation and philosophical and theological reflection can illuminate the question but they cannot answer it».

[31] The full version, promulgated as official *motu proprio* by the Pope John Paul II, is available on the web. I report below by integrating with notations of the same *Catechism* that are in bracket: **2270**: «Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person - among which is the inviolable right of every innocent being to

The Church considers today the conception as a fundamental

life. [*Congregation for the Doctrine of the Faith*, Istr. *Donum vitae*, 1,1: AAS 80 (1988) 79]; «Before I formed you in the womb I knew you, and before you were born I consecrated you» (*Ger.* 1,5); «My frame was not hidden from you, when I was being made in secret, intricately wrought in the depths of the earth» (*Sal.* 139,15). **2271**: «Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law: "You shall not kill the embryo by abortion and shall not cause the newborn to perish" [*Didaché* 2,2: SC 248, 148 (Funk 1,8); see *Letter of Pseudo-Barnabas* 19,5: SC 172, 202 (Funk 1,90); *Letter to Diognetus* 5,6: SC 33,62 (Funk 1,398); Tertullian, *Apologeticum,* 9,8: CCL 1, 103 (PL 1, 371-372)]; «God, the Lord of life, has entrusted to men the noble mission of safeguarding life, and men must carry it out in a manner worthy of themselves. Life must be protected with the utmost care from the moment of conception: abortion and infanticide are abominable crimes» [Vatican Council II, Past. Const. *Gaudium et spes*, 51: AAS 58 (1966) 1072]. **2272: «**Formal cooperation in an abortion constitutes a grave offense. The Church attaches the canonical penalty of excommunication to this crime against human life. "A person who procures a completed abortion incurs excommunication latae sententiae" [CIC canon 1398]; "by the very commission of the offense" [CIC canon 1314]; "and subject to the conditions provided by Canon Law" [CIC canon 1323-1324]. The Church does not thereby intend to restrict the scope of mercy. Rather, she makes clear the gravity of the crime committed, the irreparable harm done to the innocent who is put to death, as well as to the parents and the whole of society»; **2273: «**The inalienable right to life of every innocent human individual is a constitutive element of a civil society and its legislation: "The inalienable rights of the person must be recognized and respected by civil society and the political authority. These human rights depend neither on single individuals nor on parents; nor do they represent a concession made by society and the state; they belong to human nature and are inherent in the person by virtue of the creative act from which the person took his origin. Among such fundamental rights one should mention in this regard every human being's right to life and physical integrity from the moment of conception until death" [*Congregation for the Doctrine of the Faith*, Istr. *Donum vitae*, 3: AAS 80 (1988) 98-99]; "The moment a positive law deprives a category of human beings of the protection which civil legislation ought to accord them, the state is denying the equality of all before the law. When the state does not place its power at the service of the rights of each citizen, and in particular of the more vulnerable, the very foundations of a state based on law are undermined. [...] As a consequence of the respect and protection which must

moment, although it is not yet possible to specify exactly in scientific terms which it is, and equates the figure of the unborn child with that of the embryo. This position for which the embryo is (*as it were*) "person", regardless of the actual response of rationality, is supported by Vittorio Possenti in a study entitled in a very evocative manner: *Il principio-persona*[32].

The scientists, however, say: «it is known that at least up until the fourteenth day after conception the pre-embryo (which not coincidentally is called just "pre-") can not be considered an in-

be ensured for the unborn child from the moment of conception, the law must provide appropriate penal sanctions for every deliberate violation of the child's rights"» [*Congregation for the Doctrine of the Faith*, Istr. *Donum vitae*, 3: AAS 80 (1988) 99]; **2274**: «Since it must be treated from conception as a person, the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being. Prenatal diagnosis is morally licit, "if it respects the life and integrity of the embryo and the human fetus and is directed toward its safe guarding or healing as an individual [...]. It is gravely opposed to the moral law when this is done with the thought of possibly inducing an abortion, depending upon the results: a diagnosis must not be the equivalent of a death sentence" [*Congregation for the Doctrine of the Faith*, Istr. *Donum vitae*, 1,2: AAS 80 (1988) 79-80]; **2275:** «"One must hold as licit procedures carried out on the human embryo which respect the life and integrity of the embryo and do not involve disproportionate risks for it, but are directed toward its healing the improvement of its condition of health, or its individual survival" [*Congregation for the Doctrine of the Faith*, Istr. *Donum vitae*, 1,3: AAS 80 (1988) 81]. "It is immoral to produce human embryos intended for exploitation as disposable biological material" [*Congregation for the Doctrine of the Faith*, Istr. *Donum vitae*, 1,5: AAS 80 (1988) 83]. "Certain attempts to influence chromosomic or genetic inheritance are not therapeutic but are aimed at producing human beings selected according to sex or other predetermined qualities. Such manipulations are contrary to the personal dignity of the human being and his integrity and identity" [*Congregation for the Doctrine of the Faith*, Istr. *Donum vitae*, 1,6: AAS 80 (1988) 85]; "which are unique and unrepeatable"». See: http://www.vatican.va/archive/catechism_it/index_it.htm (english translation).

[32] Possenti. *Il principio-persona...*, p. 162 interprets literally the definition of Boethius and excludes from this concept all that is not human: «*... it is of the human nature to be in a single person*. Everything that has human nature and belongs for its genome to the human race is, for this reason person».

dividual present: before the sixth day, because its cells are still totipotent, and therefore each of them is an individual potential; and between the sixth and fourteenth day because the pre-embryo can still be divide itself into identical twins, and so, also in this case, it not is an actual individuality. As for the humanity, then, it all depends on what the term means. If it indicates the presence of a nervous system, this begins to develop after the fourteenth day. If the sensory perceptiveness, then the sense of touch comes in the second or third month, taste and smell the sixth to eighth. If self-consciousness, of course, you have to wait months after birth»[33].

A closer look, which seems possible and reasonable for a *quivis de populo* (the embryo must be defended because it must be defended human life), it seems unacceptable to those who approach it from a speculative point of view. The De Monticelli, for example, has no difficulty in criticizing the principle of person of Vittorio Possenti on the assumption that is not possible give a qualification of person as predicate ontological *ab origine* and based on the argument that, according to the definition of Boethius, *person* is a rational individuality[34].

This sort of speculation, perched only on the *modern* concept of person, however, in my opinion is not the best way to address the issue of the embryo. The embryo is in fact ontological in nature. Exists before and independently of the "concept of embryo" or "person", secular or Christian. Any way you can think it, we have to start first from here. Boethius, therefore, with his famous notion of *person* as *rationabilis naturae individua substantia* (*c. Euthy. et Nest*. 4.8) is surely the cornerstone of the modern and contemporary personalism, but when he excludes by definition (to narrow connotation of the person only to man, the Angels and the Trinity) from the concept of *prósōpon/persona* animals, plants, and things (*c. Euty. et Nest*. 2.28 Loeb) be-

[33] Odifreddi P. *Perché non possiamo essere cristiani (e meno che mai cattolici)* (2007). Milano: TEA; 2001: 72.

[34] De Monticelli. *La novità di ognuno*…, p. 363.

cause they are deprived of "life", "senses" and "intellect", does a choice that epistemologically, reflects a truth only relative (a truth only of Boethius), which therefore we can not assume as a postulate of truth[35].

7. A genealogy of the idea of embryo

On this basis I groped a genealogy of the problem trying to climb up to the origin of the linguistic code in order to draw something definitive that has to do with the embryo as a real object and therefore not only with the "concept of the embryo". The *Urtexts* for our discussion is a famous verse from the Psalms: PSALM. 138 (139): «15. My frame was not hidden from You, When I was made in secret, And skillfully wrought in the owest parts of the earth. 16. Your eyes saw my substance (*scil.* in ancient Greek *upostasis*), being yet unformed. And in Your book they all were written, The days fashioned for me, When as yet there were none of them».

The Pope Benedict XVI at the General Audience of wednesday 28 december 2005 has defined this verse «a biblical tribute to the human being from the first moment of its existence»[36].

[35] See on this the acute reasoning in DE MONTICELLI. *La novità di ognuno*…, p. 365.

[36] BENEDETTO XVI. Psalm 139[138] "The wonder of my being". General Audience. 2005: Wednesday 28 December (http://www.vatican.va/holy_father/benedict_xvi/audiences/2005/documents/hf_ben-xvi_aud_20051228_it.html): «…in the second part of the Psalm on which we are meditating today God turns his loving gaze upon the human being, whose full and complete beginning is reflected upon. He is still an "unformed substance" in his mother's womb: the Hebrew term used has been understood by several biblical experts as referring to an "embryo", described in that term as a small, oval, curled-up reality, but on which God has already turned his benevolent and loving eyes (cp. v. 16). 2. To describe the divine action within the maternal womb, the Psalmist has recourse to classical biblical images, comparing the productive cavity of the mother to the "depths of the earth", that is, the constant vitality of great mother earth (cp. v. 15). First of all, there is the symbol of the potter and of the sculptor who "fashions" and moulds his artistic creation, his masterpiece, just as it is said about the creation of man in the Book of Genesis: "the Lord God formed man out of the clay of

The Greek text (dating from about 100 BC with the translation of the Septuagint) of the Psalter uses in verse 15 the term *upostasis*; while the Latin version (the third version was translated from the Greek by St. Jerome in the last years of the sixth century) uses *substantia*, and in the verse 16 *imperfectum*[37] (that is, a denial of the word *perfectum* that comes from *perficio* = i.e. "done up to the bottom"[38]).

The Hebrew version (which is said to written between the sixth and third centuries BC) rounds off the picture and it bears as *apax legomenon* (i.e. as the first and only use of the Bible) the word golem[39]. We must also say something about this because the study of Gershom Scholem on the issue of representation of the Golem in Jewish mystical culture gives us a valuable guidance for our discussion[40]. Despite the great scholar (of german Jewish family) excludes (in a manner we must say rather apodictic[41]) any reference to the human embryo of the *golem* (not so, as we have

the ground" (*Gn* 2.7). Then there is a "textile" symbol that evokes the delicacy of the skin, the flesh, the nerves, "threaded" onto the bony skeleton. Job also recalled forcefully these and other images to exalt that masterpiece which the human being is, despite being battered and bruised by suffering: "Your hands have formed me and fashioned me.... Remember that you fashioned me from clay...! Did you not pour me out as milk and thicken me like cheese? With skin and flesh you clothed me, with bones and sinews knit me together" (*Jb* 10.8-11). 3. The idea in our Psalm that God already sees the entire future of that embryo, still an "unformed substance", is extremely powerful. The days which that creature will live and fill with deeds throughout his earthly existence are already written in the Lord's book of life. Thus, once again the transcendent greatness of divine knowledge emerges, embracing not only humanity's past and present but also the span, still hidden, of the future. However, the greatness of this little unborn human creature, formed by God's hands and surrounded by his love, also appears: a biblical tribute to the human being from the first moment of his existence».

[37] Salm. 138(139),15: «*Non est occultum os meum a te, quod fecisti in occulto: et substantia mea in inferioribus terrae*. 16. *Imperfectum meum viderunt oculi tui, et in libro tuo omnes scribentur: dies formabuntur, et nemo in eis*». Latin version from Martini A (ed.). *La Sacra Bibbia*, Napoli: Achille Morelli Editore; 1863.

[38] Moro A. *Breve storia del verbo essere*. Milano: Adelphi; 2010: 30.

[39] Odifreddi. *Perché non possiamo essere cristiani…*, p. 74.

[40] Scholem G. *La Kabbalah e il suo simbolismo*. Torino: Einaudi; 2001: 201-257.

[41] Scholem. *La Kabbalah e il suo simbolismo…*, p. 204.

seen, Ratzinger), I think we can say that even for the Jewish tradition, the *golem* represents in a symbolic form the human being in the embryonic stage. The arguments are offered by the same theologian of Berlin: «It is said that at a certain stage of its genesis Adam is Golem. Golem is a Hebrew word that appears only once in the Bible, in Psalm 139,16, and the Jewish tradition has always attributed this psalm at the same Adam. We can say that here "Golem" means the shapeless, the amorphous and that certainly has this meaning in later sources»[42].

We can conclude that, if the Golem is the description of the man in an embryonic state, we should infer that in this tradition it is a symbolic representation of the creative force of man *before that God insufflates the rational soul in a human body*.

From these few data shows well in my opinion as the Greek and Latin versions of Psalm 138 (139) are already strongly influenced by the philosophical-theological debate which opened from the first translation of the Septuagint. Boethius uses *upostasis/substantia* just to indicate the nature of man (which unlike the divine person is subject to the accidents) in the definition of the human person as *naturae rationabilis individuae substantia*, but only after a long debate involving the best minds of culture philosophical of greek-Roman Hellenistic matrix[43]. Duns Scotus, a few centuries later (he died in 1308), completed the route and posed the problem of "suchness" or *haecceitas* in anthropocentric terms: *Ord.* II, Dist. 3.1: *In principalissimis autem principaliter intentum est individuum*[44]. The *Catechism*, therefore, giving the definition of a embryo as a person makes a pass argumentative philologically correct, regardless from a its characterization in the sense axiological: in fact, the Greek version of the Psalter and the Latin, as mentioned, have *upostasis* or *substantia* and *imperfectum*. In this way, relying on the authority of S.Thomas, Ratzinger could also

[42] *Ibid.*

[43] Boethius *adv. Euty. et Nest.* 3,79.

[44] Hence the requirement of "inizialità" of the contemporary personalism on which see De Monticelli. *La novità di ognuno*…, p. 366 ff.

define the embryo as *materia signata quantitate* without incurring contradiction[45].

8. When the embryo becomes a person?

It remains unresolved, however, the question of when the person/embryo becomes such.

If we look at the first part of the person definition of Boethius (the requirement of a *rational nature*), the moment, consistently, should be the one in which the embryo acquires precisely rationality or the soul and so far no one has doubted that it is a time deferred (*esse proportionaliter semini animam in potentia, sed non actu*). The Psalter in the Latin version uses, as mentioned, *imperfectum*. Thomas Aquinas, has considered the problem from the point of view of the conception of Jesus. S.Thomas, as know the theologians, departs from the idea of Aristotle that, by nature, the embryo human forms itself by degrees, from a vegetal state, then animal and, only at a later time, human[46]. In this way the Angelicus plays with great balancing act on the hylomorphic conception of Aristotelian philosophy of being, according to which, where there is life there is soul, form and self-movement that proceeds from the inside[47].

You do not do a long way even looking at the second part of the definition of Boethius wondering when the embryo/person become "individual substance". To this, however, could give an answer, as we have seen, modern science when it argues that between the sixth and the fourteenth day the "pre-embryo" can be divided into monozygotic twins[48]. In any case, after the fourteenth day after conception (?), the embryo become "individual substance" and thus person from the point of view of the "inizialità",

[45] Gallinaro. *L'enigma dell'embrione umano…*, p. 104.

[46] S.Thomae, *Summa Theologiae*, III, 33 art. 2; *Summa contra gentiles*, II 89,6.

[47] Possenti. *Il principio-persona…*, p. 144.

[48] The gynecologist Dagan Wells has been able to extract DNA from a cell of an embryo from in vitro fertilization of five-day. Cfr. Saragosa A. *Letto il Dna di un embrione di cinque giorni*. il Venerdì di Repubblica; 2013; 16 of august: p. 66.

even if not yet from those of *creativity* and *self-determination*[49]. So we return to the paradox of an embryo in the womb that at the same time, would be "individual substance" and not "*individuus*" in the sense etymologically correct of the word. We would have in this sense a shared notion of person and well justified from a legal-philosophical point of view; but a situation, clearly contrary to logic and to the *ius naturae*, of a "individual" embryo out of the womb. But even looking at the situation more natural, that of the fertilized embryo (according to nature with artifice or technological) in the mother's body, using the conventional term posed by the Warnock Committee, before the fourteenth day, what is what we face? A pre-embryo? A substance still *imperfecta*?

The contemporary thought (nihilistic) attempts to explain the situation in these terms: *the essence of an entity that precedes existence* (following the philosophical language); *the specifications of a program that will precede the implementation* (following the computer language); *the information genetics of an organism that precedes its expression* (following the biological language).

On closer inspection all shows a nearness with the Golem of the Old Testament, despite Gershom Scholem excludes, as mentioned, that we can assimilate the embryo with it. This may be true if we look at the embryo in terms of "concept" (and comes into play here all the way made from the tradition of medieval Jewish exegesis and pre-modern), but if we look at the bio-anthropological essence of the thing, then the situation changes completely.

In conclusion, if the Church defines the embryo as a (like a) "person" it does so by applying a rule of Roman law where that concept had a rhetorical function of logical index of attribution in a pragmatic way (= not axiologic). The caution observed by Cardinal Ratzinger, the author of the *Catechism of the Catholic Church*, that assimilates the embryo to the unborn child and to the person, it's all encapsulated in the phrase of the Chapter 2274: «The embryo […] must be treated from conception as a person». This is not a realy problem for a consideration of the embryo as person

[49] De Monticelli. *La novità di ognuno*…, p. 35 ff., 369.

because it is explained, in my opinion, with the solution of a double need: a) the philological respect, from a refined exegete what is Josef Ratzinger, for the letter of the Roman sources (the *incerta persona* of Gai 2.204); b) and the need to not fall in open contradiction with the wording Boethian (*rationabilis naturae individua substantia*).

While waiting that is the science to tell us what is the "soul" (if it exists), and when it may be bought by human beings (assuming that this may be a valid criterion to distinguish human beings from mere biological matter), seems that the original version of the Psalter provides the indication that is better adapted to the reality of our problem. The human embryo, irrespective of the question of the soul, has an interest of a very high symbolic value. Represents the mystery of human reproduction. It's still something that is not possible to define completely, but we know of its existence and the space for penetrating its deepest essence epistemological is now very small.

9. Why the embryo is person?

In conclusion, up to that science can not give us new insights on the subject, it seems to me reasonable to assume that the embryo may coincide with the genome formed by the union of the chromosomes of a man and a woman (the real parents of a human being). I personally think that the condition of the embryo is similar to that of the unborn child/conceived starting from the moment in which science can tell us that it forms its genome. As historian of law, I define the embryo so configured as "person" and not yet an "individual" according to the following "phenomenological" figuration of person as: *a logical index of attribution able to include in his notion every entity that has subjectivity, quality and relationship; and that has in a given context epistemically relevant a memorial fund of the past, of the present and of the future*.

The embryo is thus considered as the contemporary "giuspersonalismo" sees the individual/person - trying to overcome (or improve) the paradigm of the modern personalism -, i.e. not only from a point of view *noetic* (only as an abstract concept) or *empathetic* (as relation) but also in a *memorial* way[50]. So I would define the embryo as a "person" from the formation of the genome (I dont feel as obstacles the problem of the identical twins between the 6th and the 14th day from the conception and the possibility, at the moment only theoretical, of the human cloning). The embryo is made by the DNA in a sense "giuspersonalista" as a "person" because in the DNA there is already the memory of a past (the belonging to the human race, the genetic makeup of the parents); of a present (because the DNA of the embryo is the same as that of the adult); and of a future (if it is true that in the amino acid chain there is already in place the biological history of the human being until his death). Whatever, therefore, we can say that is the embryo (would be fine also the *materia signata quantitate* of S.Thomas[51]), if it is such, as memory of its past, of its present and of its future, it is a quid unique in the Universe even if not yet "*individuus*".

10. Conclusions

For this reason the embryo can be qualified a "person" worthy to receive adequate protection irrespective of the question of his alleged legal subjectivity as decreed also by the recent decision no. 16754 2.10.2012 of the Italian Supreme Court in relation to the unborn child.

The Legislator contemporary (I think in particular to the Italian), which obviously is not bound to Boethian resolution, recogniz-

[50] For this see Sacchi O. *La persona, una bottiglia nel mare. Intervista a Giuseppe Limone*. Napoli: Liguori; 2012; 2: 157-176, p. 169.

[51] S.Thomae, *in Boeth. de Trin*. q. IV, a. 2.

ing to the embryo the attribute of person, may fall in contradiction only with modern personalism and with his concept of the person.

The Civil Code, on the other hand, provides for a regime of the legal person very articulate without creating major damage to the system. This remaining perched on the principle of self-determination (identity of person = rational human being), perhaps does not realize to adopt a notion historically created in a theological context and then supported from the modern personalism. So a notion by a strong connotation axiological and relativistic.

As for those who in good faith persist in denying the extensibility of the attribute in person to the embryo, these should be at least aware of the risk that they run. I do not think about situations as that of the dr. Josef Mengele who used human guinea pigs for his experiments in Nazi concentration camps, but there is the real possibility of a degradation of the embryo as a *res*, like the *homunculus* of Paracelsus whose story was immortalized in the famous pages of the Faust of Goethe. The *Homunculus* is a modern version of the alchemycal Golem, born to be a servant of his creator, that eventually ends up destroying it.

I think that all this evidences sufficiently the appropriateness of the metaphor of Kafka of a "seasickness on the land" which "consists in forgetting the real names of things and in to give them hastily names at random"[52]. It is appropriate, therefore, that the Legislator recoveries full awareness of the need to understand *who*, or *what*, is person. Taking into account, of course, of the scientific expertises, but without neglecting the problems of moral nature and the history.

For my part the human embryo can *have* person (as in Roman law) because it is something that deserves protection and because it can be said "person" also, as we have seen, in sense bio-anthropological, philosophical and theological. He has its memorial fund perfectly defined since the conception. The same as what will be the memorial fund of the fetus (or the unborn child), the infant,

[52] KAFKA F. *Conversazione con l'uomo che prega* (1909), it. tr. edited by Coppé L. *Kafka. Tutti i romanzi e i racconti*. Roma: Newton Compton; 2006: 617-620, p. 618.

the child, the adolescent, the adult and the elderly[53]. On the type of legal protection I do not pronounce, but it should come conseguently (*recta ratio naturae congruens*).

[53] See for an antropological notion of person in GIUSTINIANI. *Verso un nuovo compromesso…*, p. 185.

BIOETHICAL ISSUES AT THE BEGINNING OF LIFE AND FEMALE CITIZENSHIP

Emilia Taglialatela[*]

Abstract

The inquiry on the status of the human embryo is the central point of so many ethical, political and legal questions, which are interconnected about the problem of generation. *In this question, first of all the opportunities for women's freedom are involved and, consequently, the possibilities given to them to be included inside the uncertain area of rights and citizenship. In particular, women's thought has been interested in the discussion about hard bioethical present problems, such as the voluntary interruption of pregnancy or the assisted reproductive technology. This paper is going to underline the contribution given by the notion of* gender *to a different idea of female experiences linked to the control of their own body and its generative power.*
The birth of a new female subjectivity, based on the value of a moral autonomy and equal freedom, has caused a lot of philosophical, political and legal conflicts due to a debate about the meaning of the human embryo's life and a new idea of motherhood no longer linked to a fatal biological destiny but connected to a real determined choice. This paper is going to examine the most meaningful steps of the ethical and bioethical debate characterizing this transition, putting into evidence all the ambiguities and problems that, still nowadays, affect the idea of habeas corpus *for women.*

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The bioethical inquiry, despite the various points of view expressed over time, finds its core in the recognition of the individual autonomy of choice about questions which directly and deeply involve people's lives and their bodies.[1] Bioethics, then, in its inter-disciplinary constitutive structure, is related to those situations of the human existence affected by crucial interests and projects of life, such as the freedom of giving birth and the freedom of a personal expression of one's own sexuality. At these levels the moral reflection, the law and, in more recent times, the bio-law interlace the meanings of huge transformations which have marked, and still mark, the building of the female identity. A more and more changeable and complex identity, aimed at breaking social cages and stereotypes and now aware of the possibility to consider one's own female body, and thus its generative power, as part of one's own subjectivity, as a field of individual choices.

The control practices of reproduction are quite old, however, starting from the middle of the last century, they have broken through into the social scene acquiring an unprecedented public visibility and a strong political value. For ages women have used contraceptive forms and the interruption of pregnancy, always at their own risk and often ineffectually, performed secretly and clandestinely. The tragedy of abortion happens within domestic walls or in illegal ambulatory rooms, involving many women suffering from loneliness and hurt by shame. At the wake of the huge changes characterizing the society in the 1900s, the questions connected to sexuality and birth acquire a new meaning, inevitably related to the struggle for women's rights, also towards a free and responsible motherhood. This is the crucial matter which was removed from the obscurity of illegal practices and brought to the broad light of political debate by the feminists' movements of

[1] An accurate general layout of the origin and development of the bioethical reflection is available in D'ANTUONO E. *Bioetica*. Napoli: Guida; 2004.

the 1960s and 1970s. And this is also a matter of citizenship for women, who, once obtained access to the public sphere with the achievement of the right to vote, are still denied the recognition of an "equal freedom" regarding the self-determining of their body.[2]

The symbolic action of several famous female intellectuals and common women who, in France, in Germany, in the United States, in Italy denounce themselves for having had abortion[3], is a sign of the breaking of silence which paves the way to committed debates, political conflicts and the search of difficult legal mediations.

Large are the groups denouncing the gap between the bans of penal laws and the painful experience of thousands of women forced to "die from abortion". Various is the assembling of the forces making up these groups, different are their reasons, their goals. Widely shared is the need, also discussed in parliaments, to solve what looks like a social tragedy, underlining the risks of clandestine practice mainly for the health of those with minor cultural and economical resources. But other views are developing as well, claiming the free availability of the body, finding its fundament in the modern theory of personal rights.

And just starting from those years the feminists' view on the body and the self-determination is interlacing the bioethical inquiry related to the beginning of life issues, facing the analysis of the new challenges coming from the reproductive technologies.

Therefore, using the category of *gender* as a point of view to understand the historical and social processes, women's thought commits itself in the wide field of research opened by the interpre-

[2] For a reference to history of abortion see Galeotti G. *Storia dell'aborto*. Bologna: il Mulino; 2003 and Sciré G. *L'aborto in Italia. Storia di una legge*. Milano: Bruno Mondadori; 2008.

[3] I refer to the widely known practice of self-denounces adopted by women to claim the abolition of the abortion crime. The facts firstly occurred in France in April 1971 with the publication in the "Nouvel Observateur" of the manifesto of 343, written by Simone de Beauvoir, and secondly in Germany with the appeal by the feminist group "Aktion 218" appeared in the magazine "Der Stern", then in the USA and finally in Italy in 1973 during the trial against Gigliola Pierobon, accused of voluntary abortion, when some women accused themselves of co-responsibility.

tation of the techno-sciences whose capability of controlling the whole duration of human life leads to a new conceptualization of Foucault's notion of "bio-power".[4]

Even if the means of manipulation of the living matter have a long history[5], it is undeniable that in the last decades an accelerated scientific and technological progress has been shown, marking a sort of *qualitative* leap forward full of complex and upsetting ethical, political and legal implications. The new areas opened to intentional action by the assisted reproductive technologies, the bio-engineering interventions, the developments of genetic tests and the predictive medicine, making concretely practicable unprecedented possibilities to modify our own biological conditions, result in contradictory reactions. On one hand we can emphasize the value of emancipation of the so-called *technologies of freedom*[6] just for the opportunity that they offer to enlarge human planning by multiplying the alternatives of choice. On the other hand we are afraid of the risks of reification of a fragmented body as compared to its biological organic unity and limited to a storage of organs, tissues, gametes, cells.

Hope and fear, faith and anxiety have got interlaced so in the debate on the medically assisted fertilization, which has consolidated itself as a field of conflicts among alternative and incompatible points of view on the moral and legal legitimacy of practices which make available for the human manipulation processes - such as birth and death - until recently considered undoubtedly natural. This debate gives new life to an unprecedented confrontation between eugenic and therapeutic interventions.[7]

[4] See Foucault M. *Histoire de la sexualité, t. 1: La volonté de savoir*. Paris: Gallimard; 1976.

[5] See Marchesini R. *Bioetica e biotecnologie. Questioni morali nell'era biotech*. Bologna: Apèiron; 2002.

[6] Rodotà S. *Repertorio di fine secolo*. Roma-Bari: Laterza; 1999: p. 225.

[7] About the debate on the so called "new eugenics" see the views expressed by Buchanan and Habermas. Buchanan A, Brock DW, Daniels N et Al. *From Chance to Choice: Genetics and Justice*. Cambridge: Cambridge University Press; 2000. Habermas J. *Die Zukunft der menschlichen Natur. Auf dem Weg zu einer liberalen Eugenik?*. Frankfurt am Main: Suhrkamp Verlag; 2001.

Old and *new* inextricably move across the bioethical issues at the beginning of life. The old problem of abortion and the new one of reproductive technologies bring up again old philosophical questions about the meaning of life and person, and challenge us to a new way of thinking about conceptual categories and ethical principles, questioning representations inherited by traditions such as family, motherhood and fatherhood, but also questions never thought before such as that of the relationship between our genetic identity and our biographical one.

The metamorphosis of the scene, on which the questions concerning a "nascent life" lie, is clearly not unfamiliar to the relationship between ethics and law, which, in addition, results in the need of democratic and pluralistic societies of reconsidering the process of the making of political decisions.[8]

The feminists' reflection has offered contributions of great importance in the field of inquiry of the bioethical issues at the beginning of life, in which the status of the female body becomes a subject of arguments among opposing ideological and cultural groups.

Several female scholars underline the need of bioethics of steering clear of speculations based on abstract general principles, which spoil the correct comprehension of the problems of the individual cases. Their target of argument is the theoretical model developed by Thomas Beauchamp and James Childress, which indeed features the strict applying of general principles to multiple actual cases.[9] On the contrary the feminists' reflection aims at an open minded disposition, oriented towards the real experiences of a moral kind lived by each individual.[10]

[8] See Rodotà S. *La vita e le regole. Tra diritto e non diritto*. Milano: Feltrinelli; 2009. Id. *Il diritto di avere diritti*. Roma-Bari: Laterza; 2012.

[9] Beauchamp TL, Childress J. *Principles of Biomedical Ethics*. New York: Oxford University Press; 1994.

[10] See Gilligan C. *In a Different Voice: Psychological Theory and Women's Moral Development*. Cambridge: Harvard University Press; 1982. See besides Feder Kittay E, Meyers DT (ed.). *Women and Moral Theory*. Totowa: Rowman & Littlefield; 1987.

And above all a sensible approach to social and political questions is preferred, careful of the different forms of iniquity and oppression which cross the experiences of many people at various levels, bringing to light the means that increase the structures of subjugation and reinforce the *gender* discrimination.[11]

In a report published in 1996 Susan Sherwin reminded us how bioethics had succeeded in preventing a «feminist scrutiny», as the dominant *neutral* approach denied or hardly considered the fact that the question of *gender* could be relevant in the matters under study. The feminist authors have lately dealt with these omissions, knowing that «invisibility does not mean irrelevance in the problems concerning oppression».[12]

Another remarkable aspect emerging from women's research is linked to the overcoming of the limits of a strictly *rational* approach to bioethical problems. In this field, indeed, one cannot ignore or underestimate the *non-rational* and *non-consciously-pre-ordered* dimensions affecting choices and behaviors, like the role played by symbolic representations rooted in the individual and collective identities, or, more, the meaning of our deep psychological life and the value of unconscious desires.[13]

1. Asymmetries of citizenship

At this point I would like to briefly clarify the reasons supporting the necessity to face the questions of the beginning of life as questions closely connected to the female citizenship.

[11] See Sherwin S. *Femminismo e bioetica* in Dodds S, Donchin A, Gibson S et Al. *Nuove maternità. Riflessioni bioetiche al femminile* (a cura di C. Faralli e C. Cortesi). Reggio Emilia: Diabasis; 2005: 3-29.

[12] *Ivi* p. 6.

[13] See Vegetti Finzi S. *Volere un figlio. La nuova maternità fra natura e scienza*. Milano: Mondadori; 1997. Nunziante Cesaro A (a cura di). *Il bambino che viene dal freddo. Riflessioni bioetiche sulla fecondazione artificiale*. Milano: Franco Angeli; 2000.

Since the great revolutions of the late 1700s, the claim for equal rights has been historically denied.[14] If equality and citizenship do have their foundation in the concept of autonomy, being it intended as liberty from any ties of dependence, then the legal history of the western world features a wide range of cases in which such rights have always consolidated themselves starting from a preliminary and obstinate exclusion, that of women from the world of equals.[15]

Due to its generative power the female body makes up both a resource and a limit, it is subject to control and at the same time it becomes an instrument of exclusion from any decisional prerogative, it is transfigured in the "physical place" in which the historical *habitus* of the social building is crystallized in the forms of a "natural order", from which it claims full legitimacy and universal validity.

As a matter of fact, as regards to the more general layout, private law in bourgeois times does not refer to the existence of female subjects within politics, intended as a common and gradually enlarged space of free and equal citizens. Such absence is not the result of contingent considerations or a temporary removal, but is rooted in the very idea of family and marriage as "sexual contract" based on the asymmetry of roles in the couple and on the confinement of women in a strictly private sphere of action (or rather inaction).

The domestic circuit which women are assigned to, with the relative duties of giving birth and parental care, is only partly due to a bulky residual feudalism. The strictly private dimension of the female destiny is actually embedded in the foundation of the bourgeois society, it makes up an irreplaceable piece in its functional mechanisms.[16]

[14] For a large and accurate study on the conceptual articulation of the notion of citizenship, Piero Costa's essays are a remarkable reference. See Costa P. *Cittadinanza*. Roma-Bari: Laterza; 2009.

[15] About the complex events related to female citizenship see Bonacchi G, Groppi A (a cura di). *Il dilemma della cittadinanza. Diritti e doveri delle donne*. Roma-Bari: Laterza; 1993 and Rossi-Doria A. *Diventare cittadine*. Firenze: Giunti; 1996.

[16] See Pateman C. *The Sexual Contract*. Stanford: Stanford University Press; 1988 and Pitch T. *Un diritto per due*. Milano: Il Saggiatore; 1998.

In other terms, the female body, as key agent in the reproductive process, is a remarkably important "asset" either in the private dimension, for the destinies of the family unit, or on a public scale in the context of wider demographical policies. Just because it is an "asset", it is taken away from the power and the freedom of choice of women, who are, quite hardly and too late, allowed to have the right to the *habeas corpus*, which is inalienably safeguard of individual freedom against arbitrary State action. The controversial themes of contraception and abortion lie upon this separation between public and private.

The dichotomy public/private, radically questioned by the women's thought, is further troubled by the rise of bioethical matters, whose feature is that a series of events such as birth and death, long considered "natural", are drawn, as a result of the new discoveries of research and of the availability of new technologies, to the sphere of public decisions.

2. Female self-determination and moral evaluation of abortion

«Critical point of a whole culture»[17]: so the philosopher of law Uberto Scarpelli defines the problem of abortion, underlining how it represents a non-marginal question at all in which we can find metaphysical, anthropological and religious points of view, which need to be considered very carefully through a dialectic confrontation where the assessment of one's values does not mean the negation of the others'. Unlike what Scarpelli expected, the debate on the voluntary interruption of pregnancy has been seen for the last few decades as a harsh ideological battlefield, confined in a logic of oppositions in which intolerance does not seem to let possible exercises of understanding.

A correct framework of the matter cannot do without some preliminary yet brief considerations. At the international level we can report a permanent clash between "pro-life" and "pro-choice"

[17] Scarpelli U. *Bioetica laica*. Milano: Baldini & Castoldi; 1998: p. 99.

movements, inside which heterogeneous positions are found regarding the moral debate, not always univocally definable in political terms. A solid point, however, is the fact that the constitutional democracies, even through the making of a legal framework within which the abortion debate is to be found, have developed their ultimate dimension of secularism. And it is the State's secularism itself, for its meaning of inclusive vision in the democratic process of ethical and religious pluralism, to be continuously challenged by bioethical questions.[18]

Particularly undermined is the area of debate regarding the govern of the female body and the self-determining of women regarding pregnancy. Therefore, the laws regulating abortion in Europe and in the United States are constantly the object of attempts of restrictive reforms. In this context, strong is the impulse from the Catholic Church; in the encyclical *Evangelium vitae* John Paul II condemns abortion and euthanasia as «crimes which no human law can claim to legitimize», arguing that «there is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection».[19]

Waves of revisionism are also caused by the substantial change in the relationship between genders occurred in the collective imaginary. In the public debate the traditional representation of the female gender to be defended as subaltern, victim of social stereotypes, oppressed by the concept of motherhood as a destiny, leaves room to a representation of the female gender from whose claims we have to defend society. Indeed, once obtained the right to abortion, women would be oriented to forms of egoistic self-assessment, eager to sacrifice their families and have abortion for arbitrary, and thus immoral, reasons. In this change of representations what remains untouched is the incapability of recognizing the female responsibility in the act of giving birth.

[18] See Mancina C. *La laicità al tempo della bioetica*. Bologna: il Mulino; 2009.

[19] John Paul II. *Evangelium Vitae* (March 25, 1995). Rome; 1995 (http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html).

Wide is the literature speculating both on the difficult theme of the moral evaluation of abortion[20], and on the different approach that the various laws, at the national and international level, have developed to regulate the voluntary interruption of pregnancy.[21] On this occasion I would like to mention just a few studies which better allow to appreciate the peculiar contribution offered by women's reflections.

First of all, we must not underrate the fact that even within the catholic area, committed to the support of "pro-life" positions, one can report the attention paid to the developments of the female thought. Remarkable, in this sense, is the reflection by Laura Palazzani[22], who relies on the analysis by Carol Gilligan about the distinction between the two approaches to the moral choice, the one focused on the "ethics of justice", typical of the male side and characterized by a universal point of view, and the other focused on the "ethics of care", to which the female world is mainly oriented, which is based on affective bondage, sympathy, promptness towards the others.[23]

The Italian scholar emphasizes the aspects of the "ethics of care" that contribute to define a "mother-like moral" intended as total responsibility for the absolute dependence and vulnerability of the embryo, but even warns us about what she considers the unsolved ambiguity of the analysis by Carol Gilligan, that is the risk that the cure of oneself prevails on the cure of the others leading to the supremacy of the strong over the weak. Therefore, according to Laura Palazzani, «a philosophical integration would be necessary, besides an ethical and legal one, to assess the ontological status of a nascent life, which justifies the relevance of a complementary co-presence of care and justice; the former does

[20] See Botti C. *Prospettive femministe. Morale, bioetica e vita quotidiana*. Torino: Espress Edizioni; 2012.

[21] See Mancini S. *Un affare di donne. L'aborto tra libertà eguale e controllo sociale*. Padova: CEDAM; 2012.

[22] See Palazzani L. *L'aborto nel pensiero femminista e femminile*. Studia Bioethica. 2008; I (2-3): 161-164.

[23] See Gilligan C. *In a Different Voice…*

not replace the latter, but integrates it and makes it real, taking for granted the recognition of the equal ontological dignity of every human being, including the embryo».[24]

But the question whether the embryo is a person starting from its conception – as the catholic doctrine firmly claims – is the subject of endless talks. The decision concerning which characteristics and which rights it possesses cannot be referred to some ultimate and univocal evidence produced by science, but it is a decision that involves evaluations of anthropological and moral kind.

Certainly, the most relevant aspect of the bioethical inquiry from the feminists' side is that related to a revision of the traditional ways by which to face the problem of abortion, based on the conflict of rights between the woman and the embryo. The feminists' bioethics suggests, indeed, the overcoming of the concept by which subjects and bodies are placed in opposite positions because – as Susan Sherwin underlines – it is not possible to discuss abortion in mere terms of interests of the embryo ignoring the fact that it finds its «universal dwelling in women's bodies».[25]

Considering the embryo and the woman as autonomous entities separated from each other denies the real condition of inter-dependence of the embryo's life. The embryo has a *sui generis* status since it is in an inter-corporeal relationship with its mother.

Moving from the peculiar relationship started during pregnancy, theories have been developed focused on the theme of responsibility as the central point of the debate on the morality of abortion. The women's choice, indeed, cannot be ethically irrelevant, because denying the fact that the embryo is a person does not mean ignoring the fact that it is an initial form of human life anyway. Thus, recognizing the moral competence of women means recognizing the relevance of their deliberations, which are the result of some balancing process which «does not deny the value of life, but expresses a responsibility of judgment towards different lives, each with their own value, possibly in reciprocal

[24] Palazzani L. *L'aborto nel pensiero…*, p. 164.
[25] Sherwin S. *Femminismo e bioetica…*, p. 17.

conflict».[26] At this level one can get the deep link between the regulation of abortion and the question of female citizenship. Claudia Mancina successfully argues that «the legalization of abortion is a sort of *habeas corpus* for the female citizens»; empowering women with the full availability of their body is like recognizing their freedom to «decide about their lives, which – just like any kind of freedom – is placed within a framework of rules based on the gradualist conceptualization of the embryo's life and thus of the moral weight of abortion».[27]

3. The debates on the medically assisted fertilization

The practice of assisted fertilization has opened a wide field of biomedical intervention where personal choices and religious bans, marketing interests and legislative emergencies, old-fashioned taboos and attitudes of faith in science meet and clash.

It was the birth of the first *in vitro child*, Louise Brown, in 1978, to mark the starting up of the practices of artificial fertilization on the stage of the international press. It was an extraordinary event which deeply impressed the collective imagination and called into question values, beliefs, representations always considered to be inviolable. Assisted fertilization, indeed, offers a wide range of more and more complex options, by which it becomes possible to separate sexuality and reproduction, conception and filiations, the biological mother and the educational one.

Since 1978 the fast improvements in the techniques of intervention and their large diffusion in the global market of sanitary service have allowed the birth of nearly as many as four millions of those who, as Stefano Rodotà remarks, are sarcastically called *in vitro children*.[28]

[26] Mancina C. *Oltre il femminismo. Le donne nella società pluralista*. Bologna: il Mulino; 2002: p. 99.

[27] *Ivi* p. 101.

[28] Rodotà S. *Perché laico*. Roma-Bari: Laterza; 2009: p. 68.

IVF (*In Vitro Fertilization*) has therefore become a sort of "technological base" questioning our moral conscience for its complex and certainly ambiguous meanings, which we put off to a more general evaluation of science and genetic engineering in particular, alternatively interpreted as accomplice of the merchandizing of bodies or as a promise of victory over sterility and hereditary diseases.

The analysis of assisted fertilization features the same crucial problem as in the abortion debate, that of the status of the embryo. It acquires new relevance because, since the link that seemed unbreakable between the embryo and the mother's body disappears, the question rises, and it is difficult to solve it from a legal point of view, of the stored redundant embryos and their possible use in the scientific research.[29]

In Italy, law n. 40/2004 regulating assisted fertilization operates a balance of interests regarding the couple, the embryo, the medical technique and the scientific research. Among the features of this controversial law, the most relevant is the protection of the embryo, qualified as "subject". Based on the protection of the embryo is a thick network of bans: from that of heterologous fertilization to that of the cryopreservation of the embryos and of the preimplantation genetic diagnosis. And so law, in order to govern science, or better to limit it, lets a high price to pay, not only in economical terms but also in psychological and affective terms, to those who rely on science. The ban of the storage of the embryos, for instance, which aims at limiting the quantity of material by which science can perform its research, is a price to be paid by the woman, who has to undergo assisted fertilization again and again, and by the man near her, who personally experiences such a heavy situation.

A further example of the contradictions arisen from the idea of protecting the embryo as a subject is that related to the previsione by which the preimplantation diagnosis is banned, in order to prevent the embryo from arbitrary decisions by its future parents, but at the same time the woman is granted the possibility to under-

[29] See Jasanoff S. *Designs on Nature: Science and Democracy in Europe and the United States*. Princeton: Princeton University Press; 2005: 146-170.

go therapeutic abortion after months of a pregnancy achieved at the cost of practices of assisted fertilization. We get to a paradox, then: law 40 support the principle of protection of the embryo, but subsequently expose it, omitting the burden of sufferings of the mother, to a late abortion, in the cases established by law n. 194/78 for the therapeutic interruption of pregnancy.

Over the last few years law 40, for some of its most paradoxical aspects, like that of the ban of the preimplantation diagnosis, has been objected and "corrected" by sentences from Italian courthouses, but there is no doubt that women's freedom still remains limited in several aspects.

The feminists' theories on the meaning of medical fertilization intervention have been different over time. At first a short phase of enthusiasm is reported, with the publication, in 1971, of the essay by Shulamith Firestone, *The Dialectic of Sex*. In the American researcher's analysis technologies become a useful tool in the strategy of women's liberation.[30] Indeed, the possibility predicted by science to create a pregnancy entirely *in vitro* would have released women from the slavery imposed on their bodies by social schemes where the biological difference and the generative function result in sexual subordination.

The fading of the early enthusiasm is also due to those reflections which, by highlighting the reductive schemes of Shulamith Firestone's thesis, more accurately examine the historical meaning of motherhood in women's lives and warn about the possible exploitation in the invading use of technology. The latter is seen with suspicion especially by radical feminists, who think that the medical intervention in fertilization, far from granting the overcoming of the patriarchal structure of power, has allowed men, because of technology, to take over the generative power. The feminists' debate shows disbelief in science and its applications, regarded as a dangerous opportunity of alliance between medicine and commercial interests. Quite significant, in this sense, are the views expressed by the *Feminist International Network of Resistance to*

[30] Firestone S. *The Dialectic of Sex*. London: Jonathan Cape; 1971.

Reproductive and Genetic Engineering (FINRRAGE), which firmly reject assisted fertilization, regarded as a new scientific means by which patriarchal ideologies confirm the strictly reproductive role of women.[31]

These issues by FINRRAGE had large audiences and surely contributed to highlight the political character of a certain use of technology, but then they have been replaced by views that redefine the problem of infertility in a more complex context. Particularly developed is the awareness of how misleading is the representation of women relying on artificial fertilization as victims manipulated by the power of medicine.

We can see, then, the pursuit of an approach which does not conceal the subjectivity of each woman undergoing this treatment, but at the same time does not forget the influence of the therapeutic and institutional context within which personal choices start and develop.[32]

In particular, some scholars focus their attention on the tendency of medicine to dissolve the female identity – which is certainly the most concretely and intrusively involved in the practice of artificial fertilization – within a wider entity: the couple. As the studies by Irma Van der Ploeg show, there is a new configuration of corporeal boundaries, leading, in the medical-scientific "discourse", to the formation of new bodies, no more individual bodies-subjects but "collective bodies", as in the example of the concept of the «hermaphrodite couple».[33]

[31] See Rowland R. *Living Laboratories: Women and Reproductive Technologies*. Bloomington: Indiana University Press; 1992.

[32] Donchin A. *Prospettive che convergono: le critiche femministe alla riproduzione assistita* in Dodds S, Donchin A, Gibson S et Al. *Nuove maternità…*, pp. 69-108.

[33] Irma Van der Ploeg refers to "hermaphrodite couple" to understate that only entity, built by medical reports on the in vitro fertilization treatments, which produce ovules and spermatozoids and solve problems of infertility of one of the two partners. See Van der Ploeg I. *Hermaphrodite Patients: In Vitro Fertilization and the Transformation of Male Infertility*. Science, Technology & Human Values. 1995; 20 (4): 460-481.

Over the years the women's thought has dealt with the need to limit the risks of two converging trends: that of despising technology and that of making "natural" motherhood more essential. «The organization of the debate on the natural or artificial kind of specific technologies – Anne Donchin clarifies – leads to the duplication of the same polarities that originally saw women as the subjugated sex: the identification of technology with the male side and of nature with the female one. Metaphors prevail […] which continuously represent technology as a destructive force of the original natural order».[34] This view does not permit to listen to the profound needs, the concrete interests of women, and to see them capable of moral and responsible actions.

This means reconsidering the question of citizenship, and thus the attribution to all subjects of the rights to individual liberty and autonomy of choices.

The total condemnation of the assisted fertilization expressed by the Catholic Church in *Donum vitae*[35] is not only the result of the rejection of artificiality, which alters the sacred order of generation, but even more it is the result of the awareness of the revolutionary consequences brought by the new methods of birth in the context of parental relationships.

A model of marriage and family is then involved, which has to be protected not so much from the risks of extreme experimentation but mostly from the progressive and inevitable breaking of the traditional assets. However, as Claudia Mancina notes, «assisted fertilization surely alters the meanings of notions like motherhood and fatherhood, but it cannot be blamed for the (alleged) collapse of the traditional family».[36] Separations, divorces, second weddings, children born out of marriage, one-parent-families, ho-

[34] Donchin A. *Prospettive che convergono…*, pp. 84-85.

[35] Sacred Congregation for the Doctrine of the Faith. *Instruction on respect for human life in its origin and on the dignity of procreation replies to certain questions of the day* (February 22, 1987). Rome; 1987 (http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for%20human-life_en.html).

[36] Mancina C. *La laicità…*, p. 92.

mosexual couples are increasingly frequent situations that have greatly changed the structure of parental systems. Catholic morality, which is clearly against this change, has chosen assisted fertilization as a «symbolic target».[37] In the public debate and in the Italian Parliament a struggle has been developing which denies the new procreative rights and establishes «an unacceptable gap between natural and artificial birth. […] This gap – Claudia Mancina claims – cannot find its foundation in any rational ethics».[38]

Another aspect of the assisted fertilization under women's study is the one related to the complexity of the *choice* made by those women who start the long and painful treatment against sterility. The inquiry on the notion of choice has been one of the most significant elements of the feminists' research, which has examined its values connecting them to a relational kind of interpretation of the concept of autonomy.[39]

The latter, indeed, is taken away from an ideal of independence of the individual from society, and it is viewed in the recognition of the complexities of the relationships between people and their culture as constitutive elements which act by modeling identities. Thus, even the autonomous choice can no longer be considered just as the expression of an informed preference, but has to be examined in the light of the network of social rules and material circumstances affecting individual determinations.

Surely, today, what Gena Corea said in 1985 against reproductive technologies sounds wrong: «the woman who decides autonomously – argued the remarkable representative of FINRRAGE – is fake».[40] Fake, then, would be the choice of the woman who, relying on medicine, does not express her free will, but is subject to social influences and sexual stereotypes, which tie womanhood to a reproductive destiny. These views, which are the result of anachronis-

[37] *Ibid.*

[38] *Ivi* p. 93.

[39] Dodds S. *Scelta e controllo nella bioetica femminista* in Dodds S, Donchin A, Gibson S et Al. *Nuove maternità…*, pp. 31-66.

[40] Corea G. *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*. New York: Harper and Row; 1985: 228.

tic determinism, deny the meaning held by the generative chance in the building process of female identity.

In this context, Emilia D'Antuono sharply observes: «the fact that giving birth, though a form of creativity, does not complete it, like motherhood, with its relative meanings and values, is not over after physical birth, nothing spoils the relevance, for the constitution of the female identity, of the pure possibility to give birth».[41] In the scholar's analysis the body made vulnerable by suffered sterility is a body related to a subjectivity marked by pain and desire. Recognizing the perceptions of deprivation of the women undergoing assisted fertilization, listening to their experiences of sorrow and hope means giving ethical value and political legitimacy to a choice that figures itself as an undeniable exercise of freedom.

[41] D'Antuono E. *Il corpo femminile tra necessità, libertà e legge* in Bonito Oliva R (a cura di). *La cura delle donne*. Roma: Meltemi; 2006: 272.

THE INTERSECTION OF THE LOGICS OF FILIATION IN THE CONTEXT OF BEGINNING OF LIFE: A PSYCHOANALYTIC APPROACH

Maria Clelia Zurlo[*]

Abstract

In recent years the debate on issues on the beginning of life and on the ethical-ontological status of the embryo shows how scientific progress in the biomedical field has modified the traditional concept of birth and has turned the attention of researchers towards the antenatal phase. Then, the problems related to abortion, artificial insemination, predictive medicine and genetic screening are the main questions put forward by bioethics. The new possibilities of observation, monitoring, care, and interaction with forms of nascent life, with embryos to implant in assisted procreation, to accept, reject, cure in relation to predictive medicine and genetic screening, has changed the experience of procreation, placing the theme of filiation as the focus of discussions and critical analysis on new possibilities to consider.
These changes elicit both the juridical view, which focus on the definition and regulation of the different ties that have been established, and the psychological research, which examines the impact of biotechnology on individual, familiar and social psychic life.
The article, moving from a psychoanalytic and relational perspective, firstly proposes some considerations on the intersection of conscious and unconscious desires and representations within which the beginning of life always makes sense and meaning, and then describes the way these

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dimensions of filiation could be declined with respect to two specific areas of influence of biomedical techniques on the establishment of the bonds of filiation: antenatal diagnosis, and medically assisted procreation, with particular reference to the heterologous fecundation.

1. In recent years the debate on issues on the beginning of life and on the ethical-ontological status of the embryo shows how scientific progress in the biomedical field has modified the traditional concept of birth and has turned the attention of researchers towards the antenatal phase. Then, the problems related to abortion, artificial insemination, predictive medicine and genetic screening are the main questions put forward by bioethics. The new possibilities of observation, monitoring, care, and interaction with forms of nascent life, with embryos to implant in assisted procreation, to accept, reject, cure in relation to predictive medicine and genetic screening, has changed the experience of procreation, placing the theme of filiation as the focus of discussions and critical analysis on new possibilities to consider.

These changes elicit both the juridical view, which focus on the definition and regulation of the different ties that have been established, and the psychological research, which examines the impact of biotechnology on individual, familiar and social psychic life. In this context, the reflections on the beginning of life from a psychological and psychoanalytical perspective induce to pose several questions:

- when we treat issues concerning the beginning of human life, we should consider the relational and intergenerational perspective that gives meaning to human life itself, and we need to reflect on the origins of the ties of filiation, which assumed new configurations in the contemporary background;
- any question concerning the beginning of life in a psychodynamic perspective concerns the conscious and unconscious representations and fantasies elicited about it: representations and fantasies of individuals, of families, and of social contexts (i.e. cultural and juridical conceptions about the beginning of life);

- the recent changes in the field of filiation may lead to problematic situations of lack of cultural and symbolic references to support individual processes of assimilation of the experience of procreation.

The contribution that follows, moving from a psychoanalytic and relational perspective, firstly proposes some considerations on the intersection of conscious and unconscious desires and fantasies within which the beginning of life always makes sense and meaning, and then describes the way these dimensions of filiation could be declined with respect to two specific areas of influence of biomedical techniques on the establishment of the bonds of filiation: antenatal diagnosis, and medically assisted procreation, with particular reference to the heterologous fecundation.

Our reference in dealing with the above issues is the psychoanalytic approach, which focuses its attention on the impact of biotechnology on the psyche of the individuals involved, and, in particular on the imaginary and unconscious dimensions of the filiation. In fact, Biotechnologies operate on human body and reproduction, and inevitably influence central aspects of mental life such as identity, transmission, experience of the body, erogenous and sexual nature of the body, sexual desire and desire for a child. In dealing with the profound changes generated by biomedical progress the psychodynamic perspective aims to identify the characteristics of conscious and unconscious psychological experience and the conditions that make possible the assimilation of these new experiences of procreation, thus attempting to avoid or overcome traumatic experiences that may result from the absence of adequate symbolic references.

2. The pre natal counseling interventions show us how the complex process of development of parenting may be an occasion of redefinitions, repetition and re-enactment of the vicissitudes and psychic conflicts that have characterized the psychological birth and evolution of parents. The process involved in the desire to have a child, which passes

through the conception, gestation, childbirth and the construction of the parent-child relationship, takes shape in relation to the re-emergence of desires, images, fantasies, representations in the psyche of the parents.

It has been already several decades since, first, authors such as G.L. Bibring (1961) and P.C. Racamier (Racamier et al. 1961) have shown that the conception of a child and the pregnancy represent a turning point in psychic development and the definition of human identity, and that the process of development of the bonds of filiation and of construction of parental roles constitute for both members of the couple an experience of crisis (Kaës, 1979), which imposes profound redefinitions and rework and that may have structuring and maturational effects. In the following years the reflections on the process of parenting have been enriched by many clinical data (Stoleru et al., 1985; Stoleru, 1989, 1998; Missonnier, 1998, 2003; Missonnier, Golse, Soulé, 2004).

Monique Bydlowski (2009) has shown that the experience of motherhood in the women requires a recovery of the various pre-oedipal and oedipal stages of their process of psychological birth and of construction of female identity. In her description of the vicissitudes of the construction of parenting and of parent-child ties Elisabeth Darchis (2000) used the metaphor of psychic journey that any future parent should make in their family history, in a movement of recovery and reprocessing of childhood experiences. This movement of research concerns two dimensions of identity, which activate two corresponding identification processes: a dimension concerning the research and the rediscovery of the child that each of the parents has been, to build their own personal meaning of being a child, a son; and a dimension concerning the research and the rediscovery of the parents that they have had, to build their own personal meaning of being a parent.

If then, as affirms André Carel (1988), "The birth must be considered in its biological meaning, but, at the same time and with equal force, as the birth of the child's psyche and as the birth of the child's psyche in the parents psyche"[1], consequently we can af-

[1] Carel A. *Transfert et périnatalité psychique. La fonction alpha à l'épreuve de la naissance*. Gruppo. 1988; 4: 49-67, p. 50.

firm that from a psychodynamic point of view the beginning of life should be considered inseparable from the process of construction and elaboration of the conscious and unconscious representation of the child's psyche, and, especially, of the child's individuality in the psyche of the parents. This process of construction of parenting is influenced by the psychosexual and adaptive development of the parent during his childhood, adolescence, and adulthood, from the intergenerational ties in which the individual is inscribed and inscribes his project of parenthood, and finally from the cultural and social environment in which the parent is engaged and which provides the horizon of meanings from which she draws in the processes of symbolization of his own life.

Therefore, it means that from the psychological point of view the concept of prenatal period exceeds the time limits fixed in Perinatology (the twenty-eighth week of intrauterine life until the seventh day of postnatal life), and it becomes larger and more complex as it extends from the birth of the project parents to have a child until the end of the second year of the child's life (Stoleru, 1995, 1998; Missonnier, 2003).

In this perspective, the prenatal processes, from a psychological point of view, should be considered as a process of activation and transformation of questions and issues that shape the individual and his identity: questions about the origins, conflicts of separation, questions concerning the difference between the sexes and between generations, conflicts and vicissitudes characterizing the development of the self and of object relations. So the prenatal period constitutes a phase of reactivation of primal fantasies concerning intrauterine life, primal scene, castration and seduction (Missonier, 2003).

Therefore, if we reflect on the problematic issues of the filiation and on the beginning of life from a psychodynamic perspective, then we could consider the complexity of this process of transformation as well as the inevitable ambivalence towards the child and the experience to have a child, that ambivalence can emerge in relation to the project to have a child, but also during pregnancy, or later, in relation to the childbirth and/or

during the post-partum. Consequently we have to consider the ghosts reactivated by the desire to have a child, and the conflicts and interdicts that can characterize this desire, from the conception and during the pregnancy, until the birth and the post-partum. We must seize the meaning of "the ghosts in the nursery" (Fraiberg, Adelson, Shapiro, 1987) that are present before the birth and before the child's conception, and the processes of recovery and processing of such ghosts, which follow the processes of filiation and their evolution.

3. Dealing with issues concerning the beginning of life from a psychological and psychodynamic point of view means exploring representations of the embryo and fetus by the parental couple and by the social and cultural group to which it belongs. These representations are in fact the prehistory of the system of relations in which occurs the psychological birth of the child, regardless of any discourse about the determination of the philosophical and juridical status of the embryo as a person or as a subject of rights.

It is significant, however, that in many contributions to contemporary juridical debate - which was characterized by a growing awareness of the relational dimension of the rights of the child - was instead adopted an atomistic perspective about the status of the embryo, which focuses on the definition of the moment from which it is possible to consider the embryo a person, an individual with legal capacity, rather than on the relationships from which the meaning of individual human life originates.

To understand the genesis of this trend, in my opinion it could be useful to refer to some psychoanalytic theories about the multidimensional nature of the ties of filiation.

Starting in the '80s Jean Guyotat was introduced to the study of psychology and psychopathology of the ties of filiation to distinguish "three logics" of these relationships; these logics also function as vectors for the transmission of different meanings from one generation to the next: the institutional filiation; the imaginary

and narcissistic filiation; and the biomedical filiation, also defined filiation "from body to body."

The institutional filiation is the filiation which is socially and culturally defined. It refers to the customs, laws and rituals that encode and redefine, within every human group, the procreation and the roles of the individuals involved, and to ensure that a child is recognized and designated by the group as the son of a certain mother and of a certain father. The institutional aspects of the filiation are closely intertwined with aspects of filiation concerning the experience through which every individual places himself in the chain of generations, which includes his ancestors and his descendants. These aspects concern the filiation from psychological, narcissistic and imaginary point of view, that is rooted in the network of relationships to which each individual belongs from his birth.

According to Guyotat, it exists, among the psychological symbolization of the filiation and the institutional symbolization of the filiation, a constant interweaving. But, with the emergency of the new forms of filiation that has become possible for the contribution of the modern biomedical techniques, this intersection has become even more complex by the emergence of a third symbolic dimension of the filiation relationship, the biomedical filiation, the filiation "from body to body". According to its biomedical representation, the filiation relationship consists in "putting in relation body parts and body products". In this regard Guyotat adds: "The biomedical approach is developed from the study of these relationships and when we talk about the ties of blood it is primarily a representation of a link between products of the body (blood), parts of the body that are initially in close relation to each other (the child in the womb of the mother) and then separate as in childbirth"[2].

In accordance with Guyotat the biomedical conception of filiation is centered on the functioning of the relationship between

[2] Guyotat J. *Tre logiche del legame di filiazione*, in ZURLO M.C. (a cura di). *La filiazione problematica. Saggi psicoanalitici.* Napoli: Liguori, 2013: 277-287, p. 285.

body parts and products (blood, genes, organs) and ignores all aspects of filiation concerning relationships, desires and expectations of individuals. In my opinion, the biomedical conception of filiation is often dominant in the current debate on the juridical status of the embryo and it is at basis of the positions that pose in the background the psychic and relational dimensions of the filiation.

The reflections of Guyotat regarding the logic of biomedical filiation find significant convergence with what Stefano Rodotà (1999) describes when, taking up the reflections of Dorothy Nelkin and Susan Lindee (1995) on the cultural stereotypes concerning genetic research, speaks of "mystique "of DNA. Rodotà points out that the recent acquisitions of genetic research have led to the progressive diffusion and affirmation of deterministic theories and new forms of biological reductionism, which have promoted, in the collective imaginary, the diffusion of a segmented and reductionist conception of man. In fact, on the one hand, the human being has been increasingly considered as a set of separate parts (blood, genes, organs), and, on the other hand, the individual has been more and more considered as dependent on its genetic characteristics. This form of reductionism leads to "emphasize the genetic characteristics of individuals, to sacrifice and put in the background the wealth of relationships born in the course of the social relationships," and re-evaluate "the ties of blood at the expense of the construction of the motherhood and paternity on the social and relational plan".

Of course, the reference to the psychoanalytic theories of relational approach can not in itself provide any direct contribution to the debate about the ethical and legal status of the embryo. However, it can invite those that reflect on this subject to consider that every individual psychic life originates and is always built within a system of relationships, desires, expectations, real and imaginary, conscious and unconscious, preceding the birth, which give meaning to the single life that begins and which profoundly affect the subsequent existence of the individual.

4. The discourse developed here, which turns its attention to the representations and fantasies of the couples concerning the beginning of life, can find another interesting application in the field of antenatal diagnosis, an area in which advances in biomedicine have had profound influence on the ties of filiation.

Advances in biomedicine led to the massive diffusion of antenatal exploration techniques - notably the ultrasound and amniocentesis - aimed to protect the well-being of the fetus and to allow the diagnosis of malformations and fetal abnormalities.

In juridical terms the possibility of such investigations led to the establishment of new rights such as the right to a not modified genetic inheritance, or the right to a genetic inheritance that doesn't involve the transmission of diseases, and above all, the right "to be born healthy" with consequent definition of existential damage to the person derived from the genetic transmission of diseases. In the same direction, recent research perspectives have also described the procreation in terms of civil liability, introducing the notion of "damage from procreation" which also includes the damage to the newborn as a result of malformations or troubles caused by the presence of inherited diseases.

Several interesting observations on this subject were made by Eugenio Paci (1999), who pointed out regarding the progress of predictive medicine that the findings of genetic research have brought to the fore the concept of risk. In fact predictive medicine is an advanced sector in which occurs strongly and frequently the emergence of issues concerning the risk in medicine. In developing his thesis Paci takes up the arguments of the anthropologist Mary Douglas (1992), who underlined that Western society is becoming more and more a "risk society". Inside the "risk society" the definition of each risk is assigned to a specific field of knowledge, which is recognized as responsible of the attribution of a quantitative value to the risk, a quantitative value that has a meaning concerning the specific field, but that nevertheless assumes an absolute character. In this per-

spective, the biomedical sciences are the specific field which is considered in our society responsible for the description in terms of probability of the disease risk of an individual.

The problem inherent the process of description of the risk in terms of probability is that it leads to an abstract and de-contextualized conception of the risk. For this reason, it is essential to reinsert a contextualized conception of the risk, providing counseling interventions aimed to rediscover the emotions aroused in the individuals by the experience of risk (emotions which are often stifled and inhibited), and to promote processes of reflection and research of the meanings that each individual attach to the risk of suffering of a particular disease. In fact, in my opinion the central point of the question is to be able to understand the meanings related to the probability of a particular risk in relation to the lives of individuals. The logic of quantitative evaluation must find its meaning in the narrative description of the disease, and must integrate harmoniously the meanings of the diagnosis. In conclusion it is necessary to reconnect the notion of risk at the real life of the individuals, to their emotions and to the subjective meanings that they attach to the risk.

In fact, we should consider that the dimensions related to the personality and history of the individual affect profoundly his possibilities and modalities of understanding a genetic risk, and that these possibilities and modalities are related to the meaning attributed to the risk, to the levels of experienced anxiety and the subject's ability to control and manage the anxiety. Then, in these cases, the emphasis on the medical dimension involves the danger that medical intervention does not consider the psychological dimension of the filiation and ends to bypass, deny, remove all the problems related to the unconscious, imaginary and narcissistic dimension of the filiation.

The imaginary and narcissistic dimension of the filiation is intensely activated in situations where there is a pathology of the procreation, and in situations where there is a reproduction from one generation to the other of events such as an inherited disease. Psychological and psychodynamic researches have underlined as

the repetition, or even the only risk of repetition, of a dramatic event or illness, can reactivate in many cases the distressing fantasy of a transmission between generations of a fault and of an inevitable punishment. In this sense, the presence of fantasies concerning a sort of "curse" transmitted from generation to generation is found in many families with members suffering from mental and physical disorders, and this presence emerges also in families with a member suffering from a disease that is genetically transmitted .

The discover of the risk of transmitting a genetic disease, or of the risk that the unborn child has a malformation can be intolerable and in many cases results in a deep crisis. In these cases, the communication of the diagnosis can be experienced as a repetition and a re-actualization in the reality of individual and family of persecutory fantasies, which can determine an underestimation or an overestimation of the real risk.

Serge Lebovici (1989, 1994) proposed to distinguish in the psyche of the future mother three different aspects of a child's wish:

- an aspect concerning the imaginary child, or the child who emerges from the conscious and preconscious fantasies of the mother and is the result of the desire for a child as well as of the meanings of filiation transmitted between generations;
- an aspect concerning the child who emerges from the unconscious fantasies of the mother, and that stems from childhood conflicts, from the desires of the oedipal phase, from the unconscious representations of the mother on her early childhood; this aspect concerning the child that emerges from the unconscious fantasies of the mother is also the child object of the "life debt" that the mother has towards her mother (Bydlowski, 1997);
- finally, an aspect concerning the mythical child, which is derived from the social and cultural context of the mother and reflects the cultural and institutional conceptions of filiation within it.

The mother's conscious and unconscious fantasies about the baby are reactivated during pregnancy, that is considered a period of crisis (Kaës, 1979) in which the "transparency" of the psyche (Bydlowski, 1997) makes observables the processes of elaboration and the centrality of '"anticipation" of parenting, which, as point-

ed out Missonnier (2003) connects past and present and anticipates at the same time the future of the relationships that will be established with the unborn child.

The embryo-fetal ultrasound and amniocentesis are involved in the process of structuring of parenting and the process of signification of test results in the exchange that occurs between the couple and members of the medical team is important. In fact this exchange could become a significant contribution to the necessary work of psychological organization of the experience; but it could also become a moment of emergence of pathological situations. André Carel used the term "traumatosis" to describe the effects of a reactivation of traumatic experiences concerning the infantile psychic life of parents during the antenatal and prenatal period. This reactivation induces a state of intense mental suffering that can cause a psychotic breakdown of parents (who is often evident in the mother and cryptic, unrecognized, in the father), somatizations, or destructive manifestations against the child.

These processes and the ability to deal with them should be considered for the provision of counseling interventions aiming to support antenatal diagnosis procedures as an essential tool to promote an effective informed consent and try to facilitate the identification of responsibilities that each individual can take. The communication of the results should therefore consider the impact of the diagnosis on the approach to procreation of the couple and of each member of it.

5. In the same theoretical perspective, I will develop below some thoughts on another specific theme, much debated today, i.e. on the particular type of medically assisted procreation that is called heterogonous fertilization because it involves the participation of a donor who is external to the couple. It is not my intention, in accordance with my perspective, to take a position on the prohibition of this fertilization formulated by Law no. 40 of February 2004, but rather to highlight some facts that should be taken into account regardless of our opinion about the law, and to describe

some psychic representations of the couple on the beginning of life that can be elicited by such fertilization and that may affect the relational context in which occurs the psychological birth of the child.

In my opinion, the risks that have been detected in the heterologous fertilization should be considered through the analysis of the conscious and unconscious dimensions that underlie the experience of members of couples that recur to it. In particular my proposal is to consider the unconscious fantasies elicited by this type of filiation and that make the concept of informed consent more complex in these cases.

In this sense, I think that the different possibilities of heterologous fertilization should be distinct from one another in consideration of the various fantasies that they activate and of different possibilities of psychological elaboration of such fantasies. In cases of heterologous fertilization with anonymous sperm donation donor has been highlighted the risk of a de-institutionalization of the father, i.e. of a loss of important elements concerning the social recognition of the father's role in procreation (Guyotat, 1995), and some authors posed the problem that some legal fathers whose wife is fertilized with seed from an anonymous donor could be exposed in consequence of these interventions at the risk of developing severe psychological disturbances (Chasseguet-Smirgel, 1996).

The Oedipal fantasy, with its inherent dimensions of conflict, is always re-activated by the desire for filiation of the members of the couple, but can also lead to the re-emergence of developmental problems and previous difficulties in the processes of identification with the parental figures of childhood. Clinical practice with infertile couples shows that these issues are often present. According to André Beetscheen, the desire for a child for a man always implies a comparison with the father figure, and in cases where it still exists an intense ambivalence towards this figure, connected to an unresolved oedipal rivalry, infertility can play a defensive role against this conflict. This trend is usually accompanied to the maintenance of an idealized imaginary figure of the father as a defensive structure erected against destructive threats

perceived as coming from the oedipal father (Rosolato, 1989). In these cases, the intervention of assisted reproduction is experienced by the men of infertile couples as a transgression of sterility that undermines the defensive structure that we have described. This trend may give rise to persecutory anxieties that may be intensified and also determine episodes of delusions of persecution that occur after the baby is born.

When conception occurs as a result of heterologous fertilization the persecutory anxieties can be further activated by the presence of the anonymous donor. In some cases the ghost of the donor can overlap to the persecutory ghost of the oedipal father, arousing a feeling of exclusion and the perception of destructive threats, and creating a situation where it is legitimate to talk about post-partum psychosis in the father. This phenomenology describes what happened in the cases of request for denial of paternity of children born with heterogonous fertilization through seed donation, and in these cases the request for denial of paternity can be interpreted as an attempt to escape and defense against the perception of feelings of exclusion and threats of persecution that derive from the reactivation of the oedipal conflict.

But the researches on the psychological experience of the infertile couples undergoing assisted reproduction interventions showed, in addition to the problems described concerning the heterologous insemination with anonymous donor seed, a substantial asymmetry about the psychic effects of heterologous fertilization in man and in women. In fact, clinical experience has shown that the gift of oocyte - unlike the gift of male semen - fertilized with the seed of her husband and implanted in the woman who carries the pregnancy, tends to promote in the infertile woman a reparative experience of narcissistic injury caused by infertility.

In this regard, E. Weil (1993) - which has deepened the imaginary dimensions related to the donation of gametes - has highlighted, in couples where pregnancy has been undertaken through heterologous fertilization with oocyte donation, the presence of two constituent elements in the unconscious representations that underlie the experience of filiation: the mother's pregnancy, and

the father's seed. Getting pregnant, living the experience of pregnancy, give birth, assumes for the women who undergo this type of heterologous fertilization the significance of evidence of their capacity to become mothers. According to Weil, the contents of the unconscious representations prevalent in these cases could be described as follows: the father's seed + the mother's womb = the child. These observations highlight the weak weight of the biological reality on the processes of psychic organization of experience: the imaginary processing prevails and gives meaning to the experience. "The pregnancy deletes the oocyte, transforms the embryo into a child and the sterile woman into a mother"[3].

Therefore, we can conclude that psychoanalysis can help infertile couples to try to interpret and understand the meanings and fantasies aroused by the experience of medically assisted procreation. In fact, the intervention of assisted reproduction can be considered successful if at the same time the members of the couple will be able to make sense of their mourning in relation to their fertility and the injuries resulting from the lack of control over their procreative ability. If this psychic work is not done by the couple, the child born may be perceived as a reflection and projection of their unresolved conflicts, of their wounded narcissism and of their defense mechanisms activated in relation to the lived experience of infertility.

More specifically, studies that describe the unconscious representations activated by the use of different techniques of heterologous fertilization showed: the reparative character assumed from the experience of heterologous fertilization through the gift of oocyte (E. Weil, 1993); the need to explore carefully with members of the couple the ability to assimilate the psychological experience that is activated by the gift of male seed; and the major, and often insurmountable difficulties in processing the cases of "surrogate mother", because, as we have seen, the pregnancy is closely tied to the psychological experience of motherhood. These differences

[3] Weil E. *Les enfants, les embryons, les psychanalystes et la civilisation.* Revue Française de Psychanalyse 1993; 57 (4): 1268 -1279, p. 1278.

in the psychological experience resulting from the different types of heterologous fertilization should, in my opinion, be considered, also in view of reconsideration of the prohibition in the law 40/2004 in respect of each type of heterologous fertilization.

Finally, these considerations aimed to describe the unconscious representations that underlie the different types of intervention of heterologous fertilization are reflected in the legislation of many countries in the field of assisted fertilization. In fact, the laws enacted to regulate medically assisted procreation in France, Spain, Germany, Austria, Sweden prohibit the so-called "surrogate mother", but allow other types of heterologous fertilization. The United Kingdom legislation allows the surrogate mother but significantly the law recognizes as mother of the child the woman who gives birth, and the natural parents can adopt the child only with her consent. Even in the latter case we can observe that it is clear in the British legislation a reflection of the representations of the different types of heterologous fertilization described above, representations that, as we have said, affect deeply the experience to recognize another and to recognize himself and herself as a father and a mother.

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PARENTAL RESPONSIBILITY AND RESPONSIBLE PARENTHOOD: SOME REFLECTIONS ABOUT THE INSTRUMENTS FOR THE DEFENSE OF CHILDREN WITH REFERENCE TO MEDICALLY ASSISTED PROCREATION IN ITALIAN LAW

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Abstract

1. The regulation of the parent-child relationship has been the subject of extensive reflection in doctrine and jurisprudence and has led us to define a single legal status of the child with the recent law n.219/2012 of the Italian Republic. With this law the institution of parental rights has been reconstructed in terms of parental responsibility for the protection of children.
2. This discipline calls for a reflection on the Italian law n.40/2004, about medically assisted procreation: its contents had sparked a heated debate and were subjected several times, with alternate outcomes, review by the Constitutional Court.
3. The reproductive process based on assisted reproductive technology provides, in fact, in Italian law, a consent to the use of these techniques. This consensus leads to a voluntary assumption of paternity and maternity and responsible parenting. Instead, the component has not volitional, autonomous relevance to biological data in the case of natural parenting.
4. Part of the Italian case law has developed on the issue of consent to assisted procreation; with particular interest related to cases of heterologous fertilization, which is prohibited by Italian law. The most recent rulings on the subject (from last Court of Cassation. Sect. 1 Civil Sentence no. 11644 of 2012) founded the protection of offspring on the consensus on medically assisted procreation heterologous expressed by

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the parent for facta concludentia, by giving precedence to the quality recognized as a son over the principle of truth.
5. In conclusion, the possibility of making use of techniques of medically assisted procreation leads to significantly different evaluation of the "principle of truth" with respect to "the principle of legitimation."

1. The definition of the status of child and the legal subject of the relationship of filiation, until a short time ago, was distinct in legitimacy and natural. In Italy it has been, the object of a long and ample reflection in doctrine and law.

Recently, the law 10.12.2012 n.219[1] has unified the regulation of filiation, overcoming the distinction between legitimacy, contained in marriage, and natural, between un-married parents.

With this law the institute of parental authority has been reconstructed in explicit form of parental responsibility in defense of the child.

Parental authority has always been considered as a complex of powers that the law attributes to the parents in instrumental function for the obligations of the duties towards the children regarding maintenance, instruction, and education. Being only one aspect of the parents/children relationship, constituted also of non-authoritative moments, the terms of parental authority is often utilized with reference to the legal position of parents in their complex: however some authors have for some time put in evidence the interpretative risk to tend to hide the initiative space and the autonomy known of children by the legislator and they have kept underlying correlations between the duties, necessary prologue and fundamentally the powers towards children, not implicit that to reduce the powers corresponding to the extinguishment of obligations, for how much the interests of the children could ask for the cessation of the power of one parent but the permanence at least of some of their obligations.

[1] Published in "Gazzetta Ufficiale" of 12/17/2012 n.293

The reform of title IX of book I of civil code, actuated with the law 10.12.2012 n. 219, had redesigned the institute of parental authority in terms worthy of ample, further deepening, but unclear until now in the pursued objectives, putting in a plastic way at the center of the discipline the child as subject of right and no longer only as subject or object of obligation. Even though, as it has been noted, the reform law in part has assembled contents that already belong to civil code and to some special laws, the modality of re-writing the theme under exam has a very wide cultural value because it qualifies parental authority in explicit terms of responsibility.

The cited art. 315 cc in fact, abandons its austere formulation centered on the listing of the obligations of child and becomes the focus of the reform with the acknowledgement of the right of all the children as the same legal status without distinction, with an efficacious synthesis "all the children have the same legal status" which truly deserves to be appreciated.

The successive art. 315 *bis* cc, introduced *ex novo*, is significantly titled "Rights and obligations of the child" and is articulated in four paragraphs, of which three are centered on the prevision expressive of the rights of child and only the fourth of the previsions on the obligations of the child.

The first paragraph ratifies the right of maintenance, of education, of instruction and of moral assistance, in observance of their capacity, natural inclinations and aspirations.

The second paragraph ratifies the right of the child to a life in relation to family and with the relations.

The third paragraph ratifies the right of the child to be an active subject in the matters or procedures that regard them, listening is consented also for ages inferior of twelve years, if a capacity of discernment is found.

The fourth paragraph reproduces, even if with some modifications, the contents of the old art. 315 cc stating the obligation of the child to respect the parents and to contribute with their own capacity, force, and income to maintain the family as long as they live with the family.

So, the new art. 315 *bis* cc, by re-taking and assembling principles already noted, remarks the known importance of the rights

of the child, rather than corresponding powers and obligations of parents.

Therefore, it is symptomatic of a progressive and profound cultural and social evolution, centered on the child and orientated to privilege the contents of parental authority in terms of parental responsibility.

Interestingly, at this point, to consider if these marked innovations can suggest a re-reading of the law 19.02.2004 n.40[2], that had regulated medically-assisted procreation in Italy, and contribute to a renovated interpretation of its system.

2. The law 19.02.2004 n.40 is the product of a complex elaboration that has tried to conciliate, with not always convincing results, the medical/scientific goals reached in this area with the ethical and religious reasoning found in the Italian tradition.

The principle points of the law most discussed are those that rigidly define its application. In fact the decision regarding medically-assisted procreation is consented only to favor the solution of reproductive problems derived from sterility or human infertility (art.1) with limitations on production, cryopreservation, diagnostic implantation, and the use of the embryos (art. 14) and with exclusion of the use of techniques of heterologous types (art. 4). The access to techniques in medically-assisted procreation also is consented for legal-aged couples of different sexes, married or living together, both of potentially fertile age and both living (art. 5).

Some aspects of the law 19.2.2004 n.40 have been passed immediately to referendum: the abrogative referendum of four questions on the L. 19.2.2004 n.40 were made the 12th and 13th of June 2005 and did not reach the *quorum* of voters necessary to validate the referendum. Several times the question of constitutional legitimacy has been proposed to the Constitutional Court, which only once declared it illegitimate.[3]

[2] Published in "Gazzetta Ufficiale", 12/17/2012 n.293

[3] With the sentence n.151 of 2009, the Constitutional Court declared the

3. In the field of medically-assisted procreation, differently than natural procreation, the willingness of the couple is paramount. Willingness must be declared in written form as informed consent, which is taken by the doctor (art.6) which drives the theme of parental responsibility. The legislator has to make sure of the clear willingness of the parents and he has to obligate the doctor to check all the possibilities of the questions about the beginning of the procedure the bioethical problems and the health and psychological collateral effects after the procedure, the probability of success and the risk of it, and the relative legal consequences for the woman, the man, and the neonatal. The couple must know about the possibility of adoption or fostering as an alternative to medically assisted procreation.[4] They can revoke the consent until the fecundation of the ovules.

The consent implicates health treatments and legal consequences for the neonatal.

In fact, children born from this procedure have the status of legitimate children or acknowledged children by the couple (art.8): this distinction has been overcome by the unification of the status of the child, made with the cited reform of 2012.

So, in defense of the status of the child, there is an exemption of the principles which are maintained for biological filiation.

constitutional illegitimacy of the art.14 of the law, about the limitation to three embryos in medically assisted procreation and the obligation of implantation at the same time, considered against the principles of defense of women's health. Others questions were refused: with the ordinance n.369 of 2006 the Court declared the inadmissibility of the question of banning of pre-implant diagnosis for the embryos; with the ordinance n.97 of 2010 it declared the evident inadmissibility of the question in relation to the limit of cryopreservation of surplus embryos and the irrevocability of the procedure; with the ordinance n. 150 of 2012 it forwarded the case to the judicial authority who raised the issue about the banning of heterologous assisted procreation, to re-examine after the law approval by the High Chamber of November 3rd , 2011, S.H. and others c. Austria.

[4] Adoption and fostering are regulated by the law 4.5. 1983, n. 184, published in "Gazzetta Ufficiale", n. 133 of 17.5.1983

The anonymity of the mother is forbidden, [5] because preventive consent establishes clear willingness to establish the relationship of filiation, a willingness that is not so obvious in biological filiation. Also, in cases in which the parental couple has consented to a heterologous assisted procreation in violation of the law, it is prohibited to disown paternity.

The man or the woman who have applied the heterologous technique are excluded from punishment, even if there are serious sanctions against the medical group.

In addition, it is mandated that, in case of application of heterologous techniques in violation of the ban (art.4), the donor of the gamete has neither paternal rights nor obligations.

On the theme of consent of procreation, the Court of Cassazione expressed, in relation to the regulation of disownment of paternity, before the law of 19.02.2004 n.4 was enforced, underlining the difference between natural procreation and assisted:

- "In case of birth by natural procreation the paternity, ex art.269 cod. civ., is attributed as a legal consequence of the procreation, it is not necessary to have a "willingness to procreate" and not noting the refusal of conception from the alleged father." (Court of Cassazione 1, sentence n.12350 of 18.11.1992)
- "In case of birth by natural fecundation, the paternity is attributed as a legal consequence of conception, because the biological element is decisive, and willingness is not necessary. The unwillingness of the father is irrelevant, in contrast with the art.30, based on the principle of responsibility which is linked to every potential procreative behavior." (Court of Cassazione 1, sentence n.2315 of 16.03.1999)
- "In the theme of heterologous assisted fecundation, the husband who has legally expressed his consent to the fecundation of the wife by an unknown donator has no right of disowning of the child born from this insemination." (Court of Cassazione Sez.1, sentence n.2315 of 16.03.1999)

[5] In natural parenthood the right to anonymity (art.30 D.P.R. 3.11.2000 n.396 published in "Gazzetta Ufficiale" 30.12. 2000 n.303) was given to defend the minor's interest to birth, in relation with the risk of an interruption of the pregnancy by the mother.

The principle of responsibility in filiation is affirmed by the act of consent to assisted fecundation.[6]

For one side, this preventive assuming of responsibility shows the difference between biological filiation and assisted filiation and, for the other side, it is the key to unify the legal effects of filiation in favor of the neonat.[7]

A recent sentence of the Court of Cassazione has returned to the theme of disowning of paternity after a heterologous assisted fecundation and affirmed that: "In case of disownment of paternity, the rule inserted in the art.235 cod. civ., is also applicable to parenthood generated by artificial fecundation, understanding that the whole of rules, after the introduction of the law 19 February 2004, n.40, as it is formulated and interpretable on the principle of "favor veritatis", it has been enriched of a new hypothesis of disownment, that has to be added to the other rules of the code. For this, understanding the identity of the "ratio" for evident systematic reasons, the terms of decadence established by art.244 cod.civ. which begins when the decision of this kind of fecundation is taken, are also applicable. (Court of Cassazione 1, sentence n11644 of 11.07.2012).

This decision makes evident the flaws of a very complex system in the theme of filiation, which is waiting for a new law which redefines the actions taken for disownment and the actions for the relationship in filiation with the status of the child.

It would be useful to reach a balance between the principle of "favor veritatis" and "favor legitimationis", choosing as a cornerstone rather than "favor minoris", or "favor filii".

On this subject, the introduction of the "favor veritatis" by the Constitutional Court after the progress of techniques in genetics/hematology of DNA (law n.291 of 2012), requires a balancing, be-

[6] On the principle of irrevocability of the consent a question of constitutional legitimacy has been recently raised from the Tribunal of Florence, 7.12.2012 (Reg.Ord. n.166/2013 published in "Gazzetta Ufficiale" 17.07.2013, n.29).

[7] In this sense the project by the European Council in 2012 on the legal status of children and on the responsibility of the parents is paramount (Draft recommendation (Cm/Rec 2012), to member states on the rights and legal status of children and parental responsibilities), points 91 and 92.

cause the aim of preserving the status of legitimate child does not cancel the need of maintaining the values regarding the certainty and stability of the status. On this subject it was announced that the "favor veritatis" is not a value with an absolute constitutional significance, because the art.30 Cost. did not confer a main value to the biological truth, but saying, in paragraph 4, that the law "gives the rules and the limits of the pursuit of paternity", the legislator has the power to privilege, according to other constitutional values, legal paternity respective to natural, and to define the conditions to make it valid, according to the interest of the child (Court of Cassazione, Sez. 1, sentence n.5653, of 10.04.2012).

Now, the present studies show that the conflicts about the relationship of filiation after the assisted procreation using heterologous techniques are increasing, in spite of the ban of procedure, even with the medical and scientific progress on the subject.

Considering the current complex of law, giving attention to the evidence, it is difficult to surmise that the consent would be in the terms of the law 19.02.2004 n.40 by both parts, not every that the DNA exams would help. So, it is important that the legislator operates in defense of the child using specific instruments, to uphold the true principles of "responsible parenthood" and "parental responsibility", also including unmarried couples who have used heterologous techniques.

4. The sensitivity of these topics, albeit only briefly dealt with here, shows the complexity of issues related to assisted heterologous procreation which, although illegal, can rely on the full recognition of its effect on filiation relationships.

In this respect, it is worth mentioning that the Milan Court has recently submitted the prohibition set forth in art. 4 to the attention of the Constitutional Court. (Order of Tribunal of Milan 4.8.2013, reg. n. 135 of 2013 published on the Gazzetta Ufficiale n. 135)

This decision finds ample justification in the verdict issued by the High Chamber of Strasbourg's EDU Court on 3 November 2011. While confirming that the partial ban imposed by Austria

on heterologous procreation does not violate articles 8 and 14 of the Convention for the safeguarding of human rights and fundamental liberties, the verdict reaffirms the principles to be taken into consideration when assessing compliance of the norms issued by the national lawmaker to the values set forth in the Convention.

The High Chamber has indeed confirmed that the right of a couple to conceive a child and to use to such end medically-assisted procreation, including the heterologous option, is a right recognized by art. 8 of the CEDU since it is the expression of free will in private and family life. The Milan Court has referred the issue to the Constitutional Court based on the EDU sentence recognizing factors such as science and social consensus. These must be assessed in a "dynamic" perspective that takes the time factor into consideration. This necessarily entails the recognition of changes and advancements brought about by passing time. The decision is being looked forward to with great interest.

The Plurality of identity: Gender Issues and Sexual Orientation

PUBERTY BLOCKING DURING DEVELOPMENTAL YEARS: ISSUES AND DILEMMAS FOR GENDER-VARIANT ADOLESCENTS

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Abstract

The contribution wants to focus on a delicate matter consisting of those adolescents who do not consider their gender as corresponding with the sex assigned at birth; adolescents defined gender variant, term currently preferred to the more known one of Gender Identity Disorders.
In fact, more and more often, in some European countries, in cases of gender variant adolescents, a block of puberty is preferred, in order to prevent the development of secondary sexual characteristics.
As a group, at the Unit of Clinical Psychology, University of Naples "Federico II", with experience in gender identity and that has been working for many years with these matters and, in particular, gender variant people who wish to pursue a hormonal, surgical and legal change of sex, in recent years we are facing an increase in requests

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for psychological consultation by gender variant adolescents and this has brought us to wonder what is currently happening in some European countries where early hormonal injections are "blocking" puberty.
Therefore the objective of this work is to present different points of view so that even Italy, through an interdisciplinary approach that takes into consideration psychological, medical, ethical, legal and social aspects, can take a position that has clearly as its objective the individual's well-being.

Introduction

People don't know how lucky they are to recognize themselves in their biological gender. For me, on the contrary, it's a never-ending search for identity. Every morning I wake up and wonder "Who am I?" This quote is from an adolescent who is expressing identity-related suffering and confusion; the words could just as well apply to the innermost feelings of many gender-variant young people.

Gender variation, also known as gender identity-related issues, may be defined as states in which gender identity is organized atypically during the course of a child/teenager's psychosexual development. Children and adolescents who perceive their own gender identity as not matching up with their own body, and in consequence their own biological sex, may feel unhappy about their body's physical characteristics and sexual functions and express a desire to be acknowledged as belonging to the other gender; they may prefer the clothing, toys and games commonly associated with the other gender, as well as friendships with the opposite gender. These situations are accompanied by difficulties at both emotional and behavioural level arising out of hardship and significant suffering associated with their condition, particularly during their adolescent years.

According to the *Gender identity disorder in children and adolescents: guidance for management*, written in 1998 by Di Ceglie et

al.[1], it is important to consider these states as differing from what may be observed among adults, given that:

a. A (physical, psychological and sexual) process of development is underway;

b. Final outcomes are subject to greater fluidity and variability – only a small percentage of such children grow up to become transsexuals or transvestites; the majority of them move towards a homosexual orientation, while others transition towards a heterosexual orientation with no transvestism or transsexualism[2].

What is important to remember here is that this depends precisely on the developmental processes during these developing years, and it involves a degree of fluidity. In some cases it is indeed possible to observe development of a typical gender identity; in others, development takes place atypically, through a gradual crystallization of an atypical organization of gender identity, which usually stabilizes towards adolescence and therefore leads to a variance in the young person's gender. Although not recognizing themselves in the gender assigned to them at birth, more often than not these people embark on a long and delicate process during which they change their own hormonal system, primary and secondary sexual characteristics and even their name so that they may be acknowledged as belonging to the gender they have felt themselves to belong to since birth.

Taking a depathologizing approach, this paper seeks to consider gender variance against the backdrop of the genderistic society in which we live; a society that deems there to be two genders and two genders alone – male and female – and tends to pathologize everybody who strays from this binary approach. The goal of the paper is to focus attention on a challenging and complex ethical and social issue affecting gender-variant adolescents: blocking the onset of puberty.

[1] Di Ceglie D, Sturge C, Sutton A. *Gender identity disorder in children and adolescents: guidance for management*. The Royal College of Psychiatrists, 1998, 2:1-8.

[2] Ibid.

In some European nations, there has been a trends towards "blocking" puberty by adopting hypothalamic blockers, temporarily suspending production of estrogen or testosterone to prevent the development of secondary sexual characteristics[3], and alleviating all of the conflicts associated with changes in the body. It is not hard to understand how far-reaching and delicate psychological work with gender variant adolescents is – a process that is already highly complex – owing to the extreme variability of the elements underlying the desire to change one's own body. One of the goals of this psychological work is to facilitate the emergence of great fragility, a void, a sense of loneliness and uncertainty for which a desire exists to find a remedy.

1. Our Approach

Fifteen years ago the Clinical Psychology and Applied Psychoanalysis Unit at the "Federico II" University of studies in Naples set up a transsexualism research and intervention group[4]. Over the years, this group has undergone significant changes. From its initial psychological/clinical work undertaken exclusively with transsexual adults who had reached the point of a highly specific "demand" to correct their own gender, the group has expanded its scope to encompass gender variance in general. Theoretical and clinical work has been pursued through psychological work with a number of young people seeking psychological consultation in order better to comprehend the confusion they feel about the gender to which they believe they really belong, a gender that does not match up to their own biological sex. This broadening of our scientific interests has been led by demand received by the unit. In recent years we have observed a significant rise in the number

[3] Cohn Kettenis P, Pfäfflin F. *Transgenderism and Intersexuality in Childhood and Adolescence: Making Choices*. SAGE Publications; 2004.

[4] Valerio P, Bottone M, Galiani R, Vitelli R. *Il transessualismo. Saggi psicoanalitici*. Milano: Franco Angeli; 2001.

of requests from gender-variant adolescents and young adults for psychological consultation. In 2005, this prompted us to consider adapting the model of intervention we had followed over the years to take into account this specific and often challenging new type of client, who are in the midst of their developmental years.

Adolescence is a particularly challenging time of life: the passage from childhood to adulthood is characterized by a great deal of uncertainty – in varying degrees from individual to individual – owing to the internal and external changes that the young person undergoes, leading to moments of confusion and suffering. The clinical psychologist's job is to listen to young adolescents, help them put a little order in the confusion that they present, and allow them to begin understanding their suffering. Adopting a depathologizing approach, gender variance may be framed as one of the potential changes that can emerge in developmental processes. Clinical psychologists should always focus on the individual's specific story rather than on changing his/her behaviour. Our approach is to frame psychological intervention with gender-variant adolescents as seeking to help a confused person think using an approach that differs from their standard practice in order to dispel their confusion.

The clinical/psychological intervention model we currently deploy with gender-variant adolescents – one that is loosely based on the approach used with adolescents at the Tavistock and Portman Clinic in London – envisages an initial series of sessions, usually four in number, with young people who come to the unit after requesting a psychological consultation. This initial cycle of assessment sessions uses an experiential approach to explorative psychological work. Because of the brevity of the intervention, the analyst leverages the adult elements in the young person's personality while seeking to avoid the establishment of a regression- and dependency-led relationship, as is the case with a long-term psychoanalytical approach. In our case, the analyst uses the relationship to understand and help the client understand how to relate to their external and internal worlds. By undertaking an assessment over a number of weeks, the analyst is able to observe

how an adolescent copes with *separation-related anxieties*. This is the reasoning behind the adoption of a four-session approach. The time-limited nature of the sessions makes it possible to trigger feelings of loss and, on occasion, even envy and resentment; it also makes it possible to work on separation from interjected parental images in order to help these young people construct a personal identity[5]. In concomitance with these sessions, the young person's parents are in many cases offered four sessions with a different analyst from the workgroup. This provides a space in which to think about, and dwell on, their anxieties and suffering in order to shore up their ability to understand what is happening to their child and their parental functions and qualities.

Generally speaking, psychological work with children and teenagers should envisage psychological support for their parents. This is even more important for parents of gender-variant young people, who should first and foremost be helped to understand what is happening to their child – something that, to quote the mother of a gender-variant teenager, is "*completely unthinkable!*"

In many cases, the relationship between the parents and their gender-variant children becomes so complex that it alters the conduct of their offspring in ways that reflect whether they are child or teenagers – shame and rejection are all-too-common parental reactions.

The parents of Matteo, six-year-old, began their sessions at the our Unit because their boy was presenting feminine behaviour and a preference for play very much considered to be feminine-oriented. Matteo's father, a successful career man, could not understand why his boy would prefer to play with dolls rather than toy cars, why he flitted around the house in fairies' wings, and why he kept saying that he had a girl's brain. The father, for whom this was a mortifying and frustrating experience, had even considered moving to a different town. Although the boy's mother felt an unconditional love for him, her reaction to the child's behaviour was

[5] Adamo SMG et al. *La cassetta degli attrezzi: i concetti psicodinamici che troviamo utili nel lavoro di counselling con studenti universitari.* In Adamo SMG, Valerio P. 1997.

depressive, neglecting herself as a woman and choosing to spend most of her time at home. Each parent adopted a different initial reaction to Matteo's requests and conduct: the father severely prohibited the boy from carrying dolls around and dressing up as a fairy, while his mother let him do these things for the child's good and for her own tranquillity. This carried on until the shame associated with little Matteo's public behaviour became too much for the family and they contacted our Unit.

To win back his parents' love, little Matteo would try to conceal his feminine inclinations. He began watching boys' cartoons and asked his folks to buy him boys' toys. However, his true gender identity became clear when he slapped himself hard on the head and shouted: "*Stop Pimpi! Stop Pimpi!*". When his parents asked him who Pimpi was, he replied: "*It's my brain, it's a girl's brain and reminds me all the time that it is and I get angry and tell my brain that it's a boy's brain.*"

The parents of 17-year-old Claudio got in touch to ask for psychological support for themselves and their son who, they found out, leaves home in women's clothing. Neither of these people, both of high socio-cultural level, would accept their child's situation; they hoped that psychological therapy would "*put him back on track*". Claudio himself saw the therapy as a space for him to work through his confusion as he became increasingly certain that one day he wanted to be a woman. At home, Claudio continued to behave like a boy. Nevertheless, worried about their son's forays into the world, his parents were concerned he might be in women's clothes and in danger of falling into prostitution. Their reaction was to deny the situation. They even considered supporting him economically to help him move out and go to college elsewhere, where they wouldn't have to see what was going on.

These examples highlight the reactions of some parents, which are often forms of rejection. Fortunately, some parents do manage to understand and accept what is happening to their child; in our experience, though, it is a minority. What it is important to un-

derstand here is that psychological support is vital not just for the child or adolescent but for his/her family too, including any brothers and sisters who, faced with such an unfamiliar situation, can find themselves out of their depth, alone and confused. The school environment must not be neglected either: in many cases it is ill-prepared to cope with such situations, and psychological support is required to help this environment comprehend what is happening and, consequently, truly to be in a position to help the child or adolescent integrate with his/her peer group.

As part of our approach, at the end of the four sessions there is a session of "feedback" about what has emerged: if the client is a child, parents only attend; for adolescents, the entire nuclear family is invited, and both analysts are present. Often at this meeting the young person – and sometimes his or her parents – is offered access to a more in-depth approach, marking the start of a "co-thinking" process. Generally speaking, psychological support is very important in order to contain and support gender-variant individuals' anxieties and suffering as they come into contact with a predominantly trans-phobic society. It is vital for adolescents to find a way through their confusion about their own identity, to observe its fluidity, and to be able to talk of Atypical Gender Identity Organization (AGIO)[6] which, in Di Ceglie's definition, frames the phenomenon within a developmental approach that introduces the elements of flexibility and greater variability peculiar to the developmental processes of gender-variant children and teenagers.

2. Issues and Dilemmas

At present, the use of hypothalamic blockers is a hot-button issue in scientific and social community debate. Administering these hormones before the age of majority, in many cases prior to the onset of puberty, suppressing the production of oestrogen or testosterone and leaving the young person in a condition of neutrality,

[6] Di Ceglie D. *Straniero nel mio corpo*. Milano: Franco Angeli; 2004.

temporarily halts the development of secondary sexual characteristics. This has evident physical-level consequences (making it easier for any surgical sex reassignment) as well as symbolic consequence (greater psychological adaptation and a less-troubled development of self-identity). Puberty blocking can be continued for a number of years, offering a period of time in which the adolescent may decide to suspend all hormone therapies and continue their own development in accordance with the gender to which their biological sex coincides, or to transition onto a feminizing/masculinizing regime of hormones. It is important to note that blocking puberty does not inevitably lead to a social transition or surgical sex reassignment, that it is considered to be temporary and, above all, reversible, unlike feminizing/masculinizing therapies which, on the contrary, should only be initiated when the subject is certain of their wish to switch gender.

Naturally, such a delicate issue has generated heated ethical debate: how far and to what point should human intervention make such drastic decisions for an underage person who, when they grow up, might regret the decision having been taken? What consequences might there be? Could the administration of hypothalamic blockers help make atypical gender identity organization last longer? And, last but not least, is it truly reversible?

In some European nations, notably England and Holland, healthcare workers have begun administering hypothalamic blockers to young people between the ages of 12 and 16. The claim is that these procedures are reversible. In other words, after suspending the administration of hormones, the blocked development of secondary sexual characteristics should resume without any consequences. It is also claimed that young candidates for puberty blocking are carefully selected, have presented gender identity-related issues since early childhood, and when they reach the age of majority, all of them have gone on to complete the process of sex reassignment surgery.

Not surprisingly, a major ethical controversy has developed around the timing of such hormone intervention during pubertal growth, partly for the above-mentioned reasons, partly because no long-term studies exist on the real consequences of early hor-

mone administration. The matter is currently under investigation in Italy through a tangible assessment of adolescents who present what Di Ceglie defines as atypical gender identity organization not likely to change over time, prompting the adolescent to continue wanting to be acknowledged as belonging to the opposite gender. A year or so ago, in Italy a group was established of leading experts in gender identity-related work with young people, under the auspices of the National Gender Identity Monitoring Group (*Osservatorio Nazionale sull'Identità di Genere,* ONIG). This group meets once every three months to discuss the main clinical, medical and psychological issues surrounding work with gender-variant children, adolescents and their parents.

The idea of presenting a paper investigating such a delicate and complex issue – one that is still wholly undecided – is intended to raise awareness about these issues and extend debate beyond experts in the sphere to include other professionals and associations, so that "best practice" may be adopted in Italy and guidelines be laid down for people working in the field.

3. Conclusions

As is evident from the above, these many unresolved issues are all the more delicate and complex given that they concern individuals who are in their developmental years. Fortunately, a number of associations and high-level scientific organizations are working alongside client groups to investigate these issues.

In Italy, since 1998 the highest profile association has been the ONIG (Osservatorio Nazionale sull'Identità di Genere). Following WPATH (World Professional Association for Transgender Health) guidelines,[7] it helps to foster dialogue and partnership among all stakeholders in transgender and transsexual-related

[7] An international professional multidisciplinary association that fights for the respect of transgender health, committed to defending changes in public policy and social reform.

topics with the goal of enhancing scientific and social knowledge about this aspect of life while promoting cultural opportunities that allow transsexual and transgender people fully to express their freedom.

As noted in passing above, in October 2012 "Baby ONIG" was formed out of ONIG as a group of specialists in gender-variant minors. The Group meets on a quarterly basis to debate major clinical, ethical and social questions, including puberty blocking and the depathologization of gender dysphoria.

A depathologizing approach is vital in a dualistic, dichotomy-riven society in which people must be either male or female; a society that, alas, continues to discriminate against homosexual, transsexual and intersex people. Issuing a strong signal to move beyond a pathologizing approach, in 2010 WPATH published a statement promoting worldwide gender non-conformity depathologization. The statement declares: "*The expression of gender characteristics, including identities, that are not stereotypically associated with one's assigned sex at birth is a common and culturally-diverse human phenomenon which should not be judged as inherently pathological or negative.*"[8]. This statement should remain uppermost in the minds of professionals who work in the sector, whose priority should be always to think of the needs, desires and inclinations of the clients with whom they come into contact, rising above personal and social prejudices associated with old – yet unfortunately still held – gender stereotypes.

All of this is certainly complex when working with gender-variant children and adolescents; perhaps this helps explain why the issue of early hormone treatment-related remains undecided.

One must always bear in mind that gender variance outcomes are extremely variable and fluid, particularly for young and pre-pubertal children. On the other hand, the continuance of gender variance into adulthood would appear to be higher when it continues into adolescence.

[8] WPATH *Standards of care for Health of Transsexual, Transgender and Gender-Nonconforming people, Version 7*. International Journal of Transgenderism, 2011.

This paper outlines these issues not to espouse any position but to raise awareness in the hope that the existence of associations like ONIG in Italy, promoting an equality-based approach that eschews any type of discrimination, will make it possible for a definitive decision to be taken on this topic. In any event, we must remember that any decision to proceed with physical intervention, first through hormones and subsequently surgery, should where possible be taken against the backdrop of a multidisciplinary specialist team approach involving not just gender identity experts but, specifically, specialists in clinical work with gender-variant minors, and only downstream from appropriate psychological support for the child/adolescent, his/her parents, and indeed the social fabric in which they live.

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LAW AND GENDER: HOW AMBIVALENT IS THE LEGITIMATION GIFT?

Valeria Marzocco[*]

Abstract

The legal protection of the sexual orientation has more than something to do with some of the main issues and problems of contemporary legal theory: on the one hand, it is necessary to adopt an approach that allows the handling of this topic, from a historical and cultural-anthropological point of view, in the perspective to which it belongs, i.e. that of the legal evolution in the context of Western modern societies. In this Western legal tradition, such claim does not represent a break, but rather it is a necessary linear development, if it is true that this tradition has been characterized by a progressive struggle for the recognition of liberties and rights. In this perspective there is a fil rouge *that links the roles of women and homosexuals in the context of Western modern societies, in their being victims of a natural prejudice on the legal and political level, but also in their being the protagonists of the struggle for the recognition of their rights to obtain for themselves a public and clear political identity and to be included in the circuit of political citizenship. But how ambivalent is the legitimation gift?*

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1. Sexual orientation and rights culture. A matter of rule of law

In Italy, the legal protection of sexual orientation started to attract the attention of scholars remarkably later than in the rest of the EU countries, and this gap widens even further when the comparison is extended to the International legal community at large[1].

The lack of concern of the Italian legal culture for this new challenge concerning the fundamental rights of individuals has been discontinued only recently, when the Italian Constitutional Court was asked to rule on the constitutionality of same-sex marriage.

It is indubitable that this historic, although much controversial judgment, has to be considered as a real turning point in the debate on the topic, in terms of attention and credit received by academics and progress achieved. However, as regards legislation, nothing much has changed. Such state of inactivity shows how critical the situation regarding this question still is, and how unlikely it is that the Italian legislator will guarantee subjective rights in same-sex unions, as mandated by the Constitutional Court.

In asserting the authority of the legislator in such matters, the Court showed commitment by taking both its role and its interpretative powers "very seriously"[2]. However, there is no doubt that the decision made by the Italian Constitutional Court, which tended to establish the boundaries of its interpretative powers, was also connected to the difficult constitutional issues involved in that case. It is from this perspective, that several outstanding academics have examined many critical elements inherent in that ruling in the last few years. First of all, there seems to be a kind of dangerous link between the decision to reject the question proposed by the judges – based on a heterosexual interpretation of the concept of family defined in the Italian Constitution as a "natural society based on marriage" (art. 29) – and the mandate given to Parliament, which seemed to be a kind of compromise between

[1] Ninatti S. *Ai confini dell'identità sessuale. Dinamiche familiari e integrazione europea*. Torino: Giappichelli; 2012.

[2] Ninatti S. *Ai confini dell'identità sessuale*: 79.

the different and opposing views proclaimed by the judges who were members of the Constitutional Italian Court[3].

Leaving aside other possible remarks on that judgment, it is important to stress how important the effort of the Court has been in clarifying the connection between family and marriage as defined in the Constitution, given the need to verify the legitimacy of same-sex marriages. From this point of view, the interpretation of such a connection meant for the Constitutional Italian Court the necessity to keep a balance between the *position* and the *interpretation* of the constitutional provisions, because of the gap between the Constituent power and the role of the constitutional policy. Some years ago, an influential Italian scholar, Letizia Gianformaggio, explained such gap and balance between the *past*, in which the Constitution was devised, and the *present*, in which the Constitution has to be able to adapt itself and interpret social and historical changes, by using a mythological figure: the Constitution – so Gianformaggio wrote – is not Prometheus' child, but rather Demetra's[4]. This is because that founding text is meant to *receive* and to *preserve*, rather than *transform*, the challenges of the historical and social changes, ensuring that those changes do not affect the weaker subjects who are part of the system.

It is evident how much effort as well as caution the search for such a balance requires, particularly in the context of a legal field undergoing rapid changes.

There are two main perspectives that contribute to the understanding of how critical and exemplary, in this sense, the claim to obtain legal protection for the sexual orientation is. The first concerns how the legal protection of individual rights within the family has changed in the context of the authentic transformations that have affected the European legal area; the other helps us to follow how the progressive and growing forms of recognition in

[3] Capotosti P.A. *Matrimonio tra persone dello stesso sesso. Infondatezza versus inammissibilità nella sentenza n. 138 del 2010*. Quad. Cost. 2010; 2: 362 and 364.

[4] Gianformaggio L. *Tempo della costituzione, tempo della consolidazione*. Pol. dir. 1997; 4: 541.

subjective situations connected to gay condition within the international legal community can be considered as strictly related to the more general anti-discrimination principle of equal treatment.

From the first standpoint, it is important to derive a useful lesson by analysing how much regulations governing the family law in Europe have changed, since family issues can no longer be considered as a kind of *island*[5], excluded from a profound legal revision, but rather as an area becoming more and more involved in new and unexpected modifications and transformations.

In the last few years, the growing *dialogue* on this topic between the European Courts and Tribunals has played a crucial role for the legal protection of the subjective situations within the family. Besides, the free movement of persons and their rights, one of the most fundamental accomplishments of the UE, has generated both changes and paradoxes.

In the context of the European legal area, this consequence has been almost inevitable because of the deep and unresolved tension between the current provisions pertaining to family law issued in the context of the international regulations, and those family matters, which are still the concern of individual Member States. In this sense, if the movement of people within the European Union is going to be more than an empty phrase, it must be accompanied by the necessary measures in the field of family law, particularly if we consider two important provisions (art. 12 of the European Convention of Human rights and art. 9 of the European Charter of Fundamental rights).

The paradoxical condition of individuals rights in the context of the European legal area demands the evaluation of two main issues. The first one involves the role of the European Union in guaranteeing a certain level of uniformity and effectiveness in terms of respect of fundamental rights of individuals within its jurisdiction. The other, perhaps even more significant, regards the European political identity and legitimacy themselves, both heavily dependent on the ability of European institutions to promote fundamen-

[5] Jemolo A.C. *La famiglia e il diritto*. Ann. Univ. Cat. 1949: 47.

tal rights, even through a mediation effort between the different regulations of its individual member states.

The transformations that are investing both the marriage and the family legal concepts force us to consider those legal institutions more carefully, throwing light on their historical foundation: they are institutions carrying very specific and well rooted values, but, at the same time, they are witness to historical and social developments. Consequently, their function and role are often subject to criticism, while some individuals make legal claims to alter such institutions in accordance to the more general social changes.

In relation to the much wider perspective offered by international law, this proves to be a fruitful area of investigation, which confirms how vital the function of a sound constitutional policy is, and how necessary it is to find a balance, adjustable from time to time, between fundamental and constitutional principles, and historical and social changes.

The international legal community – which, in the course of the XXth century, never reached the status and authority of that *civitas maxima* expected by the kelsenian legal theory[6] – has been the area in which the claim not to be discriminated on grounds of sexual orientation has grown in line with the Western legal tradition, characterised by an ever expanding culture of freedoms and rights[7]. In this perspective, it is necessary to adopt both a synchronic approach and a diachronic one in order to clarify the theoretical understanding of those claims. The former, thanks to a comparative method, promotes the acquisition of a large representation of the practices followed by the considered different legal experiences while the latter enables us to reconstruct, from a chronological point of view, the path towards the affirmation of the right not to be discriminated on grounds of sexual orientation, *in line with* and not *in opposition to* the Western legal culture of fundamental rights of the individuals.

[6] Kelsen H. *Das problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reiner Rechtslehre* (1920); tr. it. edited by A. Carrino. *Il problema della sovranità*. Milano: Giuffré; 1989: 355-402.

[7] Barberis M. *Europa del diritto*. Bologna: Il Mulino; 2008.

From this point of view, we have to adopt a legal and an anthropological approach to the claim not to be discriminated on grounds of sexual orientation: it is a matter of culture, because it involves the issue of cultural differences meant as something that clashes with the universalistic assertion which belongs to the Western culture of rights.

However – whether we find it interesting to study the legal protection of sexual orientation through the practical observation and changes in family law, or rather, we deem a synchronic approach to be more useful, because it provides a cultural and historical analysis, to understand how that claim not to be discriminated on grounds of sexual orientation finds its progressive affirmation – something emerges quite clearly from this discussion. In this debate, we can find elements that urge us to think about key theoretical problems, all connected to a crucial topic of contemporary legal philosophy, meant as the question of the relationship between *concept* of law and *rule* of law[8]. The doctrine that keeps on underestimating these problems, wrongly thinking that they are not central to the legal debate, reveals its blindness and inability to recognize what is at stake: what idea of the rule of law we are prepared to accept and receive in a normative sense.

It is possible to trace the main evidence for this assertion in the history of judicial cases that in the USA have accompanied the affirmation of progressive hypothesis of *suspect classification* and *suspect classes*: the right not to be discriminated on grounds of sexual orientation, in that juridical development, is a right strictly connected to the legal evolution and the gradual extension of the equal treatment principle posed by the XIVth Amendment, which guarantees all citizens equality before the law, and declares that the federal government should intervene if any states tried to deny rights of citizenship to any citizen.

[8] Dicey A.V. *An Introduction to the study of the Law of the constitution*. London: MacMillam; 1885; Hutchinson A.C., Monahan P. *The Rule of Law: Ideal or Ideology*. Toronto: Carswell; 1987.

2. Equal treatment and political inclusion. The parallel history of women and homosexuals

Considering the previous critical perspectives, it is evident that the legal protection of the sexual orientation has more than something to do with some of the main issues and problems of contemporary legal theory.

On the one hand, it is necessary to adopt an approach that allows the handling of this topic, from a historical and cultural-anthropological point of view, in the perspective to which it belongs, i.e. that of the legal evolution in the context of Western modern societies. In this Western legal tradition, such claim does not represent a *break*, but rather it is a necessary linear *development*, if it is true that this tradition has been characterized by a progressive struggle for the recognition of liberties and rights.

This approach to our subject of investigation – the legal evolution meant as the development and affirmation of a culture of rights of the individuals – enables us to consider the claim not to be discriminated on grounds of sexual orientation, not as a *hiatus*, but rather as a *page* that belongs to the history of rights claims.

In this history, both *difference* and *discrimination* are present, and they play a particular and fundamental role in the Western legal development. For sure, difference and discrimination are integral part of the struggle which regards both women and homosexuals while trying to affirm their status and condition.

It is possible to find a clear representation of that assertion if we consider the distance between two emblematic perspectives of Western modern philosophy, belonging to the second half of the XVIIIth century, and both suggesting the political dimension of prejudice: Rousseau's and Bentham's, points of view are made clear in their respective works *Emile* (1762) and *Offences against one's self* (1785).

Prejudice is a key-concept in both these essays: it enables us to find a connection between these two perspectives on *difference* and *discrimination*, but it is also important to represent exemplarily the Western legal and political development following discrim-

ination claims. Because of prejudice, women, like Sophie, were chained to their own home-prison, the *oikos*, while Emile was a citizen, expected to play a role in the public dimension, a member free to participate in the civil society. However, because of the same prejudice, that caused public shame towards homosexuals' behaviour and condition, as Jeremy Bentham wrote, judges follow suit and react emotionally by showing *disgust*; the same *disgust* on which Martha Nussbaum, a few years ago, based her philosophical approach to the legal protection of sexual orientation, which also took into consideration its political consequences[9].

The political dimension of that prejudice is revealed in the role that discrimination plays in clearly separating the public sphere, meant as something derived *per differentiam,* from the privacy of the citizens: so citizenship happens to be, on the one hand, a legal and political *status* that unifies and creates a sort of identification for the people included in its circuit, while on the other, it functions as a trigger able to activate the struggle for the recognition of the same inclusion rights in those people who are left on the edge of that circuit.

The 'natural' role played by prejudice, as well as its legal and political dimension, underlies the history of women's past struggles, and those still to be written, and of homosexuals' claims to the recognition of their status: prejudice against them is grounded on *nature*, on a set of facts and mechanisms based on biological evidence explaining what human nature really consists of, and considering 'difference' as a natural, unchangeable and intrinsic part of certain human beings. Thus, being a woman is by nature a disability[10] since, for example, a woman is usually physically smaller and has a weaker and higher-pitched voice. In this view nature is seen as a permanent system of laws and structures, and not – as Montaigne claimed – nothing more than *practices* and *habits*[11]. Women and homosexuals are rooted in their *natural* con-

[9] Nussbaum M. *Hiding from humanity: disgust, shame and the law*. Princeton: Princeton University Press; 2004.

[10] Aristotle: *Historia animalium*: 608 a 21-b 18.

[11] de Montaigne M. *Essays* (1580). London: Penguin; 2004: Book I, XXXIII.

dition, characterized by a *natural* relationship with their status. The woman is *placed* – as Collin remarks – in a kind of biological destiny[12], because a man – as Aristotle wrote – is more suitable than a woman to exercise power and control, with the exception of certain cases, which are *against* nature[13]. The homosexual is a human being destined, still *by nature*, to an unchangeable fate, and whose actions and behaviours have been strongly criticized and condemned throughout history, on grounds of religious (pit), judicial (offence), medical (disease) and psychological (immaturity and perversion) principles.

Both women and homosexuals have therefore been involved in exclusion practices, because of unreasonable discrimination, prejudice against them being based on the idea that passions and behaviours have natural and biological origins, that women's bodies are aristotelically described as disabled, and on the benthamian analysis of the judges' condemnation of pederasty, founded on the consideration that a homosexual's body is against nature, and therefore only able to create *disgust* and *shame*.

In this perspective there is a *fil rouge* that links the roles of women and homosexuals in the context of Western modern societies, in their being victims of a natural prejudice on the legal and political level, but also in their being the protagonists of the struggle for the recognition of their rights to obtain for themselves a public and clear political identity and to be included in the circuit of political citizenship. Basically to pass from the private dimension of their lives, from their invisibility – *Hiding from humanity* – to the public sphere, to their visibility.

This is the reason why women and homosexuals share the same Western and modern representation of the development – throughout progress and paradoxes – of rights culture, in its historical evolution and in its struggle for the recognition of their being different, under the claim of equal treatment, at the legal and political level.

[12] Collin F. *Le différend des sexes: de Platon à la parité*. Nantes: Pleins Feux; 1999.
[13] Aristotle. *Politica*. I (A), 5, 1254 b.

3. What are we struggling for? On Rule of law and Gender Issues

If we consider the right not to be discriminated in the light of the Western modern rights culture, throughout its development and struggles for the recognition of equal treatment rights, we find more problems than solutions in the contemporary debate on this topic.

In this sense, it is indubitable that scepticism prevails in many sectors of legal and political theory when it comes to issuing measures to legalise same-sex marriage. This idea, typical of the legal and philosophical area of the United States, is often justified by arguing that such a claim has a clear Western and modern connotation: they do not *break* with but rather *preserve* the Western legal tradition, by reaffirming the conservative, somehow ambiguous, but disciplining wish to be included in it, a fact that helps maintain and reproduce the same political and legal paternalistic hierarchy.

Many academics have started to draw public attention[14] to "the ambivalent gift that legitimation can become"[15] in considering how the inclusion of LGBT's (lesbian, gay, bisexual, and transgender) communities and cultures in the *mainstream*, could quickly undermine their value and role as a political minority capable to destabilize the system: the condition of being an «invisible visibility» could instead save this movement, with its political and social implications, from a process of mass identification. If you can be identified, you can be disciplined[16].

Therefore, from these perspectives, the main problem is not to deny LGBT individuals their right to marry, but rather to satisfy their *desire* to have access to that institution: in cultivating that claim, homosexuals would finally achieve a heterosexual role and function, and would finally reaffirm and recognize the patriarchal

[14] Butler J. *Undoing gender*. New York: Routledge; 2004: 105.

[15] Harris D. *The rise and fall of gay culture*. New York: Ballantine; 1997. Warner M. *The trouble with normal. Sex, politics and the Ethics of queer life*. Cambridge: Harvard University Press; 2000.

[16] Foucault M. *Il faut défendre la société: cours au Collège de France, 1975-1976*. Paris: Gallimard; 1997.

order of the family and society, with the consequence of becoming attached to a social condition able to regulate and normalize their diversity.

This kind of internal critique to the claim to have same-sex marriage recognized addressed by a part of the LGBT community of academics reveals how advanced the level of the debate is on this subject in other countries, and how the Italian discussion is still left behind.

However, once this Italian delay and the serious attitude towards the interpretation of our Constitution have been ascertained, the only reasonable answer to those questions may be actually found in the fact that those people claim their right to decide, to affirm their right to self-determination.

If their claim not to be discriminated is a matter of rule of law, the main concession to guarantee people's freedom, is to let them be able to decide for themselves: this involves a choice closely connected to the concept of rule of law meant as "an activity of social planning", that is the result of the idea that "legal institutions plan for the communities over whom they claim authority, both by telling their members what they may or may not do and by authorizing some of these members to plan for others"[17].

[17] Shapiro S.J. *Legality*. Cambridge: Harvard University Press; 2010: 195.

BEYOND THE BOUNDARIES OF DISCRIMINATION. AN INTRODUCTION TO HOMOSEXUAL RELATIONSHIPS

Fabio Corbisiero[1*], *Alessia Schisano*[2*]

Abstract

Within the stream of the "global" speech on the recognition of human and civil rights and powered by a massive amount of scientific data on social inequality, Europe - through the EU Treaty, its regulations and directives - is doing its best to deal with discrimination and intolerance of any kind and is actually avoiding the risk - inherent even in democracies – of an inconceivable subordination of some (minorities) to others (the majority). From this point of view, the twenty-first century reflects an increasing juridical and social awareness of the legal systems of Member States of the rights of homosexuals, based on the principle that all European citizens, as such, are of equal value and dignity and, to quote the words of Nussbaum (2010), "based on the principle that those who share the same humanity must also participate in the same equality" (p. 96). In Italy, the de facto relationships, both between heterosexual and homosexual citizens are not regulated, except for a few sentences of the Supreme Court seeking in some way to facilitate the daily lives of the partners, extending forms of protection and guarantee.
In our country there is no marriage between persons of the same sex, although a clear need is emerging to remove from the legislation in

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force all forms of discrimination and unequal treatment between heterosexual and homosexual citizens, based on sexual orientation and this in application of the principle of equality enshrined in Article 3 of the Constitution. Still, to give the same legal value to the feelings of gays and lesbians would take a "simple" modification of the Civil Code replacing the terms "husband " and " wife " with the neutral word " spouses " (art. 107, the co, art. 108 co, Art.143, co. / art. 294 II co) and expand the scope of Article. 90 of the Civil Code, inserting art. 90a, stating that "marriage is subject to the same conditions and the same effect regardless of whether the spouses are of different or the same sex."

In his classic work *Citizenship and social class* (1976), Marshall defines citizenship as:

"*A status that is conferred on those who are full members of a community. All those who have this status are equal with respect to the rights and duties conferred by that status [...] the push forward along the path mapped out is a move towards a greater degree of equality, a qualitative improvement of the status and an increase in the number people who have been granted this status [...]. Citizenship requires [...] a perception of belonging to the community, membership based on loyalty to a civilization which is common possession. It is a loyalty of free men, provided with rights and protected by a common law. Its growth is stimulated both by the struggle to obtain these rights, which once obtained from their enjoyment*"[1].

According to this perspective, the "right" to what we might call "full citizenship" will acquire through a sense of collective belonging[2] and individual guarantees that qualify persons as members of a "community". As such, the city becomes the subject of specific rights and duties. This is typically granted by the State, which guarantees "civil and political" rights (freedom of speech,

[1] Marshall Th. *Cittadinanza e classe sociale*. Roma: Laterza; 1976.

[2] See Parsons T. *Sistema politico e struttura sociale*. Milano: Giuffrè; 1975; Durkheim E. *La science sociale et l'action* (1970), tr. it. *La scienza sociale e l'azione*. Milano: Il Saggiatore; 1996

thought, association, property, electorate) and "social" (electorate, right to work, right to strike, access to subsidies, pensions, social services, health, education...) and on the part of the citizen, obeying the laws of the state and social conventions.

But the very presence of these two principles - only apparently conflicting - has always animated the major issues concerning the existence and coexistence in a hetero-normed society of gay people, so the enhancement of gender difference and sexual identity has now become a "defense of equality "of all citizens. The trend of democratic countries around the world today is to provide all homosexual citizens the guarantee of "equality", while the material content of the rights may be varied according to the needs and affiliations of these subjects, as well as practices of citizenship and law enforcement differ according to the areas and circumstances.

At the dawn of the third millennium, the issue of gay rights has become one of the pillars of the global discourse on equality. Although the risk of a systematic subordination of some (minorities) to others (the majority) is inherent even in democratic regimes, the democratic world is doing its best to overcome stigma, intolerance and heterosexism. We must not forget that only a few decades ago in the cradle of democracy, the United States of America, there was a ban on the African-American (colored) to marry citizens of white color. When they were properly attached, laws against interracial marriages (miscegenation laws) were defended by an appeal to their formal symmetry: blacks could not marry whites, but also the whites could not marry blacks. The same argument is applied to the discrimination based on gender and sexual orientation, as in the case of marriage between persons of the same sex.

However the efforts of the most recent national jurisdictions are progressing towards equality: first, to prevent unreasonable distinctions, or more exactly, discrimination against gay people, in addition, to evolve discrimination in the direction of removal and prevention. From this point of view, the movements for the rights of homosexuals and the latest social inclusion policies show that the discourse on family needs a "quantum leap". From this point of view, in the last decade the European Union has start-

ed policies, guidelines and strategies to address discrimination based on gender and sexual orientation, founding this work on the principle that all European citizens, as such, have equal value and dignity and, to quote the words of Nussbaum, "according to the principle that those who share the same humanity must also participate in the same equality"[3].

There are several countries in Europe that have adopted marriage between persons of the same sex or forms of legal recognition similar to the institution of marriage. Not without problems, as we will see through the legal reading of the "Italian case". Although EU law does not oblige States to allow or recognize relationships and marriages between persons of the same sex – though stating the principle of non-discrimination based on sexual orientation - it has compelled the States to deal with same-sex couples equally to couples of people of different sex, in cases where the nature of the legal relationship between them (civil unions, for example) is the same. Seen under this critical angle, it is clear that the equality of gay people is the result of a cocktail of measures and strategies, consisting of different actions, actors and territories; it also appears clear that the process of "de-homophobization"[4] of societies is accompanied by subsidiary and territorialized policies. In the present European pressure from center (state) to periphery (municipality) the principle of the equality of gay and lesbian citizens is complexified, as it creates a confrontation between quite different political, legal, cultural and identity values, more or less permeable to policies of social justice.

In this procedural tangle, it is clear, as indeed is confirmed by the social sciences, that family cannot be just the sum of two (or more, counting the offspring) individuals, but a *quid pluris* of relatedness. If until few years ago society had limited its analysis

[3] Nussbaum MC. *Disgusto e umanità. L'orientamento sessuale di fronte alla legge*. Milano: Il Saggiatore; 2010: p. 96.

[4] Corbisiero F. *Comunità omosessuali. Le scienze sociali sulla popolazione LGBT*. Milano: Franco Angeli; 2013.

to affirming the necessary "heterosexual nature" of marriage, now also in Italy you can feel a change of register. Public debates, social issues and, on the whole, the powerful impulse of international jurisprudence, urge the Italian courts to change the interpretation criteria and the Parliament to discuss more thoroughly the reasons for the refusal to allow access to marriage for persons of the same sex. The line of reflection the doctrine should follow is not the homo-parental family or same-sex marriage, but the critical deconstruction of the ideal-typical model of the family, based on the heterosexual, monogamous and reproductive marriage between a man and a woman.

The arguments in support of the hypothesis that a family of same-sex parents is inadequate for the development of children, lacking of attachment to their children, or even bound to influence the sexual orientation of their children has not, until now, found any evidence in the scientific literature. On the other hand most gay people are born and grow up in families of heterosexual parents. The real question is whether children will grow up in families of parents who have access to civil rights, welfare and job opportunities. If pushed towards the periphery of, or even outside, the ideal model of production of "good" citizens, homo-parental families become an anthropological mirror through which society and state define themselves, stating the conditions for inclusion or exclusion.

Let's stop here, even if we could go on and on. In our "liquid modernity" (Bauman 2003), types of relations so far regulated by traditions which were not felt any more as cultural and therefore historically conditioned, are now exploded and partly rooted (such as cohabitation). In particular, the way is now open for what an outstanding expert in civil law has called "the legalization of the bios"[5], although there are still supporters of a steady (albeit renovated) "natural law" foundation - mostly oriented in a Christian-Catholic direction - in order to anchor constitutional values. The latter address is

[5] Irti N. *La giuridificazione del bios* in Giacobbe G. (a cura di). *Scritti in memoria di V. Sgrai*. Milano: Giuffrè; 2008.

expressed by well-known view that "the secularized liberal state lives on presuppositions it cannot guarantee"[6].

1. The egalitarian marriage and civil unions: what future?

The Italian legal system still does not provide for the institution of egalitarian marriage, i.e. one held between two people of the same sex, perpetrating, thus, a clear discrimination between citizens on the basis of their sexual orientation. Marriage, in fact, is commonly defined as "the act by which two persons of different sex undertake to carry out a communion of spiritual and material life" and is governed by the norms contained in the Civil Code of 1942 which, in six articles, refers exclusively to "husband and wife", marking, therefore, the need for the sex difference within the married couple, unlike the Constitution which, on the other hand, does not distinguish (and therefore does not discriminate) individuals according to their sex and sexual orientation, stating that: "the Republic recognizes the rights of the family as a natural society founded on marriage", not indicating how and of whom the "marriage" should be composed.

Italy, until now, has deliberately chosen not to observe the European Convention of Human Rights, the Charter of Nice and even not to acknowledge the numerous resolutions adopted by the European Parliament which establish that it is absolutely prohibited to discriminate people on the basis of their sexual orientation.

To no avail the constant "reminders" operated by the Italian courts - including the Supreme Court - which, through Orders and Judgments, raised, especially in recent years, significant questions of constitutionality (e.g. the Court of Venice, Court of Appeal of Trento) in relation to the non-recognition of same-sex unions, arguing that the Constitutional law, in fact, has never established a limit to same-sex marriage, especially given the fact that, by now, we can ob-

[6] Böckenförde EW. *La formazione dello Stato come processo di secolarizzazione*. Brescia: Morcelliana; 2006.

serve "an unstoppable transformation of society and customs that led to the end of the monopoly held by the traditional family model and the simultaneous spontaneous emergence of different forms of cohabitation that are clamoring to be protected and regulated."

It should be added that our Constitution, in particular Article 3, enshrines the principle of equality of all citizens for whom the right to marry is certainly an essential expression of human dignity, also guaranteed by art. 2 of the Constitution, art. 12 and 16 of the Universal Declaration of Human Rights of 1948, as well as art. 8 and 12 of the ECHR and art. 7 and 9 of the Nice Charter of 2000.

Because of this, the Constitutional Court in 2010 called on the Parliament to identify forms of protection and security for same-sex unions, recognizing, therefore, not only their existence but also their relevance.

In the absence of legislation the Supreme Court has took action again in reference to same-sex marriage and its importance in our Order with Judgment 4184/2012 which - though prohibiting the transcript in Italy of marriages celebrated abroad, ineffective for our Order - has recognized the importance of same-sex unions, citing the extensive legislation of the European Court of Human Rights, in favor of the recognition and protection of same-sex couples, that should be considered in all respects as family units.

In such a climate always the Supreme Court established that: "the members of the homosexual couple, living together in a stable relationship... regardless of the intervention of the law, can, as the subjects of the right to family life and in the exercise of their inalienable right to live freely in a state of couple and of their right to judicial protection of specific situations, in particular the protection of other fundamental rights, appeal to the courts to enforce, in the presence of specific situations, their right to a uniform treatment as that afforded by law to the married couple".

A second judgment, certainly significant, is no. 601/2013 by which the Supreme Court took a position regarding the relationship of the children with their homosexual parents. More specifically, the Court pointed out that, so far, "there is no scientific certainty or experience, but it's just mere prejudice, that living in a

household centered on a homosexual couple should be detrimental to the harmonious development of the child... what is usually assumed is yet to be proved, that is the harmfulness of that family environment for the child, which the Court of Appeals correctly claimed should be specifically demonstrated...".

However, beyond these pronunciations, Italy remains all the same the slowest country in Europe in terms of recognition, protection and guarantee of civil rights. In such a scenario, members of the LGBT community are oppressed and limited in their intimate desire to "make a family" and "to have children."

At a closer look, however, in Italy also heterosexual citizens' rights are sometimes limited when they choose to marry again after a previous marriage.

To be honest, an ample front has formed in the country in favor of the recognition civil unions, made up of heterosexual as well as homosexual people, who stand up for the introduction of specific forms of protection and extension of guarantees for all those who " are also families " without wanting or being allowed to get married. In aid of de facto families, ignored by the Law, the courts have taken many steps, providing, for example, the takeover of one partner in a lease agreement in the place of the other partner, the inability to make one's will against one's partner, the possibility to remove one partner from the common domicile for excessive violence, the right to adopt, and so on.

The children born to cohabiting unmarried parents have equal rights compared to those born to married parents. Luckily the law 219/2012 has wiped out the latest terminological discrimination (such as legitimate vs. illegitimate children).

The problem of divorce by law as a result of a sex change is also worth a mention and a special discussion. To date, the sex change of one of the spouses – in a heterosexual married couple - determines the immediate dissolution of the marriage. The Supreme Court with its interim ordinance of June 6, 2013, no. 14329 has appealed to the Constitutional Court about the forced divorce imposed on a couple as a result of a sex change of the husband, on the basis of the well-established require-

ment to obtain a constitutional recognition of homosexual unions also, given their primary importance as social formations set out in Article 2 of the Constitution and endorsed by the principle of equality enshrined in Article 3, as well as in art. 12 ECHR, which expressly allows same-sex couples. Well, the Supreme Court has raised the question of the constitutionality of the divorce imposed by law to the married couple, challenging the unacceptable interference of the State in the freedom of self-determination of the individuals which cannot and will not allow for exceptions whatsoever. This Ordinance has an exceptional importance, reflecting the atmosphere of profound transformation of the country which males it no further deferrable to define and implement programs of equalization of individual rights also within the family sphere, free from any form of conditioning and discrimination: "the character of heterosexuality is no longer a issue of home or international public order; unions that are founded on a stable and continuous affection, even if not falling within the model of marriage, still receive constitutional protection from Article 2 of the Constitution and art. 8 of ECHR. This recognition is not limited to the freedom to live the condition of couple and not to hide the choices regarding the emotional individual sphere, but extends to the recognition of the objective situation of stable cohabitation and of the rights that follow the creation and consolidation of this constitutionally and conventionally guaranteed social formation.

2. Conclusions

The issue of the equality of "gay rights" is now one of the central themes in the Italian political agenda, at least in that of the left-wing parties. Thanks to the progressive thrust of the movements and associations of homosexuals also the Italian political class has put the "homosexual issue" in the public discussion and parliamentary proposals. The recent (September 2013) and very

animated parliamentary debate on the so called "Mancino/ Reale Bill" had as its principal objective the introduction of the crime of homophobia and transphobia, rather than considering it as a mere aggravating circumstance, thus extending the offenses punishable by the current Law also to the discrimination based on sexual orientation or gender identity of the victim, as is the case in other European countries. As Article 3 of our Constitution (1948) reads - even before distinguishing between formal and substantive equality - "All citizens have equal social dignity." It is a notion still little explored and erroneously considered rhetoric, recurring only in sociological terms. As we have seen Marshall himself defines the term "rights of citizenship" in terms of equality between different social aggregates; in this respect the twenty-first century reflects an increasing awareness of legal systems of Member States to the rights of homosexuals, based on the principle that all European citizens, as such, are of equal value and dignity; to quote the words of Nussbaum[7], "based on the principle that those who share the same humanity must also participate in the same equality." This recent process unraveled in Europe on the basis of Article 141 of the Treaty, has found articulate and punctual implementation in art. 21 of the Charter of Nice, where (formal) equality produces the prohibition of all forms of discrimination based on sex, race, social or ethnic origin, religion or belief, disability, age or sexual orientation and at the same time imposes the respect for all cultural, religious and linguistic diversity and the right of all to equal treatment and equal opportunities in all areas of life and work.

It is interesting to remark that the "strongest" and most complete model of anti-discrimination principles is contained in a document conceived geographically far from Old Europe, that is to say in art. 9 of the already mentioned South African Constitution, after the abolition of apartheid, which should be cited in full for its poignancy:

[7] Nussbaum MC. *Disgusto e umanità...*

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection. National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection is unfair unless it is established that the discrimination is fair.

Equal dignity of every person, equality as non-discrimination in social life and the right to a personal identity have been so specified as essential premises to continue the process. In recent discussions the personal identity, however, has been viewed in a dynamic sense, as a possibility for the subjects, if they wants to, to project their inner self outside themselves, i.e. their " need to live within the family and society in a way corresponding to the sex they feel to belong to . "Of course, if they want to".

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DISORDERS OF SEX DEVELOPMENT: THE FRONTIERS IN A SCIENTIFIC, BIOETHICAL AND SOCIAL DEBATE

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Abstract

The birth of a child with a Disorder of Sex Development (DSD) raises many questions about the psychological, medical, ethical, legal and social theme: these are congenital conditions in which development of chromosomal, gonadal, or anatomical sex is atypical and the most common are Turner's Syndrome, Klinefelter's Syndrome, Congenital Adrenal Hyperplasia, Morris's Syndrome and other conditions with androgens' reduced production or peripheral insensitivity. DSD are

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diagnosed, in most cases, at birth, sometimes the difficulty in establishing a correct diagnosis as earliest can cause a medical and psychological emergency for the child and his/her family, especially about the gender assignment. Once diagnosed, some children with atypical genitalia are subjected, during the first years of life, to surgery to "normalize" the appearance of the genitals, while other children will follow a pharmacological therapy for a lifetime. Difficulties in the diagnostic and therapeutic treatment, eventual gender dysphorias during the child's psychosexual development, implications in the surgery and complex issues about the informed consent in children and adolescents are open questions that raise a delicate bioethical and social debate. Therefore, the primary objective of the interdisciplinary team working in this field is an integrated medical and psycho-social work, with particular attention to the well-being of children with DSD and their families.

> *Intersexuality has been a flashpoint of social controversy about the relationships between sex, sexuality, and gender, as well as the subject of much recent clinical controversy and speculation about what constitutes good treatment.*
> Katrina Karkazis, 2008

Male, female or...? This article seeks to address several extremely delicate and complex issues regarding medical, psychological, ethical and social themes: we shall discuss individuals with atypical genitalia and the "normalising" surgery they often have to undergo. An international debate of both a scientific and social nature is currently underway which regards not just the children or adolescents involved but also the parents and the health professionals who take care of these families.

The theme of this study is a specific type of condition which, in the past, has often been described using the term *intersexuality* following the suggestions of Anne Fausto Sterling[1], although the

[1] Fausto-Sterling A., *The five* sexes, *revisited*, Sciences. 2000; 40(4):18–23.

term currently in favour is 'Disorders of Sex Development (DSD)' [2,3], as indicated in the document known as *Consensus Statement on Management of Intersex Disorders*[4] which will be discussed below. This wide-ranging and rather generic term covers an extremely varied range of clinical conditions due to congenital causes, determined by inconsistencies within one or more levels of Sexual Differentiation (chromosomal, gonadal or genital).[5]

The "terminological" issue is one of the first to be discussed by the scientific community and associations: the term DSD was coined in 2006 in Chicago during an important meeting of leading international experts in the field. At the end of the meeting, a document was produced, as already mentioned, called the *Consensus Statement on Management of Intersex Disorders* (2006), which provides important guidelines regarding the care and treatment of patients with DSDs.

However, several associations have protested about this terminology since it contains unfairly pathologising overtones due to the use of the term "disorders" which implied a condition that required surgical "correction". The associations representing transgender individuals, who are not "people with disorders" and, above all, do not consider themselves as such, rightly opposed the use of this term, raising the objection that it had been chosen in a "Consensus" at which only two transgender individuals were present[6]. As a consequence, WPATH (The World Professional Association for Transgender Health) proposed the term "Atypical

[2] Sax L. *A response to Anne Fausto-Sterling*. The Journal of Sex Research. 2002: 39(3):174-8.

[3] NEK-CNE - Swiss National Advisory Commission on Biomedical Ethics. *On the management of differences of Sex Development. Ethical issues relating to "intersexuality"*. 2012, www.nek-cne.ch.

[4] Hughes IA, Houk C, Ahmed SF, Lee PA, LWPES/ ESPE Consensus Group. *Consensus statement on management of Intersex Disorders*. Arch Dis Child. 2006; 91:554-563.

[5] *Ibid.*

[6] Valerio P. Santamaria F. *Bambini e adolescenti intersessuali: quali dilemmi?*. La Camera Blu. 2013, in press.

Sexual Development" in 2012 in order to eliminate the use of the term "disorders".[7]

The terminological question is a particularly thorny one for a genderist and heterosexist society like ours which considers genders exclusively as male and female. This is the reason behind the frenetic search for a term that can explain an atypical variation, given that it is still hard to imagine that variability can exist and these conditions can be just some of the many possibilities and variations of the human condition.

Despite many signs of willingness to tackle the problem, the issue is still very much open to debate. These conditions, with their associated traits, continue to pose numerous questions since they imply the need to consider new possibilities in assigning gender that would make it possible to move beyond the rigid dichotomy of male/female categories. The presence of atypical genitalia should therefore lead to consideration of other gender categories that must find a social classification that ensures these individuals receive adequate recognition.

At the heart of this complex social struggle in favour of the "third gender" and the principle of self-determination[8], in which we have been involved for several years, there are also issues linked to the justifiable worries of parents. Atypical genitalia can lead to considerable anxiety among parents regarding the health, biological gender and sexual orientation of their children; sometimes it is possible to accept the idea, linked to common sense, that the atypical appearance of genitalia could lead to confusion or rejection on the part of the family and the social context, and, similarly, to confusion about the gender identity of the child[9]. In reality, recent

[7] *Ibid.*

[8] Valerio P. Santamaria F. *Bambini e adolescenti intersessuali: quali dilemmi?*, La Camera Blu. 2013, in press.

[9] Meyer-Bahlburg HF. *Lignes de conduite pour le traitement des enfants ayant des troubles du développement du sexe - Treatment guidelines for children with disorders of sex development*, Neuropsychiatrie de l'enfance et de l'adolescence. 2008; 54: 339–344.

studies[10],[11] have shown that the development of gender identity cannot just be determined by phenotypal appearance[12],[13],[14],[15],[16],[17]. The structuring of gender identity involves complex aspects of a varied nature which affect the biological-hormonal and the socio-cultural sphere, as well as a profoundly phantasmal psychological level which regards relational exchanges between a child and the parents. It is important not to underestimate the presence of factors that concern random events that can take place during early infancy which may affect the cerebral structure and, as a consequence, affect the construction of a child's gender identity[18],[19].

Nevertheless, for some of these conditions, frequent use is made of "corrective and normalising" surgery within the first year

[10] Berenbaum S. *Management of children with intersex conditions: psychological and methodological perspective*. Growth genetics and hormones. 2003; 19 (1): 1-6.

[11] Heino FL. Meyer-Bahlburg CD. Baker SW. Carlson AD. Obeid JS., *New prenatal androgenization affects gender-related behavior but not gender identity* in *5–12-year-old girls with Congenital Adrenal Hyperplasia*. Archives of Sexual Behaviour. 2004; 33 (2):97-104.

[12] Holmes M. *Critical Intersex*, 2009 Ashgate Publishing, Ltd.

[13] Jones L. *The third sex: Gender Identity development of Intersex Persons*, Graduate Journal of Counseling Psychology 2009; Vol. 1: Iss. 2, Article 3.

[14] CNB - Comitato nazionale per la bioetica. *I Disturbi della Differenziazione Sessuale nei minori: aspetti bioetici*, 2010, www.palazzochigi.it

[15] Hughes IA, Houk C, Ahmed SF, Lee PA, LWPES/ ESPE Consensus Group. *Consensus statement on management of Intersex Disorders*, Arch Dis Child. 2006; 91:554-563.

[16] Meyer-Bahlburg HF. *Lignes de conduite pour le traitement des enfants ayant des troubles du développement du sexe - Treatment guidelines for children with disorders of sex development*, Neuropsychiatrie de l'enfance et de l'adolescence. 2008; 54:339–344.

[17] NEK-CNE - Swiss National Advisory Commission on Biomedical Ethics. *On the management of differences of Sex Development. Ethical issues relating to "intersexuality"*, 2012, www.nek-cne.ch

[18] Boncinelli E. *La vita della nostra mente*. Roma-Bari: Laterza; 2011.

[19] Santamaria F. Auricchio A. Parisi I. Valerio P. *Bambini e adolescenti con Disordini della Differenziazione Sessuale: nuove prospettive*. Minori e Giustizia (a journal) n° 2/2013 Franco Angeli.

of life: this type of operation is mainly used for girls with *Congenital Adrenal Hyperplasia*. Although it affects both sexes, this condition leads to the excessive production of male hormones in females during the foetal stage and can cause thickening of the clitoris so that it resembles a micro-penis. Other conditions that frequently result in surgical intervention include *Androgen Insensitivity Syndrome* (or *Morris Syndrome*), in which chromosomically male individuals with insensitivity to androgens develop female phenotypal traits, and occasionally *Turner Syndrome* in the rare cases in which there are Y chromosome fragments in the karyotype. In these two cases, gonadectomy – involving the removal of the gonads - is advised because the presence of the Y chromosome also leads to the formation of testicles which are believed to pose risks of tumoural degeneration.

Advocates of surgery consider the operation to be essential for definitive gender attribution to be made and to enable the adequate development of gender identity: the primary sexual traits of these girls are therefore "corrected" to enable them to achieve "normality", to integrate and to feel at ease[20]. However, different schools of thought[21],[22], together with various associations and movements, have expressed strong criticism of the logic behind medical and surgical intervention, underlining the importance of suggesting new approaches and forms of treatment for these children.

This is a serious ethical problem: this type of intervention constitutes irreversible sex assignment, involving harmful physical and psychological consequences which cannot be justified on the grounds that the family, school or social environment have

[20] Lee PA., Houk CP., *Normal male childhood and adolescent sexual interactions: implication for sexual orientation of the individual with Intersex*, Journal of Pediatric Endocrinology & Metabolism. 2005. 18: 235-240.

[21] Meyer-Bahlburg HF. *Lignes de conduite pour le traitement des enfants ayant des troubles du développement du sexe - Treatment guidelines for children with Disorders of Sex Development*. Neuropsychiatrie de l'enfance et de l'adolescence. 2008; 54:339–344.

[22] Holmes M. *Critical Intersex*, 2009 Ashgate Publishing, Ltd.

difficulty in accepting the child's natural physical characteristics[23]. In cases where there are no risks to the health of girls, surgery is designed chiefly to 'normalise' the aesthetic appearance of the genitalia, to make the child more acceptable to her parents or to prevent future difficulties in social or sexual life[24],[25],[26].

In the opinion of opponents of this treatment, the main aim of surgery seems to make the child acceptable to the family and society[27],[28],[29]. They therefore argue that no surgery should be conducted on the genitalia so that only the girls themselves, when they have grown up and received adequate psychological support, can decide whether to have these operations[30].

Moreover, in 2006, the Intersexed Society of North America published Clinical Guidelines that highlight the importance of resorting to surgery only when there is an imminent risk to the physical wellbeing of the child, thus avoiding the need to force the person to undergo 'normalisation', linked to social constructs which could prove to be harmful[31] [32]. A clear appeal has therefore been made by the Intersexed Society to delay surgery and hormone treatment as long as possible in order to facilitate the decision-making process and the active participation of the individual in the treatment.

[23] NEK-CNE - Swiss National Advisory Commission on Biomedical Ethics, *On the management of differences of Sex Development. Ethical issues relating to "intersexuality"*, 2012, www.nek-cne.ch

[24] Richter-Appelt, H. *Intersexualität*, 2007, Zeitschrift für Sexualforschung, 2.

[25] Holmes M. *Critical Intersex*, 2009 Ashgate Publishing, Ltd.

[26] Chase C. *Letters from readers*, The Sciences, 1993, 3.

[27] Richter-Appelt H. *Intersexualität*, 2007, Zeitschrift für Sexualforschung, 2.

[28] Warne G.L. Raza J. *Disorders of Sex Development (DSDs), their presentation and management in different cultures*, Rev Endocr Metab Disord, 2008, 9:227–236.

[29] Holmes M. *Critical Intersex*, 2009 Ashgate Publishing, Ltd.

[30] Valerio P. Santamaria F. *Bambini e adolescenti intersessuali: quali dilemmi?*, La Camera Blu, 2013, in press.

[31] *Ibid.*

[32] Intersexed Society of North America. *Clinical Guidelines for the management of Disorders of Sex Development in childhood*, Whitehouse Station, N.J 2006: Accord Alliance.

Italy has also adopted a clear stance on the issue through a Ministerial document of the *Comitato Nazionale per la Bioetica* (National Committee for Bioethics)[33]. Based on the Clinical Guidelines, the document underlines how "*each medical intervention in cases of DSD should seek to harmonise elemennts of disharmony at a psycho-physical and social level; each intervention on the body should be guided by the principle of the greatest interest for the child, avoiding unnecessary mutilation (such intervention should only be taken in urgent conditions, since it is preferable to wait for the individual to reach a level of maturity that enables him or her to express his or her consensus); the family and the minor should receive adequate psychological support and communication should be careful and gradual*".

The aims of this document, drawn up to support the decisions of the doctors, parents and intersex children concerned, can be briefly summarised as follows:

1. where diagnosis is possible, to bring up the child as male or female;
2. in cases of genital ambiguity, it is advisable to make a sex assignment that is agreed by parents and doctors;
3. surgery should be carried out only if strictly necessary;
4. in the case of postponed surgical intervention, psychological support should be guaranteed;
5. in the case of discrepancy between assigned sex and gender identity development, the legal change of gender identity should be facilitated;
6. long-term studies and research should be encouraged and promoted.

As psychologists, we agree with those positions that argue, on most occasions, that it is not really necessary to carry out surgical intervention immediately and that it is better to avoid what has been defined by some as 'genital mutilation'[34], partly because risky surgical operations are being performed as standard care and are not being adequately followed up[35].

[33] CNB - Comitato Nazionale per la Bioetica. *I Disturbi della Differenziazione Sessuale nei minori: aspetti bioetici*, 2010, in http://www.palazzochigi.it

[34] Pini V. *"Non è né maschio né femmina". E per i genitori diventa un dramma*. La Repubblica, 28 August 2013.

[35] Chase C. *Letters from readers*, The Sciences. 1993, 3.

We agree with the position of intersexuals who are understandably tired of hearing that "long – term follow – up data is needed", while the surgery continues to take place[36],[37]. For 20 years now, survivors of this type of surgery have expressed their public opposition to them, and consistently criticise them as "immensely destructive of sexual sensation and of the sense of bodily integrity"[38]. We agree with the criticisms of the continuing scorn and intolerably paternalistic approaches towards adult survivors speaking out about their suffering and demanding an end to non-consensual cosmetic genital surgery on children and minors, trying to marginalise their experiences, deriding them publicly and denying their right to voice their experiences and opinions[39].

We are also concerned about the psychic costs of surgery on genital zones. If carried out prematurely, surgical intervention may cause serious traumas to girls, both in the short and long-term. We underline the importance of focusing on the needs and desires of people with DSDs and also, in line with the principle of self-determination – which we wholeheartedly support - of the possibility of individual choice and will. This principle would undermine the rigid polarity of gender and offer a new perspective. In this regard, we believe the research by Judith Butler to be of crucial importance. She is extremely critical of the rigid categorisation of gender and the regulatory aspects which, in her opinion, lead to the social and cultural construction of male and female individuals[40],[41]. The strength of Butler's critique lies in her lively opposition to the rigid categories, firmly rejecting the violent, normalising approach by which a baby with atypical genitalia needs

[36] *Ibid.*

[37] NEK-CNE - Swiss National Advisory Commission on Biomedical Ethics. *On the management of Differences of Sex Development. Ethical issues relating to "intersexuality"*, 2012, www.nek-cne.ch.

[38] Chase C. *Letters from readers*, The Sciences. 1993, 3.

[39] *Ibid.*

[40] Butler J. *Undoing Gender*, London: Routledge; 2004.

[41] Valerio P. Santamaria F. *Bambini e adolescenti intersessuali: quali dilemmi?*. La Camera Blu. 2013, in press.

to have surgical "correction" in order to belong to the social and cultural normalisation of male and female gender identity[42],[43].

Butler's ideas are extremely innovative because they propose a "disintegration of gender" which ensures that humans are no longer divided into this dual category[44]. Acceptance of this position would reduce the effects of experiences linked to diversity, estrangement and the social stigma of children with atypical genitalia as well as the difficulties linked to the impossibility, on the part of their families, of representing their own child according to male-female gender categories[45],[46],[47],[48],[49],[50],[51], with important consequences on the family's decisions regarding treatment.

In support of this position, it is interesting to note that the legal systems in various countries are increasingly broadening their horizons to take account of the new views of the scientific community: a particularly interesting example is the recent stance of the German legal system by which, in June 2013, Germany became the first European nation to recognise the 'third gender' in the

[42] *Ibid.*

[43] Butler J. *Undoing Gender...*

[44] *Ibid.*

[45] *Ibid.*

[46] Drescher J. *Queer diagnoses: parallels and contrasts in the history of Homosexuality*, Gender Variance, and *the Diagnostic and Statistical Manual*, Arch Sex Behav, 2010, 39:427–460.

[47] Holmes M. *Critical Intersex*, 2009 Ashgate Publishing, Ltd.

[48] Warne G.L. Raza J. *Disorders of Sex Development (DSDs), their presentation and management in different cultures*, Rev Endocr Metab Disord, 2008, 9:227–236.

[49] Canguçú-Campinho AK. de Sousa Bastos AC. Sampaio Oliveira Lima IM. *Ambivalences in the transition to motherhood: the arrival of an intersexual baby*, in Bastos AC. Uriko K. and Valsiner J. (Eds), *Cultural Dynamics of Women's Lives*, Charlotte, N.C. 2011, Information Age Publications.

[50] Diamond M. *Human Intersexuality: Difference or Disorder?*, Arch Sex Behav, 2009, 38:172.

[51] Valerio P. Santamaria F. *Bambini e adolescenti intersessuali: quali dilemmi?*. La Camera Blu, 2013, in press.

case of children born with atypical genitalia[52]. By means of this procedure, parents of intersex children have the right to avoid having to declare a gender and to indicate it as 'unspecified'. Thus the decision for their own children can be put off until they have reached a greater awareness. In line with this approach, the lawyer Anne Tamar-Mattis, of the Californian Law Group Advocates for Informed Choice, who has been involved for many years in promoting the rights of intersex individuals, has emphasised that Australian legislation has, for many years, given adults the right to define themselves as belonging to a third gender[53].

In Switzerland too, in the interests of child protection, a recent legal review has been conducted about the liability implications of unlawful sex assignment interventions in childhood, and of the associated limitation periods. Questions of criminal law, such as the applicability of offences of assault (Art. 122 and 123, StGB) and the prohibition on genital mutilation (Art. 124, StGB), were considered. Furthermore, with regard to sexual self-determination, the age of consent specified in Art. 187 of the Swiss Criminal Code (StGB) is 16 years old[54].

Despite these results, the battle for the recognition of rights of intersex individuals and their possibility of choice still appears to be long and complex. Nevertheless, the current scientific and social debate presented here, associated with the clinical experience gained over years of collaboration with paediatric endocrinologists, has enabled us to reflect on the resources of adequate care and treatment of intersexual conditions by health workers: we believe that it is essential for the medical professionals involved to offer a suitable support setting and provide information for the whole family unit to reach an informed decision.

Although the forms of care and treatment of children with DSDs are still the subject of debate between paediatricians, geneticists and psychologists, all would agree about the need to de-

[52] Donaldson James S. *Is Baby Male or Female? Germans Offer Third Gender*, 2013, ABC News Internet Ventures.

[53] *Ibid.*.

[54] *Ibid.*.

fine models of intervention that included integrated medical and psychological assistance[55]. This prospect underlines the fact that psychological support could alleviate the anxieties of the parental couple more than correction of the child's sexual traits. We would therefore argue that health professionals involved in looking after these families can provide an important contribution by accompanying them in their decisions regarding treatment and social choices[56]. In particular, they should provide support for the families when informing them of the diagnosis[57],[58], insisting on the need to tell the truth at all times, in order to avoid forms of stigmatisation. Lastly, we would emphasise the need for a space for reception, accompaniment and support which could provide an important opportunity to reflect on the emotional experiences linked to the decisions that need to be made, taking into account the unique story of each single individual.

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[55] Hughes IA. Houk C. Ahmed SF. Lee PA. LWPES/ ESPE Consensus Group, *Consensus statement on management of Intersex Disorders*, Arch Dis Child, 2006, 91:554-563

[56] Valerio P., Auricchio M., Barone A., Boursier V., Dicé F., Santamaria F., *"I Disordini della Differenziazione Sessuale: un approccio integrato"* in: Valerio P. et al., *"Figure dell'identità di genere. Uno sguardo tra psicologia, clinica e discorso sociale"*, Rome 2013, FrancoAngeli.

[57] Freda MF. Auricchio M. Dicé F. *La diagnosi di DSD: il flusso dei processi comunicativi tra medico, genitori e bambino adolescente, Oral Comunication in Convegno Approccio integrato medico – psicologico al trattamento dei disordini della differenziazione sessuale: dalla nascita all'età adulta*, Napoli, February 2011.

[58] Dicé F. Auricchio M. (2012) *"Comprendere la diagnosi nel rapporto fra equipe sanitaria, genitori e bambini con Disordini della Differenziazione Sessuale."* In: AIP (Associazione Italiana di Psicologia), Atti del Congresso Nazionale delle Sezioni, Turin 2012, Express Edizioni.

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HETERONORMATIVITY, HOMOPHOBIA AND TRANSPHOBIA IN SPORT

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Abstract

Sexism, heteronormativity and homo/transphobia are pervasive in every social institutions. In sport such culture is evident because the cultural frame is represented by a very strong sex-segregation. The marked difference between males and females can produce dangerous gender stereotypes facilitating the development of a heterosexist culture. Heterosexism is an integral part of the male identity and seems to be particularly evident in team sports. Men socialize their own identity in opposition to the feminine one perceiving themselves as stronger and more powerful. This dynamic creates serious

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problems for sexual minority youths who are affected by homophobia and genderism.
The purpose of this study was to explore knowledge, opinions and attitudes related to gender and sexual issues in sport among 111 undergraduates attending the faculty of Movement Science at Parthenope University of Naples. Participants completed a questionnaire containing many questions about gender and sexual issues and homophobia and transphobia in sports field. In addition they completed also the Genderism and Transphobia Scale (GTS), the Homophobia Scale (HS) and the Ambivalent Sexism Inventory (ASI).
Forty% of respondents have wrong notions about gender and sexual issues. Despite that and even though most of them have not directly experienced or witnessed homophobic or transphobic episodes in sport, homophobia and transphobia were considered as significant barriers to participation in sport. Furthermore, more than one third of both males and females showed high levels of sexism, although males had higher levels than females in sexist attitudes. As in sexism, males showed high levels than females in transphobia and homophobia too.
Our results suggest the need of introducing specific training in the degree courses of Movement Science aimed to deconstruct gender and sexual stereotypes and prejudices.

Introduction

A gendered culture is pervasive in the whole western society, representing a regulator factor of social relationships. Such culture is widely evident in sports, that are *sex-segregated* and *male-dominated*[1]. Competitive sports have to be viewed as social institutions principally arranged around a need of defining some forms of masculinities as

[1] Gill DG, Kamphoff CS. *Gender in sport and exercise psychology* in Chrisler JC, McCreary DR (edit ed by). *Handbook of Gender Research in Psychology. Volume 2: Gender Research in Social and Applied Psychology*. Springer New York Dordrecht Heidelberg London; 2010: 563.

acceptable, some others as inadmissible[2]. As Messner[3] noted, an athlete has to represent the ideal of what to be a man means in opposition to what to be a women and/or a gay means in our culture. Thus, sport is a field in which biological, physical, competitive and hierarchical values emerge, almost always in favour of males. It means that in sports gender and sexual stereotypes are widely diffused being part of that specific culture. In a classic analysis, Metheny[4] stated that it is not socially appropriated for a woman to be engaged in sport activities in which she should use her bodily force or contact. According with her, many sports are considered appropriated for women, on the condition that strength and bodily contact are reduced and skills and gracefulness increased. Otherwise, more recent studies[5] state that males are more restricted than women in the choice of physical activities and behaviours. For example, Schmalz and Kerstetter[6], within a sample of 8- to 10-year-old young male and female children, have noted that young children recognize gender stereotypes and stigma associated with some activities, while females feel freer than males in crossing gender boundaries.

Such forms of sexism and misogyny are strictly linked to homophobia[7] and negative attitudes toward gender non conformity.

[2] Anderson E. *Sport theory and social problems: A critical introduction*. New York: Routledge; 2010; Crosset T. *Masculinity, sexuality, and the development of early modern sport* in Messner M, Sabo D (edited by) *Sport, men and the gender order: Critical feminist perspectives* Champaign, IL: Human Kinetics; 1990; Messner M. *Taking the field: Women, men and sports*. Minnesota: University of Minnesota Press; 2002.

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[7] Messner M. *Power at play…..*

Sport links men together and leads to perceive themselves as superior and stronger than women. It implies that a man cannot be effeminate and has to acquire behaviours, thoughts and emotions socially perceived as masculine. It could be hypothesized that heterosexism is a constitutive element of sport, such as an integral part of the male identity. As Messner[8] states, sport represents a powerful strength that leads young boys and men to socialize with a restricted male identity. Thus, homophobia and heterosexism seem to be necessary to conform to a restricted definition of masculinity. According with Rankin[9], organized sport is a hostile environment for sexual minority youths who conceal their sexual orientation or gender identity to avoid intimidation. Morrow and Gill[10] report high levels of homophobic and heterosexist behaviours and attitudes in public schools witnessed by both physical education teachers and students. Within their sample, 60% reports having seen homophobic episodes and 50% of gay and lesbian youths having experiencing them. Gill et al.[11], assessing the attitudes toward many minorities based on ethnicity, disability and sex, observed more negative attitudes toward gay and lesbian people than other minorities.

Many studies[12] have demonstrated a homonegative and heterosexist climate in different sports, talking about negative stereo-

[8] *Ibid*.

[9] Rankin SR. *Campus climate for gay, lesbian, bisexual, and transgender people: A national perspective*. New York: National Gay and Lesbian Task Force Policy Institute; 2003 Retrieved August 9, 2013 from http://www.thetaskforce.org/reports_and_research/campus_climate.

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types, social isolation, verbal comments, discrimination in team selection and homophobic harassment. Roper and Halloran[13], analysing a sample of heterosexual male and female athletes, stated that male athletes have more negative attitudes toward gay and lesbian people than female ones. Furthermore, such negative attitudes are more negative toward gay men compared to lesbian women.

Even as regards to transgender people, their inclusion in the sporting context remains uncertain. One of the main barriers to participating in sport may be represented by the lack of changing and leisure facilities which meets the need of transgender people, heightened by the concern about an "unfair competitive advantage" on sex-separated teams[14]. Indeed, the major institutional anxiety about transgender participation in competitions is especially related to male-to-female transgender people. This concern presumes a strong difference between men and women and a male athletically superiority[15].

As for gay and lesbian athletes, coaches without a proper education may be not prepared to fairly and effectively address a transgender person's interest in sports participation.

1. Objectives and hypotheses

Since heteronormativity and homonegativity are manifested in every social institution from the education system to the workplace, the sports environment is not exempt. This study represents a preliminary attempt to better understand knowledge, opinions and attitudes related to gender and sexual orientation issues in sport within undergraduates attending the faculty of Movement Science at Parthenope University of Naples. We have chosen such

[13] Roper EA, Halloran E. *Attitudes Toward Gay Men and Lesbians. Among Heterosexual Male and Female Student-Athletes*. Sex Roles; 2007, 57: 919-928.

[14] Sykes H. Transsexual and transgender policies in sport. *Women in Sport and Physical Activity Journal*, 2006; 15 (1): 3-13.

[15] Travers A. *The Sport Nexus and Gender Injustice*. Studies in Social Justice 2008; 2 (1): 79-101.

participants for their attitudes toward sports field and their inclination to become trainers or physical education teachers. Our main objective is to explore sexual and gender issues in this target taking into account the differences between males and females, specifically hypothesising that males are more likely to have sexist, homophobic and transphobic attitudes than females.

2. Methods

Instruments

- *Knowledge about homosexuality, bisexuality, lesbianism and transgenderism*: this issue has been investigated through 4 questions specifically related to homosexuality, bisexuality, lesbianism and transgenderism: e.g. "You think that homosexuality is: a) A pathology that can be cured; b) One of the possible sexual orientations; c) A sexual perversion; d) A gender identity; e) A gender role; f) An outcome of childhood trauma; g) A condition resulting from an excessive closeness with mother; h) A temporary phase. The main objective of these questions was to identify the right knowledge of participants about gender and sexual issues.

- *Opinions about homophobia and transphobia in sports field*. The participants opinions were explored through a questionnaire used in the *Out for Sport Survey* (2012 which represents the first research assessing homophobia and transphobia in Scottish Sport within Equality Network for lesbian, gay, bisexual and transgender (LGBT) people. Such questionnaire has been chosen for its ability to capture opinions about transphobia and homophobia in sports field. The questionnaire, which consists in 20 questions assessing several issues, such as discriminations, experiences of homophobic and transphobic episodes, sports policies against gender and sexual discriminations, coming out of gay athletes, etc., was translated and adapted to Italian language.

- *Opinions about sex-typing sports*. In order to evaluate the perceptions of respondents about sex-typing sports, a specific questionnaire

has been built. We asked to participants to rate on a 5-point scale from 1 (typically feminine) to 5 (typically masculine) how much a sport is feminine or masculine. In addition, participants had to rate their perceptions of levels of homophobia and transphobia for each sport.We followed the sex-typing sports categorization of Zinkhan et al. (2004)[16].

- *Genderism and Transphobia Scale (GTS)*[17] is a 32-items scale on a 7 points Likert which assesses genderist and transphobic attitudes and behaviours toward transgender and gender non conforming people. It is constituted by 2 subscales: 1) *Transphobia/Genderism* assesses the emotional disgust toward individuals who do not conform to society's gender expectations and measures the ideology that reinforces negative evaluations about gender non-conformity or incongruence between sex and gender; 2) *Gender-bashing* refers to the assault and/or harassment of persons who do not conform to gender norms.

- *Homophobia Scale (HS)*[18] is a 25-items questionnaire on a 5 points Likert scale which has the objective of evaluating homophobic attitudes. The questionnaire is constituted by 3 subscales: 1) Behavioral/NegativeAffect, that assesses primarily negative affect and avoidance behaviours; 2) Affect/Behavioral Aggressive, that measures primarily aggressive behaviors and negative affect; 3) Cognitive Negativism, that assesses negative attitudes and cognition toward gay people.

[16] Zinkhan G, Prenshaw P, Close AG. *Sex-Typing of Leisure Activities: A Test of Two Theories*. Advances in Consumer Research 2004; 31: 412-419. In their work, authors considered the following sex-typing sports: Ballet, Dancing, Gym, Skate, Riding, Volleyball, Skii, Swimming, Athletics, Badmington, Scuba diving, Tennis, Ping pong, Squash, Water polo, Cricket, Martial arts, Basket, Climbing, Canoeing, Golf, Polo, Extreme sports, Cycling, Baseball, Ice Hockey, Soccer, Hockey, Wrestling, Boxe, Motocross, Motocycling, Football, Rugby

[17] Hill DB, Willoughby BLB. *The Development and Validation of the Genderism and Transphobia Scale*. Sex Roles 2005; 53 (7/8): 531-544.

[18] Wright LW, Adams HE, Bemat J. *Development and Validation of the Homophobia Scale*. Journal of Psychopathology and Behavioral Assessment 1999; 21 (4): 337-347.

- *Ambivalent Sexism Inventory (ASI)*[19] is a 22-items questionnaire on a 6 points Likert scale which assesses the ambivalent sexism construct. Such construct is divided by authors in two different subscales: 1) *Hostile sexism* measures negative stereotypes about women who reject traditional female roles and behaviours; 2) *Benevolent sexism* assesses positive feelings towards women who embrace traditional roles; such sexism considers women as human beings who have to be protected and adored.

Selection and description of participants

111 undergraduates attending the Faculty of Movement Science were randomly recruited at "Parthenope" University of Naples, during their classes, at the presence of two researchers. Their age ranges from 20 to 50 years old (m=24.54; ds=4.19). They are 63 males (56.8%), 47 females (42.3%), and just 1 (0.9%) identifies his/herself as "other". They all have Italian nationality, mostly living in Naples (n=60; 54.1%) or in villages in that province (n=21; 18.9%); 6 (5.4%) of them is from Caserta and province; 4 (3.6%) from Avellino; 9 (8.1%) from Salerno; 2 (1.8%) from cities out of Campania region[20]. As for sexual orientation, 104 (93.7%) define themselves heterosexual; just 1 (0.9%) homosexual; 2 (1.8%) bisexual; 3 (2.7%) "other"[21]. 93 (83.8%) state that there are no homosexual and/or transsexual people in their family; 9 (8.1%) state that they have, and 8 (7.2%) that it may be. 77 (69.4%) have lesbian, gay, bisexual or transgender (LGBT) friends against 34 (30.6%) that do not. Finally, as for political orientation, 12 (10.8%) declare being conservative, 58 (52.2%) moderate and 31 (27.9%) progressive[22].

[19] Glick P, Fisk ST *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*. Journal of Personality and Social Psychology 1996; 70 (3): 491-512.

[20] Referring to the cities of origin, 9 people preferred not to answer.

[21] Referring to sexual orientation, 1 person preferred not to answer.

[22] Referring to political orientation, 11 people preferred not to answer.

Statistics

All statistical analyses were carried out using the Statistical Package of Social Sciences (SPSS, Windows release 17.0; Chicago, IL, USA). The results are reported as mean ± Standard Deviation (SD). As the sample had not a normal distribution, non-parametric tests were carried out. Mann-Whitney test for independent samples was used to compare the means of continuous variables, while a non-paramentric chi-square test was used for categorical variables. A p value < 0.05 was conventionally considered significant.

3. Results

Which knowledge about LGBT basic issues?

More than half of participants knows what homosexuality, lesbianism and transsexualism exactly mean (*Table 1*). Approximately between 50% and 60% of them recognize that homosexuality and lesbianism are possible sexual orientations and that transsexualism is an identity condition where a person feels like belonging to a gender non conforming to his/her biological sex. It appears that just bisexuality creates some confusion, since only 30.2% of males and 38.2% of females has the right cognition of it.

Table 1. Percentages of right knowledge about LGBT issues in males and females

	M	F
	N (%)	N (%)
Homosexuality is one of the possible sexual orientation	38 (60.3%)	27 (57.4%)
Lesbism is one of the possible sexual orientation	39 (61.9%)	27 (57.4%)
Transsexualism is an identity condition where a person feels like belonging to a gender non conforming to his/her biological sex	27 (57.1%)	28 (51.1%)
Bisexuality is one of the possible sexual orientation	19 (30.2%)	18 (38.2%)
A difference between sexual orientation and gender identity does exists.	37 (58.7%)	24 (51.1%)

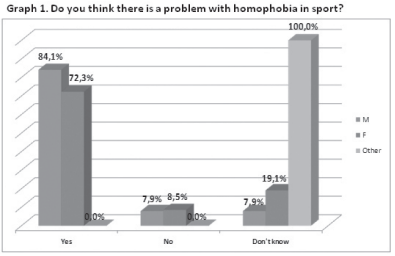
In *Table 2* the top answers for each question are indicated. As it can be noted, males participants provide "pathologizing" answers (sexual perversion) on transsexualism and bisexuality more frequently than females.

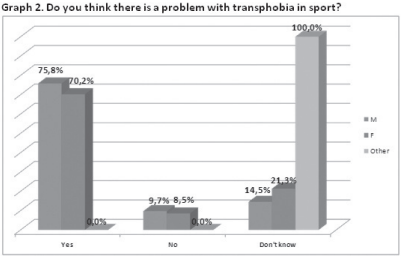
Table 2. Top answers for each question about homosexuality, bisexuality, lesbianism and transgenderism in males and females

	M	F
	N (%)	N (%)
Homosexuality is		
- a sexual orientation	38 (60.3%)	27 (57.4%)
- a gender identity	14 (22.2%)	16 (34%)
Lesbism is		
- a sexual orientation	39 (61.9%)	27 (57.4%)
- a gender identity	13 (20.6%)	14 (29.8%)
Transsexualism is		
- a sex-non-conforming identity feeling	27 (57.1%)	28 (51.1%)
- a sexual orientation	10 (15.9%)	10 (21.3%)
- a sexual perversion	12 (19%)	5 (10.6%)
Bisexuality is		
- a sexual orientation	19 (30.2%)	18 (38.2%)
- a sexual perversion	20 (31.7%)	9 (19.1%)
- a gender identity	8 (12.7%)	4 (8.5%)
- an extreme identity confusion	10 (15.9%)	9 (19.1%)

Perception of homophobia and transphobia in sport

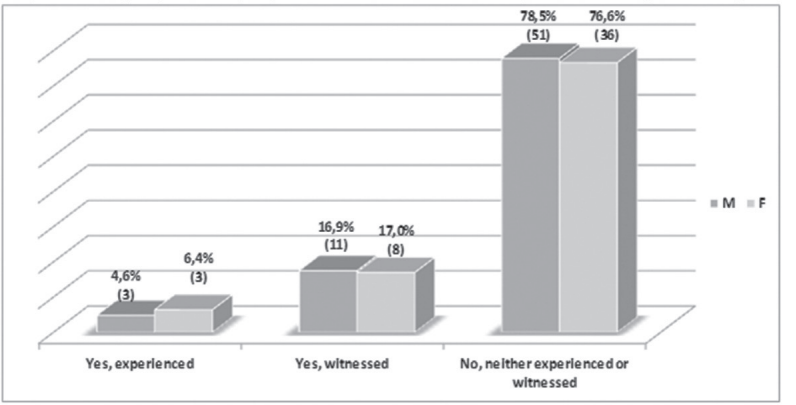
Participants perceive that sport is rather characterized by homophobic and transphobic attitudes. No differences based on sex were found, as shown in *Graph 1* and *Graph 2*.





This perception seems to be clear, even though most participants have not directly experienced or witnessed homophobic or transphobic episodes in sport (*Graph 3*). Within participants who experienced or witnessed these events, males reported just verbal aggression, while females, reported either verbal (82%) or physical aggressions (22%).

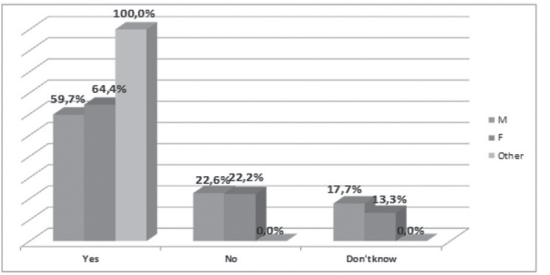
Graph 3. Have you personally experienced or witnessed homophobia or transphobia in sport?



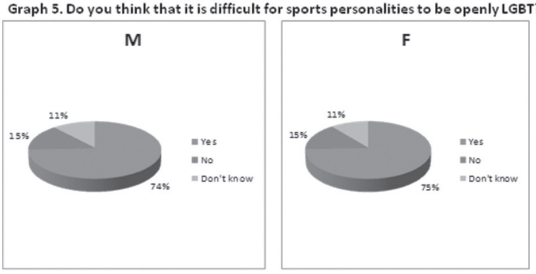
Homophobia and transphobia as strong barriers

Homophobia and transphobia are considered as significant barriers to participation in sport (*Graph 4*). This perception increases when it is asked if homophobia or transphobia represent a barrier to LGBT people participating in sport. As a matter of fact, 74% of males and 75% of females think that being openly LGBT represents a difficulty (*Graph 5*).

Graph 4. Is homophobia or transphobia a barrier to LGBT people participating in sport?



Graph 5. Do you think that it is difficult for sports personalities to be openly LGBT?



This perception is worsened by the fact that 55% of males and 60% of females think that it is doing not enough to tackle homophobia and transphobia in sport.

Sports for males and sports for females

Many sports are considered as "sex-typing". Male and female participants agreed that ballet, dance, gym and skate are extremely feminine sports, as well as rugby, football, motocross and wrestling are extremely masculine (Tables 3.1 and 3.2).

Table 3.1. Means of sports perceived as feminine or masculine by female participants

Ballett	2.36	Canoeing	3.5
Dancing	2.57	Golf	3.51
Gym	2.7	Basket	3.53
Skate	2.74	Cricket	3.53
Swimming	2.98	Extreme sport	3.62
Volleyball	2.98	Cycling	3.7
Atletichs	3	Soccer	3.72
Riding	3.02	Baseball	3.72
Tennis	3.04	Polo	3.81
Scuba diving	3.11	Boxe	3.83
Skiing	3.13	Hockey	3.89
Ping pong	3.21	Ice Hockey	3.91
Squash	3.26	Wrestling	4.19
Climbing	3.28	Football	4.21
Martial arts	3.3	Motocross	4.3
Badmington	3.37	Motorcycling	4.32
Water polo	3.46	Rugby	4.34

Table 3.2 Means of sports perceived as feminine or masculine by male participants

Ballett	1.79	Basket	3.48
Dancing	2	Climbing	3.52
Gym	2.41	Canoeing	3.54
Skate	2.54	Golf	3.56
Volleyball	2.84	Polo	3.6
Riding	2.84	Extreme sport	3.63
Skiing	2.95	Cycling	3.74
Swimming	3.03	Baseball	3.81
Atletichs	3.05	Ice Hockey	4.02
Badmington	3.08	Soccer	4.03
Scuba diving	3.1	Hockey	4.08
Tennis	3.18	Wrestling	4.2
Ping pong	3.19	Boxe	4.21
Squash	3.32	Motocross	4.26
Water polo	3.35	Motorcycling	4.34
Cricket	3.43	Football	4.43
Martial arts	3.45	Rugby	4.59

Notes: The range is from 1 (Typically feminine) to 5 (Typically masculine) points for each sport. They have been ordered from the more feminine to the more masculine.

An interesting issue is that almost all the most sex-typing sports are also considered as characterized by higher levels of homophobia and transphobia. Specifically, in order these sports are soccer (84.4%), dance (39.9%), rugby (37.7%), football (35.5%), boxe (35.5%), basket (32.2%) and ballet (26.1%).

Genderist, homophobic and sexist attitudes

The levels of transphobia/genderism, homophobia and sexism reported by males and females are shown in *Table 4*. More than one third of both males and females presented high levels of both hostile and benevolent sexism. No significant differences in sexist attitudes between males and females have emerged. On the contrary, in all subscales of *Transphobia/Genderism* and *Homophobia* (expect for *Cognitive Negativism*), males show higher levels than females.

Table 4. Means and Standard Deviations for *Genderism and Transphobia Scale* and *Homophobia Scale*. Percentages of sexist attitudes from *Ambivalent Sexism Inventory*

	M	F	
	Mean (DS)	**Mean (DS)**	**Mann-Whitney U**
Transphobia/Genderism			
Genderism	3,53 (0,99)	2,82 (0,92)	877***
Gender Bashing	2,55 (1,09)	1,79 (0,77)	894***
Homophobia[§]			
Behavioral/NegativeAffect	3,90 (0,63)	4,44 (0,43)	727.5***
Affect/Behavioral Aggressive	3,70 (0,69)	4,32 (0,53)	762***
Cognitive Negativism	3,19 (0,66)	3,66 (0,86)	986.5***
	N (%)	**N (%)**	
Sexism[§§] (Both Hostile and Benevolent Sexism >= 2.5)	19 (30,15%)	15 (31,91%)	
	M	**F**	
	Mean (DS)	**Mean (DS)**	**Mann-Whitney U**
Hostile Sexism	2,60 (0,56)	2,44 (0,53)	1237
Benevolent Sexism	2,49 (0,45)	2,55 (0,54)	1200

p*** < .001

[§] Higher scoring indicates a more positive attitudes towards gay people, lower scoring indicates negative attitudes towards them.

[§§] Only the *Ambivalent Sexism Inventory* has cut-off values to delimitate sexist attitudes. If a subject has 2.5 points to both Hostile Sexism and Benevolent Sexism subscales, it means that he/she has sexist attitudes. Neither *Genderism and Transphobia Scale* or *Homophobia Scale* has an absolute cut-off value indicating genderist/transphobic or homophobic attitudes.

4. Discussion

Lacking more specific research in this field, this preliminary study was aimed to analyze opinions, knowledge and attitudes towards gender and sexual issues related to sports field within undergraduates attending the faculty of Movement Sciences at "Parthenope" University of Naples. This target has been chosen because most of them will be future trainers or physical education teachers and they will have to deal with gender and sexual issues. Unfortunately, Italian degree courses in Movement Sciences still do not provide for a "gendered" curriculum and many undergraduates will be lacking of gender and sexual education and notions. The main and often the unique source of information is still represented by the episodes of discrimination and violence against LGBT persons provided by media reports.

As our results show, although most participants have a right knowledge about LGBT issues, many others (approximately 40%) have wrong notions about them. They are not aware of the difference between sexual orientation and gender identity and are not able to identify the right definition of homosexuality, bisexuality, transsexualism and lesbianism. Moreover, if we consider that the percentages about perceptions of homophobia and transphobia in sport are very high, we can imagine that such perception is quite independent on the right knowledge about sexual and gender themes.

Our results seem to confirm that sport is "sex-segregated"[23] and that males are considered as more suitable for physical force and bodily contact (rugby, football, motocross and wrestling) and females are more suitable for skill and grace (ballet, dance, gym and skate)[24].

Morrow and Gill[25], within a sample of teachers and students of public schools, found out that 60% witnessed homophobic and

[23] Gill DG, Kamphoff CS. *Gender in sport and exercise psychology…*

[24] Metheny E. *Symbolic forms of movement…;* Kane MJ, Snyder E. *Sport typing: The social "containment" of women*. Arena Review 1989; 13: 77–96.

[25] Morrow RG, Gill DL. *Perceptions of homophobia and heterosexism in physical education*. Research Quarterly for Exercise and Sport 2003; 74: 205–214.

heterosexist behaviors and attitudes. Although in our study we did not find out the same percentages of witnesses, homophobia and transphobia are considered as strong barriers to participation in sport, especially for LGBT personalities. This datum is very interesting if we consider that most participants have never experienced or witnessed homophobic and transphobic episodes in sport. The "cultural" perception seems to be more meaningful than the "real" one. It is not important to see with one's own eyes homophobic or transphobic discriminations, but it is as if people know that homophobia and transphobia do exist and are pervasive. This perception is worsened by the fact that 55% of males and 60% of females think that it is doing not enough to tackle homophobia and transphobia in sport. It means that homophobia is widespread and represents a power device[26]. It is noteworthy that, despite many difficulties in coming out among gay athletes, doing it in a heterosexist world such as sport can be a transformative experience and a possibility to challenge heterosexism in sport "becoming politicized"[27].

Many researchers suggest that heterosexual men have more negative attitudes towards gay men and lesbians than heterosexual women[28]. Some studies suggest also that sexism[29], genderism/gender-bashing[30] and homophobia[31] are higher in males than females.

[26] Messner M. *Power at play…..*

[27] Gough B. *Coming Out in the Heterosexist World of Sport: A Qualitative Analysis of Web Postings by Gay Athletes*, Journal of Gay & Lesbian Psychotherapy 2007: 11 (1-2): 153-174.

[28] Herek G. *Attitudes toward lesbians and gay men: A factor analytic study*. Journal of Homosexuality 1984; 10: 39-51; Herek G., Capitanio JP. *Some of my best friends: Intergroup contact, concealable stigma, and heterosexuals' attitudes toward gay men and lesbians*. Personality and Social Psychology Bulletin 1996; 22: 412-424; Lim V. *Gender differences and attitudes toward homosexuality*. Journal of Homosexuality 2002; 43: 85-97.

[29] Glick P, Fisk ST *The Ambivalent Sexism Inventory…*

[30] Hill DB, Willoughby BLB. *The Development and Validation of the Genderism and Transphobia Scale…*

[31] Wright LW, Adams HE, Bemat J. *Development and Validation of the Homophobia Scale…*

Our results, except for sexism, seem to confirm the studies above mentioned even in the sample of our undergraduated students in Movement Science, but need to be confirmed in a larger sample of participants. This finding seems to be very important because sport teams are usually split into male and female ones being them segregated and sex-typing. In agreement with Messner[32], the powerful strength of sport can represent a basis to create a common and widely shared male identity centered around a heterosexist matrix. This could be an explanation of higher levels of genderism and homophobia in males. Such power devices seem to be necessary to the survival of male identity which has to be built in opposition to the female one. Obviously, these mechanisms are extremely dangerous for sexual minority youths who could feel isolated and alienated deciding not to participate in sport activities or not to conceal their sexual orientation or gender identity.

We firmly believe in the need to educate train the future trainers in gender and sexual issues. They should be aware of the severe effects that homophobic and transphobic discriminations have on mental health, such as depression, isolation, anxiety, post-traumatic stress, both in adulthood and in childhood[33]. Our results suggest the importance of introducing specific training in the degree courses aimed to deconstruct gender and sexual stereotypes and prejudices. The trainer assumes a key role in sports teams because he or she represents a guide and his or her values are transmitted and assimilated. The main task of a trainer is to create safe and open environments where all differences should be perceived as an opportunity for personal and group growth. Such interven-

[32] Messner M. *Power at play…..*

[33] Birkett M, Espelage DL, Koenig B. *LGB and Questioning Students in Schools: The Moderating Effects of Homophobic Bullying and School Climate on Negative Outcomes*. Journal of Youth and Adolescence 2009; 38 (7): 989-1000; Meyer IH. *Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: Conceptual issues and research evidence*. Psychological Bulletin 2003, 129 (5): 674-697; Bockting WO, Miner MH, Swinburne Romine RE, Hamilton A, Coleman E. *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*. American Journal of Public Health 2013; 103 (5): 943-951.

tions should be carried out also in amateur and professional clubs and associations with the main aim to tackling homophobia and transphobia.

5. Limits

The aim of our study was to provide initial information about homophobia/transphobia in sports setting, therefore several limits should be acknowledged. The main limit is represented by the small sample size and by the absence of a control group. Furthermore, other categories of young adults are necessary to make complete comparisons. Thus, our findings cannot be generalized. Anyway, our future analyses, after recruiting other participants and increasing the sample size, will be aimed to infer whether having a right knowledge about sexual and gender themes, having played sport in the past and having high sexist attitudes can represent predictors of the development of homophobic and transphobic attitudes.

HOMOPHOBIA BETWEEN CULTURE AND CRIMINAL LAW

*Gianluca Gentile**

Abstract

There are multiple conflicting views about legal evaluation of homophobia. Some states endorse homophobia criminalizing same-sex sexual acts between consenting adults, distinguishing the age of consent for same-sex sexual acts and heterosexual acts, limiting freedom of speech and freedom of association of LGBTI people. On the other hand, some other states have a legislation which imposes extrapenalties for bias motive related to sexual orientation or gender identity and provides protection against discrimination in different fields. Who defends state-sponsored homophobia claims that it is necessary to defend morality. But the legislature of a democratic society cannot support a moral consensus without checking its factual basis and consistency of its arguments, which could be based on bias or personal adversions. Liberal democracies are grounded on a core set of political values that define citizen's constitutional rights and entitlements, failing which democracy collapses. Thus, society cultural, traditional or religious values, or the rules of the 'dominant culture', must be subject to a normative evaluation. This principle works not only in the legislative area, but also in the judiciary one.

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Member of the CIRB (Bioethics Research University Centre of Naples, Italy)

Judges and jurors should consider the normative points of view of the Constitutional and Human rights law, and not their values or those of the majority. This means that homophobia, even though it is common in our society, must not be elevated to the rank of a normative social aspiration.

1. Introduction

This paper deals with the role that social attitudes toward homosexuality play in certain areas of criminal law. There are multiple conflicting views about legal evaluation of homophobia, i.e. stigmatisation and discrimination of lesbian, gay, bisexual, trangender and intersexual (LGBTI) people because of their actual or perceived sexual orientation or gender[1]. At one end of the spectrum there are states which endorse homophobia criminalizing same-sex sexual acts between consenting adults, distinguishing the age of consent for same-sex sexual acts and heterosexual acts, limiting freedom of speech and freedom of association of LGBTI people. At the other end of the spectrum there are states which have chosen to introduce a legislation that imposes extrapenalties for bias motive related to sexual orientation or gender identity and provides protection against discrimination in different fields (for example employment, access to goods and services, education, social security and health care). Between the extremes there are states, like Italy, which have not enacted a comprehensive non-discrimination legislation and do not provide for a special regulation of crimes motivated by homophobia.

It is noted that «this current division of the world – from the point of view of legislation – into an LGBTI-friendly field and an LGBTI-unfriendly field is the result of different cultural, social and political processes rooted in the histories of the countries and

[1] As used in this paper the term «homophobia» refers to a hatred of gay men and lesbians rather than to a clinical fear of homosexuality.

the history of their relations with one another»[2]. In this paper I'll show how legal practices justify the juridical exclusion of LGTBI people (paragraph 2), why I believe that these arguments do not work in a democratic society (paragraph 3), and what are the limits of criminal law in eliminating discrimination against LGBTI people (paragraph 3).

2. Homophobia and the enforcement of morals

Criminalization of same-sex sexual acts between consenting adults is the most striking example of state-sponsored homophobia. The enforcement and the very existence of such criminal laws is openly discriminatory against LGBTI persons, which are compelled to choose between renouncing to express their own sexuality and maintaining a closeted sexual identity. While the second option involves risk of being found out and stigmatisied as a criminal[3], the first option means abiding by the law, but at the same time living an unhappy and probably unhealthy life. Thus, homosexuals who have been able to express their sexuality are psychological healthier than those who have repressed it, because anti-LGBTI laws contribuite to induce «internalized homophobia», a psychological condition which could include «feeling of insecurity, withdrawal, militancy and neuroticism […], self-derision, self-hatred, hatred of others in the group, and acting out self-fulfilling prophesies about one's own inferiority»[4].

[2] International Lesbian Gay Bisexual Trans and Intersex Association (Ilga), *State-sponsored homophobia. A world survey of laws: criminalisation, protection and recognition of same-sex love,* edited by Itaborahy L. P. , Zhu J., May 2013: p. 6 (accessed september 2013 at http://www.ilga.org).

[3] Primoratz I. *Ethics and Sex.* London: Routledge; 1999: 203, pp. 121-122.

[4] American Psychological Association and American Publich health Association, *Brief of amicus curiae of the American Psychological Association and the American Public Health Association in support of the Respondents [Michael Hardwick and John and Mary Doe, 478 U.S. 186 (1986) (No. 85-140)].* Washington: Wilson-Epes; 1986: 31, pp. 29-30.

Criminalisation of LGBTI people has a hugely detrimental effect not just within the legal sphere but also socially, because it prevents victims of homophobic violence from reporting to the police and being provided assistance. Furthemore, such victims are subject to various form of secondary victimization if they enter the criminal justice system, because the sympathy appears to be with the perpetrators of violence against LGBTI persons[5].

Laws against same-sex intercourses provide psychological justification for discriminating, harrassing and bullying LGBTI people, irrespective of the fact that such laws rarely get enforced[6]. The «criminalization of homosexual sodomy and crimes of homophobic violence mutually reinforce one another»[7]. Homophobes and queer-bashers might think that assaults and killings are justified because of the socially-imposed stigma and perception that LGTBI people are deviants and outlaws[8]. In other words, homophobic violence might be perceived by perpetrators as an act of legitimate law-enforcement against who elude prosecution under state anti-LGBTI laws[9].

In short, anti-LGBTI laws fuel religious and moral bias, because the government is seen as advancing the moral standards of

[5] Secondary victimisation is another reason for not reporting homophobic crimes: Wolhuter L. Olley N. Denham D. *Victimology. Victimisation and Victims' Rights.* New York: Routledge; 2009: 301, p. 106.

[6] Hepple J. *Will Sexual Minorities Ever Be Equal? The Repercussions of British Colonial "Sodomy" Laws*. The Equal Rights Review. 2012; 8: 50-64, p. 51. In his famous study of antigay violence, Comstock G. D., *Violence against lesbians and gay men.* New York: Columbia University Press; 1991: 319, p. 201, showed that the typical perpetrator in a gay-bashing is a younger man who believed that police would look the other way if a gay man were the victim.

[7] Thomas K. *Beyond the Privacy Principle*. Colum. L. Rev. 1992; 92: 1431-1516, p. 1490.

[8] Reinig TW. *Sin, Stigma & Society: A Critique of Morality and Values In Democratic Law and Policy*. Buff. L. Rev. 1990; 38: 859-901, p. 896.

[9] Leslie CR. *Creating Criminals:The Injuries Inflicted by "Unenforced" Sodomy Laws*. Har. C.R.-C.L. L. Rev. 2000; 19:103-181, pp. 124-125. Nonetheless, we can't asserting a direct causal connection between anti-LGBT Laws and homophobic violence, because this link «would by the nature of the case be very difficult to prove» (see Thomas K. *Beyond…*, p. 186 note 194).

the adherents of those ideas over and against the claims of non-adherents. But it is also true that moral influences the law, as the famous Lord Devlin's theory shows.

The historical context for such theory is the release of the *Report of the Committee on Homosexual Offences and Prostitution*[10] (better known as the Wolfenden Report, after its chairman), which proposed some revisions to the english criminal laws regulating sexual offences, including decriminalisation of homosexual behaviour between consenting adult males in private[11]. Lord Patrick Devlin, a leading judge of the Queen's Bench, disputed the Committee's proposals when he was invited by the British Academy to give the prestigious Maccabaean Lecture in Jurisprudence not long after the Committee had released its report in 1957[12].

Devlin noted that some immoral acts as adultery, prostitution or homosexuality between females were not criminal offences, while homosexuality between male was, and asked if this choice was arbitrary or there were «some principles which can be used to determine what part of the moral law should be embodied in the criminal»[13]. This problem implied two fundamental questions: 1) is there a connection between crime and sin? 2) should the law have concerned itself with the enforcement of morals and punish sin or immorality as such?

As regards the first question, Devlin answered that the english criminal law was based upon moral principles, because some legal institutes (e.g. that consent to be killed could not be used as a defence) had the only explanation that «there are certain standars of behaviour of moral principles which society requires to be observed; and the breach of them is an offence not merely against the

[10] Wolfenden J. et Al. *Report of the Committee on Homosexual Offences and Prostitution*. London: H. M. Stationery Office; 1957.

[11] Homosexuality between females was not a crime.

[12] Devlin P. *Morals and the Criminal Law* (*1959*) in Devlin P. *The Enforcement of Morals.* Oxford-New York: Oxford University; 1963: 1-25.

[13] Devlin P., *Morals...*, p. 2.

person who is injuried but against society as a whole»[14]. Every society – Devlin keeps on – cannot exist without shared ideas on politics, morals and ethics: that's why society can use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to his existence. This statement brings us to the second question. Society has a *prima facie* right to legislate against immorality as such[15], and from the point of view of the law it is immoral «what every right-minded person considers immoral». If this reasonable man not only disliked a practice, but felt also disgust, intolerance and indignation, it would be a good reason to criminalise that practice. Thus, if homosexuality was regarded as a vice so abominable that his mere presence would be a crime, society would have «the right to eradicate it»[16].

In 1986 the Supreme Court of the United States used a Devlinesque language to uphold the constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between consenting adults when applied to homosexuals. The majority opinion argued that the Costitution did non confer «a fundamental right to homosexuals to engage in acts of consensual sodomy» because sodomy «was a criminal offense at common law, and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights». Thus, to claim that a right to engage in such conduct was «deeply rooted in this Nation's history and tradition» would have been, «at best, facetious»[17]. In his concurring opinion, Justice Burger quoted again the «ancient roots» of prohibitions against homosexual sex, from ancient roman laws till Blackstone's description of homosexual sex as an «infamous crime against nature», and concluded: «To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching»[18].

[14] Devlin P., *Morals*..., p. 7.
[15] Devlin P., *Morals*..., p. 11.
[16] Devlin P., *Morals*..., p. 17.
[17] Bowers v. Hardwick, 478 U.S. 194 (1986).
[18] Bowers v. Hardwick, 478 U.S. 197 (1986).

3. On the relashionship between morality and criminal law

Law and morality may be considered as two intersecting circles, because not everything unlawful is also unmoral (i.e. driving on the right side of the street), and at the same time not all that is unmoral is also unlawful (i.e. heart hardeness or ingratitude)[19]. The most important area of overlap is criminal law, which regulates conducts that are deeply unmoral and often adopts terminology suggesting wrongdoing and censure (i.e. guilt, offence, culpability, *mens rea*, ecc.). A certain degree of harmony between moral and criminal law supports the enforcement of the latter. From the point of view of the positive general prevention, criminal law has a moral-educative goal, serving to mantain social cohesion intact and to reinforce basic social ideas about right and wrong, thereby reducing the need to deter violations. Thus, it is less likely that criminal prohibitions that are very different from the common moral views can perform their back-role. The same is also true for the positive special deterrence, for offenders can be more easily rehabiliated if they feel that what they did is wrong[20].

So far so good. In the previous paragraph we have seen that development of the law is influenced by the moral[21]. The law is not a neutral and agnostic tool that can be used by anyone anywhere for any purpose, but it is a technique to accomplish goals infered by the *Weltanschaung,* i.e. by the world vision and by the system of values of the society[22].

Some clarifications are required at this point. The intersection between the two circles does not mean a strict equation of morality and law, because the latter cannot be used to enforce *every* moral requirement. Lord Devlin too stated that the «boundary between

[19] Mannheim E. *Comparative Criminology. A Textbook*. London: Routledge; 1965: 793, p. 63.

[20] Basile F. *Immigrazione e reati culturalmente orientati. Il diritto penale nelle società multiculturali.* Milano: Giuffrè; 2010: 496, pp. 118-125.

[21] On the other side, moral can be influenced the law, sometimes through the judicial process, sometimes through legislation. See Hart HLA, *Law, liberty and morality.* London: Oxford University; 1963: 88, p. 2.

[22] Constantinesco JL. *La scienza dei diritti comparati.* Torino: Giappichelli; 2003: 455, p. 274.

the criminal law and the moral law is fixed by balancing in the case of each particular crime the pros and cons of legal enforcement»[23].

Anyway, Devlinesque argument that society has a right to protect its central and valued social institutions against conduct which «the reasonable man» disapproves is wrong. Devlin speaks on morality in a descriptive, sociological way[24]. His «reasonable man» is not «expected to reason about anything and his judgement may be largely a matter of feelings»[25], and it does not matter if «the belief is right or wrong, so be it that it is honest and dispassionate»[26].

The problem with this position is that disgust and indignation – which Devlin points out as the key concepts to understand *when* immorality is worth of punishment – are not a reliable basis for lawmaking. As Marta Nussbaum showed, disgust is fundamentally non rational, because it is mediated by laws of «sympathetic magic», like contagion (things that have been in contact continue to act on one another) and similarity (disgust related to an object is projected to similar ones)[27]. Because of its core-idea of contamination, disgust can lead us to banish people who are believed to be immoral, like jews during the World War Two or homosexuals in states which support homophobia. Furthemore, there are practices which might be still object of disgust, like mixed marriages, and others which might be not, like racism and sexism[28]: should we say that the former are morally wrong, while the latter are not?

The point is that the legislator of a democratic society cannot support a moral consensus without checking its factual basis and

[23] Devlin P., *Morals*..., p. 22.

[24] As pointed out by Dworkin R. *Lord Devlin and the Enforcement of Morals.* Yale L. J. 1966; 75: 986-1005: p. 1000.

[25] Devlin P., *Morals*..., p. 15.

[26] Devlin P., *Morals*..., p. 22. Anyway, Lord Devlin does not consider the fact that it is arbitrary to exclude homosexuals from the group of his «reasonable persons»: see Feinberg J. *Harmless wrongdoing.* Oxford-New York: Oxford University Press; 1988: 416, p. 138.

[27] Nussbaum M. *Hiding from Humanity. Disgust, Shame and the Law.* Princeton: Princeton University Press; 2004: 432, p. 102.

[28] Nussbaum M., *Hiding from Humanity*…, p. 79.

consistency of its arguments, which may be based on bias or personal adversions[29]. Liberal democraties are grounded on a core set of political values that define citizen's constitutional rights and entitlements, failing which democracy collapses.

To this end it is worth remembering European Court of Human rights (ECtHR) case law. In *Dudgeon v. UK*[30] ECtHR held that english laws against homosexual acts – in 1980, still in force in Northern Ireland – violated the right to respect for private life (Art. 8 European Convention on Human Rights). According to article 8 ECHR, public authority is allowed to interfere with the exercise of this right if it is, among others, «necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

The english government claimed that legislation was necessary because of profound differences of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality. Northern Irish society was said to be more conservative and to place greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct.

After having remembered that two hallmarks of a democratic society are tolerance and broadmindedness, the ECtHR replied that there was no «pressing social need» to criminalize homosexual behaviour, because the aim to afford safeguards for vulnerable members of society, such as the young, were «outweighed by the detrimental effects which the very existence of the legislative provisions in question [could] have on the life of a person of homosexual orientation», and «a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation» did not «afford a good ground for maintaining it in force with all its unjustifiable features»[31].

[29] Dworkin R., *Lord Devlin…,* p. 1001.

[30] ECtHR, 22 ottobre 1981, Dudgeon v. the United Kingdom, Applications Nos. 7525/76.

[31] ECtHR, 22 ottobre 1981, Dudgeon v. the United Kingdom, Applications case Nos. 7525/76, § 61.

On the same grounds, the ECtHR found no «objective and reasonable» justification for a legislation which classified as a criminal offence homosexual acts of adult men with young males between 14 and 18, but not with young females in the same age bracket, highlighting that «bias on the part of a heterosexual majority against a homosexual minority […] cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour»[32].

In short, in a democratic society cultural, traditional or religious values, or the rules of the 'dominant culture' are subject to a *normative evaluation*[33]. Even though it is common in our society, homophobia must not be elevated to the rank of a normative social aspiration.

This principle works not only in the legislative area, but also in the judiciary one. Judges are often called to *evaluate* emotions, feelings and personal values, and every decision implies a certain degree of discretion. The problem is that discretion might hidden homophobic bias. Once again, judges and jurors should consider the growing *normative* acceptance and understanding of homosexuality reflected by the developments of the Constitutional law[34] and of the Human rights law[35], and not their values or those of the majority (the «sociological moral»).

4. Conclusions

If the state can provide an environment in which homophobia can flourish, states can therefore do the opposite, using criminal law as a tool to fight homophobia. A first technique is to treat as an aggravating factor the fact that the offence was motivated

[32] ECtHR, 9 January 2003, L. and V. v. Austria, Application Nos. 39392/98 and 39829/98, § 52.

[33] Gentile G. *Un'aggravante per i reati culturalmente motivati? Riflessioni critiche sulla proposta di legge Sbai* in Luigi Stortoni, Silvia Tordini Cagli (a cura di), *Cultura, culture e diritto penale*. Bologna: Bononia University; 2012: 240, pp. 59-79.

[34] Hepple J., *Will Sexual Minorities…*, p. 55 ss.

[35] See Vitucci C. *La tutela internazionale dell'orientamento sessuale.* Napoli: Jovene; 2012: 222.

by hostility and hate towards the victim's sexual orientation[36]. A second technique is to create a specific range of offences related to the incitement of hatred on the ground of sexual orientation[37].

We already know that criminal law can't be neutral, because *every* punishment choice expresses societal values. Anti-Homophobia laws are entitled to publicly condemning discrimination against LGBTI persons, sending to the society the message that criminal acts based on hatred and prejudices will not be tolerated. From this point of view the aim of the punishment is more the positive general prevention (the social cohesion) than the negative general prevention, for the offender is probably the least important audience of the message[38].

This kind of legislation might be problematic because in a multicultural and democratic society we must strike a balance beween the right not to be discriminated from one side, the right of freedom of thoughts, coscience, religion and expression from another. Anti-homophobia crimes might be seen as an antidemocratic attempt to change the moral outlook on moral issues such as homosexuality with the crude tool of the criminal law. So we shall not forget that homophobic violence is a complex phenomenon that has many sources (social mores, religious indoctrination, legal environment), and without a social policy which increases the acceptance of homosexuality punishment will not end homophobic bias in the society.

[36] See for example the Criminal Justice Act 2003, Section 146 (United Kingdom) or article 132-77 *Code pénal* (France).

[37] See for example the Public Order Act (1986), Part 3A (United Kingdom) or the Federal Civil Rights Law (1964), par. 245 (b) (2), as emendeb by the so called Matthew Shepard and James Byrd, Jr Hate Crime Prevention Act.

[38] See Berard TJ. *Hate crimes and their criminalization,* in Peyrot M. Burns SL.(edit ed by). *New Approaches to Social Problems Treatment.* Bingley: Emerald Group; 2010: 298, p. 23: the most important audiences are «first, lobbyist and minority groups they represent, and second, the general public».

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