The Italian legislation on abortion

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I. The historical context of the legalisation

For all the XIX and until mid XX century, abortion was generally criminalised by States. Only by the Fifties of the last century a small number of States had legalised it[1]. It is during the Sixties and the Seventies that the debate on the introduction of a law regulating abortion became a dominant political issue in the Western countries, including Italy. This was the result of the worldwide movement which spread with the '68 Sexual Revolution, the revindications of the feminist groups and the concerns of the medical community. In 1973 the Supreme Court of United States in the *Roe v. Wade case*[2] affirmed that the *woman's right to privacy* provided by the Due Process Clause of the Fourteenth amendment of the American Constitution covers her *liberty to terminate pregnancy*. The Court divided the pregnancy in three trimesters legalising abortion in the first one for any reason and in every State, admitting it for the preservation of woman's life or health and finally allowing the States to prohibit it in the last trimester. The criterion used in the judgement to define when abortion cannot be practiced was the *viability of the foetus*[3] from the woman's body. In the meanwhile, the debate was raging in Italy: the political parties, the Catholic Church and the public opinion were deeply divided. In particular, the Catholic Church exercised a powerful influence on the debate: the Pope strenuously fought the legalisation of abortion with numerous official documents[4]. Furthermore, the Catholic thought itself was embraced by the Christian Democracy (*Democrazia Cristiana*, DC), the most influential and powerful party of the time in the country.

The very first of several drafts on the legalisation of abortion was proposed by the Italian Socialist Party[5] in 1973 but it was soon rejected: the moment was not still mature. Instead, two years later in 1975 the Italian Constitutional Court intervened by stating some firm principles, making the

[1] C. Joffe, *Abortion and medicine: A sociopolitical history*, (BI.BK137- Paul 2009).
[2] U.S. Supreme Court, *Roe v, Wade*, 410 U.S. 113 (1973).
[3] *Ibid.*, pages 163-165.
[4] *Humane Vitae* (1968); *Declaration on procured abortion* (1974).
[5] The very first draft of the law proposed by Loris Fortuna, Parliament member of the PSI, considered legal the abortion only in case of peril for the mother's health and in case of serious malformation and genetic diseases of the embryo.

perspective of legalisation concrete for the first time. With the *judgment no'27 of 1975* the Court declared the constitutional legitimacy of *the protection of the embryo* based on *the protection of motherhood* and the *inviolable rights of man* (articles 21 and 2 of the Italian Constitution). At the same it affirmed that this protection is not *absolute* and can collide with other constitutional safeguarded interests as *the right of the woman's health*[6]. In this way, the Court stated that a process of balance between the *embryo's right to life* and the *woman's right to health* must be guaranteed by the national law. The Court declared that the safeguard of the latter interest must prevail. The Court stated:

> "Equivalence does not exist between the right to life and to health of the mother, who is already person, and the protection of the embryo who has to become person."

As a result, the Constitutional Court declared against the Constitution the article 546[7] of the Penal Code because of the absence of the possibility to interrupt the pregnancy when the gestation implied a dangerous and medically verified harm for the woman's health. *De facto* the Court allowed *therapeutic abortion*. In the end, the Court recalled the Parliament to its duty to legislate in an organic and harmonic way on abortion. Consequently, from 1973 to 1978 each political party proposed its draft of law on abortion. After five years of wrathful political debate and crisis, related also to the events that dramatically marked Italy during the Seventies[8], the current Act was finally approved in May 1978.

II. The legal content of Act.194/1978

i. Principles

The Act no'194 of 1978 was the result of the compromise between the Christian Democracy Party, the catholic inspired against the legalisation of abortion[9], and the Communist Party, which had not a

[6] Italian Constitutional Court, sentence no'27 of 1975.

[7] Articles 545-551 used to criminalise different forms of abortion. They were titled "*Crimes against the integrity and the wellness of the ancestry"*: the value of motherhood and the interests of the woman were not considered.

[8] The Act was approved only two weeks before the discovery of the corpse of Aldo Moro, prime Minister and member of the Christian Democracy Party, kidnapped on 16th of March 1978 by the Brigate Rosse, extreme leftish terroristic group.

[9] The Christian Democracy Party had always supported the criminalisation of abortion. The promulgation of the act was lived as a real shock for the Italian catholic world and as a betrayal of the Catholic principles and moral committed.

clear position on the issue[10]: the process of its construction can reveal and clarify the *haziness* of several provisions. The regulation is titled "*Dispositions for the social protection of motherhood and on the voluntary interruption of pregnancy*". At first sight, the intent of the legislator appears to be the safeguard of the social role of maternity and only secondly the legalisation of abortion. Article 1 states that the State guarantees *the right to conscious and responsible procreation,* recognising the value of the maternity and the human life since the beginning. The declaration of this principle reflects the fears of the political forces, especially the Church, that allowing abortion would mean making the phenomenon spread and increase it. From a legal point of view the statement contains an *initial contradiction*: the human life is declared to be protected *since the very beginning*[11], so since the very first moment of conception, while the Act's aim is to regulate abortion. The provision appears to be constructed ambiguously: indeed, an agreement or compromise on the *legal status of the foetus* was not reached by the political forces and remained untouched by the regulation. Still today the legal status of the embryo and the foetus is debated in the Italian legal framework and the Jurisprudence is deeply divided[12] due to the obscurity of the legislation in the field.

The same considerations are valid also for the second paragraph of the article, where the legislator states that the interruption of pregnancy is not a *tool of births control*. The catholic political forces and the Church herself were very sensitive to and afraid of a possible implementation through the legalisation of abortion of the theory of *Malthusianism*, according to which to the demographic increase of the population of the world is the cause of the poverty and the hunger all over the globe and it can be managed through the control of births[13]. Indeed, in 1968 Pope Paul IV had condemned the theory of *Malthusianism* in the declaration *Humane Vitae*[14], one of the several official document through which the Church explicitly fought against the legalisation of abortion in the country.

ii. Voluntary and therapeutic abortion

[10] The position of the Communist Party (PC) was obscure: it never expressed an exact and general political position on abortion, probably because of the presence in the party of Catholic members. A legislative draft proposed in 1975 by PC aimed to allow the termination of pregnancy within the third month only in case of peril for the woman's life and physical and mental health, in case of anomalies or malformations of the foetus, in case of rape and incest. In any of these cases the final decision where to proceed to abortion or not was detained by a commission of doctors.

[11] For a detailed analysis of the implications of this statement see "*Act.194/1978 and Act.40/2004: the foetus as subject or object of law?*".

[12] 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).

[13] Only initially based on the work of the economist T.R. Malthus and then developed by several authors in the current of Malthusianism.

[14] Pope Paul IV, *Humanae Vitae,* 1968, paragraph 23.

The general rule in article 4 of the Act states that abortion is permitted until the third month (ninety days or twelve weeks) of pregnancy[15]. The reasons to have access to abortion can be the serious peril for the *physical or mental health of the woman*, the *economic or social reasons* and the *circumstances of the conception*. From a legal point of view this list is exhaustive but *in practice*, according to the use of time, the rule is interpreted as providing to the woman the *freedom to choose* to abort until the third month. According to article 6, the pregnancy after the third month can only be interrupted when the pregnancy or the birth can put the *woman's life at risk* or when the certified presence of *malformations or relevant anomalies of the foetus* can determine *a serious danger for her physical and mental health*. However, in the latter case the interruption of pregnancy can be realised only if the foetus cannot autonomously survive. Theoretically, the legacy of abortion is the result between the balance of two interests: the woman's right to mental and physical health and the foetus' right to life. This is why the regulation does not include the so called *eugenetic abortion,* a practice legal in the model of legalisation of other European States, which enables the woman to abort when the foetus is characterised by malformations or anomalies[16]. Indeed, the risk for the woman's mental or physical health, and not her freedom to choose, is the founding principle of this regulation. However, as already mentioned, even if the *principle of self-determination* was not in the mind of the drafters, in practice until the third month the woman can freely decide to abort. After this temporal limit, abortion can be practiced only in two situations which have to be medically certified and thus the decision is in the doctor's hands.

Residually, some conclusive provisions criminalise some forms of abortion. In particular, article 17 punishes *involuntary procured abortion* with 3 months up to 2 years of imprisonment. Article 18 outlaws *abortion intentionally procured* without the woman's consent with 4 up to 8 years of imprisonment. Article 19 punishes every form of abortion which does not respect the modalities and the procedure regulated by the law with a maximum of 3 years of imprisonment. According to the latter article, not only the medical staff but even the woman can be sentenced to a maximum of 3 months of imprisonment.

iii. Procedure and restrictions

[15] This temporal limiti is conventional and derives from the biological division of the pregnancy in three trimesters. In Europe the avarage of the temporal limit is 14 weeks, with 10 weeks in Poland and until the sixth month in England and Holand.

[16] The Jurisprudence has expressed clearly the inexistence of eugenetic abortion in the Italian legal system, see the paragraph "*The right "to be born healthy" and the right "not to be born if not healthy"*".

This regulation has established numerous and detailed provisions concerning procedural aspect of the medical process of abortion. First of all, the Act. 405/1975 had founded the *public clinic* to help women (consultori). These, according to article 2, are the places where the medical examinations are conducted, the woman can be helped to remove the causes of her decision, the situation can be assessed. With the woman's consent, even the male part can be involved (article 5). The woman can also go to a *private doctor* who, according to the same article, has to discuss the decision with her and also with the male part, under the same conditions of the previous case. In both cases, this process must take place in accordance with the respect of the *woman's dignity and privacy*. Doctors of the public clinic or the private ones have to give the woman a certificate, the *legal authorisation* to interrupt the pregnancy: according to the law, the doctor must postpone the consignment of the certificate for *seven days.* This span of time, according to the *ratio legis*, is necessary for the woman to think about her final choice. After seven days, the doctor must consign her the authorisation in question without any further postponement. This provision does not apply when the doctor certifies the urgency of the abortive practice: indeed, in this case the consignment will be immediate. In addition, according to article 7, when the life of the woman is at risk abortion can be practiced without respecting the described legal procedure. Furthermore, article 8 of the Act states that the termination of pregnancy can only be practiced in public or authorised private medical structures: in the first case abortion is free of charge due to the existence of the *Servizio Sanitario Nazionale* (National Medical Service); in the second the cost of the medical treatment is variable.
Another relevant provision is articles 12: if the woman is a *minor*, the consent of the parents or the tutor is requested to have access to the interruption of pregnancy. If the minor woman wants to abort in disagreement with her parents' or her tutor's will the decision, once completed the procedure regulated in article 5, is submitted to the *tutelar judge* who owns the final decision whether to proceed or not to abortion.

iv. The right of conscious refusal

The ratio of the right of conscious refusal is based on the State's recognition of the legitimacy of personal refusal to perform a legal duty on the base of his or her *religious*, *philosophical* or *moral believes*. In Italy the recognition of this right was guaranteed for the first time in 1972 when the Parliament introduced the right of conscious refusal to join the military service[17]. The same principle underpins this right in the field of abortion. According to article 9 of the Act the right to conscientious objection or refusal can be exercised by the doctor and the medical staff. A preventive declaration

[17] Act no' 772/1972, "*Norms for the recognition of the conscientious objection"*.

has to be submitted and consigned to the medical structure by who wants to exercise this right and it exonerates them from taking part to the *activities specifically* or *necessarily* directed to determine the interruption of pregnancy. However, the article states that they are not exonerated from the previous and consecutive assistance to the operation. Furthermore, the objectors are in any case obliged to join the medical process of abortion if their presence is essential for the *survival of woman's life* (comma 4).

Some considerations can be done in relation to the *implementation of the law* and the real functioning of the described procedure. In practice, the percentage of objectors among the doctors and the medical staff is very high in Italy: today the 70,9% of gynaecologists (more than two out of three)[18] are objectors. This percentage has considerably increased recently: objectors passed to be the 58% in 2005 to the 70,5% in 2007 and it remained stable until today. This phenomenon clearly affects the correct implementation of the law because it reduces the possibility to have access to abortion, especially in the *public sector*. From a social point of view, the massive exercise of the right of conscious refusal is perceived as just or common in the country[19].

v. General consideration on the Italian model of legalisation and challenges

In the light of the content of the regulation which has been examined above, the model in force in Italy is characterised by a *partial legalisation* based on the recognition and protection of the right to *physical and mental health of the woman*, on the protection of *motherhood* and the general *right to life*. It is therefore possible to argue that the right to self-determination of the woman and her freedom are not conceived as founding principles by the historical legislator: her right to health is the essential principle of the Act. This conclusion is supported by the temporal limit, the numerous procedural restrictions and the residual criminalisation of abortion. Even the Court of Cassation[20], as will be examined, has recently reconfirmed that. Essentially through the introduction of Act.194 the State has monopolised the condition and prerequisites of the access to abortion but, at the same time, has not solve some relevant related issues: first, from a theoretical point of view it is still a matter of debate if the one to abortion is a *right* or a *faculty*; second, an organic legislative position on *the status of the embryo* or the foetus is still missing.

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[18] Official data by the Italian Ministry of Health, 2016, (http://www.salute.gov.it/imgs/C_17_pubblicazioni_2686_allegato.pdf)

[19] This is a point of great difference with Greece, where from a social point of view the doctors' refusal to practice abortion in the public sector is perceived as scandalous.

[20] Cass. no'14488 of 2004. The analysis of this judgement can be found in *"The right to "be born healthy" and the right to "not be born if not healthy""* in *The Italian Jurisprudence on abortion and related issues.*

From a social point of view, the Act has been the object of criticisms since the very moment of its introduction. Indeed, three years after its promulgation was subject to *two abrogative referendums*, promoted by two political forces and with opposite objectives. On the one hand, the Radical Party supported the entire abrogation of the Act in order to reform it in a liberal sense and base it on the principle of *free choice of the woman*. On the other hand, once again the Christian Democracy party and other Catholic forces, like the Movement for Life and similar associations, wanted to abrogate it to re-stablish the previous *total criminalisation* of abortion. The people voted to maintain the Act in force. It has not been amended until today. In any case, anti-abortion forces continued to exist and to exercise pression for the abrogation of the law during the last decades of the century through the new one. In the recent years a revival of anti-abortion thesis and movements has marked the Italian social scenario, reopening the discussion. Essentially *bipartite* between the supporter of the *liberal model* based on the recognition of *the principle of self-determination of the woman* (leftish and feminist groups), and the supporter of the absolution of *the right to life of the embryo* (prolife and catholic movements), the debate in Italy on the legal legitimacy of abortion is never-ending.