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OBSERVATIONS FROM THE *ASSOCIAZIONE LUCA COSCIONI PER LA LIBERTÀ DI RICERCA SCIENTIFICA*

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OBSERVATIONS
ASSOCIATION LUCA COSCIONI FOR THE FREEDOM IN SCIENTIFIC RESEARCH

PROCEEDING INTERNATIONAL PLANNED PARENTHOOD FEDERATION – EUROPEAN NETWORK (IPPF EN) COMPLAINT N. 87/2012

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1. Observations on abortion and moral objection in Italy.

1.1. Abortion in Italy.

Before the 194/1978 came into force, the discipline related to abortion was contained in the penal code, title X, title II, art. 545 and ss. This discipline repressed every form of abortion(both from a consenting woman or a non-consenting one) as an offence related to the damage of integrity and health of the birth (expressing an authoritarian mark). The operative side of the norm was expressing quite an archaic and repressive view connected to the woman's body and her procreative self-determination . Actually, a legal shift can be found already with the 1975 ruling and, even before that, thanks to a gradual change, inspired- as often happens – from some consecutive judgments, with the implementation of the justification of the "necessity state", provided by art. 54 p.c. finding not punishable the abortive intervention seen as necessary to save the mother's life and because of health reasons, as long as they are serious: it was a solution considering the pregnancy interruption in lawlessness terms, except for renouncing to the application of the sentence in the concrete case of the presence of factual circumstances rigorously.

Specifically, voluntary pregnancy interruption, defined by art. 547 p.c. "abortion of a consenting woman" punished everyone who caused the abortion of a woman sentencing him to spend from two to five years in. This sanction was extended to the same consenting woman. It was then categorically punished the abortive conduct, without leaving space neither to risks eventually connected to the pregnancy, nor to the psychological and physical and social sphere of the woman.

In 1975 there's the detention, caused by a self-denounce to the police, of the secretary of the Radical Party Gianfranco Spadaccia, of the secretary of the centre for information on sterilization and abortion (CISA) Adele Faccio and the radical activist Emma Bonino, for practising abortions. The 5th of February a delegation including Marco Pannella and

Livio Zanetti, director of L'espresso, presented the request for a referendum regarding art. 546,547,548,549 2º clause, 550, 551, 552, 553, 554, 555 of the penal code to the court of Cassazione, regarding the crimes of abortion on consenting woman, of instigation to abortion, abortive acts on a woman to be considered as pregnant, of sterilization, of incitement to acts against procreation, of syphilis or blennorrhoea contagion. After collecting over 700.000 signatures, on the 15th of april 1976 with a decree coming from the president of the Republic issued on the same day of the referendum, but the president Leone was compelled to use his power to dissolve the parliament for the second time. However, in order to fit the norm to the social and cultural changes that the country was experiencing, the constitutional court, with the 18th of February 1975 ruling n. 27 permitted the VPI for serious situations.

1.2. The decision of the Constitutional Court.

The first visible change of routes occurs in 1975, due to the decision n. 27 by the Constitutional Court, when, even recognizing " constitutional fundament of the protection of the conceived" in art. 2 of the Constitution, allocated as guarantee of the secure human rights, makes a logical progress, when it asserts that " It does not exist any other equivalent right to the one of life and of the health of who is already a person, like the mother and the protection of the embryo, who has still to become a person". The Constitutional Court, therefore, considers therapeutically abortion legal, leading substantially the hazard for the mother' s life and health to the scheme of a justificatory reason. The sentence found that the constitutionally protected interest linked to the unborn child can collide with other goods having constitutional protection and that, consequently, the law cannot give a total and absolute prominence to the first,

denying an adequate protection to the second. The ruling then, makes a step ahead from the juridical praxis of applying the justification matter contained in art.54 p.c.: in fact necessity state asks not only for the seriousness and absolute inevitability of the damage or danger, but also its newness, while the damage or danger consequent to the continuation of a pregnancy can be foreseen but it is not always immediate. Moreover the diversification connected to art. 54 p.c. is found on the equivalence between the good damaged by the author's action and the other good to be saved with the same action. Instead, as expressed from the court, there is no equivalence between right to the mother's life and the embryo's one, still in the process of a becoming a "person". This does not imply, obviously the lowering of the new-born's rights, but only a shake-out in the light of the mother's health, good that has to be considered both if there is an actual danger or a predictable one. The ruling opened a path for the actual legislation that, implementing the principles expressed by the national council, created a law able to protect the mother's and the unborn's interests at the same time and recognised that – if there are some conditions legally defined – the voluntary pregnancy interruption is not punishable but legal.

1.3. The 194/78 law.

Law 194/78 has introduced in our country a right, that we consider as fundamental one today that is, the right of self-determination linked to the procreative choices of every single person. The law following a social necessity, captured also by the Constitutional Court through the historical decision 27/1975, has therefore introduced the right to the free willing pregnancy termination.

The range of the law 194/78, far from just making legal a conduct that until then was considered a crime, introduces a right away fundamental right, linked to woman' s life and health. Law 194/78 therefore establishes and rules the whole medical and health related free willing pregnancy termination, recognising the social value of pregnancy.
The law regulates the conditions and procedures with which the woman can decide to interrupt the pregnancy. In fact, using strictly juridical terms, abortion remains a felony, but only when the conditions given by the law are not respected, as provided by art. 19 of 194/78 law. The law establishes the conditions necessary to be able to interrupt the pregnancy respectively in the first 90 days of childbearing, and after. Naturally the conditions change if the decision is made before or after 90 days. Before the passing of the 90 days the motivations can be physical or psychical, as well as regarding economic, social ad affective circumstances in which the pregnancy happened. After 90 days is possible to interrupt the pregnancy only if:

- The pregnancy or the delivery can cause a serious danger for the woman's life.
- When there are certified pathological processes, like the ones related to relevant anomalies o malformations of the new-born, determining a great peril for the woman's physical or psychic health.

Therefore 194/78 law, establishes and regulates all the medical path that the woman, or the couple, has to follow to accede to voluntary pregnancy interruption. The prevision of the related structures is fundamental, in order to contextualize pregnancy interruption, seen not only as a material moment per se, but also as a route including talks and medical opinions, in order for the woman to obtain health-related or psychological-related information and come to mindful decision.

1.3. Moral objection: genesis and developments

Within this legislation art. 9 is specifically dedicated to the recognition of moral objection of healthcare staff and those carrying out supporting activities, who " *are not obliged to take part to the procedures following arts 5 and 7 nor to the interventions to the termination of pregnancy, when it makes moral objection by means of a written declaration*" . The successive clauses establish that " *moral objection relieves medical personnel and performing the auxiliary activities linked to the procedures and activities* ***specifically and necessary directed to determine the pregnancy interruption, and not by the assistance coming before and following the procedure****. Medical facilities and private structures officially authorized are obliged to assure the possibility to follow the procedures provided by art. 7 and the execution of the pregnancy interruption required following art.5, 7 and 8. The region controls and grants the implementation also with the personnel mobility. Moral objection* ***cannot be asked from the medical personnel*** *when, given the existence of particular circumstances, their intervention is imperative in order to save the woman' s life suffering from an immediate threat*" .

Therefore the law limits the scope of validity of the eventual moral objection raised by the gynaecologist to the strictly executive phase of pregnancy interruption, without extending it to the preliminary phase of 194/78 law. Nowadays the use of moral objection is becoming massive and important. Data underline quite an high percentage of doctors if compared with the patients' needs and consequently with the protection of the right to access the VPI as provided by 194/78 law.

The tendency to the constant increase in the use of moral objection unveils the existence of an internal contradiction of the norm, a real "wedge" undermining the implementation of VPI.

The report of the Minister of Health presented to Parliament on 4th August 2011 shows

that in 2009, nationally, 70.7% of gynaecologists is objector and that the trend has gone from 58.7% in 2005 to 69.2% of 2006 to 70.5 in 2007 to 71.5% in 2008.

The problem today is perceived to an alarming extent, and therefore requires a regulatory approach that balances the interests at stake, precisely the one related to the unsustainable current incompatibility between women who wish to undergo abortions, and doctors who are not objectors, who cannot cover all requests resulting in a significant risk to the health of women and for the respect of the right provided by law 194.

The problem today is the unsustainable incompatibility between women willing to undergo VPI, and non-objector doctors , that cannot answer every request determining an important risk for the respect of the right provided by 194 law.

1.4. Actual consequences of moral objection

It is undeniable that the introduction of the moral objection " valve" together with the recognition of the right of every woman – in certain conditions – to interrupt a pregnancy was functional to metabolise a Law that legalised something that was previously considered to be a true crime against descent.

In 1978, moral objection was therefore justified by the context in which it was conceived. The transition from abortion as a crime to abortion as a women's right might have created, at that time, some disorientation in the health personnel (although we know for sure that the practice of abortion was already of widespread use before 1978). Therefore, at the legislative level, moral objection played a role of " mitigation" or an accompaniment between these two dimensions of crime vs. right.

Today, after 35 years, moral objection has no longer any logical and legal foundation, and it represents the greatest obstacle to the full implementation of Law 194/1978.

The massive use of moral objection – even if it does not represent a crime in itself, according to Italian criminal law – causes the interruption of a public service (through terrible administration) which might indeed constitute a crime under Italian law[1] [1].

Law 194/1978 states indeed that the «clinical facilities and authorised private hospitals must ensure completion of the procedures provided for by art. 7 and carry out the interventions for interruption of pregnancy requested according to art. 5, 7 and 8».

The law therefore obliges hospitals to guarantee the abortion health service, regardless of the moral objection choice made by doctors. The latter cannot indeed violate the constitutional right to health of a patient.

But the Law 194/1978 reinforces the said principle by stating that «the Region controls and guarantees the implementation of [the right to abort] through mobility of personnel also».

Associazione Luca Coscioni for the freedom in scientific research, through the "Soccorso Civile"[2] service , where it is possible to find more information in order to prevent laws and a bad practice from destroying freedom and people rights, offering the possibility to leave testimonies and personal stories, granting, naturally, anonymity when the person behind the story is willing to stay anonymous. Thanks to this service the association was able to collect direct experiences from women who suffered a damage because of the impossibility to access to pregnancy interruption or had to bear serious difficulties in acceding to a service provided by the law. Some stories underline that many times women experiencing the advanced phase of abortion are left completely alone because the doctors and the personnel are objectors. Unfortunately to date is quite

[1] Regarding this the Association

[2] http://www.associazionelucacoscioni.it/soccorso-civile

difficult that a woman would expose herself personally in this context, differently for example, from what happens in the case of medically helped procreation, where the couples, because of the completely opposite means of those interventions tend to expose more easily and with less shame instead.

The association, together with the italian association for the demographic education(AIED[3]), started some actions direct to:

- Asks for the implementation of the 194/78 law with intervention from the Regions and the hospitals, proposing : a public list of the objector doctors; the possibility to go to well-known doctors; public selections dedicated to non-objector personnel; controls coming from the region and guarantee of non-interruption of a sanitary service provided by art.9 of the 194/78 law;
- With a written statement to the Rome prosecution to integrate the felony provided by art.340 p.c. (interruption of a public service) that, in order to be successful, in a sector like the penal one, characterised by its compulsory nature, the determinacy and most of all its damaging power in the concrete case, requires necessary direct testimonies from women exposing themselves, thing that, as said before, is seen as mostly unlikely.

1.5. Moral objection in the Italian courts.

Some Italian tribunals, ruling on the legitimacy related to specific public selections non-objector, in order to limit the phenomenon that is posing a risk for health and the right to procreative self-determination of the woman, effortfully conquered more than 30 years ago, can suggest a model or a path able to contain the actual phenomenon fully respecting the principles of equality and not discrimination. It is possible to recall the

[3] The AIED (http://www.aied.it/), italian association for the demographic education has the purpose of defending the culture of a responsible and conscious assisted procreation, in line with the objective of the same 194/78,as well as the general diffusion of a cultural and social growth regarding sexuality fighting discriminations and promoting the health of the human being.

T.A.R. Emilia-Romagna judgement (sect. Parma, 13 December 1982, n. 289, in Foro adm. 1983, 735 ss) that, even declaring the appeal as inadmissible for reasons not strictly connected to the 1. N.194 of 1978, precises that "the clause conditioning the hiring of the member of the medical personnel to the avoidance of moral objection contained in art. 9 is connected to the need to consent the possibility to effectuate a public service for which the employee is hired, from a perspective not far from the intentions of the 1978 law-maker".

Therefore it is already set the assumption that the prevision of the modalities and criteria for the hiring have the sole scope to realize the right expressed by the 194/78 law cannot be considered discriminatory, but has to be read in the light of a reasonable balancing of counter posed interests.

At heart, it is possible to underline the ruling that more than any other ,through the material application of the principle of balance between constitutional rights, was able to get over this barbarian absolute ban regarding the voluntary pregnancy (sent. 27/75).

The Constitutional court, as well as the international courts and this committee, have often taught us to value the adherence to the constitution and then the plausibility of a norm using the so-called balancing criterion. This is maybe the moment to collect this lesson learned, reasoning about the interests at stake.

The prevision of public selections including clauses of exclusion for objector doctors cannot be read from the perspective of a working discrimination, but has to be interpreted in the light of self-determination right expressed by the 194/78 law. Where the massive the massive presence of objector doctors, that lawfully oppose abortion, come to damage a constitutional right as the one related to self-psychophysical health of, the nit is necessary to find alternative solutions, mostly at a regional level(with the same law suggesting the implementation even through the mobility of the personnel). Transparency and publicity on the ethical and moral choices of the doctors, strictly connected to the profession, and influencing it, could grant the right for patients to turn

to the adequate and equipped structures when in need to do so.

1.1.6. The TAR Puglia judgment (14/09/2010, n. 3477, sect. II)

The case involving Puglia is Emblematic ;in fact the region, understood that inside its territory almost half of the abortions was practiced in private structures, even because of the diffusion of the moral objection among the medical personnel, started the process of bringing the VPI management back inside the public structures. Foreseen the strengthening of the advisory structures approved the "Project for reorganization of the advisory network", that anticipated the integration of the personnel of some advisory centres, defined by the local sanitary centre, with gynaecologists and obstetricians "**not-objectors**", expressly requesting for **specialists not practising moral objection for the advisory activities.** This "expulsive" clause was brought to the Tar Puglia, that, even accepting the appeal did not exclude completely the possibility to limit the access to advisory structures of objector specialists, when this prevision finds its base in the principles of proportionality and plausibility and is focused on finding the necessary balance between different voices involved in the abortive process"[4]. Tar Puglia was compelled to accept the appeal, eliminating the public selection because of the insertion of this selective procedure in the advisory context, that it is not the exact place where the VPI is practiced. There is no possibility to raise the moral objection question in advisory centres because in this phase there is no material application of the abortion. Then, lining up to some influential doctrinal views[5], the T.A.R. Puglia sees as decisive, for the objective determination of objection, the definition of the art.9 third comma, that is the

[4] IADICICCO: "*Obiezione di coscienza all'aborto ed attività consultoriali: per il T.A.R. Puglia la presenza di medici obiettori nei Consultori familiari è irrilevante, ma non del tutto*", in Giur. Cost. 2011, 2

[5] Cfr. A. D'ATENA, *Commento art. 9*, in *Commentario alla l. 22 maggio 1978, n. 194*, in *Le nuove leggi civili commentate*, 1978, I, 1652 ss.; A. NAPPI, *I limiti oggettivi dell'obiezione di coscienza all'aborto*, in *Giur. it.* 1984, 314. *Contra* P. NUVOLONE, A. LANZI, *Gravidanza (interruzione della)*, in *Dig. disc. pen.*, VI, Torino 1992, 33, to their judgment " all the procedures and activities provided by artt. 5 and 7 are specifically and necessarily directed to the pregnancy interruption".

clarification for which **the exclusion only interests the procedures and the activities uniquely used for abortion**.

The administrative judge says that, regarding the advisory context only, the exclusion of objector doctors from the advisory structures integrates a violation of the constitutional principles put as the milestones of moral objection. Therefore the Tar Puglia denies the possibility of excluding moral objectors in the advisory phase only on the base of the assumption that this is absolutely not involved in the moral choices, leaving an open path for hospital selections requiring fixed percentages of not-objectors in order to grant a VPI service. These remarks, in the Tar view find their base in the legislative decree n.216 of 2003, that defends equity of treatment for all the workers, both in the public and private sector, without any distinction of religion, personal beliefs, handicap, age or sexual orientation, even with a specific mention regarding the access to work, both as a self-employed or an employee, including the selection criteria (art.3). The same specific norm reads as follows at its third comma " **respecting the proportionality and plausibility principles and as long as the purpose is lawful, do not constitute discriminatory acts**" the treatment differences amenable to the said motivations, but justified by the fact that these personal characteristics influence the working activity, because "**they constitute an essential and instrumental prerequisite to the purposes of the performance**" of the same.

Therefore, the T.A.R. Puglia affirms that the interested administration could "**alternatively (..) prearrange public selections in the future, finalized to the publication of the vacancies related to the single advisory centres that provide that 50% of them to be given to not-objector doctors and the other 50% to be saved for the objector ones. This could be a plausible option that would not contrast with the equality principles provided by art. 3 of the constitution".**

2. Violations of the European social charter

The overview concerning the historical-legislative evolution of willing pregnancy interruption, and mostly about moral objection as a right that today has debated range of execution, makes us pose the bases for fining the specific violations of the european social charter. Supporting the scopes of this petition, and the needs of safeguard that the petitioning associations see as impelling, we will proceed in making a brief analysis of art. 11,13 and 14 read in combination with art. E regarding discrimination. The petition focuses on the aspects related to prejudice regarding the fact that the actual normative structure is causing to women lawfully asking for pregnancy interruption.

2.1. Articles 11 and 13 of the European Social Charter

Art. 11 affirms that in general " *any human being has the right to dispose of the appropriate measures to obtain the highest attainable level of health*[6]" ; Through this article, the European social charter poses itself the goal of protecting in effective terms the right to health, committing the member states to adopt the necessary measures and cut down the normative and institutional barriers eventually existing. In this sense the

6 Obviously, several norms contained in the charter regard the subject of health from specific perspectives, like: hygiene and work safety (art.3), protection from physical and moral dangers for underage children(art.7 and in general 17), pregnancy of working women (art.8), assistance to migrant workers (art.19), social protection for elders (art.23), to which is necessary to add the correspondent disposition provided by part II concerning the obligations arising for states in the situations specified before. This norms are related to specific categories of subjects and determined situations(work, childhood, maternity, immigrations, seniority), but it is possible recall the widespread and almost pervasive power of the right to health, as a goal tacitly implemented in the other purposes of the Charter. Among the other documents elaborated by the Council of Europe regarding health matters, we would like to recall the Convention on the Elaboration of a European Pharmacopoeia of the 22th of july 1964 and the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of the 4th of april 1997; finally, the recommendation n. 1626 (2003) of the parliamentary assembly regarding the Reform of health care systems in Europe: reconciling equity, quality and efficiency, as well as the recommendation of the Committee of Ministers on the Good governance in health systems (CM/Rec(2010)6).

European court of Human rights has expressed its view several times, affirming that the states are bound to organise an effective health service in order to grant an effective access to the cures.

Regarding the Italian legislation on voluntary pregnancy interruption, it is particularly relevant the clarification stating that the access to medical services has to be granted to everyone. In this sense, even if there is a specific law on the matter (law 194/78) assuring the right to the interruptive treatment to the woman , because of the high number of objector doctors there is no guarantee on the effective access to treatments necessary for the protection of life and health, besides the woman self-determination. In this sense it states not only the importance of being able to turn to structures able to satisfy this needs connected to health, but also the speed of the reaction of the facilities. In fact time, as well as stated in lots of clinical cases, plays an essential role in pregnancies, especially in safety terms regarding the woman that has to undergo the abortive treatment. The passing of the time is a significant consequence connected to the question : not only the law prescribes the maximum terms (90 days) within the woman can interrupt the pregnancy. Passed this period of time the abortion is only allowed in case of danger for the life or health of the woman or the foetus, but at the same time, making the inefficiencies of the structure fall upon the woman, linked to the absence of non-objector personnel, then forcing her to wander in the region or the country looking for a structure able to treat her, creating a strong aggravation of the physical and mental sufferings inevitably connected to the choice or the necessity of interrupting the pregnancy. The state, through its institutions and structures, has to take charge of the problems indirectly linked to the moral objection phenomenon. And then gives concrete answers and remedies.

On the other hand Art. 13 specifically regards those who do not have the " sufficient resources", recognising to the them the " right to medical and social assistance", in a

way substantially similar to the " poors" . Our constitution makes a reference to them.

Even if there is no discussion about the freeness of the cures in this instance, a combined reading of the two quoted dispositions induces to come to a similar conclusion. In fact, if the pronounced generality – to the limit of vagueness – of art.11 makes its content compatible with every type of organization related to medical services (universalistic and mutual-assicurative, public and private, free and paid-rate regulated and with a free market, and so on), and it could not be otherwise, the provision of art. 13 would add precious little or nothing if it did not stated the prohibition of refusing medical assistance necessary to who does not have the adequate resources to face it. The ways to ensure the service may vary (i.e.: through the free distribution or paying with public vouchers, etc) but the core of the provision stays. An indirect confirmation can be found from the corresponding art.13 part II of the charter, concerning the state obligations regarding the matter.

Coming to the tendencies of the European committee, some important corrections concern the status of the present right: a right is of " fundamental importance" because of its close connection to the right to life and, more closely, with the same human dignity. The protection of health is a prerequisite to life safeguard[7].

In fact the right to health is intended as a natural prerequisite for the same respect of human dignity. Especially in this context, because of the motivations at the base of abortion are cosily connected to the recognition of habeas corpus, that women fought hardly to conquer and that is the main condition for an inclusive and equal citizenship.

Unique among all the treaties, only the social charter recognises the right to medical assistance " and" social, breaking with the traditional notion of assistance, as

[7] International Federation of Human rights Leagues (FIDH) v. France, complaint n.14/2003, ruling regarding the 8th of September , point 31.

synonymous of " moral duty of charity" and obliging all the signatory states to take seriously the commitment taken, eventually even over the level they consider " adequate" and answering to the judges of its unsuccessful compliance[8]. Because of this, the right to social and medical assistance of art. 13 grants that the service is also offered to the ones not having the possibility to face the costs because of the nature of their assicurative coverage, distinguishing itself from the more general right to social security stated by art. 12[9].

The already stated connection between health and human dignity functions as a rhetoric tool to develop another decisive operation, that is the integrated reading of the social charter and the European convention on human rights, as texts inextricably linked. The committee, immediately recognises and without difficulties the natural link between art.11 of the social charter and art.2 and 3 of the ECHR as interpreted by the Strasbourg court. Also in the conventional system, as well as in the communitarian one, the goal is the protection of health to the highest level possible granted by the actual knowledge, with the obligation for states to predispose what is necessary to this mean, in particular facing and answering all the so-called sanitary risks " avoidable" (dependent on human intervention)[10] and in the light of two fundamental markers: life expectancy and principal mortality causes.

A great protection of health implies, obviously, a right to access the cures effectively granted. From this point of view, the perspective of the charter is admittedly " universalistic", even reading it in the light of the non-discrimination principle to art.

[8] Conclusions I, statement of Interpretation on Article 13§1, 65-67

[9] Conclusions XIII-4, Statement of Interpretation on Articles 12 and 13, 34-36

[10] Conclusions XV-2, Denmark, 126-129; among the "avoidable risks" there are certainly those related to enviromental pollution: v. ancora MFHR v. Greece, quot., point 202. The states have to do everything in their powers to draw near to zero the risk percentage: see conclusions 2003, France, 146

E, that the committee could explain in such a wide way to include the substantial equality, as when it asks for a " special consideration" to the situations of the more disadvantaged and exposed communities. To be effective, the right to cures requires some warranties, specified by the committee: the cost of assistance has to be charged, even only partially, to the community; it does not have to be an excessive financial burden to the person, especially if he is part of the more disadvantaged groups; the access to the cures has to be based upon transparent criteria, nationally defined, taking count of the patient quality of life; finally, the number of facilities and medical personnel has to be adequate in relation to the population, while the conditions of the hospital recovery have to appear as satisfactory and in any case compatible with the respect for human dignity.

As i noticed before, the right to health is so primary and universal that it is not possible deny the cures to who is in the conditions to not be able to face the costs because of lack of " adequate resources" (art. 13 of the social charter). The " poors" , using a term closer to our legal system, are the ones that does not have the necessary resources useful to conduct a fair life, that is satisfying the person' s basic needs in an adequate way. Because of them, the states have to offer free sanitary assistance or at least grant the financial support for the cures, even outside necessity or emergency cases.

Staying on the field of contents, the committee believes – in line with the evolution of the national and communitarian legal systems – that the effective enjoyment of the right to health obviously implies a special attention to the sanity of the environment. The right to an healthy environment is seen as directly coming from art. 11 of the social charter (that is, the right of every person to " use all the measures that let him to enjoy the best health condition obtainable") and its combination with art.2 of ECHR,

concerning the right to life: among the measures to enjoy, the ones able to remove the causes of illness considered as environmental " threats" like, for example, pollution.[11]

Naturally, it is about goals possible to reach only in a gradual way, but the state are nevertheless involved in making it in a reasonable period of time, with constant and measurable progresses, using the resources available to their best.[12] This clarification is part of an important current regarding the " margin of state appreciation" , whose wideness is pent-up by the committee, as well as in other occasions happened with the recall to the necessity that public action is not prevented de facto or the protection of the substantial right is emptied.[13]

Regarding the policies to adopt, moving from contents of the right of the action to undertake, the states have to prove to be politically active in promoting an education and hygienic-sanitary information generalized to all the population, with a specific attention to particularly disadvantaged groups. This, with the goal of prevent the diffusion of behaviours detrimental to health, like tobacco, alcohol and drugs consumption, promoting the development of an individual conscience responsible on the matter, about healthy life styles , sexuality and environment. Regarding this perspective, an important place is justly given to the promotion of controls and screenings for pregnant women and underage (periodical and free of charge for this last group during the compulsory education) as well as, in a systematic way, in relation to the illnesses being the principle causes of mortality. The direction taken by the committee are enlightening in relation to the object of this petition.

[11] FIDH v. France, quot., point 31;

[12] Maragapoulous Foundation for Human rights (MFHR) v. Greece, complaint n. 30/2005, ruling of the 6th of December 2006,point 228;

[13] ERRC v. Grecia, complaint n. 15/2003, judgment of the 8th of december 2004, point 27;

2.2. Art. 14 (Right to enjoy social services)

Art. 14 might seem secondary with respect to the object of this application, but in reality the right enjoy social services represents a fundamental corollary of the right to health, in this context especially. Indeed, as the Law 194/1978 prescribes: *«the consultation office and the social and sanitary structure, besides being obliged to guarantee the necessary medical assessments, are obliged to examine with the woman and the father of the child conceived – especially when the interruption of pregnancy is motivated by the incidence of economic, social or family conditions on the health of the pregnant woman – if the woman grants it, in respect of the woman's and the father's dignity and privacy, all possible solutions to the proposed problems; to help her remove the causes that would lead her to an interruption of pregnancy; to put her in such a position that her rights as a mother and a worker are respected; to promote all interventions aimed at sustaining the woman, offering her all the help necessary during the pregnancy and after birth».* This context of social assistance is thus tightly tied to healthcare itself, considering the psychic and social implications connected to the choice or the necessity of the woman to interrupt the pregnancy. Therefore, the activity of the consultation offices must be valorised and most above all exempt from conscientious objections that can instead lead to the abortion itself and not to stages before and after that. Indeed, on the issue of conscientious objection, art. 9 explicitly states that *«conscientious objection exempts the sanitary personnel and the personnel conducting auxiliary activities from procedures and activities specifically and necessarily directed at the interruption of pregnancy, but not from the assistance preceding and consequent to the intervention».*

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Aligning itself to authoritative juridical interpretations[14], the TAR Puglia also considers this formulation of the third subsection of art. 9 to be decisive, because of the clarification that the exemption concerns only those procedures and activities univocally directed at the abortion. This assertion is supported by the rigorous reconstruction of the duties – according to art. 5 of the 194 Law – of the family consultation offices: since in those structures abortion is not materially practiced – but only psychological and information/consultation activities for the pregnant woman (cf. art. 2 and 5 Law 194/1978) or gynaecological functions that fall outside the abortive procedure – the presence of conscientious objectors is utterly irrelevant. *«Therefore, a selective procedure that a priori excludes specialist objectors from access to consultation offices appears (…) to be a discrimination besides being an irrational since it is not justified by and plausible objective reason».*[15]

Therefore, the TAR Puglia judgment affirms that the consultation context should not at all be involved in the issue of conscientious objection.

«In other words, according to the TAR, there is no necessary link of causality between the abortive event and the consultation activity, from which problems of conscience can arise among the sanitary personnel. What matters – for understanding how art. 9 must be enforced – is not the professional qualification of the objector, but the activity

[14] Cfr. A. D'ATENA, comment art. 9, in commentary to the law 22 may 1978, n. 194, in Le nuovi leggi civili commentate, 1978, I, 1652 ss; A.NAPPI, I limiti oggettivi dell'obiezione di coscienza all'aborto, in Giur.it. 1984, 314. Contra P. NUVOLONE, A.LANZI, Gravidanza(interruzione della), in Dig. Disc. Pen., VI, Torino 1992, 33, stating that "all the procedures and activities related to art.5 and 7 are specifically and necessarily directed to the pregnancy interruption.

[15] Judg. Tar Puglia 14/09/2010, n.3477, sez.II

carried by the same, which must be specifically and necessarily aimed at the interruption of pregnancy, according to an objective assessment and not a subjective perception of the agent. It is therefore clear that the said activity of information and support carried out in the consultation offices is everything but able to provoke a conflict between individual conscience and professional obligations».

Therefore, a doctor which is a conscientious objector is also obliged to assist the patient before and after the abortion. This principle has been recently confirmed by the judgment (April 2, 2013) n. 14979 of the Sixth Criminal Section of the Court of Cassation of Italy.[16] Art. 14 of the European Social Charter is important to valorise the consultation phases and to establish decisively that conscientious objection cannot involve those stages before and after an abortion. According to art. 14, the Parties must commit themselves to subsidies and organise services that use the specific social service methods and that contribute to the well-being and development of individuals and groups in the community and to their adaptation in the social environment.

2.3 Art. E

Article. E of the European Social Charter is matched by the other provisions, making them both practical and effective. The principle of non-discrimination is general and universal. It is considered the reference principle in the Italian Constitution that in the

[16] The case regarded a doctor, after a specific request of intervention towards a patient, undergone a procedure of pregnancy interruption through drugs, refusing to visit and assist this one, as moral objection, nevertheless the several instances of intervention compelling, in the end, the chief to go to the hospital to intervene urgently. Because of this, the appeal court of Trieste, confirming the ruling of the court of Pordenone, condemned the doctor working at the hospital facility in San Vito di Tagliamento, to one year of imprisonment for the felony provided by art. 328 p.c. (negligence, omission). From a strictly normative profile, art.9 comma 3, of the 194/1978 law, excludes that the objection could refer to the assistance given before of after the intervention, recognising the right to refuse to cause the abortion to the objector doctor, but not to omit to give assistance before or after the facts related to the abortion, because he still have to insure the protection of the woman's health and life , even in the course of the happening of the pregnancy interruption.

art. 3 dictates the principle of formal equality and substantive.

After the Second World War, "those who until then had appeared only as historically principles proper to the political culture of some people in the West, some of which is more directly concerned, in other continents, in colonial policy, and have turned extended to represent a common heritage of mankind. "[17]

The principle of non-discrimination obviously stands between them and was proclaimed, not surprisingly, in art. 2 of the Universal Declaration of Human Rights of 1948, as a direct expression of the general postulate of the equal dignity of all human beings, in turn enclosed in art. 2.

Securely anchored in the international order thanks to the many tools developed since then for the protection of human rights, has recently been the subject of new attention, with the approval and entry into force, in 2005, of Protocol. 12[18] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[19]

The principle of equality / non-discrimination is relevant practice also and above all in the judgments of constitutionality that the Court is called upon to express: in fact it always arises as a yardstick of a rule, just as it is the first and most important screening for the constitutionality of a norm. The equality of citizens expressed the need for a just and democratic social state. Similarly, in the international context the same Court of Human Rights considers the art. 14 of the European Charter of Human Rights, the first legal reference in terms of equality and reasonableness, to assess the legality of legislation.

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[17] Cfr. V.ONIDA, La costituzione ieri e oggi: la "internazionalizzazione" del diritto costituzionale. Relazione al Convegno della Accademia Nazionale dei Lincei – Roma, 9-10 gennaio 2008, in http://www.astrid-online.it/Dossier--r/Studi--ric/60-anni-de/onida.pdf,4.

[18] Open to signatures, in Rome on the 4th of November 2000, came into force on the 1st of April 2005 and has been ratified from 18 out of 47 member states of the Council of Europe; Italy signed it but did not ratify it. In general, regarding protocol n.12, ex plurimis, see: J:SCHOKKENBROEK, A New European Standard Against Discrimination: Negotiating Protocol n. 12 to the European Convention on Human Rights, in J. NIESSEN, I. CHOPIN (eds.), The Development of Legal Instruments to Combat Racism in a Diverse Europe, Martinus Nijhoff Publischers, Leiden- Boston, 2004, 61-79.

[19] The first written document introducing the subject focuses on the interesting contribution that Protocol n.12 of the ECHR offers to the anti-discriminatory protection and it is written by E.CRIVELLI, Il Protocollo n.12 Cedu: un'occasione (per ora) mancata per incrementare la tutela antidiscriminatoria, in G. D'ELIA, G. TIBERI, M.P. VIVIANI SCHLEIN, Scritti in memoria di

Expressing the principle of so-called "substantive equality", art. E states that similar situations should be treated equally and different situations should receive different treatment. The social and cultural pluralism that characterizes our society requires a detailed analysis in order to ensure the effectiveness of the principle and its application sterile and approximate. Judges in Strasbourg believe that differences of treatment based on an identifiable characteristic, or "status", are likely to integrate discrimination within the meaning of Art. 14. Furthermore, for a given matter could fall within the scope of Article 14, there must be a difference in treatment between people who are in similar situations or very similar (DH and Others v.. Czech Republic [GC], no. 57325 / 00, § 175, ECHR 2007). Such a difference in treatment is discriminatory if it has no objective and reasonable justification.

Relatively art. 9 of Law 194/78, as confirmed expresses the right to health personnel to raise moral objection in the treatment of abortion, the consequences of massive recourse to the objection, described above, are in fact leading to a real interruption of public service: the interruption, that the Italian legal system is a crime against the public administration, not only means "to deprive" a citizen of a public service, but also causing delays or slowdowns and therefore difficult to determine who may or may not lead to an appreciable damage considerably. This means that criminal law is relevant to the conduct even where it causes irreparable damage. For the purpose of the existence of the objective element is not relevant that the interruption was temporary or that it was a mere disturbance in the smooth running of the service.

This seems useful to recall an additional step: the shortage of non-objector forcing the woman to seek a facility that offers the service, so even if it is not demonstrable in terms of case studies, the impossibility to carry out abortions, is surely self-evident that an acute shortage of staff induces the woman to wander in search of a suitable structure.

Alessandra Concaro, Giuffrè, Milano, 2012, 137 ss.

This, in terms of equality and access to care, determines the territorial and economic discrimination not to be based on any principle of reasonableness but to be transferred to chance.

The same situation (request for access to the treatments of PVI) is then treated in very different ways depending on the "luck" of the patient (if you're lucky enough to live in areas adjacent to a fully equipped health facility you will have no difficulty to terminate the pregnancy, if you live in areas with a high rate of objection must move away in search of a suitable structure taking on physical and economic costs discriminatory).

The state of health of a person, therefore, certainly cannot be a criterion to engage in discriminatory treatment. Art. E makes a specific reference to this, along with race, colour, sex, language, religion, political and other, descent, national and social origin, belonging to a minority national, birth or other status.

The Italian law on the subject of abortion, therefore, is unable to protect herself when expected and provides access to hospitals in order to terminate the pregnancy but then prepares and ensures the means and the tools to make effective this right.

Discrimination, therefore, not only detects territorially and economically among women who require access to the services of abortions, but also on the basis of broader: it determines in fact discriminated between women who decide to terminate the pregnancy and those who decide to finish it because it deprives the first of a legitimate choice and staff that the law in principle recognizes them.

3. Conclusions

The problems described above, resulting from an increase always stronger and stronger to the recourse to moral objection on the part of medical personnel, are therefore to be found in the lacking or poor organization on the part of the competent institutions that should make it effective and applicable to the treatment provided for by law 194/78.

The law, by introducing a law on the reproductive choices, it must also indicate the means and tools by which to overcome or avoid any technical difficulties, just as the shortage of personnel objector who physically can proceed to the interruption of pregnancy.

So even in the wake of the indications derived from case law, it is believed that it is necessary from regional initiatives, as indicated by the same law 194/78 which states precisely how the regions should monitor and ensure the implementation of Law 194/78.

Starting from the suggestion emanating from its Italian administrative courts are believed to be able to make calls which provide 50% of doctors objectors and 50% of doctors do not objectors. But, we believe that the region may set up some real books that indicate the choice of every doctor in order to publicize it and make it accessible to patients.

After that, would be in conformity with the constitutional principles and the basic principles of the law 194 evaluate, on the basis of the specific circumstances, the need to hold competitions designed to balance any imbalances caused by excessive presence in a hospital of moral objectors.

This also on the basis of the Legislative Decree no. N. 216 of 2003[20] which does not consider discriminatory the acts those contests that take into consideration the personal characteristics that have crucial implications for the profession.

The evaluation of the P.A. should also be based on knowledge of the status quo ante or the effective dissemination of the objection in the administration of reference.

Therefore, it would not be consistent with the principle of proportionality, the issuing of

[20] Art. 3 Lgs. Decree 216/2003. Regarding the principles of proportionality and plausibility, the working relation or exercise of the entrepreneurship activity, do not constitute discriminatory acts provided by art.2 those differences of treatment connected to characteristics linked to religion, personal beliefs, handicap, age or sexual orientation of a person, if, because of the nature of working activity or the context in which it is done, it intends characteristics constituting an essential and determining requisite to the means of developing the activity. Similarly, it does not constitute a discriminatory act the evaluation of the specific characteristics when they become relevant for the suitability of the development of the functions that the armed, police, penitentiary or rescue forces can be called to exercise

notices bearing an equal quota of posts for doctors objectors and non-objectors within an Advisory that already saw the massive presence of either category, or the total absence of one in favour of the other.

Ultimately, only the competent administration has the cognitive tools needed to determine a rational and proportionate reservation of seats in favour of doctors objectors or not objectors, aimed to rebalancing the composition of staffing, in order to regard of a fundamental right to recognized by the law 194/78.

For all of these reasons the Associazione Luca Coscioni for freedom in scientific research asks the European Committee of Social Rights to accept the complaint n.87/2012.

Rome, 2 August 2012

Per Associazione Luca Coscioni
per la Libertà della ricerca scientifica
Filomena Gallo

I enclose the following documents:
1. Charter;
2. Law number 30/1999;
3. Law of 22 may 1978 number 194;
4. Ruling of the regional administrative court number 3477/2010.

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