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Why does the right to abortion continue to be discussed?

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Secção I

Investigação Científica*

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Why does the right to abortion continue to be discussed?

Porque é que o direito ao aborto continua a ser discutido?

Irene COPPOLA[1]

«O wonder! How beauteous mankind is!
O brave new world that has such people in't!»

William Shakespeare, *La tempesta*, Atto V, Scena I, vv. 203–206

ABSTRACT: The agile reflection, starting from a brief historical analysis, intends to demonstrate the non-existence of the right to abortion in Italy. The theme develops from the Law 194 of 1978 and from the recent political-legal debate that aims to give women the possibility of a different choice.
KEYWORDS: *abortus*; *gener-negatio*; perspective.

RESUMO: A reflexão ágil, partindo de uma breve análise histórica, pretende demonstrar a inexistência do direito ao aborto em Itália. O tema desenvolve-se a partir da Lei 194 de 1978 e do recente debate político-jurídico que visa dar às mulheres a possibilidade de uma escolha diferente.
PALAVRAS-CHAVE: *abortus*; *gener-negatio*; perspetiva.

1. Introduction

We are back to talk about abortion, or perhaps we have never stopped talking about abortion in Italy.

The problem of abortion has never been shelved; the increase of clandestine abortions, the implementation of deaths, the issue of migrant women, and conscientious objectors are fewer protagonists on the scene of a Greek tragedy in which the *deus ex machina* is awaited.[2]

Perhaps the problem is felt more by an unfortunate approach to the debate.

Abortion (from the Latin abortus, derived from aborigines, "to perish", composed of ab, "away from", and oriri, "to be born") means the interruption of

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[2] Clandestinely, numerous abortions were practiced with the technique of aspiration with the so-called Karma method; The feminist movement has sought to improve abortion techniques related to embryo curettage. What seems strange is that Harvey Karman was not a doctor: the inventor of the greatest surgical technique on abortions was a psychologist; A technique that was then taught to the women of the self-help groups to directly practice clandestine interruptions.

pregnancy, natural or procured, before the twentieth or twenty-second week (i.e., in the period in which the fetus is not capable of extrauterine life), with consequent expulsion of the fetus or embryo from the uterus. In that case, precisely because it is part of the dynamic of existence - the problem of abortion is linked to the history of humanity, determining many considerations on the essential point relating to its practicability and measure.

In his treatise on *politics* (350 BC), Aristotle condemns infanticide as a means of population control, preferring abortion. However, with the restriction, "[that] must be practiced before the feeling of life develops. Therefore, the line between licit and illicit abortion will be characterized by having the feeling of being alive."

According to Christian tradition, also in the light of Plato's dualistic theory of man expressed in the [3]Phaedo, voluntary abortion has always been read as a grave sin because it meant killing a being equipped not only with a body but also with a soul, a manifestation of God's creativity. This was why the rights of the woman or the family to which they belonged were not considered for any reason, inevitably placed in the background concerning the concept that depriving a human being of life was a prerogative of the divine.

This short writing, however, poses (and it could not be otherwise) in a merely juridical space, extraneous to moral and ethical considerations - however valuable for the well-known and complex relationship between law and ethics - and while underlining the debate on law 194 /78 between ethics and i*us*, will try to prevent a neutral conclusion and, therefore, sustainable (hopefully) at least in a strictly and exclusively technical field.

The conclusion that, however, will have effects on the discussion that must be done, sure, but in respect of the current legal boundaries of the Italian State.

2. Brief focus on the historical evolution of abortion in Italy

The voluntary interruption of pregnancy before 1978 was considered a crime by the Italian penal code which provided forthe penaltyofimprisonment from two to

[3]«Αὐτός,ὦφαίδον, παρεγένουΣώκράτειἐκείνῃτῇἡμέρᾳἦτὸφάρμακονἔπιενέντῷδεσμωτηρίῳ ,ἢαλλουτουἥκουσας.' incipit of the dialogue.

five years, imposed both on the perpetrator of the abortion and the woman herself.

The climate in which we lived until the sixties was that of obvious immorality of voluntary abortion; The debate is prompted by a high mortality rate affecting women with unhygienic and unsafe practices resulting from a considerable number of illegal abortions.

In 1975 the Court of Cassation presented a request for a *referendum repealing* articles n. 546, 547, 548, 549 (2º comma), 550, 551, 552, 553, 554, 555 of the penal code, concerning the crimes of abortion on consenting women, incitement to abortion, abortifacient acts on a woman believed to be pregnant, sterilization, incitement to practices against procreation, of infection with syphilis or menorrhagia.

Scheduled for April the 15th of 1976, the referendum did not take place because of the dissolution of the Chambers; hence the Constitutional Court, with the historical sentence n. 27 of February 18th of 1975, marked the first change in the admissibility for women to resort to voluntary interruption of pregnancy for severe reasons because it was not acceptable to put the health of the woman and the health of the embryo or fetus on the same level: the concept of therapeutic abortion was born in the socio-cultural consortium.

Subsequently, after the referendum consultation, Law 194 of 1978 was promulgated, and since then it was identified only with the number: Law 194. Numerous factors influenced the passage of the law: in the context and the international debate, there was the judgment of the US Supreme Court, Roe vs. Wade which, placing the right to abortion within the right to privacy, ended up denying the *status* in person to the fetus. In addition, the American Court sanctioned the principle of the freedom of free choice of the woman in her sphere of intimacy; conversely, at the national level, a decisive role was played by the environmental disaster of Seveso, which opened to abortion for health reasons.

In fact, on July the 10th, 1976, following an accident that occurred in the Icmesa industry - owned by the Swiss multinational Hoffman-La Roche - of Meda, there was the release of a cloud of dioxin that hit a large area that involved the municipalities of Seveso, Meda, Desio and Cesano Maderno. Dioxin is a substance toxic to animals and teratogenic to humans, which can therefore cause fetal-altering effects. Hence the Ministry of Justice authorized the interruptions,

even in the absence of a law, following the partial decriminalization carried out by the Constitutional Court. In any case, from law 194 to today, nothing changed.[4]

3. The denial of the right to abortion

This investigation does not aim to analyze, point by point, the normative text in force but to extract elements to support the conclusions expressed, and the only essential component that represents the paradigm of the norm is given by the textual recognition, by the legislator of 1978, of the sole right to procreation: "The State guarantees the right to conscious and responsible procreation, recognizes the social value of motherhood and protects human life from its beginning."

It would be enough to start from the incipit of law 194 to settle the *vexata quaestio.*

Now, it is necessary to start from the concept of right, and then, with an argument that can be shared (hopefully), we arrive at the denial of a right to abortion.

The law, by its nature, is considered a rule to be applied in a consortium company: it is a rule of life that becomes a norm and is concretized in a positive datum of law.[5]

Why does the right exist? So that it can perform a social function of order and tolerance of mutual behaviors consolidated and validated through *the ius*.[6] But if we pass from the general to the specific, the traditional conceptualization of law returns, understood in a subjective sense, as the power to act to protect one's interest.[7]

Precisely: of one's interest.

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[4]S. MANCINI, *Affare di donne, l'aborto tra libertà eguale e controllo sociale*, Padova, 2013, *passim*; G. SCIRE', *Abortion in Italy. Storia di una legge*, Milan, 2011; G. CARDILE, Abortion *yesterday and today: the application of 194 between conscientious objection and women's right to health*, Rome, 2016; M. MORI, Abortion, *and morality; understanding a new right*, Turin, 2008; M. REICHLIN, *Abortion. La morale oltre il diritto*, Rome, 2007, *passim*.

[5]L. HERBERT HART, *Il concetto di diritto*, Turin, 1965; U. BRECCIA, *Discourses on law. Appunti per un corso di Teoria Generale del Diritto*, in *Collana Argomenti di Diritto Civile*, Pisa-Ospedaletto, 2018, *passim*.

[6]N. BOBBIO, *Teoria della scienza giuridica (Theory of Legal Science*), Turin, 1950*, passim*; G. LOSANO, *La dottrina pura del diritto*, Torino, 1966, *passim.*

[7]A. TRABUCCHI (edited by) G. TABUCCHI, *Manuale di Istituzioni di diritto Civile*, in *Collana Manuali di Scienze Giuridiche*, 50 ed., Padova, 2022, *passim*; C. M. BIANCA, with the collaboration of M. BIANCA, *Istituzioni di Diritto Privato*, III Ed., Milano, 2022, *passim.*

What interest would go to protect the much-invoked conceptualization of the right to abortion?

We have a plurality of interests at stake; The appeal of the embryo, the interest of the father in the *making*, and the interest of the woman who denies motherhood: the essential point of the question is precisely given by the question about the consideration of the prevalence in terms of balancing the protection of interest, in a legal sense.

There would seem to be only one solution: it would be considered prevalent precisely in the interest of those who cannot manifest it, which takes the name of the embryo.

Ergo, no right to abortion in favor of the woman.

Instead, it is a question of possibility or instead of choice; nor this conclusion can be overcome by the argument, although asserted, about a property right over the uterus that is in full availability to the woman.

Yes, if anything, of the uterus, but not of the embryo.

And also on the uterus, moreover, the power of availability appears extremely limited, if only we want to consider the scope and ratio of the well-known article 5 of the civil code read *sic et simpliciter*, without misleading comments.

The fact is that the world of artificial procreation cannot be neglected, from surrogate motherhood to medically assisted procreation, nor can the issue of frozen embryos be ignored, up to that - more than recent and discussed - of the artificial uterus; in this case, it could be said that there is a sort of property right over everything that has been created *outside the human body* that would lead to an exclusive availability on the part of those who have determined all this.[8]

In other words, it seems legitimate to ask what to do and how to proceed when the body and its organs (specifically reproductive) become "things" and when "things" become bodies.[9]

[8]M. BALISTRERI, The artificial uterus and *moral issues*, in Rivista The Future of Science and Ethics, Milan, 2017, p. 53-57: the author accelerates towards new conceptions of uterus no longer considered for rent, but artificially created; A. MELDOLESI; *And man created man. CRISPR and the revolution of genome editing*, Turin, 2017; J. HARRIS, *On Cloning, Routledge*, London, 2004, *passim.*

[9]M. M. CORDOBA, *The parts of the human body that become things and things that become the human body;* report at the International Seminar *Personae and Res. Sistema Romano e Diritti Odierni*, held at the University of Rome Tor Vergata on October 26, 2022, organized by the Observatory on Person and Family and Center for Latin American Legal Studies.

But even in this aspect, what is essential is the right to procreation; If ethical problems arise, it is up to the individual to evaluate them according to conscience and responsibility.

In other words, even in the area of artificial procreation, the principle of law appears to be unique: both for frozen embryos and embryos implanted in an artificial uterus, there seem to be no other solutions than that of the denial of a right abstractly configurable as the right to abortion, because even in these specific and concrete cases the value of the embryo's life and the interest of the other potential parent does not fall within the exclusive sphere of availability of the woman.

And so, we have to conclude that women don't have a right but rather a choice whose ethical and moral boundaries always appear on the horizon.[10]

And the choice, deriving from the self-determination of the individual, oriented towards a worthy interest, does not presuppose wide-ranging protection by the legal system; the option can only be free, but the protection pertains to the law.

And if this choice cannot be protected, what relevance and significance should be attributed to it?

The choice becomes the faculty of the human being - a woman placed on the same level as the faculty of choice to be or not to be a future father, as well as being at the beginning of life who is not in a position (for obvious reasons) to make a choice, even if, it does not seem revocable in doubt, it looks complicated to imagine that life in progress can choose death and not life, just as the same argument about the choice has to be applied to the objector who, for moral reasons, does not intend to perform any abortion.

It follows that only the hypothesis of a possible (and averted)therapeutic abortion can be configured more than as a right, a real duty towards the woman, but this is another profile: life is a sacred good, and if the woman's life is in danger, it is necessary to intervene, while not neglecting that even therapeutic abortion has left traces of dissensions and criticalities.

In other words, the regulatory framework does not formally recognize self-determination but espouses a health approach. The right to abortion, therefore,

[10]A. HUXLEY, *Brave New World*, London, 1932.

does not obtain recognition. Still, it is the right to abortion, if necessary from a health point of view, to find normative citizenship, albeit subject to certain conditions: the woman *can* (and not has to) have an abortion only if "she accuses circumstances for which the continuation of pregnancy, childbirth or maternity would entail a danger to her physical or mental health, in relation either to her state of health, or to her economic, social or family conditions, or to the circumstances in which conception occurred, or to predictions of anomalies or malformations of the conceived child".[11]

The law *in question* has resisted, with a solid widespread consensus, several attacks also related to the repeal and numerous requests for unconstitutionality but has not solved the many problems deriving from such a delicate and complex issue, so much so that statistically, even today, there are thousands of clandestine abortions every month, mainly by migrant women.

A fundamental right is configured, without fear of contradiction, concerning the use of contraceptives that should always be ensured by a health system that is concerned with making a profound and pervasive information campaign; The work of family counseling centers must be strengthened to prevent problems that cannot always be solved very quickly.

Prevention and contraception: these are rights.

4. Concluding remarks

Law 194, a law not perfect?

This is not the meaning of this investigation: it does not aim at the perfect law; it aims at the right law that can deal with the abortion problem according to shared boundaries: it is not the legislator who suggests the perfect solution, but it is the sense of responsibility and civilization that leads to search a sustainable solution even within the social consortium.

[11]P. PACORA POTELLA**,** *Therapeutic abortion: ¿realmente existe?* , in Acta Medica Peruana, vol. 31, Lima, 2014, 234-239 : the author points out that **"**al contrario de lo que dice la OMS, la salud no es un estado de completo bien estar físico, mental y social. La salud es un estado de equilibrio armónico entre el organismo humano en sus cuatro áreas físico, social, psicológica y espiritual, con el medio ambiente. Armónico balance means that the person maintains the homeostasis porque tiene paz interior y recibe ayuda o cooperaciónsocial.";L. DELCARPIO -A NCAYA, *Situación de la mortalidad materna en el Perú, 2000-2012*. Rev Peru Med Exp Salud Publica. 2013;30(3):461-464; G. SUMMA, *Abortion, legal implications and etici*, Napoli, 2018, *passim*.

When we talk about abortion what emerges is the duty to be attentive and responsible towards a desired and self-determined procreation, in consideration of the many means of contraception that must be ensured and also guaranteed by the national health service through an awareness campaign and general information and above all of "entry" in the most delicate social sectors and in those that are characterized by the growing immigration of foreigners in Italy.

This is indeed a right: the right to serious and responsible parenting.

And then abortion must be classified as a free and consenting choice; The configuration of abortion as a right would lead to the emptying of constitutional values such as dignity, protection, life, responsibility, and self-determination.

The configuration of a right to abortion foresees or would foresee a change of course that does not seem possible at the moment.

REFERENCES

BALISTRERI, The artificial uterus and *moral issues*, in Rivista *The Future of Science and Ethics*, Milan, 2017.

BIANCA, with the collaboration of M. BIANCA, *Istituzioni di Diritto Privato*, III Ed., Milano, 2022.

BOBBIO, *Teoria della scienza giuridica (Theory of Legal Science*), Turin, 1950.

BRECCIA, *Discourses on law. Appunti per un corso di Teoria Generale del Diritto*, in *Collana Argomenti di Diritto Civile*, Pisa-Ospedaletto, 2018.

CARDILE, Abortion *yesterday and today: the application of 194 between conscientious objection and women's right to health*, Rome, 2016.

CORDOBA, *The parts of the human body that become things and things that become the human body;* report at the International Seminar *Personae and Res. Sistema Romano e Diritti Odierni*, held at the University of Rome Tor Vergata on October 26, 2022, organized by the Observatory on Person and Family and Center for Latin American Legal Studies.

DEL CARPIO -A NCAYA, *Situación de la mortalidad materna en el Perú, 2000-2012*. Rev Peru Med Exp Salud Publica. 2013.

HARRIS, *On Cloning, Routledge*, London, 2004.

HERBERT HART, *Il concetto di diritto*, Turin, 1965.

HUXLEY, *Brave New World*, London, 1932.

LOSANO, *La dottrina pura del diritto*, Torino, 1966..

MANCINI, *Affare di donne, l'aborto tra libertà eguale e controllo sociale*, Padova, 2013.

MELDOLESI; *And man created man. CRISPR and the revolution of genome editing*, Turin, 2017.

MORI, Abortion, *and morality; understanding a new right*, Turin, 2008.

PACORA POTELLA**,** *Therapeutic abortion ¿realmente existe?*, in Acta Medica Peruana, vol. 31, Lima, 2014.

REICHLIN, *Abortion. La morale oltre il diritto*, Rome, 200.

SCIRE', *Abortion in Italy. Storia di una legge*, Milan, 2011.

SUMMA, *Abortion, legal implications and ethics*, Napoli, 2018.

TRABUCCHI (edited by) G. TABUCCHI, *Manuale di Istituzioni* di *Diritto Civile*, in Collana *Manuali di Scienze Giuridiche*, 50 ed., Padova, 2022.

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