The Italian Jurisprudence on abortion and related issues

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The legalisation of abortion with the Act. 194 of 1978 has reopened the controversy on the legal status of the foetus in the Italian legal system. This is an issue always controversial which implies law, biology, ethics and politics and which impose to re-think and re-analyse the legislative frame on abortion in the light of the Jurisprudence. The aim of this second part[1] is to examine them, furnishing a detailed national legislative frame and reporting the evolution of Jurisprudence during the last decade[2].

I. The legal status of the foetus: a complex legal frame

i. Common law

The article 1 of the Italian Civil Code, introduced in 1942 during the Fascist era, states:

> "The legal capacity is acquired at the moment of birth".

According to the Code, only the *born* is a *legal person* that can be entitled to own rights and duties into the legal system. In particular, the definition of birth has been determined by the Jurisprudence. Indeed, with the *judgment no' 2023 of 1993* the Italian Court of Cassation has defined the *birth* as *the separation between the foetus and the maternal alveolus* and the *first act of breath*. Furthermore, the Civil Code states the entitlement of the foetus to hereditary succession and donation (articles 462 and 784) but these remains subjected to the event of the birth. The birth is the "*conditio sine qua non"*

[1] The first part titled "*The Italian legislation on abortion"* is essential to have a deep understanding of the issue.
[2] This goal is pursued without any intent of entirety or completeness and with the deep awareness of the fact that the field is in *permanent evolution*.

the entitlement to these and other rights can be exercised, as expressed by the "theory of the progressive acquirement", also known as the theory of "legitimate expectancy", which anyway divides the sholars[3]. In the light of the content of common law, it can be said that the embryo and the foetus are not subject of law and don't own legal capacity: they don't have *property rights*, which can only be exercised after the birth and, because by definition are considered uncapable of owing rights, they don't have neither *personal rights*. Some additional regulations[4], which will be further analysed, have reconsidered the legal status of the embryo and of the foetus: if the equality to the legal status of a person is still excluded, these Acts have written a new page on the issue.

ii. The interpretation of the concept of birth

Has already stated by the Court of Cassation[5] with the *judgement no' 11503 of 1993*, the same Supreme Court has recently confirmed that the birth is the essential condition for the entitlement to property rights and their exercise in the *judgment no'9700 of 2011*. In this case a son revendicated his right to reparation by a third person, who had killed his father when he was still unborn, for the damage caused to the parental relationship. The Court stated that it is irrelevant that the damage and the death took place before the birth of the applicant and that his subsequent birth, no matter in this case the legal status of the foetus, entitles him to claim reparation. Literally:

> "Once the existence of the causality between the negligent act of a third person, even if it is anterior to the birth, and the damage derived to the subject who acquires legal capacity with the birth is verified, the right to compensation arises and must be recognised to the latter".

The principle according to which the foetus can appeal for the protection of its specific interest only after the acquirement of the legal capacity with the event of birth is the current position of the Supreme Court: indeed, it has been reconfirmed by the *judgement no'1410 of 2011* and *judgement no'25767 of 2015*, which concerned similar cases but, differently from the judgement of 1993, also involved the issue of damage for *wrongful life,* which will be further examined.

[3] The numerous and discordant theoretical positions can be found in R. Ducato, *La soggettività giuridica del concepito* in *Antologia di casi giurisprudenziali,* Materiali per lo studio del diritto privato, a cura di Teresa Pasquino (Giappichelli editore, 2015).

[4] The impact of the Act on abortion and medically assisted reproduction will be further analysed.

[5] In the Italian legal framework the Court of Cassation is the highest Court, the only one entitled to ensure the right application and the legitimacy of the Italian law in the concrete case.

iii. Birth, abortion and medical malpractice in a recent borderline case

With the recent *judgment no'27539 of 2019*, the Italian Cassation has solved a particularly difficult case concerning the moment of the *labour*, the initial phase of the birth, and has renewed the law in the field. The Court was appealed to determine if the medical staff who had caused the decease of the foetus for negligence during the labour of the woman was responsible for *abortion* or for *homicide*. In practice, the Court had to define whether the foetus during the labour has to be considered a person or not. The Court decided for the first view, declaring that the foetus during the labour is considered as a person in accordance with article 578 of the Italian Criminal Code which punishes the mother who causes the death of the product of her conception during the birth or after the birth. The case was not recognised as procured abortion because, according to the Court, the separation of the foetus from the maternal alveolus was occurred and exclusively before that event there is space for the crime of abortion. Excluded the applicability of the crime of procured abortion, the Court found the medical staff guilty for homicide, a crime obviously punished with a substantial amount of years of imprisonment.

Some critical considerations on the Court's decision can be proposed. First of all, the Court has only taken into account the separation from the alveolus and has not considered the first act of breath which in this case did not happen: the death of the foetus was intrauterine, the foetus came out of the woman's body already dead. Following the logic of the Court, the foetus in the span of time between the separation and the exit from the woman's body is person. This *extension of the legal concept of person* has been differently commented by the legal experts: some of them have not agreed with the Court's interpretation and expressed concerns about the risks that it can have on the field of medical liability[6].

iv. Act. 194/1978 and Act. 40/2004: the foetus as object or subject of law?

In parallel to the common law frame, two relevant Acts, the one on abortion and the one on medically assisted reproduction (MAR), have been introduced during the Republican period. Both these Acts, that are the result of a long debate and a compromise, contain one reference to the issue of the legal status of the foetus. Indeed, the very first article of Act.194 of 1978 regulating abortion states:

[6] L. Montevecchi, *Quando si commette omicidio cagionando la morte del feto in travaglio*, Associazione Luca Coscioni, available online.

> "The States guarantees the right to a conscious and responsible procreation, it recognises the social value of the motherhood and guarantees the human life *since its beginning*".

The intention and the will of the legislator in this statement, the only one in the whole Act which obscurely refers to the legal status of the foetus, although can be guessed, remains anyway unclear. This is not an isolated case of *obscurity*. Indeed, the same technique has been used in the very first article of the recent Act no'40 of 2004 on MAR:

> "In order to promote a solution to the reproductive problems caused by human sterility and infertility is allowed the recourse to the medically assisted reproduction within the conditions and according to the modalities provided by this law, which ensure the rights of *all the subjects involved in the process, included the unborn child's rights."*

Both the statements seem to ensure, or at least to try to ensure, a protection of the embryo and of the foetus' rights before the event of the birth. At the same time, these statements are isolated and are not organically regulated. This is why a general understanding of their *ratio legis*, their meaning and their impact on the previous existing frame is extremely complex. What can be understood by the statements is that both the embryo and the foetus are included in the legal system as *subjects of law*. Nevertheless, the Court of Cassation in *the judgement no'3498 of 1989* has clarified that:

> "*every person is subject of law, but not every subject of law is person.*"

In conclusion, it can be said that the Italian legal system does not recognise them as person with legal capacity but guarantees them a *certain level of protection*: which level of protection, missing a specific regulation on the issue, is a matter of discussion and division among legal experts and judges. Indeed, the Jurisprudence on this point is conflicting.
On the one hand, the Court of Cassation with the *judgement 10741 od 2009* has declared the foetus as *subject of law*, stating:

> "The foetus (or the unborn child), although does not have legal capacity, is anyway a *subject of law*, because it is entitled to numerous personal interests recognised by both the national and the supranational systems, as the right to life, the right to health, to privacy, to personal identity, to be born healthy; these rights are subjected to the event of the "conditio iuris", the birth, which is the essential condition to claim the right of compensation…".

The interpretation of the issue has been changed by the same Court in *the judgement no'16754 of 2012*[7], according to which the foetus is only an *object of protection* by the legal system. According to this position, it is the legal system itself which recognised the foetus as "*fattispecie di tutela progressiva"*[8]. The Court has supported this position affirming that:

> "the principle of centrality of person, universally recognised and legally protected but not entitled to the general clauses of the system, is not relevant… a correct and coherent implementation of the founding principles of the Jurisprudence of interests, goes to the conclusion that each rules, primary or constitutional, which regulate the field of the conception consider the foetus as an *object of necessary protection*…because the legal subjectivity is a legal abstraction functional to the entitlement of legal relations"[9].

In this latter decision the Cassation adhered to the minority opinion. However, the major and stable recent position of the Jurisprudence is to define the unborn child as subject of law for some of the reasons described and for the following ones.

v. Personal rights of the unborn child: a progressive judicial recognition in the light of the Constitution

The whole debate on the definition of the foetus as a subject of law or not has direct consequences in the recognition of its *personal rights*. If common law regulates the recognition of the property rights as subjected to the birth and some compulsory provisions for the foetus, it does not include any reference to its personal rights: indeed, it is generally accepted that this fact is due to structure of the Civil Code itself and its general function to regulate property rights. It can be said that if on the one hand the common law does not recognise them because of article 1 of the Civil Code and does not provide any exception to this general rule, on the other one the Jurisprudence has adopted a different position through the interpretation of the Republican Constitution[10]. Specifically, the judges have recognised the protection of the foetus through the interpretation of articles 2 and 32, which state:

[7] This position had been stated by the same Court in judgement no'9700 of 2011.
[8] The argumentation of the Court at page 19 of the judgement.
[9] *Ibid*, page 42.
[10] The Italian Constitution was introduced for the first time as the fundamental legal document of the Republic on the 1st of January 1948.

> Art. 2: "The Republic recognizes and guarantees inviolable rights of man, for individual, and social groups where the personality is expressed, and demands the fulfilment of the fundamental duties of political, economic, and social solidarity."
>
> Art. 32: "The Republic guarantees health as fundamental right of the individual and as interest of the community…"

As it can be noticed, these articles refer to "the individual" and not exclusively to the "person", allowing the protection of what is a *person in power*. Through this *constitutional oriented interpretation*[11] the Jurisprudence has interpreted the intention of the Constitutional legislator to protect the foetus, the unborn child, declaring the supremacy of these articles on the common law, which introduced before the adoption of the fundamental document of the Republic and which regulated exclusively property rights. So, considering the common law renovated by the new fundamental principles, it has been said that the foetus owns numerous personal rights, as the ones declared by the Cassation in 2009[12].

vi. The right "to be born healthy" and the right "to not be born if not healthy"

Having accepted the position according to which the foetus is a subject of law which owns personal rights, the Jurisprudence has been appealed numerously for the recognition of further personal rights, not only the ones formally recognised by the Constitution, but some different ones which can be considered as corollaries of the right to life and the right to health. In this field the approach of the Jurisprudence has been the one to use an *evolutive interpretation* in order to resolve cases whose question could not find answer in the positive law. This is why the whole field has started with judicial decisions and has been successively commented, sometimes harshly criticised[13], by the doctrine. The rights in question are the one *to be born healthy* and the one *not to be born if not healthy*. The first is the result of the judicial interpretation of the Court of Cassation. Indeed, with the *judgement no'14488 of 2004* the Court has stated:

[11] The "constitutional oriented interpretation" in a way of interpretation the Italian Courts have recently adopted: they interpret the law in the light of the content, which they always interpret, of the Constitution itself. It is what in the German legal frame is "Drittwirkung*"*.
[12] Court of Cassation, judgement 10741od 2009.
[13] C. Castronovo, *L'eclissi del diritto civile*, (Giuffrè editore, 2015).

> "The right to be born healthy means only that, under the private law profile of contractual, extracontractual and "social contact" responsibility, nobody can procure to the conceived lesions or diseases through an act (commissive or omissive, fraudulent or unintentional)…and, under the public law profile, legislative institutes and structures of protection, care and maternal assistance have to be arranged to safeguard an healthy birth"[14].

The Court has declared the existence of this right allowing the recognition of the unborn child as subject of law (but always maintaining the position of the property rights scheme which subjects the exercise of the right of compensation to the event of birth). The case implies a problematical consequence of the recognition of this right. Reporting the facts, the Court was appealed by a couple whose doctor, during the initial months of the pregnancy, had prescribed some health controls to the woman and had ignored the existence of a hereditary disease of the male part. Consequently, the child resulted affected by thalassemia major, an irreversible disease. The Tribunal and the Court of Appeal condemned the doctor to a consistent amount of compensation to the couple because he had not fulfil his *duty of information* to the parents through his act of negligence (contractual responsibility), depriving them of the possibility to adopt an informed decision in the light of the circumstances (decision to abort or to be prepared to the difficulties of the birth with a mental and material support) and because of the *damage to health* caused to the parent after the birth (extracontractual responsibility). Both the judicial bodies refused to recognise the compensation to the new-born child, a minor represented by the parents themselves, affirming that the status of invalidity caused by the irreparable disease could not be imputed to the doctor, whose responsibility was only the deprivation of the parents' right to choose and whose act did not affect the thalassemia itself. The couple, unsatisfied by the decisions, made a recourse to the Cassation stating that the child had the right of compensation for her "*wrongful life*" occurred because of the *missed termination of pregnancy* that can be imputed to the doctor. This main argument of the appellants has been interpreted by the Court as a claim to the recognition of the *right to not be born if not healthy*. Analysing their case, the Court of Cassation rejected their recourse, affirming a new principle deeply related with the right to be born healthy supported by the following arguments[15]. According to the Court, the doctor cannot be considered responsible for the unhealthy life of the minor because of the fact that he has deprived the mother to abort: indeed, the Italian frame of abortion does not comprehend the *eugenetic abortion* as such[16] and the one to abortion is neither the woman's right or the unborn child's right. Indeed, the

[14] Cass. no'14488 of 2004, point 3.1.
[15] *Ibid.*, point 4.4.
[16] The Act.194 of 1978 in articles 5 and 6 provide therapeutic abortion even after the third month if the woman's mental or physical health is at risk.

revindication of a right not to be born *if not at certain condition of health* has been interpreted as a *paradox*: according to the Court a person, capable to claim a right because of his birth, cannot claim a right not to be born denying his own birth. The birth that is the substantial and fundamental prerequisite of the revindication itself. In addition, the Court has stated that the inexistence of the right "not to be born if not healthy", denying the request of the appellant and confirming that the Italian model of legalisation of abortion is based on a partial legalisation and exclusively on the woman's right to health. Indeed, the Court has expressed its opinion on the problematical issues previously mentioned, stating that Act. 194 on abortion does not give to the mother a right to abort but only a *faculty* to abort, based on the recognition of the prevalence of the woman's right to health on the foetus' right to life[17]: this is the very essential premise firstly established by the Constitutional Court in 1975 with the sentence no'27. It can be said that these final considerations of the Court are the key to understand the interpretation of the legal principles underlying the Italian model of legalisation of abortion despite of the *practice*, in which the *woman's freedom of choice*[18] is claimed to be and is applied as the founding principle.

vii. Damages for "wrongful life": questions and limits

What has been described above is the general issue of the damages for "*wrongful life"* which for the first time has been analysed by the New Jersey Supreme Court in the case *Gleitman vs. Cosgorve of 1967* and has recently spread all over Europe. In Italy, in line with the described previous position, the Court of Cassation has recently re-examined the issue of the right to not be born if not healthy with the *judgement no' 16754 of 2012* expressing some new arguments and consideration on the issue. In this case a child was born affected by the down syndrome which has not been diagnosed during the pregnancy by the medical staff. This negligence has violated the contractual *duty of information*. The appellants, the whole family and the child included, claimed their right to compensation for the damages caused by the doctors. The Court stated that parents, brothers and sisters and the child herself own the right to compensation. In particular concerning the new-born's right it declared:

> "the child, without legal capacity until the event of birth, once born he owns the right to compensation by the medical staff based on articles 2, 3., 29, 30 and 32 of the Constitution

[17] The described position has been confirmed by the same Court with the *judgement no'14623 of 2006*.
[18] For general consideration about the Italian model of legalisation see the last paragraph of *The Italian legislative frame on abortion*.

> *for not be born healthy*, represented by the interest to alleviate his condition of life which deprives him of a free expression of his personality."

Differently from the judgement of 2004, the Court has recognised even the *child's right to compensation* and has supported the *causal connection* between the negligent act of the doctor and the down syndrome, renovating deeply the field. Furthermore, another point of difference with the above described judgements is that in this case the Court has conceived differently the principles underlying the regulation on abortion, stating that the requirement of investigations on the foetus' status of health was:

> "an investigation functional both to the diagnosis of foetal malformations and to the exercise of the right of abortion."

The Court expressively states that the woman owns a *subjective right to abortion* exercisable with the manifestation of her will: she is the only one entitled to decide on the prosecution of the pregnancy according to Act.194/1978. Considering this position, if on the one hand the *right to be born healthy* has been recognised, on the other hand *the right to not be born if not healthy* has been, once again, excluded. Indeed, the Court of Cassation has not excluded the possibility of new-born to claim the right compensation for the damages to the mother herself[19], considering it a paradox and stating that the *woman's right to abort* is exclusive and this eventual recognition would violate her *right to health* and her *personal freedom*. A balance between these woman's interests and the child's interest to be born healthy cannot exist: the woman's decision on the exercise of her rights prevails.

viii. Conclusions

Some general considerations can be finally proposed. As a matter of fact, the Italian Jurisprudence has assumed some controversial and conflicting positions on the relevant issues related to abortion. First of all, concerning the legal conception of abortion and its model of legalisation, the judicial interpretation has permitted a better understanding of the legalisation of abortion and of its founding principle. In relation to this fact, it has to be noticed that the positive law level, according to which the woman's health is the core of the legislation, has revealed distant from the practical level and the general social perception, according to which the woman's freedom of choice founds the regulation. Secondly, concerning the legal status of the foetus, in the light of what had been described it can be

[19] Court of Cassation, no' 16754 of 2012, pages 39-40.

said that there is an ongoing and progressive tendency toward the enlargement of the unborn child's legal protection: the judges are the main actors of this evolution. In general, the analysis of the mentioned judgements has shown how these issues still divide the legal experts and will surely continue to do so, confirming the never-ending nature of the debate on abortion.