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115

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Minors' Digital Vulnerability in the EU and the US: A Comparison Between The Digital Services Act and The Kids Online Safety and Privacy Act

HEALTH CARE, REPRODUCTIVE SELF-DETERMINATION AND MORAL REPUGNANCE IN THE LEGAL DISCOURSE ON ABORTION*

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TABLE OF CONTENTS:

The US Supreme Court's decision in Dobbs v. Jackson Women's Health Organization has brought the debate on abortion at the center of the public and scholarly attention once again.
In Italy abortion is regulated by legislation since 1978, but can abortion be considered a fundamental and autonomous right? Can we talk about reproductive self-determination?
After a brief overview on the Italian legal framework on abortion and its place inside the international law standard, the chapter aims at analyzing the Italian rules on the expansion of the use of RU*486 pill, enacted in 2020, as a path of pharmacological abortion.*
The chapter will focus on some collateral elements, and on some specific contrasting and concurring rights - different from the traditional ones (the father's one to parenthood or family life and the fetus' one to life) - which can encourage or discourage the access to abortion: welfare instruments and procedure to ensure informed consent to the treatment; anti-abortion advertising campaigns and freedom of speech and publishing; conscientious objector doctors' right.
Through deductive and inductive method on relevant legislation, through statistical data on access to abortion and to RU*486 in Italy, We propose a possible re-enactment on how the above mentioned "collateral elements" affect woman's intimate choice and reproductive self-determination, mining or not the effectiveness of the law rules and of the rights protected and of woman's health.*
Assuming that the law in the western legal tradition is the instrument to protect values and rights, to perpetuate moral repugnance or to embrace different and new paradigms, in our conclusions we will propose a "secular and lay perspective" on the matter, according to theories on the sovereignty on the body and procreative rights, having regard to the possibility to improve the public debate by providing concrete information about the advantages in terms of efficiency of choices considered morally problematic and the chance that such approach could ensure more effectiveness of the rights involved.

La decisione della Corte Suprema degli Stati Uniti nel caso Dobbs v. Jackson Women's Health Organization ha riacceso il dibattito sull'aborto, sia nell'opinione pubblica che nel contesto accademico.
In Italia l'aborto è regolamentato dalla legge sin dal 1978, ma può essere considerato un diritto fondamentale e autonomo? È possibile parlare di autodeterminazione riproduttiva?
Dopo un'analisi del quadro giuridico italiano e del suo allineamento con gli standard internazionali, l'articolo esamina le norme italiane del 2020 sull'uso della pillola RU*486, come metodo di aborto farmacologico.*
Vengono inoltre presi in esame alcuni diritti concorrenti o contrastanti che incidono direttamente o indirettamente sull'autodeterminazione riproduttiva della donna. Si tratta di diritti diversi da quelli tradizionalmente considerati, quali il diritto del padre alla paternità o alla vita familiare e quello del feto alla vita. In particolare, si guarda: alla libertà di espressione e di manifestazione del pensiero attraverso l'analisi della giurisprudenza su alcune campagne pubblicitarie antiabortiste, al diritto all'obiezione di coscienza dei medici e ad alcuni meccanismi legati al consenso informato e ai servizi di welfare offerti alle donne.
Attraverso una metodologia sia deduttiva sia induttiva, basata sull'analisi di dati legislativi, giurisprudenziali e statistici, si evidenzia come i suddetti fattori collaterali possano influire sulla scelta intima delle donne e

* This study is the result of a common research and reflection of the two authoresses. However, only under the scope of research evaluations, Alessandra Pera drafted Sections 3, 3.1 and 6 while Nicoletta Patti drafted Sections 2, 4, 4.1 and 5. The Introduction, Section 7 and the conclusions were co-authored.

sull'autodeterminazione riproduttiva, compromettendo (o meno) l'efficacia delle norme giuridiche, i diritti tutelati e la salute della donna.
Partendo dal presupposto che, nella tradizione giuridica occidentale, la legge è uno strumento volto a proteggere valori e diritti, a perpetuare la ripugnanza morale o ad abbracciare nuovi paradigmi, si propone in conclusione una 'prospettiva laica' sulla questione, basata sulle teorie della sovranità sul proprio corpo.

Keywords: Abortion, Reproductive self-determination, Freedom of thought, Informed consent, Conscientious objection.

I. Introduction

In recent years attention has once again been turned towards a woman's freedom to choose whether to terminate her pregnancy. This phenomenon can be observed in many of the jurisdictions belonging to the Western legal tradition[1] or in some way related to it. One wind is blowing in the direction of limiting women's freedom of choice, in the United States before and after Dodds[2], in Poland[3] and in Italy, as analyzed here. Then there is another wind blowing in the opposite direction: in France[4], with the constitutionalization of women's right to choose voluntary termination of pregnancy, or in Ireland with the recent reform[5], and at the level of European institutions[6]. Significant changes have taken place in South and Central American legal systems in recent years, driven by constitutional case law and then translated into legislative acts[7]. In this very heterogeneous picture, the WHO emphasizes the need to ensure women's access to a medical procedure that is not very risky, but not yet uniformly and safely guaranteed globally. It is a serious public health problem, affecting both economically less developed countries and jurisdictions with

[1] On the concept of Western Legal Tradition in comparative law studies, see: J.M. Merryman, *The civil law tradition. An introduction to the legal systems of western Europe and Latin America*, Standford University Press, 1969, p. 2; M. A. Glendon, M. W. Gordon, P. G. Carrozza, *Comparative legal traditions*, West Group, 1994, 6 at p. 8; P. Stein-J. Shand, *Legal values in Western Society*, in *Edinburgh University Press*, 1974; P. G. Monateri, *Black Gaius. A quest for the multicultural origins of the western legal tradition,* in *Hastings Law Journal*, 2000, pp. 490 ff.
[2] *Dobbs v Jackson Women's Health Organization* [2022] *597 U.S*. See, for all, M. K. Mayer, J. C. Morris, J. A. Aistrup-R. B. Anderson, R. C. Kenter, *Dobbs*, *American Federalism, and State Abortion Policymaking: Restrictive Policies Alongside Expansion of Reproductive Rights*, in *Publius: The Journal of Federalism*, 2023, Vol. 53, n. 3, 378 at p. 404, https://doi.org/10.1093/publius/pjad012.
[3] Poland Constitutional Court, 22 October 2020 (K1/2020). For scholarly writings, see A. Bien-Kacala, T. Drinoczi, *Abortion law and illiberal courts: spotlight on Poland and Hungary*, in Mary Ziegler (ed.), *International abortion law,* Cheltenham, 2023, 263 at p. 282.
[4] See the new article 34 of the French Constitution, available at <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf>. For scholarly writings, see A. Nocquet-Wass, *The constitutionalisation of abortion (interruption volontaire de grossesse) in France IACL-AIDC Blog*, 2024, available at <https://blog-iacl-aidc.org/2024-posts/2024/4/16/the-constitutionalisation-of-abortion-interruption-volontaire-de-grossesse-in-france>.
[5] F. de Londras, *Abortion, reform, and rights: tales from a small island*, in Mary Ziegler (ed.), *International abortion law,* Cheltenham, 2023, 421 at p. 439.
[6] European Parliament, *Resolution on Including the right to abortion in the EU Fundamental Rights Charter*, 11 April 2024, <P9_TA (2024)0286 https://www.europarl.europa.eu/doceo/document/TA-9-2024-0286_EN.html>.
[7] Colombian Constitutional Court, C-055-22, 21 February 2022, available at < https://reproductiverights.org/wp-content/uploads/2023/07/Constitutional-Court-Ruling-C-055-de-2022-ENGLISH-VERSION.pdf>.

generally more sophisticated abortion legislation and, in both cases, however, the most vulnerable or marginalized segments of the population[8].

The chapter focuses on the Italian legal system and, in particular, on some collateral elements, specific contrasting and concurring rights that are different from the traditional ones (the fetus' right to life and the father's right to parenthood or family life) and which can encourage or discourage women's access to abortion:

- Anti-abortion advertising campaigns and freedom of thought, speech and publishing (para 4).
- Welfare instruments and procedures to ensure informed consent to the treatment (para 5).
- Conscientious objector doctors' rights (para 6).

Through deductive and inductive methods on relevant legislation and case law, through statistical data on access to abortion in Italy, we propose a possible re-enactment on how the above-mentioned "collateral elements" affect women's intimate choices and reproductive self-determination, undermining the effectiveness of the legal rules, the rights protected and women's health.

The analysis refers to Nobel laureate Alvin Roth's theory, which lists abortion among events perceived as "repugnant" because it determines moral unease and repugnance, which depend on institutional contexts and on an implicit "price" associated with one's morality[9].

Assuming that the law in the Western legal tradition is an instrument to protect values and rights, perpetuate moral repugnance or embrace different new paradigms, in our conclusions we propose a lay perspective on the matter, according to Stefano Rodota's theories on sovereignty over one's body and procreative rights. The objective is to improve the public debate and, eventually, bring about reform by providing concrete information on the advantages in terms of efficiency of choices considered morally problematic.

Such an approach could ensure greater effectiveness of the rights in question, as the Italian system is strongly affected by problems of an organizational nature arising from:

- a high percentage of conscientious objectors among gynecologists;
- inadequate dissemination and information about the pharmacological abortion procedure as a viable alternative to surgical abortion;
- some particularly aggressive and misleading anti-abortion campaigns;
- paradoxically, some welfare instruments and procedures to ensure informed consent to the treatment.

These and other elements, and the way in which they are embedded, determines what Alvin Roth describes as part of the costs for moral repugnant transactions. He lists abortion among the events perceived as 'repugnant', as one of the objects of transactions in the sex and reproduction market that determines moral unease. Roth expressly refers to the link between 'cash payments and repugnance', which makes the event harder to accept[10].

[8] See <https://www.who.int/news-room/fact-sheets/detail/abortion>.
[9] A. E. Roth, *Repugnance as a constraint on markets* in *Journal of Economic Perspective,* 2007, vol. 21, n. 3, p. 39.
[10] A. E. Roth, *Repugnance as a constraint on markets, cit.,* pp. 44-45.

Repugnance can be a real constraint on markets. In response to repugnance, economists, jurists and scientists can propose and design different forms and elaborate new or alternative rationales and legal reasoning for those markets. Indeed, 'being aware of the sources of repugnance can only help make such discussion more productive'.[11]

II. THE ITALIAN LEGAL FRAMEWORK

Italy is among the countries where abortion is legal, as long as it takes place within certain time limits, under certain circumstances and using circuits and services provided by law. Despite the substantial constitutional relevance of the Abortion Act, no. 194/1978, known as "Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza"[12] (VTP), there remain some significant problems of application that can pose obstacles, sometimes even of a substantial nature, on the path a woman takes to terminate her pregnancy.

Act 194 is built on a scheduled time pattern, itself based on the natural weekly evolution of human pregnancy.

The first - and most significant - timeframe concerns the ninety-day time limit. The Act identifies the first trimester of pregnancy as the term within which it allows greater freedom of choice for the woman, as long as it is paramount to ensure the protection of her fundamental right to health, as indicated by the Constitutional Court[13].

The drafting activity and parliamentary proceedings show that the two chambers of the Italian parliament worked from the outset on the distinction between termination in the first ninety days and therapeutic abortion (TTP). This time frame was not a debated issue and, in all likelihood, it was the agreement around it - reminiscent of the trimester framework developed by the U.S. Supreme Court in the leading case Roe v. Wade[14] - that built the essential consensus which, together with other balancing and compromising elements, led to the approval of the Act in 1978.

In this regard, it is necessary to mention that the Constitutional Court has long since recognized how the overall structure of the Act - and especially articles 4, 5, 12 and 13, which include the time frame - are to be considered 'provisions with constitutionally binding normative content in several respects', devoted to ensuring 'a minimum level of necessary protection of inviolable constitutional rights to life and health, as well as maternity, childhood and youth'[15]. A delicate balancing point between multiple relevant constitutional interests, ranging from the protection of a woman's right to health to 'safeguarding the embryo that person has yet to become'[16].

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[11] A. E. Roth, *Repugnance as a constraint on markets, cit.,* p. 54.

[12] Originally published in GU Serie Generale no. 140, 22 May 1978. Now available at https://www.gazzettaufficiale.it/eli/id/1978/05/22/078U0194/sg.

[13] Italian Constitutional Court, 18 February 1975, no. 27, available at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:1975:27>; Italian Constitutional Court, 10 February 1997, no. 55, available at < https://giurcost.org/decisioni/1997/0035s-97.htm>.

[14] *Roe v Wade,* [1973] *410 U.S. 113.*

[15] Italian Constitutional Court no. 35/1997, cited. The translation into English is by the author.

[16] Italian Constitutional Court no. 27 of 1975, cited. The translation into English is by the author.

The second element of a time limit for terminating a pregnancy in the first trimester is set out in article 5 of the Act and consists of the seven-day time interval which, with the sole exception of cases of urgency, must elapse between the consultation interview and the actual procedure.

This is an aspect of the regulation that is far from marginal, for two reasons. On the one hand, it constitutes one of the few aspects of rigidity in a regulatory fabric written with a tendentially elastic mesh: in fact, the entire structure of the Act is characterized by the identification of the conditions under which a woman can request a termination and by the provision of the procedure to be followed.

The legislator has chosen not to indicate the medical procedures to be followed, or the details regarding the intervention or any subsequent checks. This is a positive feature of the regulatory framework since, over the forty plus years of the Act's existence, it has allowed the new possibilities offered by medical progress, in relation to both surgical abortion and the introduction of pharmacological abortion, to be incorporated, with the legislative text unchanged.

Precisely in the face of such elasticity, therefore, a seven-day waiting period between the interview in which a woman requests an abortion and her actual access to the procedure appears to be a rigid requirement, to say the least. The reason for this provision is most likely to be found in the legislature's intention to allow the woman to weigh up the reasons for her choice, adding an additional element of (potential) protection for the embryo. This is linked to the particular informational burden that the Act imposes on the physician, and which is accurately described in article 5(1); possible solutions to the proposed problems must, in fact, be examined with the woman (and with the father of the fetus, only if allowed by the mother). Counseling centers also have the task of helping the woman 'to remove the causes that would lead her to the termination of the pregnancy, to enable her to assert her rights as a worker and mother, and to promote any appropriate intervention that would support the woman'[17].

Today, this time requirement appears susceptible to criticism that was not at all foreseeable when the Act was passed.

On the one hand, in the face of the widespread promotion of access to pharmacological abortions, partly for reasons related to lower exposure to the risks associated with a surgical procedure, even in light of the WHO guidelines, one wonders whether it is reasonable to impose the need to "mark time" for a period of seven days. The WHO strongly recommends that States avoid or remove the statutory provision of 'mandatory waiting periods' between the request to terminate a pregnancy and access to the service, as these create an effective barrier to access to procedures. Even if they do not prevent such procedures, they at least delay them, to the detriment of women in more vulnerable positions due to economic or social reasons, age, ethnic or geographical origins[18].

From the point of view of the organization of health care, this provision results in additional and unnecessary burdens and costs, without any real benefit for women. The

[17] Art. 5, para. 1, Act no. 194/1978.

[18] See <https://abortion-policies.srhr.org/>.

choice is not cost-effective, in terms of time and money, for the people involved or for the health care system.

We are very keen to point out and emphasize the nature of the health care provision for VTP in Italy. This implies that the service is entrusted exclusively – or at least predominantly - to the National Health System (*Sistema Sanitario Nazionale* - SSN)[19]. This is probably a somewhat underestimated element, but one that must be adequately considered since, on closer inspection, it constitutes the real backbone of the normative text and is only apparently of a purely organizational nature. Hence, a universalistic choice oriented toward a full realization of the constitutional dictate, in terms of guaranteeing the right to health and substantial equality among people in access to services. A clear sign of this can be found both in the central role that the Abortion Act reserves for family counseling centers (article 2) and in the identification of facilities that can practice such interventions.

The primary objective of the Act is the social protection of motherhood and the prevention of abortion through the family counseling network, an objective that is intended to be pursued as part of women's health protection policies.

VTP can be practiced by a "doctor in the Obstetrics and Gynecology department at a general hospital", and interventions can also be performed 'at specialized public hospitals, institutes and hospital institutions' (article 8).

This choice has two essential implications. Firstly, it creates a burden on the Ministry of Health and on all health administrations to ensure this service. Secondly (and we will return to this in paragraph 6), the fact that VTP is a health care service that can be performed only in licensed public facilities constitutes the ontological and factual prerequisite that legitimizes and justifies the presence of the conscientious objection provision (article 9).

For a treatment to be included in the essential levels of service, it must be provided in a uniform manner throughout the country, a principle that has been affirmed by the Constitutional Court for 20 years[20]. The function of the essential levels, in this sense, is first and foremost egalitarian: by establishing the services that must be guaranteed to all, uniformly, throughout the country, the state legislature, lays the foundations for the right to health and creates the tools for ensuring its effectiveness. It follows, therefore, that the regions and health agencies have a duty to guarantee VTP and the specialized medical, diagnostic and therapeutic services necessary for counseling, psychological support and pre and post VTP care.

These are services that must be guaranteed to all women, including foreign women, regardless of how long they stay on state territory[21].

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[19] L. Busatta, *Interruzione volontaria di gravidanza entro i primi novanta giorni: una prestazione sanitaria a contenuto costituzionalmente vincolato*, in *Nomos*, 2022, 2, p. 8.

[20] Italian Constitutional Court, 26 June 2002 no. 282 <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2002&numero=282>; Italian Constitutional Court, 24 April 2020 no. 72/2020, available at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2020&numero=72>.

[21] Article 35, Legislative Decree 286/1998, *Consolidated text of provisions concerning the regulation of immigration and rules on the status of foreigners,* which is intended to protect women without residence permits from the risks

However, data collected by the Ministry of Health, tell us of a strong dissociation between the declaimed rule and the operational solutions[22]. A declamatory formant[23] defeated by the Report containing 2021 data on the implementation of Act no. 194[24].
A total of 63,653 VTPs were notified in 2021, confirming the continuous downward trend of the phenomenon (-4.2% from 2020) since 1983. The abortion rate (no. of VTPs per 1,000 women aged 15-49 years resident in Italy), which is the most accurate indicator for a correct assessment of the use of VTP, confirms the decreasing trend of the phenomenon: it was 5.3 per 1,000 in 2021 (-2.2% compared to 2020). The Italian rate remains one of the lowest internationally. In 2021, the number of VTP decreased in all geographic areas.
The use of VTP in 2021 decreased in all age groups compared to 2020, particularly among younger women. The highest abortion rates remain in women aged 25-34.
Among underage women, the abortion rate for 2021 was 2.1 per 1,000 women. In 2021, there were 1,707 women under the age of 18 who underwent a VTP, accounting for a total of 2.7 percent of all interventions performed in Italy, a figure consistently lower than that of European countries with similar social health systems.
After increasing over time, VTP among foreign women has shown a downward trend in recent years. In 2020, the latest year for which the abortion rate for foreign women is available, the figure was 12.0 per 1,000 women, a figure that is declining (it was 17.2 per 1,000 women in 2014) but remains higher than that of Italian women (5.0 per 1,000 women in 2020).
The percentage of VTPs performed on women with previous abortion experience has continued to decline since 2009 and was 24.0% in 2021. The trend in the percentage of repeat abortions confirms that the trend in the use of abortion in our country is steadily decreasing; the phenomenon can presumably be explained by the increased and more effective use of methods for conscious procreation, rather than abortion, according to the auspices of the Act.
For 2021, use of family counseling centers for the issuance of the certification necessary for VTP application (42.8 percent) also appears to be prevalent, compared to other services (Medical Practitioner 20.3 percent; Obstetrics & Gynecology Department 34.9 percent). Counseling centers not only offer this service but also play an important role in preventing VTP and supporting women who decide to terminate pregnancy, although not uniformly across the territory.

associated with possible and dangerous illegal abortions, available at <https://www.gazzettaufficiale.it/eli/id/1998/08/18/098G0348/sg>.

[22] On the concepts of legal formant, see the studies by Rodolfo Sacco, particularly R. Sacco, *Legal formants: A dynamic approach to comparative law*. in *The American Journal of Comparative Law*, 1991, vol. 39, II, 343 at p. 401; Id., voce "Formante." In *Digesto civ. IV*, Turin, pp. 438 ff.

[23] On the idea of declamatory legal formats, see R. Sacco, cited above.

[24] <https://www.salute.gov.it/portale/donna/dettaglioPubblicazioniDonna.jsp?lingua=italiano&id=3367>. Data are collected through the *Sistema di Sorveglianza Epidemiologica delle Interruzioni Volontarie di Gravidanza*, which has been active in Italy since 1980 and involves the Ministry of Health, the *Istituto Superiore di Sanità* (ISS), the *Istituto Superiore di Statistica* (ISTAT), the Regions and the two Autonomous Provinces. Monitoring is conducted through ISTAT questionnaires, which must be completed for each VTP in the facility where the intervention was performed, then collected and transmitted by the Regions.

The percentage of surgeries performed early, thus less prone to complications, continues to increase: 61.7 percent of surgeries were performed by 8 weeks of gestation (compared to 56.0 percent in 2020), 21.7 percent at 9-10 weeks, 9.9 percent at 11-12 weeks, and 6.7 percent after 12 weeks.
Waiting times are decreasing, although non-negligible variability between regions persists. The use of pharmacological abortion varies widely across regions, both in terms of the number of interventions and the number of facilities offering them. In 2021, 48.3 percent of interventions were performed with mifepristone and prostaglandins.
Regarding conscientious objection, in 2021 it affected 63.6 percent of gynecologists (a decrease from 64.6 percent in 2020), 40.5 percent of anesthesiologists, and 32.8 percent of non-medical staff. Wide regional variations are noted for all three categories, resulting in widespread health care shopping phenomena and "abortion tourism" from one region to another. This results in economic inefficiency for the person concerned and for the health system, and "overbooking" for those regions where objection is lower or the services are better managed.

III. Pharmacological Abortion/Surgical Abortion

To better understand these data, it is appropriate to distinguish between the different types and procedures allowed. There are two techniques for performing VTP: pharmacological, also called Medical Abortion (MA), and Surgical Abortion (SA).
MA is a medical procedure, carried out in several steps, which is based on taking at least two different active ingredients: mifepristone (better known as RU486) and a prostaglandin, 48 hours apart.
In Italy, the voluntary interruption of pregnancy using the pharmacological method is possible upon the request of the person concerned. In August 2020, the Ministry of Health released a circular on the update of the Guidelines on the voluntary interruption of pregnancy by pharmacological method with the following conditions: up to 63 days, equal to 9 completed weeks of gestational age, at adequately equipped public outpatient facilities, functionally connected to the hospital and authorized by the Region, as well as counseling centers and day hospitals[25].
Although in recent years women are increasingly resorting to MA, SA - as the above-mentioned data show - remains widely practiced. The procedure can be performed, under general or local anesthesia, at public facilities of the National Health Service and private facilities affiliated with and authorized by the regions. In the field of SA, the methodology depends on the gestation period. Within the first eight weeks, vacuum curettage is used, which consists of aspiration of the embryo and endometrium through a cannula introduced into the uterus. From the 8th to the 12th week, dilatation and revision of the uterine cavity are performed (in this case, dilatation of the cervix is necessary to enable the use of a cannula with a larger diameter).
By contrast, MA does not require the use of surgery, as it is induced by a drug.

[25] Ministry of Health, 4 August 2020,
<https://www.salute.gov.it/imgs/C_17_pubblicazioni_3039_allegato.pdf>.

In Italy, the commercialization of this drug has had a very troubled path, which we do not have space to illustrate here, but which would be very interesting to reconstruct, because it again demonstrates the widespread sense of moral repugnance to abortion, as described by Alvin Roth.

However, consistent with the rule provided under Act 194, its sale to the public in pharmacies was not allowed. The limits placed by the Act on the surgical termination of pregnancy did not permit such sales, as a woman seeking an MA had to be assisted by a doctor in an Obstetrics & Gynecology department from the time she took the drug to the time of the expulsion of the abortifacient materials (article 8).

However, more recent protocols stipulate that MAs can take place in a day hospital setting or through telemedicine, depending on the specific case and the treating physician's assessment.

MA is recommended by the WHO as a safe and effective pregnancy termination method in the first trimester. From a feminist perspective, it is a non-medicalized, self-managed, emancipating procedure that allows individuals seeking an abortion to have more control over their reproductive choices than they would when undergoing a surgical procedure.

Thus, this procedure is used much less frequently in Italy than in most other European countries.[26]

From this point of view, the use of complex and unnecessary methods appears to have a disincentivizing and punitive function: abortion must remain a complicated, painful and psychologically traumatic procedure to discourage its use and leave an indelible mark on the memory of those women who have decided not to carry their pregnancy to term, thereby perpetuating social repugnance.

In Italy, the costs of VTP are – in theory – covered by the National Health Public System (SSN *Sistema Sanitario Nazionale*), and can obviously vary depending on the procedure chosen, the specific case, the time and stage of the pregnancy, and the woman's health. Nonetheless, the economic costs of abortion represent a burden for the SSN and, ultimately, for taxpayers. It should therefore be emphasized that medical abortions cost far less than surgical interventions in terms of money, time and the structural expenses of hospitals, including the services of medical and paramedical personnel.

The National Health Service bears the costs of both medical abortions and surgery. There are, however, expenses to be borne such as the co-payment for a blood test (between €15 and €35) and any medications that are prescribed after the procedure, such as painkillers.

In private, fee-paying facilities, the price for a voluntary termination of pregnancy ranges from €400 to €2,000 (without complications). The variability in costs is because each method is priced differently. The price depends on both the method and the week of pregnancy[27]. Vacuum suction is the most widely used method. Since sedation or anesthesia is required in this method, the price will be different from a pharmacological termination.

[26] Source M. Della Giusta, M. L. Di Tommaso, C. Muratori, *Aborto, un diritto negato* at <https://www.lavoce.info/archives/96608/aborto-un-diritto-negato/>.

[27] See <https://www.profemina.org/it-it/aborto/costi-di-un-aborto-in-italia>.

Both methods are possible within the legal deadline for an abortion. As mentioned above, since pharmacological abortion is no longer possible as from a certain week of pregnancy, the price will be higher.

III.1 EMERGENCY CONTRACEPTION

Emergency contraceptives include the so-called 'morning-after pill' and the 'five-day-after pill'; these are tablets with hormonal content, based on levonorgestrel and ulipristal acetate, respectively, which must be taken within 72 or 120 hours after any sexual intercourse considered at risk in order to prevent an unwanted pregnancy.
The sale of the 'morning-after pill' was authorized by the Ministry of Health in 2000[28] as part of an EU 'mutual recognition' procedure started by France the previous year.
Reactions from Catholic and pro-life associations were immediate: the *Accademia Pontificia per la Vita* urged all health professionals to refrain from prescribing and selling the drug[29].
However, scientific and medical arguments that such medicine is not abortifacient, but contraceptive, have prevailed in the public discourse. Thus, in a leading case in 2001, the Lazio Regional Administrative Court (TAR)[30] ruled out including it among abortifacient methods and, rejecting the arguments of the plaintiffs (*Movimento Italiano per la Vita* and the *Forum delle Associazioni Familiari*), held that the provisions of Act 194 were not applicable for the purposes of prescribing and administering the drug Norlevo. Moreover, the Regional Administrative Court ordered that the drug's leaflet be modified and supplemented to ensure the informed consent of the woman, who has the right to choose - provided she is fully aware of its effects - whether to take an emergency contraceptive.
The TAR's approach, with different legal reasoning from the one used in cases on voluntary abortion, assumes the scientific impossibility of ascertaining conception within days of any intercourse considered a 'pregnancy risk' and makes any possible gestation a 'private' matter[31]. Thus, it is the woman's sole responsibility to identify if and when a life should be considered worthy of protection and to decide whether or not to take emergency contraception.
However, it has taken about fifteen years since this ruling of the TAR, many scientific studies, manifestations of public opinion in various forms and articles of legal and medical scholars for AIFA[32] to gradually abolish the requirement for a prescription to be able to

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[28] Cfr. Decreto AIC/UAC, *Autorizzazione all'immissione in commercio della specialità medicinale per uso umano 'Norlevo'*, 2000, 510, available at <https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2000-10-11&atto.codiceRedazionale=00A13060&elenco30giorni=false>.
[29] See<https://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_20001031_pillolagiorno-dopo_it.html>.
[30] TAR Lazio, 2 July 2001 no. 8465, available at <https://dejure.it/#/home>.
[31] B. Duden, *Der Frauenleib als öffentlicher Ort. Vom Mißbrauch des Begriffs Leben*, in *Luchterhand Literaturverlag GmbH*, Hamburg-Zürich, 1991, trad.it., *Il corpo della donna come luogo pubblico. Sull'abuso del concetto di vita*, Torino, Bollati Boringhieri, 1994.
[32] The Italian Medicines Agency - AIFA - is a public body operating according to the principles of autonomy, transparency and efficiency, which guarantees access to medicines and their safe and appropriate use as a health protection instrument. For more details see <https://www.aifa.gov.it/en/l-agenzia>.

purchase emergency contraceptives: first for adult women only in 2015[33] and since 2020[34] for minors, even if only with regard to 'Ellaone', also known as the 'five-day-after pill'.
There have been other cases in which prolife movements (such as the *Centro Studi Rosario Livatino*, the *Movimento Italiano per la Vita*, the *Comunità Papa Giovanni XXIII*, the *Associazione Medici Cattolici Italiani*, the *Osservatorio Parlamentare 'Vera Lex?'*, the *Associazione Pro Vita e Famiglia Onlus* et al.) have insisted that emergency contraception may result in a possible anti-implantation effect and that the drug should be classified as an abortifacient method[35].
In 2021, they requested the Lazio Regional Administrative Court to annul AIFA's Order of 8 October 2020, which had provided for the elimination of the prescription requirement for 'Ellaone' even for minors. The court, rightly, found that the contraceptive drug's anti-implantation and abortifacient effect was not sufficiently proven and ruled against the appeal.
Today we can appreciate an evolution in the use of emergency contraception that has overcome initial resistance, supported by reasons of conscientious objection by pharmacists, to which we will return in section 6.
Here, on the other hand, it is important to note that the abolition of the prescription requirement for underage women, albeit limited only to the so-called 'five-day-after pill', should also be read positively as a mean of improving their sexual and reproductive autonomy, as shown by the above-mentioned Ministerial report, and led to a sharp decrease in the use of abortion by underage women. This was in response to a phenomenon that had already emerged from a 2017 ISTAT study regarding the sexual habits of the very young; these were seen to have a tendency to undergo unwanted pregnancies and subsequent abortions due to casual relationships, and the ability to "learn" from such experiences and straighten themselves out[36].
After this overview on the general legal framework, this chapter will focus on some collateral elements and on some specific contrasting and concurring rights – other than the traditional ones (the fetus' right to life and the father's right to parenthood or family life) - which can encourage or discourage the access to abortion.

IV. PRO-CHOICE AND PRO-LIFE MOVEMENTS. ADVERTISING CAMPAIGNS AND FREEDOM OF SPEECH AND PROPAGANDA.

The margins of a woman's right to information about available abortion services and the limits on freedom of expression and assembly in the case of ideologically oriented public demonstrations are part of the public discourse on abortion and the debate about whether a woman has the right to decide on her own pregnancy.
One issue that has raised a fair amount of attention even in recent times, at the level of law and public opinion, concerns the extent of the limits of freedom of expression and

[33] AIFA, 21 April 2015, available at <https://www.gazzettaufficiale.it/eli/id/2015/05/08/15A03360/sg>.
[34] AIFA, 8 October 2020, available at < https://www.aifa.gov.it/documents/20142/1134592/2020.10.10_Det-DG-998-2020_modifica_regime_fornitura_ELLAONE_08.10.20.pdf>.
[35] TAR Lazio, 4 June 2021, no. 6657, available at <https://dejure.it/#/home>.
[36] Cfr., *Verso i 40 anni della legge sull'aborto*, annex to *Relazione ministeriale sull'attuazione della legge n. 194/1978 dell'anno 2017*, available at <https://www.salute.gov.it/imgs/C_17_pubblicazioni_2686_allegato.pdf>.

religious freedom with reference to public posters bearing provocative images or content regarding abortion or conscientious objection. From this point of view, the possibility of restricting or prohibiting the dissemination of billboards is an interesting test case for challenging the resilience of the instruments put in place to safeguard the democratic pluralism on which the Constitution is based.

In this context, this section aims to investigate very briefly the extent of freedom of expression and its limits, with specific reference to some recent cases concerning openly one-sided posters affixed in numerous Italian cities, which have inevitably raised significant debate in political circles and in civil society and which, in some circumstances, have even come to the attention of the courts.

A recent anti-abortion billboard, featuring a black-and-white picture of the late movie director Pier Paolo Pasolini, declared: "I am against abortion". The use of Pasolini — an avowedly progressive, gay man — has been strongly contested.

Another billboard we are referring to was signed *Pro Vita*, and included wording such as: 'Would you ever take poison? Stop the RU486 abortion pill, it puts the life and health of the woman at risk and kills the child in the womb'. It was accompanied by an image of a woman who dies after taking a bite of a red apple.

This poster, which appears to show a contemporary Snow White or Eve guilty of original sin, was scrutinized by the Emilia Romagna TAR[37], which had ruled on a case between the Municipality of Rimini and some associations who were the promoters of the advertising campaign.

From a constitutional point of view, what are the limits to the freedom of expression of anti-abortionists? Currently, under article 21 of the Constitution, all individuals have the right to freely express their thoughts in speech, writing or any other form of communication[38].

However, no principle or right recognized by the Constitution (not even the fundamental right to health) can be considered absolute and paramount, since – as the Constitutional Court has repeatedly stated – all 'the fundamental rights protected by the Constitution are mutually integrated' and are therefore subject to being balanced with other rights.

In particular, the point on which the TAR insists is not so much about the ideological character of the messages conveyed through the poster prohibited by a Municipal order, but rather their untruthful content. With reference to the billboard's content, the TAR highlights that it expressly equates a drug (the RU486 abortion pill) with a poison, stating that it poses risks to women's health. According to the judge, the poster's content is 'objectively untrue and likely to misleadingly and deceptively affect' the use of a drug approved by the competent national authorities.

A similar solution was also reached by the TAR Lazio, Rome[39], with reference to the advertising campaign bearing the following message: 'abortion is the leading cause of femicide in the world'. The judge recognized a broad discretionary power in the hands of

[37] TAR Emilia-Romagna, 26 October 2022 no. 845, available at <https://dejure.it/#/home>.

[38] An official translation of the Italian Constitution is available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

[39] TAR Lazio – Roma, 12 March 2022 no. 12394, available at <https://dejure.it/#/home>.

the municipal administration, which must assess 'in light of the historical context of reference and in the context of the various interests at stake, including those of constitutional relevance, whether or not the content of the advertising message is, for what is relevant here, respectful of individual freedoms or civil rights.' On the merits, the Regional Administrative Court found that the advertising message 'does not, in fact, appear to be respectful of individual freedom and the woman's right of self-determination to have an abortion, which have a constitutional basis [...]'. The order issued by the Municipality against the flyposting was therefore considered lawful by the Court, and the appeal was dismissed.

In particular, the Lazio Regional Administrative Court expressly recalled article 12-bis of "Municipal Regulations on the Display of Advertising and Public Admissions" of the Municipality of Rome, which states that 'it is prohibited to display advertising whose content is detrimental to respect for individual freedoms, civil and political rights, religious beliefs, ethnicity, sexual orientation and gender identity, and physical and mental abilities'.

Along these lines, to complete the analysis of the limits on the freedom of expression of thought related to abortion and health services, we can see how the public authorities bear the burden of verifying the content of information about a health treatment regulated by state law within the essential levels of services. This control is aimed, of course, at verifying the truthfulness of the messages and protecting the health of people who might benefit from that service.

From a constitutional perspective, the ban on displaying these posters can be justified by article 21 of the Constitution, which sets forth the limits to the freedom of expression of anti-abortionists.

Traditionally, the freedom of expression of thought is subject to two types of limits provided for by the last paragraph of article 21 of the Constitution: good morals (a concept taken from criminal law, which is understood as a common sense of public decency based on the average sentiments of the community); or limits drawn from the systematic reading of the constitutional text.

Of particular interest here are the limits of the constitutional public order, which, according to the Constitutional Court, must be protected to ensure the conservation of those values that every State must guarantee to allow for the effective enjoyment of inviolable human rights.

Going back to the Pro Vita posters, associating poison with the RU486 abortion pill, conjured by the image of a woman who feels sick after taking a bite of a poisoned apple, or associating abortion (legal in Italy) with feminicide (illegal and criminally prosecuted) gives a false message that is particularly violent and harmful to the dignity of women.

As mifepristone, the active ingredient of the abortion pill, has been used for over 20 years in numerous countries, and is a well-tested and safe drug authorized by WHO, EMA and AIFA, it certainly is not a poison. Furthermore, it considerably reduces all the risks that the voluntary surgical termination of pregnancy necessarily entails. As regards the second poster, the SSN is not a criminal organization paying killers to commit mass feminicide. No other comments are needed.

Both posters impart an anti-abortion propaganda message, but they appear dangerous because they convey mistaken ideas through falsehoods; in the first case, this could lead

less informed women to avoid the option of pharmacological abortion and to prefer surgical abortion, with additional risks to their health; in the second case, to decide not to have an abortion because of the criminal stigma attached to it, which could impact doctors and health personnel (conscientious objection) or women worried for their lives.
The spread of the false message 'RU486 = poison', abortion = feminicide could, theoretically, even lead to distrust of the institutions responsible for the protection of public health, which could have a direct impact on public order and safety. Indeed, a poorly informed citizen could become alarmed and even protest against a state that administers deadly poison to pregnant women or plans and organizes the practice of feminicide.
While *Pro Vita* and the other anti-abortion associations have every right to express their opinion in the public space, there are constitutional and legal limits that must be respected. While it is legitimate to carry out an anti-abortion campaign, as the principle of secularism protects the pluralism of ideas in the public space,[40] such a campaign may not spread false and dangerous messages that threaten health or other "individual freedoms, civil and political rights, religious beliefs, ethnicity, sexual orientation and gender identity, and physical and mental abilities."

IV.1 FREEDOM OF THOUGHT, RELIGIOUS BELIEFS AND ANTI-CONSCIENTIOUS OBJECTION PROPAGANDA

With regard to religious faith and beliefs, freedom of expression and speech, on the one hand, must be balanced against freedom of thought and conscience, on the other. On these issues, we would like to mention the billboard campaign promoted by the *Unione degli Atei e degli Agnostici Razionalisti* (UAAR) on the conscientious objection of doctors and health personnel. Unlike the case concerning the poster against abortion, in which freedom of conscience and religion had only been invoked by the plaintiff association but was not considered legally relevant by the Tribunal, the information campaign proposed by the UAAR offers an additional perspective.
The City of Genoa had, in fact, imposed the modification of the contents of the image on an advertising poster depicting a two-part cartoon, which juxtaposed (with different chromatic gradations) the bust of a doctor (identified by scrubs and stethoscope) and that of a Christian minister (identified by cassock and crucifix), with the inscription, "Head or tails? Don't rely on chance. Ask your doctor now if he practices any form of conscientious objection."
According to the local government, such a poster infringed on the individual freedom of conscience and religious freedom. On the other hand, the UAAR argued in court the inappropriateness of the substantive control carried out by the municipality and the consequent infringement of freedom of expression of thought.
Although it was not expressly stated in the disputed poster, the reference would seem to be to the right provided by article 9 of Act no. 194 which, as will be seen in section 5, has generated a long-lasting debate that is still ongoing.

[40] S. Rodotà, *Perché laico*, *cit.*, pp. 22-23.

According to the court of first instance[41], the juxtaposition between the exercise of conscientious objection and the Catholic religion, suggested through the depiction of the cassock and crucifix, is not such as to infringe on the religious freedom of objecting physicians or to generate hatred of the Catholic religion. It merely juxtaposes the religious symbol 'with the orientation traditionally expressed by the Catholic religion' on VTP and suggests the 'necessary deliberation' in the choice of doctor by a woman wanting such treatment. In addition to the poster, the information campaign included other images with more detailed phrases and untruthful content, for which the judge adopted a strict approach, upholding the rejection opposed by the city administration.

The *Consiglio di Stato* (the court of last resort in the administrative-public law jurisdiction)[42], on the other hand, decided in favor of the discriminatory nature of the advertising poster banned by the Municipality of Genoa, since it 'appears to indiscriminately offend the religious or ethical sentiment' of doctors who opt for conscientious objection, in accordance with the provisions of Act 194. The Consiglio di Stato's pronouncement seems at times to go perhaps too far in assessing the merits of the issue, going on to identify a series of reasons that aim to demonstrate the discriminatory nature of the campaign[43].

One aspect to highlight lies in the choice to base discrimination on the Manichean opposition between two options. In fact, in the opinion of the Court, the position of a non-objector doctor and an objector doctor are equivalent for the legal system, and it is not therefore permissible for one to be treated in negative terms with respect to the other. In our opinion, willingness to perform a health care service and conscientious objection should not be considered equal merely because both are provided for by law. Instead, as we shall see in section 6, between the two there is a relationship of rule (providing a health care service) and exception (shirking one's professional duty for reasons of conscience).

According to the Court, since the UAAR campaign must simplify the message, it wishes to convey in order for it to be effective, it ends up equating conscientious objection to the Catholic faith, making the same mistake that makes the *Consiglio di Stato*'s approach objectionable. In this regard, the judges noted that the image 'appears to deny autonomous dignity to the objection moved by reasons that are not Christian but simply ethical or of other religious faith'[44]. The billboard would, therefore, strike at the religious dimension and individual ethical convictions of objector doctors. According to the Court, since 'albeit legitimate criticism' of such a professional choice, it exceeds the limits of reasonableness and proportionality, going so far as to make assessments 'detrimental to the moral and professional dignity of others'[45]. Although, as noted above, the reason given is supportable, it is not so much because it does not take into account the other reasons that

[41] Tar Liguria, 4 March 2019 no. 174, available at <https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=tar_ge&nrg=201900084&nomeFile=201900174_20.html&subDir=Provvedimenti>.

[42] Consiglio di Stato, 9 April 2019 no. 2327, available at <https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=cds&nrg=201902093&nomeFile=201902327_23.html&subDir=Provvedimenti>.

[43] F. Cortese, *Laicità e giustizia amministrativa*, in A. Cardone-M. Croce (eds.), *30 anni di laicità dello Stato: fu vera gloria?,* Roma, 2021, pp. 228-229.

[44] Consiglio di Stato, 9 April 2019 no. 2327, cited.

[45] Ibidem.

may lead to conscientious objection, but rather because it does not consider that among the ranks of (numerically fewer) non-objecting physicians there may also be convincedly Catholic physicians, whose faith or sensibilities might be hurt or impacted by the poster in question[46]. The question remains open as to whether this argument can be said to be sufficient to restrict freedom of expression and consider the poster ban established by the municipality to be legitimate.

As noted above, when dealing with public posters, the requirement for the information conveyed to be truthful is not only because the termination of pregnancy is a health service regulated by law, but also (inevitably) due to the "non-dynamic" nature of the criticism expressed in the poster. By this, we refer to the fact that, since it is not possible to refute or react to what is expressed in a poster - unlike in a public debate - such advertising campaigns must not exceed the content necessary 'for the public interest in broad and correct information'[47].

The rule of judgment must remain anchored in respect for pluralism, which is the essence of the constitutional structure of our system. On the one hand, allowing expressions that are discriminatory or detrimental to the necessary protection due to the different moral and value positions accepted by the legal system entails an excessive expansion of freedom of thought that unduly overwhelms other constitutionally relevant rights, such as freedom of conscience and religion. On the other hand, the tenor of the words and images in dispute appears to be in a gray area in which it is hard to detect the "clearly" discriminatory character of the campaign.

To ensure the mutual space between potentially conflicting rights is maintained, it is necessary and inevitable to parameterize the assessment from time to time to the specifics of the concrete case, since it is not possible to limit the mutual extension of these rights in the abstract. Therefore, the role of the courts is crucial in interpreting changing social values and sensitivities, deciding 'within the law' and respecting the composite and pluralistic social body.

V. Welfare instruments and procedure to ensure informed consent to treatment.

Drawing the lines of intersection between the legal positions that come into play in the field of the VTP and the right to information is not straightforward and several distinctions need to be made.

We can distinguish, firstly, between an active and passive dimension of the right, respectively connoted by giving and receiving information about abortion services; within the passive dimension, two further positive and/or negative sub-dimensions, consisting, respectively, of wanting to be informed or refusing to receive information. All these dimensions are relevant when a woman accesses the VTP procedure, as a health treatment regulated by the system, and becomes part of the care relationship together with her physicians under the Abortion Act.

[46] S. Rodotà, *Perché laico,* Roma-Bari, 2010, p. 156, 189 at p. 197.
[47] Ibidem.

The fact that the Abortion Act places the VTP within the sphere of health treatments guaranteed by the public facilities of the National Health Service and falling within the essential levels of services, means that the duty to inform also applies to physicians under Act no. 219/2017[48] on the "health caring relationship".

On the other hand, precisely in line with the provisions of the regulations, a woman who nevertheless consents to the treatment is also granted a right to refuse all or part of the information and to rely on her caregivers. With specific regard to the termination of pregnancy, however, the procedures provided for by Act no. 194 and, especially, the contents of the interview between the woman and the doctor at the counseling center (or her private doctor) at the time of the request for termination of pregnancy seem to leave a narrower margin for the right to refuse information. From this point of view, however, it is worth pointing out that the phrase "with respect for the dignity" of the woman, repeated twice in the text of article 5 of the Abortion Act, suggests that the appropriate ways to respect a possible refusal of certain information profiles that may hurt or affect the woman's dignity[49] are to be found in the realm of the communication between the woman and the doctor.

In other words, it is now a matter of offering a reading of the regulations on the interruption of pregnancy, from the perspective of the law that deals with informed consent and the relationship of care, to verify how consistent and compatible the regulatory framework of 1978 is today with the 2017 Act.

The first profile to be analyzed from this perspective consists of the interview that the woman must have with the doctor at the counseling center or with her private gynecologist, when she decides to request a termination. The reference norm is represented by article 5 of Act no. 194, which has some interesting points of contact with the provisions of Act no. 219 on building the treatment relationship.

The information profile of the interview is set out in the 1978 legislature: the counseling center or social health facility to which the woman is referred has the burden of examining with her the reasons for her decision, informing her about her rights as a worker and a mother, and offering possible solutions to the proposed problems.

Although the interview has been seen by some as excessively invasive of the woman's freedom of choice and as potentially aimed at directing her decision, due to the high risk of interference with a deliberative pathway that is by its very nature highly dramatic, it is interesting to note how the above-mentioned provision repeatedly recalls the physician's duty to respect the woman's dignity, confidentiality and freedom.

Respect for the person's dignity and self-determination is the intrinsic foundation of the treatment relationship which, according to article 1 of Act no. 219, is based on 'informed consent, in which the patient's decision-making autonomy and the physician's competence, professional autonomy and responsibility meet'.

From this point of view, moreover, the combination of the two norms makes it possible to remove from the field those interpretations that see the interview between the woman

[48] The Act is called *Norme in materia di consenso informato e di disposizioni anticipate di trattamento* and is available at <https://www.gazzettaufficiale.it/eli/id/2018/1/16/18G00006/sg>.

[49] L. Busatta, *Libero mercato delle idee e diritto alla verità: sui limiti della libera manifestazione del pensiero in materia di aborto*, in *BioLaw Journal, Special Issue*, 2023, 1, pp. 280-281.

and the doctor as a possible tool to divert the patient from the decision and to directly condition her will. Under article 1, paragraph 3, Act no. 219, the physician must inform the person about the diagnosis, prognosis, benefits and risks of the proposed treatment, as well as about possible alternatives and the consequences of refusal. Combining this provision with those in Act no. 194 implies two possible outcomes:

a) the woman is informed, during the interview or later, i.e., when she goes to the authorized facility to obtain the VTP, about the type of abortion procedures available and the one most suitable for her situation and is offered the opportunity to choose the one she feels is most appropriate with respect to her feelings, while following the doctor's advice.

b) the woman may refuse to receive such information and will, therefore, rely entirely on the doctor.

On the issue of the information provided to pregnant women, a measure allowing anti-abortion (pro-life) associations to operate within family counseling centers and cooperate in the information procedure has recently been approved in both the Chamber of Deputies and the Senate. The measure has raised a great deal of criticism, even though the right to abortion is back on the European political agenda with a Parliament resolution[50].

Pro-choice activists, in fact, have taken to the streets, as this is an attempt to attack Act 194, albeit not head-on. Since its election in September 2022, Giorgia Meloni's right-wing-led government has never openly challenged the 194, as demanded by the pro-life and traditional family advocacy groups that supported it. In particular, the recent regulatory intervention was justified by the government as being aimed at enabling women to have all the information they need to choose freely and, therefore, as an instrument that gives full implementation to Act no. 194 and the right to informed consent.

Specifically, article 1 of the Act states that "The State, regions and local authorities shall promote and develop social and health services, as well as other necessary initiatives to prevent abortion from being used for the purpose of birth control."

Article 3, on the other hand, states that the responsibilities of counseling centers include helping "overcome the causes that could induce the woman to interrupt her pregnancy" and the possibility of making use of voluntary associations that "can also help with difficulties after birth."

Some people feel that this measure represents an attempt to Act no. 194.

Actually, the Act provides for the social protection of motherhood, considering abortion as an exception to be prevented as much as possible, for example through state or regional measures. However, the institutionalization of the presence of these associations in the health and welfare system increasingly reduces the room for a woman's self-determination, as has occurred in some consultation centers in Piedmont and other right-wing governed regions.

[50] The European Parliament's position has strong value politically and on the level of symbolic communication, but the resolution is non-binding and the inclusion of the right to abortion in the EU's Charter of Fundamental Rights would presuppose the unanimous vote of all member states. However, there is no homogeneous sentiment among member states, some of whom would likely veto efforts to declare it a right.

The personnel of these associations, including those serving at counseling centers, are volunteers and are not always adequately qualified.
According to part of the legal doctrine, this is a tool to implement the doctor's duty to inform women about their rights as workers and mothers, and about the social interventions available to them, as expressly provided in article 5, paragraph 2. On the one hand, the provisions of Act no. 194 are to be considered as a special rule with respect to the rules of Act no. 219 which, as far as informed consent is concerned, are obviously of a general nature; on the other hand, however, the duty to inform described here goes beyond the medical indications listed in article 1, paragraph 3 of Act no. 219.
In our opinion, the positive obligation of the state, the counseling center and the physician to guarantee informed consent to the woman concerns the health care provision, the possible alternatives and their risks, and has nothing to do with the very personal choice about whether to carry on or terminate the pregnancy. The choice is solely and exclusively the woman's, so much so that Act no. 194 and Act no. 219 allow for the possibility of involving the father of the fetus in the health care relationship if - and only if - the woman so desires.

VI. CONSCIENTIOUS OBJECTOR DOCTOR'S RIGHT.

Together with 22 other EU member states, Italy gives its doctors the right to abstain from performing abortions. In fact, since the termination of pregnancy was conceived by the legislature not only as a choice connected to women's freedom of self-determination, but also as a health service guaranteed by the SSN, as mentioned above, public facilities are obliged to guarantee the service, which is also reflected in the employment relationship of the doctor (and health personnel) involved.
While the Act expressly provides for the institution of conscientious objection, as a way of avoiding disobedience to a normative precept which turns out to be morally untenable for the individual, the same is not true for public facilities, which are responsible, by law, for guaranteeing the service.
According to the provisions of article 9, paragraph 4, of the Act, 'Authorized hospitals and nursing homes are obliged in any case to ensure the completion of the procedures [...].' A health care facility that is unable to cope with a woman's request for a VTP determines a failure to fulfill a regulatory obligation but also legitimizes and urges the identification of organizational and staff recruitment strategies useful for filling in any gaps.
Some indications have come over the years from case law, which rejected the appeal against the Lazio Region decree on the reorganization of family counseling centers, which provided that conscientious objection does not apply to the staff on duty who are not directly engaged in the abortion procedure[51], and stated that conscientious objection does not also cover post-abortion care[52].

[51] Tar Lazio, 2 August 2016 no. 8990, available at < https://www.camera.it/temiap/2018/12/18/OCD177-3856.pdf>
[52] Corte di Cassazione, 27 November 2012 no. 14979, available at <https://www.biodiritto.org/ocmultibinary/download/2526/24074/7/9b4ba00d7a8067879809ad3873ac5962.pdf/file/14979_2013_Cass.pdf>.

Other indications come from article 22 of the Code of Medical Ethics which, while recognizing the physician's right to refuse services contrary to his or her conscience, nevertheless stipulates that he or she must provide 'all useful information and clarification to enable the use of the service.' Concerning the voluntary interruption of pregnancy, recalling Act no. 194, the Code specifies that conscientious objection 'does not exempt the physician from the obligations and duties inherent in the relationship of care towards the woman' (article 43).

Thus, the objecting physician is professionally obliged to provide the woman with all useful information to enable her to benefit from the service and cannot in any way exempt him/herself from the duties related to the care relationship.

However, frequent misapplication of the provision has created a challenging situation whereby many women are essentially barred from accessing the services they need to obtain an abortion.

At a declamatory level, article 9 of Act no. 194 has opted for a 'compatibility rule'[53], which should have allowed for the coexistence of different values without delegitimizing any of them. This rule is more in keeping with a pluralist and secular society since, being 'the fruit of a relational perspective', it excludes the opportunity to refer to a preestablished hierarchy of values and intervenes in a situation of conflict without resorting to evaluations based on absolute criteria. At the operational level, since the enactment of Act no. 194, there have been strong attempts to delegitimize the right to access VTP; such attempts have undergone an expansion beyond the normative scope of conscientious objection, which article 9 limits both in an objective and subjective sense.

In an objective sense, the objection is limited both because it can only be opposed to the performance of procedures and activities specifically and necessarily directed at bringing about the termination of pregnancy, and not also to assistance 'prior to and consequent to the intervention' (article 9, paragraph 3), and because, in any case, it is intended to be withdrawn if the intervention of health care providers 'is indispensable to save the life of a woman in imminent danger' (article 9, paragraph 5).

In a subjective sense, on the other hand, conscientious objection concerns only health care and auxiliary personnel: this formulation has been sharply criticized by pro-life, pro-objection and freedom of conscience positions [54] since the entering in force of the Act.

Anti-abortion activists defend the right of all medical staff to object to any kind of abortion care, including pharmacists, who may even refuse to provide women with emergency contraceptives such as the morning-after pill. Such arguments are contested by pro-abortion campaigners, who point out that article 9 only exonerates staff who are 'directly involved in the termination of a pregnancy' and not those assisting 'before and after the event'.

Moreover, with reference to the day-after-pill, the anti-implantation effect is currently excluded, but even before the dissemination of this scientific acknowledgement, instances of objections by pharmacists, in our opinion, could not be considered a hypothesis of conscientious objection *secundum legem*.

[53] S. Rodotà, *Repertorio di fine secolo*, Roma- Bari, Laterza, 1999.
[54] A.C. Jemolo, *Lezioni di diritto ecclesiastico*, Milano, 1979, p. 28, no. 1.

If one agrees with this perspective, that is, if one recognizes that the taking of an emergency contraceptive presupposes the evaluation, but above all, the action of the woman concerned, it follows that, between the sale to the woman of the so-called 'morning-after pill' by the pharmacist and the possible interruption of the pregnancy, there cannot be a direct and necessary causal link such as to justify the pharmacist's conscientious objection.

Anyone who claims otherwise is effectively neutralizing the active conduct of a woman who decides, independently, to purchase, but more importantly, to take the emergency contraceptive. The 'repugnant transaction' here is her own business.

To this it should be added that, if the objector pharmacist's intent was not to avoid an event he or she felt was ethically problematic, but rather to obstruct its very occurrence; if, therefore, denying the emergency contraceptive represented an attempt to defend human life from its inception, such action would be highly nonsensical. Having ascertained a woman's desire to prevent the onset of gestation by means of an emergency contraceptive, the failure to access the drug could encourage the establishment of an unwanted pregnancy and, therefore, increase the chances of the woman resorting to abortion at a stage of development much later in prenatal life.

On this topic, the Court of Appeal of Trieste[55] found a pharmacist guilty of 'nonfeasance' under article 328 of the Criminal Code. The pharmacist had refused to provide a woman with the 'Norlevo' pill, despite her having a doctor's prescription (the facts date from before 2014).

In our opinion, conscientious objection constitutes not the rule but the exception to the rule itself. Thus, whenever a conscientious objector, such as the pharmacist in this case, refuses a request for the sale of an emergency contraceptive with the explicit aim of hindering its intake, and not simply to avoid an event that he or she deems ethically controversial, there is an ideological misuse of conscientious objection. Objection is physiologically instrumental, even when *contra legem,* only to the guarantee of freedom of conscience and not to the defense of other interests, such as the right to life of the potential unborn child.

Conscientious objection protects the conscientious objector's freedom of conscience, but when it takes the form of obstructing the achievement of the goal protected by the law itself it is pathological.

Moreover, such extensions of the scope of the right to object are contrary to article 10 of the Nice Charter, which recognizes the right to conscientious objection 'in accordance with the national laws governing the exercise thereof', requiring exegetes to interpret the institution narrowly.

On the other hand, it is precisely the abuse of conscientious objection that has led to today's substantial voiding of women's right to abortion in several Italian regions: the practice of a great many public hospitals of not adequately guaranteeing non-objecting health personnel frustrates the balancing of interests abstractly crystallized in Act no. 194.

Thus, the abuse of the right to conscientious objection ends up transforming, de facto, the legal rule of compatibility contained in article 9 into a rule of prevalence of the right of objection, which makes the dominant moral and religious conception its own to the detriment

[55] Court of Appeal of Trieste, 2 July 2018, available at <https://www.rivistaresponsabilitamedica.it/wp-content/uploads/2020/02/App-Trieste-2-luglio-2018.pdf>.

of two minorities (women and, in several respects, also non-objecting health personnel) and the principle of secularity of the State.

Indeed, as has been noted, extending conscientious objection in the most varied directions corresponds to a very clear political project. Not so much the liberation of the individual conscience, but rather the use of this instrument to replace the table of constitutional values with a different one, strictly dependent on adherence to a creed. This would not only result in a serious breach of constitutional legality but would lead to a dangerous rupture of the covenant between citizens, of which the Republic must remain the guarantor. Behind this use of conscientious objection there is a call for civil disobedience, which serves quite different purposes and which, in any case, is governed by principles and rules that make it differently demanding and onerous for those who practice it[56].

A lay and secular State cannot accept systemic conscientious objection without threatening and violating women's freedoms and health when seeking VTP and also the rights of non-objector doctors, as stated by The Council of Europe in 2016[57].

The case *CGIL v. Italy* was brought before the Court by a Union representative of "non-objector doctors", who was arguing that massive and systemic conscientious objection violated not only women's rights to access abortion and the non-discrimination principle (art. 11 CSE and art. E), but also the working rights of non-objecting health personnel (arts. 1-2-3 and 26).

This brings a new perspective to the legal debate and the need to provide adequate protection also for doctors and auxiliary personnel who do not raise conscientious objection and who ensure the implementation of Act 194: violation of the right to work, especially in terms of the division of duties and career prospects, for doctors who perform interventions.

It is evident that the institution of conscientious objection requires reflection about the limits of the authority provided by the Act to resolve ex ante a complex conflict between the individual moral dimension and professional activity[58].

It is indispensable to adjust the system to find a reasonable balance between women's right to health and health care professionals' freedom of conscience, with a view to guaranteeing the right to access medical treatment that is regulated and governed by a state law, on equal terms. Widespread adherence to conscientious objection by health professionals is at a very high national average (63.6%, see para 2), with peaks of up to 90 % in some regions. This is unacceptable and shows an obvious technique of weakening the normative bearing of Act 194 such as to lead, in some situations, to a real "sabotage" of the Act, consistent with moral unease and social stigma, referred to in Roth's theory of repugnant transaction on the market, but in blatant violation of women's rights.

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[56] S. Rodotà, *Perché laico*, Bari-Roma, 2009, p. 36.

[57] See <https://rm.coe.int/complaint-no-91-2013-confederazione-generale-italiana-del-lavoro-cgil-/1680483a69>.

[58] L. Busatta, *Nuove dimensioni del dibattito sull'interruzione volontaria di gravidanza, tra divieto di discriminazioni e diritto del lavoro,* in *DPCE*, available at <https://drive.google.com/file/d/0B-oQ7e3IykezX0VGeDR0eDZ4bmc/view?resourcekey=0-fxLO6i_rEQTseTOPM9tpZQ>.

Obviously, a woman's right arises when the law recognizes it and provides instruments for its enactment, so that at national level '(…) a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State'[59].

The State is obliged to perform positive actions to ensure procedural and institutional conditions to effectively enforce rights: 'While Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it'[60].

In other words, 'once the legislature decides to allow abortion, it must not structure its legal framework in way which would limit real possibilities to obtain it'[61]. On the contrary, it must ensure 'a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion'[62]. Otherwise, its actions would violate article 8 ECHR.

It is also possible to deduce a number of conditions that can ensure effective access to VTP services, which the Court defines as 'positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion'[63]: a) 'measures affecting fundamental human rights must be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence'[64]; b) the procedure must ensure that a woman has 'at least the possibility to be heard in person and to have her views considered'[65]; c) the decision must be formalized in a written document[66]; d) 'the procedures in place should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion'[67].

So, there is much that can be done on the concrete system and its organization in Italy, but guidelines are enough and there is no need to touch Act no. 194, jeopardizing the positive results it has brought.

De iure condendo, like all other health services, then, VTP must also be guaranteed a priori by licensed health facilities in all Italian regions. A real "variable geography" of the application of conscientious objection in the Italian Regions emerges from the data. This situation is barely tolerable under article E (non-discrimination) of the European Social Charter, according to which the enjoyment of the rights recognized therein 'must be

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[59] *A, B and C v Ireland [GC]* - 25579/05. Judgment 16.12.2010 [GC], para 249, available at <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-680%22]}>.

[60] *Tysiac v Poland*, no. 5410/03, European Court of Human Rights, Judgment of 20 March 2007, available at <https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-1952452-2061288%22]}>, para 113; and *A B C*, para 245; *Tysiac*, para 110.

[61] *Tysiac*, para 116.

[62] *R.R. v Poland*, no. 27617/04, European Court of Human Rights, Judgment of 26 May 2011, para 202, where the Court clarifies that 'if the domestic law allows for abortion in cases of foetal malformation, there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus' health is available to pregnant women'.

[63] *Tysiac*, para. 128.

[64] *Tysiac*, para. 117.

[65] Ibidem.

[66] Ibidem.

[67] *Tysiac*, para. 118.

guaranteed without any distinction based in particular on race, color, sex, language, religion, political or any other opinion, national ancestry or social origin, health, membership of a national minority, birth or any other situation'.

Yet women seeking abortions in Italy are faced with intersectional discrimination[68]. Firstly, the psychophysical health status of women who want to access an abortion procedure becomes limited compared to any other person - man or woman - who wants to access any other procedure offered by the National Health Service, for which conscientious objection is not provided.

Secondly, it is economic and territorial discrimination, since the lack of guaranteed non-objector health personnel in all Italian hospitals forces women to have to move from one hospital to another until they find a facility that can offer them abortion services. This creates a burden on women who do not have the financial resources to reach facilities that can provide the abortion service and is an unacceptable restriction on their right to health[69].

These different facets of discrimination are closely related and overlapping, since certain categories of women in Italy are allegedly subject to less favorable treatment with respect to access to health facilities that perform abortions, and this applies to gender, health status, territorial location and socioeconomic status: in essence, there is discrimination because women who fall into these vulnerable categories are denied effective access to abortion services, as a result of the failure of the competent authorities to take the necessary measures to compensate for the shortcomings in service provision caused by health care personnel who choose to exercise their right to conscientious objection.

VII. Reforming the law on abortion or on connected sensitive issues

In a country marked by a long-standing and deeply complex relationship toward abortion, matters could be muddied even further after recent political developments.

To make matters even more alarming for Italian pro-choice positions, the revocation of *Roe v. Wade* in the US has seemed to empower conservatives' fight against abortion rights. The reversing of *Roe* shows that no leading cases or statutes, however long-lasting and 'politically correct', are untouchable. Circulation and imitation phenomena[70], legal transplants[71] and strange convergences are very common among the legal systems belonging to the Western legal tradition: while the effects of the overturning of Roe may not necessarily impact Italian

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[68] One for all, K. Crenshaw, *Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, in *University of Chicago Legal Forum*, 1989, 139 at p. 167.

[69] S. Rodotà, *La vita e le regole. Tra diritto e non diritto*, Milano, 2006, p. 56.

[70] W. Twining, *Diffusion of law: a global perspective*, in *Journal of Legal Pluralism*, 2004, 49, 1, pp. 34-35. On legal formants and circulation of models in the Italian literature, see again R. Sacco, voce *Circolazione e mutazione dei modelli giuridici*, in *Digesto civ.*, vol. II, Torino, pp. 365 ff.

[71] A. Watson, *Legal Transplants and law reform*, in *L.Q.*R., 1972, 92, pp. 79 ff.; Id., *Law and legal change*, in *Camb. L. J.*, 1978, 38, pp. 313 ff.; Id., *Legal change: sources of law and legal culture*, in *Un. Of Pennsylvania L. Rev.*, 1983, 131, pp. 1121 ff. For some criticism on Watson theory, see H. Kahn-Freund, *Book Review, Legal Transplants*, in *L.Q.*R., 1975, 91, pp. 292 ff.; U. Mattei, *Why the wind changed. Intellectual leadership in western law*, in *Am. J. Comp. Law*, 1994, 42 pp. 195 ff.; P. G. Monateri, *Black Gaius*, in *Hastings L.J.*, 2000, 51, 510 at p. 513.

legislation, it could make the overall social climate - where women are often shamed and denigrated for choosing to terminate a pregnancy - even more fraught.

Although the right of access to abortion is relatively recent in Italy, and protected by women's rights groups, the issue has become increasingly controversial in recent years, especially as the prohibition or restriction of abortion has become the goal of a well-funded international network, which is more present in the US, but has also spread to Italy and other European countries.

Heartbeat International is the largest anti-abortion organization in the United States and is believed to have played a significant role in promoting anti-abortion legislation in several American states. It has 60 offices around the world, including Italy.

Movimento per la Vita, the largest anti-abortion organization in Italy, is affiliated with Heartbeat International and has received stable funding from it since 2014.

Another model emulated by anti-abortion groups in Italy is Hungary, where in September 2022 Prime Minister Viktor Orban's government introduced a new Act requiring those seeking an abortion to listen to the fetus' heartbeat[72]. This was the first amendment to abortion laws in the country since 1992.

Although, as we have seen, there are some kinks in the implementation of Act no. 194, especially regarding procedures and effectiveness in accessing VTP within the first ninety days, the overall assessment of the Act continues to be positive. It has shown good resilience over the years, even before the Constitutional Court and even in the face of some enforcement difficulties.

Finally, experience gained in the pandemic has shown how attention to the shrewd organization of services, in a manner adherent to the Act's dictate and aimed at satisfying the rights of the individual, is the vehicle for ensuring the Act's effectiveness. The updating of the guidelines regarding pharmacological abortion and the reduction of hospitalization times have brought about a significant change in the provision of tools available to the health administration to ensure the application of the Abortion Act and to align the Italian discipline on the termination of pregnancy with the current state of medical knowledge. The data presented in the ministerial report for 2022 tentatively shows the impact of this change. The positive effect is attributable, paradoxically, to the pandemic, due to which health services have undergone a major revision[73]. Thanks in part are also due to guidance from the WHO and the European Union[74].

However, a reform of Act no. 194 at this historical moment could be very problematic because of the obvious polarizations in the fabric of civil society and the very heated positions in the political debate. The difficulty of finding compromise formulas would jeopardize the constitutional resilience of the Abortion Act, its effectiveness and the challenging balancing act between the fundamental rights analyzed here and guaranteed to date. Some pro-choice proposals insist on a medical curriculum that teaches reproductive

[72] See W. Strzyżyńska, *Hungary tightens abortion access with listen to 'foetal heartbeat' rule*, in *Washington Post*, 13 September 2022, available at <https://www.washingtonpost.com/world/2022/09/15/hungary-abortion-viktor-orban/>.

[73] See Ministry of Health, 4 August 2020, <https://www.salute.gov.it/imgs/C_17_pubblicazioni_3039_allegato.pdf>.

[74] T. Hervey-S. Sheldon, *Abortion by telemedicine in the European Union,* in *International Journal of Gynecology and Obstetrics*, 2019, 145, p. 125; R. Rubin, *Expanding Access to Medication Abortions*, in *JAMA*, 2022, 327, p. 112.

healthcare and on a reform of Act no. 194 to bring the limit up to 14 weeks. These are probably not the most important points to focus on.

Conversely, some Italian anti-abortion associations with ties to the United States have collected more than 100,000 signatures to force women who want an abortion to listen to the fetus' heartbeat before proceeding with the termination. *Pro Vita & Famiglia*, among the promoters of the initiative, would in fact like to amend the Act by introducing two additional steps before women can receive treatment. According to the association's demands, doctors performing an abortion would first have to show images of the fetus to the patient and then let her hear the heartbeat. The proposed reform is supported by 50 different associations.

On this issue, the American College for Obstetricians and Gynecologists (ACOG) has repeatedly stated that the term "fetal heartbeat" is not medically and scientifically accurate. It should be clarified that in the early stage of pregnancy - when abortion is allowed - the sound that is often mistaken for a heartbeat is produced by the ultrasound scanner used to observe the status of the pregnancy. As the analysis proposed so far has shown, the information given to women before obtaining their consent must be truthful, clear and scientifically valid. So, according to the ACOG, an Act which provides for informed consent after listening to the 'fetal heartbeat' would be contrary to the principles discussed in section 5.

Another Bill, no. 1238, proposes the adoption of embryos. The draft was put forward by Stefano Stefani, a leading figure in the right-wing populist League party, and its purpose is to 'identify the most effective ways, in terms of political choices, to prevent abortion as the primary objective of public health choices as well as to match the high number of unwanted pregnancies to the real desire of couples seeking to adopt'[75].

This is a clear attack on women's freedom of self-determination and on Act no. 194, through an attempt to recognize legal capacity for the fetus, which, however, is contrary to Constitutional Court ruling no. 27/1975.

Stefani has defended the measure, stating that the freedom of women to abort is not affected by his proposal, while opposition parties highlight that "the possibility of giving birth anonymously" and giving up the child for adoption already exists in Italy, and that Act no. 194 will be indirectly modified by the proposal[76]. Neither can this proposal be intended as a solution to solve the demographic crisis in Italy, where it could be more effective to boost the birth rate by increasing welfare instruments and policies for families, and longer paternity leave.

However, the children's rights group, *Amici dei Bambini* (Ai.Bi), which is accredited by the Italian state for intercountry adoption, supports the measure as a means of promoting children's right to life and preventing abortion[77], as it does not aim to replace the possibility of abortion with that of adoption at birth, but to expand women's freedom of choice with another alternative.

[75]The bill is available at
<https://www.parlamento.it/leg/14/BGT/Schede/Statistiche/Iniziativa/2001/ElencoDDLPerIniziativa_1_1_C.html>

[76]https://27esimaora.corriere.it/19_marzo_27/aborto-maria-edera-spadoni-cosi-si-cambia-indirettamente-194-a4fa8e7c-506a-11e9-bc24-e0a60cf19132.shtml

[77] See https://www.aibi.it/ita/adozione-del-concepito-aborto/

But if we read this proposal together with Bill no. 950[78] proposed by Senator Maurizio Gasparri, which seeks to give children legal rights from the moment of conception instead of from birth, we can be afraid of the wind that is blowing against women's reproductive self-determination and health and whose aim is to increase the moral unease and disapproval towards VTP.

VIII. CONCLUDING REMARKS

The analysis conducted here leads us to criticize the position according to which abortion appears to be more of a concession of the state than a woman's right. On a cultural and symbolic level, this means that women do not have full availability of their reproductive potential[79].

And in fact, the concrete application of Act no. 194 is subordinated to the behavior of a very small professional category with special technical skills (obstetricians and gynecologists) who can condition a woman's choice and health in no small measure: the higher the number of objectors, the greater difficulty a woman will have in accessing VTP.

On closer inspection, what in the recent past appeared to be the Achilles' heel of Italian legislation on abortion, and more generally on procreative choices, was to have constructed (and to continue to construct) the "legal situations" of the subjects involved - woman and fetus - starting from their fundamental rights to health under article 32 of the Constitution and to life under article 2 of the Constitution[80]. This trend exacerbates the elements of conflict not only between fetus and woman, but also - as seen above, with the recognition of conscientious objection - between health care personnel and women.

Yet these subjects are legally constructed as bearers of often opposing and conflicting subjective legal situations, rather than in a relational manner as would be required by the Constitution (article 31, para. 2), which protects motherhood as a relationship of interdependence, an indivisible whole [81].

The Constitutional Court, in Judgment no. 27/1975, does indeed subordinate the fetus' interest in being born to that of the woman's health, but it links the former to article 2 of the Constitution, and does not recognize the woman's procreative freedom as having any constitutional importance.

While these appear to be the limits of the medicalization of abortion and, therefore, of the moral repugnance of the market, in Roth's words, on the other hand, it is precisely the right to health that has proved to be a valuable pick in Europe in recent years for the protection of legal situations that have found protection overseas under the umbrella of privacy, as an expression of self-determination in the construction of one's personality, but have recently been overwhelmed, as Dobbs demonstrates.

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[78] See https://www.senato.it/leg/18/BGT/Schede/Ddliter/testi/50963_testi.htm

[79] M.R. Marella, *Le donne*, in L. Nivarra, *Gli anni Settanta del diritto privato*, Milano, 2008, pp. 353 ff.

[80] An official translation of the Italian Constitution in English is available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

[81] M.R. Marella, *Esercizi di biopolitica*, in *Riv. crit. dir. priv.*, 2004, 1, pp. 1 ff.

The position reached by Act no. 194 is not neutral, appearing to limit abortion, as shown by the mechanisms for access to VTP governed by articles 4 and 5. In these two provisions, in fact, a whole series of operational and institutional devices (family counseling centers, nursing homes, etc.) are put in place to at least neutralize the economic reasons that could plausibly induce a woman to have an abortion during the first three months of pregnancy. While this kind of approach to the issue may have been agreeable at the time of the enactment of the Act, it cannot be so today, 50 years later. There now seems to be a general consensus at European level in recognizing a woman's right to have an abortion freely during the first 3 to 5 months of pregnancy, as affirmed by the European Court of Human Rights[82].

Indeed, in the very structure of the Abortion Act, Italy regulates a sophisticated system of persuasion of pregnant women, which risks undermining their mental health and procreative self-determination. Thus, in an effort to bring about reform, the constitutional coverage of the right to abortion for women could be shifted under the freedom of self-determination and privacy argument[83], even if elsewhere such an approach, first proposed with Roe v. Wade and then confirmed and partly revised with Planned Parenthood of Southeastern Pennsylvania v. Casey, has been reversed by a conservative US Supreme Court.

Assuming that the law in the western legal tradition is an instrument to protect values and rights, to perpetuate moral repugnance or to embrace different new paradigms, in our conclusions we want to propose a 'secular and lay perspective' on the matter, according to Rodota's theories on sovereignty over the body and procreative rights, with regard to the possibility, partly demonstrated in the previous paragraphs, of improving the public debate by providing concrete information about the advantages in terms of efficiency of choices considered morally problematic.

Duden's observations were true in respect of some of the 'side effects' of the medicalization of pregnancy, which transformed gestation from a 'private matter' to a 'public affair', which needs permission to be performed, in the collective imagination. The criminalization of abortion developed from this point of view, as did the regulation of voluntary abortion later, once it was decriminalized.

Voluntary abortion is represented by Act no. 194 as an *extrema ratio*, a conflictual affair in which the interests of the fetus and those of the woman carrying the child concur, on an antagonistic, albeit logically unequal, plane.

It is worth noting at this point that we adhere to the idea that the position of otherness with respect to the maternal body, conferred on the fetus by the regulations on the voluntary interruption of pregnancy, has opened up the danger of a devaluation of the individual and personal involvement of the female body and experience in the generation of life, whose repercussions on the reproductive sphere of women, and on the related rights, appear as enduring as they are pervasive.

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[82] *R.R. v Poland, Application no. 27617/04*, European Court of Human Rights, Judgment of 26 May 2011, available at <https://hudoc.echr.coe.int/fre?i=001-104911>.

[83] G. Marini, *La giuridificazione della persona. Ideologie e tecniche nei diritti della personalità*, in *Riv. dir. civ.*, 2006, I, p. 359 ff.

During the analysis conducted here, we have spoken about different dimensions of freedom: information and consent, conscience, self-determination and self-reproductive determination.

The highly divisive subject of abortion has provided rich material from which to draw the contours of such freedoms, albeit with an awareness of the spatial-temporal relativity of each consideration. Indeed, as mentioned above, the necessary protection and promotion of pluralism in a democratic state under the rule of law and the rapid evolution of social sentiment that has accompanied the debate on reproductive rights, at least for the past fifty years, requires that every assessment be weighed in concrete terms and recalibrated in correspondence with the potential change in the value structures of the social structure.

Nevertheless, drawing some guidelines from the case law reviewed, it is possible to summarize the extent of freedom of expression of thought about abortion by distinguishing a prevalent and more extensive dimension pertaining to the duty to inform from the dimension concerning the mere dissemination of (even) ideologically oriented content. Although the subjects entitled to disseminate this information may have their doubts, there is no room for interpretation regarding the duty to ensure that the information provided is truthful and non-discriminatory. As for the narrower sphere of actual access to services, it is a necessary part of the professional duties of physicians and health care personnel to inform the woman fully, while respecting her dignity, about the nature of the treatment and every aspect necessary for the construction of informed consent.

Regarding the more ideologically oriented profiles, on the other hand, we have seen how the definition of limits to freedom of expression becomes delicate when the content to be disseminated is potentially detrimental to some people's dignity or sensibilities or is offensive or discriminatory. In such cases, the trend of the court's decision-making seems reasonable and can be summarized in the requirement that, despite being the expression of a particular viewpoint, any posters and pamphlets to be disseminated should not contain false or insinuating information. What emerges is the multidimensionality of freedom of expression and, especially, its dual nature as a right that is certainly individual (passively as well as actively), but also and above all relational.

Because of this relational feature, state institutions have the duty to remain vigilant in monitoring compliance with the identified constraints, to prevent the formation of dominant positions and to promote the free circulation and dissemination of ideas and concepts, protecting freedom of expression as the foundation of the democratic order[84].

However, the balance is more problematic when it collides with conscientious objection, and the outcome is pathological when objection is systemic.

The problem is that the right to abortion, purely and simply, does not exist or, at any rate, is a controversial issue.

The symbolic proposal to include access to abortion in the European Union's Charter of Fundamental Rights follows France's initiative to include the right in its Constitution, but

[84] Italian Constitutional Court, 17 April 1969 no. 84 available at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1969&numero=84>; Italian Constitutional Court 25 July 2019 no. 206, available at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2019&numero=206>.

the right to 'safe and legal abortion' has almost no chance of being included in the Charter: the traditionally opposed countries, such as Poland, Hungary and Malta, and probably now Italy as well, reject the idea of abortion being protected within the right to health.

From a reform perspective, which in our opinion is not desirable at the current political juncture, the legal redevelopment of the right in question is a crucial issue, as VTP is a field in which sexual difference produces a gendered right, specific to women with a strong relational component.

The wording 'right to abortion' may make this right appear to be an expression of a positive freedom consisting precisely of the freedom to have an abortion, while instead it is a negative freedom in that it allows a woman not to be forced to become a mother against her will. A *habeas corpus*, that is, the 'personal freedom' enshrined as inviolable in article 13 of the Constitution, comes into consideration[85]. It is a freedom from 'restrictions', such as precisely the legal compulsion or coercion to become a mother[86]. This is why the decision of motherhood reflects a woman's exclusive right, because the negative freedom not to become a mother, consisting of immunity from personal restraints or servitude, of which the right to abortion is a corollary, is complementary to a fundamental positive freedom: the right/power to beget and bring people into the world, which is a creative and constituent power of a pre- or meta-legal kind, being the reflection of a power inherent exclusively in gender difference[87].

This different configuration of a woman's right and freedom could also lead to a reconsideration of the scope of the right to conscientious objection, or rather, to ensure the effectiveness of women's access to abortion procedures.

[85] Under art. 13 of the Constitution: "Personal liberty is inviolable. No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void. Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished. The law shall establish the maximum duration of preventive detention".

[86] L. Ferrajoli, *Diritti fondamentali e bioetica. La questione dell'embrione*, in *Trattato di Biodiritto a cura di Rodotà e Zatti, Vol. I, Ambito e fonti del Biodiritto*, Milano, 2010, p. 248.

[87] L. Ferrajoli, *Il problema morale e il ruolo della legge*, in *Critica marxista*, 1995, p. 46.