UNIVERSITÀ
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Facoltà di
Giurisprudenza

Carla Maria Reale

(IN)VISIBILE BODIES: DISABILITY, SEXUALITY AND FUNDAMENTAL RIGHTS

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For the transformative power of our desires

Of fortune cookies and tarot cards they have no need: my wheelchair, burn scars, and gnarled hands apparently tell them all they need to know. My future is written on my body.
-Alison Kafer

Remember:
Your first site of protest was
your body. Your heartbeat:
the most palpable chant
you have ever marched to.

-Alok- Vaid Menon

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INTRODUCTION

SUMMARY: *1. The main research questions. 2. Some methodological and linguistic notes. 3. At one glance: structure and contents of this study.*

> Sexuality is the source of our deepest oppression; it is also the source of our deepest pain. It's easier for us to talk about – and formulate strategies for changing – discrimination in employment, education, and housing than to talk about our exclusion from sexuality and reproduction[1].

This was what Anne Finger, a US disability activist and scholar, wrote in 1992. Almost 20 years later in a private email conversation she wrote that sexuality «points to our need for more than rights, for cultural changes»[2]. Addressing the topic of sexuality and disability means uncovering issues capable of questioning our stereotypes, our bodies, the construction of our desires and our notion of desirability. It is an issue that, in the end, touches our identities as human beings, as persons.

Examining sexuality and disability through the category of fundamental rights implies the recognition of sexuality as a relevant element of humanity, as a lawful space for personal growth defined by the principles of equality, self-determination and the promotion of the well-being of the person. It means investigating the last frontier of positive measures, unmasking the supposed neutrality of the law in front of situations of injustice and launching a call to action.

1. The main research questions

The idea of this study, which aims to investigate disability and sexuality from a comparative Constitutional Law perspective, arose during

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[1] A. FINGER, *Forbidden fruit*, in *New Internationalist*, 233, 1992, p. 9.

[2] R. MC RUER, A. MOLLOW, *Introduction*, in IID. (eds.), *Sex and disability*, Durham-London, 2012, p. 2.

the first year of my PhD. It was a spring weekend and I decided to join a festival in a small town near Trento. It was during that festival that, for the first time, I found myself at the crossroads where sexuality and disability meet, together with other paths such as gender, race, sexual orientation and so on. This happened thanks to the words of some young disabled LGBT people from an organized group (*Jump LGBT - Oltre le barriere*), sharing their experience of discrimination, struggle and most of all empowerment to affirm themselves as queer disabled people in society. I was captivated. I became passionate about the topic, due to its ability to intersect many paths of inquiry and incorporate many different levels of complexity (both human and scientific). I wondered how and whether legal science could approach this topic and contribute to it, given that the legal literature on this topic is not broad.

I found myself thinking about the role of the law in shaping power relationships between groups and, in particular, how this worked with the dichotomy non-disabled-disabled people, finding interesting analogies with reflections I've been developing while working in the vast field of gender studies and law.

The main research questions that gave life to this work are:

- What is the relationship between the social theories around disability and law? And how can the law implement these models in order to address the needs and grant the respect of the rights of people with disability?
- What is particular about the field of sexuality in law? Does law have a role in perpetuating stereotypes, misconceptions and discrimination against people with disabilities? Is it possible and, above all auspicious, for the State to implement measures to affirm the sexuality of people with disabilities? What constitutional framework should these have?
- What are the main legally relevant discriminations affecting people with disabilities in the field of sexuality? Is there any country which has adopted legislation/policies or implemented positive measures to encourage the self-determination of people with disabilities?
- What kind of instrument is sexual assistance? Is sexual assistance regulated and disciplined by law or other legally binding instruments in Europe? What is its relationship with the regulation of sex work?

- Is there any proposal to regulate sexual assistance in Italy? How are these proposals articulated? What is their relationship with the law on prostitution (the Merlin Law)? Would that be compatible with the Constitution? If not, is there a way to frame it in order to make it compatible with the constitutional system?

2. Some methodological and linguistic notes

All these questions are mainly addressed from the perspective of fundamental rights and constitutional law. This work will often use the Italian Constitution as a compass, looking at the horizon of the protection and promotion of the fundamental rights of the person, without forgetting the fundamental contribution coming from international law[3]. Disability in fact, just like other material and identity-related factors, calls into question fundamental rights, such as equality and equity, health, self-determination, participation in public life and many others that will be the object of this study. It can be a testing ground for their effectiveness and for the ability of a legal system to respond to challenges and needs arising from social issues.

This main perspective will be inevitably enriched by comparative law. In this study, comparative law is present in each part and, in particular, in Chapter III and Chapter IV. In Chapter III some relevant experiences from other legal systems on issues intersecting disability and sexuality will be discussed[4]. In Chapter IV the focus is rather on the

[3] Particular attention in the whole work will be given to the United Nations Convention on the Rights of Persons with disabilities and the jurisprudence from the European Courts of Human Rights.

[4] This can be defined as a "micro level" of comparison, having an analytic nature and limited object. See L.J. CONSTANTINESCO, *Introduzione al diritto comparato*, Torino, 1996, p. 220, according to which micro comparison «per la sua natura analitica e per il suo oggetto limitato, (…) è rivolta all'esame del fenomeno giuridico, sezionato e ridotto alle sue cellule estreme o alle particelle elementari». This difference between micro comparison and macro comparison can be drawn within the debate on the nature of comparative law (methodology vs. science). See L.J. CONSTANTINESCO, *Introduzione al diritto comparato*, cit., p. 222. However according to K. ZWEIGERT, H. KOTZ, *An introduction to comparative law*, II ed., v. I, Oxford, 1987, p. 5, «the dividing line be-

instrument of sexual assistance: two different models will be developed[5], by recognizing the existence of recurring approaches and elements in the European context.

This study breaks from the most traditional scheme of comparative legal method, which is developed around the experience of authoritative models, to analyse, for each chapter and specific topic, the most relevant and significant legal experiences, with particular focus on Europe. This analysis has the scope to allow the reader to have a wider view on each issue and create a «system of knowledge»[6] around sexuality and disability, from a legal perspective.

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tween macro comparison and micro comparison is admittedly flexible». For further discussion on comparative law see the following note.

[5] The development of models in comparative law follows the complex discussion on the nature of legal comparison, which has long been debated by scholars. The main terms of the discussion revolve around whether comparative law can be defined as a science itself or should be qualified as a methodology. According to R. SACCO, *Introduzione al diritto comparato*, IV ed., Torino, 1990, seeing legal comparison as a methodology is reductive. The development of models is the first and main aim of comparative law as science: «chi dica che la comparazione è metodo ha una visione riduttiva del metodo della comparazione (…), ovvero ha una visione riduttiva dei suoi scopi e del suo oggetto» (p. 14), «la migliore conoscenza dei modelli può essere considerata come lo scopo essenziale e primario della comparazione intesa come scienza» (*ibid.*, p. 16). For a summary reconstruction of this debate see L.J. CONSTANTINESCO, *Introduzione al diritto comparato*, cit., p. 188 ff., which at the end observes how this debate turned out to be quite sterile (*ibid.*, p. 191). *Ex multis* see also R. DAVID, *I grandi sistemi giuridici contemporanei*, III ed., Padova, 1980; K. ZWEIGERT, H. KOTZ, *An introduction to comparative law*, cit.; U. MATTEI, P.G. MONATERI, *Introduzione breve al diritto comparato*, Padova, 1997. On constitutional comparative law see P. BISCARETTI DI RUFFIA, *Introduzione al diritto costituzionale comparato*, VI ed., Milano, 1988; A. PIZZORUSSO, *La comparazione giuridica e il diritto pubblico*, in R. SACCO (ed.), *L'apporto della comparazione alla scienza giuridica*, Torino, 1980; G. BOGNETTI, *Introduzione al diritto costituzionale comparato (Il metodo)*, Torino, 1994; G. DE VERGOTTINI, *Diritto costituzionale comparato*, IX ed., Padova, 2013; G. MORBIDELLI, L. PEGORARO, A. REPOSO, M. VOLPI, *Diritto pubblico comparato*, III ed., Torino, 2009; L. PEGORARO, *Diritto costituzionale comparato. La scienza e il metodo*, Bologna, 2014.

[6] This expression is used by Pegoraro, which highlights how the creation of a system of knowledge is what characterizes comparative law as a science, rather than as a methodology. See L. PEGORARO, *Diritto costituzionale comparato. La scienza e il me-*

The analysis adopts an interdisciplinary approach as well, starting from the assumption that the law is inevitably and inextricably connected to social phenomena and at the same time is a social phenomenon[7]. Nonetheless, disability itself is a variable of the human condition that can be questioned from multiple perspectives – social historical, philosophical, legal, and many others. Sexuality is no less nuanced. This complexity can be handled only by incorporating multiple perspectives. In this study the categories developed in the field of other social sciences, sociology and political philosophy, will be considered. This will help in uncovering the hidden assumptions behind law and legislation, addressing the power relations and assuming a critical perspective on the production of legislation and legal knowledge[8]. This process is particularly important when dealing with fundamental rights of a traditionally oppressed or marginalized group of people, to disprove the neutrality of law[9] and understand how it can contribute to the achievement of

todo, cit., p. 54. In the same book the author provides an overview of the main arguments in legal scholarship, pp. 49-50.

[7] See V. FERRARI, *Diritto e società. Elementi di sociologia del diritto*, Bari, 2007; and R. TREVES, *Sociologia del diritto. Origini, ricerche e problemi*, Milano, 2012. On the preeminent social dimension of law and how it can be structured by different societies see R. SACCO, *Antropologia giuridica*, Bologna, 2008.

[8] This objective is shared with that branch of studies called 'Critical legal studies'. Under the umbrella of 'Critical legal studies' fall many theories sharing the idea of law as something intertwined with social issues, drawing focus on the social biases present in law, legislation, law-making and legal scholarship. According to these theorists, law has a role in perpetuating a power dynamic that sees the historically privileged group of people in a position of advantage over historically oppressed people. According to this view, inevitably, law supports the interest of those who create the law (who usually come, in fact, from historically advantaged groups). See A. HUNT, *The Theory of Critical Legal Studies*, in *Oxford Journal of Legal Studies*, 6, 1, 1986, pp. 1-45. Critical legal studies developed into many different sub theories, focusing on specific issues, such as feminist legal theory, critical race theory, queer legal theory and many others. The literature on the topic is vast. For a first glance at the plethora of approaches inside critical legal theories see in Italian M.G. BERNARDINI, O. GIOLO, *Le teorie critiche del diritto*, Pisa, 2017.

[9] This is one of the main lessons from critical legal theories. In fact, these studies challenge «what is taken to be the natural order of things, be it patriarchy (in the case of feminist jurisprudence), the conception of 'race' (critical race theory), the free market (critical legal studies), or 'metanarratives' (postmodernism)». For these scholars, «Far

social justice. Another important opening note for this work pertains to language, which just like law, is not to be considered a neutral instrument[10]. Both the terms *people with disabilities* and *disabled people*[11] will be used in this study. These expressions will be used in an interchangeable way, to be intended both as respectful and inclusive. This choice represents an attempt to consider the perspective of both a "people-first" language and "identity-first" language[12]. The term *disabled* (identity-first language) emphasizes disability as a key part of someone's experience. It implies the recognition of the social process of disablement enacted against individuals with impairments. This language, mostly used by UK disability scholars, pays homage to the social model of disability[13] (see further, Chapter I). Conversely, the term *people with disabilities* (people-first language) is aimed at highlighting the common

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from being a determinate, coherent body of rules and doctrine, the law is depicted as uncertain, ambiguous, and unstable. And instead of expressing rationality, the law reproduces political and economic power». See R. WACKS, *Critical legal theory*, in ID. (ed.), *Philosophy of Law: A Very Short Introduction*, Oxford, 2013, p. 92.

[10] Amongst linguists and sociolinguists, it is well known that besides the descripitve nature of language, there is a prescriptive function of language, with symbolic and material power over societies. Language is used to build and maintain social relatiosnhips and is also a tool to exercise power. It can be a means of maintaining the status quo or of understanding and changing power structures. In this sense language plays a unique role in influencing both the individual's and society's social conditions. For a quick introduction and overview of this topic see A. MOONEY, B. EVANS, *Language, Society and Power. An Introduction*, London, 2019.

[11] The phrasing *disabled person* is an expression of identity-first language which emphasizes disability as a key part of someone's experience. This language is adopted by thinkers and people who embrace a social model of disability (see *infra*, Chapter I). Conversely, *person with disability* uses person-first language that is intended to highlight that disability is a secondary trait, coming right after humanity (which includes us all), with the goal of reinforcing the idea that people shouldn't be defined or limited by their disabilities. This language is the one adopted, for example, by the United Nation Convention on the Rights of Persons with Disabilities as an expression of the human rights model of disability (see *infra*, Chapter I). Both their linguistic forms are recognized in this work as valid and are used in interchangeably.

[12] P. FOREMAN, *Language and disability*, in *Journal of Intellectual and Developmental Disability*, 30, 1, 2005, pp. 57-59.

[13] M. OLIVIER, *The social Model in Action: If I had a hammer*, in C. BARNES, G. MERCER (eds.), *Implementing the social model of disability*, Leeds, 2004, p. 20.

features shared by human beings, given that people shouldn't be defined or limited by their disabilities. This language is widely used in the context of international human rights law, as a result of the approval of the UN Convention on the Rights of Persons with Disabilities (2006), and is the expression of the human rights model of disability[14] (see further Chapter I).

Moreover, in this book inclusive language is adopted also in a gender perspective: the female/male declination will be used together with the gender-neutral form "they/them" for nouns, pronouns and terminology. As mentioned above, this choice reflects the author's need to adopt a critical perspective on language[15] and use inclusive strategies capable of encompassing a wider spectrum of identities.

3. At one glance: structure and contents of this study

The analysis will go from the general to the particular and the study will be articulated in five chapters.

The first chapter outlines the general framework on disability and law. It investigates the evolution of the social understanding of disability and whether law and the production of legislation have been contaminated by it. The chapter opens by explaining the shift from the medical model of disability to the social model of disability, without ignoring how, from the main criticisms of the latter, new intermediary approaches towards disability have been developed. These approaches,

[14] T. DEGENER, *A Human Rights Model of Disability*, in P. BLANCK, E. FLYNN (eds.), *Routledge Handbook of Disability Law and Human Rights*, London, 2016, pp. 31-49.

[15] As was observed by the European Parliament: «Gender-neutral or gender-inclusive language is more than a matter of political correctness. Language powerfully reflects and influences attitudes, behaviour and perceptions». See the report *Gender neutral language in the European Parliament* available at *https://www.europarl.europa.eu/cmsdata/151780/GNL_Guidelines_EN.pdf*. For a more technical perspective on linguistics, legal science and gender issues, see S. CAVAGNOLI, *Linguaggio giuridico e lingua in genere. Una simbiosi possibile*, Alessandria, 2013. All these observations are developed mainly in relation to gender issues but can be easily extended to a broader notion of inclusive language.

in particular the intermediate model and a crip/feminist[16] perspective on disability, will be adopted as the starting point of the investigation on sexuality and disability. The following legal analysis, aimed at verifying the implementation of the sociological models, will start by examining Italian legislation and then the international and European ones. On the Italian level, the analysis moves between different sources of law, considering the Constitution, the legislations on disability and finally the Constitutional case law around it. On the international level, a prominent space is given to the discussion of the UN Convention on the Rights of Persons with Disabilities, which represents an implementation and – allegedly – an evolution of the social model of disability. The EU dimension is considered as well, with a particular focus on the definition of disability under EU Law. To conclude, the disability approach adopted by the Council of Europe is analysed in terms of soft law, policy and jurisprudence.

Chapter II starts to address the issue of sexuality and disability, which emerged as a focal point from social sciences. In order to understand why this field is little explored in legal science and practice, the complex relationship between sexuality, disability and law is disentangled. The starting point is the controversial relationship between sexuality and law in general, which is reconstructed from a historical point of view, giving room to emerging trends on both the national and international level. After this, we discuss how the sexuality of people with disabilities is constructed socially through stereotypes and misconceptions, and how this influences the ways in which this topic is and has been approached by the law at the domestic level (Italy) and at the international level (UN). The second part of this chapter addresses one of the most common arguments used to justify the absence of any form of positive regulation in the field of sexuality and disability. The "private" argument is discussed by using some relevant examples and case law in other areas, such as the US jurisprudence on homosexuality. The chapter closes by contextualizing all these findings in the Italian constitu-

[16] Crip is a slang word for "crippled"; which was reclaimed in the field of disability activism and research. The use and the meaning of this term will be discussed in detail in the first Chapter of the book (par. 1.5).

tional framework to provide a strong anchor to any positive measure in the field of sexuality and disability.

After building a theoretical apparatus on disability and sexuality, Chapter III is dedicated to the concrete analysis of some legally relevant issues that might arise in the field of sexuality and disability. The first part discusses the condition of people with intellectual disabilities in the area of sexuality. Particular attention is given to the existence of criminal law aimed at protecting people with disabilities from possible sexual abuse in some of the most interesting Countries. This topic is analysed by discussing the case study of Ireland (which recently underwent a reform process) and Italy and the implication of these provisions for disabled people's sexual agency. On the opposite side, some best practices from Denmark to facilitate the sexual life of people with disabilities are presented. The second issue addressed is the forced sterilization of people with disabilities, and in particular women with intellectual disabilities. The issue is presented at first through the analysis of some comparative case law, then by examining how this practice is considered on the international and Italian domestic level. To close the chapter some considerations are made on the need to balance the demand for protection and an affirmative view of the sexuality of people with disabilities. It is in this view that positive measures are contextualized and discussed, starting from the need to design inclusive sex education.

Chapters IV and V examine the instrument of sexual assistance.

Chapter IV draws up different definitions of sexual assistance, investigating the boundaries between this practice, sex work and sexual surrogacy. This quest for a definition suggests a strong link between sexual assistance and sex work, which is the assumption of the comparative law analysis that follows in this chapter. Two different models of approach in Europe are theorized, looking both at the legislative level and the factual/social dimension. Both these models are characterized by the absence of a specific regulation on sexual assistance, but what marks the distinction is the different regulation of sex work. On the one hand there are Spain, France and Sweden and, on the other hand the Netherlands, Germany, Switzerland and Denmark.

In Chapter V the Italian situation will be articulated. In order to do this, a necessary premise is put forward on the regulation of prostitution in Italy (together with its most recent developments, e.g. decision 141/2019 by the Italian Constitutional Court). The social dimension of sexual assistance is discussed through the work of the *LoveGiver Committee*, the main Italian public actor in this field. Its experience has inspired the drafting of three law proposals issued during the previous legislature, which are explained in detail and discussed by analysing some critical points, legal gaps and possible adjustments. This chapter closes with a detailed constitutional analysis of the existing proposals on sexual assistance. An alternative proposal, compatible with the constitutional and legislative framework on prostitution, will be put forward.

Finally, the concluding remarks of this study are aimed at highlighting some transversal points, some anchors, that might guide any further intervention in the field of sexuality and disability and close with some thoughts on the role of the law as actor of social changes.

CHAPTER ONE

THE EVOLUTION OF DISABILITY THEORY AND LAW

SUMMARY: *1. From the individual model to the social model of disability: philosophical and sociological perspectives. 1.1. The individual model of disability. 1.2. Disability movements in the US and the UK. 1.3. The social model of disability. 1.4. Limits and challenges of the social model of disability. 1.5. An intermediate model and a feminist/crip perspective: the theoretical framework adopted for this analysis. 2. From the individual model to the human rights model in international law. 2.1. The UN and disability: the route towards the Convention on the Rights of Persons with Disabilities. 2.1.1. The CRPD and the human rights approach. 2.1.2. Some core provisions of the CRPD. 2.2. The European Union approach to disability. 2.2.1. The European Union and the CRPD. 2.2.2. The definition of disability under EU anti-discrimination law as interpreted by the European Court of Justice. 2.2.3. The 2010-2020 Disability Strategy and the 2021-2030 Disability Strategy. 2.3. The Council of Europe and disability. 2.3.1. The non-binding documents: resolutions, policies and strategies. 2.3.2. Disability according to the European Court of Human Rights. 2.3.3. The European Social Charter: focus on inclusive education and employment for life in the community. 3. From the medical model to the social model: a map of the Italian legislative and constitutional approach to disability. 3.1. Lights and shadows of Italian disability law. 3.1.1. Law 104/1992: a bledend approach. 3.1.2. The supposed transition from the individual model to the social model: the legislation on employment. 3.1.3. The effective transition from the individual model to the social model: the law on inclusive education in Italy. 3.2. The constitutional perspective on disability: the relevant parameters. 3.3. The case law on disability: overcoming social barriers as a constitutional duty.*

This first chapter is aimed at highlighting the paradigm shift in the notion of disability in the last 50 years.

This ground-breaking change happened at first on a philosophical, sociological and political level, through the development of theories and models for understanding disability. We will thus discuss how and whether these findings have been integrated into law, on both an inter-

national and national level, with a focus on Italian legislation and Constitutional Court case law, as well as on the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and European disability law.

1. From the individual model to the social model of disability: philosophical and sociological perspectives

Disability is a complex phenomenon, and as such precise and systemic definitions are needed to approach and understand it. For this reason, since the birth of Disability Studies[1], the very first comprehensive production of knowledge on disability, scholars have been using models to explain it. In this first paragraph, we will provide a quick overview of disability theories and discuss their implications in order to clarify the theoretical framework adopted in this book.

1.1. The individual model of disability

The individual model of disability, unlike the other theories that will follow, is not a fully and cohesively developed approach to disability. On the contrary, it is the result of the sedimentation of many different theoretical assumptions on disability coming from medical practitioners

[1] The term "Disability Studies" refers to an academic field of research that adopts an interdisciplinary approach in examining disability as a social, historical, political and cultural phenomenon. This discipline is ultimately aimed at understanding the significance, nature and consequences of disability. For an overview of this vast field of studies see N. WATSON, S. VEHMAS (eds.), *Routledge Handbook of Disability Studies*, New York, 2012; R. ADAMS, B. REISS, D. SERLIN (eds.), *Keywords for Disability Studies*, New York, 2015; L.J. DAVIS (ed.), *The Disability Studies Reader*, New York, 2006; D. GOODLEY, *Disability Studies: An Interdisciplinary Introduction*, London, 2017. For a specific discussion of the relevance of Disability Studies in the field of law, with a particular focus on the Italian context, see A.D. MARRA, *Diritto e Disability Studies. Materiali per una nuova ricerca multidisciplinare*, Reggio Calabria, 2010.

and philosophers as well as from the fields of law, theology, sociology and bioethics[2].

The main assumption of this model is that disability is a burden and an individual responsibility. Disability is indeed seen as a form of deviance from the norm. Lacking certain bodily characteristics, or precise relational or mental capabilities – those believed to be normal for a human being – the disabled person is considered somehow less than human.

The disabled person is pictured in a constant attempt and struggle to gain and reach what is considered the norm with the objective of improving their quality of life. Disability is depicted as a personal tragedy, a disgrace for the person and their family: both a condition to be pitied and a problem to be fixed. Remedies might be given by medicine, which should fix and cure disabled people using rehabilitative medicine, by law, which should provide state aids for everyday life and community life, and by religious institutions and other social agencies, which are responsible for charity[3].

The individual model is often simply known as the medical model[4]: this is probably because during the 20th century medicine played a considerable role in theorizing disability, which became increasingly described through the lens of pathology[5]. Medicine is also responsible for

[2] C. CAMERON, *The Medical Model*, in ID. (ed.), *Disability Studies: A Student's Guide*, London, 2013, pp. 98-101.

[3] M. OLIVIER, *The Social Model in Action: If I had a hammer*, cit., p. 20 and M.G. BERNARDINI, *Disabilità, giustizia, diritto. Itinerari tra filosofia del diritto e Disability Studies*, Torino, 2017, p. 9.

[4] Olivier, one of the main theorists of the social model of disability, argues that the influence of medicine, charity and welfare in the lives of disabled people is undeniable, but at the same time none of these influences itself is enough to constitute a model *per se*. For this reason, he states the existence of the sole individual model, based on the idea of disability as personal tragedy, and capable of encompassing all the previous mentioned factors. *Ex multis* M. OLIVIER, *The Social Model in Action: If I had a hammer*, cit., p. 20.

[5] The reference is to the process of pathologization/medicalization of disability. This kind of process transforms a condition into a medical disease in need of treatment, and thus the object of study and diagnosis. See F. ONGARO BASAGLIA, G. BIGNAMI, *Medicina/Medicalizzazione*, in *Enciclopedia*, VIII, Torino, 1979, pp. 999-1041 and A. MA-

the conceptual overlap between the notions of disability, impairment and illness. A clear example of this view can be found in the International Classification of Impairments, Disabilities and Handicaps (ICIDH)[6] from the World Health Organization (1980). This classification traces a correlation between impairment and limitations on work and everyday life. In this way, disability is defined in relation to the limitation or loss of capability compared to the assumed standard for a human being. In the ICIDH, handicap is defined as the disadvantage coming from the pathological state of disability. In this framework, strong emphasis is given to what is considered to be "normal" for a person and there is no space for any debate regarding society and environmental factors. For this reason, the whole classification is aimed at recovering individual functions as much as possible.

The problem with the medical/individual approach is that health professionals tend to see disabled persons as passive objects of treatment, rehabilitation or intervention, creating oppressive consequences such as the denial of their subjectivity. This approach has also served to perpetuate discrimination and often implies a prejudicial allocation of economic resources, keeping the focus on medical treatments and hospitalization rather than addressing quality of life.

We will briefly discuss later how this paradigm was incorporated into and perpetuated by the law, with legislation based on mere welfarism and denial of agency for disabled people.

TURO, P. CONRAD (eds.), *La medicalizzazione della vita*, in *Salute e Società*, VIII, 2, 2009.

[6] This classification was developed in 1980 by Philip Wood, Michael Bury and Elizabeth Badley and was adopted by the WHO until 1999. It attracted a significant amount of criticism from disability activists and scholars and was then replaced by the International Classification of Functioning, Disability and Health (ICF). The latter is inspired by a bio-psycho-social model of disability according to which these three dimensions (biology, psychology and society) concur in the creation of disability. See M.W. DE KLEIJN-DE VRANKRIJKER, *The long way from the international classification of impairments, disabilities and handicaps (ICIDH) to the international classification of functioning, disability and health (ICF)*, in *Disability and Rehabilitation*, 25(11-12), 2003, pp. 561-564.

1.2. Disability movements in the US and the UK

It is not by chance that the alternative paradigm on disability was developed drawing from the experiences of social and political movements.

It can be argued that the social model of disability was born as a tool for social change and represents the apex of 20 years of social struggles and public demonstrations. The history of the disability rights movement cannot be separated from the general struggles for civil rights in the 1960s, involving black people, the feminist movement and the early LGBT movement. These groups were remarkably active, in particular, in the US and the UK.

In the US context, it was the Independent Living Movement which reclaimed more space for disabled people, with the first concrete attempts, such as the creation of the Center for Independent Living (1970) in Berkeley, California[7]. This was a huge step for the visibility of disabled people movements, but also the earliest experience of services for disabled people designed and managed by disabled people themselves[8]. After this first experience, many similar services started to flourish, and the movement began to push for substantial changes in legislation and policies.

Similarly, in the UK, after the 1960s many disabled people began to be more aware of their position in society by creating political and so-

[7] One of the first successful experiments in this sense took place in 1962. The University of Berkeley introduced a program to allow students with wheelchairs to live on campus and not in segregated facilities. The program was born from the experience and struggles of a student with a disability, Edward Verne Roberts, now known as one of the fathers of the Independent Living Movement in the US. See D.Z. FLEISCHER, F. ZAMES, *The Disability Rights Movement: From Charity to Confrontation*, Philadelphia, 2011, pp. 33-48; K.E. NIELSEN, *A Disability History of the United States*, Boston, 2012, pp. 210-230.

[8] G. DE JONG, *Independent living: from social movement to Analytic Paradigm*, in *Archives of Physical Medicine and Rehabilitation*, 60, 1979, p. 437, pp. 435-446.

cial movements, such as the DIG (Disablement Income Group) or the Liberation Network of Persons with Disabilities[9].

One of the most well-known groups, despite being quite small, is the Union of the Physically Impaired Against Segregation (UPIAS), which is responsible for the first development of what would later be called the social disability movement. UPIAS was mainly composed of white men with acquired physical disabilities, reclaiming a Marxist approach towards disability issues. In general, their political claims regarded full participation in social life, independent living, productive work and full control of their lives. The two main thinkers behind UPIAS were Paul Hunt and Vic Finkelstein and both are considered the pioneers of a new approach to disability. This innovative theoretical framework finds its roots in a document issued in 1975, called *Fundamental Principles of Disability*, where, for the first time, disability is described in terms of social construction:

> In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society[10].

A few years later Finkelstein formulated an effective metaphor to explain the *disablement of modern culture*[11]: he described an imaginary community where wheelchair users were the majority, and the environment was designed accordingly. In this

> *disability culture* (as opposed to a *disablist culture*) able-bodied people were marked by bruises from banging their heads on lowered entrances (made for wheelchair users) and suffered from backache from stooping down. They were helped by able-bodied equipment such as helmets, neck braces and, "best of all", limb amputation, and money was collect-

[9] See C. BARNES, *Disability activism and the struggle for change: Disability, policy and politics in the UK*, in *Education, Citizenship and Social Justice*, 2(3), 2007, pp. 203-221.

[10] UPIAS, *Fundamental Principles of Disability*, London, 1996, p. 4.

[11] V. FINKELSTEIN, *To deny or not to deny disability*, in *Physiotherapy*, 74, 12, 1988, p. 650.

> ed for them in up-turned helmets with "Help the able-bodied", imprinted upon them[12].

From this key concept of disability as the socially constructed process of disablement derives a new definition of impairment, no longer correlated with disability.

A definition of impairment and disability can be found in a document issued by Disabled People's International (DPI) in 1982, where it is stated that impairment can be defined as:

> the functional limitation within the individual caused by physical, mental or sensory impairment, whereas disability is the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers[13].

In this way, the British movement attempted to distance itself from the idea of biological determinism coming from the individual model (in particular, the medical model). On the contrary, the US movement has developed a disability theory more focused on the politics of identity, giving value to impairment in this specific sense[14]. This distinction will be further developed in the sociological theories arising from the early development of the political movements.

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[12] V. FINKELSTEIN, *To deny or not to deny disability*, cit.

[13] This quotation can be found in the document *Constitution of Disabled People International*, available at *http://dpi.org/document/documents-of-reference/dpi-constitutionen.pdf*. On this point, for a brief explanation see also D. ANASTASIOU, J.M. KAUFFMAN, *The Social Model of Disability: Dichotomy between Impairment and Disability*, in *Journal of Medicine and Philosophy*, 38, 4, 2013, pp. 441-459.

[14] See M.G. BERNARDINI, *Disabilità, giustizia, diritto. Itinerari tra filosofia del diritto e Disability Studies*, cit., pp. 39-41. For a comparison between the disability movement in US and UK see H. MEEKOSHA, A. JAKUBOWICZ, *Disability, political activism, and identity making: A critical feminist perspective on the rise of disability movements in Australia, the USA, and the UK*, in *Disability Studies Quarterly*, 19, 4, 2000, pp. 393-404.

1.3. The social model of disability

The social model of disability originated precisely from what was known as the "big idea" of the disability movement[15]. The social model itself, despite being developed by disability scholars, should not be specifically considered a mere theory on disability, but more like a heuristic approach to it.

In particular, it was the UK model of disability (the so-called strong social model) that became more widely known. Starting from Finkelstein's materialistic Marxist approach[16], British sociologist Mike Oliver coined the term *social creationism* to describe the new approach to disability and distance it from biological determinism and the medical model[17].

In his work Oliver investigated the construction of the norm, highlighting how capitalist society is built on its ideal subject: a healthy, able-bodied and productive individual. Anyone who does not fit in to this standard is to be discriminated against and excluded by society.

According to Oliver, this subordination and exclusion is carried out in three main steps: the first is the construction of the normal/pathologyical dichotomy, the second is the role of medical expertise in drawing this line and regulating the transition between these two opposites (using rehabilitation and treatments), while the last one consists in affirming a strong relationship between normality and the possibility of being a productive member of society.

Oliver claims that, disability, far from being connected to impairment, has become a particular form of oppressive relationship between able-bodied people and disabled people.

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[15] Namely the intuition of the potential in the distinction between impairment and disability. See F. HASLER, *Developments in the disabled people's movement*, in J. SWAIN, S. FRENCH, C. BARNES, C. THOMAS et al. (eds.), *Disabling barriers, enabling environments*, London, 1993.

[16] Developed in V. FINKELSTEIN, *Attitudes and Disabled People: Issues for Discussions*, London, 1980.

[17] M. OLIVER, *The politics of disablement*, London, 1990, pp. 78-94.

This relationship, also described as a process, is defined as *disablement*[18]. Disablement, which is rooted in society and culture, is responsible for the exclusion of disabled people and shapes perceptions and ideas, but also social forces and the environment.

In this light, disability ceases to be a destiny or something inescapable; on the contrary, it becomes something to be reduced, fought and eliminated by changing society[19].

This theory is particularly meaningful because of its impact on the disability movement, which was provided a strategy for the pursuit of social transformation. Barrier removal and civil rights became the main political tools of the movement.

Moreover, the social model had a huge impact on the single disabled person as well. Describing disability in terms of social oppression resulted in a strong empowerment for disabled people, who were suddenly able to understand that their condition was society's responsibility and not their individual failure. Liberated from this oppression, they were made conscious of their right to claim equal citizenship. In this sense, we can understand why Oliver further described the social model of disability as a "hammer", more of a concrete tool rather than a theoretical speculation[20].

Nonetheless, the social model also had an impact on academia and research, by shifting the field of inquiry from adjustment and impairment to discrimination, the relationship between disability and industrial capitalism and cultural representations of people with impairments[21].

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[18] M. OLIVER, *The politics of disablement*, cit.

[19] Thomas Shakespeare argues that the disability movement was following a well-established path of denaturalizing forms of social oppression, just like the feminist movement and scholars had done before. He claims for example that the theoretical distinction between disability and impairments is very similar to the one on gender and sex. In so doing, the disability movement was showing how what was thought throughout history to be natural was a product of specific social relations and ways of thinking. See T. SHAKESPEARE, *Disability rights and wrongs*, London, 2006, p. 23.

[20] M. OLIVIER, *The Social Model in Action: If I had a hammer*, cit., p. 20.

[21] T. SHAKESPEARE, *Disability rights and wrongs*, cit., p. 24.

1.4. Limits and challenges of the social model of disability

The social model of disability had a great impact on the general approach to disability.

It certainly represents a tipping point from many different perspectives, yet some scholars argued that it proved to be incapable of giving input to a solid theoretical analysis[22]. For this reason, during the 1990s some critical aspects of the social model of disability began to be discussed within Disability Studies. The core of the main critiques lies in the rigid construction of the dichotomy between disability and impairments, which, allegedly, creates issues from both a theoretical and practical point of view.

To begin with, it was observed that the rigorous Marxist analysis behind the social model of disability looks outdated in a globalized and hyper-technological world, which would probably require different and more complex analytical categories. On the contrary, it looks like this model gave up on the idea of developing new responses, and decided to maintain its focus on Marxist orthodoxy[23].

Some scholars affirmed that, in spite of this "orthodoxy", the social model of disability does not manage to fully remove itself from liberal thinking[24]. This is shown, for example, by the recurring heavy stress on the fact that disabled people can be productive members of society too. This claim, as formulated, inherently supports the idea that the value of a person depends on her productivity. In a certain sense, this point represents a betrayal of the initial premises of the social model discourse[25].

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[22] D. GOODLEY, B. HUGHES, L. DAVIS, *Introducing Disability and Social Theory*, in IID. (eds.), *Disability and Social Theory. New Developments and Directions*, London, 2012, pp. 2-3.

[23] T. SHAKESPEARE, *Disability rights and wrongs*, cit., p. 20.

[24] On the contrary, the focus on civil rights can still be considered a solution inside the liberal system, as Russel remarks in a comment to the US American with Disabilities Act. See M. RUSSEL, *What Disability Civil Rights Cannot Do: Employment and political economy*, in *Disability & Society*, 17, 2002, pp. 117-135.

[25] M.G. BERNARDINI, *Disabilità, giustizia, diritto. Itinerari tra filosofia del diritto e Disability Studies*, cit., p. 20, and L. TERZI, *The social Model of Disability: A Philosophical Critique*, in *Journal of Applied Philosophy*, 21, 2, 2004, pp. 141-157.

Another critical point is that the social model is linked to a very specific experience of disability, that of middle-class white men with (mostly acquired) physical impairments. Its entire analysis is built around this subject. As such, it leaves out any other form of disability experience. This is also tightly linked to the development of the strict dichotomy between disability and impairment, which leaves no space for experiences such as mental impairment or chronic pain.

Many disabled scholars[26] conducted extensive research to support the idea that impairment cannot be totally separated from the experience of disability, and even in a barrier-free world some impairments may result in substantial disadvantages.

This is particularly valid for some disability experiences such as visual impairments[27], dyslexia or those related to chronic illness.

Similarly, some scholars noticed an excessive emphasis on politics, which is not conclusive for the most severe disabilities[28]. There is a risk

[26] The literature on this point is very vast and diverse. See *ex multis*: M. CLEAR, B. GLEESON, *Disability and materialist embodiment*, in *Journal of Australian Political Economy*, 49, 2011, pp. 34-55; R. CONNELL, *Southern bodies and disability: re-thinking concepts*, in *Third World Quarterly*, 32, 8, 2011, pp. 1369-1381; M. CORKER, *Differences, conflations and foundations: the limits to accurate theoretical representation of disabled peoples experience?*, in *Disability and Society*, 14, 5, 2009, pp. 627-42; L. CROW, *Including all our lives: renewing the social model of disability*, in J. MORRIS (ed.), *Encounters with Strangers: Feminism and Disability*, London, 1996; B. HUGHES, K. PATERSON, *The social model of disability and the disappearing body: towards sociology of impairment*, in *Disability and Society*, 12, 3, 1997, pp. 325-40; D. MARKS, *Dimensions of oppression: theorizing the embodied subject*, in *Disability and Society*, 14, 5, 1999, pp. 611-626; T. SHAKESPEARE, N. WATSON, *The social model of disability: an outdated ideology?*, in *Research in Social Science and Disability*, 2, 2001, pp. 9-28; T. SHAKESPEARE, N. WATSON, *Beyond models: understanding the complexity of disabled people's lives*, in G. SCAMBLER, S. SCAMBLER (eds.), *New Directions in the Sociology of Chronic and Disabling Conditions: Assaults on the Lifeworld*, New York, 2001; R.R. TAYLOR, *Can the social model explain all disability experience? Perspectives of persons with chronic fatigue syndrome*, in *American Journal of Occupational Therapy*, 59, 5, 2005, pp. 497-506; S. WENDELL, *The Rejected Body: Feminist Philosophical Reflections on Disability*, New York, 1996; S.J. WILLIAMS, *Is anybody there? Critical realism, chronic illness and the disability debate*, in *Sociology of Health & Illness*, 21, 6, 1999, pp. 797-819.

[27] S. FRENCH, *Disability, impairment or something in between*, in J. SWAIN, S. FRENCH, C. BARNES, C. THOMAS (eds.), *Disabling barriers, enabling environments*, cit., p. 19.

of conflating and simplifying disabled people's different experiences, while "trivializing" life with severe impairment[29].

In the end, a strict social constructionist approach is very far from the material realities of life of many people with disabilities. This happens because the strong social model approach fails to address a crucial point: disability itself is a form of embodiment.

The denial of impairment was functional on a political level, as a strategic choice. It represented a way to break free from the individual model and the idea of disability as a personal tragedy. Therefore, if we see the social model as part of a political agenda of the disability movement, it represented a tangible turning point in that historical period.

However, from a scientific point of view, the social model contributed to the epistemological invisibility of disabled bodies and failed to address the materiality of many disabled lives.

In doing so, it also perpetuated the dichotomy between the private sphere – where disability as embodiment can emerge – and the public sphere, where there is no space for vulnerability[30]. The persistence of this dichotomy and the way in which it can be damaging in discussions of disability will be the object of further examination (*infra*, Chapter II).

The scientific and theoretical limits of the social model of disability are accompanied by the difficulties experienced when trying to implement policies based on this view of disability. This can be explained by the fact that the social model refutes the idea of services and approach-

[28] See, for example, the case reported by Vehmas of Steve, a man with profound intellectual impairments who would not be helped by independent living, civil rights or barrier removal initiatives. Steve indeed cannot communicate or live independently. S. VEHMAS, *Special needs: a philosophical analysis*, in *International Journal of Inclusive Education*, 14, 1, 2010, pp. 87-96.

[29] R. MCRUER, *Crip theory: Cultural signs of queerness and disability*, New York, 2006, p. 31.

[30] This point is developed specifically by the feminist disability theorist Helen Meekosha, as part of a broader analysis carried out in feminist research on this and other dichotomies. See H. MEEKOSHA, *Body battles: bodies, gender and disability*, in T. SHAKESPEARE (ed.), *Disability Reader: Social Perspectives*, London, 2000, pp. 168-169.

es based on a specific kind of impairment, so there is no space left for the implementation of policies based on specific needs.

1.5. An intermediate model and a feminist/crip perspective: the theoretical framework adopted for this analysis

Among the abovementioned critiques, are those developed by critical approaches to disability and the one developed by Thomas Shakespeare in the intermediate model (also known as critical realism or interactional approach)[31].

The main premise of this model is that disability is the result of an interaction between individual/intrinsic factors (impairment, personality, motivations, etc.) and structural factors (environment, support systems, oppression, etc.)[32].

If the social model claims that we are made to believe that people are disabled by their bodies while they are actually disabled by society, Shakespeare argues that people are disabled by society and their bodies[33].

Shakespeare aims to start a conversation around the health of people with disability, acknowledging and addressing the fact that they have higher and/or unmet needs in the field of healthcare compared to non-disabled people[34]. Together with this, Shakespeare calls on scholars to

[31] In the opinion of Shakespeare, the intermediate model is a sort of correction of the pure social model of disability. See T. SHAKESPEARE, *Disability rights and wrongs*, cit., pp. 73-89.

[32] T. SHAKESPEARE, *Disability rights and wrongs*, cit., p. 74.

[33] T. SHAKESPEARE, *Disability rights and wrongs*, cit., p. 75. A similar view of disability can be found in the Nordic relational approach. See for example Gustavsson, who talks about a theoretical perspective that rejects assumptions about any primordial analytical level and rather takes a programmatic position in favour of studying disability on several different analytical levels. See A. GUSTAVSSON, *The role of theory in disability research - springboard or strait-jacket?*, in *Scandinavian Journal of Disability Research*, 6, 2004, p. 62.

[34] For example, the WHO World Health Survey shows that people with disabilities are three times more likely to be denied health care, four times more likely to be treated badly by medical practitioners and twice as likely to come across inadequate equipment or inadequate medical personnel. See WORLD HEALTH ORGANIZATION, *World Report on*

(re)find space for impairments and to requalify it: «disability studies need to capture the facts that impairment may not be neutral, but neither is it always all-defining and terrible»[35].

He suggests addressing impairment as a *predicament*, namely «an unpleasant, trying or dangerous situation»[36], a notion that – according to him – captures the difficulty of many impairments without the «inescapable emphasis of tragedy»[37] typical of the individual/medical model.

In this theory there is space for policies aimed at the prevention or mitigation of impairments, without the risk of undermining the worth or citizenship of disabled people[38].

This understanding of disability and impairment is the one embraced in this study, though some important theoretical elements will also be found in feminist disability theory[39] and crip theory[40].

Disability, Geneva, 2011, available at *https://www.who.int/disabilities/world_report/2011/report.pdf*.

[35] T. SHAKESPEARE, *Disability rights and wrongs*, cit., p. 85.

[36] T. SHAKESPEARE, *Disability rights and wrongs*, cit.

[37] T. SHAKESPEARE, *Disability rights and wrongs*, cit.

[38] Shakespeare is known, indeed, for having addressed some of the most controversial ethical issues in the disability studies field and coming up with original solutions. Some of these are abortion, life termination, prenatal diagnosis, and genetics. See T. SHAKESPEARE, *Disability rights and wrongs*, cit., pp. 113-173.

[39] Feminist disability studies is not a scholarship on women with disabilities but a feminist scholarship that examines disability through the lens of the entire gender system. For an introduction to this field of studies see R. GARLAND-THOMSON, *Feminist Disability Studies*, in *Signs*, 30(2), 2005, pp. 1557-1587; S. WENDELL, *The Rejected Body: Feminist Philosophical Reflections on Disability*, cit.; B. HILLYER DAVIS, *Women, Disability, and Feminism. Notes Toward a New Theory*, in *Frontiers*, VIII, 1, 1984, pp. 1-5; S. WENDELL, *Toward a Feminist Theory of Disability*, in *Hypatia*, IV, 2, 1989, pp. 104-124.

[40] Crip theory is a development inside critical disability theory. The term "crip" derives from the offensive term "crippled" that assumes a new meaning through an act of political reclaim. Crip theory investigates the area of intersection between disability and queerness (a definition of queer will be given in a note of head in this paragraph). Some of the interests these areas share are the challenge to medicalization and the issues of passing and coming out (specifically for invisible disabilities). See, in general, authors such as: A. KAFER, *Compulsory Bodies: Reflections on Heterosexuality and Able-Bodiedness*, in *Journal of Women's History*, 15(3), 2003, pp. 77-89; A. KAFER, *Feminist, Queer, Crip*, Bloomington, 2013; R. MCRUER, *As Good As It Gets: Queer Theory and Critical Disa-*

The work of Shakespeare was already able to address disability as a form of embodiment, with credit to the dimension of sexuality[41]. However, a decisive contribution in this field comes from scholars belonging to the field of critical disability studies[42].

These authors are all strongly influenced by post-structuralist and postmodernist thinkers (such as Foucault, Butler and Deleuze) and they all reject binary thinking, claiming that the struggle for social justice «is not simply social, economic and political, but also psychological, cultural, discursive and carnal»[43]. The main fields of investigation for critical disability theorist are the lived body and its medicalization, the construction of normalcy and its privilege, the politics of appearance, sexuality and identity and a critical approach to the commitment to integration[44]. In general, these studies bring together the already highly developed critiques of gender, class, race, ethnicity and sexuality and apply them to disability to show how these categories are part of «exclusionary and oppressive systems rather than the natural and appropriate order of things»[45].

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bility, in *GLQ: A Journal of Lesbian and Gay Studies*, 9(1), 2003, pp. 79-105; ID., *Composing Bodies; or, De-Composition: Queer Theory, Disability Studies, and Alternative Corporealities*, in *JAC*, 24(1), 2004, pp. 47-78; ID., *Crip Eye for the Normate Guy: Queer Theory and the Disciplining of Disability Studies*, in *PMLA*, 120(2), 2005, pp. 586-592.

[41] See the research carried out in 1996 which gave life to the first edition of T. SHAKESPEARE, D. DAVIES, K. GILLESPIE-SELLS, *Sexual Politics of Disability: Untold Desires*, London, 1996.

[42] For a definition of this branch of Disability Studies see J. GILLIES, *Critical Disability Theory*, in A.C. MICHALOS (ed.), *Encyclopedia of Quality of Life and Well-Being Research*, Dordrecht, 2014, pp. 1348-1350. For an overview of these theories: K. ELLIS, R. GARLAND-THOMSON, M. KENT, R. ROBERTSON (eds.), *Manifestos for the Future of Critical Disability Studies*, New York, 2018.

[43] H. MEEKOSHA, R. SHUTTLEWORTH, *What's so critical about critical disability studies?*, in *Australian Journal of Human Rights*, 15, 1, 2009, p. 50.

[44] R. GARLAND-THOMPSON, *Integrating Disability, Transforming Feminist Theory*, in *NWSA Journal*, vol. 14, n. 3, 2002, p. 4.

[45] R. GARLAND-THOMPSON, *Integrating Disability, Transforming Feminist Theory*, cit., p. 4.

For example, it was in the field of crip studies, which uses tools and instruments from queer theory[46], that the notion of *compulsory able-bodiedness*[47] (specular to the notion of compulsory heterosexuality)[48] was developed. This notion questions the construction of the norm in terms of able-bodiedness. It reveals that being able-bodied is socially constructed as the norm, and as such it becomes a neutral state, a non-identity, and is ultimately identified with the natural order of things[49]. For this reason, society and the environment present structural discrimination and barriers for disabled people.

The limit of these theories, as highlighted by Shakespeare[50], is that a complete juxtaposition of the terms gender/race/sexuality and the term disability is reductive: while gender, sexuality and race have no biological underpinning, disability partially does.

This critique, however, does not completely hinder the utility of the analytical categories used by critical disability theorists, which is why some of these notions will be used and further examined. In particular, this study will take into account the fundamental premises of the critical theory:

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[46] Queer theory is an approach to sex and gender studies largely inspired by LGBT (Lesbian, Gay, Bisexual, Transgender) studies, feminism and the work of Foucault, Kristeva, and Derrida. It was born at the beginning of the 1990s. The term *queer* was originally an insult (mainly against gay men), but was politically reclaimed by the community and by scholars. The terminology was used for the first time in the academic context by Teresa De Lauretis during a conference in Santa Cruz in 1990. To understand the origin of the development of queer theory see J. BUTLER, *Gender Troubles*, New York, 1990 and E. KOSOFSKY SEDGWICK, *Epistemology of the closet*, Berkeley, 1990.

[47] R. MCRUER, *Crip theory: Cultural signs of queerness and disability*, cit.

[48] This terminology was developed by Adrien Rich to explain the invisibility of lesbian identity and its oppression. See A. RICH, *Compulsory Heterosexuality and Lesbian Existence*, in *Signs*, 5(4), 1980, pp. 631-660.

[49] McRuer is careful to explain: «able-bodiedness, even more than heterosexuality, still largely masquerades as a nonidentity, as the natural order of things», R. MCRUER, *Compulsory Able-Bodiedness and Queer Disabled Existence*, in L. DAVIS (ed.), *The Disabilities Studies Reader*, Abingdon-on-Thames (UK), 2016, p. 371.

[50] T. SHAKESPEARE, *Disability rights and wrongs*, cit., pp. 47-72.

> 1) that representation structures reality; 2) that the margins define the centre; 3) that gender (or disability) is a way of signifying relationships of power; 4) that human identity is multiple and unstable; 5) that all analysis and evaluation have political implications[51].

2. From the individual model to the human rights model in international law

The following paragraphs will be dedicated to international legislation and policies on disability. We will show how, especially looking at the United Nations system but also at the activities of the Council of Europe, international law has started challenging the traditional model of disability with the development of policies and treaties more focused on human rights protection and inspired by the social model of disability.

2.1. The UN and disability: the route towards the Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities, currently the leading international legal instrument in the field of disability, was adopted on 13 December 2006 and opened for signature on 30 March 2007. Earlier attempts to address the General Assembly to focus on disabilities date back to the 1990s[52], but it was only in 2002 that the doors opened. Indeed, the Office of the High Commissioner for Human Rights commissioned a background study on human rights of disabled persons, paving the way to a new endeavour[53].

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[51] R. GARLAND-THOMPSON, *Integrating Disability, Transforming Feminist Theory*, cit., p. 6.

[52] T. DEGENER, *Disabled persons and human rights; the legal framework*, in T. DEGENER, Y. KOSTER-DREESEE (eds.), *Human rights and disabled persons: essays and relevant human rights instruments. International studies in human rights*, 40, Leiden, 1995, p. 12.

[53] T. DEGENER, G. QUINN, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Field of Disability*, Geneva, 2002, p. 30.

In the earlier documents from the UN, people with disabilities are not explicitly considered[54]. It can be stated that in the period between 1945 and 1970 disabled people were invisible as citizens and rights holders before the United Nations[55].

During the period between 1970 and 1980 disabled persons became the subject of some declarations by the UN, strongly influenced by the medical model of disability, such as the *Declaration on the Rights of Mentally Retarded Persons*[56] (1971) and the *Declaration on the Rights of Disabled Persons*[57] (1975). The *Declaration on the Rights of Mentally Retarded Persons*, for example, stated that it was possible to deny or restrict a person with cognitive impairments human rights as long as it was done with a legal safeguard protecting them from abuse (para. 7).

The *Declaration on the Rights of Disabled Persons* adopted a normalization principle, demanding that the living conditions and the environment of a disabled person be «as close as possible to those of the normal life of a person of his or her age»[58]. Despite this, the document was the first to acknowledge the importance of the participation and consultation of disabled people's organizations[59].

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[54] Neither the UN Charter of 1945 nor the Universal Declaration of Human Rights of 1948 mention disability. Nor do the Universal Declaration of Human Rights of 1948, the International Convention on the Elimination of All Forms of Racial Discrimination (1965), or the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

[55] T. DEGENER, A. BEGGER, *From Invisible Citizens to Agents of Change: a short history of the struggle for the recognition of the rights of persons with disabilities at the United Nations*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, Cham, 2017, p. 3.

[56] Declaration on the Rights of Mentally Retarded Persons, Resolution A/RES/26/2856 (XXVI), December 20, 1971.

[57] Declaration on the Rights of Disabled Persons, Resolution A/RES/30/3447 (XXX), December 9, 1975.

[58] Declaration on the Rights of Disabled Persons, Resolution A/RES/30/3447 (XXX), December 9, 1975, para. 9.

[59] Declaration on the Rights of Disabled Persons, Resolution A/RES/30/3447 (XXX), December 9, 1975, para. 12.

In 1976, the UN General Assembly launched 1981 as the *International Year of Disabled Persons*[60]. This initiative was the beginning of a new phase, more inspired by the idea that a disability was to be treated as a human rights issue[61]. For this reason, particular emphasis was given to full participation and equal opportunities.

The main result of the *International Year of Disabled Persons* was the adoption of a detailed action plan: The *World Program of Action Concerning Disabled Persons*[62], focused on enhancing disability prevention, rehabilitation and equalization of opportunities. The document was focused on achieving equal opportunities and pertained to issues such as legislation, physical environment, income maintenance and social security, education, employment, recreation, culture, religion and sport[63].

To keep on implementing the document, the General Assembly decided to proclaim the *International Decade on Disabled Persons (1983-1992)*[64]. The decade was the occasion for the United Nations to adopt documents and create tools for disability. The first one was the first legally binding human rights treaty to mention persons with disabilities: the *International Labour Organization Convention 159 on the Vocational Rehabilitation and Employment of Disabled Persons*. This Convention introduced the principle of equality of opportunities in the workplace for persons with disabilities and was the first to specifically mention women with disabilities[65].

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[60] International Year of Disabled Persons, Resolution A/RES/31/123, December 16, 1976.

[61] Still in this vision the person with disability was more of an object, rather than a subject of human rights, see *infra*.

[62] World Program of Action Concerning Disabled Persons, Resolution A/RES/37/52, December 3, 1982. On this Program see J.D. CHERMARK, *A global perspective on disability: a review of efforts to increase access and advance social integration for disabled persons*, in *International Disability Studies*, 12, 1990, pp. 123-127.

[63] World Program of Action Concerning Disabled Persons, Resolution A/RES/37/52, December 3, 1982.

[64] Implementation of the World Program of Action Concerning Disabled Persons, Resolution A/RES/37/53, December 3, 1982, para. 11.

[65] Convention (no. 159) concerning vocational rehabilitation and employment (disabled persons), entered into force June 20, 1985, UN Treaty Series, vol. 1401, 23439, arti-

After this, the United Nations Commission on Human Rights issued two important disability-related reports. The first was a study concerning the situation of persons with psycho-social impairments[66]. This document was particularly interesting as it was able to identify, for the first time, medical professionals as potential perpetrators of breaches of human rights in this context. The second study was published in 1993[67] and showed huge evidence of widespread human rights abuses against all disabled persons. During the same year, two attempts to adopt a human rights treaty for disabled persons were made: one by Italy and the other by Sweden in 1987, both of which failed.

The *International Decade of Disabled Persons* ended by adopting another non-binding instrument: the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*[68]. The document consists of four sections and 22 rules targeted at achieving equal participation, divided into: (I) preconditions, (II) main areas of action (accessibility, education, employment), (III) implementation and (IV) monitoring[69]. The document, with a rights-based approach, contains keywords such as *independence*, *personal assistance* and *service*. These words would be leading motives for future developments. The Standard Rules also had innovative monitoring provisions, establishing the figure of a Special Rapporteur, advised by a panel of experts.

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cle 4. For a general commentary on this document see F. WELTI, *ILO Convention 159 Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (no. 159)*, in E. ALES, M. BELL, O. DEINERT, S. ROBIN-OLIVIER (eds.), *International and European Labour Law*, London, 2018, pp. 635-641.

[66] Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental-Ill Health or Suffering from Mental Disorder, Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1986, E/CN.4/Sub.2/1983/17/Rev.1, Annex II.

[67] Human Rights and Disabled Persons, UN publications, Sales No. E.92.XIV.4.

[68] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Resolution A/RES/48/96, December 20, 1993.

[69] See M. RIOUX, A. CARBERT, *Human Rights and Disability: The International Context*, in *Journal on Developmental Disabilities*, 10, 2, 2003, pp. 1-12, T. DEGENER, G. QUINN, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Field of Disability*, cit., pp. 34-38.

Through this mechanism, and in connection with the rise of the disability rights movement, persons with disabilities were for the first time able to make their voice heard inside the United Nations.

This was the first step for the disability movement to become a player in international law-making and to turn disabled people into human rights agents[70]. It was during the *World Summit on Disability* in March 2000 that the disability movement called for a legally binding convention to be approved in a short time. Again in 2001 the organization succeeded in drawing attention to disability during the World Conference against Racism in Durban. The outcome document invited the UN General Assembly to elaborate an international convention for the promotion and protection of the rights and dignity of disabled people[71].

During the same year, Mexico successfully proposed a resolution to the General Assembly to discuss a possible draft of an international Convention on the rights of disabled persons.

Through a resolution, an Ad Hoc Committee of the General Assembly was created. In February 2002 the Office of High Commissioner for Human Rights published a *Study on the use and future potential of human rights instruments in the context of disability*[72].

The Ad Hoc Committee created a working group, composed of Member States and disabled persons' associations, to write the draft text that would have been the basis for negotiation by Member States and Observers[73]. The working group carried out its work successfully in two weeks, thanks to the unprecedented contribution of the disabled

[70] T. DEGENER, G. QUINN, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Field of Disability*, cit., p. 3.

[71] Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, December 8 2001, A/CONF.189/12, Program of Action, para. 180.

[72] T. DEGENER, G. QUINN, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Field of Disability*, cit., p. 33.

[73] Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, A/58/118, July 3, 2003, para. 15.

persons' association[74], but left unsolved some core controversial issues such as: legal capacity, institutionalization and forced intervention, the treatment of women and children, and a debate over inclusion versus segregation.

These points were then the centre of the discussion for three years within the Ad Hoc Committee. After two readings of the draft and discussions on the abovementioned points, Ambassador MacKay produced a Chair's text and the Ad Hoc Committee discussed this version of the text, coming to a final agreement.

The text was then referred to the Drafting Committee for a check on terminology, formalities and language. The Ad Hoc Committee adopted the final text in December 2006. The text was sent to the General Assembly and adopted on the 13th of December. On 30 March 2007 the Convention opened for signature, and 81 states signed, which was an unprecedented result for any UN treaty.

2.1.1. The CRPD and the human rights approach

The Convention is the concrete outcome of years of struggle by disabled persons' associations and of efficient lobbying for a binding treaty[75]. During the negotiation, persons with disabilities were highly involved at all levels: as representatives of NGOs, as members of government delegations, as representatives of United Nations organizations and as delegates of National Human Rights Institutions[76].

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[74] On this point see J.E. LORD, *NGO Participation in Human Rights Law and Process: Latest Developments in the Effort to Develop an International Treaty on the Rights of People with Disabilities*, in *ILSA Journal*, 2004, pp. 311-318.

[75] This work is the result of the political struggles of disabled people and allies over the last three decades to challenge the historical oppression and exclusion of disabled people. We mentioned these movements, in particular in the UK and in the US, in the previous paragraph. More literature: D. DRIEDGER, *The Last Civil Rights Movement: Disabled People's International*, London, 1989; J. CAMPBELL, M. OLIVER, *Disability Politics: Understanding Our Past, Changing Our Future*, London, 1996.

[76] G. QUINN, *A short guide to the United Nations Convention on the rights of persons with disabilities*, in G. QUINN, L. WADDINGTON (eds.), *European Yearbook of Disability Law*, vol. 1, Cambridge, 2009, pp. 89-114.

Some scholars argue that the international disability community was so strong, committed and persuasive, that it succeeded in changing the usual procedure and working methods inside the UN, enforcing the principles of openness, participation and transparency[77].

The negotiation process started from a common point of agreement: the need to overcome the medical model[78]. If some scholars argue that the Convention aimed at affirming the social model of disability[79], others support the idea that the CRPD goes beyond it by creating the human rights model of disability[80]. This view was recently endorsed by the CRPD Committee: the term *human rights model* was in fact used in its more recent concluding observations[81].

The human rights model was developed by legal scholars; it is claimed to be an example of the social model of disability[82] and the

[77] T. DEGENER, A. BEGGER, *From Invisible Citizens to Agents of Change: a short history of the struggle for the recognition of the rights of persons with disabilities at the United Nations*, cit., p. 38.

[78] R. KAYESS, P. FRENCH, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, in *Human Rights Law Review*, 8, 1, 2008, pp. 1-34.

[79] It was said that there was often a superficial knowledge of this concept. Kayess and French speak about «a populist conceptualization of the social model as a disability rights manifesto and its tendency towards a radical social constructionist view of disability, rather than from its contemporary expression as a critical theory of disability». See R. KAYESS, P. FRENCH, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, cit., p. 7.

[80] This was said even earlier, during the negotiation by Degener and Quinn. See T. DEGENER, G. QUINN, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Field of Disability*, cit., pp. 13-14.

[81] Concluding Observations on the initial report of Argentina as approved by the Committee at its eighth session (17-28 September 2012), CRPD/C/ARG/CO/1, 2012, October 8, paras. 7-8; Concluding Observations on the initial report of China, adopted by the Committee at its eighth session (17-28 September 2012), CRPD/C/CHN/CO/1, October 15, 2012, paras. 9-10, 16, 54.

[82] Mainly by T. DEGENER, *A Human Rights Model of Disability*, cit., pp. 31-49; ID., *Disability in a human rights context*, in *Laws*, 5(3), 35, 2016; ID., *A new human rights model of disability*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, cit., pp. 41-59.

CRPD should be considered its full expression. According to the human rights model, disability is the result of the interaction of many factors, but great attention is given to social ones. In this view, disability must be considered a part of the variations in the human spectrum and, as such, the debate around disability should be considered part of the bigger debate on inclusivity[83]. In the human rights model, people with disabilities are considered subjects of human rights rather than objects of legal regulation: they are rights bearers and not "problems to be fixed"[84].

[83] See T. DEGENER, G. QUINN, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Field of Disability*, cit., p. 5.

[84] According to Theresia Degener, a well-known disability scholar and one of the main theorists behind this model, the latter is based on six main assumptions: 1. First of all, Degener argues that all people with disabilities must be regarded as human rights bearers, because impairment is not an obstacle for the enjoyment of human rights. This approach is called a "rights-based" as opposed to a "needs-based" approach (typical of the individual model of disability); 2. Degener claims that, while the social model of disability was very focused on anti-discrimination law, the human rights model and the CRPD encompass first- and second-generation positive rights; 3. The third assumption involves impairment. If the social model chooses not to deal with impairment at all, the human rights model claims that impairment is part of human diversity and must be embraced as such. In this sense there is the need to consider and incorporate impairment in a wider social justice theory; 4. The fourth thesis is that the human rights model takes identity into consideration and is in favour of identity-based policies. On this matter, for example, the CRPD adopts an intersectional approach, with specific provisions for women or youth with disabilities. 5. In addition, according to Degener, this model helps to keep a distance from policies entirely based on preventing disability (widespread at the international level). For example, the CRPD doesn't explicitly mention prevention of disability. This doesn't mean that disability prevention must be considered incompatible with the human rights model. On the contrary, secondary prevention must be combined with a multidimensional and comprehensive strategy, where there is space for medical issues as well for the social dimension and the correction of disabling social mechanisms is respectful of disability human rights. 6. The last point concerns the relation between this model and social justice. The author highlights that the CRPD, representing this model, brought disability into the international cooperation agenda and policy. This happened because the model better responds to the need of including disability in justice issues. See T. DEGENER, *A Human Rights Model of Disability*, cit., p. 33.

Some scholars argue that the human rights model should be considered as part of the models developed within critical disability studies. For example, it was said that, despite being openly inspired by the social model of disability, the CRPD implements an intermediate model of disability[85].

In any case, the debate on the existence of something called a human rights model does not hinder the remarkability of the instrument in the field of international law and international disability law.

As we will discuss further, however, the CRPD contains the traditional limits related to any international law instruments, an aspect which strongly emerged during the discussion of the aspects concerning sexuality (see Chapter II).

2.1.2. Some core provisions of the CRPD

The CRPD explicitly recognizes disabled persons as human rights subjects[86], it does not create a new set of rights but it ensures the effectivity of these for people with disabilities. The rights of people with disabilities are, as such, inalienable, universal and strictly inherent to the person[87]. The Convention protects these human rights, especially for persons with more intensive support needs[88]. The purposes of the Convention are drawn up at article 1: «promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity». Article 3 provides a set of principles to reach these objectives. One of the most important statements concerns the right to equal recognition as a person before the law, with equal legal capacity[89].

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[85] For example, M.G. BERNARDINI, *Disabilità, giustizia, diritto. Itinerari tra filosofia del diritto e Disability Studies*, cit., pp. 64-72.

[86] By reaffirming the universality of all human rights for all disabled persons. Preamble, paragraph (c), of the CRPD.

[87] Art. 1 of the Universal Declaration of Human Rights states that "All human beings are born free and equal in dignity and rights".

[88] This is stated in the Preamble, paragraph (j).

[89] Art. 12, paras. 1 and 2. For comments on this article see A. ARSTEIN-KERSLAKE, E. FLYNN, *The General Comment on article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law*, in *International Jour-*

The CRPD affirms a broader vision of the rights of persons with disabilities[90]. This treaty is indeed comprehensive of both first all-defining and second-generation human rights. The importance of combining these two categories of human rights is now being understood in international law, as a hierarchical view of these two categories is now being overcome[91]. The CRPD offers a good example of the combination of these sets of human rights, supporting the idea of their indivisibility and interdependence. An example could be the right to independent living[92], strongly claimed by the disability rights movement, which has

nal of Human Rights, 20, 4, 2016; M. KEYSS, *Article 12*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities*, cit., pp. 263-279; A. LAWSON, *Article 12. Equal recognition before the law*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford, 2018, pp. 339-383; C. DE BHAILIS, E. FLYNN, *Recognising legal capacity: Commentary and analysis of article 12 CRPD*, in *International Journal of Law in Context*, 2017; A. ARSTEIN-KERSLAKE, E. FLYNN, *The right to legal agency: Domination, disability and the protections of article 12 of the Convention on the Rights of Persons with Disabilities*, in *International Journal of Law in Context*, 13, 2017, pp. 22-38.

[90] There is still a huge debate on whether or not the Convention has created a new set of rights. An interesting point of view is the one sustaining that the CRPD actually extends the set of traditional rights, adjusting them to the particular experience of the persons with disabilities. The author claims that there is an ongoing process in international law called fragmentation. This process is necessary if human rights law want to embrace the irreducibility of the experiences of different kinds of persons. See F. MÉGRET, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, in *Human Rights Quarterly*, 30, 2, 2008, pp. 494-516.

[91] These two categories are both included in the 1984 Universal Declaration but then separated into two different conventions. For a long time, it was clear that civil and political rights should be more protected than economic, social and cultural rights. Recently this hierarchy is being challenged thanks to international jurisprudence and the work of monitoring and implementation of the International Covenant on Economic, Social and Cultural Rights. See T. DEGENER, *A New Human Rights Model of Disability*, cit., p. 45.

[92] Article 19. See the following comments: J. FIALA-BUTORA, A. RIMMERMAN, A. GUR, *Article 19*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, cit., pp. 530-559; G. PALMISANO, *Article 19*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, cit., pp. 353-373.

not yet been qualified as either a civil or a social right by the CRPD Committee. In addition, the Convention recognizes the existence of different layers of identity, acknowledging that disabled people might be female, non-heterosexual, non-white, migrants, and that this may have a specific impact on an individual's life. Disabled children and disabled women are subject to specific provisions within the Convention[93], while other grounds such as race, colour, language, religion, nationality, ethnicity, indigenous and social origin, property and age are only mentioned in the preamble[94]. There is also a recognition of some impairment-related groups, such as deaf, blind and deaf-blind persons. The provisions recognize and support the specific cultural identity of groups, including sign languages and the deaf culture of blind, deaf and deaf-blind persons. Furthermore, they are mentioned in the context of the right to education[95].

In the Convention, the field of health is addressed in a human rights context, demanding equal access to general and specialized health care

[93] Articles 6 and 7. For comments see R. MIKYTIUK, E. CHADHA, *Article 6*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, cit., pp. 171-198; V. DELLA FINA, *Article 6*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, cit., pp. 175-194; I. BANTEKAS, *Article 7*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, cit., pp. 198-229; A. BRODERICK, *Article 7*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, cit., pp. 195-212. On the specific provisions on disabled women see T. DEGENER, *Disabled women and international human rights*, in K.D. ASKIN, D.M. KOENING (eds.), *Women and international human rights law*, Leiden, 2003, pp. 267-282.

[94] Preamble, paragraph (p), of the CRPD. An interesting reading on intersectionality in disability is: T. DEGENER, *Intersection between disability, race and gender in discrimination law*, in D. SCHIEK, A. LAWSON (eds.), *European Union non-discrimination law and intersectionality*, Farnham, 2011, pp. 29-46.

[95] Article 24, paras. 3 (a) and (b), of the CRPD. For comments: D. ANASTASIOU, M. GREGORY, J.M. KAUFFMAN, *Article 24*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, cit., pp. 656-705; V. DELLA FINA, *Article 24*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, cit., pp. 439-470.

services for disabled persons. It is specified that services must be community-based and oriented towards freedom rights and dignity of the individual[96].

The CRPD is also the first human rights treaty to mainstream disability in development policies. The correlation between poverty and disability was first brought to attention by the social model of disability. Now there is strong scientific evidence of the fact that impairment and poverty are mutually reinforcing[97], and this has been acknowledged for a long time by international actors such as the United Nations and the World Bank. However, it was only with the CRPD that binding provisions on development and humanitarian protection were created. Article 11 requires State Parties to take adequate actions to protect disabled persons in situations of natural disasters or humanitarian emergencies. Article 32 requires international cooperation to be inclusive and accessible to disabled people and requires disability to be mainstreamed in all development programs, having disabled persons' organizations monitor these activities.

2.2. The European Union approach to disability

The first actions on disability carried out by the European Union (at that time, the European Economic Community) date back to the 1970s. They were mainly non-binding documents, such as resolutions to encourage States to share information on disability[98]. The first Resolution

[96] Article 25. See comments here: P. WELLER, *Article 25: Health*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, cit., pp. 705-733; I.R. PADOVE, *Article 25*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, cit., pp. 471-485.

[97] World Health Organization/World Bank, World report on disability, 2011, 10-11. Available online at *http://www.who.int/disabilities/world_report/2011/report.pdf*.

[98] L. WADDINGTON, M. DILLER, *Tension and coherence in disability policy: the uneasy relationship between social welfare and civil rights models of disability in American, European and international employment law*, in Y. BREESLIN (ed.), *Disability Rights Law and Policy, International and National Perspectives*, New York, 2002, pp. 241-244.

was developed in 1974[99], mainly in the area of employment, and was inspired by a the predominant medical and welfare-based view of disability. The policy was aimed at rehabilitating people with disabilities or placing them in sheltered industries[100]. The risks were enforcing segregation and the gap between disabled and non-disabled persons.

For example, the *Resolution Establishing the Initial Community Action Program for the Vocational Rehabilitation of Handicapped Persons (EC)*, stated that «the general aim of Community efforts on behalf of the handicapped must be to help these people to become capable of leading a normal independent life fully integrated into society». Some scholars have noticed[101] that this policy, with this terminology ("helping" instead of "empowering", for example), adopts a paternalistic approach, reproducing inequalities and discrimination and reinforcing State policies based on the medical model.

In general, this first period is also characterized by the lack of "harder" measures[102] around disability, which fell outside the core of the European Community project, at that time.

The EU's approach to disability started changing around the end of the 1990s: the first step was taken with the approval of the *Disability*

[99] Council Resolution 27 June 1974 establishing the initial Community action program for the vocational rehabilitation of handicapped persons.

[100] For a specific commentary on this policy see E. SAMOY, L. WATERPLAS, *Sheltered Employment in the European Community. Commission of the European Communities*, Brussels, 1992. For a general overview of the evolution see M. PRIESTLY, *We're all Europeans now! The social model of disability and European social policy*, in C. BARNES, G. MERCER (eds.), *The social Model of Disability: Europe and the Majority of the World*, Leeds, 2005, p. 18; A. WALDSCHMIDT, *Disability policy of the European Union: The supranational level*, in *European Journal of Disability Research*, 3, 2009, pp. 8-23.

[101] See for example L. WADDINGTON, *Disability Employment and the European Community*, 21, Brussels, 1995, p. 100.

[102] For example, when the Community tried to enable institutions to follow through national implementation of goals in employment the States exercised their veto powers, or the attempt to approve ordinary disability legislation, such as the one on transportation, failed. See L. WADDINGTON, *From Rome to Nice in a Wheelchair: The Development of a European Disability Policy*, Groeninger, 2006, pp. 6-11.

Strategy in 1996[103]. This non-binding document was the first to recognize EU competences in disability policy making and the first clearly stating the need to comprehensively address fundamental rights of people with disabilities. The Strategy, inspired by the *UN Standard Rules*, was aimed at identifying and tackling obstacles to full participation and equality of people with disabilities in every aspect of life, embracing – albeit not explicitly – the social model of disability.

It was in 1999 with the *Amsterdam Treaty* that the EC gained competence for the adoption of legislative binding measures to contrast discrimination on the basis of disability[104] (art. 13 TCE, now art. 19 TFUE). From then on, the EU would endorse an approach to disability that «acknowledges that environmental barriers are a greater impediment to participation in society than functional limitations»[105].

Directive 2000/78/CE still represents one of the main legislative acts on disability, specifically on employment and occupation[106]. The Directive prohibits direct and indirect discriminations, harassment and instructions on discriminating on the basis of disability (together with religion, belief, age and sexual orientation), but also obliges employers to provide reasonable accommodation to promote the full participation of the person with disability in the work environment (art. 5)[107]. The Directive contains a provision on positive measures (art. 7) and mentions that the principle of equality is not an obstacle for member states

[103] Commission Communication on Equality of Opportunity for People with Disabilities: A New European Community Disability Strategy, COM (1996) 406 FINAL (Jul. 30, 1996).

[104] See R. WHITTLE, *Disability Discrimination and the Amsterdam Treaty*, in *European Law Review*, 23(1), 1998, p. 50 and ID., *Disability Rights after Amsterdam: the way forward*, in *European Human Rights Law Review*, 1, 2000, pp. 33-48.

[105] Commission Communication: Towards a Barrier Free Europe for People with Disabilities, at 3, COM (2000) 284 final (May 12, 2000).

[106] See A. LAWSON, *The Eu Rights Based Approach to Disability: Strategies for Shaping an Inclusive Society*, in *International Journal of Discrimination and the Law*, 6, 2005, pp. 269-287.

[107] R. WHITTLE, *The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective*, in *European Law Review*, 2002, p. 303.

> to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

During the same year, the *Charter of Fundamental Rights* was approved[108].

Here, disability is explicitly mentioned as a ground of non-discrimination in article 21. Moreover, article 26 is entirely dedicated to disabled people[109], stating that

> The Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

In 2003, the Council declared the *European Year of Persons with Disabilities*, followed by the approval of the *Action plan for disability (2004-2010)*, with the idea of implementing the application of the Directive, improving accessibility and integrating other disability issues.

With the *Lisbon Treaty*[110], the legislative competence of the EU on disability gained even more strength. An example of this might be found in art. 10, the horizontal non-discrimination clause, which imposed upon Member States a duty of mainstreaming[111]. At the same time, the Lisbon Treaty brought about a change in the status of the Eu-

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[108] For an overview of this document see S. PEERS, A. WARD (eds.), *The European Union charter of fundamental rights*, Oxford, 2004.

[109] For a focus on the role of the EU Charter of Fundamental Rights on Disability see D. FERRI, *Disability in the EU Charter of Fundamental Rights*, in D. FERRI, A. BRODERICK (eds.), *Research Handbook on Disability EU Law*, Cheltenham, 2020, pp. 29-51.

[110] M. DAWSON, B. DE WITTE, *The EU Legal Framework of Social Inclusion and Social Protection: Between the Lisbon Strategy and the Lisbon Treaty*, in B. CANTILLON, H. VERSCHUEREN, P. PLOSCAR (eds.), *Social Inclusion and Social Protection in the EU: Interactions between law and policy*, Antwerp, 2012, pp. 41-69.

[111] D. FERRI, *L'Unione europea e i diritti delle persone con disabilità: brevi riflessioni a vent'anni dalla prima "Strategia"*, in *Politiche sanitarie*, 2016, p. 120.

ropean Charter of Human Rights in European Law, making it fully part of the European legislative system.

2.2.1. The European Union and the CRPD

The abovementioned asset was integrated and modified by the CRPD[112]. The CRPD is the first treaty on international human rights to provide a mechanism for incorporating regional integration organizations as parties, and it is also the first human rights treaty to be signed by the EU.

After participating in the discussion and drafting the document, the European Union adopted the UN CRPD with a Council's decision in November 2009[113]. The CRPD is a mixed agreement[114], meaning that

[112] The influence of the CRPD in EU law is widely discussed by scholars. Here are some references: A. LAWSON, *The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?*, in O. MJÖLL ARNARDÓTTIR, G. QUINN (eds.), *The UN Convention on the Rights of Persons with Disabilities. European and Scandinavian Perspectives*, Leiden, 2009, pp. 81-109; L. WADDINGTON, *Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community*, in O. MJÖLL ARNARDÓTTIR, G. QUINN (eds.), *The UN Convention on the Rights of Persons with Disabilities. European and Scandinavian Perspectives*, cit., pp. 111-140; L. WADDINGTON, *The European Union and the United Nations, Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences*, in *Maastricht Journal of European and Comparative Law*, 18, 4, 2011, pp. 431-453; J.W. REISS, *The Convention on the Rights of Persons with Disabilities in the Post-Lisbon European Union*, in *Human Rights Brief*, 19, 2011, pp. 18-24; J. CLIFFORD, *The UN Disability Convention and its Impact on European Equality Law*, in *The Equal Rights Review*, 6, 2011, pp. 11-25; A. HOEFMANS, *The EU Disability Framework under Construction: New Perspectives through Fundamental Rights Policy and EU Accession to the CRPD*, in L. WADDINGTON, G. QUINN (eds.), *European Yearbook of Disability Law*, vol. 3, Antwerp, 2012, pp. 34-40.

[113] The CRPD was accessed through Council Decision 2010/48/EC. On this process from a constitutional point of view see D. FERRI, *The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective*, in L. WADDINGTON, G. QUINN (eds.), *European Yearbook of Disability Law*, vol. 1, Antwerp, 2010, pp. 47-59. For a focus on the European monitoring process of the CRPD see A. HOEFMANS, *The EU framework for monitoring the CRPD*, in D. FERRI, A. BRODERICK (eds.), *Research Handbook on Disability EU Law*, cit., pp. 71-88.

the treaty covers fields in which both the EU and Member States are competent (in an exclusive or subsidiary way: for example, discrimination is an area of shared competence between Member States and the EU)[115]. The CRPD is now to be considered an «integral part of EU Law», as stated by the European Court of Justice[116]. According to scholars, the CRPD enjoys a quasi-constitutional status[117] in the EU legal system: it is not at the same level as the Treaties, but it is above secondary law, and the latter must be interpreted in compliance with it.

The European Court of Justice must consider the CRPD when interpreting EU secondary legislation and must provide consistent interpretation. At the same time, a similar duty also exists for EU institutions in general: they must comply with the CRPD in the development, implementation and interpretation of EU law. However, in 2012 the Court of Justice clarified that the CRPD lacks direct effect in the EU law system and, therefore, the validity of a directive cannot be assessed in light of the Convention. The Court stated indeed that «the provisions are not, as regards their content, provisions that are unconditional and sufficiently precise, and that they therefore do not have direct effect in European Union law»[118].

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[114] The CJEU has jurisdiction on interpreting these kinds of agreements under art. 267 TFUE as stated in much case law, such as Case C-53/96, Hermes or Case C-240/09 Lesoochranàrske zoskupenie VLK.

[115] See M. CHAMON, *Negotiation, ratification and implementation of the CRPD and its status in the EU legal order*, in D. FERRI, A. BRODERICK (eds.), *Research Handbook on Disability EU Law*, cit., pp. 52-70.

[116] Cases C-335/11, C-337/11.

[117] S. FAVALLI, D. FERRI, *Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints*, in *European Public Law*, 22, 3, 2016.

[118] Case C-363/12, Z. v. A Government Department. We should note however that the Italian Constitutional Court clearly expressed in Decision no. 236/2012 that the UNCRPD is European Law. The motivation of the Court is that, since the European Union joined the CRPD, then the Treaty must have the same legal status and features of European Union Law in the areas of competence of the Union itself (while outside those competences the power is the one deriving from art. 117 of the Italian Constitution).

2.2.2. The definition of disability under EU anti-discrimination law as interpreted by the European Court of Justice

Directive 2000/78 prohibits any form of direct and indirect discrimination but does not provide a specific definition of disability. This circumstance was responsible for many preliminary references to the CJEU, in order to better understand the concept of disability to be applied for the purposes of the Directive.

After the adoption of the CRPD, the definition was also partially influenced by the Convention[119]. However, many scholars still wonder if the current definition under EU law could be considered fully compatible with the CRPD[120].

One of the first definitions provided by the CJEU is the one contained in the *Chacón Navas* case[121], decided in 2005. Despite the non-medicalized view of disability adopted by European policies and non-binding documents, the first definition by the CJEU was strongly influenced by the medical model of disability. Indeed, the definition of disability provided was the following:

[119] On this note see A. BRODERICK, P. WATSON, *Disability in EU non-discrimination law*, in D. FERRI, A. BRODERICK (eds.), *Research Handbook on Disability EU Law*, cit., pp. 121-145.

[120] L. WADDINGTON, *The potential for, and Barriers to, the Exercise of Active EU Citizenship by People with Disabilities: The Right to Free Movement*, in R. HALVORSEN, B. HVINDEN, J. BICKENBACH, D. FERRI, A.M. GUILLÉN RODRIGUEZ (eds.), *The Changing Disability Policy System: Active Citizenship and Disability in Europe. Volume 1*, London, 2017, p. 196; L. WADDINGTON, A. LAWSON, *The unfinished story of EU disability non-discrimination law*, in A. BOGG, C. COSTELLO, A.C.L. DAVIES (eds.), *Research Handbook on EU Labour Law*, Cheltenham, 2016, pp. 474-491; L. WADDINGTON, *Saying all the right things and still getting it wrong: The Court of Justice's definition of disability and non-discrimination law*, in *Maastricht Journal of European and Comparative Law*, 22(4), 2015, pp. 576-591; L. LOURENÇO, P. POHJANKOSKI, *Breaking down Barriers? The Judicial Interpretation of "Disability" and "Reasonable Accommodation" in EU Anti-Discrimination Law*, in U. BELAVUSAU, K. HENRARD (eds.), *EU Anti-Discrimination Law beyond Gender*, Oxford, 2018, pp. 321-328.

[121] Chacón Navas v. Eurest Colectividades SA: C-13/05.

> a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.

At the same time, the Court traced the boundaries between impairment and disability, stating that only long-lasting impairments could be regarded as disabilities according to EU law. At paragraph 46, the Court held that for the purposes of the Directive, disability must be considered differently from illness: the protection accorded by the Directive does not cover any type of sickness. Moreover, in this decision impairment is defined as something that can hinder participation in the working environment. In this judgement the focus is on the impaired individual and not on the environment, so that there is no consideration for social barriers.

After this first decision and before the adoption of the CRPD, the ECJ held that protection against discrimination on the grounds of disability also extends to discrimination by association, as in the *S Coleman v. Attridge Law and Steve Law* case[122] (2008). In this case, the Court of Justice recognized the protection against discrimination for a person close or related to a person with disability; in particular, the case concerned a mother and her disabled son.

A paradigm shift in the Court's case law[123], arguably influenced by the UN Convention[124], is represented by the *HK Denmark* case[125], where disability is defined as

> a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the persons concerned in professional life on an equal basis with other workers

[122] *S Coleman v. Attridge Law and Steve Law* C-303/06.

[123] This was the definition used by Advocate General Wahl in the decision *HK Danmark* C-335/11 and C-337/11.

[124] L. LOURENÇO, P. POHJANKOSKI, *Breaking down Barriers? The Judicial Interpretation of "Disability" and "Reasonable Accommodation" in EU Anti-Discrimination Law*, cit., p. 380.

[125] *HK Danmark* C-335/11 and C-337/11.

and the Court mentions that "it does not appear that the Directive is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness".

After this judgment, many other cases have been decided in the abovementioned sense, for example *Commission v. Italy* or *Z. v. A Government Department*.

In *Z. v. A. Government Department*[126] the Court stated that «whereas the UN Convention refers broadly to participation in society, the Court's definition covers only participation in professional life». With this limitation, the Court departed from the provisions of the CRPD. Additionally, in fields such as transport regulation or EU Customs Nomenclature, the Court adopted a narrower definition of disability[127].

All these considerations lead to the observation that, despite significant progress, the social model of disability is not fully embraced within the EU system and, specifically, by the CJEU.

This can also be noticed in the *Kaltoft* case[128], where the Court, having to define whether severe obesity could be regarded as a disability,

[126] Z. v. A. Government Department C-363/12.

[127] In the field of Customs Nomenclature, the CJEU refused explicitly to adopt the definition of disability of the Directive, saying that it covers only «persons affected by a non-marginal limit on their ability to walk, the duration of that limitation and the existence of other limitations relating to the capacities of those persons being irrelevant» (Case C-198/15 Invamed Group Ltd and others v. Commissioners for Her Majesty's Revenue & Customs, EU:C:2016:362, paragraph 33). In the field of transport regulation (Regulation 1371/2007) the definition is strongly anchored in physical impairments in relation to mobility.

[128] *Fag og Arbejde (FOA) v. Kommunernes Landsforening*, Case C-354/13; M. BUTLER, *Obesity as a disability: the implications of Kaltoft*, in *Web Journal of Current Legal Issues*, 20(3), 2014; K.Ó. CATHAOIR, *On Obesity as a Disability*, in *European Journal of Risk Regulation*, 6(1), 2015, pp. 145-150; S. BENEDI LAHUERTA, *Case C-354/13 Kaltoft v. Municipality of Billund – Can obesity be a disability under EU equality law?*, in *European Law Blog*, 2015; G. DE BECO, *Is Obesity a Disability: The Definition of Disability by the Court of Justice of the European Union and Its Consequences for the Application of EU Anti-Discrimination Law*, in *Columbia Journal of European Law*, 22, 2015, p. 381; C. SINGH, *Disability Discrimination: Obesity and the Court of Justice of the European Union's decision in Karsten Kaltoft v. Billund Kommune*, *Case C-354/13 ECJ*, in *Issues in Legal Scholarship*, 12(1), 2014, pp. 1-11; A. BRODERICK,

adopted the definition given in *HK Denmark*, excluding obesity as a relevant field for the purpose of the Directive in the specific case. In this decision, the Court failed again to acknowledge the role of social barriers. The Court ignored that false assumptions about ability and stigma could have caused discrimination, giving value to physical limitations only.

Similar conclusions are shared by the *Dauidi* case[129]. In general, we need to recognize that the definition elaborated in *HK Denmark* is not an expression of the medical model of disability. Despite this, the CJEU still does not consider the side of disability coming from social barriers[130].

Even in the case *TC, UB v. Komisia za zashtita ot diskriminatsia*[131], despite some important outcomes in the field of reasonable accommodation in workplace and on the relationship between EU law and the CRPD[132], the Court does not depart from the previous given definition of disability. This does not grant protection whenever it is needed, in fact

> an individual may be impaired without this impacting on their ability to work. But this does not mean that such a person is able to participate in the labour market and access all employment related benefits on an equal basis with others. They may still face discrimination, prejudice, stigma and inaccessible environments in their *professional life*[133].

(Re-)Conceptualizing Disability-based Discrimination and Sickness Absence at Work, in *International Labor Rights Case Law*, 5(1), 2019, pp. 86-91.

[129] Daouidi v. Bootes Plus SL, C-395/15. For a commentary see D. FERRI, *Daouidi v. Bootes Plus SL and the Concept of 'Disability' in EU Anti-Discrimination Law*, in *European Labour Law Journal*, 10, 1, 2019, pp. 69-84; A. BRODERICK, *(Re-)Conceptualizing Disability-based Discrimination and Sickness Absence at Work*, cit., pp. 86-91.

[130] D. FERRI, *Daouidi v. Bootes Plus SL and the Concept of 'Disability' in EU Anti-Discrimination Law*, cit., p. 84.

[131] TC, UB v. Komisia za zashtita ot diskriminatsia (C-824/19), 21 October 2021.

[132] D. FERRI, *A Step Forward in Ensuring Equality for Persons with Disabilities – TC, UB v. Komisia za zashtita ot diskriminatsia, VA*, in *EU Law Live*, 2 November 2021.

[133] L. WADDINGTON, *The influence of the CRPD on EU Anti-Discrimination Law*, in U. BELAVUSAU, K. HENRARD (eds.), *EU anti-discrimination law beyond gender*, cit., p. 350.

2.2.3. The 2010-2020 Disability Strategy and the 2021-2030 Disability Strategy

The *2010-2020 Disability Strategy* was approved by the Commission shortly after the adoption of the CRPD[134]. Its aim is to «empower people with disabilities so that they can enjoy their full rights and benefit fully from participating in society». The main focus of the document is the elimination of barriers. For this reason, the Commission has identified eight main areas of action: Accessibility, Participation, Equality, Employment, Education and Training, Social Protection, Health and External Action, in which the EU should intervene together with Member States.

The Strategy[135], explicitly inspired by the CRPD, is part of the EU's *Europe 2020 Strategy*[136]. In this document, the economic and social participation of people with disabilities in society is considered essential to create smart, sustainable and inclusive growth in European society as a whole. The Strategy embraces a view of disability strongly influenced by the social model and the human rights model, adopting the definition of disability of the CRPD.

In addition, the *Strategy* implements instruments to monitor the application of the CRPD in Member States and within European institutions. In particular, the Commission is responsible for the collection and analysis of data on barriers and social integration of people with disabilities.

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[134] Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions European Disability Strategy 2010-2020. A Renewed Commitment to a Barrier-Free Europe {SEC(2010) 1323} {SEC(2010) 1324}. See S. CHARITAKIS, *An introduction to the disability strategy 2010-2020, with a focus on accessibility*, in *Ars Aequi*, 2013, pp. 28-35.

[135] On the Strategy: D. HOSKING, *Staying the course: the European disability strategy 2010-2020*, in L. WADDINGTON, G. QUINN, E. FLYNN (eds.), *European Yearbook of Disability Law*, vol. 4, Cambridge, 2013.

[136] C. O'SULLIVAN, S. QUINLIVAN, *The EU disability strategy and the future of EU disability policy*, in D. FERRI, A. BRODERICK (eds.), *Research Handbook on Disability EU Law*, cit., pp. 12-28.

The European Accessibility Act[137], approved in June 2019, is part of the *Strategy*. It is a directive aimed at increasing accessibility of goods and services for people with disabilities in the internal market. It requires States to adopt the minimum standards of accessibility for services and products starting from 2025, mainly in the following areas: Smartphones, tablets and computers, ticketing machines and check-in machines, Televisions and TV programmes, Banking and ATMs, E-books, online shopping websites and mobile applications[138].

The Strategy also-called for the approval of a new Directive on non-discrimination. The development of a reformed Directive, however, stopped after the proposal put forward by the Council in 2008[139]. This new version extends anti-discrimination legislation beyond the labour market, covering relevant fields such as social protection, education, access to goods and services and many others. However, the proposal has never been approved.

The new Disability Strategy (2021-2030) was approved on the 3 March 2021; this new document takes into account invisible disabilities and embraces an intersectional perspective by considering the multiple disadvantages faced by children, older people, refugees with disabilities, women, etc. The Strategy is the result of a broad work of consultation, which started in July 2020 and finished in November 2020, involving stakeholders at both the European and national level. The Strategy revolves around three main topics: EU rights; independent living and autonomy; and non-discrimination and equal opportunities.

2.3. The Council of Europe and disability

During the last ten years, the Council of Europe has issued some documents and a comprehensive strategy on disability to be applied by

[137] Directive (EU) 2019/882 on the accessibility requirements for products and services.

[138] See D. FERRI, *The European Accessibility Act and the Shadow of the "Social Market Economy"*, in *European Law Review*, 2020; A. DRABARZ, *Harmonising Accessibility in the EU Single Market: Challenges for Making the European Accessibility Act Work*, in *Review of European and Comparative Law*, 4, 2020, pp. 83-102.

[139] Proposal 2 July 2007, COM (2008) 426.

all Member States. At the same time, the European Court of Human Rights has developed a substantial corpus of decisions on disability issues, specifically in the field of mental health and institutionalization. This case law unfortunately is influenced by the inherently social nature and the related high cost of most of the rights at stake, which make the Court less inclined to assume a stronger position against the States. On the whole, a tendency towards the social model of disability can be detected also in the work of the Council.

2.3.1. The non-binding documents: resolutions, policies and strategies

In the last 20 years, the Council of Europe has adopted a view of disability increasingly inspired by the social model[140].

The recommendation of the Committee of Ministers, Rec (2006) 5[141], paragraph 2.2, explicitly mentions a paradigm shift in disability law:

> We have moved from seeing the disabled person as a patient in need of care who does not contribute to society to seeing him/her as a person who needs the present barriers removed in order to take a rightful place as a fully participative member of society. Such barriers include attitudes and social, legal and environmental barriers. We therefore need to further facilitate the paradigm shift from the old medical model of disability to the social and human rights-based model.

According to one of the latest Resolutions of the Parliamentary Assembly, *Resolution 2039 (2015)*[142], there are more than 80 million people with disabilities in Europe. The notion of disability embraced by this document is a universalistic one: «Every human being is likely to

[140] For an overview on the policies of the Council of Europe before 2006 see T. AFFLERBACH, A. GARABAGIU, *Council of Europe Actions to Promote Human Rights and Full Participation of People with Disabilities: Improving the Quality of Life of People with Disabilities in Europe*, in *Syracuse Journal of International Law*, 34, 2006.

[141] Council of Europe: Committee of Ministers, Recommendation Rec(2006)5 of the Committee of Ministers to Member States on the Council of Europe, *Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015*, 5 April 2006.

[142] Resolution 2039 (2015), *Equality and inclusion for people with disabilities*, 20 January 2015, paragraph 1.

suffer some temporary or permanent impairment at some point in his or her life». The Assembly affirms that, despite being a high-impact phenomenon, disability is still largely under-addressed, which results in the marginalization and invisibilization of people with disabilities in society. According to the Resolution, exclusion and inequalities are exacerbated by the austerity measures taken by States in response to the financial crisis. The Assembly affirms at paragraph 2 that «it is the various barriers encountered by people with impairments which create the situation of disability», adopting a social view of disability. The *European Convention of Human Rights* and the *European Social Charter* are mentioned as instruments for granting the rights of people with disabilities, suggesting that these two documents shall be interpreted according to the abovementioned framework. To conclude, Member States are recommended to ratify and implement the CRPD and the European Social Charter.

Moreover, the Council of Europe has recently developed a *Disability Strategy 2017-2023*[143], where five priority areas are identified: Equality and non-discrimination; Awareness raising; Accessibility; Equal recognition before the Law; Freedom from exploitation, violence and abuse.

On the whole, it can be stated that the Council of Europe uses the CRPD as an anchor to encourage Member States to adopt and implement legislation based on the social model of disability, with particular focus on political participation, equality and non-discrimination, as well as accessibility.

2.3.2. Disability according to the European Court of Human Rights

When it comes to the judiciary level, the situation is notably different.

If the entire Convention can be applied to disability rights, the case law of the Court has mainly developed around article 3 (prohibition of

[143] G. QUINN, L. WADDINGTON, E. FLYNN, *Council of Europe*, in IID. (eds.), *European Yearbook of Disability Law*, vol. 5, Oxford, 2015, pp. 343-346.

inhuman and degrading treatment)[144], article 5 (right to liberty), article 6 (right to fair trial), article 8 (right to private life) and article 14 (prohibition of discrimination)[145]. In general, it can be noted that the Court has been very cautious in recognizing that States have certain obligations when it comes to disability rights, especially in the fields of social inclusion, independent living and accessibility.

Much case law concerns mental health and psycho-social/intellectual disability[146]. On this matter, the Court usually finds a violation of article 5 when a person with an intellectual disability is institutionalized without their consent and *de facto* deprived of their liberty (*H. L v. the United Kingdom*[147] or *Stanev v. Bulgaria*[148]).

Many decisions concern the conditions of detention for people with physical or intellectual impairments. Usually, in these cases, the Court finds a violation of article 3, affirming that not taking into consideration the particular condition of a disabled person in detention results in inhuman and degrading treatment[149]. This might be because the person cannot move autonomously inside the building, use the bathroom or have proper access to medical facilities (e.g. *Vincent v. France*[150], *Arutyunyan v. Russia*[151], *Grimailovs v. Latvia*[152], *Semikhvostov v. Rus-*

[144] See A. LAWSON, *Disability, Degradation and Dignity: The Role of article 3 of the European Convention on Human Rights*, in *Northern Ireland Quarterly*, 56, 4, 2005, pp. 462-480.

[145] S. FAVALLI, *The European Convention on Human Rights and Disability*, in D. FERRI, A. BRODERICK (eds.), *Research Handbook on Disability EU Law*, cit., pp. 414-430.

[146] P. BARTLETT, O. LEWIS, O. THOROLD, *Mental Disability and the European Convention on Human Rights*, Leiden, 2006; P. BARTLETT, *Mental Disability, the European Convention on Human Rights and Fundamental Rights and Freedoms, and the Sustainable Development Goals*, in *International Development, Mental Health and Well-Being: The Sustainable Development Goals*, London, 2017.

[147] H.L.V. The United Kingdom, no. 45508/99, 5 October 2004.

[148] Stanev v. Bulgaria, Application no. 36760/06, 17 January 2012 (Grand Chamber).

[149] C. O'MAHONY, *Legal capacity and detention: implications of the UN disability convention for the inspection standards of human rights monitoring bodies*, in *The International Journal of Human Rights*, 16, 2012, pp. 883-901.

[150] Vincent v. France, Application no. 6253/03, 24 October 2006.

[151] Arutyunyan v. Russia, Application no. 48977/09, 10 April 2012.

sia[153], *Asalya v. Turkey*[154]) or because continuous detention is not compatible with certain impairments and conditions (*Helhal v. France*[155], *Topekhin v. Russia*[156]).

In a particular case, *Z.H. v. Hungary*[157], concerning a deaf and mute person, the ECtHR, while affirming a violation of article 5.2 of the Convention (right to liberty and security), stated that Hungary failed to take any true reasonable steps. This passage is remarkable because it suggests that the notion of reasonable accommodation expressed in articles 2, 13 and 14 of the CRPD is being applied in this context.

It can be said that the CRPD plays a certain role in the ECtHR case law. The convention is explicitly mentioned, for example, in the motivation of *R.P. and Others v. the United Kingdom*[158], where it is reaffirmed that the State must provide appropriate accommodation to facilitate a disabled person's effective role in legal proceedings[159].

Other cases concern the accessibility of justice buildings (*Farcas v. Romania*[160], inadmissible), and legal capacity and guardianship (*Shtukaturov v. Russia*[161], *Stanev v. Bulgaria*[162]). Moreover, it might be useful highlighting the *Bloshin v. Russia*[163] case, discussed by the Grand Chamber, where it was stated that in the case of children with disability there must be additional safeguards to ensure that their rights are protected.

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[152] Grimailovs v. Latvia, Application no. 6087/03, 25 June 2013.

[153] Semikhvostov v. Russia Application no. 2689/12, 7 July 2014.

[154] Asalya/Türkiye, Application no. 43875/09, 15 April 2014.

[155] Helhal v. France, Application no. 10401/12, 19 May 2015.

[156] Topekhin v. Russia, Application no. 78774/13, 17 October 2016.

[157] Z.H. v. Hungary, Application no. 28973/11, 8 November 2011.

[158] R.P. and Others v. The United Kingdom, Application no. 38245/08, 9 October 2012.

[159] In this case however the court found no violation of article 6 because the measures taken to ensure that the best interest of the persons was represented were appropriate and proportionated.

[160] Decision on The Admissibility, Farcaş v. Romania, 14 September 2010.

[161] Shtukaturov v. Russia, Application no. 44009/05, 27 March 2008.

[162] Stanev v. Bulgaria, Application no. 36760/06, 17 January 2012, Grand Chamber.

[163] Blokhin v. Russia, Application no. 47152/06, 23 March 2016, Grand Chamber.

Article 8 (right to respect for private and family life) is, interestingly enough, mainly connected to cases on accessibility of public buildings and facilities in general. Article 8 is understood as the right to develop one's personality, similarly to the German and Italian Constitution (art. 2 of the Italian Constitution and art. 2 of the Grundgesetz). Unfortunately, in these cases the recognition of the lack of accessibility is not accompanied by the recognition of the violation of article 8 by member states. In *Botta v. Italy*[164], the leading case in this field, the Court uses a test in order to assess the direct link between denial of access and the duty for the State to take appropriate measures. Other cases on article 8 concern legal capacity (*Shtukaturov v. Russia*[165], *Ivinovic v. Croatia*[166], *A.N. v. Lithuania*[167]), a field in which the Court is usually more prone to recognize a substantive violation, consent in medical treatment (*Glass v. the United Kingdom*)[168] or even assisted suicide (*Pretty v. United Kingdom*)[169].

Article 14 (prohibition of discrimination) always needs to be addressed in combination with other provisions, and of course there is no exception in this field. The violation is often found in conjunction with article 8, but in a specific case it also came in conjunction with article 2 (right to education). It is important to note how in one of the first cases of this kind decided by the Court, *Glor v. Switzerland*[170], the judges explicitly mentioned *Recommendation 1592* on social inclusion by the Parliamentary Assembly and the CRPD, in order to state the need to fully tackle discrimination against disabled people. In doing so, they spoke about a worldwide consensus on the need to protect people with disabilities from discriminatory treatment, which would thereinafter guide the case law on this matter. The case *Cam v. Turkey*[171] was decided against Turkey, mainly because the State failed in providing rea-

[164] Botta v. Italy, 24 February 1998, no. 153/1996/772/9739.

[165] Shtukaturov v. Russia, Application no. 44009/05, 27 March 2008.

[166] Ivinović v. Croatia, Application no. 13006/13, 18 September 2014.

[167] A.N. v. Lithuania, Application no. 17280/08, 31 May 2016.

[168] Glass v. The United Kingdom, Application no. 61827/00, 9 March 2004.

[169] Pretty v. The United Kingdom, Application no. 2346/02, 29 April 2002.

[170] Glor v. Switzerland, Application no. 13444/04, 30 April 2009.

[171] Çam v. Turkey, Application no. 51500/08, 23 February 2016.

sonable accommodation for people with disabilities in education (specifically at the Turkish National Music Academy). This reasonable accommodation, a notion deriving from the CRPD, was considered, in that case, essential for the full exercise of human rights.

To sum up, the disability case law from the European Court of Human Rights is not remarkably audacious but is influenced by the CRPD and, as such, is slowly implementing a social/human rights model of disability[172].

2.3.3. The European Social Charter: focus on inclusive education and employment for life in the community

The European Social Charter specifically addresses disability issues in article 15. This article expresses and promotes a view according to which people with disabilities are to be considered subjects and equal citizens, who must be granted primary rights such as «independence, social integration and participation in the life of the community»[173]. Over the years article 15 has been interpreted as a provision that must be applied to all persons with disabilities, irrespective of age, nature and origin of their disability[174]. The principle of non-discrimination represents the core of the norms provided for by article 15[175].

Article 15.1 requires a State to

> take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible, or, where this is not possible, through specialized bodies, public or private.

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[172] S. FAVALLI, *The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017-2023: 'from Zero to Hero'*, in *Human Rights Law Review*, 18, 3, 2018, pp. 517-538.

[173] This was stated in the case law discussed in front of the Committee, Association internationale Autisme-Europe (AIAE) v. France, Complaint no. 13/2002, Decision on the merits of 4 November 2003, §48.

[174] Association internationale Autisme-Europe (AIAE) v. France, Complaint no. 13/2002, Decision on the merits of 4 November 2003, §48.

[175] Conclusions 2003, Statement of Interpretation on article 15.

Education for children and people with disabilities in general is seen as a key aspect of granting citizenship rights and guaranteeing the enjoyment of fundamental rights[176]. Indeed, the right to education is framed as a mean to promote independence, integration and participation of persons with disabilities. The Committee affirmed that States do not enjoy a wide margin of appreciation in choosing how to enact provisions on education: mainstream schools are the sole way to enforce article 15[177]. On this point the Committee observed that integration and inclusion are two different notions, and one does not necessarily lead to the other. Inclusive education means the right to participate in mainstream school, but also the obligation for the school to accept the disabled student, taking into account her best interest and evaluating her peculiar abilities and educational needs[178]. Under this system, States must guarantee that both mainstream and special schools ensure adequate teaching and that they are taking measures to make substantial progress in setting up an inclusive educational system[179]. This provision must be applied in conjunction with the general principle of non-discrimination. This implies that the State's legislation needs a compelling justification to support special or segregated educational systems and needs to provide effective remedy for those being excluded by mainstream education unlawfully[180]. In consideration of the fact that article 15.1 is complex and expensive to enact, the State's measures to achieve the goals must meet three criteria: (1) a reasonable timeframe; (2) measurable progress; and (3) financing consistent with the maximum use of available resources.

Article 15.2 requires the State to promote equal and effective access to employment. With this provision, legislation must prohibit discrimination on the basis of disability and grant equal opportunities on the

[176] Association internationale Autisme-Europe (AIAE) v. France, Complaint no. 13/2002, Decision on the merits of 4 November 2003, §48.

[177] European Action of the Disabled (AEH) v. France, complaint no. 81/2012, Decision on the merits of 11 September 2012, §78.

[178] MDAC v. Belgium, Complaint no. 1009/2014 Decision on the merits of 16 October 2014, §66.

[179] Conclusions XX-1 (2012), Austria.

[180] Conclusions 2007, Statement of Interpretation on article 15 §1.

labour market. States Parties can have a margin of discretion regarding the measure they choose in order to promote access to employment. Article 15.2 does not require the introduction of quotas, but policies must be effective[181]. Sheltered employment facilities should be reserved for those persons with disabilities who cannot be integrated into the open labour market due to their impairment. However, they are entitled to the application of basic provisions of labour law, in particular the right to fair remuneration and participation in trade unions[182].

The last part of article 15 is on social integration and asks States to remove barriers to communication and mobility in order to enable access to transport, housing, cultural activities and leisure. On this matter, article 15.3 requires States to adopt a comprehensive non-discrimination legislation covering public and private spheres and to provide effective remedies for those who are unlawfully denied access[183].

Moreover, article 15 requires the State to take positive actions to achieve social integration and full participation. The Committee states that disabled people themselves should be consulted when it comes to implementing and reviewing such policy, and in the design thereof[184].

From this brief analysis of article 15, it can be argued that the Committee, in its jurisdiction, is aiming at implementing the social model of disability with its jurisprudence and is trying to increase the minimum standard of application of social rights on disability matters for all the States Parties[185].

[181] Conclusion XIV2 (1998), Belgium.

[182] Conclusion XVII-2 (2005), Czech Republic.

[183] Conclusion 2012, Estonia.

[184] Conclusion 2008, Statement of interpretation of article 15§3.

[185] G. PALMISANO, *The European Social Charter and disability*, in D. FERRI, A. BRODERICK (eds.), *Research Handbook on Disability EU Law*, cit., pp. 431-447; M. SMUSZ-KULESZA, *Protection of the rights of persons with disabilities under the European Social Charter*, in *Acta Iuris Stetinensis*, 31, 3, 2021, pp. 107-122.

3. From the medical model to the social model: a map of the Italian legislative and constitutional approach to disability

Law is deeply influenced by social change and is in constant dialogue with other disciplines. Inevitably, the social model of disability progressively has caused a paradigm shift in disability law both on a national and international level.

This paragraph is dedicated to the analysis of the national level. We will show how legislation, starting from an approach based on assistance and strictly informed by medical criteria, shifted to an approach based on the idea of full participation in society and non-discrimination, with an emphasis on the disabled person as an equal and full citizen.

Nonetheless, the results of this shift are not homogeneous: legislations and policies inspired by different views of disability indeed still co-exist in the Italian legal system. The *reconductio ad unum* can be found in the Constitutional interpretation of disability law. The fragmented legislative corpus must find its common framework in light of the Constitution and in the evolving case law of the Constitutional Court.

3.1. Lights and shadows of Italian disability law

We briefly mentioned at the beginning of this paragraph that different disability paradigms are still implemented in the Italian legislative system. Nonetheless, before the 2000s, a series of legislative measures were enacted to overcome *welfarism*, expressed through support and State aids, with the objective of reaching the full inclusion of disabled people in society, as active and effective members of it[186].

Some scholars argue that the approach to disability of the Italian legal corpus is a "functional"[187] one, depending on the specific legal in-

[186] F. FURLAN, *La tutela costituzionale del cittadino portatore di handicap*, in C. CATTANEO (ed.), *Terzo settore, nuova statualità e solidarietà sociale*, Varese, 2011.

[187] L. BUSATTA, *L'universo delle disabilità: per una definizione unitaria di un diritto diseguale*, in F. CORTESE, M. TOMASI (eds.), *Le definizioni nel diritto. Atti delle giornate di studio 30-31 ottobre 2015*, Trento, 2016, p. 338.

strument to be regulated[188]. For example, the legislation on economic support is based on assistance and State aids and depends on a medical assessment of disability[189]. These legal instruments divide disabled people into "homogenous" groups (deaf people, blind people, people injured during wars and conflict, etc.) in order to grant certain privileges to some of them, within a strategy of competition and fragmentation among minority groups[190]. All these state aids[191], despite actuating art. 38 of the Constitution, are built on the idea of the disabled subject as a lesser member of society, in need of support through provisions inspired by charity[192]. These kinds of measures are of course useful in supporting people with disabilities from a financial point of view, but at the same time they do not facilitate the empowerment process, leaving people with disabilities at the margins of society.

The most comprehensive law on disability is Law 104/1992[193]. Despite some definitions, terminology and instruments still anchored in medical criteria, this law can be interpreted as an early experiment in legislation inspired by the social model of disability (see *infra*, paragraph 2.2.1).

Conversely, a good example of a definition of disability in accordance with the social model was introduced in the Italian system through

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[188] A.D. MARRA, *Disabilità*, in *Digesto delle discipline privatistiche. Sezione civile*, Torino, 2010, p. 556.

[189] A.D. MARRA, *Società, disabilità, diritti. Come i Disabilities Studies hanno attecchito nella giurisprudenza italiana*, Milano, 2018, p. 16.

[190] Marra suggests that in a period of economic crisis this kind of support risks being cut. This gives rise to mechanisms in which each group fights and lobbies for its own interests, which are often in conflict or to be weighed against other groups' interests. See A.D. MARRA, *Società, disabilità, diritti. Come i Disabilities Studies hanno attecchito nella giurisprudenza italiana*, cit., p. 16.

[191] Such as invalidity pension (Law 222/1984) and other instruments (*indennità di frequenza*, *assegno di invalidità*, *indennità di accompagnamento*). On this matter see A. CANDIDO, *Disabilità e prospettive di riforma*, Torino, 2018, pp. 65-119.

[192] A.D. MARRA, *Società, disabilità, diritti. Come i Disabilities Studies hanno attecchito nella giurisprudenza italiana*, cit., p. 18.

[193] Legge 5 febbraio 1992, n. 104, "Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate", see *infra*.

Law 6/2004[194], which modified the civil code introducing an instrument called *Support administration* (*Amministrazione di sostegno*)[195]. The new article 404 of the Civil Code adopts a definition of disability rooted in the concept of social barriers: the impairment does not disappear, but the focus is on the (even temporary or partial) loss of decisional autonomy. There is no medical assessment required, the instrument is flexible, and its goal is not to assign benefits, but to facilitate full participation and integration for self-determination[196]. The same goal is pursued by Law 112/2016[197], which specifically aims at full integration and participation of people with severe disabilities (as defined by article 3 paragraph 3 of Law 104/1992) and contrasting institutionalization both in the presence and in the absence of the original family unit[198]. It can also be argued that the understanding of disability has changed over time, and has evolved, from both a linguistic and a substantial point of view,

[194] Legge 9 gennaio 2004, n. 6, "Introduzione nel libro primo, titolo XII, del codice civile del capo I, relativo all'istituzione dell'amministrazione di sostegno e modifica degli articoli 388, 414, 417, 418, 424, 426, 427 e 429 del codice civile in materia di interdizione e di inabilitazione, nonché relative norme di attuazione, di coordinamento e finali".

[195] This figure is a sort of legal guardian who can be nominated by the Judge to support the person who is partially or entirely non-autonomous, with the idea of preserving his/her legal capacity. On this instrument see the articles in G. FERRANDO (ed.), *L'amministrazione di sostegno. Una nuova forma di protezione dei soggetti deboli*, Milano, 2005, in particular P. CENDON, *Un altro diritto per i soggetti deboli. L'amministrazione di sostegno e la vita di tutti i giorni*, p. 51 ff.; R. RITA, P. CENDON, *L'amministrazione di sostegno: motivi ispiratori e applicazioni pratiche*, Torino, 2009; E.V. NAPOLI, *L'Amministrazione di sostegno*, Padova, 2009; A. TURCO, *L'amministrazione di sostegno: novella e sistema*, Napoli, 2010; M.O. ATTISANO, *Tutela ed amministrazione di sostegno*, Padova, 2012.

[196] Scholars have noticed how this instrument is one of the few to be completely in line with the CRPD. A.D. MARRA, *Società, disabilità, diritti. Come i Disabilities Studies hanno attecchito nella giurisprudenza italiana*, cit., p. 20.

[197] Legge 22 giugno 2016 n. 112 "Disposizioni in materia di assistenza in favore delle persone con disabilità grave prive del sostegno familiare". For an initial commentary see G. ARCONZO, *La legge sul «dopo di noi» e il diritto alla vita indipendente delle persone con disabilità*, in *Quaderni costituzionali*, 4, 2016, pp. 787-789.

[198] S. ANDÒ, L. PEDULLÀ, *Legge sul "Dopo di noi" e Costituzione: dalla non discriminazione all'inclusione*, in *Non Profit Paper*, 2016; M. DOGLIOTTI, *La condizione dei disabili e la legge sul "dopo di noi"*, in *Famiglia e diritto*, fasc. 4, 2018, pp. 425-428.

moving slowly but consistently away from the medical model of disability. An example of this could be the evolution of the legislation on employment for people with disabilities (paragraph 3.2.2) or the legislation on inclusive education for students with disabilities (paragraph 3.2.3), a field where Italy is now a leading country in Europe.

3.1.1. Law 104/1992: a bledend approach

Law no. 104/1992 is the first comprehensive law on disability in Italy. It is aimed at recognizing new rights as well as collecting, coordinating and unifying previous legislation on the topic and granting the effectivity of rights for people with disability.

The terminology adopted is now outdated and people with disabilities are referred to as "handicapped people". They are defined in article 3 as persons with a stable or evolving physical, mental or sensory impairment. According to the law, impairments might cause difficulties in learning, forming relationships or finding work, which results in social disadvantage and marginalization[199]. This definition, far from being strictly consistent with a social model, is the first to recognize and acknowledge, by law, the importance of the social root of disability.

Prior to it, the only unitary definition of disability in the legal system was the one given by the Constitutional Court in Decision no. 215/1987[200] where social barriers were not mentioned at all[201] and there was a medicalized view of disability.

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[199] The original Italian text of article 3(3) reads: «è persona handicappata colui che presenta una minorazione fisica, psichica o sensoriale stabilizzata o progressiva, che è causa di difficoltà di apprendimento, di relazione o di integrazione lavorative e tale da determinare il processo di svantaggio sociale e di emarginazione».

[200] A leading case for many reasons, but not particularly illuminating on the notion of disability. See *infra*, paragraph 3.

[201] The definition of disability given by the Constitutional Court is as follows: «si considerano mutilati ed invalidi civili i cittadini affetti da minorazioni congenite o acquisite anche a carattere progressivo, compresi gli irregolari psichici per oligofrenia di carattere organico o dismetabolico, insufficienze mentali derivanti da difetti sensoriali e funzionali che abbiano subito una riduzione permanente delle capacità lavorative non inferiore ad un terzo, se minori di anni 18, che abbiano difficoltà persistenti a svolgere i compiti e le funzioni proprie della loro età».

The definition provided by article 3 is meaningful in combination with article 1, which sets out the goals of the law. Here it is stated that this legislation must be considered the expression of the commitment of the State to grant dignity, freedom and autonomy to people with disability, and promote their full inclusion into family, schools, workplace and, more broadly, society.

Although the definitions and goals are embedded in the social model, scholars have observed that this law created a sort of "double binary"[202]. On the one hand, indeed, there are still many provisions based on charity and assistance; on the other, there is a specific focus on instruments aimed at overcoming social barriers.

For example, provisions such as the one on rehabilitation (art. 7)[203], the assessment of disability (art. 4)[204] or medical diagnosis (art. 6)[205] are still more rooted in the medical model of disability. Conversely, provisions on architectural barriers (art. 24)[206], transport (art. 26, 27)[207], accessibility and the right to vote (art. 29)[208] are more inspired by the social model principles.

Allegedly, in spite of the accomplishment of this law in overcoming a segregating view of disability, the whole structure still perpetuates the

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[202] A.D. MARRA, *Disabilità*, cit., p. 557.

[203] For a commentary on article 7 see L. BELLANOVA, *Art. 7*, in P. CENDON (ed.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l'assistenza, l'integrazione sociale ed i diritti delle persone handicappate*, Torino, 1997, pp. 63-82.

[204] For a commentary see A. VENCHIARUTTI, *Art. 4*, in P. CENDON (ed.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l'assistenza, l'integrazione sociale ed i diritti delle persone handicappate*, cit., pp. 36-45.

[205] For a commentary see G.P. LEONCINI, *Art. 6*, in P. CENDON (ed.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l'assistenza, l'integrazione sociale ed i diritti delle persone handicappate*, cit., pp. 50-63.

[206] For a commentary on article 24 see M. GORGONI, *Art. 24*, in P. CENDON (ed.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l'assistenza, l'integrazione sociale ed i diritti delle persone handicappate*, cit., pp. 332-363.

[207] For a commentary see M. GORGONI, *Art. 28*, in P. CENDON (ed.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l'assistenza, l'integrazione sociale ed i diritti delle persone handicappate*, cit., pp. 373-386.

[208] For a commentary on article 29 see L. MANNELLI, *Art. 29*, in P. CENDON (ed.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l'assistenza, l'integrazione sociale ed i diritti delle persone handicappate*, cit., pp. 387-393.

idea of segregation rather than social inclusion, tracing a distinction between the rights of people with disabilities and everyone else's rights[209].

This law was then modified by some minor reforms: for example, the assessment of the condition of disability (article 4) is now based on the ICF instead of the ICDIH[210], with an evaluation which is no longer based solely on medical criteria.

At a practical level, the fact that the minimum requirements for social assistance were never set by law proved to be a weak point of the law and generates significant risks of discriminations at a regional level[211].

3.1.2. The supposed transition from the individual model to the social model: the legislation on employment

The Law on employment for people with disabilities is, to date, the result of many reforms and legislative measures, and is widely influenced by regional legislation[212]. For the purpose of this analysis, emphasis will not be given to the specific provisions, but to those capable of highlighting the transition from a legislation based on assistance to a legislation inspired by the social model of disability.

It was after the First World War that the first forms of support for people with disabilities were developed in the Italian legal system. Under the Fascist regime, however, the exaltation of good health and productivity and the subsequent criminalization of body anomalies were strongly affirmed[213]. In the field of public employment, for exam-

[209] A.D. MARRA, *Società, disabilità, diritti. Come i Disabilities Studies hanno attecchito nella giurisprudenza italiana*, cit., p. 19.

[210] For a deeper analysis of the difference between the ICIDH and the ICF and related consequences, see footnote number 18 of this work.

[211] See G.U. RESCIGNO, *Principio di sussidiarietà orizzontale e diritti sociali*, in *Diritto Pubblico*, 1, 2002, pp. 43-44.

[212] More in general on the role of the Regions in implementing social rights see E. ROSSI, *I diritti sociali nella prospettiva della sussidiarietà verticale e circolare*, in E. VIVALDI (ed.), *Disabilità e sussidiarietà*, Bologna, 2012, p. 43.

[213] M. SCHIANCI, *Storia della disabilità: dal castigo degli dèi alla crisi del welfare*, Roma, 2012.

ple, article 221 of Decree 383/1934[214] imposed a strong and healthy body (*sana e robusta costituzione pubblica*) as a prerequisite for access to any public office.

Even after the entry into force of the Constitution, this legal provision remained valid, and even the new legislation on public employment, Decree 3/1957[215], required an assessment of physical fitness[216] for access to public employment[217].

On the contrary, in the private field, there were provisions for the mandatory employment of amputees and people who were partially unable to work (generally with acquired conditions relating to war injuries), such as the ones contained in Legislative Decree 1222/1974[218] (ratified with Law 9 April 1953, no. 292).

As early as 1960, with Decision no. 38, the Constitutional Court adopted a progressive interpretation of this kind of law provision affirming that these legal instruments did not represent a form of charity from private industries nor a burden on them. The Constitutional Court pointed out that the goal of this law is to overcome barriers inhibiting access to work and to give value to the inherent capabilities and competences of disabled employees[219].

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[214] R.d. 3 marzo 1934, n. 383, "Testo Unico sul pubblico impiego".

[215] D.P.R. 10 gennaio 1957, n. 3, "Testo unico sul pubblico impiego".

[216] Law 104/1992 prescribed at article 22 that «for the purpose of the public and private employment a certificate of good health is not required». Nonetheless the Ministry of Public Affairs with a Circular (Circolare n. 90543/7/488, 28 giugno 1992) affirmed that the previous law was not to be considered abolished and, on the contrary, had to be applied for people with disabilities. The elimination of this discrimination (the exclusion from public employment) was finally enacted by law 68/1999 with article 16(3), see *infra*.

[217] G. TUCCI, *La discriminazione contro il disabile: i rimedi giuridici*, in *Giornale del diritto del lavoro e delle relazioni industriali*, 129, 2011, p. 1 ff.

[218] Decreto legislativo del Capo provvisorio dello Stato 3 ottobre 1947 n. 1222, ratified with legge 9 aprile 1953, n. 292.

[219] Here is the remarkable passage: «non devesi da tale sistema inferire che le norme del decreto, in contrasto con l'art. 38, vengano ad addossare alle imprese il mantenimento assistenziale di codesti minorati. Una volta instaurato, sia pur coattivamente, un regolare rapporto di lavoro, non è più a parlare di mantenimento, bensì di prestazione di opere, che determina da parte del datore di lavoro la corresponsione di una retribuzione. La ratio dell'impugnato decreto non è, quindi, quella di procurare ai minorati del lavoro

Regrettably, the first comprehensive Law on employment (482/1968)[220] was strongly anchored in the idea of charity and assistance. This legislation required companies to hire persons with disabilities, without, however, any obligation/guarantee related to the evaluation of the working capabilities and specific competence of the person. On the contrary, the law introduced a rigid and automatic system with no possibility of choosing or of evaluating the applicant[221]. Additionally, the category of people who were eligible for this kind of job contract was strictly predetermined[222].

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un mantenimento caritativo, ma di porre in essere le condizioni per la formazione di un contratto di lavoro (…). Con tali provvidenze il decreto rimuove, in armonia con lo spirito e con il dettato del secondo comma dell'art. 3 della Costituzione, gli ostacoli che impediscono l'effettiva partecipazione di tutti i lavoratori all'organizzazione economica e sociale del Paese; in armonia con lo spirito cui è informato l'art. 4 della Costituzione, promuove e attua le condizioni che rendono possibile ai minorati, riconosciuti, in seguito ad opportuni accertamenti, ancora in possesso di attitudini lavorative e professionali e, si ripete, non indicate genericamente ma riferite a categorie professionali, di essere reinseriti, con contratti di lavoro che presuppongono prestazioni di opere, nell'ambiente del lavoro, dal quale spesso resterebbero esclusi; offre a codesti infortunati cittadini modo di svolgere ancora una funzione secondo le proprie possibilità; sollecita anche l'adempimento di quel dovere inderogabile di solidarietà, solennemente enunciato tra i principi fondamentali della Costituzione (art. 2)».

[220] Legge 2 aprile 1968, n. 482, "Disciplina generale delle assunzioni obbligatorie presso le pubbliche amministrazioni e le aziende private".

[221] The Law required companies with more than 35 employees to hire disabled workers as 15% of the total workforce. This percentage was then to be divided between the different categories of disabled workers listed in the law. The hiring process was based on a scrolling list without any possibility of effective selection or evaluation of the candidate's profile. In this framework the whole process was basically a bureaucratic and automatic procedure, which ended up being totally inadequate. On this law see G. PERA, *Assunzioni obbligatorie e contratto di lavoro*, Milano, 1965; ID., *Sull'assunzione obbligatoria degli invalidi civili*, in *Rivista di diritto del lavoro*, II, 1966, p. 654; G. CONTI, *La nuova legge sulle assunzioni obbligatorie e la Costituzione*, in *Diritto del lavoro*, I, 1969, p. 186; G. D'EUFEMIA, *Ancora in tema di assunzione obbligatoria*, in *Diritto del lavoro*, I, 1968, p. 179.

[222] This law was aimed at very specific categories and groups of people, strictly mentioned by the law (from article 1 to article 8). For example, deaf and blind people, orphans and widows of war dead, as well as war and military disabled (*Invalidi di guerra, militari e civili*) and others. People over 50 years old who were no longer able to work, or who due to the nature and level of their disability might have been dangerous

Due to this system, many entrepreneurs tried to elude said law, to avoid what was perceived as a mere burden. This system was also pejorative for the person with disabilities herself, who had no opportunity to fully enjoy her right to work and give an effective contribution to her workplace and in general to society[223].

This law was abolished by Law 68/1992[224] in an attempt to establish a legislation that was fairer and, above all, more focused on real integration into the workforce[225].

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for the safety and health of other workers or for the workplace, were all explicitly excluded from the recipients of the law. For some of these categories of people a level of invalidity was also established under which the regulation was not to be applied. On this specific aspect see G. CORREALE, *Invalidi e mutilati*, in *Enciclopedia giuridica*, XVII, Roma, 1989; G. PERA, *Invalidi e mutilati*, in *Enciclopedia del diritto*, XXII, Roma, 1972.

[223] C. COLAPIETRO, *Diritto al lavoro dei disabili e Costituzione*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 124, 4, 2009, p. 608. See also: D. GAROFALO, *Il sistema del collocamento obbligatorio tra tutela dell'invalido e tutela dell'impresa*, in *Foro italiano*, I, 1985, p. 536 ff.; ID., voce *Lavoro (collocamento obbligatorio)*, in *Digesto delle discipline privatistiche. Sezione commerciale*, vol. VIII, 1992, p. 129 ff.; G. PERA, *Assunzioni obbligatorie*, in *Enciclopedia giuridica*, III, Roma, 1988; ID., *Disabili (diritto al lavoro dei)*, in *Enciclopedia giuridica*, XII, Roma, 2001; A. BELLAVISTA, *Assunzione obbligatoria*, in *Enciclopedia del diritto*, I, Milano, 1997, p. 158 ff.; R. RIVERSO, *Vizi e virtù della legge sul collocamento disabili: analisi della giurisprudenza*, in *Lavoro giurisprudenza*, 3, 2008, p. 221 ff.

[224] Legge 12 marzo 1999 n. 68 "Norme per il diritto al lavoro dei disabili".

[225] A. D'HARMANT FRANCOIS, *La nuova disciplina delle assunzioni obbligatorie: prime note*, in *Rivista italiana di diritto del lavoro*, 1, 1999, p. 319 ff.; A. MARESCA, *Rapporto di lavoro dei disabili e assetto dell'impresa*, in *Arg. dir. lav.*, 3, 1999, p. 659 ff.; E. PASQUALETTO, *La nuova legge sul collocamento dei disabili: prime osservazioni*, in *Quaderni di diritto del lavoro e delle relazioni industriali*, 22, 1999, p. 93 ff.; A. VALLEBONA, *La nuova disciplina delle assunzioni obbligatorie*, in *Massime giurisprudenza del lavoro*, 1999, p. 476 ff.; P. TULLINI, *Il diritto al lavoro dei disabili: dall'assunzione obbligatoria al collocamento mirato*, in *Diritto del mercato del lavoro*, 2, 1999, p. 332 ff.; A. TURSI, *La nuova disciplina del diritto al lavoro di disabili*, in *Rivista giurisprudenza del lavoro*, 4, 1999, p. 727 ff.; M.C. CIMAGLIA, *Gli aspetti giuridici della legge sul diritto al lavoro dei disabili*, in *Lav. inf.*, 9, 1999, p. 11 ff.; G. PERA, *Note sulla nuova disciplina delle assunzioni obbligatorie degli invalidi*, in *Giustizia civile*, 1999, p. 325 ff.; L. PETRONIO, *Prime osservazioni su alcuni aspetti del nuovo "collocamento obbligatorio": la legge 12 marzo 1999, n. 68*, in *Rivista giurisprudenza del lavoro*, 3, 1999, p. 16; M. BIAGI, *Disabili e diritto al lavoro*, in *Guida lavoro*, 9, 1999,

The very first remark we can make is on the terminology adopted. While in the previous law, recipients were addressed as unable/incapable (*invalidi*, *inabili*), Law 68/1992 refers to people with disabilities. This new terminology is representative of the underpinning view of this law. The goal is to give value to the capabilities and competences of each disabled worker[226], to pursue her own (working) dignity and to enable the development of her personality[227].

At article 2, the instrument of targeted placement (*collocamento mirato*) is described as a combination of technical and supportive means to evaluate the working capabilities of disabled people and place them in the most adequate working place, where environmental barriers may be addressed as well[228]. Targeted placement overcomes the mere bu-

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p. 12; S. BELLOMO, *Norme per il diritto al lavoro dei disabili (l. 12 marzo 1999, n. 68)*, in *Nuove leggi civili commentate*, 6, 2000, p. 1353 ff., 1463 ff.; P. LAMBERTUCCI, *La disciplina del collocamento obbligatorio*, in G. AMOROSO, V. DI CERBO, A. MARESCA (eds.), *Il diritto del lavoro*, *vol. I*, *Costituzione, Codice civile e Leggi speciali*, in *Le fonti del diritto italiano*, Milano, 2004, p. 956 ff.; D. GAROFALO, *Disabili (lavoro dei)*, in *Digesto delle discipline privatistiche. Sezione commerciale*, vol. IV, 2009, p. 759 ff; A. DI STASI, *Il diritto al lavoro dei disabili e le aspettative tradite del "collocamento mirato"*, in *Agricoltura diritto e lavoro*, 4-5, 2013, p. 880.

[226] Just like the previous law the new provisions could be applied to specific categories of disabled people only. The law is aimed at people who have physical, mental and intellectual sensorial impairments. Their working capability must be assessed by a medical commission as being reduced by more than 45%. Alternatively, they must have a lessened ability to work assessed by INAIL at more than 33%, or they must be blind or deaf, war invalid etc. The result is a legal provision referring to some people with disabilities only, excluding for example people with impairments considered less invalidating. It should also be noticed that this kind of evaluation, which is however essential, can be criticized for the strong medical view behind it. Nonetheless we should notice that Legislative Decree 151/2015 adopted the ICF model, which considers social barriers as well as medical factors (see *infra*).

[227] M.L. VALLAURI, *Disabilità e lavoro. Il multiforme contemperamento di libertà di iniziativa economica, diritto al lavoro e dignità (professionale) della persona disabile*, in V. BOFFO, S. FALCONI, T. ZAPPATERRA (eds.), *Per una formazione al lavoro. Le sfide della disabilità adulta*, Firenze, 2012, p. 67.

[228] See P. SANDULLI, *Il lavoro dei disabili nel sistema del Welfare State*, in M. CINELLI, P. SANDULLI (eds.), *Diritto al lavoro dei disabili. Commentario alla legge n. 68 del 1999*, Torino, 2000, p. 2; M.L. VALLAURI, *Disabilità e lavoro. Il multiforme con-

reaucratic management of the system drawn in the previous law. This legislation seeks to support the meeting point between supply and demand without neglecting the needs of employers and the professionality of the aspiring employee, making full integration into the workplace possible[229].

An important role in enforcing this flexible system towards work integration is played by employment offices and by the possibility of activating, on a local level, conventions with social enterprises, companies and cooperative societies (art. 14)[230].

It is also worth observing that this law applies to both the private and public sector, and represents a crucial step in the elimination of the abovementioned discrimination in public employment against people with disabilities[231].

Article 16(3) explicitly cancelled the provisions requiring public employees to be physically fit. In addition, article 16(2) provided that people with disabilities need to be granted equal participation in public selection processes, with a firm obligation to facilitate their participation.

This arrangement is now supported by the anti-discrimination law contained in Legislative Decree 316/2003[232], in the field of employ-

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temperamento di libertà di iniziativa economica, diritto al lavoro e dignità (professionale) della persona disabile, cit., p. 68.

[229] M. CINELLI, *Profili del collocamento obbligatorio "riformato"*, in M. CINELLI, P. SANDULLI (eds.), *Diritto al lavoro dei disabili. Commentario alla legge n. 68 del 1999*, cit., p. 3.

[230] C. COLAPIETRO, *Diritto al lavoro dei disabili e Costituzione*, cit., p. 609.

[231] The first step was made by law 104/1992. At article 22 this law explicitly mentioned that the requirements of a strong and healthy body were no longer to be considered a requisite for accessing public employment. Inopportunely, this provision was nullified by a circular from the Ministry of Public Affairs (Circolare n. 90543/7/488, 28 giugno 1992). Here the Ministry affirmed that article 22 should not be interpreted as abrogative of any previous law, therefore the previous one was still applicable in the case of people with impairments, who were to be excluded from accessing public employment.

[232] This law is the transposal of the Directive of the European Union 78/2000/CE on equal treatment on employment and occupation regardless of religion or belief, disability, age or sexual orientation. On this system see, in general, M. BARBERA (ed.), *Il nuovo diritto antidiscriminatorio: il quadro comunitario e nazionale*, Milano, 2007.

ment and occupation, and Law 67/2006[233] which provides a general legal instrument and remedy against any form of discrimination[234].

This whole system has been implemented by the many reforms that have recently been carried out.

One of these is Legislative Decree 151/2015[235]. At article 1 it enumerates strategies for creating new virtuous circles between trade unions, cooperative societies and NGOs for workers' full participation. It was with this law that the bio-psycho-social model for the assessment of disability was adopted. Besides, a new set of guidelines for the evaluation of the workplace was developed, together with a list of good practices for work integration. This Decree also established a new professional figure responsible for integration into the workplace.

One of the most recent reforms is Legislative Decree 75/2017[236], specifically aimed at implementing access of people with disabilities into the public sector. For example, this law has instituted a consultative body for the integration of people with disabilities into the workplace (*Consulta nazionale per l'integrazione in ambiente di lavoro delle persone con disabilità*), with the task of developing policies and monitoring the situation of disabled workers.

This whole legislative approach, briefly sketched above, is far from being effective and functional on a practical level[237]. Among the problematic issues, we need to mention that people with impairments classified as "minor" are excluded from this law; that a person might remain on a waiting list for many years; more importantly the law lacks any legal instrument for granting the effectivity of its provisions.

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[233] Legge 1º marzo 2006, n. 67 "Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni".

[234] See G. TUCCI, *La discriminazione contro il disabile: i rimedi giuridici*, cit., pp. 1-28; R. BELLI, *La non discriminazione dei disabili e la legge n. 67 del 2006*, Milano, 2007.

[235] D.lgs. 14 settembre 2015 n. 151.

[236] D.lgs. 25 maggio 2017, n. 75 (legge delega 7 agosto 2015, n. 124).

[237] Data on employment of people with disabilities referring to the period 2014-2015 were collected by the Ministry and published in 2018 and are available at *http://www.condicio.it/allegati/340/Relazione8_68.PDF*.

Still, this legislation is significant in appreciating how the legal definition of disability and the general approach to it has evolved over time.

3.1.3. The effective transition from the individual model to the social model: the law on inclusive education in Italy

The field of education is another field where it is possible to observe this shift from a medical/individual model to a social model of disability.

For a long time, the education of disabled youths in Italy was approached through the provision of special classes or segregated school facilities.

The regulation of this field was to be found in Law 1859/1962[238] on separate classes for unable students (*alunni disadattati*), in Law 44/1968[239] on primary schools, which established special classes or segregated schools for children between three and six years of age with sensory, intellectual and/or physical impairments. In general, specific and segregated schools were already set up for blind children, deaf children, and children with intellectual disability or with various illnesses[240]. From the 1970s, this model began to be challenged by means of a slow but effective paradigm shift, which has led Italy to now being a leading country in the matter of inclusive education[241].

Some scholars have argued that this passage to a fully inclusive legislation in the field of education was highly influenced by the deinstitutionalization movement. According to these scholars, the policy of full inclusion in Italy can be framed as «an essentially un-problematic and perfectly designed top-down initiative»[242]. The apex of the deinstitu-

[238] Legge 31 dicembre 1962 n. 1859 "Istituzione e ordinamento della scuola media statale".

[239] 18 marzo 1968 n. 44 "Ordinamento della scuola materna Statale".

[240] See L. CALCERANO, G. MARTINEZ Y CABRERA, *Scuola (ordini e gradi)*, in *Enciclopedia del diritto*, XLI, Milano, 1989, p. 889.

[241] A.S. KANTER, M. DAMIANI, B. FERRI, *The Right to Inclusive Education Under International Law: Following Italy's Lead*, in *Journal of International Special Needs Education*, 21, 2014.

[242] S. D'ALESSIO, *Inclusive Education in Italy*, Rotterdam, 2011, p. 3.

tionalization movement was reached in 1978 with the approval of the so-called *Basaglia Law* (Law 180/1978), a revolutionary text which dismantled psychiatric hospitals and paved the way to community-oriented mental health services[243].

With Law 118/1971[244], special classes became an exception reserved for those incapable of attending public school due to impairments and for those living in institutions/hospitals (article 29). The main assumption and rule of this Law is that education must be provided in regular classes by the public school, and attendance of high school and university must be promoted (on this matter there has been a very important decision by the Italian Constitutional Court, which will be explained later in paragraph 2.3).

The Governmental Ministerial Circular Letters, such as Circular Letter 227/1975 and Circular Letter 235/1975 paved the way for the complete abolition of the special education system[245].

With Law 517/1999[246] special classes were eliminated definitively. This law provides new instruments aimed at promoting the right to education for students with disabilities and the development of each individual as a human being within the education system.

Some of these are, for example, the provision concerning a maximum number of students for classes in which there is a disabled student (article 7) or the provision on specialized teachers (article 2). This professional figure was better established and implemented by Law 70/1982[247],

[243] See U. FORNARI, S. FERRACUTI, *Special Judicial Psychiatric Hospitals in Italy and the Shortcomings of the Mental Health Law*, in *The Journal of Forensic Psychiatry*, 6, 1995, pp. 381-392.

[244] Legge 30 marzo 1971 n. 118 "Conversione in legge del d.l. 30 gennaio 1971, n. 5 e nuove norme in favore dei mutilati ed invalidi civili".

[245] D. ANASTASIOU, J.M. KAUFFMAN, S. DI NUOVO, *Inclusive education in Italy: description and reflections on full inclusion*, in *European Journal of Special Needs Education*, 2015, p. 3.

[246] Legge 4 agosto 1977 n. 517 "Norme sulla valutazione degli alunni e sull'abolizione degli esami di riparazione nonché altre norme di modifica dell'ordinamento scolastico".

[247] Legge 29 maggio 1982 n. 270 "Revisione della disciplina del reclutamento del personale docente della scuola materna, elementare, secondaria ed artistica, ristruttura-

with the formalization of the role of special education teachers (*insegnanti di sostegno*), who are crucial players in the Italian inclusive education model[248].

The transition to a model entirely based on inclusive education – despite the Italian term *integrazione*, which should be literally translated as *integration*, which might be misleading[249] – is accomplished with Law 104/1992. This legislation explicitly mentions among its goals the full development of the abilities of people with disabilities, by granting

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zione degli organici, adozione di misure idonee ad evitare la formazione di precariato e sistemazione del personale precario esistente".

[248] Support teachers are qualified professionals who have obtained further and specialized postgraduate training. Their role is to "support activities assigned to the classes of the students with disabilities to facilitate their integration process", therefore they are not to be considered the teacher of the student with disabilities, but "a professional resource assigned to the class to meet the main educational needs". This is what Italy explained in the response questionnaire from the UN Special Rapporteur, available here: *http://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/Provisionofsupporttopersonswithdisabilities.aspx*.

[249] The term *integration* is usually referred in the US or even in other parts of Europe to the maximum inclusion that is appropriate for a student, as reported by D. ANASTASIOU, J.M. KAUFFMAN, S. DI NUOVO, *Inclusive education in Italy: description and reflections on full inclusion*, cit., 2015, p. 3. On the contrary, in the Italian context it has the meaning of full inclusion, without any possible exception: «Currently the term (*integrazione scolastica*) is widely used in Italy, yet some Italian scholars, school personnel, and families have encouraged the adoption of a variation on the phrase "inclusive education" because they believe it more accurately reflects the next and higher level of integration of students with disabilities. Additionally, proponents of the term "inclusive education" suggest that it may facilitate the development of shared language and meaning within the European community and internationally. Proponents of retaining the terminology of *integrazione scolastica* argue that it has cultural and linguistic meaning and a connotation that is different and more positive than inclusive education in the Italian language. Currently, there seems to be no national consensus on this issue. For some people it is a non-issue because they consider the terms synonymous, using them interchangeably. These people, while they acknowledge that reaching agreement on terminology can be helpful, are less concerned with the label and more concerned about the types and qualities of practices being used to ensure quality education for all students». See M.F. GIANGRECO, B. DOYLE, J.C. SUTER, *Demographic and Personnel Service Delivery Data: Implications for Including Students with Disabilities in Italian Schools*, in *Life Span and Disability: An Interdisciplinary Journal*, 15, 2012, pp. 97-123.

them the enjoyment of mainstream services and facilities[250], including schools.

This law enforces the idea that it is the environment that must accommodate everyone's needs, and not people who need to adapt to the situation. Therefore, it will not be required of the student with disabilities to fit into the given framework anymore. On the contrary, school needs to be organized around the specific educational needs of its students, shaping its structure, recruiting process and financial aspects towards the goal of effective and quality education for everyone[251].

This approach is based on the idea that

> the integration of people with disabilities is a positive force in the classroom; integration provides opportunities for all students to develop new understandings and new knowledge[252].

With Law 104/1992, the role of special education teachers is confirmed and enhanced. Together with the school, they are responsible for the development and implementation of the Personalized Educational Plan (PEI – *Piano educativo individualizzato*), an individualized plan for the education of the student with disabilities, which addresses specific educational needs.

In 2010, a Law on children with specific learning difficulties was passed (Law 170/2010)[253]. It is aimed at addressing specific needs coming from difficulties with reading (dyslexia), writing (graphic dyslexia

[250] D. SICLARI, *Riflessioni sullo statuto giuridico della disabilità nell'ordinamento italiano*, in *Il diritto dell'economia*, 28, 3, 2015, pp. 553-573.

[251] S. PENASA, *La persona e la funzione promozionale della scuola: la realizzazione del disegno costituzionale e il necessario ruolo dei poteri pubblici. I casi dell'istruzione delle persone disabili e degli alunni stranieri*, in F. CORTESE (ed.), *Tra amministrazione e scuola. Snodi e crocevia del diritto scolastico italiano*, Napoli, 2014, pp. 1-40.

[252] A.S. KANTER, M. DAMIANI, B. FERRI, *The Right to Inclusive Education Under International Law: Following Italy's Lead*, cit., p. 27.

[253] Legge 8 ottobre 2010, n. 170 "Nuove norme in materia di disturbi specifici di apprendimento in ambito scolastico".

and dysorthography), or computing (dyscalculia) and providing students with effective and quality education within mainstream schools[254].

One of the last reforms is the one contained in Law 107/2015[255], which further implements the principles stated in Law 104/1992, and amends some aspects regarding the training and number of special education teachers. This law grants the Government the power to enact measures on inclusive education, while setting the general criteria and principles to be followed. Legislative Decree 96/2019[256] enacted the abovementioned law[257]. Said law, which was developed with the support and collaboration of many grassroots organizations, is a further implementation of the principle of inclusive education.

It is interesting to note how this law explicitly mentions the aspiration to implement the UN CRPD, adopting the notion of disability affirmed in the Convention. In general, the Italian education system is one of the few consistent with the obligations under article 24 of the CRPD[258], despite the economic crisis[259] and some practical challenges which should be addressed[260]. Recently, the COVID-19 pandemic has

[254] For a commentary see L. BARONE, *La nuova legge n. 170/2010 sui disturbi specifici di apprendimento*, in *Minorigiustizia*, 3, 2010, pp. 239-247.

[255] Legge 13 luglio 2015, n. 107 "Riforma del sistema nazionale di istruzione e formazione e delega per il riordino delle disposizioni legislative vigenti".

[256] Decreto legislativo 7 agosto 2019, n. 69 "Norme per la promozione dell'inclusione scolastica degli studenti con disabilità".

[257] On the complicated procedure that led to the approval of this legislative decree see D. FERRI, *The Past, Present and Future of the Right to Inclusive Education in Italy*, in G. DE BECO, S. QUINLIVAN, J. LORD (eds.), *The Right to Inclusive Education in International Human Rights Law*, Cambridge, 2019; M. COCCONI, *Il compimento del cantiere della c.d. buona scuola*, in *Giornale di Diritto Amministrativo*, 4, 2017, p. 461.

[258] D. FERRI, *Inclusive Education in Italy: A Legal Appraisal 10 Year after the Signature of the UN Convention on the Rights of Persons with Disabilities*, in *Ricerche di Pedagogia e Didattica - Journal of Theories and Research in Education*, 12, 2017, pp. 1-22.

[259] On the specific issue related to the financial crisis and disability educational rights see S. TROILO, *Tutti per uno o uno contro tutti? Il diritto all'istruzione e all'integrazione scolastica dei disabili nella crisi dello stato sociale*, Milano, 2012.

[260] As highlighted by the Committee on the CRPD itself in the documents: CRPD Committee, *Concluding Observations on the Initial Report of Italy*, 2016, available at *http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx*. CRPD Committee,

challenged the system; the risk of undermining the inclusion of disabled students has been real. Between March 2020 and June 2021 distance learning was adopted to provide education during the pandemic. Online learning makes it difficult to satisfy specific needs and might imply serious accessibility issues. According to the national institute of statistics (INSTAT), 23% of students with disabilities were excluded from distance learning. The Government did not ignore the difficulties and intervened with small provisions and different instruments with the goal of granting education for all[261]. The impact of the COVID-19 outbreak on the inclusive education system is still to be assessed[262], given that the challenges faced by many students during the academic years 2019-2020 and 2020-2021 are undeniable[263].

General Comment No 4 article 24: Right to Inclusive Education (Adopted 26 August 2016), 2016, available at *http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.asp*. For a commentary on this aspect see D. FERRI, *Unveiling the Challenges in the Implementation of article 24 CRPD on the Right to Inclusive Education. A Case-Study from Italy*, in *Laws*, 2017, Open resource, available at: *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjA4dn1itjlAhXNfZoKHVPbCRwQFjABegQIBBAC&url=https%3A%2F%2Fwww.mdpi.com%2F2075-471X%2F7%2F1%2F1%2Fpdf&usg=AOvVaw0Omo8gqznj_7mlTEtkb03j*.

[261] The first relevant document is dated 17 March 2020 and is Ministerial Circular Letter no. 338. With Law 27/2020 special funds were assigned to schools to buy accessible software and instruments for students with disabilities. For the academic year 2020-2021 a set of Guidelines was approved: this document allowed fragile students and students with disabilities to attend school with a restricted group of peers as an alternative to e-learning.

[262] For example, according to Human Rights Watch, some solutions adopted in Italy on a local level were very righteous and virtuous. See *https://www.hrw.org/it/news/2021/06/15/378955*.

[263] The author briefly discussed this topic in this paper: C.M. REALE, *La dimensione costituzionale dell'emergenza: come l'epidemia moltiplica le disuguaglianze*, in *Biolaw Journal - Rivista di Biodiritto*, 1, 2020, pp. 269-279. See also: P. ADDIS, *La disabilità, l'accessibilità e i diritti in tempo di Covid-19*, in M.G. BERNARDINI, S. CARNOVALI (eds.), *Diritti umani in emergenza. Dialoghi sulla disabilità ai tempi del Covid-19*, Roma, 2021; G. MATUCCI, *Ripensare la scuola inclusiva: una rilettura dei principi costituzionali*, in *Sinappsi*, X, n. 3, 2020, pp. 3-16.

3.2. The constitutional perspective on disability: the relevant parameters

This fragmented legislative apparatus needs to be interpreted in light of the Constitutional parameters concerning disability and the related case law of the Constitutional Court. The Court progressively affirmed a dynamic notion of disability, aimed at the fullest protection for disabled people (see 2.3). This full protection is so preeminent that it cannot be re-negotiated due to financial restraints, despite the prominent and long-lasting financial crisis widespread all over Europe (see paragraph 3).

The Constitution does not explicitly mention disability in its text: nonetheless many articles of the fundamental charter can be referred to the condition of people with disability. That is because, undoubtedly, people with disability are entitled to each and every right granted by the Constitution[264].

The Italian Constitutional Court defines the legal condition of the person with disabilities as a crossroads of the most important constitutional ideals. For this reason, the constitutional statute to be applied is complex and can be found at the intersection of many constitutional provisions[265].

Moving from the specific to the general, the first article to be mentioned is article 38 on social security[266]. Here the Constitution states that every citizen who is unable to work (*inabile al lavoro*) and without

[264] The original quote is: «titolari di tutte le situazioni soggettive garantite in generale dalla Costituzione», in U. DE SIERVO, *Libertà negative e positive*, in R. BELLI (ed.), *Libertà inviolabili e persone con disabilità*, Milano, 2000, p. 36.

[265] The original quotation from decisions n. 232/ 2018, n. 258/2017, n. 275/2016, n. 215/1987 is: «di valori che attingono ai fondamentali motivi ispiratori del disegno costituzionale» and «il canone ermeneutico da impiegare in siffatta materia è essenzialmente dato dall'interrelazione ed integrazione tra i precetti in cui quei valori trovano espressione e tutela».

[266] This constitutional provision is widely discussed and commented amongst scholars. For a panorama on this debate see L. VIOLINI, *Art. 38*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds.), *Commentario alla Costituzione*, Torino, 2006, p. 775; M. PERSIANI, *Art. 38*, in G. BRANCA (ed.), *Commentario della Costituzione*, Bologna, 1975, p. 238.

the resources necessary to live has the right to social maintenance and support. At 38.2 it states that workers who are no longer able to provide for themselves because of accidents, illness, disability[267] (*invalidità*), old age or involuntary unemployment have the right to adequate means for their needs and necessities.

Article 38.3 states that disabled and handicapped persons[268] have the right to education and vocational training. This particular paragraph of the article was to become of great interest for disability law in Italy, being the basis of a development of provisions on equal opportunities and positive actions for disabled students, together with article 34[269], as will be discussed later in this paragraph.

Article 3 on the principle of equality is to be considered one of the most important interpretation criteria (*canone ermeneutico*) in the constitutional field of disability law (see also *infra*, Chapter II). There is no doubt that disability can be listed among the personal conditions mentioned by the Constitution at article 3.1.

This article prohibits discrimination on some specific grounds (not to be considered an exhaustive enumeration)[270] and affirms the equal

[267] The actual term used by the Constitution is not the exact translation of disability.

[268] In the Italian version the terminology doesn't specifically refer to any handicap or disability. The term, nowadays considered very offensive, is *minorati*, which indicates intrinsically the lesser capabilities of these persons.

[269] Here is the complete text of article 34: «Schools are open to everyone. Primary education, given for at least eight years, is compulsory and free of tuition. Capable and deserving pupils, including those lacking financial resources, have the right to attain the highest levels of education. The Republic renders this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations». See A. POGGI, *Art. 34*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds.), *Commentario alla Costituzione*, cit., p. 699 ff., p. 975; S. CASSESE, A. MURA, *Artt. 33-34*, in G. BRANCA (ed.), *Commentario della Costituzione*, cit., p. 210 ff.

[270] According to Barbera it is not possible to give article 2 of the Constitution a mere recognitive function. The fact that article 2 mentions "inviolable rights" is a constitutive and open reference to freedom and all the other personal values that the Constitution does not explicitly mention. To support this idea Barbera mention Esposito and his doctrine: according to this scholar if sovereignty belongs to the people, then law is founded on people's will. See A. BARBERA, *Art. 2*, in G. BRANCA (ed.), *Commentario alla Costituzione*, Roma, 1975, p. 83; C. ESPOSITO, *La Costituzione italiana: saggi*, Padova, 1954, p. 22. Similarly A. SPADARO, *Il problema del fondamento dei diritti "fon-*

social dignity of every citizen. This first part of the article represents a bridge connecting disability and social rights, which are framed in article 3.2.

Paragraph 2 affirms the obligation for the State to remove economic and social obstacles against freedom and equality for citizens and impeding the full development of the human person and their effective participation in the economic, political and social life of the country.

Article 3.2 is the core of social rights provisions in the Italian legal system, justifying the use of positive actions[271]. This provision is relevant in a disability perspective because, according to the social model, positive actions are capable of contrasting the process of disablement enacted by an ableist[272] society.

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damentali", in *I diritti fondamentali oggi. Atti del V Convegno dell'Associazione italiana dei costituzionalisti (Taormina, 30 novembre - 1 dicembre 1990)*, Padova, 1995, p. 235 ff.; F. MODUGNO, *I "nuovi diritti" nella Giurisprudenza Costituzionale*, Torino, 1995, p. 3 ff.; A. BALDASSARRE, *Diritti inviolabili*, ora in ID., *Diritti della persona e valori costituzionali*, Torino, 1997, p. 1. And for an overview of the main position against article 2 as an "open catalogue": P. GROSSI, *Diritti fondamentali e Diritti inviolabili nella Costituzione italiana*, in ID., *Il Diritto costituzionale tra principi di libertà e istituzioni*, Padova, 2005. But also P. BARILE, *Diritti dell'uomo e libertà fondamentali*, Bologna, 1984, p. 54; according to this author article 2 is not to be considered a source of rights but their matrix and guardian ("matrice e garante dei diritti"). At first the Constitutional Court endorsed a restrictive interpretation of article 2 as a closed catalogue (see decision n. 11/1956), however over time this position changed as the Court started recognizing the so-called "new rights" as happened in the case of – to mention the earliest – right to image, abortion and right to life (see decisions n. 38/1973; n. 27/1975 and 54/1979).

[271] The Italian case-law on positive actions pertains to gender issues, with a specific focus on political participation. In this field the Court sees positive actions as a legitimate means to grant equal opportunities and to overcome inequalities between men and women. See decision n. 49/2003 and 4/2010 of the Italian Constitutional Court. For an overview on gender equality under Italian Constitutional law see M. D'AMICO, *Una parità ambigua. Costituzione e diritti delle donne*, Milano, 2020.

[272] «The term ableism refers to a network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then is cast as a diminished state of being human». See F.K. CAMPBELL, *Contours of Ableism: The Production of Disability and Abledness*, Basingstoke, 2009, p. 5.

Article 3 usually comes in combination with article 2. These two articles together evoke the controversial notion of human dignity, which in this field might be referred to the need for each individual to have equal opportunities for self-development and to effectively enjoy constitutional rights and freedoms[273].

Article 2 can be considered the *fil rouge* connecting constitutional provisions and laws on disability and, as will be discussed later, is often used as a parameter by the Italian Constitutional Court. This article recognizes the pre-existence of a set of inviolable rights belonging to the human person, both as an individual and as a member of society. The constitutional right of self-development finds its roots in this article, which is also interpreted by the Constitutional Court as the source of the self-determination principle[274].

In this provision we can find the person with disability protected as a person among others, and in relation to others, in a condition of mutual interrelations. It was indeed stated that under article 2 people with disabilities find «a common protection for their own humanity, which has no differences»[275].

[273] See A. BALDASSARRE, *Diritti sociali*, in *Enciclopedia giuridica*, XII, Roma, 1989, p. 12. This is the original quotation: «Ogni uomo, in qualunque posizione sociale si trovi inizialmente, deve essere messo in grado di avere pari opportunità di autorealizzazione e, quindi, pari opportunità di godere effettivamente delle libertà costituzionalmente garantite».

[274] According to the Constitutional Court article 2 protects the integrity of the personal sphere of the person, namely the right of self-determination in the private sphere. See Decision 332/2000. Here is the original quote: «l'articolo in esame si pone quale presidio per l'integrità della sfera personale [dell'essere umano] e la sua libertà di autodeterminarsi nella vita privata».

[275] The translation is by the author. Here is the original quotation: «una comune tutela in ragione della loro indifferenziata umanità». See S.P. PANUNZIO, *Il cittadino handicappato psichico nel quadro costituzionale*, in *Rassegna di diritto civile*, 2, 1986, p. 525.

3.3. The case law on disability: overcoming social barriers as a constitutional duty

The case law of the Italian Constitutional Court on disability is rich and diverse.

A common ground of all these decisions is the use of a particular technique developed by the Constitutional Court, the so-called balancing of rights[276], consisting in finding a reasonable balance between conflicting constitutional interests[277]. In these decisions, the Court identifies an «indefectible nucleus of rights» (*nucleo indefettibile di diritti*) which must be granted without limitations and without any possible legislative discretion.

The other common thread in the Constitutional decisions on disability is the focus on the social dimension of disability and the recurring use of articles 3.2 and 2 as leading constitutional parameters in the judgment.

The terminology used in these decisions, especially in the past, might now appear inappropriate and obsolete; nonetheless what comes to light from this corpus is a progressive incorporation of the social model in the Italian constitutional system[278].

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[276] The literature on this technique developed by the Constitutional Court is vast. *Ex multis* see A. VESPAZIANI, *Interpretazioni del bilanciamento dei diritti fondamentali*, Milano, 2012; A. MORRONE, *Il bilanciamento nello stato costituzionale: teoria e prassi delle tecniche di giudizio nei conflitti tra diritti e interessi costituzionali*, Milano, 2014; L. DI CARLO, *Diritti fondamentali tra teoria del discorso e prospettive istituzionalistiche*, Milano, 2009, pp. 177-261; R. BIN, *Diritti e argomenti: il bilanciamento degli interessi nella giurisprudenza costituzionale*, Torino, 1992.

[277] G. ARCONZO, *La normativa a tutela delle persone con disabilità nella giurisprudenza della Corte costituzionale*, in M. D'AMICO, G. ARCONZO (eds.), *Università e persone con disabilità. Percorsi di ricerca applicati all'inclusione a vent'anni dalla legge n. 104 del 1992*, Milano, 2013, p. 30.

[278] Some scholars wrote about the "implicit" adherence of the Constitutional Court to the social model of disability. See for example D. FERRI, *La giurisprudenza costituzionale sui diritti delle persone con disabilità e lo Human Rights Model of Disability: "convergenze parallele" tra Corte costituzionale e Comitato ONU sui diritti delle persone con disabilità*, in *dirittifondamentali.it*, 1, 2020.

This is evident from the fact that the Constitutional Court defines disability as a relevant human and social issue[279]. This view was explicitly supported by the Constitutional Court in a 1999 decision on Law no. 104/1992, where the existence of a new approach to disability was mentioned. In particular, the Court remarked that disability was no longer to be considered an individual problem, but something to be addressed collectively by the whole of society[280].

According to scholars, sociality, accessibility and involved participation are the three essential elements for granting full citizenship to people with disabilities[281].

The leading case is the already briefly mentioned Decision no. 215/1987 on education[282]. Here the Court decides on article 28 of Law no. 118 of

[279] A significant social and human issue. In the original quotation: «Rilevante problema umano e sociale» (see Decisions n. 215/1987 and n. 167/1999).

[280] Decision 1999 n. 167. The Court states that the legislator first carried out this change with a legislation centred on disability issues as social issues. Here is the original quotation on the legislator: «non si fosse limitato ad innalzare il livello di tutela in favore dei soggetti disabili, ma segnasse un radicale mutamento di prospettiva rispetto al modo stesso di affrontare i problemi delle persone affette da invalidità, considerati ora quali problemi non solo individuali, ma tali da dover essere assunti dall'intera collettività». See the following comments on the decision: B. CAVALLO, *Servitù coattiva di passaggio a favore di un fondo non intercluso ed esigenze dei portatori di handicap. Nota a C. cost. 10 maggio 1999, n. 167*, in *La Nuova giurisprudenza civile commentata*, 6, 1, 1999, pp. 822-828; F. GAZZONI, *Disabili e tutela reale. Nota a C. cost. 10 maggio 1999, n. 167*, in *Rivista del notariato*, 4, 2, 1999, pp. 978-982; P. PERLINGIERI, *Principio "personalista", "funzione sociale della proprietà" e servitù coattiva di passaggio. Nota a C. cost. 29 aprile 1999, n. 167*, in *Rassegna di diritto civile*, 3, 1999, pp. 688-697; A. SCARPA, *Portatori di handicap e passaggio coattivo: traguardo o punto di partenza? Nota a C. cost. 10 maggio 1999, n. 167*, in *Rassegna delle locazioni e del condominio*, 4, 1999, pp. 521-527.

[281] A. VALASTRO, *Le vicende giuridiche dell'handicap e la "società dell'informazione": vecchie conquiste e nuove insidie per la Corte costituzionale*, in A. PACE (ed.), *Corte costituzionale e processo costituzionale nell'esperienza della rivista "Giurisprudenza costituzionale" per il cinquantesimo anniversario*, Milano, 2006, p. 990.

[282] On this decision see the following comments: C. DANIELE, *Alunni portatori di handicap nelle scuole secondarie, nota a C. cost. 3-8 giugno 1987, n. 215*, in *Rivista giuridica della scuola*, 4-5, 2, 1987, pp. 767-780; C. MORO, *L'eguaglianza sostanziale e il diritto allo studio: una svolta della giurisprudenza costituzionale. Nota a C. cost. 8 giugno 1987, n. 215*, in *Giurisprudenza costituzionale*, 10, 1, 1987, pp. 3064-3090.

1971 and, by using a particular technique, manipulates the text of the article[283], stating that access to secondary school for disabled students must be granted, not only facilitated[284]. It is a courageous decision: with this operation, indeed, the court transformed a programmatic norm into binding law[285].

Apart from the interesting technique used by the Court, the motivation of the decision is remarkable. Here the Constitutional Court describes access to school as a fundamental step in overcoming social marginalization of people with disabilities: it is in the interaction with others, students with other students and teachers, that a person can fully develop their own personality.

The Court affirms that participation in the educational process with teachers and peers represents a significant social factor that can largely contribute to developing the potential of the student[286].

This is the reason why the Court gives an extensive and noteworthy interpretation of article 34 of the Constitution. Although the text of the article puts emphasis on the economic factors and obstacles, the Court affirms the constitutional relevancy of social impediments, especially for students with disabilities. Both social and economic obstacles must be contrasted by the law (Point 5 of the decision) because attending school is an essential factor of inclusion for students with disabilities

[283] This kind of decision by the Constitutional Court is called by scholars manipulative judgment; this one is a substitutive judgment. With this kind of decision, the Constitutional Court saves the challenged provision from the declaration of unconstitutionality by modifying it or integrating it somehow. Here is some literature on this particular kind of decision: C. COLAPIETRO, *Le sentenze additive e sostitutive della Corte costituzionale*, Pisa, 1990; A. RUGGERI, A. SPADARO, *Lineamenti di giustizia costituzionale*, Torino, 2014, pp. 167-181; S.M. CICCONETTI, *Lezioni di giustizia costituzionale*, Torino, 2014, pp. 87-101; G. ZAGREBELSKY, V. MARCENÒ, *Giustizia costituzionale*, vol. 2, Bologna, 2018, pp. 229-251.

[284] The article mentioned the need to promote attendance of secondary schools (*facilitare la frequenza della scuola secondaria superiore*) and the Constitutional Court changed the word "promote" (*facilitare*) to "grant" (*garantire*).

[285] F. FURLAN, *La tutela costituzionale del cittadino portatore di handicap*, cit.

[286] The translation is almost literal and is done by the author. Here is the original passage: «la partecipazione al processo educativo con insegnanti e compagni normodotati costituisce un rilevante fattore di socializzazione e può contribuire in modo decisivo a stimolare le potenzialità dello svantaggiato».

and helps them to overcome social marginalization and to reach full development as human beings[287].

This is also why the Constitutional Court rejected the idea of the adequacy of home schooling for students with disabilities, stressing the importance of including disabled persons within mainstream institutions[288].

In general, there is significant litigation concerning right to education before ordinary courts, administrative tribunals, and at a Constitutional level.

What emerges is that right to education is unalienable and must be ensured effectively by the State[289].

This is what is highlighted in the recent decisions (no. 275/2016[290] and no. 80/2010[291]) on the unconstitutionality of financial restraints on inclusive education in times of economic crisis.

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[287] Here is the original quotation from the decision: «la frequenza scolastica è un essenziale fattore di recupero del portatore di handicaps e di superamento della sua emarginazione in un complesso intreccio in cui ciascuno di tali elementi interagisce sull'altro e, se ha evoluzione positiva, può operare in funzione sinergica ai fini del complessivo sviluppo della personalità».

[288] Decision n. 226/2001. The Court states that: «il diritto all'istruzione delle persone handicappate deve intendersi in senso estensivo, essendo penalizzato al raggiungimento degli obiettivi propri di ciascun ordine e grado di scuola ma nell'ambito di quelli perseguiti attraverso la integrazione scolastica».

[289] F. BLANDO, *Soggetti disabili e istruzione: la lotta per il diritto*, in *Federalismi.it*, 10/2017.

[290] The judges decided on article6(2)-bis of Abruzzo Regional Law no. 78/1978 as modified by law no. 15/2004. The case concerned transport and assistance of students with disabilities and their possible limitation according to available financial resources to be decided by local authorities. The Italian Constitutional Court stated that it was against the Constitution to impose budget constraints on the right to education for disabled students. Emphasis was placed on the fact that transport is fundamental for the inclusion and participation of students with disabilities in the educational process. See A. APOSTOLI, *I diritti fondamentali "visti" da vicino dal giudice amministrativo. Una annotazione a "caldo" della sentenza della Corte costituzionale n. 275 del 2016*, in *Forum di Quaderni Costituzionali*, 2016; E. FURNO, *Pareggio di bilancio e diritti sociali: la ridefinizione dei confini nella recente giurisprudenza costituzionale in tema di diritto all'istruzione dei disabili*, in *Nomos. Le attualità del diritto*, 1, 2017; L. MADAU, *È la garanzia dei diritti incomprimibili ad incidere sul bilancio, e non l'equilibrio di questo a condizionarne la doverosa erogazione*, in *Osservatorio AIC*, 2017; A. LONGO,

A similar approach can be found in other fields of disability law, such as employment or accessibility.

For example, in Decision no. 1088/1988[292] the Court rejected the question of the unconstitutionality of Law 482/1968, stating that any measure with the aim of full integration of people with disabilities in

Una concezione del bilancio costituzionalmente orientata: prime riflessioni sulla sentenza della Corte costituzionale n. 275 del 2016, in *Federalismi.it*, 2017; R. CABAZZI, *Diritti incomprimibili degli studenti con disabilità ed equilibrio di bilancio nella finanza locale secondo la sent. della Corte costituzionale n. 275/2016*, in *Forum di Quaderni Costituzionali*, 2017; L. ARDIZZONE, R. DI MARIA, *La tutela dei diritti fondamentali ed il "totem" della programmazione: il bilanciamento (possibile) fra equilibrio economico-finanziario e prestazioni sociali (brevi riflessioni a margine di Corte cost., sent. 275/2016)*, in *Diritti Regionali*, 2017.

[291] The judges decided on art. 2, paragraphs 413 and 414 of Law 244/2007 (legge 24 dicembre 2007, n. 244, *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato - legge finanziaria 2008*). This law established a limit on the maximum number of support teachers and removed the option to depart from national provisions in hiring a surplus of support teachers for the right to education of students with severe disabilities. The Court declared this provision to be unconstitutional. This decision is particularly important because it is one of the first to explicitly mention the fact that people with disabilities are not to be considered a homogenous group of people and differences should be addressed to ensure effective measures (original quotation: «i disabili non costituiscono un gruppo omogeneo. Vi sono, infatti, forme diverse di disabilità: alcune hanno carattere lieve ed altre gravi. Per ognuna di esse è necessario, pertanto, individuare meccanismi di rimozione degli ostacoli che tengano conto della tipologia di handicap da cui risulti essere affetta in concreto una persona»). For commentary see F. GAMBARDELLA, *Diritto all'istruzione dei disabili e vincoli di bilancio nella recente giurisprudenza della Corte costituzionale*, in *Nomos. Le attualità del diritto*, 1, 2017; S. ROSSI, *Disabilità e status civitatis. Nota a margine di Corte cost. n. 258/2017*, in *Diritticomparati.it*, 2018; M. LOTTINI, *Scuola e disabilità. I riflessi della sentenza 80 del 2010 della Corte costituzionale sulla giurisprudenza del giudice amministrativo*, in *Foro amministrativo (T.a.r.)*, 7, 2010, p. 2403, L. NANNIPIERI, *Il diritto all'istruzione del disabile nelle fonti nazionali tra problemi definitori, giurisprudenza costituzionale e giudici di merito*, in *Rivistaaic.it*, 3, 2012, A. PIROZZOLI, *La discrezionalità del legislatore nel diritto all'istruzione del disabile*, in *Rivistaaic.it*, 0, 2012; S. TRIOLO, *I "nuovi" diritti sociali: la parabola dell'integrazione scolastica dei disabili*, in *Gruppodipisa.it*, 2012.

[292] C. COLAPIETRO, *La vicenda del collocamento obbligatorio degli invalidi psichici; un nuovo modo di procedere nei rapporti Corte-Parlamento*, in *Giurisprudenza italiana*, I, 1, 1990, p. 863 ff.

workplaces is to be considered positively. According to the Court, this is particularly relevant in a Constitutional system which is characterized by «intense sociality», such as the Italian one, where each and every person has the right to take part in the political, economic and social organization of the country[293].

On the matter of accessibility and architectural barriers, the Court recognized that the lack thereof results in a violation of the right to have a social life for the person with disability. This implies inequalities and concrete obstacles in exercising self-determination and the right to personal development for the person with disability[294].

One can note that the case law of the Constitutional Court affirms the primary importance of social inclusion, by making it the prevalent interest[295]. What is emphasized is that the person with disabilities doesn't really need services based on medical and economic assistance, but full inclusion in social life, with particular regard to education and employment and the possibility of overcoming environmental barriers[296]. Scholars have stated that the person with disabilities has a specific role according to article 3 paragraph 2 of the Constitution[297].

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[293] Here is the original quote: «specie in un Paese come il nostro di intensa socialità nel quale tutti i cittadini hanno diritto di concorrere alla organizzazione politica, economica e sociale del Paese (art. 3 Cost.) ed, in particolare, hanno diritto al lavoro in una Repubblica impegnata a promuovere le condizioni per rendere effettivo tale diritto».

[294] Decision n. 167, 1999. For comments see the previous footnote. Here the Court states that barriers hinder relational life. Here is the original quotation from the decision: «l'impossibilità di accedere alla pubblica via attraverso un passaggio coattivo sul fondo altrui, si traduce nella lesione del diritto del portatore di handicap ad una normale vita di relazione, che trova espressione e tutela in una molteplicità di precetti costituzionali: evidente essendo che l'assenza di una vita di relazione, dovuta alla mancanza di accessibilità abitativa, non può non determinare quella disuguaglianza di fatto impeditiva dello sviluppo della persona che il legislatore deve, invece, rimuovere».

[295] C. COLAPIETRO, *I diritti delle persone con disabilità nella giurisprudenza della Corte costituzionale: il "nuovo" diritto alla socializzazione*, in *dirittifondamentali.it*, 2, 2020, pp. 1-44.

[296] C. COLAPIETRO, *Diritti dei disabili e Costituzione*, Pisa, p. 40.

[297] F. FURLAN, *La tutela costituzionale del cittadino portatore di handicap*, cit., p. 242.

At the same time, the constitutional status of the person with disability is connected with the notion of social dignity, referring to their concrete living conditions.

In the background of this case law on disability we can recognize a specific constitutional view of the person, which must be pursued to grant the realization of the «irrevocable asset of the human being» (*patrimonio irretrattabile della persona umana*)[298].

[298] This expression can be found in decision n. 11/1956 by the Constitutional Court.

CHAPTER TWO

AT THE CROSSROADS BETWEEN SEXUALITY, DISABILITY AND LAW: SOME COORDINATES

SUMMARY: *1. Sexuality as an isolated field: reasons, peculiarities and emerging trends. 1.1. An historical perspective on sexuality and law: tensions and contrasts. 1.2. A glance at sexuality in international law with a particular focus on the case law of the ECtHR. 1.3. A glance at sexuality in the Italian legislation. 2. Sexuality and disability: social barriers and the legal approach. 2.1. Sexuality and people with disabilities: prevailing stereotypes and misconceptions. 2.2. Claiming sexual citizenship and sexual accessibility for people with disabilities. 2.3. When the law meets disabled people's sexuality: the debate during the development and approval of the CRPD. 2.4. When the law meets disabled people's sexuality: the Italian domestic level. 3. The use of "the private argument" in law regulating and protecting sexuality: why to reject a strict public/private dichotomy. 3.1. Private/public dichotomy in sexuality law. 3.2. A case study: US jurisprudence on "sodomy" and the use of the private sphere argument. 3.2.1. The "unsupportable" claim against the offence of sodomy: Bowers v. Hardwick. 3.2.2. Lawrence v. Texas: protection in the domestic and private dimension. 3.2.3. The DADT policy in the US army: protection of the private sphere and compulsory closet. 3.3. The public/private dichotomy argument in the field of disability and sexuality. 4. Sexuality, Law, Disability: a statute under Italian constitutional law. 4.1. For a Constitutional roadmap on sexuality-related rights. 4.2. Discussing a possible constitutional framework for measures in the field of sexuality and disability. 4.2.1. Article 2 of the Constitution: sexuality as a personal development and social factor. 4.2.2. Article 3 of the Constitution: equality as anti-subordination. 4.2.3. Article 32: the fulfillment of sexuality as part of a state of comprehensive well-being.*

In this chapter the topic of sexuality in disability law will be disentangled. If international law and domestic law are progressively adopting the social model of disability, the issues examined by critical disability studies are still far from being addressed. This might be because sexuality itself is a very peculiar field in law, which has never been comprehensively investigated, and where many tensions and social conflicts remain deeply unresolved. This aspect will be explored in this chapter of

the book. Nonetheless, it is possible to intercept a growing interest in sexuality as a human rights issue, both on the international and domestic level. The debate around sexuality and disability, however, is still absent or marginal within international and domestic law trends. To sum up, a constitutional statute of sexuality-related rights will be sketched while trying to understand which framework to provide for positive measures in the field of disability and sexuality.

1. Sexuality as an isolated field: reasons, peculiarities and emerging trends

Sexuality became a new category in human sciences during the late 19th Century and is now a central issue in western society[1], studied globally and with increasing significance. It is a key concept through which we understand ourselves both as individuals and as members of communities[2].

If sexuality was initially understood as an instinctive drive, linked to genes, it is now understood as socially malleable, shaped by a multitude of social dynamics, prohibitions, and definitions. This interaction creates meanings, subjectivities and sexual categories, often arranged in hierarchies[3]. An example of this view can be found in the World Health Organization's (WHO) notion of sexuality[4], which is defined as

> a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social,

[1] E. KOSOFSKY SEDGWICK, *Epistemology of the closet*, cit.

[2] L.J. MORAN, *Introduction*, in ID. (ed.), *Sexuality and Identity*, London-New York, 2017, p. XII.

[3] K. PLUMMER, *Intimate Citizenship: Private Decisions and Public Dialogues*, Montreal, 2003.

[4] See *https://www.who.int/reproductivehealth/topics/gender_rights/sexual_health/en/*.

economic, political, cultural, ethical, legal, historical, religious and spiritual factors.

All these categories have recently begun to query and challenge the law, which is asked to find answers to increasingly complex questions. In the following paragraphs, we will discuss the general relationship between sexuality and the law, firstly from a historical perspective and then by analysing the domestic and international aspects of it.

1.1. An historical perspective on sexuality and law: tensions and contrasts

For a long time, as Foucault affirmed, the law nourished the view of sexuality as something fixed, natural and pre-given, by providing discipline and restraint. A good example of this are the criminal provisions around homosexuality[5]. Even in the Italian system, where criminalization of homosexual conduct was never enacted, we can observe how the law had a key role in shaping sexuality according to shared values through categories such as public morality, public order and decency. A huge role was played by criminal law: sexual offences, for example, were conceived as a matter of public morality until 1996[6].

It is not by chance that the earliest struggle in the field of sexuality was the demand for the decriminalization of consensual sexual conducts, such as sodomy or buggery[7].

It was in the same period that sexuality studies were born. These studies started by investigating the social construction of sexuality, showing

[5] He argued specifically how the criminal previsions around "buggery" or "sodomy" were to be read as marks on the person performing the action, capable of revealing the "truth" of that person. See M. FOUCAULT, *History of Sexuality. The will to knowledge*, vol. 1, New York, 1978.

[6] See the commentary on the famous criminal law book by F. ANTOLISEI, *Manuale di diritto penale. Parte speciale*, vol. I, Milano, 1999, p. 380. This situation changed, as mentioned, in 1996 with the reform of sexual crimes. This reform will be further mentioned in this Chapter and in Chapter III, however it is useful to know that it established the crime of sexual violence as a crime against the person for the first time.

[7] J. LAURISTEN, D. THIRSTED, *The early homosexual rights movement (1864-1935)*, New York, 1974; L.J. MORAN, *The Homosexual(ity) of Law*, London-New York, 1996.

how society was significantly shaping sexuality[8]. The so-called "sexual revolution", which happened in Europe and the US during the 1960s and '70s was, in fact, broadly evoking the notions of liberation from biological science and the view of sexuality as a natural phenomenon[9]. Traditionally oppressed categories of people, such as women, within the feminist movement[10], and transgender, lesbian bisexual and gay people[11], were claiming freedom and deregulation in the field of sexuality.

This revolution, arguably still unfinished, has accelerated in the past two decades. According to scholars, these struggles are aimed at transforming intimacy[12]. The result is an increasing separation of sex and reproduction, which implies a pluralization of sexual identities, a challenge to traditional values (emphasized by secularization) and an individualization of choices[13].

These modern understandings of sexuality, however, are not always fully reflected in the legal field, in spite of signs of contamination within the law (see paragraph 3).

Law and legislation are the epicentre of all the tensions in the relationships between sexuality, identity and society[14]. This is why in certain ways law has lagged behind contemporary sexuality while in others it has challenged some traditional social views of it. This tension is also in the background of the debate on the role law should play in the process of sexual liberation.

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[8] J.H. GAGNON, W. SIMON, *Sexual Conduct: The Social Sources of Human Sexuality*, London, 1973; M. FOUCAULT, *History of Sexuality. The will to knowledge*, cit.; K. PLUMMER, *Telling Sexual Stories: Power, Intimacy and Social Worlds*, London, 1995.

[9] L. GELSTHORPE, *Introduction: Reflections on Sexuality Repositioned*, in L. GELSTHORPE, B. BROOKS-GORDON, A. BAINHAM (eds.), *Sexuality repositioned: Diversity and the Law*, Oxford, 2004.

[10] S. FIRESTONE, *The dialectic of sex: The case for Feminist Revolution*, New York, 1971; K. MILLETT, *Sexual Politics*, New York, 1970.

[11] D. ALTMAN, *Homosexual: oppression and liberation*, New York, 1971; J.N. KATZ, *Gay American History*, New York, 1976.

[12] A. GIDDENS, *The transformation of Intimacy. Sexuality, Love & Eroticism in Modern Societies*, Stanford, 1992.

[13] L. GELSTHORPE, *Introduction: Reflections on Sexuality Repositioned*, cit.

[14] L. GELSTHORPE, *Introduction: Reflections on Sexuality Repositioned*, cit.

The first social movements denounced a sort of hyper-juridification[15] in the field of sexuality and for this reason, they asked the State to withdraw from this "private" arena, believing that, in this way, self-determination in the sexual sphere could be granted. At the same time, however, these social movements were asking for the recognition of certain specific rights and services in the sexual sphere, such as abortion, access to contraception, or procedures for legal gender recognition[16]. This fact breaks with the idea of a synallagmatic relationship between sexual freedom and de-juridification[17].

Once deregulation in "private" spheres was obtained, it was revealed that no legislation often means *de facto* repression[18] (this aspect will be further discussed in paragraph 3).

This suggests that after deregulation there is a need to enact promotional measures in order to secure the right to self-determination and equality in the sexual sphere. As Bobbio explains:

[15] Translation of the term "ultragiuridismo" used by Amato. See G. AMATO, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, Milano, 1985, p. 21.

[16] We can mention for example the movements in Italy for abortion and legal gender recognition which were taking place during the same period. On the feminist movement in Italy during the 1970s, see B. PISA, *Il Movimento liberazione della donna nel femminismo italiano: la politica, i vissuti, le esperienze (1970-1983)*, Roma, 2017; D. ARDILLI (ed.), *Manifesti femministi. Il femminismo radicale attraverso i suoi scritti programmatici (1964-1977)*, Milano, 2018; M. BRACKE, *La nuova politica delle donne. Il femminismo in Italia, 1968-1983* (trad. italiana E. Cappussotti), Roma, 2019. On the transgender movement in Italy during the same years see P. MARCASCIANO, *Tra le rose e le viole: la storia e le storie di transessuali e travestiti*, Roma, 2002.

[17] Amato states that «ogni rivendicazione sembra incapace di sfuggire alla fitta trama delle norme (aborto e contraccezione devono essere garantiti, persone trans chiedono riconoscimento). In quel gioco sottile e perverso in cui ogni presa di autolegittimazione esige, prima di ottenere legittimazione e riconoscimento giuridico, ma proprio la legittimazione ed il riconoscimento giuridico paiono vanificati dalla pretesa di autolegittimazione». G. AMATO, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, cit., p. 21.

[18] G. AMATO, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, cit., p. 168. But in a different way it was also observed by Foucault where he stated that choosing not to regulate is a regulation itself.

> the so-called social rights of our Constitution represent the defeat (irreversible defeat, according to me) of the "minimal" State. Minimal state and social rights are incompatible. With the welfare state the relationship between public and private is opposite compared to the one in the liberal state; the public sphere has been extended and the private one has diminished[19].

Currently, the initial demand for freedom and self-determination in the field of sexuality is being transformed into a request for protection and recognition in the eyes of the law[20]. These instances in the field of sexuality are quite varied and touch a high number of non-homogenous issues that involve many different legal categories. Sexuality-related rights, in fact, include issues such as: consensual sexual practices, sexual orientation, reproduction through sex and sex without reproduction, sexism and homophobia, parenting and filiation, gender identity and legal gender recognition, gender equality, reproductive and sexual health and many others[21]. These aspects, indeed, emerge from an examination of international and Italian domestic law.

1.2. A glance at sexuality in international law with a particular focus on the case law of the ECtHR

In international human rights law, there is nothing that explicitly refers to the field of sexuality. In the Universal Declaration of Human Rights of 1948, sexuality is not mentioned at all; only the Convention on the Rights of the Child of 1989 mentions sexuality when it comes to the duty of States to combat sexual exploitation. Global or regional human

[19] See Bobbio: «i cosiddetti diritti sociali delle nostre costituzioni rappresentano la sconfitta (a mio parere irreversibile) dello stato minimo. Diritti sociali e stato minimo sono incompatibili. Con lo stato assistenziale il rapporto tra pubblico e privato viene rovesciato rispetto allo stato liberale; la sfera del pubblico si è estesa e quella del privato si è ristretta». N. BOBBIO, *Pubblico e privato: introduzione a un dibattito*, in *Fenomenologia e società*, 5, 1982, p. 171; N. BOBBIO, *Pubblico, privato*, in *Enciclopedia*, XI, Torino, 1980, p. 401.

[20] G. AMATO, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, cit., p. 170.

[21] For a work on this aspect under the umbrella of sexuality rights, with a specific focus on the French legal system, see D. BORRILLO, *Le droit des sexualités*, Paris, 2009.

rights treaties are also silent on the point. Nevertheless, there is a growing global interest on the concept of sexual rights, which was developed in several declarations and documents issued by relevant organisation. It is the case of the document issued by the international Planned Parenthood Federation (IPFF)[22] or the Declaration of Sexual Rights of the World Association for Sexual Health (WAS)[23]. In the latter, it is stated that everyone has the right to enjoy sexual rights without any discrimination and disability is mentioned between these grounds (Statement 1). Statement 7 is also crucial, because it endorses the idea that sexual health includes sexual pleasures and the notion of accessibility is used in this same field:

> The right to the highest attainable standard of health, including sexual health; with the possibility of pleasurable, satisfying, and safe sexual experiences. Everyone has the right to the highest attainable level of health and wellbeing in relation to sexuality, including the possibility of pleasurable, satisfying, and safe sexual experiences. This requires the availability, accessibility, acceptability of quality health services and access to the conditions that influence and determine health including sexual health.

As the above mentioned declaration states, many human rights are applicable and are applied to the sphere of sexuality[24]: it is the case of the right to equality and non-discrimination, freedom of expression, right

[22] IPFF, International Planned Parenthood Federation, *Sexual Rights: An IPFF Declaration*, London, 2008. This document contains six guiding principles and also a charter of sexual rights. It is available at *https://www.ippf.org/sites/default/files/sexualrightsippfdeclaration_1.pdf*.

[23] Was, Declaration of Sexual Rights, 2014. The document is available here in several languages: *https://worldsexualhealth.net/resources/declaration-of-sexual-rights/*. For a commentary on this document see E. KISMÖDI, E. CORONA, E. MATICKA-TYNDALE, E. RUBIO-AURIOLES, E. COLEMANM, *Sexual Rights as Human Rights: A Guide for the WAS Declaration of Sexual Rights*, in *International Journal of Sexual Health*, 29, 1, 2017, pp. 1-92.

[24] See A.M. MILLER, E. KISMÖDI, J. COTTINGHAM, S. GRUSKIN, *Sexual rights as human rights: a guide to authoritative sources and principles for applying human rights to sexuality and sexual health*, in *Reproductive Health Matters*, 23:46, 2015, pp. 16-30; S. CORRÊA, R. PETCHESKY, R. PARKER, *Sexuality, Health and Human Rights*, New York, 2008, pp. 149-192; L. TIEFER, *The Emerging Global Discourse of Sexual Rights*, in *Journal of Sex & Marital Therapy*, 28, 2002, pp. 439-444.

to life, right not to be treated in a cruel, inhumane or degrading manner, as well as right to privacy and respect for private life.

These are the provisions mentioned by the European Court of Human Rights in its case law on sexuality[25]. In general, this case law pertains to negative rights (right to be left alone from State intervention) and is starting to consider positive rights as well (protection and promotion through State intervention).

For example, article 8 of the ECHR promotes a complex and comprehensive view of personality rights, and sexuality and sexual life are part of it. Article 8 includes freedom of expression and self-development, as well as freedom to establish and develop relationships with other human beings for the development and fulfilment of human personality. Following this lead, the Court affirmed the right and freedom to engage in consensual sexual activity, as will be further discussed. The protection accorded to sexual life under article 8 extends also to public sexual behaviours. It does not matter if these behaviours take place in a public or private space: sexuality is such a part of one's personality that it is always covered by the notion of private life (art. 8.1), regardless of this distinction[26].

For our purpose, these decisions will be analysed by dividing them into different thematic areas:

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[25] On the case law of the ECtHR on sexuality see the following works by legal scholars: D.A. GONZALEZ SALBERG, *Sexuality and Transsexuality Under the European Convention on Human Rights: A Queer Reading of Human Rights*, London, 2019; M. GRIGOLO, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, in *European Journal of International Law*, 14, 5, 2003, pp. 1023-1044; H. GAUPNER, *Sexuality and Human Rights in Europe*, in *Journal of Homosexuality*, 48, 3-4, 2005, pp. 107-139; P. TAHMINDJIS, *Sexuality and Human Rights in Europe*, in *Journal of Homosexuality*, 48, 3-4, 2005, pp. 9-29.

[26] See P. TAHMINDJIS, *Sexuality and Human Rights in Europe*, cit., p. 11: «Sexuality is so central to one's personality that, as a general principle, it should come under the notion of "private life". The decision whether private life is affected or not should not depend on whether the behavior takes place in public or in private. Examination of norms regulating sexual behavior in public, for instance to avoid annoyance, should always be done under par. 2 of art. 8 ECHR, thereby avoiding major problems arising from the otherwise necessary decision of whether certain conduct in fact took place in private or in public».

I. Non-discrimination on the basis of sexual orientation

The jurisprudence on the criminalization of homosexual conduct is relevant in this analysis. The Court overruled a previous decision with the *Dudgeon v. UK* case[27], challenging the legislation of Northern Ireland which punished homosexual conduct.

Following a trend in law and in general an evolution of the social perception of homosexuality, the Court stated that a complete ban on homosexual conduct implied a substantial violation of the right to private life. Subsequently the Court diminished the margin of appreciation of member States on this matter. The Court noticed how Mr. Dudgeon suffered from «detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of *homosexual orientation* like the applicant» and concluded that the one in question was an «unjustified interference with his right to respect for his private life. There is accordingly a breach of article 8»[28]. With this decision, sexuality was used for the first time as a ground of discrimination relevant in the ECHR system.

In the *Sutherland v. UK* case[29], the Court affirmed that the age of consent for homosexual couples being raised to 18 years old (compared to that for heterosexual relationships, which was 16) was against article 14 and article 8 of the Convention. In *S. L. v. Austria*, the Court acknowledged that adolescents over 14 years old have the right to self-determination in the field of sexuality, awarding the applicant compensation being prevented from having sexual relationships from the age of 14 to 18

[27] Case of Dudgeon v. The United Kingdom, Application no. 7525/76, 22 October 1981. See M.T. McLoughlin, *Crystal or glass?: A review of Dudgeon v. United Kingdom on the fifteenth anniversary of the decision*, in *Murdoch University Electronic Journal of Law*, 3(4), 1996; J.F. Kimble, *A Comparative Analysis of Dudgeon v. United Kingdom and Bowers v. Hardwick*, in *Arizona Journal of International & Comparative Law*, 1988, p. 200.

[28] Case of Dudgeon v. The United Kingdom, Application no. 7525/76, 22 October 1981.

[29] Sutherland v. UK, Application n. 25185/94, 01.07.1997. On this decision see commentary by P. Tahmindjis, *Sexuality and Human Rights in Europe*, cit., p. 9; H. Gaupner, *Sexuality and Human Rights in Europe*, cit., p. 120.

with older adult men[30]. Similarly, in *A.D.T. v. United Kingdom*[31] the Court held that the criminalization of group sex involving men was a violation of the Convention. Here the Court found a violation of art. 8: the fact that this sexual activity involved more than two men was not considered by the Court to be a relevant element. Sexual activity involving a group of consenting adults is to be covered by art. 8.

In 1999 the Court ruled against the ban on homosexual and bisexual people serving in the military, by means of the decisions *Lustig-Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom*[32].

In many other cases, moreover, the Court built a legal theory firmly based on the principle of non-discrimination on the basis of sexual orientation, comparing the latter to discrimination based on race, colour, religion or sex[33].

II. Recognition of same-sex unions and families

In general, the case law of the Court on the matter of recognition of same-sex unions and families has been extensive and has ranged from the decision on succession of tenancy for the same-sex partner (*Karner*

[30] S. L. vs Austria, Application n. 45330/99, 9 January 2003.

[31] A. D. T v. United Kingdom, Application no. 35765/97, 31 July 2000. The applicant was charged with committing a crime under the Sexual Offences Acts 1956 and 1967 for having sex 'not in private'. Following a police search of his home, the applicant was arrested, and videos were seized containing 'footage of the applicant and up to four other adult men, engaging in acts, mainly of oral sex, in the applicant's home'. From the outset, the applicant made it clear that 'there was no element of sado-masochism or physical harm involved in the activities depicted on the video tape'.

[32] Lustig-Prean and Beckett v. the United Kingdom and Smith and Grady v. the United Kingdom, Applications nos. 31417/96 and 32377/96, 27 September 1999.

[33] Smith & Grady vs. UK, Application n. 33985/96 and 33986/96, 27 September 1999; Salgueiro da Silva Mouta vs. Portugal, Application n. 33290/96, 21 December 1999; L. & V. v. Austria, Application no. 39392/98 and 39829/98, 09 January 2003. In all these cases, indeed, where a discrimination on the basis of sexual orientation is involved, the margin of appreciation for States is narrow: differences in treatment can only be justified if they are necessary (reasonableness is not enough) to fulfil a legitimate aim, as stated in Karner vs. Austria, Application n. 40016/98, 24 July 2003.

v. Austria)[34], to the recognition of the State's obligation to introduce a form of legal recognition for same-sex unions (*Oliari and others v. Italy*[35] and *Fedotova and Others v. Russia*[36]). The European Court of Human Rights is now working on access to reproductive technologies[37],

[34] In Karner v. Austria the Court declared unacceptable the eviction of a gay man from the flat he had shared with his deceased partner for years, while surviving partners of an opposite-sex couple enjoyed the right of succession of the tenancy. The case was about the interpretation of 'life companion', entitled to succeed in the tenancy contract of the deceased partner, as defined in Section 14 of the Austrian Rent Act. The Court positively recognized a violation of article 14 combined with article 8 in the refusal by the Austrian Supreme Court to include a same-sex partner in the definition of 'life companion' on an equal footing with opposite-sex unmarried partners. In light of the principle of proportionality, the Court held here that no 'weighty reasons' were advanced by the Government which suggested that discrimination of the same-sex relationship was necessary in order to protect the traditional family. However, as the applicant framed his claims in terms of 'his right to respect for his home' (the same perspective taken by the Commission in *Simpson*), the Court declared a violation of this right and found it not necessary 'to determine the notions of "private life" or "family life"'.

[35] Case of Oliari and Others v. Italy, Applications nos. 18766/11 and 36030/11, 21 July 2015. For commentary: C.M. AKRIVOPOULOU, *Same-sex unions in Italy and the recent European Court of Human Rights case law: a short comment on Oliari and Others versus Italy (judgment of 21.7.2015)*, in *International Journal of Human Rights and Constitutional Studies*, 4(2), 2016, pp. 176-179; G. ZAGO, *A victory for Italian same-sex couples, a victory for European homosexuals? A commentary on Oliari v. Italy (August 21, 2015)*, in *articolo*29, 2015.

[36] Case of Fedotova and Others v. Russia, applications nos. 40792/10, 30538/14 and 43439/14, 13 July 2021. For an initial commentary see D. BARTENEVE, *Will Russia Yield to the ECtHR? Fedotova and Others v. Russia: Yet Another Test Case of Russia's Resistance to the European Human Rights Standards*, in *Verfassungblog*, 16 July 2021, available at *https://verfassungsblog.de/will-russia-yield-to-the-ecthr/*.

[37] For example, on medically assisted procreation for lesbian couples see Charron and Merle-Montet v. France 16 January 2018 (decision on admissibility). The applicants, a female married couple, complained that their request for medically assisted reproduction had been rejected with the claim that French law did not authorize such medical provision for same-sex couples. The Court declared the application inadmissible. It noted in particular that the Hospital's decision to reject the applicants' request for access to medically assisted reproduction had been an individual administrative decision that could have been set aside on appeal for abuse of authority before the administrative courts. However, the applicants had not used that remedy. In the present case, noting the

second-parent adoption[38] and recognition of non-biological parents on birth certificates[39] (we should remember that in these areas there is a wider margin of appreciation).

III. Gender identity issues

In the area of identity, it is interesting to analyse the jurisprudence on transgender issues: the leading case on this matter is *Christine Goodwin v. UK*[40]. With this decision, the Court held that the recognition of a transgender person's gender identity was covered by art. 8. For this reason, a transgender person must be allowed to change their birth certificate and enter into a heterosexual marriage. Since 2003, the case law has moved forward to grant quick, accessible and transparent legal gender recognition procedures. For example, in the *A.P. Garçon and Nicot v. France* case[41] the Court held that the requirement of surgical intervention to obtain legal gender recognition was against art. 8 of the Convention: the recognition of one's identity and right to bodily integrity is to be considered fundamental and not to be balanced with hypothetical State interests, such as public order.

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importance of the subsidiarity principle, the Court found that the applicants had failed to exhaust domestic remedies.

[38] X and Others v. Austria, Application no. 19010/07, 19 February 2013 (Grand Chamber). This case concerned the complaint by two women who live in a stable homosexual relationship about the Austrian courts' refusal to grant one of the partners the right to adopt the son of the other partner without severing the mother's legal ties to the child (second-parent adoption). The applicants submitted that there was no reasonable and objective justification for allowing the adoption of one partner's child by the other partner as far as heterosexual couples were concerned, be they married or unmarried, while prohibiting the adoption of one partner's child by the other partner in the case of homosexual couples. The Court held that there had been a violation of article 14 (prohibition of discrimination) taken in conjunction with article 8 (right to respect for private and family life) of the Convention because of the difference in treatment of the applicants in comparison with unmarried different-sex couples in which one partner wished to adopt the other partner's child.

[39] Pending applications R.F. and Others v. Germany (no. 46808/16); S.W. and Others v. Austria (no. 1928/19).

[40] Goodwin v. United Kingdom, Application no. 28957/95, 11 July 2002.

[41] Case A.P. Garçon and Nicot v. France, Application no. 79885/12, 52471/13 and 52596/13, 6 April 2017. See C.M. REALE, *Corte europea dei diritti umani e gender bender: una sovversione mite*, in *DPCE Online*, 30, 2, 2017, pp. 409-415.

IV. Sexuality and bodily integrity

On the matter of sexuality, bodily integrity and self-determination over one's body the Court decided by means of cases on sterilization (the importance of these decisions for sexuality and disability matters will be discussed in Chapter III). Many of these cases concerned the forced sterilization of Roma women[42], and the Court repeatedly acknowledged a violation of articles 8 and 3 of the Convention, and a gross disregard of the right to autonomy and choice of these women, as well as a violation of their right to reproductive health (see Chapter III).

V. Informed decision and self-determination in the sexual sphere

On the matter of informed decision and self-determination in the sexual sphere, the Court pronounced several interesting decisions.

The first one worth mentioning is *Jiménez Alonso & Jiménez Merino vs. Spain*. Here, the Court held that public objection to sex education lessons in public schools on religious grounds was not covered by art. 9 of the Convention[43]. According to the judges, when sex education is aimed at giving students scientific information on sexually transmitted diseases, AIDS, human sexuality and sexual behaviour, access must be granted to everyone, and it does not constitute a source of "indoctrination" in favour of a specific form of sexual behaviour.

A case concerning BDSM[44] practice was then discussed by the Court in 2005 in *K.A. and A.D v. Belgium*[45]. Here the Court found no specific violation of art. 8 by the Belgian court; however, it is remarkable that the judges acknowledged that BDSM finds coverage under article 8 of the Convention when four requirements are met: I) consent persists during the whole course of the act; II) it takes place in a private space; III) it

[42] K.H. and Others v. Slovakia, Application no. 32881/04; V.C. v. Slovakia, Application, no. 18968/07; N.B. v. Slovakia, Application n. 29518/10; I.G., M.K. and R.H. v. Slovakia, Application n. 15966/04.

[43] Jiménez Alonso & Jiménez Merino vs. Spain, Application n. 51188/9, 25 March 2000.

[44] BDSM is an acronym used to refer to a variety of sexual/erotic practices related to bondage, discipline, dominance and submission, sadomasochism and similar dynamics.

[45] K.A. and A.D v. Belgium, Application nos. 42758/98 and 45558/99, 17 February 2005.

doesn't imply permanent damages; IV) there is no specific national legislation prohibiting it[46].

In a recent decision, *Carvalho pinto de sousa morais v. Portugal*[47], the Court held for a violation of article 8 and article 14 in the case of a woman who suffered from several gynaecological diseases and had urinary incontinence, difficulty sitting and walking, and could not have sexual relations due to medical malpractice. Here the Court openly broke away from a stereotypical view of sexuality, recognizing that the low consideration of women's sexuality played a crucial role in the Belgian judgement:

> The question at issue here is not considerations of age or sex as such, but rather the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people.

In stating thus, the Court showed its interest in discussing at a deeper level, by digging through stereotypes and misconceptions, the value of sexuality for self-determination and self-fulfilment, opening up to an examination of the cultural and social elements hidden in the construction of sexuality in the legal arena. Similarly, in *J. L. v. Italy*[48], the Court found that stereotypes and misconceptions around women's sexuality were responsible for the violation of human rights, in particular of those of victims of gender-based violence.

In general, we can see how sexual rights are a matter of growing interest for the ECtHR. They are considered to be related to dignity, self-determination, identity and to freedom to express one's personality.

[46] What is particularly interesting about this case is that rules usually applicable in BDSM games are acquired by the Court to come to a decision. A clear example of it is the discussion of the use of the "safe word", and in this case, indeed, the Belgian rule was not considered to be against article 8 because the plaintiff did not respect the safe word mechanism.

[47] Case of Carvalho Pinto De Sousa Morais v. Portugal, Application no. 17484/15, 25 July 2017.

[48] Case of J. L. v. Italy, Application no. 5671/16, 27 May 2017.

What should be considered, however, is that this case law is not separate from a trend in public attitudes[49].

1.3. A glance at sexuality in the Italian legislation

This growing interest can be observed in Italian legislation and case law. Even at the domestic level, however, the legal developments are strictly connected to evolving social mores and social sensitivity. The constitutional framework of sexuality will be discussed in paragraph 4.1 while in the present paragraph a brief overview on relevant legislation and case law will be sketched out.

Italy has never had criminal laws punishing acts of sodomy, but this doesn't mean that the law has always had a positive attitude towards various aspects of human sexuality.

A more nuanced approach, as already mentioned, was affirmed during the social and second-wave feminist revolution, around 1968, initiating a season of legal reforms. One of the first was Law no. 898/1970[50], which introduced the possibility of dissolution of marriage, then in 1978 the law on the interruption of pregnancy[51] was approved. The latter was

[49] H. GRAUPNER, *Sexuality and Human Rights in Europe*, in *Journal of Homosexuality*, 48, 3-4, 2005, p. 125. On the doctrine of the margin of appreciation of the European Court of Human Rights see A. LEGG, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford, 2012.

[50] On the law on divorce see some comments by scholars at the time of the approval of the law: V. BARATTA, *In tema di divorzio: considerazioni sulla impostazione di una legge sul divorzio*, in *Diritto e giurisprudenza*, 5, 1971, pp. 633-646; L. BARCA, *Il nuovo divorzio e l'unità dei "laici"*, in *Rinascita*, 49, 1971, p. 1972; F. TAMASSIA, *Secolarizzazione e diritto di famiglia*, in *Iustitia*, 1, 1972, pp. 20-37.

[51] For a commentary on the law see G. GALLI, *L'interruzione volontaria della gravidanza: commento alla legge 22 maggio 1978, n. 194: norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza*, Milano, 1978. The current challenging aspects of this law concern conscientious objection. Italy was in fact condemned by the European Committee for Social Rights – on this see S. GIUSTOZZI, *Interruzione volontaria di gravidanza e obiezione di coscienza. Il Comitato Europeo dei diritti sociali accerta la violazione della Carta Sociale Europea*, in *PRISMA Economia – Società - Lavoro*, 2015, 1, p. 191; B. ANGELA, *Il caso Italia: medicina riproduttiva e obiezione di coscienza*, in *Revista de bioética y derecho*, 29, 2013, pp. 11-23.

inspired by the decision of the Constitutional Court no. 27/1975[52]. The legislation is not explicitly based on the principle of bodily autonomy and self-determination of women[53], but it still represented a step towards taking sexuality out of the narrow spaces outlined by family and procreation[54]. The decision was a starting point also for a public and political discussion on sexuality focused on self-determination and individual choices.

Law 29 July 1975 no. 405 was emblematic of this trend: it created family counselling centres (*Consultori familiari*)[55] in every region with the aim of reinforcing responsible parenthood and procreation and supporting the women's health (article 1). Accessible for free and spread uniformly throughout the territory, these structures provided instruments to foster women's independence and self-determination in the field of

[52] Here the Constitutional Court declared article 546 of the Criminal Code unconstitutional for the part where it did not provide the possibility of interruption of pregnancy when it implies a serious and medically assessed damage or a danger to the health of the mother. For commentary see M. BOSCARELLI, *Corte costituzionale e liberalizzazione dell'aborto. Nota a C. cost. 18 febbraio 1975, n. 27*, in *Rivista italiana di diritto e procedura penale*, 2, 1975, pp. 569-573; A. CRESPI, *L'aborto vivo e vitale negli auspici della Corte costituzionale. Nota a C. cost. 18 febbraio 1975, n. 27*, in *Rivista italiana di diritto e procedura penale*, 1975, 2, pp. 566-568; F. DALL'ONGARO, *Aborto terapeutico e revisione costituzionale della normativa penale. Nota a C. cost. 18 febbraio 1975, n. 27*, in *II diritto di famiglia e delle persone*, 2, 1, 1975, pp. 375-385; G. DALLA TORRE, *Riflessioni sulla sentenza costituzionale n. 27/1975 in tema di aborto. Nota a C. cost. 18 febbraio 1975*, n. 27, in *II diritto di famiglia e delle persone*, 2, 2, 1975, pp. 594-616; D. UGO, *Prospettive sull'aborto. Nota a C. cost. 18 febbraio 1975, n. 27*, in *La giustizia penale*, 7, 1, 1975, pp. 203-209, E. FORTUNA, *L'aborto dopo la sentenza della Corte costituzionale*, in *Giurisprudenza di merito parte IV*, 3, 4, 1975, pp. 162-164; G. LA CUTE, *L'aborto di donna consenziente e i principi affermati dalla Corte costituzionale a tutela della maternità e della salute*, nota a ord. Trib. Milano 2 ottobre 1972, in *Giurisprudenza di merito*, 3, 2, 1975, pp. 183-190.

[53] T. PITCH, *Per un buon uso di diritto e diritti*, in *Studi sulla questione criminale*, V, 2, 2010, p. 2738.

[54] M. FERRARA, *Dalla rabbia all'impegno politico: com'è cresciuto il Movimento femminile attorno alla battaglia per l'aborto*, in *Rinascita*, 15, 1976, pp. 4-5.

[55] The so-called "Consultori familiari". See R.E. MARCOZ, *Sessualità e consultori familiari*, Roma, 1980; E. PROTETTÌ, M.T. PROTETTÌ, *I consultori familiari*, Padova, 1980; C. ZANTI TONDI, G. TEDESCO TATÒ, *Consultori familiari*, Roma, 1975; E. SGRECCIA, F. ANGELO, G. DALLA TORRE, *Consultori familiari: legge 405/1975*, Milano, 1976.

sexuality and procreation, despite intrinsic limits and others that arisen over time[56].

At the same time, in 1996, criminal law on sexual offences was reformed[57], highlighting a different understanding and value of sexuality in the Italian legal system. From that moment, sexuality started to be understood as a feature of identity to be protected as a fundamental aspect of the person. This is the view of sexuality that is being supported in Courts and Tribunal as well. Starting from the decision of the Constitutional Court (further analysed in paragraph 3), the Court of Cassation has always recognized the right to compensation for damage in the sphere of sexuality. This can be observed, for example, in Decisions no. 2311/2007[58] and no. 13547/2009[59]. The first case involved a man who, due to a car accident, suffered from erectile dysfunction and a consequent anxious-depressive syndrome. The second one concerned damage deriving from a medical error after a hysterectomy. In both cases, the Court quantified damage considering both the biological aspect and the existential

[56] We are referring to limits relating to a combination of different factors, some of which were already present when the Law was written while others emerged over the years. First of all, we need to consider that these kinds of structures, organized on a regional level, show significant variations from region to region. Another major limit pertains to the very scarce financial resources that these kinds of structures have. The work of *Consultori familiari* cannot often be carried out effectively due to these reasons. See the informative article with data and statistics: E. STRUFFOLINO, H. ZAGEL, *Consultori, 30 anni di diseguaglianze*, in *InGenere*, 10.10.2019. Available at *https://www.ingenere.it/articoli/consultori-30-anni-disuguaglianze*.

[57] For an analysis of the social campaign before this reform was enacted and its impact on law, carried out by the feminist movement in Italy, see T. PITCH, *The Political Use of Laws: The Italian Women's Movement and the Rape Campaign*, in *ALSA Forum*, VII, 2-3, 1983, pp. 139-159.

[58] Cass. civ., sez. III, 2 febbraio 2007, n. 2311. Commentary in A. NEGRO, *La compromissione della sessualità: danno biologico e danno esistenziale (nota a sentenza)*, in *Nuova Giurisprudenza Civile*, 11, 2007, p. 11195.

[59] Cass. civ., sez. III, 11 giugno 2009, n. 13547. For a commentary: L. VIOLA, *Sex&Law: anche la lesione del diritto alla sessualità va risarcita (nota a sentenza)*, in *Responsabilità civile*, 2009, p. 1.

side[60]; adequate compensation considers the psychological impact that a loss or partial loss of sexuality might have on a person's life.

Sexuality was confirmed by Law no. 164/1982, on the legal recognition of gender identity, as a crucial feature of individual identity. This legislation considers the right to legal gender recognition of a transgender person to be part of a broader notion of the right to health (art. 32); more importantly it embraced a complex idea of sexuality and gender, arising from the interaction of many factors, amongst which identity prevails[61].

This view was further implemented through the case law of local tribunals, aimed at affirming the possibility of legal gender recognition without any surgical intervention[62]. This approach became the prevalent one after Decision 221/2015 of the Constitutional Court[63], with a judgement that conceived legal gender recognition as a matter of self-development and self-determination according to article 2 of the Constitution.

In 2016, with Law no. 76, civil unions were introduced as a form of legal recognition of same-sex unions[64]. In this way, the Italian legal system has found a path to embracing the complexity of sexuality and affectivity, granting an equal form of protection to everyone. At the same time, with regard to jurisdiction, many cases concerning second-parent

[60] Here is the quotation from the decision: «certamente la perdita o la riduzione della sessualità costituisce anche danno biologico (la cui valutazione nelle tabelle medico legali convenzionali supera normalmente il livello della micropermanente e determina un rilevante ritocco del punteggio finale) consequenziale alla lesione, ma nessuno ormai nega che la perdita e la compromissione, anche soltanto psichica della sessualità (come avviene nei casi di stupro e di pedofilia), costituisca di per sé un danno, la cui rilevanza deve essere apprezzata e globalmente valutata, in via equitativa».

[61] See decision from the Constitutional Court n. 161/1985. For comments and explanation of the relevance of this decision see paragraph 4.

[62] See the reconstruction of this jurisdictional landscape in A. LORENZETTI, *Diritti in transito. La condizione giuridica delle persone transgenere*, Milano, 2014.

[63] See in paragraph 4 for further discussion and comments on this decision.

[64] On civil partnership introduced by Law n. 76/2016 see the Focus from the Review *GenIus: Focus 1: La legge n. 76/2016: contenuti, problemi, prospettive*, in *GenIUS Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 2, 2016, pp. 6-141.

adoption[65] and recognition of parents on birth certificates are being discussed[66].

Another element that should be considered is that, when discussing cases involving BDSM, the Court of Cassation rejected the use of the notion of public order, giving value to the actual consent of the involved parties. It was with these arguments that the Court stated that article 5 of the Civil Code is not applicable to these sexual practices[67].

The growing attention of the law towards sexuality-related issues can be confirmed at the domestic Italian level, as well, as this analysis highlights.

2. Sexuality and disability: social barriers and the legal approach

Although in general the relationship between sexuality and law is starting to evolve and its tensions and unresolved threads are starting to be addressed, when it comes to the link between sexuality and disability, other variables should be considered.

From a legal point of view, in this field the transition towards positive provisions to support sexuality is even further from being enacted. The

[65] On this matter the Corte di Cassazione stated clearly in favour of second-parent adoption affirming that law 184/1983, article 44, paragraph 1, letter d) can be used as recognition of the second parent of a child of a same-sex couple. See Corte Cass. Civile, sez. I, n. 1, 2962, 22 June 2016.

[66] See the recent decision by the Corte di Cassazione that ruled against the possibility of transcribing the birth certificate of a baby born in another country through surrogacy and having two fathers, because of limits deriving from the public order. The Court affirmed that in that case the couple can use the institution of second-parent adoption. See Corte Cass., sez. unite, n. 12193, 6 novembre 2018 (the decision went public on May 2019).

[67] See for example the case: Corte di Cassazione, n. 44986, 26 ottobre 2016. For commentary: M. PELISSERO, *Bondage e sadomasochismo: i limiti della responsabilità penale tra fine di piacere e libero consenso*, in *Diritto penale e processo*, 3, 2017. On the nature of article 5 of the Civil Code see G. RESTA, *La disposizione del corpo, regole di appartenenza e di circolazione*, in S. CANESTRARI, S. RODOTÀ, G. FERRANDO, P. ZATTI, C.M. MAZZONI (eds.), *Trattato di Biodiritto. Il governo del corpo*, I, Milano, 2011, pp. 805-855.

reason for this might be found in the well-rooted prejudices and social barriers against disabled people's sexuality.

2.1. Sexuality and people with disabilities: prevailing stereotypes and misconceptions

The constructed nature of sexuality is particularly evident when it intersects with the experience of disability. In fact, disability is a field already permeated by stereotypes and misconceptions: the encounter with sexuality generates a peculiar discourse of discrimination.

Disabled people's sexuality is surrounded by many stereotypes and misconceptions, and is a social taboo, and as such the topic is widely absent and unexplored both outside and inside the disability movement. The sexuality of people with disability is primarily dominated by denial, censorship and stigma[68]. This generates a process of desexualisation of people with disabilities.

However, even in the sexual sphere, the existing barriers are not inherently related to bodies, but to the social perception of these bodies[69]. Anne Finger, a disability feminist activist from the US, stated that:

> Sexuality is often the source of our deepest oppression; it is also often the source of our deepest pain. It's easier for us to talk about – and formulate strategies for changing – discrimination in employment, education, and housing than to talk about our exclusion from sexuality and reproduction[70].

Some scholars have argued that the absence or limited presence of sexuality in disability literature and politics shows how disabled people themselves mirror negative societal attitudes in this field[71]. Some of these

[68] E.A.G. ARFINI, *Corpi che non contano? Processi di desessualizzazione dei disabili e narrazioni personali*, in M. INGHILLERI, E. RUSPINI (eds.), *Sessualità narrate. Esperienze di intimità a confronto*, Milano, 2011, pp. 101-122.

[69] E.A.G. ARFINI, *Corpi che non contano? Processi di desessualizzazione dei disabili e narrazioni personali*, cit., p. 111.

[70] A. FINGER, *Forbidden fruit*, cit., p. 9.

[71] T. SHAKESPEARE, D. DAVIES, K. GILLESPIE-SELLS, *Sexual Politics of Disability: Untold Desires*, cit.

prevalent attitudes and stereotypes show disabled people alternately as completely asexual or sexually deviant. Pam Evan reports a list of assumptions that non-disabled people have about disabled people's sexuality:

> That we cannot ovulate, menstruate, conceive or give birth, have orgasms, erections, ejaculations or impregnate. That if we are not married or in a long-term relationship it is because no one wants us and not through our personal choice to remain single or live alone. That if we do not have a child, it must be the cause of abject sorrow to us and likewise never through choice. That any able-bodied person who marries us must have done so for one of the following suspicious motives and never through love: desire to hide his/her own inadequacies in the disabled partner's obvious ones; an altruistic and saintly desire to sacrifice their lives to our care; neurosis of some sort, or plain old-fashioned fortune-hunting. That if we have a partner who is also disabled, we chose each other for no other reason, and not for any other qualities we might possess. When we choose 'our own kind' in this way the able-bodied world feels relieved, until of course we wish to have children; then we're seen as irresponsible[72].

These stereotypes and prejudices play a key role in perpetuating the situation of marginalization of disabled people[73]. Sexual agency – the capability and desire to engage in sexual activity and express sexuality – is considered, in western societies, an aspect of adulthood. This is denied to disabled people, who are infantilized and undermined in their sexual potential[74].

In the previous chapter, we explored to what extent the individual/medical model was able to influence the social reaction to disability and orient the creation of policies. In the field of sexuality, the predominant view of disability as tragedy is still widespread and plays a key role in the denial of disabled people's sexuality. According to such model,

[72] J. MORRIS, *Pride against Prejudice. Transforming the attitudes to disability*, London, 1991, p. 20.

[73] Shakespeare argues that they play a critical role in disabling social relations, see T. SHAKESPEARE, *Disability rights and wrongs*, cit., p. 209.

[74] T. SHAKESPEARE, D. DAVIES, K. GILLESPIE-SELLS, *Sexual Politics of Disability: Untold Desires*, cit., p. 14.

sexuality is either not a problem, because it is not a matter a concern, or it is a concern, because it is seen as a problem.

From a philosophical point of view, Shildrick[75] points out the fact that the intersection between sexuality and disability touches deep tension and resistance rooted in every human being. According to this author, disability is capable of challenging the entire construction of subjectivity according to our dominant liberal culture. The "normal" subject is considered to be an autonomous subject, in control of her body. The person with disability, on the contrary, is considered vulnerable and dependent. Sexuality, in general, is already a sort of minefield for the construction of subjectivity: it is a place where bodies meet, contaminate, penetrate, where the boundaries between the self and the other are thin. It is a place where one can lose control. If sexuality is already a realm where the construction of subjectivity is blurred, the encounter between sexuality and disability is perceived as a threat.

If, taken separately, both disability and sexuality challenge the notion of an independent and rational subject, and together, according to Shildrick, they push for the disintegration of it[76]. The condition of fragility and vulnerability of the body is usually successfully managed by able-bodied people during sexual encounters, but this is not always possible for a disabled body (for example for a person with spastic syndrome, or for a person who, as a consequence of disability, suffers from incontinence, etc.). From this point of view, the fact that people with physical impairments may need to use prostheses, implements of support or assistive technology during intimacy is seen as an obstacle to fulfilling a satisfying sexual life. Shakespeare noticed how under the dominant normative view of sexuality, the fact that two naked bodies are not enough for a sexual encounter is not seen favourably[77].

Once these normative views are challenged it would be important to discuss the design of functional support for people with disabilities in the

[75] M. SHILDRICK, *Dangerous Discourses of Disability, Subjectivity and Sexuality*, New York, 2009.

[76] M. SHILDRICK, *Dangerous Discourses of Disability, Subjectivity and Sexuality*, cit.

[77] G. RUBIN, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality (1984)*, in P.M. NARDI, B.E. SCHNEIDER (eds.), *Social perspectives in Lesbian and Gay Studies: a reader*, London, 1998, pp. 100-134.

sphere of sexuality. For example, most of these highly functional pieces still have an aesthetic which recalls the medical/hospital field, which can inhibit intimacy[78]. In general, there is a need to start a conversation on how assistive technology can support and meet the needs of people with disabilities in the sexual sphere[79].

Although it is the normative construction of sexuality that is mainly responsible for the radical exclusion of disabled people from the realm of intimacy[80], Shakespeare argues that there is widespread evidence that disabled people are having sex in great numbers[81]. Studies have shown that people with disabilities are sexually active in similar ways to people without disabilities[82]. Still there is a huge need to understand the mechanism of production of barriers in the sexual field for disabled people and how to dismantle them.

[78] T. SHAKESPEARE, D. DAVIES, K. GILLESPIE-SELLS, *Sexual Politics of Disability: Untold Desires*, cit., p. 14.

[79] The field of assistive technology is very promising in increasing disabled people's quality of life. Research and funding, however, rarely involve sexuality-related issues. For example, in 2016 the WHO carried out the Global Cooperation on Assistive Technology Initiative. During this initiative it provided member states a list of 50 assistive products needed for a basic health care and/or social welfare system. None of these was in the area of sexuality. See C. PETA, *Deafening silence on a vital issue: The World Health Organization has ignored the sexuality of persons with disabilities*, in *African Journal on Disability*, 2018, 7.

[80] Liz Emens goes so far as to claim that 'normative desexualization is about utter exclusion of disabled people from the intimate realm'. See L. EMENS, *Intimate discrimination: The State's Role in the Accidents of Sex and Love*, in *Harvard Law Review*, 2008, p. 1338.

[81] «While on the one hand, these attitudes and assumptions are undoubtedly very common, I think it is hard to say that disabled people are desexualised, when there is widespread evidence that disabled people are having sex in great numbers». T. SHAKESPEARE, *Disability rights and wrongs*, cit., p. 210.

[82] E. BRUNNBERG, M.L. BOSTRÖM, M. BERGLUND, *Sexuality of 15/16-year-old girls and boys with and without modest disabilities*, in *Sexuality and Disability*, 27, 2009, pp. 139-15.

This task has been recently taken into account by scholars from the disability movement who decided to address sexuality as a social issue and not a medical or individual one[83].

2.2. Claiming sexual citizenship and sexual accessibility for people with disabilities

To tackle these widespread barriers in the sexuality arena, one of the main theoretical instruments from disability scholars is sexual citizenship[84]. Developed in the field of LGBT[85] issues, this notion can be an effective tool in addressing sexuality in the spheres of desire and rights, intimacy and legal recognition, sexual body and legislative corpus[86]. The notion of sexual citizenship challenges normative assumptions on sexuality but at the same time

> it (…) contains the notion that sexual rights have to be addressed alongside other human rights, and that disabled people should be considered as sexual beings alongside their peers, without imposing a notion of what sexuality should entail[87].

[83] T. SHAKESPEARE, D. DAVIES, K. GILLESPIE-SELLS, *Sexual Politics of Disability: Untold Desires*, cit.; E.A.G. ARFINI, *Corpi che non contano? Processi di desessualizzazione dei disabili e narrazioni personali*, cit., p. 108.

[84] D. RICHARDSON, *Rethinking sexual citizenship*, in *Sociology*, 5, 2017, p. 2010, explains: «The meaning of the term sexual citizenship is not self-evident. Sexual citizenship is a multi-faceted concept, understood in a variety of different ways. Some writers, for example, prefer to use the term 'intimate citizenship' on the grounds that this allows consideration of a broader range of areas of 'intimate and personal life' than what are typically designated as 'sexual'». On this matter see also E.H. OLESKY, *Intimate Citizenships. Gender, Sexualities, Politics*, New York, 2009; K. PLUMMER, *Intimate Citizenship: Private Decisions and Public Dialogues*, cit.; ID., *Telling Sexual Stories: Power, Intimacy and Social Worlds*, cit.

[85] LGBT is an acronym for Lesbian, Gay, Bisexual and Transgender people.

[86] E.A.G. ARFINI, *Corpi alter\abili. L'alterità somatica della disabilità nei processi di costruzione del soggetto normato. Nota Critica*, in *Rassegna Italiana di Sociologia*, 54(3), 2013, pp. 487-498.

[87] T. SHAKESPEARE, *Disability rights and wrongs*, cit., p. 213.

Another important theoretical instrument is the notion of sexual accessibility, which can be defined as follows:

> By sexual access we do not mean access to physical intimacy per se. Rather, we mean access to the psychological, social and cultural contexts and supports that acknowledge, nurture and promote sexuality in general or disabled people's sexuality specifically[88].

This goal can be reached by improving media representation of disabled people's sexuality but may also depend on «access to cultural, social and psychological supports aimed at synergistically improving the possibilities for sexual expression and negotiating sexual relationship for disabled people»[89].

While all scholars agree on the importance of tackling negative attitudes in the social perception and public representation of disabled people's sexuality, it is still widely debated whether or not the law should play a role in this. For example, Wilkerson, who strongly supports radical sexual policy based on marginalized groups' experience affirms that: «any public articulation of sexuality as an aspect of life to which everyone should be entitled, still remains almost unthinkable within mainstream discourse»[90]. One of the main reasons for this position is that sexuality, as a private matter, should not be regulated by law. This argument will be further discussed in this chapter. Before moving on, we will examine how and if negative attitudes towards disabled people's sexuality are translated into law, both at the international and national level.

2.3. When the law meets disabled people's sexuality: the debate during the development and approval of the CRPD

On the international level, it is interesting to explore how the UN system handles sexuality, with particular focus on the Convention on the

[88] R.P. SHUTTLEWORTH, L. MONA, *Disability and Sexuality: Toward a Focus on Sexual Access*, in *Disability Studies Quarterly*, 22, 4, 2002, pp. 2-3.

[89] R.P. SHUTTLEWORTH, L. MONA, *Disability and Sexuality: Toward a Focus on Sexual Access*, cit.

[90] A. WILKERSON, *Disability, Sex Radicalism, and Political Agency*, in *NWSA Journal*, 14, 3, 2002, p. 35.

Rights of Persons with Disabilities. The process that led to the CRPD is the only international arena where the topic of sexuality was discussed.

Back in 1993, when critical disability studies started researching sexuality, the *UN Standard Rules* were the relevant international act referring to sexuality. For example, Rule 9 highlighted the need to balance correctly between the urge to protect from sexual abuse and the need to not impede the fulfilment of a sexual and affective life for people with disabilities[91]. Moreover, quite interestingly, the Standard Rules imposed on States the need to enact positive measures to contrast negative attitudes towards the sexuality of people with disabilities and to grant sexual education for full, free and consensual sexuality, against every form of abuse[92].

We would expect these provisions to be enacted or maybe further implemented in the CDPR, as a result of new research and evidence on the

[91] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Resolution A/RES/48/96, December 20, 1993.

[92] Here is the complete text of Rule 9 "Family Life and personal integrity": «States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood. 1. Persons with disabilities should be enabled to live with their families. States should encourage the inclusion in family counselling of appropriate modules regarding disability and its effects on family life. Respite-care and attendant-care services should be made available to families which include a person with disabilities. States should remove all unnecessary obstacles to persons who want to foster or adopt a child or adult with disabilities. 2. Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood. Considering that persons with disabilities may experience difficulties in getting married and setting up a family, States should encourage the availability of appropriate counselling. Persons with disabilities must have the same access as others to family-planning methods, as well as to information in accessible form on the sexual functioning of their bodies. 3. States should promote measures to change negative attitudes towards marriage, sexuality and parenthood of persons with disabilities, especially of girls and women with disabilities, which still prevail in society. The media should be encouraged to play an important role in removing such negative attitudes. 4. Persons with disabilities and their families need to be fully informed about taking precautions against sexual and other forms of abuse. Persons with disabilities are particularly vulnerable to abuse in the family, community or institutions and need to be educated on how to avoid the occurrence of abuse, recognize when abuse has occurred and report on such acts».

topic of sexuality. On the contrary, the CRPD's negotiation process was influenced by misconceptions and stereotypes around sexuality, so that the Convention might appear – in this field – to be a step backwards compared to the Standard Rules. Scholars have argued that in this field the CRPD failed in rejecting the medical model of disability, enforcing social stigmas and stereotypes that see disabled people exclusively as vulnerable subjects in the sexual arena and limiting their ability to express and act consensually upon desire[93].

The original draft contained many provisions affirming positive rights in the field of sexuality but were then reformulated or cut during negotiations. What is now left, apart from negative rights provisions (the so-called "freedom from" rights), are some indirect references to sexuality, mostly on issues such as marriage, right to family and sexual and reproductive health. Those are all very important fields of inquiry; however, they do not fully encompass the spectrum of sexuality.

The impact of negotiation on the protection of sexuality in international law is evident from the debate on articles 23 and 25 of the Convention, but also from article 8.

As far as right to health is concerned, the initial draft developed by the Working Group was inspired by the Standard Rules and mentioned the right to sexual and reproductive health services. This mention was strongly opposed from the beginning, especially by the *Holy See*, but also by the NGO National Rights to Life. Their fear was that the word "service" would promote the use of genetic testing on unborn babies, promoting the abortion of babies with disabilities. Outside the pro-life alliance, the other NGOs were unprepared to engage in the debate. Moreover, similar arguments were brought up by governmental delegations, such as those from Qatar, Iran, Kenya, Jamaica, Yemen, Syria, Pakistan, Sudan, Bahrain, Kuwait, Oman, and the United Arab Emirates. These countries contested that the use of the word "service" would create news rights, in particular the right to abortion. Many country delegations backed the text, such as Brazil, Canada, Croatia, Ethiopia, Mali, Norway,

[93] R. ADDLAKHA, J. PRICE, S. HEIDARI, *Disability and sexuality: claiming sexual and reproductive rights*, in *Reproductive Health Matters*, 25:50, 2017, pp. 4-9.

Uganda, and the European Union (EU)[94]. The Chair atypically intervened to reaffirm the exclusion of abortion from the phrase "health service", which is already mentioned in other international treaties such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the CEDAW. In the end, the version proposed by Uruguay and Costa Rica, with the elimination of the word "services", was the one to be approved. However, this was not considered sufficient by some countries, which decided to sign the treaty with reservations. One clear example can be found in the case of Malta and the following interpretative statement:

> Malta understands that the phrase 'sexual and reproductive health' in art. 25 (a) of the Convention does not constitute recognition of any new international law obligation, does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion[95].

Article 23 was initially drafted after the Standard Rules. From the beginning, many countries, such as Libya, Syria, Qatar, Iran and Saudi Arabia, urged to link sexuality to marriage. For example, Saudi Arabia was in favour of accepting the term, but only with a marriage caveat[96]. A strong opposition came again from the Holy See, according to which, the phrase "experience their sexuality" would imply the development of a

[94] In particular the EU strongly stressed that sexual and reproductive health services did not include abortion, having also received the support of the Council of Europe, WHO and the Special Rapporteur on the Right to Health through written submissions. See Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Daily summary of discussion at the seventh session, 24 January 2006. Available at *http://www.un.org/esa/socdev/enable/rights/ahc7sum24jan.htm*.

[95] See Declarations and reservations to the Convention on the Rights of Persons with Disabilities. Available at: *http://www.un.org/disabilities/ default.asp?id=475*.

[96] Reported in Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Report of the third session of the Ad Hoc Committee on a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities, A/ AC.265/2004/5. Available at *http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm*.

set of new rights. The Society of Catholic Social Scientists and the Pro-Life Family Coalition affirmed that such a phrase would have let the CRPD go into «uncharted and controversial directions»[97]. The opposition from NGOs and governmental delegations to these kinds of arguments was not steady and several proposals of compromise repeatedly failed[98]. After an attempt by the Chair, the provision was removed during the seventh session due to «numerous cultural concerns about the word sexuality»[99].

The discussion on forced sterilization was included in the debate concerning marriage and family life. Some groups managed to create a tension between freedom from forced sterilization and right to sexual

[97] See Ad Hoc Committee on Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Daily summary of discussions related to article 21right to health and rehabilitation. Available at: *http://www.un.org/esa/socdev/enable/rights/ ahc3sum21.htm*.

[98] The Canadian delegation suggested framing sexuality-related rights in the context of non-discrimination, specifying that PWDs had the right to enjoy these rights "on an equal footing". See Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Daily Summary related to Draft article 14, respect for privacy, the home and the family. Available at *http://www.un.org/esa/socdev/enable/rights/wgsuma14.htm*. Many other countries, such as Costa Rica, Morocco and New Zealand supported this proposal (see the abovementioned document and 2004e. Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Daily summary of discussions related to article 14, respect for privacy, the home and the family. Available at *http://www.un.org/esa/socdev/enable/rights/ahc3sum14.htm*). Other delegates suggested different compromises: replacing the term "sexual" with "intimate", the term "sexuality" with "sexual life", or keeping the mention of sexuality, but with a marriage caveat (see Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Report of the third session of the Ad Hoc Committee on a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities, A/ AC.265/2004/5. Available at *http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm*). The Holy See, Yemen, Syria, and Qatar rejected all these compromises.

[99] Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Daily summary of discussion at the seventh session, 24 January 2006. Available at *http://www.un.org/esa/socdev/enable/rights/ahc7sum24jan.html*.

expression, which resulted in a strong emphasis on negative rights and no space for promoting the sexual freedom of disabled people.

In the end, as a result of this negotiation, the CRPD incorporated a discursive silence[100] about disabled people's sexuality:

> By narrowing sexual and reproductive rights to instances of violence and force, whose solution is restricted to sex education and information within the medical arena, the Committee has replicated prejudices that equate disability with incapacity, incompetence, impotence, and asexuality. It has also failed to acknowledge the experiences of persons with disabilities with different sexual orientations and gender identities[101].

2.4. When the law meets disabled people's sexuality: the Italian domestic level

The field where disability, sexuality and law meet, in Italy, is not a fertile one. The focus is limited both at the legislative and academic level, and the legal literature on this topic is very scarce. The possible explanation for that can be found in the idea of sexuality as a private matter or – as an Italian scholar has suggested – on a stereotypical and negative perception of disabled people's sexuality[102].

Although it is hard to find positive provisions on sexuality and disability, we can see how often in many countries, especially in the past years, disabled people's sexuality has been the object of criminal

[100] M. SCHAAF, *Negotiating Sexuality in The Convention on The Rights of Persons with Disabilities*, in *SUR International Journal on Human Rights*, 14, 2011, p. 124.

[101] F. JARAMILLO RUIZ, *The Committee on the Rights of Persons with Disabilities and its take on sexuality*, in *Reproductive Health Matters*, 25:50, 2017, p. 103.

[102] Some scholars critically noticed the absence of sexual and affective needs in this law, in particular at article 8. On this point see V. VADALÀ, *La tutela delle disabilità*, Milano, 2009, p. 19. Also Marella talks about the fact that according to a common attitude any sexual expression of a person with disability is perceived as something unnatural, perverted or to be ignored or censored. Marella observes: «comune atteggiamento mentale per il quale qualsiasi espressione di vitalità sessuale da parte delle persone disabili è percepita come un fatto innaturale, frutto di perversione, da reprimere o ignorare piuttosto che assecondare». See F. MARELLA, *Art. 8 Legislazione*, in P. CENDON (ed.), *Handicap e diritto. Legge 5 febbraio 1992, n. 104, legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate*, cit.

provisions. These provisions follow the pattern described more broadly in the area of sexuality and law in paragraph 1: many of them were recently modified, abolished or cancelled. Nonetheless, no enactment of positive measures followed. In general terms, this criminal law contains provisions aimed at protecting persons with disabilities from sexual violence and abuse, taking into account a possible state of particular vulnerability (see further Chapter III).

An example of this can be found in the previous version of article 519 of the Italian Criminal Code. In particular, article 519(2)(3) set forth a legal presumption – without any possibility of producing evidence to the contrary – of sexual violence each time sexual intercourse involved a person who was "mentally ill" (*malata di mente*) or "in condition of physical or psychological inferiority" (*in condizioni di inferiorità fisica o psichica*).

This provision which, allegedly, was meant to protect people with disability, turned out to be stigmatizing and repressive[103]. The unchallengeable presumption had the result of discouraging the expression of a consensual sexuality of the person with disability. At the same time, article 519(2)(3) was affirming, in the legal system, that people with disabilities (especially with mental disabilities, but arguably people with physical impairments as well) were unable to self-determinate in the sexual sphere.

In 1996, the law reform on sexual offences abolished this article. That reform represented the apex of 20 years of feminist struggles in Italy, and together with reforms in the field of family law, established a new legislative approach towards women, family, sexuality and marriage. As already stated above, with this reform, sexual violence became for the first time an offence against the person, not an offence against public morality, with significant consequences both on the criminal procedure side and on a social level[104]. Article 519 was cancelled and replaced with

[103] See for example V. MUSACCHIO, *La nuova legge sulla violenza sessuale*, in *Rivista Penale*, 1997, p. 257. Here the author suggests that, in the accomplishment of protecting people with disabilities the negative aspect of the right completely overshadowed the positive side.

[104] On this point from a feminist legal perspective see T. PITCH, *Un diritto per due. La costruzione giuridica di genere, sesso e sessualità*, Milano, 1998, pp. 149-189.

article 609-bis[105]. This criminal offence can be defined as *disability-neutral*[106], meaning that there is no special provision for people with disabilities, who are treated, in the field of criminal law, on an equal basis to everyone else.

In this way, the previous discrimination enacted by article 519 of the criminal code ceased[107].

The concrete application of this offence by judges follows this path. This is shown by a long-lasting and stable case law from the Court of Cassation, which confirms (see Chapter III) the need to assess, case by case, the occurrence of conducts of induction and abuse[108] regardless of disability. Disability still remains, residually, as an aggravating circumstance of the abovementioned criminal offence, implying a punishment longer by 1/3[109].

3. The use of "the private argument" in law regulating and protecting sexuality: why to reject a strict public/private dichotomy

In the previous paragraphs, the argument repeatedly emerged of sexuality as a private matter to justify and support the absence of legislation in this field. In this paragraph, this argument will be discussed, showing

[105] Here is the complete text of article 609 "Violenza sessuale" of the Italian Criminal Code, in Italian: «Chiunque, con violenza o minaccia o mediante abuso di autorità, costringe taluno a compiere o subire atti sessuali è punito con la reclusione da sei a dodici anni. Alla stessa pena soggiace chi induce taluno a compiere o subire atti sessuali: 1) abusando delle condizioni di inferiorità fisica o psichica della persona offesa al momento del fatto; 2) traendo in inganno la persona offesa per essersi il colpevole sostituito ad altra persona. Nei casi di minore gravità la pena è diminuita in misura non eccedente i due terzi». A discussion of this offence will follow at Chapter III.

[106] E. FLYNN, A. ARSTEIN-KERSLAK, *State intervention in the lives of people with disabilities: the case for a disability-neutral framework*, in *International Journal of Law in Context*, 13, 1, 2017, pp. 39-57.

[107] F. ERAMO, *Handicappati: diritto alla sessualità, diritto al matrimonio e diritto all'adozione*, in *Famiglia e diritto*, 4, 2002, pp. 435-441.

[108] The case law from the Court of Cassation is ample. See for example: Cass., sez. III, 1997, n. 4114; 24 settembre-22 ottobre 1999, n. 12110; 21 aprile - 27 maggio 2004, n. 24212; 7 luglio 2009, n. 15910; 5 maggio 2015, n. 18513.

[109] Art. 36 legge 5 febbraio 1992, n. 104.

its limits; in particular it will be argued how it might result in a subtler perpetuation of inequalities and oppression. The same vision of the private sphere as opposed to the public dimension has been used against other subjects who historically faced discrimination and oppression, such as women and LGBT people.

It is for this reason that in this paragraph, *mutatis mutandis*, we will use argumentations developed by feminist legal scholars (paragraph 3.1) and case studies from the US jurisprudence on homosexuality (paragraph 3.2). This investigation can indeed be useful in understanding how this argument is developed in our specific field of inquiry (paragraph 3.3).

3.1. Private/public dichotomy in sexuality law

The discourse on the public/private dichotomy on sexuality is strongly connected to the tension between regulation and de-regulation described in paragraph 1. In fact, one of the arguments most commonly brought up is that any legislation in this field would intrude on the private sphere of individuals: an encroachment considered risky and undue. Usually, when facing any issue surrounding sexuality, the dichotomy between the private and public sphere is immediately evoked[110]. Sedgwick noticed that the dominant spatial category in the discourse around sexuality is the binary public/private[111]. This discursive construction was decisive, according to sexuality historians, in early demands for law reform[112], when the political stance was for the State to be less intrusive in people's sexual life.

A concrete example of it can be found in the legal treatment on homosexuality and homosexual behaviours. It is possible to mention the experience of the Wolfenden Committee, a working group on the

[110] S. AMATO, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, Catania, 1985, p. 59. Here is the quotation: «potremmo genericamente constatare come ogni questione che coinvolge la sfera sessuale tenda a generare, subito, due ambiti: quello del privato e quello del pubblico, quello della libertà e quello del controllo sociale, variamente tra loro sia collidenti che coincidenti».

[111] E. KOSOFSKY SEDGWICK, *Epistemology of the closet*, cit.

[112] J. LAURISTEN, D. THIRSTED, *The early homosexual rights movement (1864-1935)*, cit.

decriminalization of certain homosexual acts in private[113], or of the *Lawrence v. Texas* decision, where the privacy of the home and the committed nature of the relationship[114] are the main arguments against the sodomy law (see at 2.2).

Even there, the main argument was that a private matter such as sexuality should not be the object of any State regulation or interference which, regardless of the kind of intervention, should always be considered undue. However, for several reasons, this approach – despite being partially effective[115] – has proven to be a reductive formula for an increasingly complex issue.

Although at first the use of the argument of "private" was decisive in gaining freedom rights in many spheres, this framework proved no longer adequate in granting full protection and promotion. A philosopher of law, Amato, observes that the spread of polymorphic sexualities is responsible for situations that can no longer be read through the public/private split[116]. Faced with these important social changes, public/private seem to be extremely outdated categories[117]:

> new subjects, new dimensions of the experience, new behaviours emerge and ask for legitimacy, both with regards to already affirmed spheres/

[113] L.J. MORAN, *The Homosexual(ity) of Law*, cit.

[114] On respectability, dignity and the case law *Lawrence v. Texas* see L. ADLER, *The dignity of sex*, in *UCLA Women's Law Journal*, 17(1), pp. 16-19.

[115] The reason why I mention the partial effectivity is that if on the hand this strategy was useful in developing arguments for the decriminalization of homosexual conducts, the same logic is behind legislative politics such as *The don't ask don't tell Act*, where privacy is used as a political strategy to push LGBTIQ* people inside the closet and lock them in. See further discussion at paragraph 2.2.

[116] S. AMATO, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, cit., p. 176: «il diffondersi di sessualità polimorfe e le variegate articolazioni delle possibilità ludiche, configurano una serie di situazioni soggettive non più tipizzabili entro lo schema pubblico/privato».

[117] S. AMATO, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, cit., p. 172 talks about "categorie logore". Moreover, Amato states that this category misses a specific framework, considering that the notion of public order, which used to be the one used in this field to stop the most radical stances, is now being used to expand the protection of fundamental rights.

> subjects and the public, in this way the public and the private and their relationship is recomposed[118].

The main point of this paragraph is not to discuss the legitimacy of the legal category of personal privacy, which still remains a relevant field of protection, but to tackle the idea of private as opposed to public – specifically, that particular understanding that expects the public sphere to be regulated by the State and the private sphere to be free from any form of State intervention. As we have already mentioned, this transition is part of the shift from the liberal State to the welfare State, as the quotation from Bobbio used in paragraph 1.1 explains well[119].

Within the debate on welfare, the State and social rights, feminist legal scholars found their own space. The lines dividing the realm of the private from that of the public have been widely discussed by feminist legal scholars since the second wave of feminism: «[t]he dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about»[120].

The rigid segregation between private and public was identified by feminist legal scholars as one of the causes of the oppression of women. The reason behind this can be summed up in three points:

> One is that the conceptual orientations of much social and political theory have ignored the domestic sphere or treated it as trivial. The second is

[118] C. SARACENO, *Interdipendenze e spostamenti di confini tra pubblico e privato*, in *Il Mulino*, 5, 1983, p. 788: «nuovi soggetti e nuove dimensioni dell'esperienza, nuovi comportamenti emergono e chiedono legittimità, sia rispetto alle sfere/soggetti già consolidate, che rispetto al pubblico così ricomponendo sia il pubblico che il privato che il loro rapporto».

[119] It was: «the so-called social rights of our Constitution represent the defeat (irreversible defeat, according to me) of the "minimal" State. Minimal state and social rights are incompatible. With the welfare state the relationship between public and private is opposite compared to the one in the liberal state; the public sphere has extended and the private one is diminished». See N. BOBBIO, *Pubblico e privato: introduzione a un dibattito*, cit., p. 171.

[120] C. PATEMAN, *Feminist Critiques of the Public/Private Dichotomy*, in EAD. (ed.), *The disorder of women: democracy feminism and political theory*, Cambridge, 1989, pp. 118-140.

> that the public/ private distinction itself is often deeply gendered, and in almost uniformly invidious ways. It very often plays a role in ideologies that purport to assign men and women to different spheres of social life on the basis of their 'natural' characteristics and thus to condemn women to positions of inferiority. The third is that, by classifying institutions like the family as 'private'… the public/private distinctions often serve to shield abuse and domination within these relationships from political scrutiny or legal redress[121].

Feminist scholars conclude that «equating liberty within the realm of the private with state non-interference in that realm, the right of privacy undervalues private inequality and overstates individual agency»[122].

In a nutshell, leaving the individual alone in the private sphere is simply not enough to grant privacy and affirm self-determination[123]. The so-called private sphere, in fact, is not neutral: it reproduces and perpetuates power relations in the public sphere. The apparently paradoxical conclusion on this matter is that, to foster individual autonomy (or privacy) there is a need for greater State regulation in the sphere where this autonomy is exercised[124].

These are the main reasons against the public/private dichotomy: the State should intervene positively in the private sphere whenever power imbalances, discrimination and inequalities take place.

3.2. A case study: US jurisprudence on "sodomy" and the use of the private sphere argument

An interesting case study to show how the private sphere argument might be controversial can be found in US case law on the criminalization of homosexual conducts (sodomy).

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[121] J. WEINTRAUB, *The theory and politics of the Public/Private distinction*, in K. KUMAR, J. WEINTRAUB (eds.), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, Chicago, 1997, pp. 28-29.

[122] T.E. HIGGINS, *Reviving the Public/Private Distinction in Feminist Theorizing*, in *Chicago-Kent Law Review*, 75, 1999, p. 20.

[123] C.A. MACKINNON, *Reflections on sex equality under law*, in *Yale Law Journal*, 100, 1990, p. 1311. She argues that «the doctrine of privacy has become the triumph of the state's abdication of women in the name of freedom and self-determination».

[124] T.E. HIGGINS, *Reviving the Public/Private Distinction in Feminist Theorizing*, cit.

The argument of the private sphere, at an early stage, allowed homosexual conducts to be decriminalized. On the other hand, however, it did not provide any form of protection for sexual orientation in the public sphere, confining this dimension to the domestic arena. It can be argued that this situation established a legal "compulsory closet"[125], where the private sphere is protected but is the only space of safe expression for homosexual and bisexual people.

A similar observation was made by MacKinnon[126] when discussing the right to abortion in the US. She argued that *Roe v. Wade*[127] relegated interruption of pregnancy to a private matter not to be safeguarded by the State; this is detrimental, for example, for poor women. This is shown by the *Harris v. McRae*[128] case, where the Supreme Court affirmed that States were not obliged to grant financial coverage for abortion: the motivation given was that interruption of pregnancy is a private decision, and the State has no duty in this field[129].

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[125] The reference is in E. KOSOFSKY SEDGWICK, *Epistemology of the closet*, cit.

[126] C.A. MACKINNON, *Privacy vs. Equality: Beyond Roe v. Wade*, in EAD., *Feminism Unmodified: Discourses on Life and Law*, Harvard, 1987, pp. 93-102.

[127] Roe v. Wade, 410 U.S. 113 (1973). This case is very well known and commented by legal scholars worldwide. Here, *ex multis*, is some US legal scholarship on the decision. For articles/comments: R.B. GINSBURG, *Some thoughts on autonomy and equality in relation to Roe v. Wade*, in *NCL Review*, 63, 1984, p. 375; J.H. ELY, *The wages of crying wolf: A comment on Roe v. Wade*, in *The Yale Law Journal*, 82.5, 1973, pp. 920-949; D.H. REGAN, *Rewriting Roe v. Wade*, in *Michigan Law Review*, 77.7, 1979, pp. 1569-1646. For monographic work see S. DUDLEY GOLD, *Roe v. Wade: A Woman's Choice?*, Salt Lake, 2005; S.T. HITCHCOCK, *Roe v. Wade: Protecting a Woman's right to abortion*, New York, 2009; S. PAYMENT, *Roe v. Wade: the rights to choose*, New York, 2004; D.S. ROMAINE, *Roe v. Wade: abortion and the Supreme Court*, Bihar, 1998; M. HIGGINS, *Roe v. Wade: Abortion and a Woman's Right to Privacy*, Minneapolis, 2013.

[128] Harris v. McRae, 448 US 297(1980). For comments see M.C.H. DUNLAP, *Harris v. McRae*, in *Women's Rights Law Rep.*, 166, 1979, p. 6; K. PALENCIA, *Harris v. McRae: Indigent women must bear the consequences of the Hyde Amendment*, in *Loy. U. Chi. Law Journal*, 12, 1980, p. 255; G.C. NIXON, *Harris v. McRae: Cutting Back Abortion Rights*, in *Columbia Human Rights Law Review*, 12, 1980, p. 113; V.M. BROCK, *Harris v. McRae: The Court Retreats from Roe v. Wade*, in *Loy. Law Review*, 26, 1980, p. 749.

[129] Here the quotation from the decision: «Regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in Wade, supra, it does not follow that a

3.2.1. The "unsupportable" claim against the offence of sodomy: Bowers v. Hardwick

In 1986, the Supreme Court of the United States decided on the case *Bowers v. Hardwick*[130]. The relevant facts took place in the State of Virginia, where the §16-6-2 of the Code of Georgia punished sodomy[131].

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woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation, and indigence falls within the latter category».

[130] Bowers v. Hardwick 478 U.S. 186 (1986). For some comments on the decision by US scholars see K. THOMAS, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, in *Virginia Law Review*, 1993, pp. 1805-1832; M.J. KAPPELHOFF, *Bowers v. Hardwick: Is there a right to privacy*, in *American UL Rev.*, 37, 1988, p. 487; T. RICH, *Sexual orientation discrimination in the wake of Bowers v. Hardwick*, in *Gay Law Review*, 22, 1987, p. 773; Y.L. THARPES, *Bowers v. Hardwick and the Legitimization of Homophobia in America*, in *Howard Law Journal*, 30, 1987, p. 829; M.F. KOHLER, *History, Homosexuals, and Homophobia: The Judicial Intolerance of Bowers v. Hardwick*, in *Conn. Law Review*, 19, 1986, p. 129; D.J. LANGIN, *Daniel Bowers v. Hardwick: The Right of Privacy and the Question of Intimate Relations*, in *Iowa Law Review*, 72, 1986, p. 1443; J.C. HAYES, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny after Bowers v. Hardwick*, in *BCL Review*, 31, 1989, p. 375.

[131] The discipline was gender-neutral providing that: «(a)(1) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. (2) A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person or when he or she commits sodomy with a person who is less than ten years of age. The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy. (b)(1) Except as provided in subsection (d) of this Code section, a person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years and shall be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. (2) A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life. Any person convicted under this Code section of the offense of aggravated sodomy shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7. (c) When evidence relating to an allegation of aggravated sodomy is collected

The public persecutor Bowers decided to drop the charge, but the American Civil Liberties Union (ACLU) convinced Hardwick to pursue strategic litigation for the abrogation of the abovementioned law and its declaration of unconstitutionality. With a *writ of certiorari*[132], the Supreme Court took on the case and decided not to repeal the law (five judges against four)[133].

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in the course of a medical examination of the person who is the victim of the alleged crime, the Georgia Crime Victims Emergency Fund, as provided for in Chapter 15 of Title 17, shall be financially responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence. (d) If the victim is at least 13 but less than 16 years of age and the person convicted of sodomy is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2». However, sodomy in a heterosexual couple was not considered punishable both inside and outside marriage, according to the Supreme Court case law – see Griswold v. Connecticut, 381 U.S. 479 (1965). For some commentary on this case: D. HELSCHER, *Griswold v. Connecticut and the unenumerated right of privacy*, in *N. Ill. UL Rev.*, 1994, pp. 15-33; P. KAUPER, *Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, in *Michigan Law Review*, 1965, pp. 64-235; W.M. BEANEY, *The Griswold Case and the Expanding Right to Privacy*, in *Wisconsin Law Review*, 1966, p. 979.

[132] The *Certiorari* is an institute of common law jurisdiction. It is a writ for the re-examination of an action from a lower court issued by a superior court. *Certiorari* can also be issued by an appellate court, to obtain information on a case pending before it. The use of the *certiorari* in the US is a prerogative of the Supreme Court. Through this writ the Supreme Court reviews questions of law, corrects errors, and ensures against excesses by the lower courts. However, the writ of *certiorari* might be issued in exceptional cases when an immediate review is required. The Supreme Court issues a writ of *certiorari*, when four of the court's nine justices agree to review the case. See B. BOSKEY, *Mechanics of the Supreme Court's Certiorari Jurisdiction*, in *Columbia Law Review*, 46, 1946, p. 255; F.D. MOORE, *Right of review by certiorari to the Supreme Court*, in *Geo. Law Journal*, 17, 1928, p. 307; F.J. GOODNOW, *The Writ of Certiorari*, in *Political Science Quarterly (1886-1905)*, 6(3), 1891, p. 493; J.W. MADDEN, *One Supreme Court and the Writ of Certiorari*, in *Hastings Law Journal*, 15, 1963, p. 153.

[133] The ACLU already knew that there would have been four judges in favour of repealing the law and four probably against. Justice Powell was the decisive one, but the ACLU was quite sure that he would vote in favour considering that he was a very strong supporter of Roe v. Wade (1973). According to Richard, Justice Powell was persuaded to vote against at the very end by Chief Justice Burger with an argument built around the

According to the judges, the case was

> whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy, and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.

After excluding the applicability of any of the previous rulings concerning privacy, the judges claimed that it was «unsupportable» to claim that consensual sexual conduct between adults should not be an object of state discipline. One of the main arguments used was the slippery slope: the judges asserted that, if homosexual conduct were decriminalized as a voluntary sexual act between consenting adults, then so should be other sexual crimes such as adultery. The judges further commented: «we are unwilling to start down that road».

To support their decision the judges used the notion of morality and referred to the ancient roots of the proscriptions against sodomy as a justification for this treatment. Justice White supported the idea that the right to sodomy could not be covered under the right to privacy, because it was not part of the moral tradition of the US, and – on the contrary – it was already against the law when the Due Process Clause and the 14th Amendment were approved. Considering this, Justice White held that there was no need for strict scrutiny, but only a need to verify whether the censored law had a legitimate aim according to the Due Process Clause. The judges affirmed that the fact that the majority of people considered sodomy to be against morality was already enough for the law to be considered legitimate.

similarity between sodomy, rape and paedophilia. See D.A.J. RICHARDS, *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas*, Kansas, 2009.

3.2.2. Lawrence v. Texas: protection in the domestic and private dimension

Bowers v. Hardwick was overruled[134] in 2003 by *Lawrence v. Texas*[135]. In Texas criminal law punished "Homosexual Conduct"[136] (the text was amended in 1979 to prohibit selling sex toys and in 1981 to punish the use of them). In spite of this, some cities such as Houston started approving laws to prohibit discrimination on the grounds of sexual orientation, with strong opposition from many religious groups.

In 1998, the case of *Lawrence and Garner* reached with a certiorari the Supreme Court. There were three main questions: 1) the compatibility of this provision with the Equal Protection Clause; 2) the com-

[134] Between Bowers and Lawrence there was another decision, a sort of intermediate step, represented by the decision *Romer v. Evans*, 517 U.S. 620 (1996). This decision concerned Amendment 2 to the Colorado Constitution, aimed at prohibiting any anti-discrimination measure on the basis of sexual orientation (for the protection of homosexual and bisexual people). With a majority of six judges against three the Supreme Court stated that the amendment did not satisfy the Equal Protection clause. For comments: A. KOPPELMAN, *Romer v. Evans and Invidious Intent*, in *Woman & Mary Bill of Rights Journal*, 6, 1997, p. 89; M. COLES, *The Meaning of Romer v. Evans*, in *Hastings Law Journal*, 48, 1996, p. 1343; B.J. FLAGG, *Animus and Moral Disapproval: A Comment on Romer v. Evans*, in *Minnesota Law Review*, 82, 1997, p. 833.

[135] Lawrence v. Texas, 539 U.S. 558 (2003). For commentary by US legal scholars see C.A. MACKINNON, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, in *Ohio State Law Journal*, 65, 2004, p. 1081; S.B. GOLDBERG, *Morals-based justifications for lawmaking: Before and after Lawrence v. Texas*, in *Minnesota Law Review*, 88, 2003, p. 1233; W.N. ESKRIDGE, *United States: Lawrence v. Texas and the imperative of comparative constitutionalism*, in *International Journal of Constitutional Law*, 2.3, 2004, pp. 555-560; M. HERALD, *A Bedroom of One's Own: Morality and Sexual Privacy after Lawrence v. Texas*, in *Yale Journal of Law & Feminism*, 16, 2004, p. 1; A.A. HAQUE, *Lawrence v. Texas and the Limits of the Criminal Law*, in *Harvard CR-CLL Review*, 42, 2014, p. 1; T. RUSOLA, *Gay Rights Versus Queer Theory: What is Left of Sodomy after Lawrence V. Texas?*, in *Social Text*, 23, 2005, pp. 235-249; R.E. BARNETT, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, in *Cato Sup. Ct. Review*, 2002, p. 21.

[136] Texas Penal Code - Section 21.06 (a): A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor. This Law was the result of the case Griswold v. Connecticut and the declaration of unconstitutionality of the offence of sodomy for married heterosexual couples.

patibility with the Due Process Clause; 3) if *Bowes v. Hardwick* was still to be considered correct or in need of being overruled.

The case originated from an episode where the police, after an anonymous call, entered the house of Lawrence and Gardner and found them having sexual intercourse. Caught *in flagrante delicto*, they were charged for homosexual conduct and arrested, despite the punishment for this offence was by law a financial penalty. This decision overruled *Bowers v. Hardwick* (with six votes in favour and three against), and Justice Kennedy was responsible for writing the opinion of the court.

The privacy of the home is one of the main arguments used:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private place. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence.

According to Justice Kennedy, in *Bowers* the judges made a big mistake by failing to «appreciate the liberty at stake». It was wrong to understand the question behind the case as whether or not the Constitution conferred a fundamental right to engage in sodomy. On the contrary, the point was not to give formal recognition to homosexual relationships, but to entitle and grant respect to the private dimension of two consenting adults engaging in a sexual practice.

The judges recognized that these criminal law provisions perpetuated the stigma on homosexual people[137], nevertheless the decision was mainly justified through the protection of the private/domestic sphere. This is confirmed by the judge's care in drawing the difference between the case being discussed and a hypothetical one involving any public «conduct or prostitution».

This decision represented a milestone for homosexual people's rights in the US and was a huge step towards equality. However, the emphasis on the private sphere argument can be read in a critical way and will be responsible for other discriminations.

[137] We are referring, in particular, to the sentence from the decision: «still, it remains a criminal offence with all that imports for the dignity of the persons charged».

3.2.3. The DADT policy in the US army: protection of the private sphere and compulsory closet

Although right after *Lawrence v. Texas* it was possible for same-sex couples to live their relationships in their own homes, this was far from implying the public acceptance of homosexual/bisexual identities[138]. On the contrary, this notion of protection of the private sphere soon transformed into a duty to privacy, which resembles the concept of "repressive tolerance"[139] developed by Marcuse.

After all, the private dimension argument was the one behind the so-called DADT policy in the US army[140], which was defined as an

[138] See in this sense: K.M. FRANKE, *The Domesticated Liberty of Lawrence v. Texas*, in *Columbia Law Review*, 104, 2004, p. 1339; J.R. ESKRIDGE, N. WILLIAM, *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, in *Fla. Law Review*, 57, 2005, p. 1011; A.J. SELIGSOHN, *Choosing Liberty over Equality and Sacrificing Both: Equal Protection and Due Process in Lawrence v. Texas*, in *Cardozo Women's Law Journal*, 10, 2003, p. 411.

[139] R.P. WOLFF, B. MOORE, H. MARCUSE, *A Critique of Pure Tolerance*, Boston, 1969, pp. 95-137.

[140] See The United States Code, Title 10 - Armed Forces, Subtitle A - General Military Law, Part II - Personnel Chapter 37 - General Service Requirements 654, "Policy concerning homosexuality in the Armed Forces": (b) Policy. - A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that –
   (A) such conduct is a departure from the member's usual and customary behavior;
   (B) such conduct, under all the circumstances, is unlikely to recur;
   (C) such conduct was not accomplished by use of force, coercion, or intimidation;
   (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
   (E) the member does not have a propensity or intent to engage in homosexual acts.
(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or

expression of institutional homophobia[141]. This policy, approved in 1993 by the Clinton administration, was supposed to end the ban on homosexual people serving in the military and the many discharges for homosexuality. The policy mainly allowed homosexual people to work inside the military ranks, upon condition that their sexual orientation remained hidden.

If a person was found engaging in homosexual acts, or if someone declared their homosexual/bisexual orientation, then they could be dismissed from the force. At the same time, the policy established a prohibition against queries on someone's sexual orientation.

Under the DADT policy there was protection of private life. But in fact, privacy was a choice of the interested person: private life simply needed to remain private. This resulted in a forced closet for LGBT military, who were asked to keep their relationships and private life out of their workplace and be careful not to reveal anything about it.

The *Lawrence v. Texas* decision in 2003 had no impact on this policy. On the contrary, in the case *Cook v. Gates*[142], decided by the Court of Appeal for the First Circuit, *Lawrence v. Texas* was used to legitimize the protection of homosexual relationships in the domestic sphere only (as such, not extendable to any other context).

This argument resulted in a situation suspended between the recognition of homosexuality as legitimate and the perpetuation of invisibility and institutional homophobia for LGBT people. The circumstances changed when the Obama administration abolished the DADT policy in 2011[143]. At the same time, the Supreme Court, with the 2015 case

she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

[141] K. DYER, *Gays in Uniform: The Pentagon's Secret Reports*, Boston, 1990, p. XVIII.

[142] Cook v. Gates, 528 F.3d 42 (1st Cir. 2008).

[143] To show evidence of the inefficiency of this policy it is interesting to note how from 2003 to its cancellation (2011) under the DADT policy about 13,650 people were discharged from the military. As Viggiani has noted, DADT created a mechanism of homosexual panic, where homosexual people are to be considered the ones who cannot be and cannot be named. See G. VIGGIANI, *Dal diritto alla privacy al diritto al matrimonio. L'omosessualità della giurisprudenza costituzionale statunitense*, Milano, 2015, p. 100.

Obergefell v. Hodges[144], decided in favour of same-sex marriage, declaring it law of the land[145]. That definitively ended the segregation in the private sphere for LGBT people in the United States[146].

This case study shows how the use of the private can be the first step towards the recognition of important rights, but at the same time, nowadays, it can perpetuate situations of inequality and discrimination.

3.3. The public/private dichotomy argument in the field of disability and sexuality

The argument according to which the State should not interfere with any positive measures surrounding sexuality is common also in the disability field. If the State should not interfere with able-bodied people's sex and sexuality – because those are private matters – similarly there is no reason why it should interfere with disabled people's sexuality. On the contrary, as already mentioned in paragraph 1.2, positive measures by the State in this area are aimed at addressing the fact the position of

[144] Obergefell v. Hodges, 576 U.S. ___ (2015). For some commentary see K. YOSHINO, *A New Birth of Freedom?: Obergefell v. Hodges*, in *Harvard Law Review*, 129, 2015, p. 147; D.H.J. HERMANN, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, in *Indiana Law Review*, 49, 2015, p. 367; M. MURRAY, *Obergefell v. Hodges and Nonmarriage Inequality*, in *California Law Review*, 104, 2016, p. 1207; K.G. PORTER, *Obergefell v. Hodges*, in *Ohio NU Law Review*, 42, 2015, p. 331.

[145] For a comparison between the US case law on homosexuality and the European supranational one, with a focus on the role of the judiciary activity in granting equal marriage, see V. VALENTI, *Principle of Non-discrimination on the Grounds of Sexual Orientation and Same-Sex Marriage. A Comparison Between United States and European Case Law*, in L. PINESCHI (ed.), *General Principles of Law - The Role of the Judiciary*, Cham, 2015, pp. 215-243.

[146] In this reconstruction we are not explicitly mentioning the intermediate passages, such as the ones related to section 3 of the DOMA (Defense of Marriage Act). For a quick overview of the evolution of the issue around same-sex relationship recognition in US, before Obergefell, but updated to the case *Hollingsworth v. Perry* and *United States v. Windsor* (concerning the unconstitutionality of DOMA), see A. D'ALOIA, *From Gay Rights to Same-Sex Marriage: A Brief History Through the Jurisprudence of US Federal Courts*, in D. GALLO, L. PALADINI, P. PUSTORINO (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions*, Berlin, 2014, pp. 33-71.

disabled people in the sexual sphere is not a neutral one. The non-intervention of the State justified through the use of the category of private causes the perpetuation of inequalities and oppression.

In fact, disability theory, just like feminist theory, recognizes the separation between the private and public sphere as a source of gender and sexual oppression[147]. This has relevant implications for people with disabilities, whose private sphere is not so obviously characterized, out of necessity, by privacy. For disabled people «privacy is abandoned at a terrible cost»[148], but this implies that for the experience and embodiment of disability, the boundaries between the private and public dimensions are already very thin and blurred.

For example, a person in need of personal assistance might share the domestic sphere with a stranger, who is usually employed to give support in a significant number of everyday life activities. This could involve, for example, assistance in very intimate moments, such as dressing/undressing, washing, general self-care and even going to the toilet. For people living in group homes or in institutions the debate on privacy is even more delicate: their personal dimension is very limited and often further restricted by invasive policies for residents (see Chapter III). In any case, very often the body of a person with disability is manipulated daily in a pervasive and intimate way. This fact itself challenges the usual understanding of the private sphere as opposed to the public one, demanding a new elaboration of these – apparently neutral and universal – categories when discussing disability and sexuality.

Arguing against a rigid dichotomy between private and public does not mean belittling privacy as a legitimate stance. This analysis does not neglect the idea of right to privacy every individual should enjoy on an equal basis with others. On the contrary, the demand for personal privacy is in some cases essential in granting sexual accessibility to people with disabilities (see further discussion on this matter in Chapter III). The fact that the intimate lives of some disabled people, mainly those living in institutions, are highly monitored, documented and discussed, generates concrete social barriers[149]. Sometimes measures of promotion in the field

[147] T. Siebers, *Disability theory*, Michigan, 2008, pp. 143-145.

[148] T. Siebers, *Disability theory*, cit., p. 143.

[149] T. Siebers, *Disability theory*, cit., p. 148.

of sexuality for people with disabilities might simply imply granting space for intimacy and privacy.

That is because there is nothing like a monolithic right to sexuality, but rather a multitude of sexuality-related rights, connected to the exercise of fundamental rights. In the case of people with disabilities, this can imply providing them with privacy on demand, and it can mean the de-medicalization of sexuality, healthcare capable of addressing sexual needs and desire, the re-professionalization of caregivers in order to take sexuality into account[150], and many other possibilities that will be further discussed.

All these kinds of interventions, however, need specific policies and regulations to be implemented in light of Constitutional principles and human rights law.

4. Sexuality, Law, Disability: a statute under Italian constitutional law

This last part of the chapter is aimed at outlining a constitutional framework for disability and sexuality.

By analysing the Italian constitutional case law, the role sexuality plays in the constitutional arena will be analysed in an attempt to qualify sexuality-related rights. Drawing from these results, the possible constitutional parameters in the field of sexuality and disability will be identified.

4.1. For a Constitutional roadmap on sexuality-related rights

During the 1980s constitutional scholars started discussing sexuality as a topic within the notion of "new rights" (so-called *nuovi diritti*)[151].

It is difficult to carry out a comprehensive analysis of the field of sexuality in constitutional law. Nonetheless, it is possible to say that, even on the constitutional level, this peculiar dimension of human life is

[150] T. SIEBERS, *Disability theory*, cit., p. 148.

[151] F. RATTO TRABUCCO, *Il diritto costituzionalmente garantito alla sessualità quale modo essenziale di espressione della persona umana*, in A. PÉREZ MIRAS, G.M. TERUEL, L.E.C. RAFFIOTTA (eds.), *Desafíos para los derechos de la persona ante el siglo XXI: familia y religión*, Pamplona, 2013, p. 185.

gaining more attention. The analysis of some key constitutional law decisions helps to understand what the polyhedron of sexuality looks like for constitutional law in Italy.

One of the first cases to be mentioned is Decision no. 561/1987[152], which originated from an episode of sexual violence, perpetrated by three soldiers against a woman. The woman asked the State to grant her a war pension according to Law no. 648/1950[153], and complained about the lack of restoration of moral damages for victims of sexual violence during war operations. The Constitutional Court found that the censored provisions were against the Constitution. The decision resulted in the possibility of being granted a war pension for moral damages coming from sexual violence perpetuated during war time. Our interest in this decision lies in a specific passage of this judgment. It was on this occasion that, for the first time, the Court qualified sexuality as «one of the essential ways of self-expression of the human person»[154].

The right to sexual freedom was considered by the Court a fundamental right. The Court also affirmed that sexuality was covered by article 2 of the Constitution: the right to dispose freely of sexuality is an absolute subjective right, not to be restricted in any way[155]. The Court also connected this right to article 32: in fact, any breach of sexual freedom (in case of violence, for example) results in a violation of the right to health.

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[152] Corte cost. n. 561/1987. Commentary by scholars: P. VITUCCI, *Pensione di guerra a Ida e Rosetta. Osservazione a C. cost. 18 dicembre 1987, n. 561*, in *Giurisprudenza costituzionale*, 12, 1, 1987, pp. 3542-3544; L. MANNELLI, *Della libertà sessuale e del suo fondamento costituzionale. Nota a C. cost. 18 dicembre 1987, n. 561*, in *Il foro italiano*, fasc. 7-8, pt. 1, 1989, pp. 2113-2119.

[153] This, together with Law 1968 n. 311, and d.P.R. n. 915/1978 were the object of the judgment. To be specific, art. 10(1), which extends a war pension also to Italian citizens who acquired an impairment for any reason connected to war which directly, violently and immediately caused the impairment coming either from the national armed forces or allies or even military forces.

[154] Here is the sentence in Italian: «Essendo la sessualità uno degli essenziali modi di espressione della persona umana».

[155] Here is the quotation from the decision: «Il diritto di disporne liberamente è senza dubbio un diritto soggettivo assoluto, che va ricompreso tra le posizioni soggettive direttamente tutelate dalla Costituzione ed inquadrato tra i diritti inviolabili della persona umana che l'art. 2 Costituzione impone di garantire».

One year earlier, the Court had discussed a case concerning the constitutionality of Law 164/1982, aimed at giving protection and recognition to transsexual people. In decision no. 161/1985[156], the first of many on this law[157], the Court stressed the need to find space for and even protect minorities' requests in the Constitutional system.

It was affirmed that sexual identity – not to be identified with mere biological characteristics – is part of a constitutional project centred around self-development. The right to sexual identity in relation to others must be granted under article 2[158]. In Decision no. 221/2015[159], this right

[156] Corte cost. 6 May 1985, decision n. 161. For comments see M. DOGLIOTTI, *La Corte costituzionale riconosce il diritto all'identità sessuale. Osservazioni a C. cost. 6 maggio 1985, n. 161*, in *Giurisprudenza italiana*, 2, 1A, 1987, pp. 235-243; S. PATTI, *Commento a C. cost. 6 maggio 1985, n. 161 (Identità sessuale e tutela della persona umana: si conclude un lungo dibattito?)*, in *Le nuove leggi civili commentate*, 2, 1986, pp. 349-352.

[157] Other decisions on transgender issues are: n. 221/2015 and 180/2017 on the procedure and requirement for legal gender identity recognition. On the same law decision n. 170/2014 on compulsory divorce imposed on transgender people, which was declared unconstitutional. On the latter decision see G. PALMERI, M.C. VENUTI, *L'inedita categoria delle unioni affettive con vissuto giuridico matrimoniale. Riflessioni critiche a margine della sentenza della Corte costituzionale 11 giugno 2014, n. 170 in materia di divorzio del transessuale*, in *La Nuova giurisprudenza civile commentata*, 12, 2, 2014, pp. 553-566; C. BATTIATO, *"Transgender" e scioglimento coatto del rapporto coniugale: quando i casi di scuola diventano realtà. Nota a C. cost. 11 giugno 2014, n. 170*, in *Osservatorio costituzionale*, 3, 2014, p. 16; P. VERONESI, *Un'anomala additiva di principio in materia di "divorzio imposto": il "caso Bernaroli" nella sentenza n. 170/2014*, in *Forum costituzionale*, 2014; B. PEZZINI, *Il paradigma eterosessuale del matrimonio di nuovo davanti alla Corte costituzionale: la questione del divorzio imposto ex lege a seguito della rettificazione di sesso*, in *GenIUS, Rivista di studi giuridici sull'orientamento sessuale e sull'identità di genere*, I, 2014, p. 28.

[158] The Constitutional Court states that: «Che se la censura fosse da ritenersi proposta in riferimento al solo art. 2 Cost., e la si volesse, in questi termini, ritenere ammissibile, certo è che tale disposto non è violato quando e per il fatto che sia assicurato a ciascuno il diritto di realizzare, nella vita di relazione, la propria identità sessuale, da ritenere aspetto e fattore di svolgimento della personalità. Correlativamente gli altri membri della collettività sono tenuti a riconoscerlo, per dovere di solidarietà sociale».

[159] This decision concerned the requirement of surgical intervention for legal gender recognition. After many years of conflicting case law, the Court stated that surgical intervention was not to be considered a legal requisite for obtaining legal gender recognition. Some commentary: C. MEOLI, *La correzione dell'interpretazione sulla correzione*

to sexual identity, which is a right of self-determination, was qualified as a right that cannot be compressed or conditioned by the law in any manner.

In Order no. 301/2012[160], the Court was asked to decide on Law no. 354/1977 (on the penitentiary system), in particular on article 18(2). Providing that the encounters of inmates with their partners must be controlled by penitentiary personnel, this article was believed to make it impossible for inmates to have sexual relationships with their partners.

This case was declared inadmissible by the Constitutional Court, because of legislative discretion. Nonetheless, some passages of the Order provide hints on the statute of sexuality under constitutional law. The Court stated that the issue of inmates' intimacy and sexual life is preeminent and the legal system is only partially addressing it. The Court added that the right to sexual expression is for all inmates, not only for those who are involved in a marriage or co-habitation regime. The main

del sesso: brevi note a Corte cost., sent. n. 221 del 2015. Nota a C. cost. 5 novembre 2015, n. 221, in *Giustizia Amministrativa italiana*, 6, 2016, p. 4; A. LORENZETTI, *Il cambiamento di sesso secondo la Corte costituzionale: due nuove pronunce (nn. 180 e 185 del 2017). Nota a C. cost. 13 luglio 2017, n. 180; ord. C. cost. 13 luglio 2017, n. 185*, in *Studium iuris*, 4, 2018, pp. 446-454; C. CARICATO, *Rettificazione di attribuzione di sesso e modificazione dei caratteri sessuali all'esame della Corte costituzionale. Nota a C. cost. 5 novembre 2015, n. 221*, in *La Nuova giurisprudenza civile commentata*, 4, 1, 2016, pp. 589-594; E. COVACCI, *Transessualismo: i requisiti necessari per il riconoscimento giuridico del cambiamento di genere prima e dopo la sentenza 221/2015 della Corte costituzionale*, in *GenIUS*, 1, 2016, p. 17; I. D'ANDREA PATRIZIO, *La sentenza della Corte costituzionale sulla rettificazione anagrafica del sesso: una risposta a tanti e nuovi interrogativi. Nota a C. cost. 5 novembre 2015, n. 221*, in *Giurisprudenza costituzionale*, 1, 2016, pp. 263-272; I. RIVERA, *Le suggestioni del diritto all'autodeterminazione personale tra identità e diversità di genere. Note a margine di Corte costituzionale n. 221 del 2015. Nota a C. cost. 18 gennaio 2015, n. 22*, in *Consulta online*, 1, 2016, p. 16; C.M. REALE, *Corte costituzionale e transgenderismo: l'irriducibile varietà delle singole situazioni*, in *Biolaw journal - Rivista di Biodiritto*, 1, 2016, p. 13.

[160] For commentary on this decision see T. GRIECO, *La Corte costituzionale sul diritto dei detenuti all'affettività ed alla sessualità*, in *Diritto penale contemporaneo*, 2013; S. CARMIGNANI CARIDI SETTIMINIO, *In tema di sessualità e regime carcerario. Nota a C. cost. 19 dicembre 2012, n. 301*, in *Quaderni di diritto e politica ecclesiastica*, 3, 2013, pp. 670-674; B. GIORS, *Sessualità e carcere. Nota a C. cost. 19 dicembre 2012, n. 301*, in *La Legislazione penale*, 1, 2013, pp. 236-239.

argument used by the Court is dignity, which covers – according to judges – the possibility of fulfilling one's own sexuality. According to the *a quo* judge, the right to sexual expression is part of those fundamental rights that cannot be nullified by the condition of detention in jail (Decision no. 26/1996). Drawing from articles 2 and 3 of the Constitution, these rights should be granted to inmates on an equal basis with people whose freedom is not restricted by the State. The *a quo* judge also affirms that compulsory sexual abstinence frustrates the right to self-development of the inmate, resulting in a form of inhumane treatment.

The possibility of granting a positive constitutional dimension to sexuality was confirmed by Decision 141/2019 of the Constitutional Court. This decision affirms the existence of limits to the right to sexual self-determination, to be found in the economic nature of an act (this decision will be further discussed in Chapter IV). In spite of this, at the beginning of this decision the Court affirms that in the Constitutional system each individual is granted the right to express their own sexuality as a means to express their personality (with the limit of respect for other people's rights and freedom)[161].

From all these decisions, it is possible to deduce an increasing focus on and importance of sexuality in the eyes of Constitutional law. To sum up, the Constitution today grants every individual the right to express her sexuality as part of a broader project of self-development (article 2). This can be interpreted both as a right to be recognized in one's own gender identity and as a right to sexual freedom. Sexual freedom is protected both in a negative way – namely as protection from external non-consensual and unwanted interference (Decision no. 561/1987) – and, arguably, in a positive way; this means that there is a duty for the State to actively promote spaces for the expression and explication of sexual freedom (Decision no. 301/2012, Decision no. 141/2019).

[161] Here is the quotation of the decision: «il quale implica che ciascun individuo possa fare libero uso della sessualità come mezzo di esplicazione della propria personalità, s'intende, nel limite del rispetto dei diritti e delle libertà altrui». For an analysis and for scholarship on this decision see Chapter IV.

4.2. Discussing a possible constitutional framework for measures in the field of sexuality and disability

It has been observed that if there is nothing like a unitary corpus of "sexual rights", sexuality is protected and encompassed, in its multiple implications, in many constitutionally protected rights, such as self-determination, right to health, self-development and principle of equality. In the end, we can affirm that sexuality is a matter of constitutional law, as well as of human rights law. The expression of sexuality, in fact, often calls into action and is supported by one or more already existent and well-recognized fundamental rights.

Historically, for some people sexuality-related rights were tackled by stereotypes, social prejudices and misconceptions, resulting in serious discriminations; it is the case, for example, of women and homosexual people. In this case, the law intervened with measures to overcome discrimination, protect and grant rights and promote their exercise.

These thoughts are also valid in the field of disability and sexuality: a field where fundamental rights should be granted. This statement is valid especially if we understand rights as something that we "do", rather than something that we are given; if we understand rights as relations, rather than objects[162].

In any case any possible measure should be guided by the Constitution, which is why it might be fruitful to intersect the case law on disability and the one on sexuality. This analysis will provide a framework for the promotion and protection of disabled people's sexuality under Italian constitutional law.

[162] J. HABERMAS, *Fatti e norme. Contributi ad una teoria discorsiva del diritto e della democrazia*, Milano, 1996, p. 496. In particular here we are referring to the following quotation from Habermas (Italian edition): (i diritti) «esistono solo a patto di esercitarli, sono relazioni, non cose (…), si riferiscono piuttosto al fare che non semplicemente all'avere».

4.2.1. Article 2 of the Constitution: sexuality as a personal development and social factor

The first intersection between sexuality and disability is to be found in article 2 of the Constitution[163]. In the constitutional jurisprudence, sexuality is strongly linked to article 2: it is often qualified as a matter of self-development, and consequently as a matter of self-determination, in a relational and social dimension protected by this article. Similarly, the constitutional case law on disability is anchored to article 2: the need to overcome social barriers and grant people with disabilities the possibility to develop their personality and fully participate in social life is stated clearly.

Article 2 is one of the most important articles of the Constitution, to be applied each time there are situations and norms referring both to the moral and physical sphere of the person[164]. It brings a synthesis of the individual and the social dimension of the person, connecting personalism and pluralism[165].

As far as the protection of the person (*principio personalista*) is concerned, the article recognizes and grants inviolable rights[166]. These

[163] As one of the fundamental principles of our Constitution this article is widely commented amongst Italian legal scholars. Apart from the works that will be mentioned in this paragraph, *ex multis* see A. BALDASSARRE, *Diritti della persona e valori costituzionali*, cit.; P. BARILE, *Diritti dell'uomo e libertà fondamentali*, cit.; N. BOBBIO, *L'età dei diritti*, Torino, 1997; E. DENINGER, *I diritti dell'uomo e legge fondamentale*, Torino, 1988; P. GROSSI, *Introduzione ad uno studio sui diritti inviolabili nella Costituzione italiana*, Padova, 1972; F. MODUGNO, *I "nuovi diritti" nella giurisprudenza costituzionale*, cit.; O. PIZZOLATO, *Finalismo dello Stato e sistema dei diritti nella Costituzione italiana*, Milano, 1999; A. PACE, *Problematica delle libertà costituzionali*, Padova, 2003.

[164] P. CARETTI, *I diritti fondamentali. Libertà e diritti sociali*, Torino, 2002, p. 137.

[165] E. ROSSI, *Art. 2*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds.), *Commentario alla Costituzione*, cit., p. 36. The original quotation is: «L'aspetto che risulta maggiormente significativo rispetto a tale formulazione è rappresentato (…) soprattutto dalla stretta connessione che si evidenzia tra personalismo e pluralismo».

[166] We already summed up the terms of the discussion amongst scholars around the open or closed nature of article 2 (see Chapter I, paragraph 2.2). Here we reiterate the consideration that, apart from the position of the Constitutional Court on the matter which favours the openness of this disposition, the debate seems sterile nowadays. This is because undoubtedly the Constitutional Court has an increasingly important role in defying

inviolable rights of the person are aimed at protecting the "inner autonomy"[167] of the individual; the view behind it is that the State needs to serve human beings, not the opposite[168]. This approach was confirmed by the Constitutional Court, which stated that the development of the person is the ultimate goal of social organizations[169]. The manifestation of inner autonomy is what we call today right to self-determination, which is often connected to identity[170] and body.

To avoid this personal dimension becoming individualistic, there is a need to consider the social aspect:

> La "persona", per non scadere ad "individuo", va considerata non solo nella sua "immanenza" ma anche nella sua "apertura sociale", non solo "nell'isolamento dell'uomo dall'uomo" ma anche nel "legame dell'uomo con l'uomo"[171].

According to article 2 of the Constitution, in fact, persons are protected in their multiple relations and in their social context[172]. This is

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this notion of fundamental rights according to the Constitution, but also because nowadays a consideration on fundamental rights must necessarily take into account and incorporate the international and super-national dimension.

[167] This is the translation of the notion of «interiore autonomia» used by many during the Constitutional Assembly. See for example La Pira, who understood this autonomy in juxtaposition to the Fascist past of the nation. See Discussion 9 September 1946, First Subcommission.

[168] See C. MORTATI, *Istituzioni di diritto pubblico*, I, Padova, 1975, p. 155. This is the original quotation: «non è l'uomo in funzione dello stato, ma quest'ultimo in funzione dell'uomo».

[169] Corte cost. 167/1999 (il principio personalista) «pone come fine ultimo dell'organizzazione sociale lo sviluppo di ogni singola persona umana».

[170] C. PICIOCCHI, *I diritti inviolabili*, in C. CASONATO (ed.), *Lezioni sui principi fondamentali della Costituzione*, Torino, 2010, pp. 88-89. This author supports the idea that the instances of recognition of diversity find their place under article 2 of the Constitution. However, she also recognizes that it is in article 2 that they also find a possible limit.

[171] A. BARBERA, *Art. 2*, cit., p. 106.

[172] See P. Rescigno who affirms that the recognition of this social dimension (*formazioni sociali*) is a remedy to the «ragioni opposte di angoscia in cui si muove la condizione umana, sospesa tra la paura dello Stato e il deserto della solitudine». P. RESCIGNO, *Le società intermedie*, in ID., *Persona e comunità. Saggi di diritto privato*, Bologna, 1966, p. 58.

relevant because, in the constitutional view, self-development is always connected to the ability to be actively involved in society[173].

Positive measures in the field of sexuality rights could be rooted in this relational idea of personal self-development, which is why the discussion is not about a set of "new rights", but rather about «new formulations and projections» of something that is «always and fully» ascribable to the Constitution[174]. According to article 2, these measures would promote sexuality as part of the constitutional project on self-development, aimed at obtaining self-determination in the sexual sphere and contrasting social barriers. In the end, it would mean granting full participation in society to people with disabilities as sexual agents.

4.2.2. Article 3 of the Constitution: equality as anti-subordination

Article 2 must be necessarily read together with article 3 and in particular article 3.2[175]. The principle of equality is considered complementary

[173] E. ROSSI, *Art. 2*, cit., p. 53.

[174] See A. D'Aloia and the original and full quotation in Italian: «fondati su incerti referenti valoriali "esterni" al dato costituzionale, ma nuove formulazioni, nuove proiezioni (di interessi, istanze, manifestazioni identitarie) di un materiale che è sempre e pienamente riconducibile alla Costituzione nel suo volto positive ed espresso». A. D'ALOIA, *Introduzione: i diritti come immagini in movimento: tra norma e cultura costituzionale*, in ID. (ed.), *Diritti e Costituzione. Profili evolutivi e dimensioni inedite*, Milano, 2003, p. XVIII.

[175] On article 3 in its many levels of analysis, see, *ex multis*: A.S. AGRÒ, *Contributo ad uno studio sui limiti della funzione legislativa in base alla giurisprudenza sul principio costituzionale d'uguaglianza*, in *Giurisprudenza Costituzionale*, 1967; M. AINIS, *Azioni positive e principio di eguaglianza*, in *Politica del diritto*, 1999; N. BOBBIO, *Eguaglianza ed egualitarismo*, in *Rivista italiana di filosofia del diritto*, 1976, p. 361 ff.; B. CARAVITA, *Oltre l'uguaglianza formale*, Padova, 1984; A. CERRI, *Uguaglianza (principio costituzionale di)*, in *Enciclopedia giuridica*, XXXIII, Roma, 1995; C. ESPOSITO, *Eguaglianza e giustizia nell'articolo 3 della Costituzione*, in ID., *La Costituzione italiana: saggi*, cit., p. 17 ff.; A. MOSCARINI, *Principio costituzionale d'eguaglianza e diritti fondamentali*, in R. NANIA, P. RIDOLA, *I diritti costituzionali*, I, Torino, 2010; L. PALADIN, *Il principio costituzionale d'eguaglianza*, Milano, 1965; A. TOURAINE, *Eguaglianza e diversità. I nuovi compiti della democrazia*, Roma-Bari, 1997.

to article 2 and a norm summarizing all the constitutional goals[176]. In the Constitutional State, in fact, many fundamental rights are not just protected in their negative aspect, but demand a promotional commitment from the State:

> sappiamo bene che l'esercizio della libertà per così dire "naturale" presuppone che, in fatto, la persona sia in condizione di poter realmente scegliere, e che queste condizioni consistono anche in presupposti di ordine materiale (…). Lo Stato, l'autorità che governa la collettività, non può limitarsi ad assicurare condizioni di libertà formale, cioè assenza di costrizioni legali, ma deve concretamente operare perché tutte le persone possano di fatto esercitare la loro libertà e perseguire il pieno sviluppo[177].

Article 3, at paragraph 1 and 2, is aimed at realizing social justice, firstly by implying equality by law and in the law, and then by granting the ability to enact interventions for social change[178]. As Calamandrei stated, in fact, this article represents a "polemic against the present", a critique against the social structures of inequality and imbalance that this norm wants to change by addressing inequalities but also by embracing differences[179].

Article 3 tends towards the full development of persons and their effective participation in political, social and economic rights, with a connection between rights to participate and social rights[180]. These two goals are in mutual relationship: there can be no emancipation and

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[176] L. ELIA, *Il principio di eguaglianza. Relazione di sintesi*, in N. OCCHIOCUPO (ed.), *La Corte costituzionale tra norma giuridica e realtà sociale*, Bologna, 1978, p. 166.

[177] V. ONIDA, *La Costituzione. La legge fondamentale della Repubblica*, Bologna, 2004, p. 62.

[178] L. FERRAJOLI, *Diritto e ragione*, Roma-Bari, 1997, p. 308: «l'eguaglianza non è soltanto davanti o dentro la legge ma aspira anche ad essere configurata mediante l'intervento modificativo delle condizioni sociali».

[179] Calamandrei was a prominent legal scholar, lawyer and politician, who gave a great contribution during the Costitutional Assembly. P. CALAMANDREI, *Introduzione storica sulla Costituzione*, in G. BRANCA (ed.), *Commentario alla Costituzione italiana*, I, Firenze, 1960, p. CXXXV. Calamandrei talks about a «polemica contro il presente».

[180] L. BASSO, *Per uno sviluppo democratico nell'ordinamento costituzionale italiano*, in *Studi per il XX anniversario dell'Assemblea Costituente*, 4, *Aspetti del sistema costituzionale*, Firenze, 1969, p. 17.

development of the person without participation in society, but participation already implies the existence of conditions allowing personal development and dignity[181]. To promote these conditions, legal measures need to consider individual conditions[182]. However, this does not imply the recognition of rights of exclusive categories, but a gradation of policies and interventions to overcome obstacles, based on specific needs[183]. For this reason, article 3 is of a mainly evolutionary nature: open to the continuous demand for recognition, it grants and protects the complexity of human existence.

We can affirm that article 3 is propulsive of social change, as it is considered a gateway to innovation inside the legal system, a connection with social sensitivity. It has been stated that article 3 contains a program of social transformation, which considers legislation a form of political detection of social interests and expectations towards advanced solutions[184]. These advanced legislative solutions, however, start from a proper understanding of what equality means.

In the field of disability, the flexible notion of equality becomes particularly insidious, and can justify very different legislative approaches[185]. The idea of equality embraced in this work refers to the notion of "mobile

[181] Here is the original and full quotation we are referring to: «se da un lato è la partecipazione a produrre emancipazione, ad essere strumento del "perfezionamento integrale" della persona, è anche vero che si partecipa, prima ancora si comprende il significato della partecipazione, solo se sono già realizzate talune condizioni di sviluppo e di dignità». See A. D'ALOIA, *Eguaglianza sostanziale e diritto diseguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale*, Padova, 2002, p. 95.

[182] G. AUTORINO, P. STAZIONE, *Diritto civile e situazioni esistenziali*, Torino, 1997, p. 249.

[183] A. D'ALOIA, *Eguaglianza sostanziale e diritto diseguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale*, cit., p. 97.

[184] The original quotation is: «contiene certamente un programma di trasformazione sociale il cui inveramento chiama in causa prioritariamente la legge come procedimento di rilevazione politica degli interessi e delle aspettative sociali su cui costruire soluzioni normative "avanzate" verso il modello prefigurato». See A. D'ALOIA, *Eguaglianza sostanziale e diritto diseguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale*, cit., p. 63.

[185] A. LORENZETTI, *Dis-eguaglianza e disabilità*, in *Rivista Gruppo Pisa*, 2015. Available online at *https://www.gruppodipisa.it/images/rivista/pdf/Anna_Lorenzetti_-_Dis_-_eguaglianza_e_disabilita.pdf*.

parameter"[186]. The assumption behind this approach is that violations of the principle of equality come from different forms of discrimination but it is the common social oppression that must be contrasted[187].

Critical legal theory argued for the need to rethink the mechanism of application of the equality principle in courts. The common way of proceeding is by comparing two different situations, for example the situation of abled people and disabled people. This operation, however, is not neutral, as it implies a power relation between the two terms of comparison[188]. In fact, the allegedly discriminated group is compared to the one that does not suffer from discrimination, the one that faces oppression to

[186] See M.G. BERNARDINI, O. GIOLO, *Il parametro mobile. Note sul rapporto tra eguaglianza e differenza*, in *Filosofia Politica*, 3, 2014, pp. 505-520.

[187] See L. GIANFORMAGGIO, *L'identità, l'eguaglianza, la somiglianza e il diritto*, in A. FACCHI, C. FARALLI, T. PITCH (eds.), L. GIANFORMAGGIO, *Eguaglianza, donne e diritto*, Bologna, 2005, p. 90. In general, on this point, see the complex reflections by Letizia Gianformaggio around the principle of equality, collected in the book A. FACCHI, C. FARALLI, T. PITCH (eds.), L. GIANFORMAGGIO, *Eguaglianza, donne e diritto*, cit. This idea was mainly articulated in relation to the condition of women in connection with feminist reflections. For some developments of this topic by Italian legal feminist scholars see T. MAZZARESE, *Eguaglianza, differenze e tutela dei diritti fondamentali. Nuove sfide e crisi dello Stato costituzionale di diritto*, in T. CASADEI (ed.), *Lessico delle discriminazioni tra società, diritto e istituzioni*, Reggio Emilia, 2008, pp. 206-231; T. PITCH, *I diritti fondamentali: differenze culturali, disuguaglianze sociali, differenza sessuale*, Torino, 2004, pp. 109-141; ID., *Un diritto per due. La costruzione giuridica di genere, sesso e sessualità*, cit., pp. 193-240; S. POZZOLO, *Teoria femminista del diritto. Genere e discorso giuridico*, in T. CASADEI (ed.), *Donne, diritto, diritti. Prospettive del giusfemminismo*, Torino, 2015, pp. 17-41.

[188] See the quotation from M.G. BERNARDINI, O. GIOLO, *Il parametro mobile. Note sul rapporto tra eguaglianza e differenza*, cit., p. 509, for a simple explication of this mechanism: «I due soggetti, infatti, non si trovano casualmente o neutralmente all'interno di una relazione discriminatoria: se questa esiste, significa che vi è un'asimmetrica distribuzione di potere, alla quale chi ricopre una posizione dominante non ha posto rimedio, in quanto non ha rimosso o corretto le cause dell'asimmetria. Al contrario, questa condizione è stata sfruttata per mantenere la propria condizione favorevole e conservare il potere detenuto di fatto o di diritto. Dunque, celando le caratteristiche del soggetto dominante, non rivelando apertamente quelle del soggetto dominato e occultando il ruolo che il potere gioca nella relazione discriminatoria, le concezioni tradizionali dell'eguaglianza finiscono per non porre sufficientemente all'attenzione del dibattito giuridico e politico le dinamiche di dominazione e di assoggettamento/oppressione».

the dominant part of this relation. In this approach one of the parts, the dominant one, becomes the reference standard. Namely, in our case an able-bodied person becomes the parameter against which to evaluate a disabled person's experience of discrimination. This approach, apart from creating hierarchies, has a strong "normalizing" or "assimilating" view behind it. Diversity does not find its specific constitutional place, but is pushed towards the standard model[189].

Given this moving towards substantial equality[190], the process of inclusion must be rearranged in consideration of power imbalances, starting from those assumptions that can cause oppression and discrimination.

Scholars have suggested that in the application of the equality principle the discriminated/oppressed parties should themselves become the parameter of the evaluation; their point of view and needs should be considered *ab origine*, and not in relation to the dominant subject[191]. In this way, the parameter of the evaluation would become plural and mobile, to be defined each time. Interestingly, this implies that oppressed groups' perceptions and needs become crucial in defying equality and elaborating legislation and policy[192].

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[189] A. LORENZETTI, *Dis-eguaglianza e disabilità*, cit.

[190] This analysis is developed also in terms of the "anti-subordination" principle by Barbara Pezzini, specifically in the field of gender issues, but can be extended also to the other subjects who deviate from what is considered the norm. This principle was defined as an instrument for recognizing the need to remove the relationship of subordination and interpreting gender conditions as a power structure (Pezzini: «riconosce l'esigenza fondativa e fondante di rimuovere la subordinazione del genere femminile al maschile, leggendo le condizioni di genere come un assetto di potere». See B. PEZZINI, *L'uguaglianza uomo-donna come principio anti-discriminatorio e come principio anti-subordinazione*, in G. BRUNELLI, A. PUGIOTTO, P. VERONESI (eds.), *Scritti in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere*, Napoli, 2009, p. 1151).

[191] M.G. BERNARDINI, O. GIOLO, *Il parametro mobile. Note sul rapporto tra eguaglianza e differenza*, cit., pp. 511-512 further explains that «Riformulando il principio di eguaglianza in termini relazionali, infatti, il soggetto debole della relazione (quello dominato) non dovrebbe più interrogare necessariamente il soggetto dominante ("in che cosa ti devo assomigliare per godere dei tuoi stessi diritti?")».

[192] According to Bernardini and Giolo some good examples of this application might be the law on education for people with disabilities and the law on environmental barriers.

4.2.3. Article 32: the fulfillment of sexuality as part of a state of comprehensive well-being

Another point of contact between sexuality and disability lies in article 32. In the case law on sexuality, sexual freedom was directly connected to health and well-being, and the case law on disability often involved health-related issues. The parameter at article 32 might be useful also in the field of disability and sexuality: being able to fully live sexuality is part of a holistic view of well-being that each individual should enjoy.

According to the Constitution, the right to health is a fundamental right of the person[193]. This right is very complex and was able to generate, in its actuation, many obligations for the State, but also non-interference duties and positions of interest in relation to other consociates[194]. This article addresses health as both an individual and collective good. The interpretation of this norm has avoided the typical distinction

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See M.G. BERNARDINI, O. GIOLO, *Il parametro mobile. Note sul rapporto tra eguaglianza e differenza*, cit., pp. 513-516.

[193] On article 32, and right to health in its various aspects, *ex multis*, apart from those who will be directly quoted in this paragraph, see G. ALPA, *Diritto alla salute*, in *Nuovo digesto italiano*, VI, 1986; E. BALBONI, *Scienza medica e diritto costituzionale*, in *Justitia*, 2006; R. BALDUZZI, D. SERVETTI, *La garanzia costituzionale del diritto alla salute e la sua attuazione nel Servizio sanitario nazionale*, in R. BALDUZZI, G. CARPANI (eds.), *Manuale di diritto sanitario*, Bologna, 2013; C. OTTARI, *Il diritto alla tutela della salute*, in P. NANIA, R. RIDOLA (eds.), *I diritti costituzionali*, II, Torino, 2000; L. CARLASSARE, *L'art. 32 della Costituzione e il suo significato*, in R. ALESSI (ed.), *L'amministrazione sanitaria*, Vicenza, 1967; L. CHIEFFI, *Il diritto alla salute alle soglie del terzo millennio. Profili di ordine etico, giuridico ed economico*, Torino, 2003; M. COCCONI, *Il diritto alla tutela della salute*, Padova, 1998; A. D'ALOIA, *Bio-tecnologie e valori costituzionali*, Torino, 2005; C.M. D'ARRIGO, *Diritto alla salute*, in *Enciclopedia del diritto*, Milano, 2001; R. FERRARA, *Salute (diritto alla)*, in *Digesto delle discipline pubblicistiche*, XIII, Torino, 1997; C. FLORIO, *Libertà personale e diritto alla salute*, Padova, 2002; M. LUCIANI, *Il diritto costituzionale alla salute*, in *Diritti sociali*, 1980; C. MORTATI, *La tutela della salute nella Costituzione italiana*, in *Rivista infortuni e malattie professionali*, 1961; L. BUSATTA, *La salute sostenibile. La complessa determinazione del diritto ad accedere alle prestazioni sanitarie*, Torino, 2018.

[194] B. PEZZINI, *Il diritto alla salute: profili costituzionali*, in *Diritto e società*, 1983, p. 125.

between positive and negative freedom[195], and has also challenged the classical distinction between programmatic and perceptive norm[196]. Health must be understood, even in this field of inquiry, as a "state", a condition of well-being to be maintained in time, but also as a subjective value, depending on a complex and interdependent mixture of internal and external factors[197].

Right to health is typically understood as a multi-dimensional phenomenon, which includes the physical and mental spheres but also the social sphere, which is why it is relevant also in the field of sexuality and disability.

The two most common dimensions of the right to health are the ones related to bodily and physical integrity and the right to medical care. Both these dimensions are relevant in the field of sexuality and disability, but do not entirely encompass it. In particular, the first one is pertinent in the discussion of forced sterilization of people with disabilities[198], and in the field of reproductive rights (often denied to people with disability) (see Chapter III). The second aspect, related to medical care, pertains to the sexual health of people with disabilities, often compromised by social and architectural barriers (Chapter III).

Other issues and instruments, such as for example sexual assistance, sexual counselling and inclusive sexual education (further discussed in the following chapters) refer to right to health as a comprehensive state of well-being and as a factor that can be influenced by human actions.

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[195] Because the notion of non-intrusion by the State is inherently connected to the request for positive measures, as noted by A. BALDASSARRE, *Diritti pubblici soggettivi*, in *Enciclopedia giuridica*, IX, Roma, 1989.

[196] V. CRISAFULLI, *La Costituzione e le sue disposizioni di principio*, Milano, 1952, p. 75.

[197] A. SIMONCINI, *Articolo 32*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds.), *Commentario alla Costituzione*, cit., p. 657. Here is the original quotation in Italian: «essa in realtà è uno "stato", condizione di benessere da conservare nel tempo, un valore percepito dal soggetto e generato da una serie complessa e interdipendente di fattori esterni ed interni al soggetto stesso».

[198] See P. GEMMA, *Sterilizzazione e diritti di libertà*, in *Rivista trimestrale di diritto e procedura civile*, 1977, p. 245 ff.; M.C. CHERUBINI, *Tutela della salute e c.d. atti di disposizione del proprio corpo*, in F.D. BUSNELLI, U. BRECCIA, *Tutela della salute e diritto privato*, Milano, 1978.

This view is well represented by a passage in a Constitutional Court decision on environmental barriers: «socialization (can be seen) as an essential element for health, and as such can have a therapeutic function just like medical treatments and rehabilitation»[199]. This also means that, if right to health is a necessary requisite for the development of persons, it is not sufficient for their full realization[200]. Right to health always needs to be addressed in combination with other constitutionally protected rights and values. Article 32 must be read in combination with articles 2 and 3 of the Constitution, which require the field of sexuality and disability to be treated first of all as a social issue, rather than a medical one. Any interpretation of this parameter that attempts to reduce the sexuality of disabled people to medicalization must be rejected. Of course, some of these measures could involve rights that are more related to the medical sphere (such as access to reproductive rights or sexual/reproductive health) and require health care measures. However, even in this case, the focus is on the need to overcome barriers to fostering self-determination, keeping in mind that the core issues revolve around stereotypes and negative attitudes in society[201]. Otherwise, the risk would be that of implementing policies based on the medical model of disability, which departs from the Constitutional understanding of disability and might further strengthen discrimination and oppression.

To sum up, just like critical race theory and feminist theory have shown that a colour-blind and gender-blind regulation is inadequate to address situations of injustice (and – on the contrary – it perpetuates discrimination), a similar approach should be adopted in the field of sexuality and law. That is why law should address issues in the field of disability and sexuality with measures aimed at overcoming social barriers, following an already existing constitutional path. These instruments are justified in the idea of the existence of sexuality-related rights as a complex structure relevant for Constitutional law, involving already existing

[199] Corte cost., n. 251/2008. Here is the original quotation in Italian: «la socializzazione come un elemento essenziale per la salute degli interessati, sì da assumere una funzione sostanzialmente terapeutica assimilabile alle pratiche di cura e riabilitazione».

[200] A. SIMONCINI, *Articolo 32*, cit., p. 655.

[201] B. CASALINI, *Disabilità, immaginazione e cittadinanza sessuale*, in *Etica & Politica / Ethics & Politics*, XV, 2, 2013, pp. 301-320.

fundamental rights. To secure these rights, social barriers must be tackled by putting people with disabilities in a central position inside the policy-making and legislative process.

CHAPTER THREE

IN THE EYES OF THE LAW: SOME RELEVANT ISSUES AT THE INTERSECTION OF DISABILITY AND SEXUALITY

SUMMARY: *1. An opening note: the sexual sphere of people with intellectual disabilities. 2. The role of law for the expression of sexuality for people with intellectual disabilities. 2.1. The efforts in Ireland for a disability-neutral approach: the recent reform. 2.2. Sexual offence in Italy: towards a disability-neutral approach. 2.3. How to support the sexuality of people with intellectual disabilities: a case study from Denmark. 3. Forced sterilization of disabled people and, in particular, disabled women. 3.1. The "best interest" argument: the leading case Buck v. Bell and some examples from comparative case law. 3.2. Forced sterilization in international law: the CRPD and the case law of the EctHR. 3.3. The Italian legal framework on forced sterilization. 3.3.1. Forced sterilization in Italy according to the Tribunals and Courts. 4. Some remarks on the need to balance protection and self-determination of people with disabilities in the sphere of sexuality.*

In Chapter III, before moving to the analysis of the instrument of sexual assistance, which is currently being discussed in Europe, some specific questions around sexuality and disability will be examined.

The focus will be on fields in which the law is more involved, on both a jurisdictional and legislative level. For this reason, among the many practical issues arising at the point of intersection between disabilities and sexuality, forced sterilization of people with disabilities and sexual expression of people with intellectual disabilities will be discussed. In considering these topics, we will provide examples from significant experiences of other legal systems, in a comparative perspective[1].

[1] As we mentioned in the introduction, here we will proceed on a so-called micro-level of comparative legal analysis, while in Chapter V we will develop some models. For the discussion of this distinction inside comparative law and its validity see

Some final remarks on the need to balance protection and right to self-determination in the field of sexuality of people with disabilities will close the chapter.

1. An opening note: the sexual sphere of people with intellectual disabilities

As already emerged, the universe of disabilities is vast. Many different experiences can fall under the umbrella of disability and a distinction must be made to avoid further stigmatization and invisibilization of the experiences of those who are mostly marginalized[2], especially in a complex field such as sexuality.

It is the case of people with intellectual disabilities: the barriers, discrimination and prejudices faced by people with disabilities in the field of sexuality are further exacerbated. As far as people with intellectual disabilities are concerned, the importance of sexual expression is underestimated, while, of course, it is an essential part of self-expression and relationships[3]. The social stigma on people with intellectual disabilities and the social attitude that does not see them as capable of acting as agents of their own life, making their own decisions, and choosing for their own well-being, has an impact also on the sexual and intimate

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L.J. CONSTANTINESCO, *Introduzione al diritto comparato*, cit., in particular p. 220, and K. ZWEIGERT, H. KOTZ, *An introduction to comparative law*, cit., p. 5, according to which «the dividing line between macro comparison and micro comparison is admittedly flexible». For a more detailed discussion of this profiles see notes 5 and 6.

[2] A case to be cited is the one related to invisible disabilities and chronic illness. We can define invisible disability as an umbrella term for various kinds of impairments that cannot be detected by looking at the person. Among these we can mention challenges of a neurological nature, visual or auditory disabilities, and conditions related to chronic pain and diseases. These kinds of disabilities are subject to further stigmatization because, they are often not acknowledged or recognized by the majority of people. People with invisible disabilities are often accused of faking. For a discussion of this issue see G. JOACHIM, S. ACORN, *Stigma of visible and invisible chronic conditions*, in *Journal of advanced nursing*, 32, 1, 2000, pp. 243-248.

[3] M. PARCHOMIUK, *Specialists and sexuality of individuals with disability*, in *Sexuality Disability*, 30, 4, 2012, pp. 407-419.

sphere, with significant legal implications. For instance, these ideas are responsible for human rights violations, such as forced sterilization, which we will be discussed further in this chapter.

Also, medical staff and service providers working with people with intellectual disabilities perceive this topic as a sensitive one and treat it as a taboo[4]. It has been reported that caregivers, who are largely responsible for the holistic well-being of many people, tend to see people with intellectual disabilities as asexual, and treat them as such, due to their condition[5]. The result is that these people receive no or very little assistance and support «for expressing their sexuality, especially practical assistance with social skills and support for sexual activity»[6].

This is strictly connected to their condition of social isolation, which affects relationships and interactions with other people[7], aggravated by the fact that people with intellectual disabilities are perceived mainly as being in need of protection in the sexual sphere[8]. This is evident if we look at the legal approach towards the expression of sexuality of people with intellectual disabilities, as we already briefly discussed (Chapter II) and will further investigate (in paragraph 2).

There are very few opportunities for people with disabilities to learn about their sexuality, experiment and engage in social activities[9]. Moreover, many people with intellectual disabilities around the world live in residential settings, such as institutions and group homes. This generates other specific obstacles such as mandatory room sharing with

[4] M. PARCHOMIUK, *Specialists and sexuality of individuals with disability*, cit., p. 409.

[5] N. WINGES-YANEZ, *Why all the talk about sex? An authoethnography identifying the troubling discourse of sexuality and intellectual disability*, in *Sexuality and Disability*, 32, 1, 2014, pp. 107-116.

[6] J.A. COOK, *Sexuality and People with Psychiatric Disabilities*, in *Sexuality and Disability*, 18, 2000, p. 197.

[7] A. ISLER, F. TAS, D. BEYTUT, Z. CONK, *Sexuality in adolescents with intellectual disabilities*, in *Sexuality and Disability*, 27, 1, 2009, pp. 27-34.

[8] J.C. SURIS, M.D. RESNICK, N. CASSUTO, R.W. BLUM, *Sexual behavior of adolescents with chronic disease and disability*, in *Sexuality and Disability*, 19, 2, 1996, pp. 124-131.

[9] C.J. CHEN, *From the perspective of philosophy of life care for sexuality education for persons with disabilities*, in *Journal of Sexual Medicine*, 8, 2011, p. 283.

no privacy for intimacy and sexual life[10] and policies discouraging sexual expression (e.g. the *No sex between residents* policy)[11].

While there is a need for people with intellectual disabilities to express their sexuality and be supported in doing so, this population is currently more vulnerable as regards abuse, sexually transmitted diseases[12]. According to some studies, it is young people who mostly suffer from abusive behaviours[13] and these conducts are usually perpetrated by those who are responsible for their care and education[14].

These aspects however need to be addressed at the same time, without creating a conflict between self-expression and protection.

In the closing remarks some possible solutions to this apparent conflict will be discussed, such as inclusive sexual education, affordable and accessible contraception, safer sex materials, etc.

[10] H. HICK, *To the right to intimacy and beyond: a constitutional argument for the right to sex in mental health facilities*, in *NYU Review of Law and Social Change*, 40, 2016, p. 621.

[11] D. PONE, *Consenting sexual relationships in a private and dignified manner: it's the law!*, in *The Journal of the California Alliance for the Mentally Ill*, 5, 1994, pp. 61-62; B.H. SCHELL, *The unmentionable*, in *The Journal of the California Alliance for the Mentally Ill*, 5, 1994, pp. 58-60; J.A. COOK, *Sexuality and People with Psychiatric Disabilities*, cit., p. 197.

[12] See L. AKRAMI, M. DAVUDI, *Comparison of behavioral and sexual problems between intellectually disabled and normal adolescent boys during puberty in Yazd, Iran*, in *Iranian Journal of Psychiatry and Behavioral Science*, 8, 2, 2014, pp. 68-74; H. ENOW, P. NAGALINGAM, R. SINGH, M.D. THALITAYA, *Need for a comprehensive sex and relationship education programme for adults with learning disability*, in *Psychiatric Danub*, 27, 2015, pp. S465-S467.

[13] P. FRAWLEY, N.J. WILSON, *Young people with intellectual disability talking about sexuality education and information*, in *Sexuality and Disability*, 34, 4, 2016, pp. 469-484.

[14] E. MARTINELLO, *Reviewing strategies for risk reduction of sexual abuse of children with intellectual disabilities: a focus on early intervention*, in *Sexuality and Disability*, 32, 2, 2014, pp. 167-174.

2. The role of law for the expression of sexuality for people with intellectual disabilities

Sexuality constitutes an essential part of personhood and identity and people with disabilities should have legal agency in all fields of life, including the sexual one[15]. However, legislations, especially in the past, not only did not promote the expression of disabled people's sexuality, but also prevented them from acting consensually in the sexual sphere.

In the previous chapter the Italian legislative approach towards disability was briefly mentioned: the former formulation of article 519(2)(3) of the criminal code resulted in the denial of sexual agency for people with disabilities. This kind of provision does not constitute an exception: criminal law has assumed this attitude towards disabled people's sexuality in other countries. It can be argued that all these systems choose to «prioritize the protection of people with cognitive disabilities over the recognition of their sexual agency»[16].

While some jurisdictions created offences of strict liability, others simply required a demonstration of validity regarding the consent to sex expressed by a person with intellectual/cognitive disability. This is usually done by using ability tests, aimed at assessing the person's potential to understand the relevant elements of sexual acts. These instruments are commonly used in common law jurisdictions[17]. An example of how these tests work can be found in two decisions from the United Kingdom, where the Court of Protection declared the involved person to be incapable of consenting to sex.

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[15] T. SHAKESPEARE, *Sexual Politics of Disability: Untold Desires*, cit.; K.Q. HALL, *Feminism, Disability, and Embodiment*, in *NWSA Journal*, 14, 3, 2002, pp. vii-xiii; A. WILKERSON, *Disability, Sex Radicalism, and Political Agency*, cit., pp. 33-57.

[16] A. ARSTEIN-KERSLAKE, E. FLYNN, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, in *Social & Legal Studies*, 25, 2, 2016, p. 237.

[17] See for example, Section 30, *Sexual Offences Act 2003* (England and Wales); A. ARSTEIN-KERSLAKE, E. FLYNN, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, cit., p. 226.

The first UK's case was *D Borough Council v. AB*[18], decided in 2011, involving a 41-year-old man with a moderate learning disability who was living in a community with another man, with whom he had a sexual relationship. Here, the Local Council applied for interim measures to restrict contact between the two men and obtained for the man to be moved to different accommodation and put under supervision to prevent further sexual relations. According to the Court, he lacked the capacity to understand and be aware of the health risks related to sex, and for this reason he was declared incapacitated[19].

Similar principles were used in the case of *A Local Authority v. H*[20], which involved a 29-year-old autistic woman with mild learning difficulties. The Court declared she was incapable of consenting to sex because she could not understand the health implications of sexual relations, and she could not effectively use the information she had in the decision-making process[21].

The assumption behind this case law and the abovementioned legislations is that people with intellectual disabilities are vulnerable when it comes to expressing their sexual needs and desires[22], while many disa-

[18] D Borough Council v. AB [2011] EWHC 101 (COP).

[19] According to the judgment, consent requires an understanding and awareness of:
- The mechanics of the act
- That there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections
- That sex between a man and a woman may result in the woman becoming pregnant.

In terms of heterosexual intercourse, Alan was considered to fail all three criteria, however only two of them were necessary in the case of homosexual intercourse and in particular Alan was judged incapable of understanding health risks involved. What is interesting in this case, therefore, is that the self-harm principle provided the reason for interfering with Alan's autonomy. As Alan may cause himself serious harm, paternalistic intervention is justified. See A. DIMOPOULOS, *Let's Misbehave: Intellectual Disability and Capacity to Consent to Sex*, 2012, available at *https://ssrn.com/abstract=2332259*.

[20] A Local Authority v. H [2012] EWHC 49 (COP).

[21] For further commentary see J. HERRING, *Mental disability and capacity to consent to sex: A Local Authority v. H [2012] EWHC 49 (COP)*, in *Journal of Social Welfare and Family Law*, 34:4, 2012.

[22] This legal provision mainly affects women. See M. MCCARTHY, *Sexual violence against women with learning disabilities*, in *Feminism & Psychology*, 8(4), 1998,

bility activists have fought to be free from disproportionate interferences in their sexual lives[23]. While it is true that people with disabilities, women and young people with intellectual disabilities are remarkably vulnerable to sexual abuse, it has been shown that this is often caused by poverty, social isolation, dependency and misconceptions about intimate relationships[24]. All these factors, «which are also risk factors for sexual abuse in the general adult population»[25], are the ones to be contrasted to protect people with disabilities from abuses in the sexual sphere. On the contrary, laws that inhibit and sometimes deny the expression of sexuality of people with disabilities only perpetuate the stigma burdening these groups of people, leaving no space for policies of prevention.

The struggle for the recognition of the sexual agency of people with disabilities can be supported by international treaties, specifically by the CRPD, even though the right to sexual agency has not adequately found its place in human rights law[26]. Indeed, the fact that these laws often target people with cognitive disabilities disproportionately, by creating a barrier to stop them from engaging in sexual activity, appears to be inconsistent with international law. It can be argued that these kinds of provisions are against article 23[27], which requires non-dis-

pp. 544-551; EAD., *Women with intellectual disability: their sexual lives in the 21st Century*, in *Journal of Intellectual and Developmental Disability*, 39(2), 2014, pp. 124-131.

[23] In particular women with disabilities have been struggling to be recognized equally as sexual agents. See J. MORRIS, *Pride against Prejudice. Transforming the attitudes to disability*, cit.

[24] D. FINKELHOR, G. HOTALING, I.A. LEWIS, C. SMITH, *Sexual abuse in a national survey of adult men and women: Prevalence, characteristics, and risk factor*, in *Child Abuse & Neglect*, 14, 1, 1990, pp. 1-140.

[25] A. ARSTEIN-KERSLAKE, E. FLYNN, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, cit., p. 227.

[26] T. SHAKESPEARE, *Disability rights and wrongs*, cit.

[27] A. ARSTEIN-KERSLAKE, *Understanding sex: the right to legal capacity to consent to sex*, in *Disability & Society*, 30, 10, 2015, pp. 1459-1473.

criminatory treatment in the field of relationships and equal recognition of legal capacity, granted by article 12[28].

2.1. The efforts in Ireland for a disability-neutral approach: the recent reform

Ireland, just like Scotland and England[29], was one of those countries in which criminal law contributed to the creation of barriers against the expression of sexuality for people with disabilities[30].

In 2011 this country started a process of reform of sexual offences, initiating a public debate involving scholars, experts and associations of persons with disabilities. Before the reform, the *Criminal Law Act 1993* regulated in Section 5 the *Protection of the mentally impaired person*[31]

[28] In particular, on legal capacity and article 12 see A. ARSTEIN-KERSLAKE, E. FLYNN, *The General Comment on article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law*, cit., pp. 471-490.

[29] In the UK this field is regulated by *Sexual Offences Act 2003*, which does not qualify as a disability-neutral law, having a range of offences specific to victims with a mental disorder or a 'learning disability'. For example, section 30 contains an offence of having sex with a person who is unable to refuse because of a mental disorder and knowing of that mental disorder. Consent is not involved in this provision. See G. MAHER, *Rape and Other Things: Sexual Offences and People with Mental Disorder*, in *Edinburgh Law Review*, 14, 2010, p. 131. As far as Scotland is concerned here, the Milan Committee in 2001 discussed disability-neutral legislation as an alternative to making provision for a separate offence relating to intellectual disability and sexual offences. These new offences would be based on a notion of consent close to "free argument". In this way people with intellectual disabilities would not be treated differently from the non-disabled population: for everybody consent must be free agreement. See Law Reform Commission, *Consultation Paper: Sexual Offences and Capacity to Consent* (LRC CP 63 - 2011), p. 63.

[30] R. MCCONKEY, G. LEAVEY, *Irish attitudes to sexual relationships and people with intellectual disability*, in *British Journal of Learning Disabilities*, 41, 2013, pp. 181-188.

[31] Here is the text of the article:
«A person who:
(*a*) has or attempts to have sexual intercourse, or
(*b*) commits or attempts to commit an act of buggery,

amongst *Sexual offences*. This provision criminalized a person who had or attempted sexual intercourse with a mentally impaired person.

According to paragraph 85, the mentally impaired person is one who suffers from a «disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation». The consent of the person involved is not a defence for this offence: it is a *strict liability offence*[32]. The only possible defence is for the accused person to demonstrate that they did not know, at the time of the act, that the person involved was mentally impaired.

As we have already highlighted, this provision is discriminatory against people with cognitive disabilities, and it presumes without any exception that the process of decision-making in the sexual sphere is qualitatively different for this group of people. Some scholars have also

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with a mentally impaired person (other than a person to whom he is married or to whom he believes with reasonable cause he is married) shall be guilty of an offence and shall be liable on conviction on indictment to –

(i) in the case of having sexual intercourse or committing an act of buggery, imprisonment for a term not exceeding 10 years, and

(ii) in the case of an attempt to have sexual intercourse or an attempt to commit an act of buggery, imprisonment for a term not exceeding 3 years in the case of a first conviction, and in the case of a second or any subsequent conviction imprisonment for a term not exceeding 5 years.

(2) A male person who commits or attempts to commit an act of gross indecency with another male person who is mentally impaired shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 2 years.

(3) In any proceedings under this section, it shall be a defence for the accused to show that at the time of the alleged commission of the offence he did not know and had no reason to suspect that the person in respect of whom he is charged was mentally impaired.

(4) Proceedings against a person charged with an offence under this section shall not be taken except by or with the consent of the Director of Public Prosecutions.

(5) In this section "mentally impaired" means suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation».

[32] A. ARSTEIN-KERSLAKE, E. FLYNN, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, cit., p. 3.

affirmed that the law proves to be a denial of the sexual agency of people with cognitive disabilities, rather than the criminalization of perpetrators who might take advantage of this hypothetical vulnerability[33]. Many disability groups have called for a legal change, affirming the discriminatory nature of this offence and highlighting the negative impact the law has had on the sexual expression of people with cognitive disabilities[34].

Over the years, evidence emerged that this separate offence had not led to increased prosecution, but had what was defined as a «chilling effect»[35] on the expression of sexuality for people with cognitive disabilities, by creating more barriers to the exercise of sexual agency.

These points were considered by the *Law Reform Commission*, which decided to address this problematic point with a consultation paper, *Sexual Offences and Capacity to Consent*[36], dated 2011. Simultaneously, this Commission opened up to the submission of observations from interested parties. In the previously mentioned document, the Commission affirmed the need to introduce a functional test to assess capacity to consent to sex (as regulated by the *Mental Capacity Legislation*)[37]. The Commission also recommended retaining strict liability

[33] A. ARSTEIN-KERSLAKE, E. FLYNN, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, cit., p. 6.

[34] G. MINOGUE, R. HOPKINS, *We want to get into relationships, not to go to gaol!*, in *Frontline Magazine*, 2012, pp. 1-5; CONNECT PEOPLE NETWORK, *The connect people network's response to the law reform commission's report on sexual offences and capacity to consent*, Dublin, 2013. Available at *https://dl.dropboxusercontent.com/u/9594222/The%20Connect%20People%20Network%20Submission%20Easy%20Read%20No%20Pictures.pdf*.

[35] A. ARSTEIN-KERSLAKE, E. FLYNN, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, cit., pp. 1-24.

[36] Available at *https://www.lawreform.ie/_fileupload/consultation%20papers/cp63.htm*.

[37] The law in this field was reformed in 2015 and is now *The assisted decision making (mental capacity act) 2015*, available at *http://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/print.html*. This law applies to different spheres. For example, for more information on the health care system, see D. O'DONNELL, C. DAVIES, F. FATTORI, S. DONNELLY, E. NÍ SHÉ, M. O'SHEA, *Implementing Assisted Decision-making in Healthcare in Ireland: Understanding Enablers, Barriers and Context from the perspective of patients and healthcare professionals*, in *International Journal of Integrated Care*, 19(4), 2019, p. 66.

offences, in very specific cases, such as the ones related to positions of trust or authority[38].

This arrangement was confirmed in the 2013 Final Report of the Commission[39], even though many organizations argued against any separate offence for people with cognitive disabilities and asked to introduce instead specific sexual education programmes to enable informed decisions in the sexual sphere[40].

After the final report, Senator Zappone, together with the *Centre for Disability Law and Policy* of NUI Galway and representatives of peo-

[38] Here are the related Recommendations: «The Commission provisionally recommends that the test for assessing capacity to consent to sexual relations should reflect the functional test of capacity to be taken in the proposed mental capacity legislation, that is, the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made. Consistently with this, therefore, a person lacks the capacity to consent to sexual relations, if he or she is unable –

(a) to understand the information relevant to engaging in the sexual act, including the consequences;
(b) to retain that information;
(c) to use or weigh up that information as part of the process of deciding to engage in the sexual act; or
(d) to communicate his or her decision (whether by talking, using sign language or any other means) [paragraph 5.119].

7.05 The Commission provisionally recommends that, since section 5 of the *Criminal Law (Sexual Offences) Act 1993* is not consistent with a functional test of capacity, it should be repealed and replaced [paragraph 5.120].

7.06 The Commission provisionally recommends that there should be a strict liability offence for sexual acts committed by a person who is in a position of trust or authority with another person who has an intellectual disability. A position of trust or authority should be defined in similar terms to section 1 of the *Criminal Law (Sexual Offences) Act 2006* which defines a "person in authority" as a parent, stepparent, guardian, grandparent, uncle or aunt of the victim; any person who is in loco parentis to the victim; or any person who is, even temporarily, responsible for the education, supervision or welfare of the victim [paragraph 5.121]».

[39] Available at *https://www.lawreform.ie/_fileupload/Reports/r109.pdf*.

[40] On this point see E. DUKES, B.E. MCGUIRE, *Enhancing capacity to make sexuality-related decisions in people with an intellectual disability*, in *Journal of Intellectual Disability Research*, 53, 8, 2009.

ple with disabilities, elaborated a Private Member's bill[41]. Their proposal was to abolish Section 5 and replace it with an offence of abuse of a position of power, built in a disability-neutral way[42]. Moreover, they suggested the introduction of the defence of consent, so that a person with or without disability who consciously and consensually develops a relationship with a support person or a person in a position of dependency or trust, would not automatically see their relationship criminalized. Consent was defined in this bill as «an agreement between the parties to engage in the specific act» based on an «examination of the communication between the parties immediately prior to the act»[43] (2014 Act, Section 2) and an understanding of the nature of the act. The latter is defined at (4) as something requiring «the person to understand the physical nature of the act» and not the «possible physiological consequences of the act».

To conclude, the Bill also explicitly mentioned that no higher standard should be applied to a person with disability in the assessment of consent (5a) and that in determining whether a person understands the nature of the act, mental impairment should not be a determining factor (5b). The bill proposed by Zappone did not pass, and in the end the reform of Section 5 was approved and published on 27 July 2018.

What is positive about the offence, as it is currently formulated, is that it is more based on the capability of expressing consent and it is not

[41] Flynn reports being contacted by Zappone after publishing a blog post of Human Rights in Ireland arguing for a disability-neutral approach to sexual offence law. She also observes: «Since private members' bills are generally not likely to be enacted without government support, the main purpose of our efforts was to raise awareness of the issue and to demonstrate that a human rights compliant solution could be put forward to reform the current law». A. ARSTEIN-KERSLAKE, E. FLYNN, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, cit., p. 12.

[42] «We sought to develop a reform proposal that would: (1) challenge the perception of people with cognitive disabilities as lacking in sexual agency and (2) restore their legal autonomy to consent to sex. We believe that this approach is in line with the tenets of the social model of disability and the human rights obligations contained in the CRPD». A. ARSTEIN-KERSLAKE, E. FLYNN, *State intervention in the lives of people with disabilities: the case for a disability-neutral framework*, cit., p. 45.

[43] 2014 Act, Section 2, *https://data.oireachtas.ie/ie/oireachtas/bill/2014/41/eng/initiated/b4114s.pdf*.

strictly anchored to a pre-given idea of people with intellectual disabilities. However, the offence is still not neutral, because it creates the category of *protected person* (and the related offence of *Sexual act with protected person*), which is not so different from the range of subjects covered by the legislation from 1993. Indeed, at 21(7) it is specified that a protected person is a person who lacks the capacity to consent to a sexual act because he or she «by reason of a mental or intellectual disability or a mental illness» is incapable of:

> (a) understanding the nature, or the reasonably foreseeable consequences, of that act,
> (b) evaluating relevant information for the purposes of deciding whether to engage in that act, or
> I communicating his or her consent to that act by speech, sign language or otherwise.

There is no perfect overlap between a person with intellectual disability and a protected person (because there might be people with disabilities who are considered capable of giving consent), but, at the same time, every *protected person* is a person with either an intellectual disability or a mental illness. This still somehow recreates a separate legislative provision that only applies to people with disabilities and is, as such, potentially against the non-discrimination principles of the CRPD[44].

At §22 of the renewed Act we find the offence related to the sexual engagement of a person in a position of authority[45] with a so-called *relevant person*. According to (8) a relevant person is a person who has a mental or intellectual disability or mental illness «which is of such a nature or degree as to severely restrict the ability of the person to guard

[44] See A. ARSTEIN-KERSLAKE, E. FLYNN, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, cit., pp. 22-23 and IID., *State intervention in the lives of people with disabilities: the case for a disability-neutral framework*, cit., pp. 39-57.

[45] According to the Criminal Law (Sexual Offences) Act 2017 22(8) the definition of person in authority is: «'person in authority', in relation to a relevant person against whom an offence is alleged to have been committed, means any person who as part of a contract of service or a contract for services is, for the time being, responsible for the education, supervision, training, treatment, care or welfare of the relevant person».

himself or herself against serious exploitation». The suggestion contained in Senator Zappone's Bill was not considered, so there is no consent defence.

At the same time, a *reasonable mistake* as to whether the complainant was a relevant person at the time of the facts constitutes a defence. It was observed that this construction seems to be contradictory. Indeed, if a person in a position of authority is hired by the person or is responsible for her/his/their education, care and other similar tasks, it is very difficult to imagine this person arguing that she/he was unaware of the disability of the person involved[46]. In the end, it seems that this defence is highly unlikely to be applied in practice.

2.2. Sexual offence in Italy: towards a disability-neutral approach

It has already been mentioned that Italy changed its approach towards disabled people's sexuality with the comprehensive reform of sexual offences in 1996[47]. Before this reform, there was a strict liability offence[48] at article 519(2)(3) to protect people who are mentally ill (*malate di mente*) or in a condition of physical or psychological inferiority (*condizioni di inferiorità fisica o psichica*). The result was a disproportionate reduction of the sexual agency of people with disabilities[49]. Article 609-bis was introduced with the abovementioned reform. This offence adopts a disability-neutral approach, and as such can be

[46] A. ARSTEIN-KERSLAKE, E. FLYNN, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, cit., p. 3.

[47] On the reform of sexual offences: G. AMBROSINI, *Le nuove norme sulla violenza sessuale: legge 15 febbraio 1996, n. 66*, Torino, 1997; R. RICCIOTTI (ed.), *Studio sulla riforma dei delitti contro la libertà sessuale*, Bologna, 1997. For a general and more current overview of sexual offences crimes see B. ROMANO, *Delitti contro la sfera sessuale della persona*, Milano, 2007; F. COPPI (ed.), *I reati sessuali*, Torino, 2000.

[48] C.M. GRILLO, *Handicap e reato*, in *Giurisprudenza Italiana*, 1994, p. 10.

[49] See for example V. MUSACCHIO, *La nuova legge sulla violenza sessuale*, cit., p. 257. Here this scholar observes how this provision, while trying to protect fully these subjects, resulted in a disproportionate space for the negative aspect of their right, nullifying the positive side of it. Here is the original quotation: «nell'intento di assicurare la più ampia e assoluta tutela a questi soggetti (…) si finiva con il dare spazio al contenuto "negativo" della loro libertà sessuale, annullandone del tutto il contenuto "positivo"».

considered in line with article 23 of the CRPD[50]. At paragraph 1, the offence is built around the conduct of forcing someone to have sexual intercourse by using violence, blackmail or by abusing one's authority[51].

Article 609-bis paragraph 2 punishes whomever leads anyone to perform or to endure sexual intercourse by abusing the condition of physical or mental inferiority of the person (no.1) or by fraud, impersonating another person (no.2). This offence of induction represents the mediation between the need for protection from abuse and exploitation and the need to recognize the sexual agency of people with disabilities[52]. The Court of Cassation clarified that, in line with the reform, there must not be a presumption of incapacity of the person with disability to give consent for the sexual act. For this reason, the factual situation is to be assessed case by case. This evaluation must consider the persistence of coercion or abuse and, in particular, the presence or absence of consent. What should be verified is if the consent, which was apparently given freely, is actually invalidated by a reduced or absent «capability of resisting to external stimuli»[53].

It should be noted that the offence of induction, as detailed in article 609-bis, paragraph 2, no. 1, does not consider disabled people only as passive subjects of the offence. This was confirmed by the Courts immediately[54], given that the relevant state of inferiority can depend upon many factors, both intrinsic and external to the subject. For in-

[50] V. DELLA FINA, *Article 23*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities*, cit., pp. 417-438 and J. FIANA-BUTORA, *Article 23: Respect for Home and the Family*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities*, cit., pp. 628-656.

[51] For an overview of legal doctrine and jurisprudence on this article of the Criminal Code see G. MULLIRI, *Art. 609-bis*, in G. LATTANZI, E. LUPO (eds.), *Codice penale. Rassegna di giurisprudenza e di dottrina*, vol. X, Milano, 2000, pp. 590-626; S.R. PALUMBIERI, *Violenza Sessuale*, in A. CANOPI, S. CANESTRARI, A. MANNA, M. PAPA (eds.), *Trattato di diritto penale. Parte speciale-IX*, Milano, 2011, pp. 81-92.

[52] Cass. pen., sez. III, n. 12110, 24.09.1999.

[53] Cass. pen., sez. III, n. 15910, 12.02.2009. For more on the nature of consent: Cass., sez. III, n. 52041, 11.10.2016; Cass. pen., sez. III, n. 38261, 20.09.2007.

[54] Cass. pen., sez. III, n. 4114, 03.12.1996.

stance, judges explicitly recognized that environmental factors may hinder the individual's capacity to decide. A recent decision by the Court of Cassation[55], for example, found that in a case regarding the sexual relationship between a schoolteacher and his 17-year-old student with intellectual disability, the facts were not criminally relevant. What emerged from the evidence was that the cognitive impairment of the young woman did not hinder her capacity to understand the «ethical and social meaning of the sexual conducts realized» and to «recognize the effects that these had on her psychological and affective dimension». On the whole, the girl was considered capable of «self-determining in a comprehensive, adequate way in response to the solicitation she received» from the teacher[56]. A part from the merit of this decision and the consideration on the position of power of the teacher, which in this case should be probably discussed; what is remarkable is the fact that the judges proceeded to a concrete evaluation of the capability of the person involved, without any form of disability-related bias.

2.3. How to support the sexuality of people with intellectual disabilities: a case study from Denmark

Legislations have been capable of hindering the possibility of sexual expression of people with disabilities, but at the same time legal instruments can actively promote spaces for sexual self-determination, as will be explored in this paragraph. Denmark is the only country that has adopted a legal document addressing the needs of people with intellectual disabilities in the sphere of sexuality, providing a set of recommendations and concrete solutions for operators and caregivers[57].

[55] Cass. pen., sez. III, n. 45947/17, 06.10.2017.

[56] The translation is by the author. Here is the original quotation from the decision: «complesso di tali acquisizioni, pur indicativo di un deficit di competenze cognitivo-relazionali, non abbia comunque inficiato la capacità della giovane di comprendere il significato etico-sociale delle condotte di natura sessuale realizzate, di riconoscere gli effetti che le stesse producevano sulla sua dimensione psicologica ed affettiva, di determinarsi in maniera complessivamente adeguata rispetto alle sollecitazioni che riceveva».

[57] At the beginning of this paragraph it will be important to address that the English literature and in general the literature on this topic is very meagre. For this reason, dur-

The document, a soft-law non-binding instrument, was approved, in the form of Guidelines, by the National Ministry of Social Affairs for the first time in 1989. The Guidelines were the result of years of political, social and scientific debate mainly promoted by the socialist-inspired *Youth Circle of the National Association of Cripples*[58].

It was in 1969 that the jurist Niels Erik Bank-Mikkelsen[59], after a discussion on the possible legal responsibility of operators helping people with disabilities fulfil a sexual life[60], published an article in the *Mental Hygiene Journal* (*Mental Hygiejne*), establishing the basis for further developments of the Danish approach to sexual facilitation[61].

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ing this whole paragraph reference will be made to the one and only author who wrote about these Guidelines in English, translating some pieces of this text. For Danish speakers a link to the original text of the guidelines in Danish will follow.

[58] The issue of sexuality was widely addressed in the publication of the association called Handi-kamp, which literally means Handy(capped) struggle or battle. Between 1979 and 1989 Handi-kamp published ten special issues related to sexuality and disability. The last special issue, no. 84 (1989), was dedicated to the Guidelines and was also the last issue of the publication. See J. RYDSTRÖM, *Disability, socialism and autonomy in the 1970s: case studies from Denmark, Sweden and the United Kingdom*, in *Disability & Society*, 2019, pp. 9-13.

[59] He was an advocate for the rights of people with intellectual disabilities. He is very well known for developing the principle of normalization, according to which people with intellectual disabilities should live a life resembling as much as possible that of nondisabled people. He thought that this could be done by teaching self-help skills and providing a variety of supportive services. See H. HANAMURA, N. ERIK BANK-MIKKELSEN, *Father of the Normalization Principle*, Niels Erik Bank-Mikkelsen Memorial Foundation, 1998. The normalization principle became the core of the Nordic approach to disability, which constitutes a variation to the social model of disability mainly adopted in Europe by the United Kingdom. See A. GUSTAVSSON, J. SANDVIN, R. TRAUSTADÓTTIR, J. TØSSEBRO, *Resistance, Reflection and Change: Nordic Disability Research*, Lund, 2005.

[60] N.E. BANK-MIKKELSEN, *Udviklingshæmmede og deres seksualproblemer*, in *Mental Hygiejne*, 5-6, 1969, pp. 120-125.

[61] In this article, he laid out some fundamental principles, theorizing some duties operators have in the field of disability and sexuality, namely:

- To provide sexual education that respects the fact that the people receiving it have intellectual disabilities,
- To instruct about sexual practices,

On the basis of this elaboration and at the behest of the Government, the National Board of Social Services presented a report in October 1986 entitled *Investigation of the need for improvements regarding the possibilities for handicapped people's sexual life*, which showed an urgent need for measures to improve the sexual life of people with disabilities[62]. The report highlighted the urgency to adopt national guidelines to ensure operators could engage with the sexual lives of people with disabilities without being persecuted by law, and at the same time, showed the need to address the issue of sexuality in affirmative terms. The Minister of Social Affairs reacted immediately by giving the Board the task of preparing a set of guidelines for the staff of institutions and group homes to address the sexuality of guests.

The outcome was the document *Guidelines about Sexuality – regardless of handicap*, presented on 10 February 1989[63]. This text contained specific and concrete recommendations for social workers and helpers to assist people with disabilities in the fulfilment of their sexuality. The guidelines were first amended in 2001, then in 2012.

According to Danish legislation, the Guidelines do not constitute binding law[64], but are a set of recommendations and good practices of a persuasive nature, but also, for people with disabilities, a «tool to argue

- To provide access to family counselling and to help regarding marriage, to inform about contraception, including recommendations regarding voluntary sterilization, where appropriate,
- To arrange the living conditions in institutions so that it will be practically possible to have a sexual life,
- To inform about the rights of the clients in this area, in order to create a better understanding of these aspects of human rights in the general population, and among parents, relatives working with these questions and staff.

See N.E. BANK-MIKKELSEN, *Udviklingshæmmede og deres seksualproblemer*, cit. The translation of this part of the article in English is from D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, Durham, 2015, p. 47.

[62] Socialstyrelsen undersøgelse af behovet for forbedringer af handicappedes muligheder for seksualliv, Socialstyrelsen, October 1986.

[63] Available in Danish at *https://dagsorden-og-referater.brk.dk/Sites/Politiske_Internet/Internet/2012/InfDag6711-bilag/Bilag893327.PDF*.

[64] See D. MELCHIOR, R. TAMN, *Danish Law in a European Perspective*, Copenhagen, 1996.

for respect and assistance»[65]. The recommendations are aimed at social workers and helpers working in public services and who are employed in the public sector, namely at people working in group homes, homes for the elderly, senior flats and institutions. Any employment relationship involving a personal assistant and a person with disability outside the public umbrella is not regulated by this text and does not fall under any specific regulation[66]. Thanks to the guidelines, however, in 1990 a course was established for social workers to obtain a special certification in the area of sexuality and disability and become sexual advisors (*seksualvejleder*)[67].

The *Guidelines* document opens with a statement reaffirming that people with reduced physical or psychological functionality have the same basic needs and rights as other people. The recommendations are aimed at improving social and personal functionality of people with disabilities and their ability to develop as persons. There is space in this framework for measures for fostering sexual agency, which are connected to the need to assist individuals in being able to keep contact and be together with others. The first version of the Guidelines took inspiration from the *UN Standard Rules*, in particular *Rule 9*, which emphasizes that «persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood», and that «States should promote measures to change negative attitudes towards marriage, sexuality and parenthood of persons with disabilities».

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[65] D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 80.

[66] Here we must refer to the generic law Social Service Act (no. 573 of 2005) which does not encompass the field of sexuality. For the complete translation of the text in English see *http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=70908&p_country=DNK&p_count=244*.

[67] The course was established in 1990 and consists of 20 full days of meetings and coursework over one-and-half years. Students are provided materials on sexuality and disability, complete practical assignments and carry out personal projects they have to discuss together with the study group. According to Kulick, in 2010 there were 400 certified sexual advisors in Denmark, and he also reported the creation of two more programmes in this field D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 90.

At the same time, the Guidelines take a step further. While *Rule 9* is expressed in a negative form (*persons should not be denied*), the Danish document clearly affirms the need to address disabled people's sexuality in a positive manner:

> people with reduced functional ability shall have the possibility to be able to experience their own sexuality and have sexual relations with other people, and that they, in accordance with this shall be supported through legislation and relevant counselling[68].

Apart from a general framework, the Guidelines are split into three different sections: what helpers cannot do, what they may do, and what they must do regarding the sexuality of the people they assist. According to the guidelines, social workers and helpers: cannot have sex with the person they assist; cannot provide sexual assistance to a person who has indicated – verbally or nonverbally – that he/she does not want it; are forbidden from providing any form of sexual assistance to children under the age of 15. They are permitted: to assist by giving support in learning how to masturbate; to assist by giving support to persons who want to have sexual relations with one another; to assist by helping a person who wants to contact a prostitute. In general, the assistant is not obliged to provide assistance, but it is her/his obligation to make sure that the person who is seeking help gets in touch with someone who can assist him/her[69].

To understand fully how sexual facilitation works in Denmark, an example from an ethnographic study conducted by Kulick during several months spent living in a group home will be provided[70]. It might

[68] D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 5.

[69] In this way the guidelines are aimed at ensuring that the needs of a person in the field of sexuality are not ignored or unaddressed, but on the contrary, this reinforces the idea that they are the responsibility of the team working with that person. See D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 80.

[70] A breakdown of all the interviews can be found as an Appendix in the Book. See D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., pp. 297-299.

not be easy to imagine how one can provide support in the sphere of sexuality, e.g. with masturbation, without being involved in a sexual act with the assisted person, however the praxis in Denmark has developed so that all the people involved are highly supported in the execution of their activity and there is a minimal margin of discretion on the individual. Everything on the matter of sexual facilitation is discussed in detail and agreed upon, then written down in a plan which is a source of guarantees for the parties involved. The sexual advisor works together with the interested person to develop a specific and detailed plan based on their needs and desires, which is to be executed by another person, a helper. The helpers' tasks and actions are discussed in detail in the plan and broken down into single parts. This ensures that the user can be supported with the minimal intrusion needed in their privacy and that the assistant already knows the perimeters and boundaries of the facilitated sexual activity. The role of the written agreement on sexual facilitation is crucial, and these documents are not public. Staff members know that that specific person is seeing a sexual advisor, but the details of the kind of intervention needed or of the plan itself are never disclosed to guarantee privacy[71]. This kind of measure is part of a broader and collective effort to create an environment where the person who lives in a group home can feel that their sexual needs are validated and taken into consideration. In Denmark, group home discussion groups are organized with all the residents to talk about sex relationships, love, contraception, parenthood, jealousy, and intimacy in general[72]. Some group homes have also developed an internal written policy on sexuality, a set of indications and rules, which is usually given to everyone who moves into the home.

[71] D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 125.

[72] Several groups also use theatre and role-playing. For general information on the methodology of education on sexuality for people with intellectual disabilities and literature on the topic see D. SCHAAFSMA, G. KOK, J.M. STOFFELEN, L.M. CURFS, *Identifying effective methods for teaching sex education to individuals with intellectual disabilities: a systematic review*, in *Journal of Sexual Research*, 52, 4, 2015, pp. 412-432; B. MCDANIELS, A.R. FLEMING, *Sexuality Education and Intellectual Disability: Time to Address the Challenge*, in *Sexuality and Disability*, 34, 2, 2016, pp. 215-225.

The Guidelines were reformed in March 2012, taking the name of Handbook (*Handbog*)[73]. With a higher number of practical examples and situations for caregivers, it provides more accurate advice on how to talk about sexuality and more precise descriptions of how to organize group discussions. The new document, however, also made substantial changes, tightly linked to an episode which happened in 2006 and its implications for the Municipality of Copenhagen[74]. The fact led the Copenhagen City Council to adopt an Ordinance of Conduct that made it illegal for any person working for the municipality to arrange contact between a person with disability and a sex worker. The employee who infringes this prescription can be dismissed for refusal to abide by employment regulations[75]. After this, the Government solicited the Board of Social Services (*Socialstyrelsen*) to amend the Guidelines, with particular attention to the passage concerning prostitution.

The new document, first of all, has lost its positive statement on the matter of sexuality of people with disabilities and now opens with a literal transcription of Rule 9 (UN Standard Rule), which, as we mentioned above, is expressed in negative terms. Another substantial change is that the part concerning the duty of the helper not to perform

[73] Kulick reports that this also implies that they lost their legal status of policy document. For further discussion of this point see D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 190.

[74] These facts go back to 2005 when a man with cerebral palsy, Torben Vegener Hanses, started a legal proceeding against the county of Århus to ask for compensation for the extra cost he had to pay to have a female escort provide him sexual services at his home. The National Social Appeals Board struck down this application ruling that these costs were not covered by article 84 of the Social Services law, which primarily concerns transport, food, dietary preparation and medicine. To consult a translation of the law, Social Service Act (no. 573 of 2005), see *http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=70908&p_country=DNK&p_count=2442*.

[75] From the point of view of the hierarchy of the law sources an ordinance of the local government can overrule the national guidelines, which again are not legally binding. For a general idea of how hierarchy works in the Danish constitutional system, see P. CARROZZA, A. DI GIOVINE, G.F. FERRARI, *Diritto costituzionale comparato*, Roma, 2014, pp. 327-372; P. LETTO-VANAMO, D. TAMM, B.O. GRAM MORTENSEN, *Nordic Law in European Context*, Berlin, 2018; D. MELCHIOR, R. TAMN, *Danish Law in a European Perspective*, cit.

sexual facilitation, but to find another helper or qualified expert who is willing to assist the person who is asking for assistance, was eliminated.

As far as the part mentioning sex work is concerned, the wording was changed as follows: «in some cases, staff members may experience that a resident expresses a wish for help to contact a prostitute. Staff members do not have an obligation to arrange such a contact»[76]. It is important to consider that social workers/helpers no longer have the duty to find a substitute person who is capable of helping the user. Furthermore, the Handbook now states that «the municipality (may) specify, within the parameters of the law, a latitude for the staff to work with sexuality»[77], a passage validating the ordinance adopted by the Copenhagen City Council.

Overall, the changes in the text brought about by the latest amendment are mostly in pejorative terms. Nonetheless, Kulick reported that the work of operators, social workers and helpers in group homes was not substantially affected. This happened because they rely on best practices developed over years of work, which are still being implemented. For example, as regards the specific situation of the municipality of Copenhagen, staff members who are asked to call a sex worker by their user call colleagues in other municipalities and ask them to contact the sex worker instead[78]. At the same time, Kulick stresses that those who are being affected the most by this amendment are the most vulnerable: for example, people with intellectual disabilities who would need to be accompanied to a brothel – if they wished to visit one – cannot enjoy the company of their helpers anymore[79].

Nevertheless, Denmark can still be considered a unique case and a virtuous country in this field.

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[76] The translation is by D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 191.

[77] The translation is by D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 192.

[78] D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 192.

[79] D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 330.

3. Forced sterilization of disabled people and, in particular, disabled women

At the beginning of the 20th century, in the US the idea of the possibility of using science to "correct" society started spreading. The practice of sterilization was justified for the protection of collective health. Impeding the procreation of certain groups of people meant pursuing the common good. It was a common belief that "degenerated people" could threaten the entire collectivity by transmitting their bad genes to their children. These ideas were at the basis of so-called negative eugenics[80], which resulted in the forced sterilization of many people worldwide[81]. Together with people with disabilities, mentally ill people, racial minorities, and poor women were forced to undergo sterilization[82].

In the US many States approved legislation to forcefully sterilise women with disabilities, to prevent the birth of other people who would burden States' finances[83]. The United States was not the only country

[80] Negative eugenics is aimed at impeding the gene transmission and inhibiting the reproductive capabilities of a certain group of people. During the Nazi-Fascist regimes, negative eugenics was also accompanied by forced euthanasia against people with disabilities. See E. GIRMENIA, *L'eutanasia nazista. Lo sterminio dei disabili nella Germania di Hitler*, Roma, 2016. Today, negative eugenics might be enforced by gene editing technologies such as CRISPR-Cas 9. On the use of this tecnique see from an ethical perspective in Italy see COMITATO NAZIONALE PER LA BIOETICA, *L'editing genetico e la tecnica CRISPR-Cas9: considerazioni etiche*, 23 February 2017 on the relationship between constitutionalism and genetics see M. TOMASI, *Genetica e costituzione. Esercizi di eguaglianza, solidarietà e responsabilità*, Napoli, 2019.

[81] See N.W. GILLHAM, *Sir Francis Galton and the birth of eugenics*, in *Annual Review of Genetics*, 35, 2001, p. 83 ff.; E. GIRMENIA, *L'eutanasia nazista*, cit., p. 55; M. SCHIANCI, *La terza nazione del mondo. I disabili tra pregiudizio e realtà*, Milano, 2000, pp. 103-105; ID., *Storia della disabilità*, cit., p. 188 ff.

[82] T.R. PEAL, *The continuing sterilization of undesirables in America*, in *New Jersey: Rutgers Race and Law Review*, 6, 2004, p. 225; P.R. REILLY, *Eugenic Sterilization in the United States*, in A. MILUNSKY, G.J. ANNAS (eds.), *Genetics and the Law III*, Boston, 1995.

[83] P.A. LOMBARDO, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, in *Journal of Contemporary Health Law and Policy*, 1, 1996, p. 1; A. MINNA STERN, *Eugenics, sterilization, and historical memory*

where sterilization became a State public policy. Many other countries, both in Europe and in other regions of the world, such as Japan, Canada, Australia, Norway, Switzerland, France and Iceland, adopted similar policies[84]. Sweden, for example, abandoned this practice only in 1975[85].

This coercive medical practice has particularly affected, and still affects, people with disabilities and, amongst them, women more than men. We have already discussed how people with disabilities, in general, suffer from stereotypes and misconceptions that see them either as desexualized or hypersexualized, not capable of having sexual relationships and at the same time inadequate for any parental role and in general for any autonomous decisions regarding sexuality and their bodies.

These stereotypes and misconceptions are what expose women with disabilities to unwanted sterilization to avoid pregnancy. In the field of reproductive rights, women with disabilities suffer a double/intersectional discrimination hindering their ability to make autonomous choices[86]. Forced sterilization of girls and young women with disabilities is

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in the United States, in *História, Ciências, Saúde-Manguinhos*, 23, 1, 2016, pp. 195-212.

[84] Open society foundation, *Sterilization of women and girls with disabilities*, November 2011. Available at *https://www.opensocietyfoundations.org/publications/sterilization-women-and-girls-disabilities-0*.

[85] T. TÄNNSJÖ, *Compulsory sterilization in Sweden*, in *Bioethics*, 12(3), 1998, pp. 236-49; P. WEINDLING, *International Eugenics: Swedish Sterilization in Context*, in *Scandinavian Journal of History*, 24, 2, 1999, pp. 179-197.

[86] We can suggest that it depends on an intersectional view of identity and a consequential view of intersectional discriminations. For the development of the notion of intersectionality, which was born from black feminist legal scholarship, see 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, p. 139. On the intersectional discrimination faced by disabled women see J.K. PRICE, *Across Boundaries: The Emergence of an International Movement of Women with Disabilities*, in *Hastings Women's Law Journal*, 8, 1997, p. 233; T. EMMETT, E. ALANT, *Women and disability: exploring the interface of multiple disadvantage*, in *Development Southern Africa*, 23, 4, 2006, pp. 445-460; A. MOODLEY, L. GRAHAM, *The importance of intersectionality in disability and gender studies*, in *Agenda*, 29, 2, 2015, pp. 24-33; N. HIRSCHMANN, *Disability as a New Frontier for Feminist Intersectionality Research*, in *Politics & Gender*, 8, 3, 2012, pp. 396-405; A.C. CAREY, *Gender and Compulsory Sterilization Programs in America: 1907-1950*,

considered a gross violation of human rights which still happens worldwide for reasons such as eugenics, menstrual management and pregnancy prevention[87]. In particular, women living in institutions are the ones who suffer the most from these abuses[88].

A very significant example of gross violation of human rights against women with disabilities in this area is the case of Ashley X, born in 1997 in US, known as the "Ashley treatment case"[89]. Ashley X, a young woman with severe intellectual and developmental disability – at the request of her parents and supposedly in her best interest – was subject to a hysterectomy, breast removal and growth attenuation with a very high dose of oestrogens[90]. The case opened a wide debate on the legal, bioethical and medical issues involved[91]. While a small number

in *Journal of Historical Sociology*, 11, 1, 1998, pp. 74-195. On the specific issues of sexuality, reproductive rights and gender-based violence from a perspective intersecting gender and disability see S. CARNOVALI, *Il corpo delle donne con disabilità. Analisi giuridica intersezionale su violenza, sessualità e diritti riproduttivi*, Roma, 2018.

[87] Open Society Foundations, *Sterilization of women and girls with disabilities*, cit. See also United Nations, Note by the Secretary-General, *Sexual and reproductive health and rights of girls and young women with disabilities*, 14.07.2017. Available at *https://ap.ohchr.org/documents/dpage_e.aspx?si=A/72/133*.

[88] At the same time, women are more likely to be institutionalized. See L. SERVAIS, R. LEACH, D. JACQUES, J.P. ROUSSAUX, *Sterilization of intellectually disabled women*, in *European Psychiatry*, 19, 7, 2004, pp. 428-432; L. LENNERHED, *Sterilization on eugenic grounds in Europe in the 1930s: news in 1997 but why?*, in *Reproductive Health Matters*, 5, 10, 1997, pp. 156-161.

[89] It was called such by the parents of the young woman in the blog they wrote about their daughter.

[90] The case came to light when CNN highlighted an article published by Gunther and Diekema in the issue of *Archives of Pediatric and Adolescent Medicine* of October 2006, describing a novel growth attenuation treatment for *Ashley X*, a 6-year-old girl with developmental disabilities: D.F. GUNTHER, D.S. DIEKEMA, *Attenuating Growth in Children with Profound Developmental Disability: A New Approach to an Old Dilemma*, in *Archives of Pediatric and Adolescent Medicine*, 160(10), 2006, pp. 1013-1017. The case raised many critiques and a heated debate. Dr Gunther replied with this article: D.F. GUNTHER, D.S. DIEKEMA, N. FOST, *Ashley Revisited: A Response to the Critics*, in *The American Journal of Bioethics*, 10, 1, 2010, pp. 30-44.

[91] See for example: A.R. OUELLETTE, *Growth Attenuation, Parental Choice, and the Rights of Disabled Children: Lessons from The Ashley X Case*, in *Houston Journal of Health Law and Policy*, 8, 2008, pp. 207-245; B.S. WILFOND, P. STEVEN MILLER,

of scholars found some cases of legitimacy for this treatment, many others argued that the case showed how the ableist paradigm is still implemented nowadays against people with disabilities.

This was happening despite the increasing importance of assisted decision-making processes involving people with psycho-social and intellectual impairment, as an alternative to decision making[92]. Even if these unlawful medical procedures are condemned at the international level, across the globe, judges, health care professionals, guardians and families still consent to sterilization on behalf of people with disabilities. The most common argument to justify the procedure is the "best interest" one and its corollaries. Recurring arguments, characterized by gender biases, are that sterilization would imply better protection from sexual abuse or protection from the burden of a pregnancy.

In the following paragraph, some case law on best interest will be analysed, starting from the infamous case from the US Supreme Court, *Buck v. Bell*. Afterwards, the international and the Italian domestic regulation of sterilization will be discussed.

C. KORFIATIS, D.S. DIEKEMA, D.M. DUDZINSKI, S. GOERING, *Navigating Growth Attenuation in Children with Profound Disabilities: Children's Interests, Family Decision-Making, and Community Concerns*, in *The Hasting Centre Report*, 40, 6, 2010, pp. 27-40; A. ASCH, A. STUBBLEFIELD, *Growth Attenuation: Good Intentions, Bad Decision*, in *American Journal of Bioethics*, 2010, pp. 46-48; M. SPRIGGS, *Ashley's Interests Were Not Violated Because She Does Not Have Necessary Interests*, in *American Journal of Bioethics*, 2010, pp. 52-54; T. LILLIE, *What Took So Long? Disability Critique Recognized*, in *American Journal of Bioethics*, 2010, pp. 57-62. And also C. RYAN, *Revisiting the legal standards that govern requests to sterilize profoundly incompetent children: in light of the "Ashley Treatment", is a new standard appropriate? A perspective evaluating the violation of medical's duty*, in *Fordham Law Review*, 77, 1, 2008, pp. 287-326, T.N. BRASSINGTON, *Agency, duties and the "Ashley treatment"*, in *International Journal of Medical Ethics*, 35(11), 2009, pp. 658-661.

[92] A. ARSTEIN-KERSLAKE, *Restoring Voice To People With Cognitive Disabilities: Realizing The Right To Equal Recognition Before The Law*, Cambridge, 2017; A. ARSTEIN-KERSLAKE, E. FLYNN, *The General Comment on article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law*, cit., pp. 471-490; E. FLYNN, A. ARSTEIN-KERSLAKE, *Legislating Personhood: Realizing the Right to Support in Exercising Legal Capacity*, in *International Journal of Law in Context*, 10, 4, 2014, pp. 81-104.

3.1. The "best interest" argument: the leading case Buck v. Bell and some examples from comparative case law

It is not easy to find recent judgements on the matter of sterilization.

These cases, in fact, are not likely to reach the Courts: the abusive situation often does not emerge, as in the case of disabled people living in institutions[93]. However, if we look at the few decisions from countries such as the US and the UK but also Spain and Argentina, we can notice that, despite significant differences in the juridical systems, the emerging arguments are quite similar. The most common argument is the one of the best interests of the woman involved, but also of other subjects such as the family or society, in general. More recently, this argument has incorporated some considerations on the suitability to being a parent.

One of the most infamous cases in the field of sterilization and disability is the one discussed by the US Supreme Court in 1927, *Buck v. Bell*[94]. Here, the Supreme Court declared the constitutionality of a

[93] J.D. SMITH, E.A. POLLOWAY, *Institutionalization, Involuntary Sterilization, and Mental Retardation: Profiles from the History of the Practice*, in *Mental Retardation*, 31, 4, 1993, p. 208; J.P. RADFORD, *Sterilization versus segregation: Control of the 'Feebleminded', 1900-1938*, in *Social Science & Medicine*, 33, 4, 1991, pp. 449-458; R. CEPKO, *Involuntary sterilization of mentally disabled women*, in *Berkeley Women's Law Journal*, 1993, pp. 123-165.

[94] Buck v. Bell, 274 U.S. 200 (1927). Here are some comments from US legal doctrine: W. BERNS, *Buck v. Bell: Due Process of Law?*, in *Western Political Quarterly*, 6, 4, 1953, pp. 762-775; P.A. LOMBARDO, *Three generations, no imbeciles: New light on Buck v. Bell*, in *New York University Law Review*, 60, 1985, pp. 30-62; R.L. BURGDORF, *The wicked witch is almost dead: Buck v. Bell and the sterilization of handicapped persons*, in *Temple Law Quarterly*, 50, 4, 1977, pp. 995-1034; R.J. CYNKAR, *Buck v. Bell: Felt necessities v. fundamental values*, in *Columbia Law Review*, 81, 7, 1981, pp. 1418-1461; R.M. BERRY, *From involuntary sterilization to genetic enhancement: The unsettled legacy of Buck v. Bell*, in *Notre Dame Journal of Legal Ethics & Public Policy*, 12, 1998, pp. 401-448; V. NOURSE, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, in *Pepperdine Law Review*, 39, 2011, pp. 101-117; S. HAACK, *Pragmatism, Law, and Morality. The Lessons of Buck v. Bell*, in *European Journal of Pragmatism and American Philosophy*, 3, 2011, pp. 2-16. See also P.A. LOMBARDO, *Three generations, no imbeciles: Eugenics, the Supreme Court, and Buck v. Bell*, Baltimore, 2008.

law of the State of Virginia, allowing the sterilization of people living in state institutions[95]. The case involved Carrie Buck, a woman with an alleged intellectual impairment and the daughter of a woman who was disabled herself, who lived in an institution and remained pregnant after an episode of rape. She had a child, Vivian, who was also judged to be "feebleminded"[96] at the age of seven months and for this reason was required to undergo sterilization according to the law of Virginia. The Amherst County Circuit Court[97] approved the operation after having verified that she could have been «the probable potential parent of socially inadequate offspring». The case went to the Virginia Supreme Court of Appeal on 12 November 1925, and the Supreme Court accepted the case for review in 1926. Here, the defence of the woman argued that her sterilization implied a violation of the equal protection clause and the XIV amendment. With a decision written by Judge Oliver Wendell Holmesand only one dissenting opinion[98] (out of eight judges),

[95] Chapter 46B of the *Code of Virginia* §1095h-m (1924), in particular article Chapter 46B, Sexual Sterilization of Inmates of State Institutions.

«§1095h. When operation of sterilization shall be performed; authority of superintendent of hospital or colony. – Whenever the superintendent of the Western State Hospital, or of the Eastern State Hospital, or of the Southwestern State Hospital, or of the Central State Hospital, or of the State Colony for Epileptics and Feeble-Minded, shall be of opinion that it is for the best interests of the patients and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, the operation of sterilization on any patient confined in such institutions afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeblemindedness or epilepsy; provided that such superintendent shall have first complied with the requirements of this act (1924, p. 569)». The whole text of Chapter 46B on "Sexual Sterilization of Inmates of State Institutions" is available at *https://encyclopediavirginia.org/entries/chapter-46b-of-the-code-of-virginia-%C2%A7-1095h-m-1924/*.

[96] J.P. RADFORD, *Sterilization versus segregation: Control of the 'Feebleminded', 1900-1938*, cit., pp. 449-458.

[97] See the decision at *https://www.encyclopediavirginia.org/Judgment_Against_Carrie_Buck_April_13_1925*.

[98] Judge Butler dissented. See A.K. FERNANDES, *The Power of Dissent: Pierce Butler and Buck v. Bell*, in *Journal for Peace and Justice Studies*, 12, 1, 2002, pp. 115-134; P. THOMPSON, *Silent Protest: A Catholic Justice Dissents in Buck v. Bell*, in *Catholic Lawyer*, 43, 1, 2004: this article is available at *https://scholarship.law.stjohns.edu/tcl/vol43/iss1/6*.

the US Supreme Court ruled in favour of the constitutionality of the law of Virginia, observing that the measure is aimed at granting the best interest both of the community and of the patient:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind

concluding that «Three generations of imbeciles are enough»[99].

The leading case in the UK was decided almost 60 years later, in 1987. Nevertheless, the arguments developed by the judges in favour of the sterilization of a young disabled woman are not so different from the ones we mentioned above. The case involved B.[100], known as Jeanette, a 17-year-old female with a «moderate degree mental handicap», who lived at the Institute of Sunderland Borough Council from the age of four. The young woman showed signs of «sexual awareness» and her mother, together with some doctors, considered it vital for Jeanette not to have the possibility of becoming pregnant. The council of the institution applied to have a Ward of Court and to obtain leave for the operation of sterilization. The case reached the House of Lords as a result of

[99] See C. CASONATO, *Diritto, diritti ed eugenetica. Prime considerazioni su un discorso giuridico altamente problematico*, in *Humanitas*, 4, 2004, pp. 841-856.

[100] In *Re B.*, [1987] 2 All ER 206. For comments on this decision see G.B. ROBERTSON, *Sterilization, Mental Disability, and Re Eve: Affirmative Discrimination?*, in W.S. TARNOPOLSKY, J. WHITMAN, M. OUELLETTE (eds.), *Discrimination in the Law and the Administration of Justice*, Montréal, 1993, pp. 449-456; R.M. POWELL, M.A. STEIN, *Persons with Disabilities and their Sexual, Reproductive and Parenting Rights: An International and Comparative Analysis*, in *Frontiers of Law in China*, 11, 1, 2016, pp. 53-85, in particular p. 63; K. MCKNORRIE, *Sterilization of the Mentally Disabled in English and Canadian Law*, in *The International and Comparative Law Quarterly*, 38, 2, 1989, pp. 387-395; R. LEE, D. MORGAN, *Sterilization and mental handicap: sapping the strength of the state*, in *Journal of Law & Society*, 15, 1988, p. 229; L. MICHELINE, *Non-Therapeutic Sterilization of Intellectuality Disabled Women*, in *Legal Service Bulletin*, 13, 1988, p. 199.

an appeal by the Official Solicitor against the decision of the Court of Appeal, which had ruled in favour of sterilization, given that the woman would have never been capable of expressing consent, according to the judges[101]. The House of Lords unanimously rejected the appeal, stating that the only arguments to be considered were those relating to the best interest and welfare of Jeanette, which is why sterilization had to be authorised. The judges, indeed, claimed the irrelevance of the distinction between therapeutic and non-therapeutic sterilization, in this case, considering that any pregnancy would have caused severe harm to the woman. Here, sterilization was authorised without any attempt to start a process of assisted decision making with the young woman and without considering any other less invasive means of birth control. The best interest of the woman was not evaluated through objective criteria, but using pre-formulated assumptions on her well-being, since there was no evidence of the physical or psychological harm the woman would have suffered in case of a pregnancy.

Another leading case in this area, decided by the House of Lords, which however did not involve a minor, was *In Re F*[102]. The subject of the decision was a 36-year-old woman with a mental disability, who lived in a mental hospital where she developed a sexual relationship with another patient. The doctors considered that it was in the patient's best interest to be sterilised, given that she was judged to be incapable of coping with pregnancy and childbirth and incapable of using any contraceptive method. Her mother sought a declaration by the Court about the operation. The case reached the House of Lords, which was asked to consider its competence on the matter and what kind of procedure should be followed for the operation of sterilization. The judges stated that despite the impossibility for the patient to express her consent, this was not necessary in the case. The operation, indeed, was in the patient's best interest and as such should be authorised by the court. The decision lacks significant arguments to support such an invasive operation, and no attempts were made to reach even a basic form of consent, nor was any less invasive means of birth control considered;

[101] *Court of Appeal decision [2008] EWCA Civ 282*.

[102] (Mental Patient Sterilization) [1990] 2 AC 1.

on the contrary, the consent and involvement of the woman in the decision was explicitly considered irrelevant.

These kinds of arguments, however, are not a prerogative of past decisions alone: in 2015 the UK Court of Protection[103] decided for the coerced sterilization of a woman with an intellectual disability, who was already the mother of six children, on similar considerations. In this case[104] the Court, which was solicited by the local authorities of the town of residence of the woman, highlighted how the factual circumstances, namely an extraordinarily complex and tragic personal story, made it a *hard case* to decide. In authorizing sterilization, the judge observed that

> As I have earlier said, while this case is not about eugenics, it is clear that her fertility brings no realistic prospect of parenting a child. Rather than being a benefit, it is a burden to her, bringing with it the prospect of ongoing long-term intrusion by health and social services into her life.

In addition, the judge, despite recognizing that the woman in question had the same human rights as every human being[105], ordered that

[103] The Court of Protection was established in 1947 together with the figure of guardian, with competence on personal welfare of people under guardianship (integrating issues related to medical treatment). In 1983 the criteria for deciding who could be deprived of legal capacity changed (only for people with mental illness, mental impairment or abnormally aggressive or seriously irresponsible conduct) and the power of guardians was narrowed. Since the guardian could not decide on medical treatment anymore, nor the person herself could, it was up to the Court of Protection to decide on these issues through the doctrine of necessity. The Court of Protection nowadays is a superior court of record disciplined by the Mental Capacity Act of 2005, with jurisdiction on property, financial affairs and personal welfare of people lacking mental capacity. The Court of Protection decides if a person lacks the capacity to make autonomous decisions.

[104] Court of Protection judgment, The Mental Health Trust The Acute Trust & The Council Claimants – and – DD (By her litigation friend, the Official Solicitor) BC Respondents Re DD (No 4) (Sterilization) [2015] EWCOP, Available at this link: *http://www.bailii.org/ew/cases/EWCOP/2015/4.html*.

[105] She claims «my body is mine, by human rights»: point 17 of the decision, reporting a letter from the woman.

she not be notified of the decision, in order to facilitate forced entry into her home, her removal to hospital and her forced sterilization[106].

From these decisions, it is possible to observe how the argument related to the best interest of the whole society, namely the social cost of the reproduction of people with disabilities, is not directly mentioned, due to the increasing social disapproval of control of the reproductive capabilities of people with disabilities[107]. However, the fact that this argument is not used by judges does not prevent forced sterilization from happening: a severe violation of the basic human rights of people with disabilities is still ongoing in this area. This is now justified by the best interest argument, which often masks a violation of the right of self-determination and is evoked as a decisive point without particular argumentative effort. This kind of motivation is often reinforced by considerations relating to the parental inadequacy of the disabled person, which has become an increasingly common argument in contemporary jurisprudence[108]. These decisions often ignore the existence of less intrusive ways to reach the same result and totally ignore the willingness of the person and an effective assessment of their capability: it

[106] An Italian scholar defined this fact as «original and frankly disturbing». See S. ROSSI, *È lecita la sterilizzazione forzata dell'incapace - Court Of Protection, 4.2.2015, judg. Cobb*, in *personaedanno.it*, 05.02.2015, available at *https://www.personaedannoit/articolo/e-lecita-la-sterilizzazione-forzata-dellincapace-court-of-protection-422015-judg-cobb-stefano-rossi*.

[107] In fact, we can note that the argument related to the social cost of disabled lives is well-hidden in the decision on the sterilization of people with disabilities. These judgments usually refer to the best interest of the woman in order to authorise such invasive treatments. This happens because nowadays an argument such as the one on social cost is immediately linked. to eugenics and the Nazi eugenics programmes. Two of the fathers of Nazi eugenics, Karl Binding and Alfred Hoche, based their doctrine on three main assumptions on disability: 1) that the life of a person with disability is unhappy; 2) that this life makes families suffer; 3) that people with disabilities represent a social burden and a cost for the State and society. See E. DE CRISTOFARO, C. SALETTI, *Precursori dello sterminio. Binding e Hoche all'origine dell'"eutanasia" dei malati di mente in Germania*, Verona, 2011.

[108] Scholars affirm that there is a presumption that the woman with disability will never be able to bear her child and for this reason the child will be taken away from the mother to be adopted by another family. See S. CARNOVALI, *Il corpo delle donne con disabilità*, cit., pp. 357-360.

is taken for granted that a person with disability could never be a suitable parent.

The same assumption is shared by the case decided by the Constitutional Court of Colombia in 2014[109], where the interested subject was a minor[110]. Regardless of the concrete outcome of the case, one of the most critical passages of the decision strongly supported the idea that a person with intellectual disability is inherently incapable of understanding the nature of parenthood. The Court affirmed that

> someone who cannot understand what sterilization consists in and what its consequences are, such as people with severe and profound intellectual disability, will hardly be capable of assuming the responsibility of motherhood or fatherhood because they do not understand the implication of being able or not to procreate[111].

Another relevant example is the case discussed in Argentina by the Superior Tribunal de Justicia[112] in 2011, where the Court decided in

[109] Available at *http://www.corteconstitucional.gov.co/relatoria/2014/C-131-14.htm*. For a commentary see S. HOYOS SUÁREZ, J.M. GARCÍA BETANCUR, *La Esterilización En Las Personas Con Discapacidad Cognitiva Y Psicosocial: Una Perspectiva Crítica A La Jurisprudencia Constitucional*, in *Revista de Derecho Publico*, 38, 2017.

[110] Indeed, the court rules in favour of the law that creates a general exception to the possibility of free access to sterilization for everyone for people under 18 years old. The applicants claimed that this prohibition, when it involves a person with disability, is discriminatory and contrary to the principle of Equality. The court rejects all these arguments.

[111] The translation is by the author. Here is the original sentence in Spanish: «En este sentido, la jurisprudencia ha estimado que una persona que puede decidir con plena conocimiento someterse a la esterilización es alguien que también puede comprender la responsabilidad de tener hijos y que por ende puede ejercer plenamente sus derechos sexuales y reproductivos. Por el contrario, alguien que no está en posibilidad de comprender en qué consiste y cuáles son las consecuencias de la operación de esterilización, como en el caso de discapacidades mentales severas y profundas, difícilmente estará en capacidad de asumir la responsabilidad de la maternidad o de la paternidad porque no comprende las implicaciones de poder o no procrear. No se trata en este caso de una restricción de derechos en razón del tipo de discapacidad, sino de la protección de personas que se encuentren en un estado de discapacidad tal que les impida ejercer dichos derechos».

[112] Superior Tribunal de Justicia, Re J.V.A, Application n. 24837/10, n. 48/2011.

favour of the sterilization of J.V.A, a 23-year-old woman old with intellectual disability. The authorisation for the irreversible operation was requested by her aunt, who was also her legal guardian. The sterilization, according to the Court, was in her best interest. The Court justified it by referring to the equality principle[113]: according to the judges, the treatment would have allowed her to live a full sexual life by eliminating any possible danger of pregnancy. The latter was in fact qualified as an obstacle to the full enjoyment of her rights, without any consideration for the woman's consent or her possible desire for parenthood.

A similar argument can be found in the decision issued on 18 August 1998[114] by the Constitutional Court of Spain. The judges, in affirming the constitutionality of article 428 Criminal Code last subsection[115], affirmed that sterilization would

> allow the disabled not to be under constant surveillance that could be contrary to their dignity (art. 10,1 Spanish Constitution) and moral integrity (art. 15,1 Spanish Constitution), enabling the exercise of their sexuality – if it can be supported by their psychological condition – but without the risk of possible consequences of procreation that they cannot anticipate nor consciously take into account because of their mental illness and, for the same reason, they would not be able to enjoy the satisfactions and rights of paternity and maternity nor meet the duties (art. 39,3 Spanish Constitution) inherent in such situations[116].

[113] S. CARNOVALI, *Il corpo delle donne con disabilità*, cit., p. 360 defines the use of this principle as "distorted".

[114] Constitutional Court, S 14-7-1994 no. 215/1994 BOE 197/1994 of August 18, 1994 rec. 1415/92. The text is available in English at *https://www.globalhealthrights.org/wp-content/uploads/2014/01/STC-215-1994.pdf*.

[115] Article 428 of the criminal Code in made in accordance with art. 6 of Ley Orgánica 3/89 of 21 June. The text, translated in English follow: «However, it will be no punishable the sterilization of disabled persons suffering of serious psychic deficiency when it has been authorized by the judge in response of request of the legal representatives of the disabled, after hearing the opinion of specialists, Prosecutor and upon examination of the disabled».

[116] The translation is by the author. Here is the original passage in Spanish: «Además, el TC considera que la medida está justificada y es proporcional. La justificación se encuentra en el interés del incapaz, interés que ampara la limitación del derecho fundamental a la integridad física y que permite al incapaz no estar sometido a

In all these cases involving people with profound intellectual disabilities, arguments such as the best interest one or the one related to parental capabilities might not be completely inconsistent, but the relevant ethical and legal issues at stake should be considered as well. The judges' evaluation must follow objective criteria and supported decision-making processes and the less intrusive solution should always be valued. The sterilization of people who cannot give their consent should be the last resort and the residual remedy, not the recurring one. Moreover, sterilization should not be considered by judges a key to granting a full sexual life to people with psycho-social or intellectual impairments, given that the possibility of a full and consensual expression in the sexual sphere is not related to reproductive incapability, but to the possibility of having access to a comprehensive sexual education and being supported in the sphere of sexual-reproductive health.

The delicate issues that arise in this field should be addressed beforehand with concrete policies by «spending time, energies and commitment in the education, training, consultancy and assistance for people with intellectual impairments», while – on the contrary – it appears that disabled people's «reproductive and sexual rights are easily steamrolled in the name of commodity»[117].

una vigilancia constante que podría resultar contraria a su dignidad (art. 10,1 CE) y a su integridad moral (art. 15,1 CE), haciendo posible el ejercicio de su sexualidad, si es que intrínsecamente lo permite su padecimiento psíquico, pero sin el riesgo de una posible procreación cuyas consecuencias no puede prever ni asumir conscientemente en razón de su enfermedad psíquica y que, por esa misma causa, no podría disfrutar de las satisfacciones y derechos que la paternidad y maternidad comportan, ni cumplir por sí mismo los deberes (art. 39,3 CE) inherentes a tales situaciones». Indeed, the Court states that any intervention on the right to physical integrity must be justified by a contrary right and value recognised by the Constitution, whose protection covers the violation of the right to physical integrity.

[117] M.D.A. FREEMAN, *Sterilising the Mentally Handicapped*, in ID. (ed.), *Medicine, Ethics and the Law*, London, 1998.

3.2. Forced sterilization in international law: the CRPD and the case law of the EctHR

Even before the entry into force of the *Standard Rules* and then the *Convention on the rights of persons with disabilities*, the sterilization of women with disabilities was internationally condemned, just like forced sterilization of women in general. Indeed, the *Committee on the Elimination of Discrimination against Women* adopted two different General Recommendations in the *Convention on the Elimination of Violence Against Women* (CEDAW) in 1992[118] and 1999[119], where forced sterilization was defined as a violation of fundamental rights, a coercion over women's bodies and against their free and informed consent and their dignity[120].

Forced sterilization of people with disabilities is now explicitly forbidden by the CRPD, and several provisions can be used to condemn this practice. Starting from the general principles, the first relevant article is 12[121]. Here it is stated that any person with disability is recognized equally as a person before the law (1) and that the State shall recognize his/her/their legal capacity in every aspect of life on an equal

[118] CEDAW, *General Recommendation no. 19: Violence against Women*, Adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women, 1992 (Contained in Document A/47/38), available at *https://www.refworld.org/type,GENERAL,CEDAW,,453882a422,0.html*.

[119] CEDAW, *General Recommendation no. 19: Violence against Women*, cit.

Adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women, 1992 (Contained in Document A/47/38) available at this link: *https://www.refworld.org/type,GENERAL,CEDAW,,453882a422,0.html*.

[120] CEDAW General Recommendation no. 24: article 12 of the Convention (Women and Health) available at *https://www.refworld.org/type,GENERAL,CEDAW,,453882a73,0.html*.

[121] For comments see A. ARSTEIN-KERSLAKE, E. FLYNN, *The General Comment on article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law*, cit., p. 471; M. KEYSS, *Article 12*, cit., pp. 263-279; A. LAWSON, *Article 12. Equal recognition before the law*, cit., pp. 339-383; C. DE BHAILIS, E. FLYNN, *Recognising legal capacity: Commentary and analysis of article 12 CRPD*, cit.; A. ARSTEIN-KERSLAKE, E. FLYNN, *The right to legal agency: Domination, disability and the protections of article 12 of the Convention on the Rights of Persons with Disabilities*, cit., pp. 22-38.

basis with others. At paragraph 3, States are called upon to take appropriate measures to provide people with disabilities the support they might require to exercise their legal capacity. At paragraph 4, States are called upon to take appropriate and effective steps to ensure that measures on a person's legal capacity

> respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.

In general, a medical practice of sterilization without, and in particular against, the consent of the person involved represents a violation of the abovementioned principle of equal recognition as a person before the law, and more broadly of the legal capacity of the person. Other general principles that can be applied can be found at articles 15[122], 16[123], and 17[124], which protect the person from inhuman and degrading treatments, from exploitation, violence and abuse and protect her/his integrity. In fact, forced sterilization impacts on personal freedom by causing irreversible damage to a person's psycho-physical integrity: for

[122] M. ANTONIO, *Article 15*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities*, cit., pp. 307-316 and P. PHENNEL, *Article 15 Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities*, cit., pp. 426-466.

[123] M. ANTONIO, *Article 16*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities*, cit., pp. 317-325 and A. KEELING, *Article 16: Freedom from Exploitation, Violence and Abuse*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities*, cit., pp. 466-494.

[124] K. MARY, *Article 17*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities*, cit., pp. 327-337, and F. SEATZU, *Article 17: Protecting the Integrity of the Person*, in I. BANTEKAS, M. ASHLEY STEI, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, cit., pp. 494-508.

this reason, it is defined by international law as torture[125]. This damage, for our national system, is to be considered very serious[126], as we will further discuss.

Coerced sterilization is also relevant for article 25[127] of the Convention, in particular letters a) and b) which require States to

> Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programs as provided to other persons, including in the area of sexual and reproductive health and population-based public health programs

and

> Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons.

[125] Sterilization was defined as cruel, inhuman and degrading treatment by the UN Committee on the Rights of Persons with Disabilities and the Special Rapporteur on torture. See CRPD, *General comment no. 3 on women and girls with disabilities*, 2016, para. 32, available at *https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en*; and the UN Doc. A/HRC/31/57, para. 45, available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/000/97/PDF/G1600097.pdf?OpenElement*. In addition we should mention that in 2018 the Special Rapporteur on the rights of persons with disabilities referred to evidence that the sterilization of women and girls with intellectual and psychosocial disabilities continues to be prevalent and called on States to include «a human rights-based approach to disability in health programmes, seek informed consent prior to any medical treatment, respect privacy and ensure that people are free from torture or other cruel, inhumane or degrading treatment». See UN Doc. A/73/161, *Report of the Special Rapporteur on the rights of persons with disabilities*, 2018, paras. 40, 74. The document is available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/75/PDF/N1822475.pdf?OpenElement*.

[126] Art. 538 paragraph 2 n. 3 of the Italian Criminal Code. See the following paragraph.

[127] I.R. PAVONE, *Article 25*, in V. DELLA FINA, R. CERA, G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities*, cit., pp. 471-485 and P. WELLER, *Article 25: Health*, cit., pp. 705-734.

Article 23[128] is even more relevant. Forced sterilization is a manifest violation of the duty of each State to adopt measures to contrast discrimination against people with disabilities in the field of marriage, family, parenthood and interpersonal relationships in general. In particular, letter c) imposes on States the duty to ensure that «Persons with disabilities, including children, retain their fertility on an equal basis with others». On 14 July 2017, the UN Special Rapporteur on disability, Catalina Devandas Aguilar, presented to the General Assembly the report *Sexual and reproductive health and rights of girls and young women with disabilities*[129]. In this report, sterilization is described as a widespread medical practice still happening worldwide, including in Europe.

The issue of forced sterilization reached the European Court of Human Rights, with specific regard to the case of Roma women. A case on disability and sterilization was presented to the Court, but it was declared inadmissible because domestic remedies were not exhausted according to article 35 of the Convention. The case, *Gauer and Others v. France*[130], involved five women with intellectual disabilities who were forced to undergo sterilization, in particular tube ligation, for contraceptive purposes without their consent. The domestic judges in France declared that the medical treatment was not to be considered irreversible, but a mere contraceptive method, and as such it was not against the right to health. Both the Tribunal and the Court of Appeal concluded by stating that, given the incapability of these women of being parents, the treatment was to be considered to be in their interest.

Although no case pertaining to disability and sterilization was decided by the ECtHR, as we mentioned before, we could apply the principles formulated in the case law regarding sterilization, in general and

[128] V. DELLA FINA, *Article 23*, cit., pp. 417-438 and J. FIANA-BUTORA, *Article 23: Respect for Home and the Family*, cit., pp. 628-656.

[129] C. DEVANDAS AGUILAR, Special Rapporteur on the Rights of Persons with Disabilities, *Sexual and reproductive health and rights of girls and young women with disabilities*, 2017. The report is available at *https://ap.ohchr.org/documents/dpage_e.aspx?si=A/72/133*.

[130] Gauer and Others v. France, Application n. 61521/08, 23 October 2012.

in particular that of Roma women, together with the judgements on informed consent. Two cases might be useful for our analysis.

The first one is the case *I.G., M.K. and R.H. v. Slovakia*[131], where three Roma women complained that they were sterilised without their consent and their country failed to successfully investigate in order to find and punish those responsible for the violation. The three women affirmed that their ethnic origin was the main reason for the coerced intervention. In this case, the Court ascertained a violation of article 3, article 8 and article 13 of the Convention, assessing that there had been a violation of the private and family life of the applicants and that they were forced to undergo inhuman and degrading treatments. According to the judges, Slovakia failed to grant an efficient and impartial investigation[132]. Similar arguments related to private and family life, as well as to the violation of informed consent, were the basis of the decision *Y.F. v. Turkey*[133], where a woman was forced to undergo a gynaecological visit against her will. Here the Court found a violation of article 8 of the Convention, stating that the notion of private life must be extended to the psycho-physical sphere of the person and protect its integrity[134]. Even though these decisions do not involve women with disabilities, they are still relevant for understanding how the Court condemns the violation of informed consent and physical integrity using article 3

[131] I.G., M.K. and R.H. v. Slovakia, Application no. 15966/04, 13 November 2012. On the issue of forced sterilization of Roma women, in particular in Slovakia, see the fact-finding report Centre for Reproductive Rights, *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom*, Slovakia, 2003.

[132] Other similar cases to analyse are *K. H. and Others v. Slovakia*, Application no. 32881/04, 24 August 2011, and *V.C. v. Slovakia*, Application no. 18968/0, 8 November 2001, both concerning Roma women and the fact that they found they were sterilised right after giving birth, without their consent. In general, on the sterilization of Roma women in Europe see C. ZAMPAS, A. LAMAČKOVÁ, *Forced and coerced sterilization of women in Europe*, in *International Journal of Gynecology and Obstetrics*, 114, 2011, pp. 163-166.

[133] Y.F. v. Turkey, Application no. 24209/94, 22 July 2003.

[134] The body of a person touches the most intimate aspects of private life. Any medical intervention, even minor, can be qualified as an interference with this right. See the commentary by J. DUTE, *European Court of Human Rights. ECtHR 2003/9 Case of Y.F. v. Turkey, 22 July 2003, no. 24209/9 (Fourth Section)*, in *European Journal of Health Law*, 10, 4, pp. 389-391.

and article 8 of the Convention. Similar points indeed can be raised in cases involving the forced sterilization of women with disabilities, even when the person involved might have difficulties in expressing her consent due to an intellectual impairment.

3.3. The Italian legal framework on forced sterilization

In this paragraph the laws regulating sterilization in the Italian legal system and the relevant constitutional parameters in this case will be examined.

Forced sterilization in Italy is a crime[135]: article 583, paragraph 2 no. 3 of the Criminal Code defines any damage or injury causing the loss of an organ or reproductive capacity as a very serious personal injury (*lesione personale gravissima*)[136]. An exception is made for voluntary sterilization, which falls outside criminal law provisions and outside article 5 of the Civil Code (*atti di disposizione del proprio corpo*)[137].

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[135] See T. PADOVANI, *Sterilizzazione*, in *Enciclopedia del diritto*, XLIII, Milano, 1990, p. 1085 ff. and the following notes.

[136] Article 552 c.p. (*Procurata impotenza alla procreazione*) was repealed and replaced by art. 22 law n. 194/1978. Of course, sterilization is to be considered legitimate when there is the consent of the subject. See the leading cases from the Court of Cassation, the first one on female sterilization, the second one on male sterilization: Cass. pen., section V, decision n. 438, 18 March 1978 and Cass. pen., section V, 18 March 1987, in *Foro Italiano*, 111, 2, 1998, pp. 447-448. For an overview of legal doctrine and jurisprudence on article 583 see M. D'ANDRIA, *Art. 583*, in G. LATTANZI, E. LUPO (eds.), *Codice penale. Rassegna di giurisprudenza e di dottrina*, cit., pp. 188-208; R. ALAGNA, *Le fattispecie di lesioni personali dolose*, in A. CANOPI, S. CANESTRARI, A. MANNA, M. PAPA (eds.), *Trattato di diritto penale. Parte speciale-VII*, cit., pp. 419-422.

[137] The literature on the topic is vast. On article 5 of the Civil Code and sterilization see P. D'ADDINO SERRAVALLE, *Atti di disposizione del corpo e tutela della persona umana*, Napoli, 1983; M.C. VENUTI, *Gli atti di disposizione del corpo*, Milano, 2002; U. BRECCIA, A. PIZZORUSSO, R. ROMBOLI, *Atti di disposizione del proprio corpo*, Pisa, 2007. More in general on the issue of sterilization and voluntary sterilization see N. COVIELLO, *Il problema della sterilizzazione volontaria: studio e ricerca interdisciplinare*, Milano, 1983; M.C. DEL RE, *La sterilizzazione volontaria: fatti e proposte*, Roma, 1982; E. SGRECCIA, *Manuale di bioetica*, vol. I, *Fondamenti ed etica biomedica*, Milano, 2002, p. 722 ff.; E.M. AMBROSETTI, *Sterilizzazione e diritto penale*, in S. CANE-

The abovementioned provisions probably refer to a woman with full legal capacity, without acknowledging the fact that in the case of women with intellectual impairment, their will could be more easily manipulated in order to obtain a consent which is formally full, but substantially vitiated[138]. In 1998 the Italian Committee for Bioethics issued a document opinion on forced sterilization. In the document the Committee explicitly excluded that the sterilization of people with disabilities can be covered by any bioethical justification. On the contrary, it considered that the main aim behind the sterilization of people with disabilities is always eugenic: this is unacceptable in a society where absolute respect for the human being is the primary value[139].

Forced sterilization is contrary to the Italian Constitution. This practice is prohibited under the CRPD, sanctioned, albeit in different contexts, by the ECtHR and by the Oviedo Convention[140], and as such it

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STRARI, G. FERRANDO, C.M. MAZZONI, S. RODOTÀ, P. ZATTI (eds.), *Il governo del corpo. Trattato di Biodiritto*, I, Milano, 2011, p. 738.

[138] S. CARNOVALI, *Il corpo delle donne con disabilità*, cit., p. 348.

[139] COMITATO NAZIONALE PER LA BIOETICA, *Il problema bioetico della sterilizzazione non volontaria*, Roma, 1998, p. 25.

[140] The Oviedo Convention is a human rights treaty from the Council of Europe, dated 4 April 1997. Law 145/2001 in Italy was meant to ratify the Treaty, however the ratification process was never completed (no deposit of the instrument of ratification). The Oviedo Convention, however, is currently used by the Constitutional Court and Judges as an interpretative criterion. Adamo explains it as follows: «Difatti, all'accordo valido sul piano internazionale, ma non ancora eseguito all'interno dello Stato, può assegnarsi – tanto più dopo la legge parlamentare di autorizzazione alla ratifica – una funzione ausiliaria sul piano interpretativo: esso dovrà cedere di fronte a norme interne contrarie, ma può e deve essere utilizzato nell'interpretazione delle norme interne al fine di dare a queste una lettura il più possibile ad esso conforme». See U. ADAMO, *Costituzione e fine vita. Disposizioni anticipate di trattamento ed eutanasia*, Milano, 2018, p. 36 ff. On the specific issue see F.M. PALOMBINO, *La rilevanza della Convenzione di Oviedo secondo il giudice italiano*, in *Giurisprudenza costituzionale*, 2011, pp. 4811-4824; S. PENASA, *Alla ricerca dell'anello mancante: il deposito dello strumento di ratifica della Convenzione di Oviedo*, in *Forum costituzionale*, 2007. On the Oviedo Convention and the Law of Ratification in Italy see also C. PICIOCCHI, *Costituzione e fine vita. Disposizioni anticipate di trattamento ed eutanasia*, in *Diritto pubblico comparato ed europeo*, III, 2001, p. 1301.

becomes relevant under article 117 of the Constitution[141]. Forced sterilization is against article 2, article 13 and article 32. Article 2 refers to the notion of self-determination in the area of medical treatments, and article 32 states that it is not possible to force anyone to undergo medical treatments, except when specific law provisions impose them.

Article 13 setting forth a legislative and jurisdictional guarantee on any limitation of personal freedom. Furthermore, article 32 specifies that a medical treatment can be imposed by law, but the latter cannot violate the limits imposed by respect for the human being. The notion that immediately comes to mind is that of dignity: during the Constitutional Assembly for the discussion of this article sterilization was specifically mentioned[142]:

> Not only is there a reference to the law to determine that citizens cannot be subjected to health practices, but there is a limit for the legislator, preventing health practices that are harmful to human dignity. This is mainly the problem of sterilization and other ancillary issues. Recent historical experience shows that it would be appropriate for the Italian Constitution to establish a similar principle[143].

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[141] Here we refer to the technique of the so-called *parametro interposto*, relevant in the examination of constitutional legitimacy. This concept is often used to describe the relationship between the Italian Constitution and the European Convention on Human Rights, which was defined by the decisions by the Constitutional Court n. 348/2007 and 349/2007. These decisions are widely commented by legal scholars, *ex multis*: N. PIGNATELLI, *Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la dilatazione della tecnica della "interposizione" (e del giudizio costituzionale)*, in *Quaderni Costituzionali*, 1, 2018, pp. 140-143; M. CARTABIA, *Le sentenze "gemelle". Diritti fondamentali, fonti, giudici*, in *Giurisprudenza costituzionale*, 5, 2007, pp. 3564-3574.

[142] It is important to remember that eugenics was a reality in Italy, especially during fascism, and it ended at the beginning of the 1970s. For further information on the Italian case see F. CASSATA, *Molti, sani e forti. L'eugenetica in Italia*, Torino, 2006.

[143] The translation of this passage from Aldo Moro is by the author of this book. Here is the original quotation: «Non soltanto ci si riferisce alla legge per determinare che i cittadini non possono essere assoggettati altrimenti a pratiche sanitarie, ma si pone un limite al legislatore, impedendo pratiche sanitarie lesive della dignità umana. Si tratta, prevalentemente, del problema della sterilizzazione e di altri problemi accessori. L'esperienza storica recente dimostra l'opportunità che nella Costituzione italiana sia sancito un simile principio». See *Atti della Commissione per la Costituzione, Resoconto*

The combination of these articles (2, 13, 32) was used in 2008 by the Constitutional Court in the formulation of the notion of informed consent, which is at the intersection of the right to health and self-determination[144] and is relevant when it comes to sterilization and disability. In this regard, informed consent, understood as the expression of conscious adherence to the health treatment proposed by the doctor, is configured as an actual right of the person. This right is based on the principles expressed in article 2 of the Constitution, which protects and promotes fundamental rights, and in articles 13 and 32, which establish, respectively, that personal freedom is inviolable and that no one can be obliged to undertake a particular health treatment except by law[145]. This

sommario della seduta di martedì 28 gennaio 1947, pp. 203-204. This point was also raised by Caronia who affirmed that there was no space in Italy for medical practices against the human personality, such as sterilization: «non vogliamo pensare che possano mai affermarsi nel nostro Paese pratiche che comunque possano ledere la personalità umana, quali la sterilizzazione obbligatoria», see *Atti della Assemblea Costituente, seduta di giovedì 24 aprile 1947*, p. 3298. On this topic see S. RODOTÀ, *Il diritto di avere dei diritti*, Bari, 2015, p. 256; I. CIOLLI, *I trattamenti sanitari obbligatori e il paziente con problemi psichici. Profili costituzionali*, in *Amministrazione in Cammino*, 2012, pp. 5-6; S. ROSSI, *La salute mentale tra libertà e dignità. Un dialogo costituzionale*, Milano, 2015, p. 263.

[144] The mentioned decision from the Constitutional Court is n. 38/2008. D. MORANA, *A proposito del fondamento costituzionale per il "consenso informato" ai trattamenti sanitari: considerazioni a margine della sent. 438 del 2008 della Corte costituzionale*, in *Giurisprudenza costituzionale*, 2008, p. 4972; R. BALDUZZI, D. PARIS, *Corte costituzionale e consenso informato tra diritti fondamentali e ripartizione delle competenze legislative*, in *www.personaedanno.it*, 2009; E. ROSSI, *Profili giuridici del consenso informato: i fondamenti costituzionali e l'ambito di applicazione*, in *Rivista AIC*, 4, 2011; D. CEVOLI, *Diritto alla salute e consenso informato. Una recente sentenza della Corte costituzionale*, in *Studi parlamentari e di politica costituzionale*, 160, 2008, pp. 75-95.

[145] The translation is by the author. This is the original quotation from the decision: «Al riguardo, occorre rilevare che il consenso informato, inteso quale espressione della consapevole adesione al trattamento sanitario proposto dal medico, si configura quale vero e proprio diritto della persona e trova fondamento nei principi espressi nell'art. 2 della Costituzione, che ne tutela e promuove i diritti fondamentali, e negli artt. 13 e 32 della Costituzione, i quali stabiliscono, rispettivamente, che la libertà personale è inviolabile, e che nessuno può essere obbligato a un determinato trattamento sanitario se non per disposizione di legge». On this decision: I.B. LELLI, *Consenso informato e attitudini*

principle was then formulated by Law no. 219/2017[146], which explicitly refers to the condition of a person who has lost legal capacity (*interdetto* ex art. 414 of the Civil Code)[147] and has a legal guardian and the person whose legal capacity is only partially missing (*inabilitato* ex art. 415)[148] or is supported by an administrator (*amministratore di sostegno* ex art. 404 of the Civil Code)[149]. According to article 3, the person who has partially lost her legal capacity must be given information on her medical condition and be encouraged to value her ability to understand and make decisions (paragraph 1). For the person who is under legal guardianship the guardian will express consent, but the will of the

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garantistiche delle Regioni, in *"Studi e commenti" di Consulta OnLine*, 2009; C. CASONATO, *Il principio della volontarietà dei trattamenti sanitari fra livello statale e livello regionale*, in *Le Regioni*, 3-4, 2009, pp. 627-637; F. CORVAJA, *Principi fondamentali e legge regionale nella sentenza sul consenso informato*, in *Le Regioni*, 3-4, 2009, pp. 639-648. For a general overview on informed consent on a comparative level see C. CASONATO, *Il consenso informato. Profili di diritto comparato*, in *Diritto pubblico europeo*, 3, 2009, pp. 1052-1073.

[146] On Law n. 219/2017 see *Biolaw journal - Rivista di Biodiritto*, 1, 2018, pp. 1-104, with a specific focus on the Law on informed consent.

[147] Before the introduction of the figure of support administrator (*amministratore di sostegno*) (Law 6/2004) this article was the main provision aimed at protecting people who were incapable of taking care of their interests. Currently this article represents the *extrema ratio* where there is no capacity left and disability is extremely serious. For an overview of the legal doctrine and case law on article 414 of the Civil Code see P. BACCARINI, *Art. 414 cc. Persone che possono essere interdette*, in P. CENDON (ed.), *Commentario al codice civile*, Milano, 2009, pp. 927-997.

[148] The observations on article 414 Civil Code (see the previous note) are valid for article 415 Civil Code as well. This article provides a softer protection of the person, limiting her legal capacity for the purpose of some specific acts (*atti di straordinaria amministrazione*) when her condition is not so serious. This article needs to be coordinated now with article 404 on Support Administration. For an overview of the legal doctrine and case law on article 414 of the Civil Code see A. BULGARELLI, *Art. 415 cc. Persone che possono essere inabilitate*, in P. CENDON (ed.), *Commentario al codice civile*, cit., pp. 999-1026.

[149] This law was examined in Chapter I. For specific and unitary reference to the Law instituting this instrument see that Chapter, in particular paragraph 2.1. For a specific overview of legal doctrine and case law on article 404 see R. MASONI, *Art. 404. Amministrazione di sostegno*, in P. CENDON (ed.), *Commentario al codice civile*, cit., pp. 545-612.

person must be taken into account and the guardian has to act by considering the well-being of the person and her life by valuing, above all, her dignity (paragraph 3)[150]. As far as the person who has partially lost legal capacity is concerned, she needs to express her consent, but if this person has an administrator for medical decisions, then she must be involved in this decision, partially or fully taking into consideration the will of the beneficiary and the full possession of her mental faculties (paragraph 4)[151].

The correct development of the process of informed consent becomes particularly relevant and delicate when it involves a person with an intellectual or psycho-social impairment[152]. In this case, the controversial notion of legal capacity[153] becomes even more problematic. For example, a person who is legally capable of acting might not be in the condition of discerning, and, as such, must be considered unable to give consent. At the same time, a person who is legally incapable might be able to unambiguously manifest her will and she needs to be involved in choices concerning her fundamental rights[154]. It was suggested that, specifically in the medical field, a notion of *de facto* capacity should be embraced[155], with an assessment carried out case by case, depending on the specific medical treatment and situation.

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[150] On this matter see G. FERRANDO, *Art. 3, Focus l. 219/2017*, in *Biolaw journal - Rivista di Biodiritto*, 1, 2018, pp. 46-53.

[151] G. FERRANDO, *Art. 3, Focus l. 219/2017*, cit., pp. 46-53.

[152] See M.G. BERNARDINI, *Disabilità e consenso libero ed informato ai trattamenti sanitari*, in *InformareH*, 2018, available at *http://www.informareunh.it/disabilita-e-consenso-libero-ed-informato-ai-trattamenti-sanitari/*.

[153] Some scholars observed that the notion of legal capacity is highly problematic, at the point of being one of the most serious theoretical mistakes. See A. FALZEA, *Capacità*, in *Enciclopedia del diritto*, VI, Milano, 1960. The main weak point according to Falzea is in pretending that consent is something that can be calibrated and limited to specific notions, while at the same time the notion of mental capacity overlapped with the notion of legal capacity. See also P. STANZIONE, *Capacità (diritto privato)*, in *Enciclopedia giuridica*, V, Roma, 2010, p. 21 ff.

[154] S. CARNOVALI, *Il corpo delle donne con disabilità*, cit., p. 286; see also U.G. NANNINI, *Il consenso al trattamento medico: presupposti teorici e applicazioni giurisprudenziali in Francia, Germania e Italia*, Milano, 1989, p. 405 and p. 425.

[155] See P. ZATTI, *Il processo del consenso informato*, in L. KLESTA DOSI (ed.), *I nuovi diritti nell'integrazione europea: la tutela dell'ambiente e la protezione del con-*

3.3.1. Forced sterilization in Italy according to the Tribunals and Courts

Despite the Criminal Code provisions, it is not easy to ascertain how many decisions on sterilization of people, and particularly women, with disabilities reach Courts. The competent judge on this matter is the *Giudice tutelare*[156] and the decisions of this judge are not necessarily public, published or easily retrievable. At the same time, it has been observed that such decisions might not be recurrent, considering that when similar cases go public there is significant media attention towards them[157].

This was the case for the decision of the Tribunale di Catanzaro dated 18 November 2013[158]. The judge was asked to decide on a request presented by the doctor and the guardian of a pregnant young woman with an intellectual and cognitive impairment to proceed with medical abortion and then sterilization, without her consent[159]. The doctor, with the support of the guardian of the woman, presented a report showing that the continuation of the pregnancy would have resulted in substantial damage for the woman's health. They argued that sterilization would be a solution to protect the woman from abuse that she would

sumatore, Padova, 2000, p. 214; U.G. NANNINI, *Il consenso al trattamento medico. Presupposti teorici e applicazioni giurisprudenziali in Francia, Germania e Italia*, cit., p. 247 ff. On the relationship between legal capacity and *de facto* capacity see, *ex plurimis*, G.M. VERGALLO, *Il rapporto medico-paziente. Consenso e informazione tra libertà e responsabilità*, Milano, 2008. A similar notion of capacity was promoted in the field of medically assisted suicide by the working group "gruppo di lavoro in materia di aiuto medico al morire" see their document published on the website *Biodiritto.org* on the 11 September 2019: *Aiuto medico a morire e diritto: per la costruzione di un dibattito pubblico plurale e consapevole*.

[156] D. MORELLO DI GIOVANNI, *La tutela dei soggetti deboli nell'amministrazione di sostegno*, in *Materiali per una storia della cultura giuridica*, 2, 2006, pp. 541-546; G. CAMPESE, *Il giudice tutelare e la protezione dei soggetti deboli*, Milano, 2008.

[157] S. CARNOVALI, *Il corpo delle donne con disabilità*, cit., p. 334. This affirmation is also supported by interviews carried out by Carnovali on the topic with judges, lawyers and social actors in the field of disability.

[158] The full text of the decision is available at *http://www.ilcaso.it/giurisprudenza/archivio/10118.pdf*.

[159] Pretura di Nicosia, 23 gennaio 1997, in *Diritto di famiglia*, 1998, p. 1533.

not have been able to prevent herself. After a long preliminary investigation, the judge decided to reject the petition, once he had summoned the doctor, the guardian, and also the woman in question and her mother to Court. It was observed by several scholars that the judge exercised her power fully in order to comply with her assigned role, namely the protection of the vulnerable subject and not the mere approval of decisions already taken by the interested person's parents or legal guardian[160]. In particular, in the case of abortion the judge must investigate in an adequate manner in order to understand the concrete situation of the pregnant woman and assess that, without any reasonable doubt, the continuation of the pregnancy would be harmful for the woman and for the baby[161].

Here, the judge affirmed that the woman, despite her medical condition and the legal condition of being interdicted, had remarkable relational skills and capabilities. After hearing her in Court, it was assessed that, notwithstanding some elements of imagination and some confusion, she had a good attitude towards the fact of becoming a mother and a certain awareness of the basic tasks required of it. Considering that

[160] S. ROSSI, *Per il suo bene: note sulla sterilizzazione coatta dell'interdetta*, in *Persona e Danno*, 2014. Available at *https://www.personaedanno.it/articolo/per-il-suo-bene-note-sulla-sterilizzazione-coatta-dellinterdetta-trib-catanzaro-decr-18112013-gt-delorenzo-stefano-rossi*. See also S. CARNOVALI, *Il corpo delle donne con disabilità*, cit., pp. 334-336.

[161] Specifically in cases regarding abortion, as we can observe from law 194/1987 *Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza*. Here is the text of article 13: «Se la donna è interdetta per infermità di mente, la richiesta di cui agli articoli 4 e 6 può essere presentata, oltre che da lei personalmente, anche dal tutore o dal marito non tutore, che non sia legalmente separato. Nel caso di richiesta presentata dall'interdetta o dal marito, deve essere sentito il parere del tutore. La richiesta presentata dal tutore o dal marito deve essere confermata dalla donna. Il medico del consultorio o della struttura socio-sanitaria, o il medico di fiducia, trasmette al giudice tutelare, entro il termine di sette giorni dalla presentazione della richiesta, una relazione contenente ragguagli sulla domanda e sulla sua provenienza, sull'atteggiamento comunque assunto dalla donna e sulla gravidanza e specie dell'infermità mentale di essa nonché il parere del tutore, se espresso. Il giudice tutelare, sentiti se lo ritiene opportuno gli interessati, decide entro cinque giorni dal ricevimento della relazione, con atto non soggetto a reclamo. Il provvedimento del giudice tutelare ha gli effetti di cui all'ultimo comma dell'articolo 8».

there were no substantial medical reasons related to her physical condition, and given her positive view of parenthood, the judge found no reason to deem the pregnancy a danger for the well-being of the woman.

As regards the further request, pertaining to the permanent sterilization of the woman, the judge stated that

> the solution (…) suggested by the doctor and the guardian, of intervening on the reproductive capability of the woman, to preserve her (…) is completely aberrant, given that this solution would impair in an irreversible way the physical integrity of a vulnerable subject, who is not culpable for this situation, to compensate for the lack of protection and effective support from family and institutions[162].

The judge also stated that this request reveals an unacceptable and archaic idea of mental health which is no longer acceptable, refusing to treat the person as a label or as her illness, an idea which mainly affects women with disabilities, due to double oppression[163].

Scholars have welcomed this judgement positively[164], and in general this can be considered a good example of how judges can apply constitutional parameters, national legislation and international principles in a virtuous way, to ensure effective protection for people with disabilities, balancing the need for protection and the right to self-determination in

[162] Translation by the author. Here is the original passage: «la soluzione indicata dal medico curante e dal tutore di praticare sull'interdetta un intervento completamente ablativo della capacità riproduttiva della stessa, motivato dall'esigenza di preservare quest'ultima in quanto giovane, appetibile e non in grado di proteggersi da eventuali abusi, appare del tutto aberrante atteso che attraverso tale soluzione si finirebbe per mutilare in maniera irreversibile l'integrità fisica di un soggetto debole, del tutto incolpevole della sua situazione, per compensare vuoti di tutela e la mancanza di un sostegno reale ed efficace da parte della famiglia e delle istituzioni».

[163] Some scholars talk about a patriarchal view see S. CARNOVALI, *Il corpo delle donne con disabilità*, cit., p. 374.

[164] For commentary on this decision see S. ROSSI, *Per il suo bene: note sulla sterilizzazione coatta dell'interdetta*, cit.; M.G. BERNARDINI, *Il soggetto tra cura e diritti. Disabilità, relazioni e inclusione*, in T. CASADEI (ed.), *Donne, diritto, diritti. Prospettive dal giusfemminismo*, cit., pp. 203-204; P. FERRARI, *Tribunale di Catanzaro: disabile stuprata, niente aborto e sterilizzazione coatta*, in *Il sole 24 ore, Sanità24*, 21 gennaio 2014, *www.sanita24.ilsole24ore.com*.

the sexual sphere. There might be cases in which, given the complete impossibility of acquiring any form of consent or starting a process of assisted decision-making, with solid medical evidence related to concrete damage or injuries, sterilization could be lawfully authorised by a judge, but these cased are to be considered residual.

4. Some remarks on the need to balance protection and self-determination of people with disabilities in the sphere of sexuality

Many of the topics we have discussed in this paragraph mainly concern and involve people with intellectual disabilities. Indeed, they are amongst those facing a greater burden of discrimination and denial of sexuality[165]. Yet, another issue that affects disabled people's sexuality is related to sexual health and access to contraception and to sexual health services and facilities[166]. In Italy, for example, according to the survey "The accessibility of gynaecology and obstetrics services for women with disabilities" (*L'accessibilità dei servizi di ginecologia e ostetricia per le donne con disabilità*), published in 2013 by *Coordinamento Gruppo Donne UILDM*[167], there are profound and widespread gaps in the services and there is no systemic approach to disability, in particular in the design and organizational phase[168].

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[165] M. GILL, *Already Doing It: Intellectual Disability and Sexual Agency*, Minnesota, 2015; M. PERLIN, A. LYNCH, *Sexuality, Disability, and the Law Beyond the Last Frontier?*, New York, 2016.

[166] In particular for a discussion of the issue of access to obstetrics and gynaecology services for women with disabilities see the work of S. CARNOVALI, *Il corpo delle donne con disabilità*, cit., pp. 377-383.

[167] The report can be found at *https://www.uildm.org/wp-content/uploads/2013/09/ServiziSanitariDonneDisabiliRapporto2013.pdf*.

[168] The survey was conducted in collaboration with different professionals working in the field of disability rights by involving several hospitals and public health services in Italy. Information was gained by distributing the questionnaire among professionals and operators working in the facilities. The indicators used where: opening times, website for booking, the presence of a reception, the existence of an accessible toilet, the presence of an accessible changing room granting privacy to the patient, the possibility of reaching the facility by public transport, the training of operators on intellectual dis-

These result in a massive violation of the fundamental human rights of women in the field of reproduction and sexuality. It is documented that the lack of access to sexual health is one the factors making people with disabilities more vulnerable to risks connected at different levels to the practices of sexuality. Indeed, as we pointed out earlier, this vulnerability is not intrinsically connected to the condition of disability *per se* but, on the contrary, is generated by the intersection of many factors.

To acknowledge this does not mean to deny the need to balance the right to self-determination in the sexual sphere with the protection of the position of vulnerability that some people with disabilities, in particular of an intellectual nature, may find themselves in. However, the most fertile ground for abuse in the sexual sphere is a culture that refuses to address the sexuality of people with disabilities and denies them the possibility to express their sexuality in affirmative ways. This is what Denmark, which represents a best practice in this field, assumes as the basis of its policy. According to the Danish model, «only by engaging positively with people's erotic interests can one provide them with knowledge and experience that will allow them to identify and understand abuse should it ever occur»[169].

In this specific field, for example, many public institutions in Denmark worked on raising awareness of abuses against people with intellectual disabilities, by designing and publishing materials on the topic in accessible formats[170]. For example, the Social Development Centre (*Social Udviklingscenter*) created an easy-to-read booklet for helpers and for people with disabilities that discusses sexual harassment and sexual abuse. Another interesting state-funded project supported the creation of a toolbox aimed at students in schools and group homes, providing explicit guidelines to contrast sexual harassment and abuse. Moreover, the Danish national board of social services itself has a website for social workers and professionals entitled *Prevent sexual abuse*

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ability and the training of professionals based on different kinds of disabilities (physical, intellectual, etc.).

[169] V. KULICK, J. RYDSTROM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 264.

[170] See V. KULICK, J. RYDSTROM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit.

of people with handicap with brochures, publications, links and videos on the topic.

To sum up, preventing abuse and fostering self-determination necessary start by removing legal obstacles related to discrimination, unwanted medical practices such as forced sterilization or criminal laws denying the possibility for people with disabilities to self-determine in the sexual sphere. These obstacles are often indirect and not easy to detect and tackle: they come from laws that were developed by (and based upon the ideas of) the dominating subjects, and do not incorporate the perspective of people with disabilities[171]. This is the case of criminal laws that only consider people with disabilities as subjects in need of protection. Even though it is necessary to remove these legal obstacles and re-establish a situation of non-discrimination in this field, it might not be enough. Other measures, policies and programmes should be implemented and designed by starting from the voices and concrete needs of people with disabilities.

For example, if we discuss the case of sexual violence and sexual abuse, a disability-neutral criminal legislation to punish abuses might not be enough. Criminal law provisions are essential but do not impact the core issue behind violence and do not enact preventive strategies. Efforts should be made to build the capability of engaging in consensual sexual relationships and distinguishing between consensual and non-consensual relations for everyone. That it is why there is a need to de-

[171] See M.G. BERNARDINI, *Soggettività "mancanti" e disabilità. Per una critica intersezionale all'immagine del soggetto di diritto*, in *Rivista di Filosofia del diritto*, VII, 2, 2018, pp. 281-300. An analogy can be made in a strictly gendered perspective. Feminist scholars have amply shown that legislation on rape and sexual offences was designed in a way that never questions power imbalances between genders: it has often been constructed either in a domineering way that leaves sexual power in the hands of men (see M.J. ANDERSON, *Reviving Resistance in Rape law*, in *University of Illinois Law Review*, 1998, p. 953; R.M. RYAN, *The sex right: A legal history of the marital rape exemption*, in *Law & Social Inquiry*, 20, 4, 1995, pp. 941-1001), or in a paternalistic way to protect women (see S.J. SCHULHOFER, *Taking sexual autonomy seriously: Rape law and beyond*, in *Law and Philosophy*, 11(1), 1992, pp. 35-94). The issue was broadly discussed by many feminist scholars, see for example S. ESTRICH, *Real Rape*, Harvard, 1987.

velop and implement inclusive sexual education[172], capable of taking into consideration the different needs of people with different kinds of impairments. For example, in Sweden, where sexual education programmes (SRE) have been compulsory in schools since 1995 and cover topics such as anatomy, sexually transmitted diseases, relationships, pregnancy, love, gender equality and the prevention of sexual harassment[173], a specific programme aimed at students with physical impairment was designed[174]. These kinds of programmes work on the discrimination and difficulties that a young person with a mobility or physical impairment may face[175], which of course are different from the needs of people with intellectual disabilities. Many programmes specifically aimed at them have been developed over the years, both within and out-

[172] A. BOEHNING, *Sex education for students with disabilities*, in *Law & Disorder*, 1, 2006, pp. 56-66; B. MCDANIELS, A. FLEMING, *Sexuality education and intellectual disability: Time to address the challenge*, cit., pp. 215-225; J. TRAVERS, M. TINCANI, P. WHITBY, A.E. BOUTOT, *Alignment of sexuality education with self-determination for people with significant disabilities: A review of research and future directions*, in *Education and Training in Autism and Developmental Disabilities*, 49, 2, 2014, pp. 232-247; A.C. TREACY, S.T. SHANON, T.V. ABERNATHY, *Sexual Health Education for Individuals with Disabilities: A Call to Action*, in *American Journal of Sexuality Education*, 13, 1, 2018, pp. 65-93.

[173] RFSU, *What is It All About? Information on Sex and Relationship Education in the Swedish School*, Stockholm, 2011.

[174] J. BAHNER, *Cripping sex education: lessons learned from a programme aimed at young people with mobility impairments*, in *Sex Education*, 18, 6, 2018, pp. 640-654.

[175] J. BAHNER, *Cripping sex education: lessons learned from a programme aimed at young people with mobility impairments*, cit., p. 645. Bahner reports: «for young people with mobility impairments this socio-sexual development can be constrained by physical inaccessibility, judgmental attitudes and inaccessible sexuality and relationship education (SRE). Therefore, in addition to requiring basic SRE like all young people, customized education in relation to disability experiences is needed». See, for example, the specific case study on spina bifida M.K. HELLER, M. KUPFERT, S. GAMBINO, P. CHURCH, S. LINDSAY, M. KAUFMAN, A.C. MCPHERSON, *Sexuality and Relationships in Young People with Spina Bifida and Their Partners*, in *Journal of Adolescent Health*, 59, 2, 2016, pp. 182-188; C. AKRE, A. LIGHT, L. SHERMAN, J. POLVINEN, M. RICH, *What Young People with Spina Bifida Want to Know about Sex and Are Not Being Told*, in *Child: Care Health and Development*, 41, 6, 2015, pp. 963-969.

side Europe[176], in contexts such as schools or group homes, and Italy is not isolated in this landscape[177].

As we continue to adopt a national perspective on good practices and instruments to support the sexuality of people with disabilities, it is worth mentioning the experience of the municipality of Turin. Here, an info point on disability and sexuality has been active and available for people with disabilities and operators since 2002[178]. The info point offers educational, psychological and psycho-sexual counselling, with the aim of supporting the self-determination of each person in the sphere of sexuality and affectivity[179]. The service is currently divided into two different hotspots, one specifically for people with intellectual impairments and the other for people with physical impairments. The whole work is directed and supervised by a multidisciplinary scientific committee[180]. In addition, on the basis of this positive experience, a similar service was begun in 2017 in the town of Borgaro, in the province of Turin[181].

Going back to the Italian survey on access to gynaecological and obstetric services for women with disabilities, what emerged from that study is the need for specific training for medical personnel on disabil-

[176] N.A. GOUGEON, *Sexuality Education for Students with Intellectual Disabilities, a Critical Pedagogical Approach: Outing the Ignored Curriculum*, in *Sex Education*, 9, 3, 2009, pp. 277-291; L. LÖFGREN-MÅRTENSON, *'I Want to Do It Right!' A Pilot Study of Swedish Sex Education and Young People with Intellectual Disabilities*, in *Sexuality and Disability*, 30(2), 2011, pp. 209-225.

[177] G. CASTELLI, P. CEREDA, M.E. CROTTI, A. VILLA, *Educare alla sessualità. Percorsi di educazione alla vita affettiva e sessuale per persone con disabilità intellettiva*, Milano, 2013; V. MARIANI, *Disabilità intellettiva: educazione affettiva e sessuale*, Milano, 2013; F. ROVATTI, *Sessualità e disabilità intellettiva. Guida per caregiver, educatori e genitori*, Trento, 2016.

[178] On this see F. VEGLIA, *Handicap e sessualità: il silenzio, la voce, la carezza. Dal riconoscimento di un diritto al primo centro comunale di ascolto e consulenza*, Milano, 2000.

[179] See F. VEGLIA, *Handicap e sessualità: il silenzio, la voce, la carezza. Dal riconoscimento di un diritto al primo centro comunale di ascolto e consulenza*, cit.

[180] More information on their website: *http://www.comune.torino.it/pass/disabilita sessualita/category/progetto-e-sportelli/gli-sportelli/*.

[181] Website: *http://voltoweb.it/iphborgaro/disabilita-e-sessualita-a-borgaro-apre-uno-sportello-per-affrontare-temi-difficili/*.

ity-related issues. This measure was defined as a vital requisite for providing quality services[182]. The survey also reveals the need to create and implement policies on the education and training of operators who, at many levels, work with people with disabilities. This training should be aimed at addressing the misconceptions and prejudices around the topic of sexuality and disability and at giving some basic field-based recommendations. These programmes should take into consideration the specificity of each disability and could be implemented by operators themselves, fostering the creation of internal good practices.

[182] In the conclusion of the report, indeed, we can read: «la formazione dei medici in tema di disabilità […] [è] un requisito imprescindibile per l'erogazione di servizi sanitari di qualità. Che questo aspetto fondamentale della qualità dei servizi, nella quasi totalità dei casi, sia lasciato all'improvvisazione o alla buona volontà dei singoli, esprime, ancor meglio di altri indicatori, quale sia la misura della discriminazione subita dalle donne con disabilità nell'accedere ai servizi sanitari». See GRUPPO DONNE UILDM (ed.), *L'accessibilità dei servizi di ginecologia e ostetricia alle donne con disabilità*, cit., p. 64.

CHAPTER FOUR

A COMPARATIVE PERSPECTIVE ON THE NATURE AND FUNCTION OF SEXUAL ASSISTANCE

SUMMARY: *1. Sexual assistance and sexual facilitation: some preliminary definitions. 1.2. Sexual facilitation and sexual assistance: uncertain boundaries. 1.3. Sexual assistance vs. sex work. 1.4. Sexual assistance vs. sexual surrogacy. 2. Sexual assistance in a comparative perspective: two main models in Europe. 3. The negative incorporation model: sexual assistance as part of a criminally relevant phenomenon. 3.1. France. 3.1.1. The regulation of prostitution in France. 3.1.2. The debate on sexual assistance in France. 3.2. Spain. 3.2.1. The regulation of prostitution in Spain. 3.2.2. The debate on sexual assistance in Spain. 3.3. Sweden. 3.3.1. The regulation of prostitution in Sweden. 3.3.2. The debate on sexual assistance in Sweden. 3.4. Pros and cons of the negative incorporation model. 4. The positive assimilation model: sexual assistance under the regulatory umbrella of sex work. 4.1. Germany and the Netherlands. 4.1.1. The regulation of sex work in Germany. 4.1.2. The regulation of sex work in the Netherlands. 4.1.3. Sexual assistance in Germany and the Netherlands. 4.2. Switzerland. 4.2.1. The regulation on sex work in Switzerland. 4.2.2. Sexual assistance in Switzerland. 4.3. Denmark. 4.3.1. The regulation on sex work in Denmark. 4.3.2. Sexual assistance in Denmark. 4.4. Pros and cons of the negative assimilation model.*

This chapter will look at sexual assistance as a possible tool for fostering sexual access and self-determination in the sexual sphere for people with disabilities. The first paragraph will give a definition of sexual assistance and its relationship with sexual surrogacy and sex work. Then, the legal level will be examined, with a comparative European analysis of policy and legislation on sexual assistance in seven different countries.

The existence of two different approaches will be theorized. In both these models the regulation of sexual assistance is strictly connected to

the regulation of prostitution[1] and sex work. For this reason, the following paragraphs will provide insight into the legal framework of sex work in the selected countries. The regulation of prostitution and sex work is a very complex topic that, for the purpose of this work, will not be analysed in depth in its social, legal and criminal policy implications. The analysis of these legislations is narrowed to the purposes and needs emerging from the inquiries on sexual assistance.

1. Sexual assistance and sexual facilitation: some preliminary definitions

It is not always easy to draw clear boundaries between sexual assistance and similar commercial/medical practices involving the experience of sexuality. When looking for a definition of sexual assistance there is a need to discuss the intersection between this practice, sex work, and surrogate partners.

1.2. Sexual facilitation and sexual assistance: uncertain boundaries

Sexual assistance can be defined as a particular form of sexual facilitation. The latter is the act of receiving assistance with sexual activity.

People with disabilities might need to receive personal assistance for ordinary life activities: getting support with mobility or personal hygiene, for example, is undoubtedly considered a right. It is less commonly acknowledged that the same person who needs assistance in everyday

[1] The author prefers the terminology sex work (rather than prostitution) for two main reasons: because it encompass the many ways in which sexuality can become a form of income, and because it's a terminology that recognizes that outside the wide space of exploitation and human trafficking (that needs to be condemned and contrasted) there are people who self-determinate in their choice and engage in sex work consensually. However, the term prostitution will be used each time a legislation and a specific legal system uses this terminology, it is the case for Italy (see further Chapter V), for example. On the use of the word sex work see F. DELACOSTE, P. ALEXANDER, *Sex Work: Writings by Women in the Industry*, Jersey City, 1987. On the sex worker movement and claims from a sociological perspective see G. SELMI, *Sex work. Il farsi lavoro della sessualità*, Bologna, 2016.

life activities might need support in the sexual sphere, for example in facilitating masturbation or engaging in sexual activity with partners[2]. Therefore, personal assistance in the field of sexuality is sexual facilitation. Sexual facilitation includes a wide range of activities such as:

> Providing accessible information, fostering an environment which allows intimacy, offering and observing the need for privacy, encouraging and enabling social interaction, the procurement of sexual goods, arranging paid-for sexual services, facilitation of masturbation or sexual intercourse with another party (undressing, handling of aids, positioning) and sexual surrogacy[3].

In Europe a Platform was funded to create a network of organizations working in the field of sexuality and disability and establish an epicentre of advocacy for sexual assistance. In fact, the situation in Europe is inhomogeneous: some countries have decided to regulate sexual assistance within sex work, while others, with legislation inspired by abolitionist or prohibitionist ideas, have not regulated this matter but engage in public debate and non-legal solutions on the matter.

Some of these organizations support the idea of specific training required to become a sexual assistant, while others do not; some of these organizations support the idea of sexual assistance as a comprehensive experience that might involve penetration and oral sex, while others conceive sexual assistance as support with masturbation only. The network would like to bring together all these different experiences from European countries, to combine existing expertise and create new ones. At the same time, they aim to create a sexual assistant training programme and write a manifesto of proposals and recommendations to improve the legal framework for sexual assistance in Europe[4].

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[2] L.R. MONA, *Sexual Options for People with Disabilities: Using Personal Assistance Services for Sexual Expression*, in *Women with visible and invisible disabilities*, 26, 3-4, 2003, p. 212.

[3] S. EARLE, *Disability, facilitated sex and the role of the nurse*, in *Journal of Advanced Nursing*, 36(3), 2001, pp. 433-440.

[4] See the section "Aims and goals" of the website *http://www.epseas.eu/en/page/180*.

According to *the European Platform Sexual Assistance*, sexual assistance is the act of

> supporting adults with disabilities in the whole spectrum of their sexuality. It could be to help them to learn or improve their skills when it comes to interpersonal relationships, intimacy and intimate and/or sexual relationships. Each person is unique, as is their sexuality. Each relationship between a Sexual Assistant and the beneficiary is unique and made of unique circumstances. Sexual assistance is determined as much by the particular needs imposed by disability as by the sexual experience itself. These two aspects are systematically present in each Sexual Assistance[5].

And sexual assistants are

> men and women who have the competence necessary to offer quality support for an intimate or sexual relationship. These people are sensitive to different disabilities and offer an intimate or sexual experience with the disabled person in a professional manner and for a specified amount of time[6].

From a theoretical point of view, we must point out that scarce attention has been given by scholars to formulating a precise definition of sexual assistance, which remains very broad and encompasses the many practices existing in this matter. An interesting framework is provided by the Spanish disability activist and philosopher Antonio Centeno, who defines sexual assistance as «the space of intersection of sexual assistance (which concretises the right to access one's own body) and sex work (where one exchanges money for sexual pleasure)»[7]. In this view, sexual assistance is aimed at helping the person with disability before, during and after sexual intercourse with other people and/or sexual assistants are expected to help the person with masturbation in

[5] This information can be found on the association's website: *http://www.epseas.eu/en/*.

[6] This information can be found in the section of the website dedicated to "What is sexual assistance? Who are sexual assistants?". See *http://www.epseas.eu/en/page/181*.

[7] A. CENTENO, *Asistencia sexual para personas con diversidad funcional*, in *Derechos Humanos*, 2014. Available at *http://www.derechoshumanosya.org/node/1240*.

case they are not able to do it by themselves. Centeno explains that sexual assistance must be conceived as an expression of the right to access one's own body[8]. The perimeter of sexual assistance is drawn by allowing a personal assistant to support the person in actions they cannot do alone due to their impairment. In this view, sexual assistance can be defined as a human tool (*herramienta humana*) within the philosophy of Independent Living[9]. According to Centeno, «there is no right to oral sex or coitus or any other sexual practice on other bodies. The access to others' bodies is by agreement not by law»[10].

1.3. Sexual assistance vs. sex work

According to Centeno, within this framework, sexual assistance, which is paying for assistance in the sexual sphere, finds its place somewhere between sex work and personal assistance. Still, it must be recognised that there is no common agreement on the way in which these factors interact; on the contrary, this matter is very controversial[11].

The proposal of sexual assistance put forward in Italy for example, as we will discuss in Chapter V, places strong emphasis on distancing from "simple" sex work due to its nature and purposes. This kind of rhetoric is not solely part of the proposal in Italy but can be found in other organizations working with sexual assistance all over Europe.

For example, the organization *Tandem Team*, currently active in providing sexual services for people with disabilities in Spain, clearly distinguishes the services provided from sex work: «We don't have clocks here, there is no intent to make money but only vocation for the service, it's not just sex but personal growth, an improvement of quality

[8] A. CENTENO, *Asistencia sexual para personas con diversidad funcional*, cit.

[9] S. ARNAU RIPOLLÉS, *La asistencia sexual a debate, Forum on Sexual Assistance*, in *Dilemata*, 6, 15, 2014, p. 12. In the same paper she also explains how, if personal assistance can be defined as basic and universal first-order need, sexual assistance can be defined as a basic but specific second-order need.

[10] A. CENTENO, *Asistencia sexual para personas con diversidad funcional*, cit.

[11] G. MANNINO, S. GIUNTA, G. LA FIURA, *Psychodynamics of the Sexual Assistance for Individuals with Disability*, in *Sexuality and Disability*, 35, 10, 2017, pp. 1-12.

of life»[12]. According to the organization, the difference between sexual assistance and prostitution is the emotional connection and the intimacy that differentiate this experience from sex work.

Some scholars have argued that this kind of approach presents the correlated risk of perpetuating the already existent stigma around sex workers[13]. According to the *Comité Consultatif de Bioéthique de Belgique*, as expressed in their document on sexual assistance[14], prostitution and sexual assistance can be considered distinct for four main reasons: 1. The fact that sexual assistance is specifically provided by people who are trained, and have specific competences regarding the needs of people with physical or mental impairments; 2. The fact that sexual assistance is strictly legally framed to ensure the quality of the service and that it is accessible for a fixed and moderate price, to guarantee respect, and ensure the protection and moral and physical safety of users

[12] The translation was done by the author, here is the original quotation: «Aquí no hay relojes, no hay intención monetaria sino vocación de servicio, no hay sólo sexo sino crecimiento personal, una mejora de la calidad de la vida». This statement is a fragment of an interview with María Clemente (co-Founder of TandemTeam), available in Spanish at *https://www.eldiario.es/retrones/Maria-Clemente-sexo-ofrecemos-intimidad_6_310129007.html*. For an analysis of this interview and related observations see A. García-Santesmases, C. Branco de Castro, *Fantasmas y fantasías: controversias sobre la asistencia sexual para personas con diversidad funcional*, in *Pedagogia i Treball Social. Revista de ciències socials aplicades*, 5, 1, 2016, p. 18.

[13] A. García-Santesmases, C. Branco de Castro, *Fantasmas y fantasías: controversias sobre la asistencia sexual para personas con diversidad functional*, cit., p. 18, and also G. Garofalo Geymonat, *Oltre il dibattito pubblico ma non oltre la critica*, in M. Ulivieri (ed.), *Loveability. L'assistenza sessuale per persone con disabilità*, Trento, 2014, pp. 99-114. She points out how sexual assistants are often pictured as heroes or saints who are ready to do what no-one else is willing to do (having sex with a person with disability), and for this nobility they are better than simple sex workers, who do it all for money. Garofalo draws our attention to the fact that this kind of thinking again marginalizes people with disabilities. See, for example, the critiques of sexual assistance by a French disabled thinker: R. Gendarme, *Je n'accepterai aucune assistante sexuelle si lui faire l'amour ne la fait pas elle-même trembler de plaisir*, Paris, 2014.

[14] Comite Consultatif de Bioethique de Belgique, *Avis n° 74 du 13 novembre 2017 relatif à l'assistance sexuelle aux personnes handicapées*, available at *https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/avis_74_ass_sexuelle_aux_ph.pdf*.

and assistants; 3. The fact that sexual assistance is not a paid job nor a principal activity. The fixed amount of money received for the service is not a salary, but a lump-sum payment. This remuneration fixes the limit of the relationship, which is a service and a form of assistance, not a love relationship; 4. The fact that sexual assistance is offered to both women and men. In the end, the *Comité* also specifies that this doesn't imply the exclusion of sex workers from this profession: they can be sexual assistants as long as they train and accept to work within the abovementioned scheme[15].

Conversely, the French *Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé*, in its document from 2012 on the sexual and affective life of people with disabilities[16], concludes that there are not substantial differences between prostitution and sexual assistance: «The associations of disabled people claim this assistance challenges this equivalence with prostitution. However, it is difficult to qualify it otherwise (…)»[17], then it continues: «The difficult question of instrumentalization, even if it is consensual, remunerated or compassionate, of one person's body cannot be dismissed for the personal satisfaction of another». This document widely discusses the relationship between criminal law around prostitution and sexual assistance, with particular regard to the crime of exploitation of prostitution/pimping (*proxénétisme*), which is part of the chapter relating to *Offences against the dignity of the human person* in the French Criminal Code. On this

[15] Avis nº 74 du 13 novembre 2017 relatif à l'assistance sexuelle aux personnes handicapées, p. 37.

[16] COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ, *Avis nº 118. Vie affective et sexuelle des personnes handicapées. Question de l'assistance sexuelle, 27 September 2012*, available at *https://www.ccne-ethique.fr/sites/default/files/publications/avis_ndeg118.pdf*.

[17] The translation of the sentence is by the author. Here is the original statement: «Les associations de personnes handicapées qui revendiquent cette aide contestent cette assimilation à la prostitution. Il est pourtant difficile de la qualifier autrement, sauf à en faire une activité non rémunérée», and «On ne peut évacuer la difficile question de l'instrumentalisation, même consentie, rémunérée ou compassionnelle du corps d'une personne pour la satisfaction personnelle d'une autre». See COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ, *Avis nº 118*, cit., p. 10.

matter the Comité observes that: «If something is prohibited for everyone, for ethical reasons, it seems difficult to consider that it should be authorized as part of individual initiatives and only for the benefit of certain people»[18].

The same questions feed the debate between scholars in the field of medical ethics. Some of these scholars believe that even in a legal system condemning prostitution[19] there should be a legal exception for people with disabilities. The main reason to support this position is that many people need sexual relations to express their sexuality and some people with disabilities might be incapable of satisfying this need except through the procurement of sexual services from a prostitute[20]. Other scholars argue for the recognition of sexual pleasure as a fundamental right, and consequently they support the idea, for those countries that prohibit prostitution, of a narrow exception for people with disabilities[21].

Conversely, other scholars show scepticism towards these arguments[22]. For example, some of them agree on the urgency of addressing the sexual needs of people with severe disabilities but argues against establishing a right to sexual pleasure as a state-funded service and in general against the idea of a legal exception for prostitution. According

[18] The translation of the sentence is by the author. Here is the original statement: «Si une chose est interdite pour tout le monde, pour des raisons éthiques, il semble difficile d'envisager qu'elle soit autorisée dans le cadre d'initiatives individuelles et seulement au profit de certaines personnes?». See COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ, *Avis n° 118*, cit., p. 11.

[19] F.K. THOMSEN, *Prostitution, disability and prohibition*, in *Journal of Medical Ethics*, 41, 2015, pp. 451-459; J.M. APPEL, *Sex rights for the disabled?*, in *Journal of Medical Ethics*, 36, 2010, pp. 152-154.

[20] F.K. THOMSEN, *Prostitution, disability and prohibition*, cit., p. 455.

[21] «Jurisdictions that prohibit prostitution should carve out narrow exceptions for individuals whose physical or mental disabilities make sexual relationships with non-compensated adults either impossible or highly unlikely». See J.M. APPEL, *Sex rights for the disabled?*, cit.

[22] E. DI NUCCI, *Sexual rights and disability*, in *Journal of Medical Ethics*, 37, 3, 2011, pp. 158-161; B.D. EARP, *Paying for sex - only for people with disabilities?*, in *Journal of Medical Ethics*, 42, 1, 2016, pp. 54-56; A. LIBERMAN, *Disability, sex rights and the scope of sexual exclusion*, in *Journal of Medical Ethics*, 44, 4, 2018, pp. 253-256.

to this view an alternative could be to make the service wholly voluntary and non-commercial[23].

Scholars from the field of social science have pointed to the mutual influence that public debate and the development of new policies around sex work and sexual assistance might have on each other. Teela Sanders notices how «people living with impairments and sex workers are marginalized groups fighting for sexual rights, autonomy and freedom» and suggests social movements cooperate and work on common pragmatic issues[24]. In this context it has been argued that both people with disabilities and sex workers would have many benefits from the decriminalization of sex work[25]. The same findings emerged from an 18-month participant observation study based in Europe. Here the conclusions suggest that we should

> look at sexual assistance and specialized sex workers for people with disabilities as an interesting space for alliance between disabled rights, as a uniquely politicized group of (potential) clients, and sex workers' rights[26].

The researcher further affirms that an approach to sexual assistance rooted in disabled rights could «only be supported by decriminalizing and integrative policies, not exclusively with respect to sexual assistance, but in the field of prostitution as a whole»[27].

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[23] «We likely guarantee a better experience for those involved; the severely disabled would probably enjoy it more in virtue of the fact that the service would be independent, voluntary, charitable, non-profit, and non-commercial». See E. DI NUCCI, *Sexual rights and disability*, cit., p. 160.

[24] T. SANDERS, *The politics of sexual citizenship: Commercial sex and disability*, in *Disability & Society*, 22, 5, 2007, p. 453.

[25] K. FRITSCH, R. HEYNEN, A. ROSS, E. VAN DER MEULEN, *Disability and sex work: developing affinities through decriminalization*, in *Disability & Society*, 31, 1, 2016, pp. 84-99.

[26] G. GAROFALO GEYMONAT, *Disability Rights Meet Sex Workers' Rights: The Making of Sexual Assistance in Europe*, in *Sexuality Research and Social Policy*, 16, 2, 2019, pp. 214-226.

[27] G. GAROFALO GEYMONAT, *Disability Rights Meet Sex Workers' Rights: The Making of Sexual Assistance in Europe*, cit., p. 226.

From this brief discussion it already emerges that the relationship between sex work and sexual assistance is a core issue in the debate on sexual assistance. These blurred lines of separation need to be further investigated, from a legal and legislative point of view.

1.4. Sexual assistance vs. sexual surrogacy

It is also quite common to overlap the figure of sexual assistant and that of sexual surrogate; however, there are substantial differences between these two figures. First of all, sexual surrogacy has a wider target: it is not for people with disabilities only. Sexual surrogacy is a specific medical therapy[28] for people who are facing issues with physical and emotional intimacy[29], as well as sexual dysfunction, with a professional figure who works individually with the patient. This is a strictly therapeutic relationship, aimed at overcoming emotional and/or physical obstacles to achieve a satisfactory sexual life, in order to accomplish sexual health. The fact that the framework of this relationship is a medical one is also clear from the subjects involved in it. The surrogate partner, in fact, represents one of the actors in a triadic relationship: they are not contacted directly by the user; on the contrary, their presence is recommended by a doctor.

Sexual therapy is carried out by a three-way therapeutic team formed by the sex therapist (usually a mental health professional), the sex surrogate partner and the client[30]. The relationship between the sex surrogate partner and the client is always supervised, guided and mediated by the psychologist/therapist, who dictates the terms and conditions of the medical relationship[31]. Surrogate partners also have an in-

[28] Developed by Masters and Johnson in the 1970s. See W.H. MASTERS, V.E. JOHNSON, *Human Sexual Inadequacy*, Boston, 1970.

[29] T. ROSENBAUM, R. ALONI, R. HERUTI, *Surrogate Partner Therapy: Ethical Considerations in Sexual Medicine*, in *The Journal of Sexual Medicine*, 11, 2, 2013, pp. 321-329.

[30] T. SANDERS, *The politics of sexual citizenship: commercial sex and disability*, cit., p. 440.

[31] B. CASALINI, *Disabilità, immaginazione e cittadinanza sessuale*, cit., pp. 301-320.

ternational association, IPSA (International Professional Surrogates Association), particularly active in the US, which provides an ethical code of the profession[32]. If we consider all these elements, the differences between a surrogate partner and a sexual assistant become intuitive: they pertain to the kind of relationship, the actors involved, the aims and goals, but also to the instruments used.

2. Sexual assistance in a comparative perspective: two main models in Europe

After discussing the boundaries and definition of sexual assistance, the legislative European framework will be examined. When looking at the situation of sexual assistance in Europe, two main observations can be made. First of all, no country in Europe has adopted a particular legislation on the matter of sexual assistance. Secondly, the approach towards sexual assistance is strictly connected to the regulation of the trade of sexual services[33].

On the first point, the upcoming paragraphs will show how, even in countries where sexual assistance is a well-established service, with associations working in the field since the early 1990s, there is no specific regulation of the issue. From the legislative point of view, sexual assistance is assimilated to the broader notion of sex work.

In this field, the attempt to build models, through the most common comparative law analysis, based on the observation of the sources of law, fails. The classic distinction between models based on interven-

[32] See their website at *http://www.surrogatetherapy.org/ipsa/code-of-ethics/*. In Italy sexual surrogacy for people with this kind of needs is not an option. This is probably because of the abolitionist approach towards prostitution and its broader repercussion on sexual services.

[33] For an overview of politics, policy and approaches towards prostitution and sex work in Europe, see D. PAOLA, *Tutti in comune disaccordo. Diritti umani e questioni di policy nel dibattito sulla prostituzione in Europa*, in *Studi sulla questione criminale*, XII, 3, 2017, pp. 45-78. With a particular focus on policy and human trafficking, see A. DI NICOLA, *La prostituzione nell'Unione europea tra politiche e tratta di essere umani*, Milano, 2006.

tionist and abstentionist models[34] is not adequate to describe the practice of sexual assistance. From this point of view, in Europe all States adopt an abstentionist model towards sexual assistance. No primary sources of law, in fact, have been created to regulate this service. A small exception is Denmark, where an already mentioned non-binding document, initially in the form of Guidelines and now of a Handbook, tries to set out best practices in the field of sexuality for people with intellectual impairments living in State houses.

In the effort to develop models it is possible to investigate the factual regulations and conditions regarding sexual assistance. From this perspective we can observe that the presence of a well-established service of sexual assistance is strictly linked to the presence of new form of regulation and decriminalization[35] of prostitution and related activities, at different levels. Conversely, in countries where the approach towards prostitution is abolitionist/neo-abolitionist or neo-prohibition-

[34] See the description provided by C. CASONATO, *Introduzione al biodiritto*, Torino, 2012, pp. 94-107. Here the author observes that a model can be found looking at the source of law or at the contents of law. As far as sources of law are concerned, the legal system can be distinguished by analysing whether they regulate a specific field. According to Casonato the choice to set up legislation has these positive consequences: legitimacy, political responsibility and democratic accountability. This intervention then might be a "heavy" one or a light one, and can be substantial or procedural, depending on the choice of the individual legal system. The abstentionist model implies a *laissez faire* approach that exposes all the subjects and does not grant them any kind of protection.

[35] In the context of Europe, we usually refer to "neo-regulationist approach" to describe the experience of countries such as Germany, Belgium, The Netherlands, Switzerland and others. Neo-regulationist approaches are inspired by the idea of recognizing sex work as a form of work and grant workers rights. This model recognizes the need to protect worker's privacy and refuses compulsory health checks, which characterized the '800s regulations. A full "decriminalization" of sex work is what happened in New Zeland since 2003 with the Prostitution Reform Act. This law maintains the focus on sex workers human rights and a fundamental role is given to sex workers' collective organizations (such as the New Zeland and Prostitutes Collective). For a general overview on this model see G. GAROFALO GEYMONAT, *Vendere e comprare sesso. Tra piacere, lavoro e prevaricazione*, Bologna, 2014.

ist[36], sexual assistance is struggling to be recognized on both a social and a legislative level. In these countries, associations are advocating and working outside any legal framework, trying to create a space for this service often having difficulties falling outside the criminally sanctioned umbrella of prostitution.

According to these criteria the two following models will be articulated:

- The *negative incorporation* model: in this model there are no specific provisions around sexual assistance, but there is a social and public debate around the creation of this professional figure. At the same time, the approach towards sex work is an abolitionist or neo-prohibitionist one, that criminalizes activities related to prostitution and often the person who pays for sexual services. Sexual assistance is incorporated within the legal discourse of sex work and for this reason it struggles to find its space in the system. In this model we find countries such as Spain, France, Sweden and Italy.
- The *positive incorporation* model: in this model sexual assistance is a well-established practice, however, there are no specific provisions around it. Sexual assistance is disciplined by laws on sex work in general. Indeed, in these countries, there is a neo-regulationist approach towards prostitution, and sexual assistance is usually a service that has been around for more than 20 years. In this model we find countries such as Germany, the Netherlands, Switzerland and Denmark.

[36] The abolitionist approach initially refereed to the abolition of State brothels, which were present in many countries in Europe in 1800. At the same time under this model prostitution is seen as a negative phenomenon which is destined to disappear. Since the 1980s this model was contested and an alternative was born. It is the so-called Nordic model, born in Sweden in 1998, which aims at combating prostitution by criminalizing those who buy sexual services. For a general overview on this model see G. GAROFALO GEYMONAT, *Vendere e comprare sesso. Tra piacere lavoro e prevaricazione*, cit.

3. The negative incorporation model: sexual assistance as part of a criminally relevant phenomenon

The common characteristics of the countries that can be regrouped under the *negative incorporation* model (Sweden, France, Spain and Italy) are the following:

- In all these countries the law provisions around prostitution criminalizes activities related to prostitution at least, such as procuring, and prostitution is surrounded by social stigma. In particular, Sweden and France have a more severe approach, both being systems where the purchase of sexual services is criminalized. In Sweden this system has existed since 1998 and entered into the social sensibility in a pervasive way. Conversely, in France this system is the result of a very recent reform, enacted in 2016.
- In all these countries there is no specific legislation on sexual assistance, and the issue is considered more broadly connected to sex work. The topic is struggling to reach Parliamentary debate, and institutional politics in general.
- In all these countries sexual assistance has been discussed and often promoted by social actors. In particular in France, Spain and Italy associations and NGOs are advocating for and offering this service, even outside of and, arguably against, the legal framework. As we already mentioned, in France the *Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé* issued an opinion about it in 2012, at the request of the Ministry of Health. Conversely, in Sweden, associations and NGOs are not openly advocating for it, due to the stigma surrounding any kind of exchange of money for sexual services. Nonetheless, the topic has been addressed theoretically by a Consultative organism.

3.1. France

The topic of sex work is widely debated in French public opinion and has been subject to modifications and Parliamentary discussions

over the years[37]. In 1964 France adopted an abolitionist approach. This happened with the so-called Marthe Richard law *Tendant à la fermeture des maisons de tolérance et au renforcement de la lutte contre le proxénétisme*, which closed State brothels[38]. This legislative choice was reinforced during the 1960s, in order to adopt a much more penetrative abolitionist view on prostitution. The legislative apparatus surrounding prostitution has been widely emended over the years: for example, in 2005 the offence of human trafficking was introduced.

The latest reform, dated 2016, shapes in a significant way the French approach to prostitution by making it closer to a neo-prohibitionist model (such as the one adopted in Sweden; see paragraph 2.3.). This recent reform was the object of a constitutional legitimacy scrutiny and was not censored.

Social mobilization and discussion around sexual assistance is tightly linked to the debate on prostitution, as confirmed by the French *Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé*. In its document, this consultative organism ruled out the possibility of enacting any form of sexual assistance compatible with the existent legal framework against prostitution.

3.1.1. The regulation of prostitution in France

As mentioned above, France is now a country with a neo-prohibitionist approach towards prostitution, where the purchase of sexual services is considered an offence. The reform implemented in 2016 did not modify the pre-existent legal apparatus, but a new offence was formulated in addition to the previous ones. For this reason, the reform will be discussed after outlining the existing measures on prostitution. The legislative measures adopted by France follow two different goals: on the one hand they are aimed at preventing prostitution and protecting

[37] L. MATHIEU, *The Debate on Prostitution in France: A Conflict between Abolitionism, Regulation and Prohibition*, in *Journal of Contemporary European Studies*, 12, 2, 2004, pp. 153-163.

[38] S.P. CONNER, *The Paradoxes and contradictions of prostitution in Paris*, in M.R. GARCIA, L.H. VAN VOSS, E. VAN NEEDERVEN MEERKERK (eds.), *Selling Sex in the City: A Global History of Prostitution, 1600s-2000s*, Leiden, 2017, pp. 190-195.

prostitutes, and, on the other hand, criminal law is used to punish any act promoting prostitution[39].

As far as the first kind of actions is concerned, it is in the Code on Social Action and Families (*Code de l'action sociale et des familles*) that we can find the relevant measures – which were further implemented with the recent reform. For example, article 121-9 states that the State must give assistance to people who are put in danger by prostitution, by providing housing and social and medical support[40].

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[39] S.M. MAFFESOLI, *Le traitement juridique de la prostitution*, in *Sociétés*, 1, 99, 2008, pp. 33-46.

[40] Here is the text, in the original language, of the abovementioned article: «I.-Dans chaque département, l'Etat assure la protection des personnes victimes de la prostitution, du proxénétisme ou de la traite des êtres humains et leur fournit l'assistance dont elles ont besoin, notamment en leur procurant un placement dans un des établissements mentionnés à l'article L. 345-1. Une instance chargée d'organiser et de coordonner l'action en faveur des victimes de la prostitution, du proxénétisme et de la traite des êtres humains est créée dans chaque département. Elle met en œuvre le présent article. Elle est présidée par le représentant de l'Etat dans le département. Elle est composée de représentants de l'Etat, notamment des services de police et de gendarmerie, de représentants des collectivités territoriales, d'un magistrat, de professionnels de santé et de représentants d'associations. II.-Un parcours de sortie de la prostitution et d'insertion sociale et professionnelle est proposé à toute personne victime de la prostitution, du proxénétisme et de la traite des êtres humains aux fins d'exploitation sexuelle. Il est défini en fonction de l'évaluation de ses besoins sanitaires, professionnels et sociaux, afin de lui permettre d'accéder à des alternatives à la prostitution. Il est élaboré et mis en œuvre, en accord avec la personne accompagnée, par une association mentionnée à l'avant-dernier alinéa du présent II. L'engagement de la personne dans le parcours de sortie de la prostitution et d'insertion sociale et professionnelle est autorisé par le représentant de l'Etat dans le département, après avis de l'instance mentionnée au second alinéa du I et de l'association mentionnée au premier alinéa du présent II. La personne engagée dans le parcours de sortie de la prostitution et d'insertion sociale et professionnelle peut se voir délivrer l'autorisation provisoire de séjour mentionnée à l'article L. 316-1-1 du code de l'entrée et du séjour des étrangers et du droit d'asile. Elle est présumée satisfaire aux conditions de gêne ou d'indigence prévues au 1° de l'article L. 247 du livre des procédures fiscales. Lorsqu'elle ne peut prétendre au bénéfice des allocations prévues à l'article L. 262-2 du présent code et à l'article L. 744-9 du code de l'entrée et du séjour des étrangers et du droit d'asile, une aide financière à l'insertion sociale et professionnelle lui est versée. L'aide mentionnée au troisième alinéa du présent II est à la charge de l'Etat. Le montant de l'aide et l'organisme qui la verse pour le compte de l'Etat sont déterminés par décret. Le bénéfice de cette aide est accordé par

Analysing the issue of repression and punishment of activities related to prostitution, we can observe that the majority of these measures can be found in Chapter V, Title II, Book II, of the French Criminal Code: Offences against the dignity of persons (*Des atteintes à la dignité de la personne*). The provisions establish the offences of procuring and related activities. The offence of procuring is divided into procuring by supporting or procuring by constriction and they are both punishable with a seven-year maximum sentence and a fine of up to 150,000 Euros[41].

Article 225-5 defines procuring as the act of any person who, in any manner: helps, assists or protects the prostitution of others; makes a profit out of the prostitution of others, shares the profits deriving from it or receives income from a person engaging habitually in prostitution; hires, trains or corrupts a person to exercise prostitution or exercises on

décision du représentant de l'Etat dans le département après avis de l'instance mentionnée au second alinéa du I. Il est procédé au réexamen de ce droit dès lors que des éléments nouveaux modifient la situation du bénéficiaire. L'aide est incessible et insaisissable. L'instance mentionnée au second alinéa du I du présent article assure le suivi du parcours de sortie de la prostitution et d'insertion sociale et professionnelle. Elle veille à ce que la sécurité de la personne accompagnée et l'accès aux droits mentionnés au troisième alinéa du présent II soient garantis. Elle s'assure du respect de ses engagements par la personne accompagnée.

Le renouvellement du parcours de sortie de la prostitution et d'insertion sociale et professionnelle est autorisé par le représentant de l'Etat dans le département, après avis de l'instance mentionnée au second alinéa du I et de l'association mentionnée au premier alinéa du présent II. La décision de renouvellement tient compte du respect de ses engagements par la personne accompagnée, ainsi que des difficultés rencontrées. Toute association choisie par la personne concernée qui aide et accompagne les personnes en difficulté, en particulier les personnes prostituées, peut participer à l'élaboration et à la mise en œuvre du parcours de sortie de la prostitution et d'insertion sociale et professionnelle, dès lors qu'elle remplit les conditions d'agrément fixées par décret en Conseil d'État. Les conditions d'application du présent article sont déterminées par le décret mentionné à l'avant-dernier alinéa du présent II».

[41] R. PARIZOT, *La prostituzione in Francia*, in A. CADOPPI (ed.), *Prostituzione e diritto penale*, Roma, 2014, p. 134.

such a person pressure to engage in prostitution or to continue doing so[42].

Article 225-6 provides a list of activities assimilated to procuring: acting as an intermediary between two persons, one of whom is engaged in prostitution and the other who exploits or remunerates the prostitution of others; facilitating the justification of a procurer's fictitious resources; being unable to account for an income compatible with one's lifestyle while living with a person habitually engaged in prostitution or while entertaining a habitual relationship with one or more persons engaging in prostitution; obstructing operations of prevention, control, assistance or re-education undertaken by institutions qualified to deal with persons in danger of prostitution or engaging in prostitution[43].

Article 225-7 provides a list of aggravating circumstances if procurement involves vulnerable subjects[44]. Article 225-10 punishes the

[42] Here is the original text in French, as modified by Loi nº 2003-239 du 18 mars 2003 – art. 50: «Le proxénétisme est le fait, par quiconque, de quelque manière que ce soit: 1º D'aider, d'assister ou de protéger la prostitution d'autrui; 2º De tirer profit de la prostitution d'autrui, d'en partager les produits ou de recevoir des subsides d'une personne se livrant habituellement à la prostitution; 3º D'embaucher, d'entraîner ou de détourner une personne en vue de la prostitution ou d'exercer sur elle une pression pour qu'elle se prostitue ou continue à le faire. Le proxénétisme est puni de sept ans d'emprisonnement et de 150 000 euros d'amende».

[43] Here is the original text in French, as modified by Loi nº 2003-239 du 18 mars 2003 – art. 50: «Est assimilé au proxénétisme et puni des peines prévues par l'article 225-5 le fait, par quiconque, de quelque manière que ce soit: 1º De faire office d'intermédiaire entre deux personnes dont l'une se livre à la prostitution et l'autre exploite ou rémunère la prostitution d'autrui; 2º De faciliter à un proxénète la justification de ressources fictives; 3º De ne pouvoir justifier de ressources correspondant à son train de vie tout en vivant avec une personne qui se livre habituellement à la prostitution ou tout en étant en relations habituelles avec une ou plusieurs personnes se livrant à la prostitution; 4º D'entraver l'action de prévention, de contrôle, d'assistance ou de rééducation entreprise par les organismes qualifiés à l'égard de personnes en danger de prostitution ou se livrant à la prostitution».

[44] The original text of the article, as modified by Loi nº 2011-525 du 17 mai 2011 – art. 150 is: «Le proxénétisme est puni de dix ans d'emprisonnement et de 1 500 000 euros d'amende lorsqu'il est commis: 1º A l'égard d'un mineur; 2º A l'égard d'une personne dont la particulière vulnérabilité, due à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse, est apparente ou

person who, acting directly or through an intermediary, holds, manages, exploits, directs, operates, finances or contributes to financing a place of prostitution; holding, managing, exploiting, directing, operating, financing or contributing to financing any given place open to the public or used by the public, accepts or habitually tolerates one or more persons to engage in prostitution within the premises or their annexes, or solicits clients in such premises with a view to prostitution; sells or makes available to one or more persons any premises or places not open to the public, in the knowledge that they will therein engage in prostitution; sells, hires or makes available in any way whatsoever vehicles of any type to one or more persons knowing that they will engage in prostitution in them[45].

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connue de son auteur; 3º A l'égard de plusieurs personnes; 4º A l'égard d'une personne qui a été incitée à se livrer à la prostitution soit hors du territoire de la République, soit à son arrivée sur le territoire de la République; 5º Par un ascendant légitime, naturel ou adoptif de la personne qui se prostitue ou par une personne qui a autorité sur elle ou abuse de l'autorité que lui confèrent ses fonctions; 6º Par une personne appelée à participer, de par ses fonctions, à la lutte contre la prostitution, à la protection de la santé ou au maintien de l'ordre public; 7º Par une personne porteuse d'une arme; 8º Avec l'emploi de la contrainte, de violences ou de manoeuvres dolosives; 9º Par plusieurs personnes agissant en qualité d'auteur ou de complice, sans qu'elles constituent une bande organisée; 10º Grâce à l'utilisation, pour la diffusion de messages à destination d'un public non déterminé, d'un réseau de communication électronique. Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables aux infractions prévues par le présent article».

[45] The text of the article, as modified by Loi nº 2003-239 du 18 mars 2003 – art. 51, is the following: «Est puni de dix ans d'emprisonnement et de 750 000 euros d'amende le fait, par quiconque, agissant directement ou par personne interposée: 1º De détenir, gérer, exploiter, diriger, faire fonctionner, financer ou contribuer à financer un établissement de prostitution, 2º Détenant, gérant, exploitant, dirigeant, faisant fonctionner, finançant ou contribuant à financer un établissement quelconque ouvert au public ou utilisé par le public, d'accepter ou de tolérer habituellement qu'une ou plusieurs personnes se livrent à la prostitution à l'intérieur de l'établissement ou de ses annexes ou y recherchent des clients en vue de la prostitution; 3º De vendre ou de tenir à la disposition d'une ou de plusieurs personnes des locaux ou emplacements non utilisés par le public, en sachant qu'elles s'y livreront à la prostitution; 4º De vendre, de louer ou de tenir à la disposition, de quelque manière que ce soit, d'une ou plusieurs personnes, des véhicules de toute nature en sachant qu'elles s'y livreront à la prostitution. Les deux

In 2003, with Law n. 2003-239 (*Loi pour la sécurité intérieure*)[46] the crime of human trafficking was introduced into the French criminal code. This was then reformed in 2013 with Law 5 of August 2013 (*Loi portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France*)[47]. This offence is now punishable as per article 225-4-1 with seven years' imprisonment and a fine of € 150,000[48].

After many years of debate, both inside and outside the Parliament[49], a reform on prostitution was approved in 2016. The aim of the reform, actuated with the approval of Law n. 2016-444 on 13 April 2016[50] is to «reinforce the fight against the system of prostitution and support people who exercise prostitution». The reform acts on two different levels: on the one hand it establishes measures to educate, assist and support people who want to quit prostitution, on the other hand it strengthens the criminal law provisions. As regards the measure in support of people who want to exit prostitution, the law contains a specific Prostitution exit programme that provides many forms of assistance and support, both social and monetary. Some of these are, for example, a temporary residence permit for foreigners (6 months, renewable), fi-

premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables aux infractions prévues par les 1º et 2º du présent article».

[46] Loi nº 2003-239 du 18 mars 2003 pour la sécurité intérieure.

[47] For a general commentary on this offence and its effect see R. PARIZOT, *La prostituzione in Francia*, cit., pp. 136-139.

[48] Here is the text of the article: «Human trafficking is the recruitment, transport, transfer, accommodation, or reception of a person in exchange for remuneration or any other benefit, in order to put the person at the disposal of a third party, whether identified or not, so as to permit the commission against that person of offences of procuring, sexual assault or attack, exploitation for begging, or the imposition of living or working conditions inconsistent with human dignity, or to force this person to commit any felony or misdemeanour».

[49] M. DAVID, M. DARLEY, V. GUIENNE, G. MAINSANT, L. MATHIEU, *France*, in S.O. JAHNSEN, H. WAGENAAR (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 92-107.

[50] The text, in French, is available at *https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032396046&categorieLien=id*. For initial commentary on the law by a French scholar see R. PARIZOT, *La prostitution, infraction sans texte*, in *Revue de science criminelle et de droit pénal comparé*, 2, 2016, p. 373 ff.

nancial aid to help with social and professional integration (AFIS), possibility of accessing housing and employment, health care, professional support and more[51].

On the other hand, the reform details a criminal law response against those who buy sexual services (clients), while at the same time trying to protect the people who work as prostitutes from abuse and stigmatization. The offence of soliciting at article 225-10-1[52] of the Criminal Code (*Racolage passif*)[53], which, however, was not frequently applied

[51] Some of these articles of the Social Action and Families will be cited here, in English. Article 5-121-9-II of the Code on Social Action and Families (Code de l'action sociale et des familles): «A programme for exiting prostitution and social and professional integration is offered to anyone who is the victim of prostitution, procurement, and human trafficking for the purposes of sexual exploitation. It is defined according to an assessment of health, professional and social needs, in order to enable access to alternatives to prostitution»; article 5-121-9-II of the Code on Social Action and Families: «A person engaged in the programme for exiting prostitution and social and professional integration may be issued a temporary residence permit as mentioned in article L. 316-1-1 of the Code on Entry and Residence of Foreigners and the Right of Asylum»; article 5-121-9-II of the Code on Social Action and Families: «When an individual is not eligible for the allowances set out in articles L. 262-2 of this Code, L. 744-9 of the Code on Entry and Residence of Foreigners and the Right of Asylum and L. 5423-8 of the Labour Code, financial assistance for social and professional integration will be provided»; article 5-121-9-II of the Code on Social Action and Families: «Any organization chosen by the person concerned which aids and supports people in difficulty, particularly people in prostitution, may participate in the development and implementation of the programme for exiting prostitution and social and professional integration, as long as they meet the accreditation requirements set by a Decree of the Council of State». It was Decree 2016-1467 of 28 October 2016 which defined the exit programme, the work of the departmental committees to prevent and combat prostitution, procurement and trafficking in human beings and the ways in which organizations responsible for implementing the exit programme out of prostitution are accredited.

[52] See R. PARIZOT, *La prostituzione in Francia*, cit., 142-143.

[53] Here is the text: «Le fait, par tout moyen, y compris par une attitude même passive, de procéder publiquement au racolage d'autrui en vue de l'inciter à des relations sexuelles en échange d'une rémunération ou d'une promesse de rémunération est puni de deux mois d'emprisonnement et de 3 750 euros d'amende». This provision was added in Law n. 239/2009 (*Loi pour la sécurité intérieure*), also known as Law Sarkozy II. Some commentary can be found in J. VERNIER, *La Loi pour la sécurité intérieure: punir les victimes du proxénétisme pour mieux les protéger?*, in M.E. HANDMAN,

by Courts[54], is eliminated. To protect prostitutes, the reform also introduces an aggravating circumstance for several violent crimes against the person, such as sexual violence, if they are perpetrated during the act of prostitution. The main innovative point of this law is the punishment of the client: according to article 20-611-1 of the Criminal Code

> The act of soliciting, accepting or obtaining sexual relations with a person involved in prostitution, including in an occasional manner, in exchange for remuneration, a promise of remuneration, the provision of a benefit in kind or the promise of such a benefit, is punishable by a level five fine.

In case of a re-offence the punishment is a fine of 3,750 Euros[55]. For those who are punished under the abovementioned provisions, the law also establishes a duty to attend an awareness-raising course on the fight against the purchase of sexual favours (article 21-131-16). All these provisions are based on the idea that the client who purchases sexual services is an active actor and contributes to the prostitution system, and as such to a system of exploitation. In fact, according to legislators, the main goal of criminalizing clients is to make them sensitive to the issue of human trafficking and make them aware of the ways in which the procurement system operates.

J. MOSSUZ-LAVAU (eds.), *La prostitution à Paris*, Paris, 2005, pp. 121-152; and ID., *La pénalisation des prostitués selon la LSI*, in *Plein droit*, 2, 2005, pp. 42-44.

[54] This fact is reported by F. PARISI, *Prostituzione. Aporie e tabù di un nuovo diritto tutorio*, Torino, 2018, p. 73. It must be considered, however, that many people have been arrested and kept in custody on the basis of this law and many human rights organizations described this as a form of institutional harassment. See for example: LIGUE DES DROITS DE L'HOMME, COMMISSION NATIONALE CITOYENS-JUSTICE-POLICE, *Mission d'enquête. "Un harcèlement institutionnalisé: les prostituées chinoises et le délit de racolage public"*, 8 March 2013: *https://www.ldh-france.org/Rapport-Un-harcelement/* (in French).

[55] Here is the text of article 20-225-121-1 of the Criminal Code, translated into English: «When a repeat offence takes place under the conditions set out in the second line of article 132-11, the act of soliciting, accepting or obtaining sexual relations with a person involved in prostitution, including in an occasional manner, in exchange for remuneration, a promise of remuneration, the provision of a benefit in kind or the promise of such a benefit, is punishable by a fine of € 3,750».

The reform is not well viewed by many French scholars, both for technical reasons related to criminal law (such as the respect of legal principle) and for the fact that it seems to be inspired by a pedagogical view of criminal law[56].

This reform was also the object of a decision by the *Conseil Constitutionnel*, decision nº 2018-761[57]. The application for a priority prelim-

[56] Here are some remarks on the reform by French scholars: B. LAVAUD LEGENDRE, *Quand le législateur se veut pédagogue… Retour sur les objectifs de la loi de lutte contre le système prostitutionnel*, in *Revue de science criminelle et de droit pénal comparé*, 4, 2016, p. 725 ff.; G. DUCHE, M.H. FRANJOU, H. DE RUGY, *La lutte contre le système prostitutionnel, une politique publique française*, in *Forum*, 2018, pp. 43-54; C. DUMESNIL, *Choralyne. Application de l'article 611-1 du code pénal portant sur la contravention de 'pénalisation des clients de personnes prostituées' (Application of article 611-1 French Criminal Code Regarding the Misdemeanor of' Penalization of Clients of Prostituted Persons')*, in *La Revue des Juristes de Sciences Po-Printemps*, 15, 2018; F. GIL, *La prostitution entre débats et lois*, in *Le sociographe*, 3, 2017, pp. 41-48; L. MATHIEU, *Le proxénète, cible mouvante des politiques de prostitution*, in *Genre, sexualité & société*, 20, 2018; ID., *Des monstres ordinaires. La construction du problème public des clients de la prostitution*, in *Champ pénal*, 2015, p. 12; A.F. DEQUIRE, *Prostitution*, in *Le sociographe*, 3, 2017, pp. 7-9; R. PARIZOT, *La prostitution, infraction sans texte*, cit., p. 373; P. MORVAN, *Quand le «cave» devient délinquant: la pénalisation des clients de prostitué(e)s*, in *La semaine juridique - édition générale*, 2016, p. 487.

[57] Commentary by French scholars on this decision: L. CONSTANTIN, T. LEFORT, *Prostitution (sanction contre les clients): constitutionnalité du régime*, in *Recueil Dalloz*, 4, 2019, p. 202; R. CORALIE, *Pénalisation des clients de personnes se livrant à la prostitution: la schizophrénie juridique*, in *La Gazette du Palais*, 10, 2019, pp. 30-31; P. LE MAIGAT, *Question prioritaire de constitutionnalité (QPC) Pénalisation du recours à la prostitution: entre mépris et compassion, le juge constitutionnel valide les dispositions de la loi abolitionniste de 2016*, in *La Gazette du Palais*, 11, 2019, pp. 29-31; E. BUGE, *Pénalisation des clients de la prostitution: le Conseil constitutionnel face aux choix de société*, in *Actualité juridique. Droit administratif*, 17, 2019, pp. 969-979; J.P. CAMBY, *La Constitution, entre consentement et prostitution: le respect de la prostituée n'est pas le respect du client*, in *Les Petites Affiches*, 119, 2019, pp. 18-28; A. DARSONVILLE, E. DAOUD, *La pénalisation du recours à la prostitution soumise à l'examen du Conseil constitutionnel*, in *Constitutions*, 1, 2019, pp. 83-88; A. PONSEILLE, *La pénalisation du recours à la prostitution soumise à l'examen du Conseil constitutionnel, observations sur Cons. const., 1er février 2019*, in *QPC*, 761, 2019; D. GOETZ, *Prostitution: conformité à la Constitution de l'infraction de recours à*

inary ruling (*question prioritaire*)[58] on the issue of constitutionality was raised by the *Conseil d'État* (Decision no. 423892 of 12 November

l'achat d'actes sexuels, in *Dalloz actualité*, 5 février 2019; H. DIAZ, *Blanchiment: présomption simple d'illicéité des biens ou revenus*, in *Dalloz actualité*, 26 mars 2019.

[58] The *Question prioritaire* in France is the priority preliminary ruling procedure that can be established before the *Conseil Constitutionnel* to verify the compatibility of a certain law with the French Constitution. This institution came into life in the French constitutional justice system after the constitutional reform of 2008 and came into effect in 2010. This was the result of years of adjustment by the *Conseil Constitutionnel* itself and constitutional reform, in the attempt to introduce a constitutional scrutiny of the laws in a reluctant system, historically attached to the doctrine of parliamentary sovereignty. The evolution of French constitutional review started at the end of the sixties. It began when the *Conseil Constitutionnel* decided to incorporate the 1789 *Declaration of the Rights of Man and the Citizen*, the *Preamble of the 1946 Constitution* and the *Principes fondamentaux reconnus par les lois de la République (Bloc de constitutionnalité)*, between the parameters for the review of statutory provisions before their enactment. Since then the *Conseil* has had the power to decide on issues related to civil, political and socio-economic rights. The case law of the *Conseil* developed progressively after 1971, and several constitutional amendments took place after 1974. The first of these, from 1974, allowed 60 members of the National Assembly or 60 members of the Senate to refer back to the *Conseil* an adopted statute, before its enactment, to assess its unconstitutionality (*Saisine Parlementaire*). The second remarkable amendment was the one from 2008, which changed one third of the Constitutional text. With this reform for the first time in French history a provision could be challenged in Court after its enactment: this new mechanism is provided by article 61-1: «If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period». A *Loi organique* on the enactment of this provision was approved on 10 December 2009 (Loi organique n. 2009-1523). Some French literature on the *Question prioritaire*: C. MAUGÜE, J.H. STAHL, *La question prioritaire de constitutionnalité*, Paris, 2011; M. DISANT, *Droit de la question prioritaire de constitutionnalité*, Paris, 2011; J.H. STAHL, *La longue marche de l'exception d'inconstitutionnalité*, in *Mélanges en l'honneur de Bruno Genevois. Le dialogue des juges*, Paris, 2009, p. 997; G. TUSSEAU, *La fin d'une exception française*, in *Pouvoirs*, 2011, 137, p. 5. In Italian: C. SEVERINO, *La Question prioritaire de constitutionnalité. Quadro normativo e prassi applicative del giudizio in via incidentale francese*, in *Diritto pubblico comparato ed europeo*, 2014, p. 496; M. CARTABIA, *La fortuna del giudizio di costituzionalità in via incidentale*, in *Annuario di diritto comparato e di studi legislativi*, 2014; S. CATALANO, *La question prioritaire de constitutionnalité in Francia: analisi di una riforma attesa e dei suoi significati per la giustizia costituzionale italiana*, Napoli, 2016.

2018)[59] on behalf of many associations and sex workers' trade unions[60]. The application concerns the first section of article 225-12-1, and article 611-1 of the Criminal Code. According to the applicants, the fact that these offences are to be applied in every case, including when the conducts are carried out by consenting adults, freely, and in a public space, might be contrary to the Constitution. They affirm that the provisions would violate the personal liberty of persons working as prostitutes, their right to respect of personal privacy, personal autonomy, and the right to sexual freedom. Moreover, there would be a violation of the freedom of enterprise and freedom of contract. To conclude, the applicants claim that these offences would go against the principles of necessity and proportionality of penalties. The relevant constitutional parameters were: articles 2 and 4 of the Declaration of Human and Civil Rights of 1789 with regard to personal freedom; article 8 of the Declaration of Human and Civil Rights of 1789 according to which «The Law must prescribe only the punishments that are strictly and evidently necessary…»; the eleventh section of the Preamble of the Constitution of 1946, concerning right to health and lastly, article 4 of the Declaration of Human and Civil Rights of 1789, for the protection of free enterprise and the freedom of contract.

The *Conseil* rejected all the arguments. On the alleged violation of personal freedom, the judges stated that these offences are aimed at safeguarding human beings against human trafficking and sexual exploitation. Moreover, the choice of legislators preserves public order and prevents further crimes. By punishing clients of prostitution and the purchase of sexual services, inherently connected to the crimes of procuring and exploitation, legislators inhibit the demand for sexual favours for payment. For this reason, the chosen means is to be considered not manifestly inappropriate. On the other objections, the Court observed that the penalties are not to be considered disproportionate to

[59] The decision by the *Conseil d'État* is available in French at *http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=214728&fonds=DCE&item=1*.

[60] The recurrent associations were: Médecins du monde, Syndicat du travail sexuel, Aides, Fédération parapluie rouge, Les amis du bus des femmes, Cabiria, Griselidis, Paloma and Acceptess-t. They all acted on behalf of Thierry S., Giovanna R., Marie S., Christine D. and Marianne C.

the offence, so that the arguments on the violation of the principles of necessity and of proportionality of penalties must be dismissed. As regards the limitations on freedom of enterprise, and freedom of contract, the *Conseil* observed that legislators have the freedom to impose limitations related to constitutional requirements, or requirements that are justified by the public interest, on the condition that they do not result in disproportionate infringements. For this reason, these arguments are to be rejected[61].

3.1.2. The debate on sexual assistance in France

The debate on sexual assistance in France started in the early 2000s with the publication of an interview in *Le Monde* with René-Claude Lachal[62]. With this interview, the topic of the sexuality of people with disabilities entered the public debate, tackling pervasive stereotypes to raise awareness on the topic[63]. An important step for the debate was, undoubtedly, the organization in 2007 of a European conference at the European Parliament in Strasbourg on the topic of sexuality and disability called "Physical dependence: intimacy and sexuality"[64]. This event represented the apex of years of lobbying between many associa-

[61] The full text of the decision is available in French on the website of the *Conseil Constitutionnel* at *https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2018761qpc/2018761qpc.pdf*.

[62] Claude Lachal is a tetraplegic person, who was the director of CRNS. In this interview with *Le monde*, published on 23 October 2002, for the first time he revealed to a greater public the obstacles to sexual life a person with disability might face. He reported not having enough resources for masturbation («ne possède pas les ressources suffisantes pour la masturbation»), asking for sexual assistance to contrast the *solitude of the body*. The interview can be found in the *Le monde* archive at *https://www.lemonde.fr/archives/article/2002/10/23/la-sexualite-des-handicapes-sort-difficilement-de-la-clandestinite_4250818_1819218.html*.

[63] A. GIAMI, *Sexualité et handicaps: de la stérilisation eugénique à la reconnaissance des droits sexuels (1980-2016)*, in *Sexologies*, 25, 3, 2016, pp. 93-99.

[64] The conference, which took place on 27 and 28 April 2007, resulted in a publication known as the "white book" of *Handicaps et sexualités*, edited by one of the main actors and the face of the struggle for sexual assistance in France, Marcel Nuss. See M. NUSS, P. DREYER, *Handicaps et sexualités: le livre blanc*, Paris, 2008, p. 260.

tions and NGOs working with disability in France[65]. In the following years, there was an attempt to raise the issue to the institutional political debate by entering into the Parliamentary discussion, with very little success. This was mainly linked to the strong opposition from politicians supporting a prohibitionist view of prostitution, inherently considered in conflict with any discourse around sexual assistance[66]. It is not a coincidence that in 2016 a law reinforcing the criminalization of prostitution was passed.

Nonetheless, a similar position was adopted by the French *Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé* in 2012[67]. The consultative organism was approached by Mrs Roselyne Bachelot, who was Minister of Solidarity and Social Cohesion, on three questions[68].

The *Comité* observed that sexuality remains, despite a change in morals, the realm of intimacy, from which no-one should be excluded. A person with disability, just like everyone else, «needs a satisfying relational life and, in particular, to be recognized in all aspects of his or

[65] The conference was organized by Handicap International, AFM, APF and CHA. For further observations see M. NUSS, P. DREYER, *Handicaps et sexualités: le livre blanc*, cit., pp. 2-3.

[66] P. BRASSEUR, P. DETUNCQ, *L'assistance sexuelle: qu'est-ce-à-dire? Quels enjeux?*, in *VST - Vie sociale et traitements*, 2014, pp. 53-54.

[67] COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ, *Avis n° 118*, *Vie affective et sexuelle des personnes handicapées. Question de l'assistance sexuelle*, 27 September 2012. Available in French: *https://www.ccne-ethique.fr/sites/default/files/publications/avis_ndeg118.pdf*.

[68] The three questions that gave life to the document issued by the *Comité* were articulated as follows: "– what services might society offer to alleviate the lack of emotional and sexual support felt by people with disabilities, particularly those "whose disability does not allow them to engage in unassisted sexual activity" and who question "the provision of sexual support services"?; – what analysis should be made of the possible implementation of these services by professionals in the health and medico-social sector, what would be the situation in this context of the right to compensation?; – what is the current situation and what proposals could CCNE make on ways of promoting good practices among health and social sector personnel regarding privacy, respect for the freedom and dignity of people with disabilities?». The translation is by the author. See COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ, *Avis n° 118*, cit., p. 1.

her identity»[69]. After observing this, the *Comité* addressed some issues around sexuality and disability, by considering the differences between people with physical and psycho-social impairments «In terms of awareness, autonomy and responsibility». Some of the entangled issues were: the recognition of sexual identity by parents, the infantilization of people with disabilities and their need for intimacy. On the specific issue of sexual assistance, the *Comité* initially pointed out the need to make a clear distinction between sexual assistance and support. In this sense the *Comité* stated that «The question of the emotional and physical consequences of the involvement of the body for the person who would provide this type of service cannot be ignored»[70]. It further specifies that «the fact remains that questions arise about the fine line between prostitution and those who are accompanying them»[71].

According to the *Comité*, the recognition of a professionalized and remunerated figure of sexual assistant would require an adjustment of the legislation prohibiting the procurement of prostitution. In any case, the CCNE considered it impossible to make sexual assistance like any other professional situation, because of the principle of non-commercial use of the human body. To sum up, even though the CCNE recognized the existence of sexual rights, it also specified that this doesn't imply that the State must necessarily compensate for the situation of people

[69] Here is the original quotation: «Comme tout un chacun, la personne handicapée a besoin en priorité de liens, d'une vie relationnelle satisfaisante et notamment d'être reconnue dans tous les aspects de son identité», COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ, *Avis n° 118*, cit., p. 4.

[70] The *Comité* observes: «Providing a sexual service to the disabled person entails significant risks of abuse. On the one hand, the beneficiaries are vulnerable persons who are likely to be emotionally transferred to the sex worker who may cause suffering; on the other hand, there is no guarantee that the sex worker himself will not place himself in a situation of vulnerability through excessive personal involvement in his service. One thing is the use of one's skills, one's knowledge, another is the use of one's intimacy in the professional relationship. There is a difference between "talking" about sexuality and "acquiring training" to respond concretely to requests to put one's own body into play and to have sexual contact with the other's body». The translation is by the author. See COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ, *Avis n° 118*, cit., p. 10.

[71] COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ, *Avis n° 118*, cit., p. 10.

with disabilities in the sexual sphere. In fact, not all freedom corresponds to a duty to be assumed by the community[72]. The only responsibility the State can have is to facilitate encounters and social life, as already stated by law.

The institutional, legal and Parliamentary debate was definitively shut down after this opinion from the *Comité*. Since then, the legal framework has become even more complex with the adoption of the new law on prostitution incriminating clients. In spite of this, it is suggested that a service of sexual assistance might be framed inside Law of 11 February 2005 *Loi pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées*[73] on equal rights and opportunities for persons with disabilities. This legislative text represents a major turning point for disability rights in France because it recognizes full autonomy for people with disabilities, and their right to participate in all areas of social life. The demand for access to sexual life and the request for sexual assistance could be rooted inside this legislative text, in particular linked to article 11: «La personne handicapée a droit à la compensation des conséquences de son handicap quels que soient l'origine et la nature de sa déficience, son âge ou son mode de vie».

[72] The CNNE continues by stating that: «It must be noted that many people, regardless of their disability, have difficulties in their emotional and sexual lives and that this does not imply any "duty" on the part of society towards them. The fundamental element of relational life is free, understood in commercial and financial terms. Is there not a risk that recognition in terms of law and financial means will distort things?». COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ, *Avis n° 118*, cit., p. 8.

[73] On this law see P. DIDIER-COURBIN, P. GILBERT, *Éléments d'information sur la législation en faveur des personnes handicapées en France: de la loi de 1975 à celle de 2005*, in *Revue française des affaires sociales*, 2, 2005, pp. 207-227; D. CALIN, *Comprendre la loi de février 2005 sur les droits des personnes handicapées*, in *Enfances Psy*, 4, 2005, pp. 191-200; J.F. CHOSSY, *Une lecture critique de la loi du 11 février 2005*, in *Reliance*, 1, 2007, pp. 53-57; P. GILBERT, *La définition du handicap dans la loi de 2005 et le certificat médical*, in *Perspectives Psy*, 54(4), 2015, 309-315; A. RATIER, *Les personnes handicapées. Le hand in cap revisité par la loi de 2005*, in *La Revue du Centre Michel de l'Hospital*, 2017, pp. 160-165.

As far as the de facto situation is concerned, we must report, however, that the association APPAS (guided by Marcel Nuss) has been very active, promoting training courses and putting sexual assistants into contact with potential users[74]. The association has given itself a set of rules: a Statute, rules for operators – including an ethical code – and rules for users. They consider sexual assistance a form of prostitution with a therapeutic aim[75]. According to their view, since prostitution is not illegal in France, then sexual assistance is not an infraction of the law[76]. They believe that APPAS cannot be prosecuted for procuring because the association does not receive any financial advantage from creating a contact between assistants and users[77]. In fact, it is not APPAS that provides the salary for sexual assistants and there is no rela-

[74] See article 7 of their Statute: article 7: «Engagements de l'APPAS vis-à-vis des accompagnants sexuels. L'APPAS fait la promotion de l'accompagnement sexuel et assure la mise en relation entre personne en situation de handicap et accompagnant(e)s sexuel(le)s. Dans cette optique, l'association s'engage à:

- Les former, informer, accompagner, et à leur procurer écoute, conseils et protection juridique tout au long de leur activité;
- Offrir un soutien et un suivi réguliers à tout accompagnant(e) sexuel(le) ayant obtenu son agrément, à sa demande, et à lui proposer des formations continues;
- Faire une pré-sélection des demandes d'accompagnement sexuel et les mettre en relation avec les personnes en situation de handicap dans les meilleures conditions possibles;
- Garantir leur anonymat, s'il est souhaité;
- Associer activement les accompagnant(s) sexuel(le)s qui le désirent aux réflexions et concertations ayant trait à l'accompagnement sexuel (un groupe de discussions sera créé à cet effet);
- Proposer sa médiation en cas d'éventuel litige».

This Statute is available on the APPAS website: *https://www.appas-asso.fr/index.php/reglement/*.

[75] See their Statute at *https://www.appas-asso.fr/index.php/reglement/*.

[76] On this point see the following legal doctrine: P. MISSOFFE, *L'admission judiciaire d'une formation théorique à l'assistance sexuelle pour les personnes en situation de handicap*, in *La Revue des droits de l'homme*, 2015; J.B. THIERRY, *Libres propos sur l'assistance sexuelle au sujet de la liberté sexuelle des personnes handicapées*, in B. PY, N. DEFFAINS (eds.), *Le sexe et la norme*, Nancy, 2011, pp. 304-322.

[77] P. MISSOFFE, *L'admission judiciaire d'une formation théorique à l'assistance sexuelle pour les personnes en situation de handicap*, cit.

tionship of subordination between the professionals and the association[78].

3.2. Spain

In general, the Spanish approach towards prostitution is, on a national level, moderately abolitionist[79]. However, in recent years, when it comes to street prostitution, some Municipalities have adopted a more severe approach, closer to the neo-prohibitionist one[80].

On 30 August 2018, the first sex workers' trade union (*Organización de trabajadoras sexuales*, OTRA), was legally established. The Statute of this trade union was challenged in Court: the *Audencia Nacional* issued its decision on it on 19 November 2018. The tribunal affirmed that the Statute was to be considered void because «it includes activities that, for their nature, cannot be the object of a valid contract just like prostitution (…) which would imply the recognition of the activity of procuring as a legitimate one»[81]. In spite of this, in a very recent decision, the *Tribunal superior de justicia de Madrid* recognized a working relationship between a prostitute and a nightclub.

If prostitution in Spain lives in this grey area, sexual assistance is a widely debated topic addressed by local initiatives and associations which has not yet reached institutional politics.

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[78] This is what they affirm in their Statute: *https://www.appas-asso.fr/index.php/reglement/*.

[79] J.L. GUERENA, *La prostitución en la España contemporánea*, Madrid, 2003.

[80] E. BODELÓN GONZÁLEZ, P. ARCE BECERRA, *La reglamentación de la prostitución en los ayuntamientos: una técnica de ficticia seguridad ciudadana*, in *Revista Crítica Penal y Poder*, 15, 2018, pp. 71-89.

[81] Audiencia Nacional, Sentencia 174/2018, de 19 de noviembre de 2018. Available at *http://www.poderjudicial.es/search/openDocument/454dea8be780ba89*. Here is the quotation in the original language: «comprenda actividades que, por su naturaleza, no pueden ser objeto de un contrato de trabajo válido como es la prostitución por cuenta ajena, lo que implicaría, a su vez, reconocer como lícita la actividad del proxenetismo, que se encuentra tipificada en el Código Penal». For the complete decision see *https://www.laboral-social.com/sites/laboral-social.com/files/NSJ059150_0.pdf*.

3.2.1. The regulation of prostitution in Spain

In general, in the Spanish legal system prostitution is respected as a personal choice and tolerated if carried out autonomously, by a person over 18 years old with legal capacity, and in a voluntary and free way. However, if a person works as a prostitute for someone else, this is considered exploitation – in the form of induction, coercion, and in general in the case of a particular form of the vulnerability of the subject – and it is, as such, illegal[82].

The criminal provisions are aimed at protecting self-determination and free decision of the person from anyone who wants to limit these freedoms for economic reasons, while there is no criminalization of intermediation and similar conducts[83].

Before the intervention of *Decreto Ley 3 marzo 1956* and the reform of the Criminal Code in 1961 and 1963, widely inspired by internation-

[82] However according to jurisprudence from the Tribunal Social there is a distinction between prostitution and "actividad de alterne". The latter is a form of work in which the employee is paid by a club or a bar to entertain clients and drink with them, and any further exchanges between the client and this person are not in any manner controlled by third parties. This was considered a legitimate form of work. See for example: Sentencia Social nº 127/2016, Tribunal Superior de Justicia de Navarra, Sala de lo Social, Sección 1, Rec 1/2016 de 13 de Marzo de 2016; Sentencia Social Tribunal Superior de Justicia de Castilla y León, Sala de lo Social, Sección 1, Rec 318/2016 de 09 de Junio de 2016, Sentencia Social nº 5863/2014, Tribunal Superior de Justicia de Galicia, Sala de lo Social, Sección 1, Rec 1717/2013 de 25 de Noviembre de 2014, Sentencia Social nº 220/2015, Tribunal Superior de Justicia de Galicia, Sala de lo Social, Sección 1, Rec 2699/2013 de 16 de Enero de 2015. For some commentary by scholars see R. Fernández Villarino, *El alterne y la prostitución. La legítima asociación de sus protagonistas y los efectos de su consideración laboral*, in *Temas Laborales. Revista Andaluza de Trabajo y Bienestar Social*, 74, 2004; D. De La Villa De La Serna, *Relaciones laborales de hecho, nulidad del contrato de trabajo y actividades laborales de causa u objeto ilícitos o contrarios a las buenas costumbres. Comentario a la doctrina judicial sobre el alterne*, in *Revista General del Derecho del Trabajo y de la Seguridad Social Ius-Tel*, 6, 2004.

[83] See E. Orts Berenguer, C. Suárez Mira, *Los delitos contra la libertad e indemnidad sexuales*, Valencia, 2001; F. Alonso Pérez, *Delitos contra la libertad e indemnidad sexuales (perspectiva jurídica y criminológica)*, Madrid, 2001.

al law[84] , the main approach towards prostitution in Spain was regulationist.

After this, the legislative approach became abolitionist, where prostitution was to be considered a legitimate activity, but brothels were closed with a ban on their reopening (*Decreto Ley 3 marzo 1956*), and with the progressive introduction of offences such as procuring[85]. Conversely, the Criminal Code of 1995 abandoned the abolitionist approach by eliminating the number of related activities punishable under Spanish criminal law[86]. With an Organic Law[87] (*Ley Orgánica n. 11/1999*), after

[84] In particular by the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, approved by the United Nations General Assembly on 2 December 1949 (entered into force on 25 July 1951). In the preamble we can read: «Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community».

[85] The Criminal Code, articles 452 bis d) and 452 bis c): «"dueño, gerente, administrador o encargado del local, abierto o no al público, en el que se ejerza la prostitución u otra forma de corrupción, y toda persona que a sabiendas participe en su financiamiento"; y "a quien a sabiendas, sirviera a los mencionados fines en los referidos locales", así como a "los que dieren o tomaren en arriendo un edificio o local, o cualquier parte de los mismos, para explotar la prostitución o corrupción ajenas" (proxenetismo), incluyendo en este concepto amplio de proxenetismo "cualquier forma organizada o empresa sarial del ejercicio de la prostitución"; castigaba, también, a "quien viviere en todo o en parte a expensas de la persona o personas cuya prostitución o corrupción explote" (rufianismo). Sin embargo, no se prohíbe la prostitución ejercida de forma independiente por personas adultas si bien se consideraba "tráfico ilícito", por lo que no podía ser regulada ni por el derecho público ni por el derecho privado». For more see L. GARRIDO GUZMÁN, *La prostitución: estudio jurídico y criminológico*, Madrid, 1992, p. 64.

[86] Articles 187.1 and 188 decriminalize voluntary prostitution and procuring when there is no coercion. See J.C. CAROBONELL MATEU, *Delitos relativos a la prostitución en el proyecto de código penal de 1994*, in V. LATORRE LATORRE (ed.), *Mujer y derecho penal presente y futuro de la regulación penal de la mujer*, Valencia, 1995, pp. 83-97.

[87] The notion of Organic Law has been regulated by the Spanish Constitution (*Constitución Española*) since 1978. Organic laws are laws that, due to their particularly relevant object of regulation, are aggravated from the procedural point of view, to ensure a higher level of protection in these fields. According to article 81, the following areas must be disciplined by organic law: fundamental rights and freedoms, Statutes of

a few years, intimidation and vulnerability were introduced as elements capable of hindering the consent of the person engaged in prostitution[88]. The latest modification came into force with *Ley Orgánica 11/2003* 29 September, with the punishment of the activity of earning profit from the exploitation of prostitution, even with the consent of the person involved[89]. At the moment, the relevant criminal provisions are article 187 of the Spanish Criminal Code, which at §1 punishes anyone who forces an adult to engage or remain in prostitution by using violence, intimidation or deception, or by abusing a situation of superiority or of necessity or vulnerability of the victim[90]. The punishment is im-

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Autonomy (for autonomous communities in Spain) and electoral law. The procedure for the approval of an Organic Law requires that it must be passed by an absolute majority of members of the Congress. A similar process exists for any amendments or derogations to this kind of law. This institute was modelled on the French system, and in particular article 81 was inspired by article 66 of the French Constitution from 1958. For an analysis of the comparative profile of Organic law see L. PEGORARO, *Le leggi organiche. Profili comparatistici*, Padova, 1990.

[88] On this point it has been observed that this law equates the use of violence to taking advantage of a situation of vulnerability of the victim, although these circumstances are actually very different. E. ORTS BERENGUER, C. SUÁREZ MIRA, *Los delitos contra la libertad e indemnidad sexuales*, cit., p. 259.

[89] E. ORTS BERENGUER, C. SUÁREZ MIRA, *Los delitos contra la libertad e indemnidad sexuales*, cit.; F. ALONSO PÉREZ, *Delitos contra la libertad e indemnidad sexuales (perspectiva jurídica y criminológica)*, cit.

[90] Here is the text of the provision in Spanish:

«1. El que, empleando violencia, intimidación o engaño, o abusando de una situación de superioridad o de necesidad o vulnerabilidad de la víctima, determine a una persona mayor de edad a ejercer o a mantenerse en la prostitución, será castigado con las penas de prisión de dos a cinco años y multa de doce a veinticuatro meses.

Se impondrá la pena de prisión de dos a cuatro años y multa de doce a veinticuatro meses a quien se lucre explotando la prostitución de otra persona, aun con el consentimiento de la misma. En todo caso, se entenderá que hay explotación cuando concurra alguna de las siguientes circunstancias:

a) Que la víctima se encuentre en una situación de vulnerabilidad personal o económica.

b) Que se le impongan para su ejercicio condiciones gravosas, desproporcionadas o abusivas.

2. Se impondrán las penas previstas en los apartados anteriores en su mitad superior, en sus respectivos casos, cuando concurra alguna de las siguientes circunstancias:

prisonment from two to five years, and a fine. The same punishment is prescribed for anyone who, even with the person's consent, profits from exploitation of prostitution. The article continues by stating that:

> In any case, exploitation shall be deemed to occur when any of the following circumstances are present:
> (a) The victim is in a situation of personal or economic vulnerability.
> (b) The victim is subjected to burdensome, disproportionate or abusive conditions.

Article 188 punishes all activities related to the prostitution of minors, people with disability and vulnerable subjects[91].

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a) Cuando el culpable se hubiera prevalido de su condición de autoridad, agente de ésta o funcionario público. En este caso se aplicará, además, la pena de inhabilitación absoluta de seis a doce años.

b) Cuando el culpable perteneciere a una organización o grupo criminal que se dedicar a la realización de tales actividades.

c) Cuando el culpable hubiere puesto en peligro, de forma dolosa o por imprudencia grave, la vida o salud de la víctima.

3. Las penas señaladas se impondrán en sus respectivos casos sin perjuicio de las que correspondan por las agresiones o abusos sexuales cometidos sobre la persona prostituida».

[91] Article 188 of the Spanish Criminal Code in the original language:

«1. El que induzca, promueva, favorezca o facilite la prostitución de un menor de edad o una persona con discapacidad necesitada de especial protección, o se lucre con ello, o explote de algún otro modo a un menor o a una persona con discapacidad para estos fines, será castigado con las penas de prisión de dos a cinco años y multa de doce a veinticuatro meses. Si la víctima fuera menor de dieciséis años, se impondrá la pena de prisión de cuatro a ocho años y multa de doce a veinticuatro meses.

2. Si los hechos descritos en el apartado anterior se cometieran con violencia o intimidación, además de las penas de multa previstas, se impondrá la pena de prisión de cinco a diez años si la víctima es menor de dieciséis años, y la pena de prisión de cuatro a seis años en los demás casos.

3. Se impondrán las penas superiores en grado a las previstas en los apartados anteriores, en sus respectivos casos, cuando concurra alguna de las siguientes circunstancias:

a) Cuando la víctima sea especialmente vulnerable, por razón de su edad, enfermedad, discapacidad o situación.

3.2.2. The debate on sexual assistance in Spain

The public debate on sexual assistance in Spain is very lively, and it started in the city of Barcelona, with some specific projects around disability and sexuality[92]. In particular, activists from the Forum for Independent Living (*Foro de Vida Independiente y Divertad-FVID*)[93] and also the Crip-transfeminist Alliance (*Alianza tullido-tranfeministas*) are formulating a debate around crip pride[94], touching upon issues such as

b) Cuando, para la ejecución del delito, el responsable se haya prevalido de una relación de superioridad o parentesco, por ser ascendiente, descendiente o hermano, por naturaleza o adopción, o afines, con la víctima.

c) Cuando, para la ejecución del delito, el responsable se hubiera prevalido de su condición de autoridad, agente de ésta o funcionario público. En este caso se impondrá, además, una pena de inhabilitación absoluta de seis a doce años.

d) Cuando el culpable hubiere puesto en peligro, de forma dolosa o por imprudencia grave, la vida o salud de la víctima.

e) Cuando los hechos se hubieren cometido por la actuación conjunta de dos o más personas.

f) Cuando el culpable perteneciere a una organización o asociación, incluso de carácter transitorio, que se dedicare a la realización de tales actividades.

4. El que solicite, acepte u obtenga, a cambio de una remuneración o promesa, una relación sexual con una persona menor de edad o una persona con discapacidad necesitada de especial protección, será castigado con una pena de uno a cuatro años de prisión. Si el menor no hubiera cumplido dieciséis años de edad, se impondrá una pena de dos a seis años de prisión.

5. Las penas señaladas se impondrán en sus respectivos casos sin perjuicio de las que correspondan por las infracciones contra la libertad o indemnidad sexual cometidas sobre los menores y personas con discapacidad necesitadas de especial protección».

[92] For example, the documentary film "Yes, we fuck!" directed by Antonio Centeno and Raul Morena in 2015. The documentary tells the story of six different characters exploring the complex universe of sexuality and disability through different topics such as life as a couple, sexual assistance, prostitution and so on. See *https://www.huffingtonpost.es/2015/04/18/discapacidad-sexo-documental_n_7092272.html*.

A. GARCÍA-SANTESMASES, *Yes, we fuck! El grito de la alianza queer-crip*, in *Revista latino-americana de geografía y género*, 7, 2, 2016, pp. 226-242.

[93] See *http://forovidaindependiente.org*.

[94] A. GARCÍA-SANTESMASES, *Yes, we fuck! El grito de la alianza queer-crip*, cit.; P. GUZMÀN, R.L. PLATERO, *The critical intersections of disability and non-normative sexualities in Spain*, in *Annual Review of Critical Psychology, Gender and Sexuality*, 11, 2014, pp. 357-387.

sexual assistance, starting from their bodies and their own experience of sexuality. The work of these associations is taking on a perspective that is far from promoting assimilation, and on the contrary is questioning the norm, and trying to break stereotypes around sexuality and disability.

Despite the many associations and NGOs working on this topic and operating in this context, the issue has never managed to reach political institutions at any levels. Outside the institutional level, theoretical and practical proposals around sexual assistance are flourishing all around Spain, with a multitude of different approaches. This plurality of associations and models is probably what most distinguishes Spain from similar countries such as Italy or France. At the moment there are three main actors providing sexual assistance in Spain, and a plethora of other horizontal initiatives. *Tandem Team*[95] and *Sex Asistent*[96], for example, promote a model, defined as an "erotic connection model", which is probably the one with the biggest social and mediatic incidence[97]. According to this proposal, sexual assistance is the answer to the sexual needs of people with disabilities, given that without it many of them wouldn't be able to experience sexuality at all. For both these NGOs, sexual assistance is a service provided by people with a vocation and given for free to provide intimacy and connection. This model risks relegating people with disabilities to the role of undesirable subjects, condemning them to social exclusion and further stigmatization[98].

Other associations and movements, more connected to the philosophy of independent living, such as *asistenciasexual.org*[99] are promoting

[95] See the website of the association *Tandem Team* for information on their services: *https://www.tandemteambcn.com*.

[96] See the website of the association *Sex Asistent* for information on their services: *https://sexasistenteu.wixsite.com/home*.

[97] A. García-Santesmases, C. Branco de Castro, *Fantasmas y fantasías: controversias sobre la asistencia sexual para personas con diversidad funcional*, cit., p. 18.

[98] A. García-Santesmases, C. Branco de Castro, *Fantasmas y fantasías: controversias sobre la asistencia sexual para personas con diversidad funcional*, cit., p. 19.

[99] See *https://asistenciasexual.org*.

a different form of sexual assistance, called the "auto-erotic"[100] model. This model and its definition of sexual assistance were discussed in paragraph 1, but to sum up, according to its promoters, sexual assistance here is a form of personal assistance, and the exercise of the right of access to one's own body.

All these associations, with their different approaches, respond to a social need in a field where public policy is deficient, institutional politics are absent and families have been silenced for a long time[101].

3.3. Sweden

Sweden was the first country in Europe to adopt a neo-prohibitionist model in the regulation of prostitution (also known, indeed, as Nordic model), with the criminalization of the purchase of sexual services. The law, which passed in 1998, was surrounded by a debate dominated by a radical feminist perspective, according to which prostitution was a form of male dominance oppressing women[102]. If Sweden is known to be a "strong State" that doesn't repel a paternalistic approach, the legislation and the debate around prostitution has been (and still is) markedly anti-liberal[103]. The liberal side of the discussion around prostitution was totally absent, and no consideration was made for the possibility of pros-

[100] A. GARCÍA-SANTESMASES, C. BRANCO DE CASTRO, *Fantasmas y fantasías: controversias sobre la asistencia sexual para personas con diversidad funcional*, cit., p. 19.

[101] From the legal point of view see R. DE ASÍS, *¿Es la asistencia sexual un derecho?*, in *Revista Española de Discapacidad*, 5, 2, 2017, pp. 7-18; S. NAVARRO CASADO, *El asistente sexual para personas con discapacidad, ¿una figura alegal?*, in *Red CDPD*, 2014.

[102] One feminist jurist and thinker who broadly inspired the regulation of prostitution in Sweden is Catharine MacKinnon. She is a very prolific scholar. For an introduction to her view on prostitution see C.A. MACKINNON, *Prostitution and Civil Rights*, in *Michigan Journal of Gender & Law*, 1, 1993, pp. 13-31.

[103] For more about this see R. SUNSTEIN, R. CASS, H. RICHARD, H. THALER, *Libertarian Paternalism Is Not an Oxymoron*, in *The University of Chicago Law Review*, 70, 4, 2003, pp. 1159-1202. With a gender perspective see M.L. EDUARDS, *The Swedish gender model: Productivity, pragmatism and paternalism*, in *West European Politics*, 14, 3, 1991, pp. 166-181.

titution as a free choice of some women and, in general, of a person. This approach has deeply permeated public opinion and public discourse[104]: the social disapproval around prostitution consistently influences the debate around sexuality and disability. Indeed, compared to other countries, here we can see that the social debate and horizontal public initiatives struggle to emerge.

3.3.1. The regulation of prostitution in Sweden

In Sweden, prostitution itself has never been a criminal offence. It was, however, subject to regulation for reasons of public health and hygiene during the 19th and 20th centuries. Related activities, such as procuring, have been criminalized since 1864 with the Criminal Code[105].

In 1977 the Commission of public inquiry on sexual offence was created to study prostitution, amongst other issues. In 1993 another Commission was set up with the specific task of investigating the possibility of criminalizing prostitution[106]. This commission made this assumption in approaching its tasks:

> prostitution is incompatible with the individual's potential to develop as a human being, prostitution is a phenomenon that society finds despicable and prostitution is associated with so many negative consequences for society that it must be combated vigorously[107].

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[104] A. GOULD, *The Criminalisation of Buying Sex: The Politics of Prostitution in Sweden*, in *Journal of Social Politics*, 30, 3, 2001, pp. 437-456.

[105] The Criminal Code of 1864 also included other provisions on sexuality, such as minor offences contrary to ethical and sexual common morality such as incest, certain forms of sexual exploitation, "offences against nature", distribution of pornography and illicit gambling. See P. ÖSTERGREN, *Sweden*, in S.O. JAHNSEN, H. WAGENAAR (eds.), *Assessing Prostitution Policies in Europe*, cit., p. 169.

[106] M. WALTMAN, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, in *Michigan Journal of International Law*, 33, 1, 2011, pp. 133-146; J. LEVY, *Criminalising the Purchase of Sex: Lessons from Sweden*, London, 2014.

[107] The translation of this part of the document, Dir. 1993:31, is by C. WONG, *Prohibition in Swedish Law of the Purchase of Sexual Service*, in A. CADOPPI (ed.), *Prostituzione e diritto penale*, cit., p. 180.

The report of the Commission was published in 1995: its main outcome was the definition of the offence of sex trade, which was meant to punish both those who sell and those who buy sex. The law proposal was part of a broader reform package, aimed at contrasting gender-based violence. It was from here on that prostitution started being framed as a crime of violence against women. In this period, prostitution became central to the feminist discourse, and it was made clear that the issue was to be treated legally as a form of oppression of men over women, that is why the possibility of punishing prostitutes progressively lost popularity. For this reason, the criminalization of people who sell sexual services was repealed by the law: the Government introduced a Bill on the offence of buying sexual services, and the measure was then adopted in 1998.

Until 2005 the provision was detailed in the special Statute. It was transferred into the Criminal Code, chapter 11, section 6, dealing with sexual offences, with the amendment 2005:90[108]. It should also be mentioned that the maximum penalty was originally of six months' imprisonment and was raised to one year's imprisonment in 2011 with the reform 2011:57[109] (in Sweden the maximum is ten years).

Article 6.11 states as follows:

> A person who, otherwise than as previously provided in this Chapter [on Sexual Crimes], obtains a casual sexual relation in return for payment, shall be sentenced for purchase of a sexual service to a fine or imprisonment for at most six months. The provision of the first paragraph also applies if the payment was promised or given by another person.

As can be easily noticed the offence is formulated in a gender-neutral way. The punishable offence is a crime against the State, and not against the person, which is why people who perform prostitution are

[108] An English version of the Swedish Criminal Code translated by the Government is available at *https://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf*.

[109] C. WONG, *Prohibition in Swedish Law of the Purchase of Sexual Service*, cit., p. 186.

called in trial as witnesses, not as plaintiffs[110]. The main incriminated activity is obtaining sex in exchange for money; however, sexual intercourse must be interpreted in a very broad way, including different sexual practices. The act must happen for the offence to take place, while when it comes to the payment, the promise is already sufficient[111]. Attempts are punishable as well.

The second part of the article specifies that the activity is punished also when payment is given or promised by a third party. This part of the provision applies to anyone who is providing clients to someone carrying out prostitution as a business[112]. In this case, the person who is actually involved in the *liaison* will be considered the perpetrator, while the other person will be considered an instigator or an accomplice. The abovementioned provision is subsidiary, as the phrase «otherwise than as previously provided in this Chapter [on Sexual Crimes]» indicates. This means that this provision applies only when the conduct is not punishable under other provisions from the Criminal Code.

Another relevant norm around prostitution is the one regarding procuring. Article 12 states that:

> A person who promotes or improperly financially exploits a person's engagement in casual sexual relations in return for payment shall be sentenced for procuring to imprisonment for at most four years.
> If a person who, holding the right to the use of premises, has granted the right to use them to another, subsequently learns that the premises are wholly or to a substantial extent used for casual sexual relations in return for payment and omits to do what can reasonably be requested to terminate the granted right, he or she shall, if the activity continues or is resumed at the premises, be considered to have promoted the activity and shall be held criminally responsible in accordance with the first paragraph.

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[110] C. WONG, *Prohibition in Swedish Law of the Purchase of Sexual Service*, cit., p. 184. See also Y. SVANSTRÖM, *Prostitution in Sweden: debates and policies 1980-2004*, in N. WESTMORLAND, G. GANGOLI (eds.), *International Approaches to Prostitution: Law and Policy in Europe and Asia*, Bristol, 2006, pp. 73-74.

[111] C. WONG, *Prohibition in Swedish Law of the Purchase of Sexual Service*, cit., p. 184.

[112] C. WONG, *Prohibition in Swedish Law of the Purchase of Sexual Service*, cit., p. 186.

> If a crime provided for in the first or second paragraph is considered gross, imprisonment for at least two and at most eight years shall be imposed for gross procuring. In assessing whether the crime is gross, special consideration shall be given to whether the crime has concerned a large-scale activity, brought significant financial gain or involved ruthless exploitation of another person.

3.3.2. The debate on sexual assistance in Sweden

In Sweden the discussion on the topic of sexual assistance hasn't reached the parliamentary level, so the issue still remains unaddressed by institutional politics. However, unlike countries such as Spain, France and Italy, the public debate on sexual assistance in Sweden is not very lively. Law on prostitution and its side effects, such as a very strong stigma around the sex industry, turned the discussion about sexuality and disability into a taboo topic, impeding a constructive public debate on how sexual facilitation could be organized[113].

The practical situation is that sexual facilitation is managed (or better, unmanaged) in an inconsistent way, depending on the single persons involved[114]. Studies have shown that as far as people living in institutions in Sweden are concerned, the insecurity coming from the fact that the law on assistance does not mention sexual facilitation, results in different prerequisites for dealing with the topic of sexuality, depending on the manager's willingness to discuss sexual facilitation[115].

In spite of serious difficulties, even in engaging in a proper public debate on the topic, the Swedish Federation of Youth with Mobility Impairments (*Förbundet Unga Rörelsehindrade*) launched a project on sexuality, disability, and sexual assistance between 2009 and 2011,

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[113] V. KULICK, J. RYDSTROMM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit., p. 70.

[114] To explore the factual situation of sexual facilitation in Sweden from the point of view of users, assistants and managers see J. BAHNER, *Sexual citizenship and disability: Understanding sexual support in policy, practice and theory*, London, 2021, pp. 76-94.

[115] J. BAHNER, *The power of discretion and the discretion of power: personal assistants and sexual facilitation in disability services*, in *Vulnerable Groups & Inclusion*, 4, 1, 2013, pp. 206-273. Bahner also highlights managers' power advantage following their professional discretion. On this point, see in general M. LIPSKY, *Street-level bureaucracy. Dilemmas of the individual in public services*, New York, 2010.

which resulted in a book entitled "A secret known by many" (*Hemligheter kända av manga*)[116]. The project was aimed at challenging judgmental attitudes surrounding the topic. Its mission was to create a mentorship programme for service users and a handbook with methods. The adopted approach was an effort towards horizontal and collective policymaking[117]. In fact, in this book the possibility of including sexuality in the range of services provided by personal assistants is discussed from the user's point of view[118].

In general, the possibility of introducing sexual assistance and sexual facilitation could be framed within law-LSS, the Swedish law on support and services for people with functional impairments (*Lagen om stöd och service till vissa funktionshindrade 1993*) approved in 1993[119].

In 2011 and 2013 the Swedish National Board of Health and Welfare (*Socialstyrelsen*) commented, through their Social Committee, on certain cases of sexual facilitation. The Committee is an organism that meets every three months to solve questions relating to ethical dilemmas in the field of social services, by issuing official statements[120]. The questions that were addressed by the Committee are the following: 1. Is the personal assistant allowed to facilitate the purchase of sexual fa-

[116] Available, unfortunately in Swedish only, at *http://enhemlighet.se/wp-content/uploads/2012/03/Hemligheter-k%C3%A4nda-av-m%C3%A5nga.pdf*.

[117] In affirming this Bahner refers to the work of Colebach, who discusses the different approaches in policymaking. See H.K. COLEBATCH, *Policy*, Buckingham, 2009.

[118] J. BAHNER, *Sexual professionalism: for whom? The case of sexual facilitation in Swedish personal assistance services*, in *Disability & Society*, 30, 5, 2015, pp. 788-801.

[119] For some explanatory journal articles and commentary on Sweden's LSS and Social Integration: T. BOREN, M. GRANLUND, J. WILDER, A.K. AXELSSON, *An Exploration of the Relationship between Personal Assistant Type, Activities, and Participation for Children with PIMD*, in *Journal of Policy and Practice in Intellectual Disabilities*, 2016, pp. 50-60; U. CLEVNERT, L. JOHANSSON, *Personal Assistance in Sweden*, in *Journal of Aging & Social Policy*, 19, 3, 2007, pp. 65-80; B. LEWIN, L. WESTIN, L. LEWIN, *Needs and Ambitions in Swedish Disability Care*, in *Scandinavian Journal of Disability Research*, 10, 2008, pp. 237-257; O. PETTER ASKHEIM, H. BENGTSSON, B. RICHTER BJELKE, *Personal assistance in a Scandinavian context: similarities, differences and developmental traits*, in *Scandinavian Journal of Disability Research*, vol. 16, 2014, pp. 3-18.

[120] For more information see *https://www.socialstyrelsen.se/en/regulations-and-guidelines/national-guidelines/*.

vours? 2. Can the personal assistant help a disabled person to masturbate? On the first issue, the *Socialstyrelsen* observed that in Sweden the purchase of sexual services is illegal. Considering this, an assistant (who is, among other things, a publicly funded figure) should not be involved in any illegal act. The Committee evoked moral and ethical boundaries, to conclude that the personal assistant is not allowed to carry out such an action. In fact, in doing so, the assistant would «support the exploitation of another person's body»[121]. The Committee however also noticed that «there is a sliding scale for what the assistants can be asked to help with» and that «the assistant must make a valuation in every situation» (*Socialstyrelsen* 2011)[122]. As regards the second question, the Committee first observed that in the disability service law there is no mention of sexual needs. The Committee also mentioned that it is not clear whether these should be included among the basic needs addressed by the legislator, in spite of the fact that theoretically they could be considered as such. In this framework, helping a service user with masturbation would not fall under the criminal provision against the purchase of sexual favours, although ethical dilemmas persist. The Committee did not provide answers, but asked the following questions:

> Can sexual needs be equated to other basic needs? Can helping to masturbate be reduced to a technical issue detached from feelings between the one giving the help and the one receiving it? Can the assistants give such help in a professional manner? […] Even if the assistant only helps the service user to masturbate on their own, this help may be experienced as sensitive and private, which is why the assistant's volun-

[121] The quotation of this sentence, translated by Bahner from Swedish, can be found in her article: J. BAHNER, *Sexual professionalism: for whom? The case of sexual facilitation in Swedish personal assistance services*, cit., p. 798.

[122] THE NATIONAL BOARD OF HEALTH AND WELFARE (*Socialstyrelsen*), *Can the personal assistant facilitate purchase of sex? (Får den personliga assistenten underlätta sexköp?)*, Stockholm, 2011. Available online in Swedish at *http://www.socialstyrelsen.se/etikisocialtjansten/fardenpersonligaassistentenund*.

> tariness to help must be emphasized, discussed and assessed from case to case[123].

After highlighting the difficulties in dealing with sexual facilitation, the Committee did not offer concrete insights or suggestions.

What they affirmed is that, in this uncertain panorama, a distinction could be made. They all agreed on the fact that helping the service user to masturbate on their own could be included in «professionally executed care». Conversely, the majority of the members excluded the possibility of actively performing masturbation on the user as part of this range of activities. In this context, they reported one of the members having a different opinion about it. This member affirmed that as long as there is a fully voluntary agreement, «also the execution of a sexual act can be included in personnel's duties».

3.4. Pros and cons of the negative incorporation model

The dimension of sexuality and disability addressed through the service of sexual assistance does not emerge *per se* in the legal dimension of the systems belonging to the so-called "negative incorporation model". Sexual assistance becomes visible for these countries when it reaches a pathological dimension, and when it evolves into a criminally relevant fact. The abovementioned model, as sketched, has its own weak points and strong points.

Among the positive remarks it is important to mention that this model maintains a certain level of consistency in the legal system. All the relevant countries broadly define prostitution and sanction some related activities and make no exceptions for a service such as sexual assistance.

The other side of the coin is that, despite the strong imposition on the legislative level, the factual dimension evolves and moves on. In fact, in most of these countries, associations and NGOs have started providing this service. This implies the existence of an extra-legal or

[123] The translation from Swedish is courtesy of J. Bahner and can be found here: J. BAHNER, *Sexual professionalism: for whom? The case of sexual facilitation in Swedish personal assistance services*, cit., p. 800.

contra-legal dimension of sexual assistance, where abuses and discrimination might flourish.

4. The positive assimilation model: sexual assistance under the regulatory umbrella of sex work

The common characteristics of the countries belonging to the positive assimilation model (Germany, the Netherlands, Switzerland and Denmark) are the following:

- In all these countries the legislative provisions around prostitution changed between the 1990s and the early 2000s. They all adopted a neo-regulationist approach towards prostitution, where the self-determination and freedom of economic initiative of sex workers are protected. Sex work is recognized as labour on different levels in each and every one of these countries. Most of them also have some residual criminal law provisions around activities related to prostitution, mainly to contrast human trafficking or to condemn conduct aimed at hindering self-determination in the sexual sphere.
- In all these countries there is no specific legislation on sexual assistance. Denmark has a set of guidelines, which, however, are not legally binding. Sexual assistance usually falls under the legislative umbrella of sex work.
- Sexual assistance has been practiced since the early 1990s or 2000s and promoted by local associations. The theoretical approaches towards sexual assistance vary a lot, however sexual assistance does not violate any criminal law provision, and for its regulation can be legally assimilated to sex work.

4.1. Germany and the Netherlands

Germany and the Netherlands share a neo-regulationist approach towards prostitution. In both countries, the main legal provisions were approved at the beginning of the 21st century, as a result of the evolution of social customs and morality. The legislations mainly aim at protecting sex workers' self-determination, liberty and economic freedom.

In both countries administrative law is used in this field to delegate more specific regulation of sex work to municipalities. In Germany, however, criminal law is more pervasive compared to the Netherlands, especially after the last reform in 2016.

In both countries sexual assistance is provided by sex workers or by trained sexual assistants. In fact, some local organizations provide specific training courses and offer some services, explicitly catering to the needs of people with disabilities, however their work is always legally framed under the sex work umbrella.

4.1.1. The regulation of sex work in Germany

Since 2002, with the Law *Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten- Prostitutionsgesetz*, Germany has adopted a neo-regulationist approach towards prostitution[124]. Prostitution is seen as a legitimate activity when it follows certain rules concerning public order, public health, hygiene and the protection of minors. Local authorities can circumscribe city zones where prostitution is allowed or forbidden[125].

As already mentioned, the legislation on prostitution is primarily aimed at protecting sexual self-determination and economic freedom of sex workers. For this reason, since 2002, a contract having as its main object the exchange of sexual services for money, is considered legitimate. This implies that sex workers are protected against possible non-compliance from clients, with the possibility of taking them to Court. Moreover, the law provides the possibility of signing proper employment contracts, as well as of entering the social security system, receiving healthcare insurance and unemployment insurance[126]. Local municipalities are responsible for the implementation of administrative rules

[124] For an historical excursus of prostitution before 2002 see I. HUNECKE, *Germany*, in S.O. JAHNSEN, H. WAGENAAR (eds.), *Assessing Prostitution Policies in Europe*, cit., pp. 107-111.

[125] M. HELFER, *La prostituzione nell'ordinamento austriaco e in quello tedesco*, in A. CADOPPI (ed.), *Prostituzione e diritto penale*, cit., p. 99.

[126] M. HELFER, *La prostituzione nell'ordinamento austriaco e in quello tedesco*, cit., p. 100; I. HUNECKE, *Germany*, cit., pp. 107-122.

for the exercise of sex work[127]. Any breach of the administrative provisions implies a responsibility under §120 *Ordnungswidrigkeiten Gesetz* (OWiG). The second violation of these rules is disciplined by criminal law (§184e StGB, Unlawful prostitution) and can result in imprisonment (not exceeding six months) or a fine.

The resulting legislation on the criminal side is the following. First of all is §180a of the German Criminal Code, which punishes the exploitation of prostitutes. This provision is aimed at avoiding inhuman conditions for sex workers and is intended to contrast any situation which stands against sex workers' liberty and economic independence. The offence includes three different activities. Number (1) punishes whomsoever «on a commercial basis, maintains or manages an operation in which persons engage in prostitution and in which they are held in personal or financial dependency shall be liable to imprisonment not exceeding three years or a fine». The notion of dependence incorporates situations where the person is rendered incapable of making a free choice on the *an* and *quomodo* of their work. The latter refers to financial dependence as well, which takes place when a person's freedom to choose is compromised for economic reasons, for example, their work is not being paid, or they have many debts. Number (2) punishes: «1. Whomsoever provides a dwelling or on a commercial basis an abode or a residence to a person under eighteen years of age for the practice of prostitution», which is a provision aimed at protecting minors' sexual self-determination, «2. Or urges another person to whom he has furnished a dwelling for the practice of prostitution to engage in prostitution or exploits the person in that respect». This last part punishes the conduct of continuous instigation, for the purpose of exploiting the person, in a way that seriously compromises their personal and financial independence, to the point where it would be very hard for that person to exit prostitution autonomously.

At article §181a we find the provision named *controlling prostitution*, which states that whosoever «1. Exploits another person who engages in prostitution; 2. or for his own material benefit supervises another person's engagement in prostitution, determines the place, time,

[127] See I. HUNECKE, *Germany*, cit., pp. 111-113.

extent or other circumstances of the engagement in prostitution, or takes measures to prevent the person from giving up prostitution, and for that purpose maintains a general relationship with the person beyond a particular occasion, shall be liable to imprisonment from six months to five years». According to the judges, the provision at number 1 is applicable when the financial situation of the victim is decreased by more than 50% and the perpetrator is making money by taking advantage of the sex worker. At number 2 the conduct of someone acting for profit by controlling the exercise of prostitution in terms of places, time, and other fundamental circumstances of the activity is punished.

To conclude, §181 punishes the less serious activity of aiding and abetting prostitution by stating that:

> Whosoever impairs another person's personal or financial independence by promoting that person's engagement in prostitution, by procuring sexual relations on a commercial basis, and for that purpose maintains a general relationship with the person beyond a particular occasion, shall be liable to imprisonment not exceeding three years or a fine.

To be relevant, this conduct must be particularly oppressive and offensive for the personal and financial freedom of the sex worker, the relationship between the victim and the perpetrator must be enduring and continuative, and the activity must be one of real exploitation, not just living off another person's work.

Even if these criminal law provisions might appear to be in contrast with Law 2002 on prostitution, from the point of view of the law in action (how these provisions are applied), the apparatus remains consistent. The judges are always very cautious when applying these criminal law provisions: their whole view is influenced by the fact that the law surrounding prostitution in Germany is aimed at protecting sex workers' self-determination, rather than an abstract notion of public morality. That is why any activity promoting prostitution without violence, threat, or substantial abuse is never punished[128].

[128] M. HELFER, *La prostituzione nell'ordinamento austriaco e in quello tedesco*, cit., p. 109.

This whole legal system on prostitution was exacerbated by a recent reform. The *Bundesrat* intervened recently with two different laws: Law 21 of October 2016 (*Gesetz zur Regulierung der Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen*) about voluntary prostitution, and Law 11 of October 2016 against forced prostitution[129]. Dealing with free prostitution, the new regulation disciplines things such as the obligation for clients to use condoms, a compulsory registration for people practising prostitution (with the obligation of carrying a sex worker ID, commonly known as *Hurenausweis*) and new specific hygiene conditions for brothel managers[130].

As far as forced prostitution is concerned, more severe norms against human trafficking and sexual exploitation have been introduced at §232 and §232 StGB. The conducts of forced prostitution and forced labour are introduced in articles §232a and §232b. These offences cover a broad spectrum of activities because they do not require the typical elements of trafficking, according to international law, such as recruiting and transportation. Moreover, to be in line with the European Anti-Trafficking Directive 2011[131], in particular with article 18 co. 4 at §232 co. 6, the client of a forced prostitute is punished. It has been observed that, concretely, it will be very difficult to apply this provision, given that the assessments to be carried out are complicated. For example,

[129] For a better understanding of this reform see the report by the Federal Government: Federal Ministry of Family Affairs, Senior Citizens, *Women and Youth, Report on the Impact of the Act Regulating the Legal Situation of Prostitute*, Berlin, 2007 available in English at *https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf.*

[130] The association Doña Carmen, together with 15 brothel operators and clients filed a constitutional complaint with the Federal Constitutional Court in June 2017 against the Prostitute Protection Act. The Federal Constitutional Court rejected the complaint. The Order was directed, in particular, against the obligation of registration and notification which was suspected to be against the Constitution. Here it was also affirmed that the requirement on condoms would constitute an inadmissible interference with the intimate personal sphere.

[131] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA: *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF.*

there will be the need to ensure the client was aware that the person had been forced into prostitution[132].

4.1.2. The regulation of sex work in the Netherlands

The approach towards sex work is known for its social pragmatism[133]. The law on public morality from 1911 prescribed criminal punishment at articles 250-bis and 250-ter for a person who «intentionally brings about or promotes, by profession or custom, the commission of indecencies by others with third parties», and the offences of human trafficking and procuring[134]. Since 1980, this law has barely been applied, because of a change in social attitudes and customs: the exercise of sex work by consenting adults started to be considered an expression of self-determination, even by second-wave feminists. At the same time, due to migrations, the demographics of sex workers in the country started to change with increasingly high levels of human trafficking.

The reform came about from the joint agreement between political forces to increase the fight against human trafficking, punish prosecutors and protect victims[135]. Consequently, legislators decided to decriminalize prostitution in order to contrast criminality and place it within the framework of the Dutch administrative welfare regulatory system. The *Act Lifting the Ban on Brothels*[136] came into force on 1 October 2000 (Act of 28 October 1999 to Revise the Criminal Code, some other Codes and some other Acts, Stb. 1999, 464). The reform had six main goals: (i) Regularizing voluntary prostitution, with a system of licenses and authorizations based at the municipal level; (ii) Protecting minors; (iii) Fighting against forced prostitution; (iv) Improving working conditions of sex workers;

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[132] F. PARISI, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutorio*, cit., pp. 60-63.

[133] S. ALTINK, I. VAN LIEMPT, M. WIJERS, *The Netherlands*, in S.O. JAHNSEN, H. WAGENAAR (eds.), *Assessing Prostitution Policies in Europe*, cit., pp. 62-77.

[134] S. ALTINK, I. VAN LIEMPT, M. WIJERS, *The Netherlands*, cit., p. 67.

[135] S. ALTINK, I. VAN LIEMPT, M. WIJERS, *The Netherlands*, cit., p. 69.

[136] For a commentary on the reform see J.A.E. VERVAELE, *La prostituzione nell'ordinamento (penale) olandese; una depenalizzazione repressiva?*, in A. CADOPPI (ed.), *Prostituzione e diritto penale*, cit., pp. 160-174.

(v) Separating criminality from sex work; (vi) Diminishing illegal prostitution[137].

The reform decriminalized prostitution and made it subject to administrative and labour law, respecting the right of self-determination and autonomy of sex workers[138]. Nonetheless, sex work is still considered a somewhat peculiar form of work, capable of affecting physical and mental integrity[139]. For this reason, legislators gave local authorities the power to regulate prostitution. Since the 2000s, city councils have adopted laws regulating prostitution in their municipalities[140].

Since 2008, the Dutch government has attempted to pass a new law to regulate prostitution and suppress abuse in the sex industry. The *Regulation of Prostitution and Combatting Abuses in the Sex Industry* Bill (Regulation of Prostitution Bill), presented in 2009, was intended to introduce a mandatory registration system for sex workers at a national level (like the German one) and raise the minimum age to work as a prostitute from 18 to 21 years. This law also aimed at introducing punishment for clients of underaged prostitutes and a system of licences for sex businesses (such as brothels). This Bill was however strongly criticized and was struck down by the Senate. The Senate proposed an

[137] C. POST, J.G. BROUWER, M.L. VOLS, *Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?*, in *European Journal of Criminal Policy Res*, 25, 2019, pp. 113-114.

[138] H. WAGENAAR, S.A. HELGA AMESBERGER, *Final Report of the International Comparative Study of Prostitution Policy: Austria and the Netherlands*, Den Haag, 2013, pp. 49-62; M. VAN DOORNINCK, M. WIJERS, *They Get What They Deserve: Labour Rights for Sex Workers*, in D. CANTER, M. IOANNOU, D. YOUNGS (eds.), *Safer Sex in the City: The Experience and Management of Street Prostitution*, Farnham, 2009, pp. 101-116; J. PITCHER, M. WIJERS, *The Impact of Different Regulatory Models on the Labour Conditions, Safety and Welfare of Indoor-Based Sex Workers*, in *Criminology and Criminal Justice*, 14(5), 2014, pp. 549-564.

[139] Kamerstukken II 1997/98, 25, 437, 5; Kamerstukken II 1998/99, 25, 437, 189b.

[140] Unique, in this sense, is the experience of the red light district in Amsterdam: M.B. AALBERS, M. SABAT, *Re-making a Landscape of Prostitution: The Amsterdam Red Light District*, in *City: Analysis of Urban Trends, Culture, Theory, Policy Action*, 16, 2012, pp. 112-128.

amended version in 2014, which however was never discussed and approved[141].

4.1.3. Sexual assistance in Germany and the Netherlands

Both Germany and the Netherlands are pioneering countries in the field of sexual assistance. One of the most famous sexual assistants in Europe, Nina De Vries, was indeed trained in the Netherlands – her country of origin – in the early 1990s and soon moved to Germany and started to offer services of erotic/sensual contact to people with disabilities[142].

In Germany, Nina de Vries and the Institute for the Self-determination of the Disabled (*ISSB*, *Institut zur Selbst-Bestimmung Behinderter*) have been working together since 1996. In 2002, they organized the first training course for sexual assistants in Germany, with the goal of creating a set of common rules and improving the quality of the service in this field for people with disabilities.

The association currently works both in the field of sexual assistance and on sexual counselling, holding regular training courses for new operators and offering several services. All these initiatives, fully in compliance with the guidelines of the association, are rooted in the philosophy of independent living and aimed at the empowerment of users[143]. Even if the ISSB clearly marks the differences between its service and sex work, from a legal point of view, sexual assistance is disciplined by

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[141] C. POST, J.G. BROUWER, M.L. VOLS, *Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?*, cit., p. 114.

[142] According to Nina De Vries: «Sexual companions are women and men who – based on their own healthy and conscious motivation – help people with physical, emotional or mental impairments/disabilities experience their sexuality and make this their profession. They enable people who need a gentle, creative approach in the field of sexuality due to their situation (e.g. illness, accident, life history), giving them an intimate, sensual and erotic experience as well as a positive body feeling. […] They regard people with disabilities as equals». This definition is an extract from a lecture Nina de Vries gave in September 2006 in Australia. The entire transcript in German can be found at *https://web.archive.org/web/20160913235235/http://www.integra.at/files/Sexualbegleitung.pdf*.

[143] See their website: *http://www.isbbtrebel.de*.

the law on prostitution. Specifically, the *Prostitute Protection Act* 2017 frames sexual assistance under the broader umbrella of sexual services disciplined by law. In this sense, sexual assistants should follow the same rules as sex workers, and – as such – should be considered obliged to undergo registration and an assessment, provided by law.

In the Netherlands, one of the first organizations involved in the field of sexuality and disability was founded in 1997 by people with disabilities themselves[144]. This organization is formed by various professionals, including some specialist care workers who provide sexual care and support to users. According to this organization, their work is not to be qualified as sex work, rather as a form of social work with a specific focus on the sphere of sexuality. Another organization, *Fleks-Zorg*, offers services more related to the sex work industry. In the Netherlands people with disabilities who are supported financially can freely decide to spend their budget on sexuality-related services. It was estimated that this sum of money covers approximately 10-15 visits per year[145].

4.2. Switzerland

Switzerland has a neo-regulationist approach towards sex work: the legislation is very brief on a federal level, while each canton and municipality can adopt more specific rules[146]. Today, eight cantons out of 25 have a specific regulation on prostitution.

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[144] For an overview of the initiatives and associations involved in this field see J. BAHNER, *Sexual citizenship and disability: Understanding sexual support in policy, practice and theory*, cit., pp. 140-163.

[145] L. COULDRICK, *Disability sexual health services in the Netherlands*, SH&DA meeting, 12 October 2009, available at *http://shada.org.uk/sites/default/files/Netherlands.pdf*.

[146] This setup is in line with the general system in Switzerland. This country indeed is known for its specific form of federalism, which was introduced in 1984. This form of Government is strictly linked to the characteristics of this territory, which is highly diverse in terms of national language but also geography: federalism grants the coexistence of all these differences inside a single entity, granting social cohesion. It is in the Federal Constitution of 1848 that the powers of the Confederation and cantons are established. The main principle in this field is the principle of subsidiarity according to

The public debate on sexual assistance started in the 2000s. During these years two main associations in German-speaking Switzerland and French-speaking Switzerland started projects on sexual assistance, providing training courses inspired by the experience of other European countries, such as Germany and the Netherlands. Sexual assistance, in spite of the many approaches existing between associations and sexual assistants, is by law assimilated to sex work and – as such – it is subject to general provisions on prostitution.

4.2.1. The regulation on sex work in Switzerland

Back in 1889, with the *Revue pénale Suisse*, most of the cities and cantons generally prohibited prostitution and brothels, except for the biggest cities or cantons where these were authorized (for example Bern, Zurich and Geneva)[147]. From 1925 to 1942, the activity of prostitution was criminalized nationwide, with the prohibition of opening brothels and practising prostitution in the public sphere. With the new Penal Code of 1942, prostitution ceased to be an illicit activity, while the acts of procurement, active solicitation and homosexual prostitution

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which nothing that can be done at a lower political level should be done at a higher level. For this reason, the Confederation is competent for issues where uniform regulation is required, for example the fields of defence, customs and monetary matters, foreign and security policy. According to the Federal Constitution cantons have competence on budget, political system and taxation and each canton has its own Constitution, acts, parliaments, government and tribunals. The tasks that are not expressly allocated to the Confederation are the responsibility of the cantons, while in some areas the competence is shared. The smallest political entity in Switzerland is the commune or municipality (there are about 2,300 of them), some of which (cities and larger towns) have their own Parliament. Municipalities are responsible for tasks assigned by Cantons and the Confederation, but also have some specific competences by law such as education and welfare, energy supplies and infrastructures. For an overview of the federal system in Switzerland see this Italian literature: V. GUELI, *La costituzione federale svizzera*, Firenze, 1947; G. GUIGLIA, B. KNAPP, *L'organizzazione dei poteri e il federalismo in Svizzera secondo la nuova Costituzione*, Torino, 2000; B. KNAPP, *L'ordinamento federale svizzero*, Torino, 1994; A. KÖLZ, *Le origini della Costituzione svizzera*, Locarno, 1990.

[147] M. CHIMIENTI, G. BUGNON, *Switzerland*, in S.O. JAHNSEN, H. WAGENAAR (eds.), *Assessing Prostitution Policies in Europe*, cit., pp. 136-151.

were included among criminal offences[148]. In 1992 these provisions, expressions of an enduring repressive legal framework on prostitution, were repealed. Nevertheless, some cantons still have legislation against active soliciting[149].

As can be deduced from the remaining legislation, prostitution is considered a legitimate activity, an expression of self-determination and economic freedom, covered by article 27 of the Swiss Constitution. However, anyone who is willing to practise prostitution legally must respect the regulation by cantons and municipalities. The activity of prostitution is subject to taxation and is covered by social insurance, but, according to the Federal Supreme Court of Switzerland, a contract of prostitution is still against morality[150] (atff 11 II 195).

The remaining criminal law provisions around prostitution are mainly article 195 cps, article 199 cps and article 182 cps[151]. The last one is only partially applicable as it punishes human trafficking (so it concerns forced prostitution). The other offences are aimed at punishing any activity interfering with the self-determination of a sex worker by forcing them or limiting their freedom in choosing nature, timing and location of their work.

According to article 195 cps, entitled *Exploitation of sexual acts / encouraging prostitution*, any person who:

> a. induces a minor into prostitution or encourages a minor in his or her prostitution with the intention of securing a financial advantage, b. induces a person into prostitution by exploiting his or her dependence or a financial advantage, c. restricts the freedom to act of a prostitute by supervising him or her in the course of his or her activities or by exercising control over the location, time, volume or other aspects of his or her work as a prostitute or, d. makes a person remain a prostitute against his

[148] M. CHIMIENTI, G. BUGNON, *Switzerland*, cit., p. 136.

[149] JAAC (Jurisprudence des autorités administratives de la Confédération) (2014) Exercies de la prostitution: Aspects contractuels, nécessité d'harmoniser les règles, mesures envisageables et compétence de réglementation.

[150] See the decision: ATFF 11// 297ss, JT 1986/ 449 ff.

[151] An English version of the Swiss Criminal Code is available at *https://www.admin.ch/opc/en/classified-compilation/19370083/201907010000/311.0.pdf*.

or her will, is liable to a custodial sentence not exceeding ten years or to a monetary penalty[152].

As already stated, the legal good protected by the norm is the right to self-determination in the sexual sphere and the autonomy of the sex worker in the exercise of their activity.

First of all, we should specify that the definition of prostitution given by the Federal Supreme Court encompasses the conduct of «offering or making available one's body, occasionally or professionally, for someone's sexual pleasure in exchange for money or other economic advantages»[153], regardless of the heterosexual or homosexual nature of the sexual act in question.

In general, we can observe that the punishable activities are mainly six: three related to the act of encouraging prostitution and three around the exploitation of prostitution.

Encouraging prostitution means initiating a person to this activity or convincing them to start again after quitting.

This offence can take place in many ways: simply through suggestions or also by pressuring the person. In any case the act must be within a certain scale of intensity: simple incitement is not sufficient as – according to the judges – the act must be more serious than the one considered in the offence of instigation to commit a crime under 24 cps. The act of organizing location, rooms, clients and arranging a schedule can fall under this article when it implies a deprivation of the freedom of choice for the worker[154].

[152] Here the text in French, one of the official languages of Switzerland, of article 195 cps 3. Exploitation de l'activité sexuelle/Encouragement à la prostitution: «Est puni d'une peine privative de liberté de dix ans au plus ou d'une peine pécuniaire quiconque: a. pousse un mineur à la prostitution ou favorise la prostitution de celui-ci dans le but d'en tirer un avantage patrimonial; b. pousse autrui à se prostituer en profitant d'un rapport de dépendance ou dans le but d'en tirer un avantage patrimonial; c. porte atteinte à la liberté d'action d'une personne qui se prostitue en la surveillant dans ses activités ou en lui en imposant l'endroit, l'heure, la fréquence ou d'autres conditions».

[153] See the decision: DTF 129 IV 75.

[154] D. ITEM, *La prostituzione nell'ordinamento svizzero*, in A. CADOPPI (ed.), *Prostituzione e diritto penale*, cit., p. 118.

In particular, the three punishable activities around encouragement are:

I) Encouragement of a minor: this act involves simply encouraging the minor, and is aimed at protecting self-determination of vulnerable subjects when faced with a more mature person or a person in a higher position;

II) Encouragement by taking advantage of a relationship of dependence. This act implies a state of need or despair, deriving from a relationship of employment, or a condition of social disease or drug addiction. One of the possible cases can be that of a migrant sex worker, without income and resources. The notion of *relationship of dependence* is open and is subject to the discretion of the judge;

III) Encouraging, to gain a financial advantage. This act is heavily based on the personal motive of the agent[155].

The other three activities, pertaining to exploitation, involve and protect people who are already in the sex work industry.

First of all, criminal law forbids surveillance over sex workers by punishing the agent who exercises pressure and a form of control over the sex worker.

Simple protection is not punishable under this article: for example, the mere fact of offering accommodation to a sex worker falls outside the scope of the provisions.

The act of imposing a location, a duration, a schedule or any other circumstance regarding the activity is punished[156].

According to the judges, this act implies the same intensity that is required in the case of general coercion, punished at article 181 cps. This act must be realized with adequate means: such as violence, blackmailing, or taking advantage of a relationship of dependence (e.g. economic dependence).

The other punishable act is keeping a person in the prostitution industry. In this case, it is sufficient that the sex worker is not willing to stay under the conditions imposed by the agent.

[155] D. ITEM, *La prostituzione nell'ordinamento svizzero*, cit., p. 116.

[156] D. ITEM, *La prostituzione nell'ordinamento svizzero*, cit., p. 118.

Article 199 cps[157] is titled *Unauthorized practice of prostitution* and states as follows:

> Any person who violates the cantonal regulations on the permitted locations or times at which prostitution may be practiced or the manner in which it may be practiced, or on the prevention of related public nuisance is liable to a fine.

This article is aimed at protecting the financial freedom of the person involved in prostitution and defends aspects of public security by sanctioning the violation of administrative provisions. At the same time, by sanctioning the violation of administrative provisions, this article reaffirms the competence of cantons and municipalities in the regulation of prostitution. In fact, on this matter the legal system in Switzerland is organized into three levels: 1) Federal law provisions; 2) Canton law; 3) Municipal regulations[158].

The idea behind this system is that cantons and municipalities are delegated because of their better understanding of the dynamics and reality of each territory.

The punishment for the violation of administrative provisions is a fine.

4.2.2. Sexual assistance in Switzerland

Thanks to the experience of the Netherlands, Denmark and Germany, sexual assistance reached Switzerland in the early 2000s[159]. The

[157] Here is the text in French, one of the official languages of Switzerland, of article 199 cps. Exercice illicite de la prostitution: «Celui qui aura enfreint les dispositions cantonales réglementant les lieux, heures et modes de l'exercice de la prostitution et celles destinées à lutter contre ses manifestations secondaires fâcheuses, sera puni d'une amende».

[158] M. CHIMIENTI, G. BUGNON, *Switzerland*, cit., pp. 140-141.

[159] J. AREGGER, *L'assistance sexuelle une réelle amélioration de la qualité de vie des personnes vivant avec un handicap, âgées ou souffrant de troubles sexuels, grâce à une prestation de travail du sexe – est-ce socialement acceptable et intégrable?*, Genève, 2013, p. 20. Available at *https://www.unige.ch/formcont/files/9715/1326/9622/CAS_sexologieclinique_memoire_assistance_sexuelle_Aregger.pdf.*

first promoter of this initiative was Switzerland's largest disability association, *Pro Infirmis*[160], in the German-speaking area. In 2003 they launched the first Swiss training course on sexual assistance, with more than 300 people registering. The project was actually carried out in 2004 by the association *FaBS Fachstelle für Behinderung und Sexualität*, led by Dr. Aïha Zemp, psychologist, psychotherapist, researcher and a person with disability herself. This first training course was led mainly by Nina de Vries, from Germany, and was conducted over six months and 18 days. It was aimed at men and women from all professional backgrounds, preferably from professions related to the body (e.g. body therapists)[161]. At the end of the summer of 2004, the first sexual assistants in Switzerland, six women and four men, completed their training. In the following years *FaBs* organized other courses, however, the association was shut down in 2010 for financial reasons.

At the same time, however, a similar project was carried out in 2008-2009 in French-speaking Switzerland by the association *Sexualité et handicaps pluriels*[162] (SEHP), which trained ten sexual assistants. The training was widely inspired by the experience of the Swiss-German training in terms of content, philosophy, structure, and other key elements.

Both these associations have recruited and trained sex workers[163], and, according to the heads of the two organizations, approximately 30 people have been trained, of whom 15-20 are currently working as sexual assistants in Switzerland[164].

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[160] See the website of the association here: *https://www.proinfirmis.ch/it.html*.

[161] J. AREGGER, *L'assistance sexuelle une réelle amélioration de la qualité de vie des personnes vivant avec un handicap, âgées ou souffrant de troubles sexuels, grâce à une prestation de travail du sexe – est-ce socialement acceptable et intégrable?*, cit., p. 15.

[162] See the website of the association: *https://sehp.ch/association/*.

[163] C. AGTHE DISERENS, *La formation en assistance sexuelle: toute innovation implique des risques!*, in *Reliance*, XXIX, 3, 2008, pp. 46-52; S. KESSLER, *Mais qui sont-ils? La sélection des candidats qui se destinent à l'assistance sexuelle*, in *Reliance*, XXIX, 3, 2008, pp. 53-57.

[164] Most of them are middle-class, aged between 27 and 65. About half of them are men. See C. AGTHE DISERENS, *La formation en assistance sexuelle: toute innovation implique des risques!*, cit., p. 48.

From a legal point of view, sexual assistance does not face any obstacles: anyone over 18 years of age, working independently without pressure from an external agent, can be a sexual assistant. Sexual assistance, indeed, as a form of activity consisting in providing sexual services for remuneration, is considered prostitution. For this reason, it falls under federal law, cantonal law, and municipal regulations on sex work. The activities of the associations as well, such as recruiting people and organizing training courses on sex-related services, are to be considered legal, and subject to the abovementioned laws. In French-speaking Switzerland, aspiring sexual assistants are required by the competent associations to also maintain another profession so that this activity would not be their main source of income[165].

With regard to sexual assistance for people with psycho-social impairments, a request must come from institutional third parties or parents. In this case, the assistant prepares a legal agreement to ensure that the family or legal guardian understands the nature of the service. Later they acquire a legal document, registering that receiving sexual assistance is a desire and a request of the beneficiary[166].

While the legal framework is very clear, inside it many different ideas of sexual assistance coexist. Some of them, in fact, tend to distinguish their professional figure from that of prostitutes, distancing themselves from the sex industry in a way which might be stigmatizing for sex workers[167]. For others, sexual assistance is a form of therapy within

[165] G. GAROFALO GEYMONAT, P.G. MACIOTI, *Assistants in Switzerland*, in *Sociological Research Online*, 21, 4, 2016, p. 10. While the majority of assistants work in a body-related profession (masseur, physiotherapist, nurse, etc.), others have various activities (musician, translator, psychotherapist, secretary). Some sex workers are – or have been – sex workers.

[166] J. AREGGER, *L'assistance sexuelle une réelle amélioration de la qualité de vie des personnes vivant avec un handicap, âgées ou souffrant de troubles sexuels, grâce à une prestation de travail du sexe – est-ce socialement acceptable et intégrable?*, cit., p. 76.

[167] According to Adrien, it would therefore be training that would make the difference by allowing an "alternative approach" based on respect for the other, and in particular for their rhythm, this ideal being the opposite of a caricatural representation of prostitution, which would be characterized by requirements of temporal and financial

a medicalized framework[168], and as such should be covered – according to them – by health insurance. Conversely, for others it would be very dangerous to talk about a therapeutic aim.

4.3. Denmark

Denmark is the only Nordic country which did not adopt a neo-prohibitionist approach towards prostitution. The decriminalization of the activity of prostitution took place in 1999, while the Criminal Code still criminalizes some related activities. Moreover, in recent years, the law punishing human trafficking has become more severe to conform to international standards on the topic.

On the matter of sexual assistance, Denmark has developed guidelines for social operators and disability workers on sexuality and disability (Chapter III), specifically for people living in state institutions. In general, sexual assistance is considered a form of sex work, and as such it follows the rules on prostitution.

4.3.1. The regulation on sex work in Denmark

In Denmark the regime for prostitution is neo-regulationist. Before the 1999 decriminalization, the legal understanding of prostitution was very inconsistent.

From the middle of the 19th century, a person (a woman) who sold sex had to register as a *public woman* and undergo weekly medical tests, moreover brothels were located in predetermined part of the cities. From 1895 that compulsory registration of women practicing prostitution was eliminated[169]. The Criminal Code of 1930 punished *Va-*

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profitability. See L. NAYAK, *Une logique de promotion de la «santé sexuelle». L'assistance sexuelle en Suisse*, in *Ethnologie française*, 43, 3, 2013, pp. 461-468.

[168] The medicalization of sexual assistance would thus be part of the more general movement to medicalize social assistance: P. AÏACH, *Les voies de la médicalisation*, in P. AÏACH, D. DELANOË (eds.), *L'Ère de la médicalisation. Ecce homo sanitas*, Paris, 1998, pp. 15-36.

[169] J. BJØNNESS, M. SPANGER, *Denmark*, in S.O. JAHNSEN, H. WAGENAAR (eds.), *Assessing Prostitution Policies in Europe*, cit., pp. 152-169.

grancy at §199. Vagrancy was defined, from 1967, as gaming, fornication or being supported by fornication.

In 1999, while Sweden was issuing a law to punish anyone purchasing sexual services, a law to decriminalize the trading of sexual services was being approved in Denmark[170]. With this reform, articles §222 and §223 on public decency ceased to be responsible for the criminalization of prostitution. Since then, the act of trading sex has been considered a private matter between the seller and the buyer, excepting some related conducts which are relevant for criminal law. The purchase of sexual services is legal when the person selling is over 18 years old. Prostitution, however, is not considered a profession by law for the purposes of membership of a trade union[171]. Nonetheless, it is legal to have an income from sex work, as long as the person is registered and pays taxes.

Currently the Danish Criminal Code[172] punishes the activity of pimping. The latter is defined as the activity of a person who professionally, or for profit, encourages, promotes, or facilitates the practice of another person's prostitution. The relevant articles are §228 and §229 of the Criminal Code. The first one states as follows:

> (1) Any person who 1) induces another to seek a profit through sexual immorality with others; or 2) for the purpose of gain, induces another to indulge in sexual immorality with others or prevents another who engages in sexual immorality as a profession from giving it up; or 3) keeps a brothel; -shall be guilty of procuring and liable to imprisonment for any term not exceeding four years.
> (2) The same penalty shall apply to any person who incites or helps a person under the age of twenty-one (21) to engage in sexual immorality as a profession, or to any person who abets some other person to leave the Kingdom in order that the latter shall engage in sexual immorality as a profession abroad or shall be used for such immorality, where that

[170] M.L. SKILBREI, C. HOLMSTRÖM, *Trafficking, Prostitution and the Sex Industry: The Nordic Legal Model and Prostitution Policy in the Nordic Region: Ambiguous Sympathies*, London, 2016.

[171] J. BJØNNESS, M. SPANGER, *Denmark*, cit., p. 160.

[172] The English version of the Danish Criminal Code is available at *https://www.legislationline.org/download/action/download/id/6372/file/Denmark_Criminal_Code_am2005_en.pdf*.

person is under the age of twenty-one (21) or is at the time ignorant of the purpose.

Article §229 punishes «(1) Any person who, for the purpose of gain or in frequently repeated cases, promotes sexual immorality by acting as an intermediary, or who derives profit from the activities of any person engaging in sexual immorality as a profession» with imprisonment for maximum three years and «Any person who lets a room in a hotel or an inn for the carrying out of prostitution as a profession» with simple detention or imprisonment for maximum one year.

With an amendment of 2002, the offence of human trafficking was introduced into the Criminal Code system at article §262a, directly deriving from the *UN Palermo Protocol*[173] and art. 2 of EU policies against human trafficking[174]. It should be noted that judges have often applied this article together with §228, for the cases of human trafficking related to sexual exploitation[175].

4.3.2. Sexual assistance in Denmark

Sexual assistance in Denmark is a vast phenomenon that involves different practices and professionals. In Denmark «the purchase of sexual services is only a tiny fragment of the vast landscape that emerges when one begins to examine the sexual lives and erotic desire of people

[173] The Palermo Protocols are a set of UN Treaties to combat international organized crime. In particular the one in question is to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. It was adopted in 2000 and entered into force on 25 December 2003. On the Palermo Protocol see J. DOEZEMA, *Who gets to choose? Coercion, consent, and the UN Trafficking Protocol*, in *Gender & Development*, 10(1), 2002, pp. 20-27; C.S. BRUSCA, *Palermo Protocol: The First Ten Years after Adoption*, in *Global Security Studies*, 2(3), 2011; L.L. SHOAPS, *Room for improvement: Palermo protocol and the trafficking victims protection act*, in *Lewis & Clark Law Review*, 17, 2013, p. 931; J.G. RAYMOND, *The new UN trafficking protocol*, in *Women's studies international forum*, 25, 5, 2002, pp. 491-502.

[174] For a critical perspective on EU anti-trafficking policy see S.H. KRIEG, *Trafficking in human beings: The EU approach between border control, law enforcement and human rights*, in *European Law Journal*, 15, 6, 2009, pp. 775-790.

[175] J. BJØNNESS, M. SPANGER, *Denmark*, cit., p. 164.

with disability»[176]. Various services are provided: counselling, education, assistance during intercourse with a partner, assistance with masturbation, with the possibility of involving a sex worker. All these different dimensions are encompassed in the guidelines on *Sexuality regardless of Handicap* (see chapter 3) regarding the public sector and people living in public accommodations. In general, however, sexual assistants are treated either as social workers – when their job does not consist in having any form of sexual intercourse with the assisted person – or are assimilated to sex workers, and subject to the abovementioned regulation.

The *Danish Association for Sexuality Advisors*[177], founded in 1998, is responsible for training the professional figures of sexual advisors in Denmark and consists of approximately 200 trained members. The association offers training courses for staff members (for example on disability and sexual abuse or responsibilities and liabilities in the field of sexuality and disability), the drafting of individual sexual policies, courses for couples with disabilities on relationships, education and counselling for people with disabilities, and concrete guidance in sexuality for singles and couples. In line with the national Guidelines, sexual advisors do not provide sexual services, but they can refer the person who may need them to a sex worker.

For this reason, in 2013 the Ethical Committee of the association published a paper called *Attitude paper on prostitution*[178]. The Ethical Committee states that since prostitution is legal in Denmark, people with disabilities should not be denied help with contacting a sex worker. However, sexual advisors are advised to consider the following issues when they are asked to help their assisted client in contacting a sex worker. According to the Paper, in this field it is better to follow a principle of "minimum intervention": contacting a sex worker should be considered a last resort. At the same time, if sexual advisors are con-

[176] D. KULICK, J. RYDSTROM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit.

[177] Here is the English version of this organization's website: *https://www.seksualvejlederforeningen.dk/in-english/*.

[178] The text is only available in Danish, at *https://www.seksualvejlederforeningen.dk/etik/*.

tacting a sex worker on behalf of their client, they need to pay attention to the issue of human trafficking. Sexual advisors should investigate the situation and the condition of the sex worker they are referring to.

4.4. Pros and cons of the negative assimilation model

In this model, the need for protection in the sexual sphere for people with disabilities is met. Nevertheless, even in this model, the dimension of sexuality and disability, addressed through the services of sexual assistance, does not emerge *per se*. For the legal system, the latter completely overlaps with sex work.

One of the positive consequences of this is that sexual assistance finds recognition and a (non-specific) regulation inside the legal system. This implies more protection and guarantees for sexual assistants, people with disabilities and people who support people with disabilities (families, friends, assistants). On the negative side, this implies the denial of the specific issues that might arise in this field. In fact, some controversial issues still remain unsolved, such as the financial aspects of the service and the assessment of consent. Moreover, this implies a non-formalization of existing best practices, which would help in creating a common definition of the terms of the service and in the creation of a minimum common standard for it.

CHAPTER FIVE

SEXUAL ASSISTANCE IN ITALY: FROM THE EXISTING PROPOSAL TO THE DEVELOPMENT OF A SUSTAINABLE MODEL

This chapter will examine the experience of Italy in the field of sexual assistance. Before exploring the topic of sexual assistance, the Italian legislative framework on prostitution will be outlined, with a focus on the recent decision by the Italian Constitutional Court on the topic. The Italian state of the art on sexual assistance will be sketched by ex-

ploring the existing proposal – put forward by the *LoveGiver* Committee, the main social actor on this topic – and the law proposals. The chapter will close with the drafting of a third model of approach (name), rooted in the Italian Constitutional system and in line with the existing legislation on personal assistance and prostitution.

1. A premise on the legislation on prostitution in Italy

The close relationship between sexual assistance and sex work has already been mentioned in the previous chapters. For this reason, before analysing the status of sexual assistance in Italy, it is important to discuss the legislative framework of prostitution in Italy.

1.1. Before the approval of Law n. 75/1958

Before 1800, the history of prostitution in Italy was quite disjointed[1]. It was at the beginning of the 19th century that State regulation on prostitution developed and became more specific: administrative law on this topic started to proliferate[2]. In this era, the notion of state brothels (*case di tollerenza*)[3] emerged. These regulations disciplined brothels' opening times, buildings, location in cities, as well as checks on women exercising prostitution[4], in a specific attempt to preserve public decency and order.

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[1] G. DE ROSA, *Sicurezza pubblica*, in *Digesto Italiano*, XVII, Torino, 1967, p. 361.

«La prostituzione era pressoché abbandonata a sé stessa: nessuna norma fissa, nessun regolamento, nessun servizio speciale, trascurata in ogni sorveglianza, le meretrici dipendevano interamente dal capriccio degli agenti di polizia municipale, che in diverse città, direttamente o a mezzo delle proprie mogli, esercitavano le case di tolleranza».

[2] For a detailed reconstruction of the history of legislation around prostitution in Italy see I. MEREU, *Prostituzione (storia)*, in *Enciclopedia del diritto*, XXXVII, Milano, 1988.

[3] G. FUSCO, *Quando l'Italia tollerava*, Roma, 1965.

[4] Here we talk about women, and not generic prostitutes, because the law sanctioned explicitly only female prostitution (*meretricio*) and at that time male prostitution was a marginal phenomenon, compared to current days. See L. BENADUSI, *La prostituzione maschile: un profilo storic*o, in C. CIPOLLA, E. RUSPINI (eds.), *Prostituzioni visi-*

One of the first administrative regulations was the *Regolamento Cavour* dated 15 February 1860[5], according to which the State had a right, but also a duty, to control prostitution across the country: prostitutes were provided with a special permit for their activity. That permit also became their only legal identity document, which contributed to the stigma and social isolation of prostitutes[6]. Prostitutes had to practice inside government brothels and undergo medical examinations – enforced by state doctors and the police – every two weeks[7]. In order to open a brothel, an authorization was needed, which was temporary and subject to revocation. Owners had to pay an annual tax and a tax for the medical inspection of prostitutes[8]. Even for that time, the regulation was considered excessively severe, in particular because of the measures against women and the high possibility of abuse by the police during medical examinations.

The second administrative regulation was indeed based on the idea of reducing police abuse[9], and at the same time it introduced the idea of the rehabilitation of prostitutes. Though brothels were still considered public operations, and the police were allowed to enter at any time of the day or night, prostitutes were no longer obliged to sign a public register, to have a specific document or to undergo medical examinations

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bili e invisibili, Milano, 2012, pp. 37-50; E. RUSPINI, *Uomini per donne: la prostituzione maschile eterosessuale*, in C. CIPOLLA, E. RUSPINI (eds.), *Prostituzioni visibili e invisibili*, cit., pp. 169-188.

[5] This regulation was based on a Governmental law on public safety. It should be noted that this regulation was never published in the Official Bulletin, because, according to Crispi, some things should be known to those who are interested in them, but should not be given unnecessary visibility. See Francesco Crispi alla Camera, Atti parl. Camera, XVI Legislatura, Discussione 14 aprile 1888, 1739.

[6] Prostitutes were banned from going to the theatre, walking on the main city roads and squares and were forced to stay home after 8pm from October to March and 10pm during the other months. See C.F. PRINCI, *Dal Regolamento Cavour alla legge Merlin. Veneri a Tesseramento*, in *Atti del convegno "Prostituzione e vittime della tratta: possibili percorsi di protezione sociale", Tradate, 23 gennaio 2002*, Varese, 2002.

[7] M. GIBSON, *Prostitution and the State in Italy. 1860-1915*, Columbus, 2000, pp. 113-151.

[8] A. SORGATO, *I reati in materia di prostituzione*, Milano, 2009, p. 5.

[9] See A. SORGATO, *I reati in materia di prostituzione*, cit., p. 5. In particular note 16 at that page.

by the public authorities[10]. The last regulation before the Fascist era on this matter was the *Regolamento Nicotera*, which «imposed new bans for prostitutes such as walking on the street without a specific reason», a list of predetermined prices for sexual services and a census[11].

During the regime some regulations were enacted in this field[12] and the Law on public safety (*Testo Unico di pubblica sicurezza, regio decreto 18 giugno 1931 n. 773*) contained provisions on prostitution. Since then, the legislation has been based on the principle of regulation (*regolamentarismo*)[13]: it was possible to sell sexual services inside specific spaces with specific permission. This permit was given by the public safety authority for one year (renewable). Prostitutes still needed to undergo medical examinations, but the client did not have any equivalent obligation[14]. Prostitution was not criminalized as such, but related activities such as instigation, aiding and abetting prostitution and exploitation were punishable under certain circumstances. Crimes related to prostitution were defined in Title IX (Activities against public morality and decency) and in particular in Chapter II, under offences to decency and sexual honour. Aiding and abetting prostitution were punishable offences under article 531 (only for minors or people with mental impairments) and article 532 (if the person involved was a descendent, wife or sister) of the Criminal Code. Furthermore, a broader offence of

[10] Medical examination was still compulsory but could be carried out by doctors entrusted by brothel owners. See A. SORGATO, *I reati in materia di prostituzione*, cit., p. 6.

[11] A. SORGATO, *I reati in materia di prostituzione*, cit., p. 7

[12] R.d. 25 marzo 1923 n. 846, r.d.lg. 25 marzo 1923 n. 1206, but also law on prostitution T.U. di P.S. (r.d. 18 giugno 1931 n. 773) and the related regulation r.d. 6 maggio 1940 n. 635.

[13] While before it was more common to talk about a tolerant attitude of the state towards prostitution, now it was clearly stated that prostitution was not to be considered a morally tolerated activity and worthy of state recognition. See Circolare 20 febbraio 1925, prot. 439, prefettura di Como.

[14] It was apparently the client who was protected by criminal law provisions, not the prostitute. In fact, the prostitutes were not protected from the risk of being infected by clients. See U. PIOLETTI, *Prostituzione*, in *Digesto delle discipline penalistiche*, X, Torino, 1995, p. 274 ff.; G. LA CUTE, *Prostituzione*, in *Enciclopedia giuridica*, XXXVII, Milano, 1988, p. 452 ff.; T. PADOVANI, *Disciplina penale della prostituzione*, Pisa, 2015, p. 107 ff.

exploitation of prostitution was punishable under article 534 of the Criminal Code, where anyone who lives off the money earned by a woman who practised prostitution was liable.

This legal apparatus is judged by scholars as consistent[15]. Prostitution itself was irrelevant for criminal law, both for those selling sexual services and for those buying sexual services. Conversely, criminal provisions applied where there was a proper "victim" to protect or to condemn the lifestyle of those living on earnings from an immoral activity[16]. At the same time, however, it should be acknowledged that, outside the legal framework, a strong oppression and social stigmatization of prostitutes was being perpetuated.

1.2. The so-called Merlin Law (Law n. 75/1958): the Italian abolitionist approach towards prostitution

According to surveys, in 1948 there were 730 State brothels, with more than 2 million users for a total income varying between 10 and 15 billion Liras each year. It was within this context that the Deputy Lina Merlin, on 6 August 1948, presented her law proposal for closing State brothels. The reaction of public opinion and of the majority of Deputies of the Parliament was not positive and was shared by different political parties and social classes. According to some scholars, the reason behind this reaction is that the topic is a crossroads of cultural and ideological values such as family, sexuality, public and private morals and the role of women in society[17].

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[15] A. CADOPPI, *Favoreggiamento della prostituzione e principi costituzionali*, in ID. (ed.), *Prostituzione e diritto penale*, Roma, 2014, p. 281.

[16] F. PARISI, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutorio*, cit., p. 100.

[17] L. AZARA, *I sensi e il pudore. L'Italia e la rivoluzione dei costumi (1958-68)*, Roma, 2018, p. 10. On sexual morality during fascism see B.P.F. WANROOIJ, *Il casto talamo. Il dibattito sulla morale sessuale nel ventennio fascista*, in G. TURI (ed.), *Cultura e società negli anni del fascismo*, Milano, 1987, pp. 533-561. This observation is line with the way the feminist thinker Pheterson described prostitution, using the metaphor of a prism. The prism is shining and transparent, and it draws our attention but, at the same time, the prism shifts our focus by moving it onto other issues such as corruption,

The Law was approved after a very complicated parliamentary legal process, on 20 February 1958, almost ten years later[18].

The so-called Merlin Law is targeted at voluntary prostitution[19], but it must be considered that it was born in a State managed brothels context. Its basic assumption is that no one would freely choose to work as a prostitute. As such, the prostitute is seen as a victim of society whose dignity must be protected[20]. The legislation declared State brothels illegal (art. 1), and the existing ones were forced to close (art. 2). At art. 3 substantial modifications were made to the Criminal Code, specifically at articles from 531 to 536, by extending the field of action of the provisions and punishing all the activities surrounding prostitution. In particular, the law punishes all those who, in any manner, obtain advantages from, or promote, a person's prostitution. After this reform, the conducts of aiding and abetting no longer require that the person be younger than 18 years old or have a psychological condition. This provision can be applied to any adult, no matter whether they are considered capable of making their own choices. The punishable offences are broad, and even all the following activities are criminally relevant:

identity, criminality, exploitation and many other topics. See G. PHETERSON, *The Prostitution Prism*, Amsterdam, 1996.

[18] For a critical reconstruction of the Parliamentary discussion around the Merlin Law see L. AZARA, *L'uso «politico» del corpo femminile. La legge Merlin tra nostalgia, moralismo ed emancipazione*, Roma, 2017.

[19] One of the first commentaries on the reform was by F. MANTOVANI, *La nuova disciplina penale della lotta contro lo sfruttamento della prostituzione altrui*, in *Rivista Italiana di Diritto e Procedura Penale*, 1959, p. 452 ff.

[20] See F. PARISI, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutorio*, cit., p. 101. As reported by Parisi here the notion of dignity is an objective one, which is not based on individual choice, but on social and cultural parameters. This definition, on the whole, was confirmed by decision 141/2019 by the Constitutional Court, as we will discuss later. To investigate further the notion of dignity in the offence of prostitution see A. CADOPPI, *Favoreggiamento della prostituzione e principi costituzionali*, cit., p. 285.

3.1) anyone who owns or manages, under any name, a prostitution house, or controls it, or directs or manages it, or participates in its ownership, exercise, management or administration;
3.2) whoever, owing or administrating a building, concedes it in lease for a prostitution house;
3.3) anyone who, being the owner, manager or person in charge of a hotel, drinking establishment, club, dance club, or entertainment venue (and others) or any venue open to the public or used by the public, habitually tolerates the presence of one or more persons engaging in prostitution;
3.4) anyone who recruits a person for the purpose of engaging in prostitution, or who facilitates prostitution for that purpose;
3.5) anyone who induces a woman into prostitution, or who carries out acts of pimping, either personally in public places or open to the public, either in the press or by any other means of advertising;
3.6) anyone who induces a person to go to the territory of another State or in any case to a place other than that of their habitual residence, in order to practice prostitution there, or who interferes in order to facilitate their departure;
3.7) anyone who carries out an activity in national or foreign associations and organizations engaged in the recruitment of persons for the purpose of prostitution or the exploitation of prostitution, or in any form and by any means that facilitate or favour the action or the purposes of such associations or organizations;
3.8) anyone who in any way favours or exploits the prostitution of others.

As can be deduced, the offence of exploitation of prostitution is expressed in a very summary and open way: the requirements set out in the previous version of article 534 of the Criminal Code were repealed. The offence takes place when a person takes advantage of another person's prostitution in any manner. The conduct of pimping is punishable, but also acts of simple friendship, solidarity, support and courtesy can be punished as aiding and abetting prostitution (see further on).

The spectrum of punishable activities is very broad, and for this reason a lot of responsibility is given to judges' interpretation of the law.

1.2.1. The notion of prostitution according to judges case law and literature

According to criminal law, prostitution can be defined as sexual intercourse, not with preferred partners, being of a commercial nature and involving the exchange of money[21], no matter the gender of the persons involved (it can imply both homosexual and heterosexual sexual relationships)[22]. To comply with the definition of prostitution it is not necessary to carry out the activity on a continuous and regular basis: one act is already sufficient if the exchange of money is the most significant element of it[23]. For many scholars[24] and most judges[25] the element of professionality, namely the systematic practice of prostitution and the qualification of it as the main source of income, is not needed. On the matter of the material behaviour, what is relevant is not just sexual intercourse, but also other acts (such as masturbation)[26] capable of giving sexual satisfaction under payment.

1.2.2. The scope of the offence of Recruiting

According to article 3 n. 4 of the Merlin Law, «anyone who recruits a person with the aim of making him/her practice prostitution or facilitates for this aim his/her act of prostitution» is punishable. This article is divided into two different activities, both having in common the prostitution of a third person.

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[21] Cass. pen., sez. III, 16 October 1979, in *Cassazione penale*, 1981, p. 895.

[22] Cass. pen., sez. III, 13 June 1977, in *Cassazione penale*, 1979, p. 1341.

[23] Cass. pen., sez. III, n. 33615, 25 June 2002, in *Cassazione penale*, 2003, p. 3170.

[24] M. DONDINA, *Prostituzione (diritto penale)*, in *Nuovo Digesto Italiano*, X, Torino, 1939, p. 787; P. SANTORO, *Prostituzione (diritto vigente)*, in *Nuovissimo digesto italiano*, XIV, Torino, 1967, p. 233, G. ROSSO, *I delitti di lenocinio e sfruttamento della prostituzione*, Roma, 1960, p. 32.

[25] Cass. pen., sez. III, 1 August 1967, n. 734; Cass. pen., 18 June 1968, n. 712, in L. DELPINO, *Diritto penale. I principali reati previsti in leggi speciali*, Napoli, 2003, p. 256.

[26] Cass., 22 gennaio 1966, n. 3012, in L. DELPINO, *Diritto penale. I principali reati previsti in leggi speciali*, cit., p. 255.

The first punishable activity consists in the search, persuasion and engagement for oneself or for other people and for a consistent amount of time, of one or more persons for prostitution[27]. According to many scholars, this offence can involve both people already inside the prostitution market and outside[28]. The offence takes place with the engagement, regardless of whether the initiative started from the agent or the person who will be engaged[29].

The second activity, facilitation, is, according to many scholars, a facilitation in recruiting prostitution, and it consists in procuring – with actions or omissions – favourable conditions or removing obstacles, and it includes positive actions and permissive and tolerant behaviours[30]. It can be defined as a bilateral offence: to take place it needs the recruitment or the facilitation of another person, who, with their consent, makes the offence possible (only the agent will be liable).

1.2.3. The scope of the offence of Induction

Article 3 n. 5 punishes anyone who encourages the prostitution of a person (over 18 years old) or acts as a pimp, personally, in public places or places open to the public, or through the press or any other means of dissemination[31]. This article also contains two different activities.

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[27] This includes acts that are not usually related to a common sexual intercourse. See Cass. 1 July 1998, n. 7608, in L. DELPINO, *Diritto penale. I principali reati previsti in leggi speciali*, cit., p. 256.

[28] F. LEONE, *Del concetto di reclutamento nella legge 20 febbraio 1958 n. 75*, in *Archivio Penale*, 1963, p. 392; G. GUSTAPANE, *Casa di prostituzione e lenocinio (Disposizioni penali della legge Merlin). Esposizione critica, rassegna di dottrina e giurisprudenza*, Lecce, 1959, p. 152; D. DE GENNARO, *Prostituzione e lotta contro lo sfruttamento della prostituzione*, in *Archivio penale*, I, 1958, p. 216.

[29] A. SORGATO, *I reati in materia di prostituzione*, cit., p. 105; F. DONATO DI MIGLIARDO, *Appunti sul delitto di lenocinio accessorio*, in *Archivio Penale*, 1960, p. 247; F. LEONE, *Delitti di prossenetismo ed adescamento*, Milano, 1964, p. 111; G. LA CUTE, *Prostituzione (diritto vigente)*, in *Enciclopedia del Diritto*, XXXVII, Milano, 1988, p. 460.

[30] V. MANZINI, *Trattato di diritto penale*, Torino, 1984, pp. 527-528 e Cass. pen., sez. III, 24 marzo 1951, in *Rivista Penale*, 1951, p. 24.

[31] For further analysis and a study of some case law on the issue see A. SORGATO, *I reati in materia di prostituzione*, cit., pp. 125-159.

The first (induction) consists in a deliberate activity, carried out without violence or blackmailing, aimed at inducing or reinforcing the intention of practising prostitution, or letting a person who wants to cease prostitution continue[32]. The passive subject of the offence is a person over 18 years old[33], who does not practice prostitution at the moment of the fact – but it does not matter if the person used to do it before[34]. According to some scholars, the offence takes place with the beginning of the act of prostitution[35], while for the *Corte di Cassazione* it takes place with the effective persuasion[36].

The second activity is pimping, which takes place when a person looks for clients on behalf of the prostitute[37]. The agent cannot be the

[32] See Trib. Milano, 18 marzo 1999, in *Foro ambr.*, 1999, p. 146. Similarly: Cass. pen., sez. III, 27 November 1987, in *Rivista penale*, 1988, p. 610; Cass. pen., sez. III, 13 May 1987, in *Cassazione penale*, 1988, p. 1723; Cass. pen., sez. I, 13 March 1986, in *Cassazione penale*, 1987, p. 1645; Cass. pen., sez. II, 15 February 1985, in *Giustizia penale*, II, 1986, p. 163 and Cass. pen., sez. III, 4 December 1978, in *Cassazione Penale*, 1980, p. 559. «Per induzione alla prostituzione si deve intendere quella condotta svolta nei confronti di una persona e coscientemente finalizzata, mediante opera di determinazione, persuasione o rafforzamento della volontà, a far sorgere in lei l'idea di prostituirsi, ma anche a prospettare ulteriori motivi o stimoli per dedicarsi alla prostituzione, o convincerla a persistervi o a ricominciare. L'attività di induzione deve consistere in ogni caso in una condotta attiva, idonea e concreta, e deve avere un'efficacia causale diretta anche a far cessare le resistenze che trattengono la persona del prostituirsi. Si ha induzione alla prostituzione, intesa come abitualità di prestazioni carnali nei confronti di un numero indeterminato di persone, anche quando la vita di prostituzione del soggetto passivo sia già iniziata ma non si sia ancora protratta».

[33] The text of the article mentions a woman, not a person, however thanks to judges' interpretation the provision is constantly applied in a gender-neutral way.

[34] Cass. pen., sez. III, 17 May 1973, in *Giustizia penale*, II, 1974, p. 298, and Cass. pen., sez. II, 17 February 1982, in *Cassazione penale*, 1983, p. 1216; and also Cass. pen., sez. III, 21 February 1984, in *Cassazione penale*, 1985, p. 2110, Cass. pen., sez. I, 21 November 1989, in *Cassazione penale*, 1991, p. 822.

[35] F. ANTOLISEI, *Manuale di diritto penale. Parte speciale*, cit., p. 530. Of a different opinion is P. SANTORO, *Prostituzione (diritto vigente)*, cit., p. 36.

[36] Cass. pen., sez. III, 18 December 1972, n. 8463, Cass. pen., sez. III, 10 September 1994, n. 36156, in L. DELPINO, *Diritto penale. I principali reati previsti in leggi speciali*, cit., p. 260.

[37] L. PAVONCELLO SABATINI, *Prostituzione (disposizioni penali in materia di)*, in *Enciclopedia giuridica*, XXV, Roma, 1991, p. 6.

prostitute themself. If the person gains financial advantage from this activity, then there is a concurrence with the offence of exploitation. All the acts related to pimping must be accompanied by the advertisement of the place or the means of prostitution.

1.2.4. The offences of Aiding and Abetting prostitution and Exploitation of prostitution

At article 3 n. 8 the Law affirms that anyone who, in any manner, aids and abets or exploits another person's prostitution is punishable. Here again we have two different activities: aiding and abetting; and exploitation.

The first activity (aiding and abetting prostitution) takes place with any actions capable of creating favourable conditions for practicing prostitution[38]. The action needs to facilitate the act of prostitution[39], not the person who practises prostitution[40]. At the same time, the action does not need to be a *conditio sine qua non* of the act of prostitution: anything that can facilitate prostitution is already enough. The norm is very broad, and the relevant jurisprudential cases are very different[41]. In a nutshell, according to legal scholars, significant actions are those that have a relevant causal impact on the event of prostitution, while all the

[38] «Il reato di favoreggiamento della prostituzione si concreta in qualunque attività idonea a procurare favorevoli condizioni per l'esercizio della prostituzione, con la consapevolezza di agevolare il commercio altrui del proprio corpo, senza che abbia rilevanza il movente che determina l'azione, non essendo richiesto né il fine di servire all'altrui libidine né il fine di lucro». See Cass. pen., sez. III, 22 January 1979, in *Cassazione penale*, 1980, 1226. In general on the relationship between this offence and the Constitution see A. CADOPPI, *Favoreggiamento della prostituzione e principi costituzionali*, in *Scritti in onore di Alfonso Stile*, Napoli, 2014.

[39] G. VASSALLI, *I delitti previsti dalla legge 2 febbraio 1958, n. 75*, now in *Scritti giuridici*, vol. II, Milano, 1997, p. 32.

[40] G. BARLETTA, *Osservazioni in tema di favoreggiamento alla prostituzione*, in *Rivista penale*, 1963, p. 85.

[41] See A. SORGATO, *I reati in materia di prostituzione*, cit., pp. 125-135.

marginal activities, whose absence would have not impeded the fact, are to be excluded[42].

The second activity is exploitation of prostitution, and it takes place when someone takes unjustified advantage of the prostitution of another person[43]. According to judges, one episode is already sufficient, while for scholars this should be qualified as a habitual offence (*reato abitudinario*). An activity with a proper justification of advantage[44], if there is a proportion between the value and the price applied, does not fall under this offence.

1.3. Challenges and current application of the Law n. 75/1958

Over the years, the punishment of the so-called *condotte parallele* (activities related to prostitution), and in particular the activity of aiding and abetting prostitution, was widespread, but the legislation did not have the expected outcome in terms of social impact. While the Merlin Law, in its original project was aimed at protecting people who practice prostitution, in reality it resulted in a significant growth of the social isolation of this category of people[45].

In fact, if prostitution is not a relevant fact for criminal law, there are many mechanisms of stigmatization outside the Criminal Code[46] which weigh over a sex worker's life. Moreover, data on the undeclared income of prostitution, which is about 4 billion Euros, suggest that sex

[42] L. PAVONCELLO SABATINI, *Prostituzione (disposizioni penali in materia di)*, cit., p. 7.

[43] For a discussion of the case law see A. SORGATO, *I reati in materia di prostituzione*, cit., pp. 293-299.

[44] For example, there was no criminal relevance in the act of anyone who during the day gave use of a room in their house for about ten minutes at a time in exchange for money. See Cass. pen., sez. III, 20 October 1982, in *Cassazione Penale*, 1984, p. 413.

[45] F. PARISI, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutorio*, cit., p. 139.

[46] See Parisi for a detailed discussion on each of these points: F. PARISI, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutorio*, cit., pp. 146-179.

work is a significant and widespread phenomenon[47], which is getting subtler because of the use of technology[48]. From this evidence it is possible to affirm that the premises of this law, inspired by the abolitionist principles, have failed. Many people are still working as prostitutes or sex workers and even the intentions of solidarity expressed in the Merlin Law are unfulfilled due to the social isolation burdening them.

Even though formally prostitution is a licit economic activity, in concrete terms the legitimate spaces where prostitution can be practiced are few and no protection is recognized for those who perform this work, especially for the most vulnerable subjects, such as migrants[49]. As scholars have stated:

> prostitution has no space (…) the only form is an isolated prostitution, carried out in one's own home and without any form of intermediation or contact with anyone. A sort of activity suspended in the air, otherwise any contact with the external sphere implies the transformation of each conduct into an illicit one[50].

According to Parisi[51], there are four main legal causes that perpetuate the stigma surrounding sex workers: (I) The fact that there is no protection for sex workers who are not paid by clients[52]; (II) There are still

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[47] ISTAT, *L'economia non osservata nei conti nazionali. Anni 2016-2019*, Roma, 2020. Available at *https://www.istat.it/it/files//2021/10/REPORT-ECONOMIA-NON-OSSERVATA-2019.pdf*.

[48] I. MERZAGORA, G. TRAVAINI, *Prostituzione: il mestiere più nuovo del mondo*, in *Rivista italiana di medicina legale e del diritto in campo sanitario*, 2017, pp. 635-650.

[49] See F. NICODEMI, P. BONETTI (eds.), *La prostituzione straniera*, in *https://www.asgi.it/le-schede/*, 2009.

[50] T. PADOVANI, *Disciplina penale della prostituzione*, cit., p. 245. Original quotation: «la prostituzione non ha praticamente spazi (…) l'unica forma è la prostituzione isolata, esercitata in casa propria e senza alcuna intermediazione o contatto con chicchessia. Quindi una specie di attività sospesa nel vuoto, perché diversamente ogni contatto con l'esterno determina la trasformazione illecita di ogni condotta di riferimento».

[51] F. PARISI, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutorio*, cit., p. 147.

[52] This contract, in fact, is considered void for Italian Civil law because it is against *boni mores* (article 1343 civil code). If the client does not pay, the prostitute cannot exercise their right in Court. This is confirmed by decisions by the *Corte di Cassazione*. See for example: Cass. pen., sez. II, n. 9348, 17 January 2001; Cass. civ., sez. V,

administrative sanctions on solicitation[53]; (III) The application of measures of personal prevention such as the *foglio di via*[54]; (IV) Major regulation on urban safety based on the idea of contrasting street prostitution with monetary sanctions for clients and prostitutes[55].

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n. 15596, 27 July 2016. From the point of view of scholars see R. SACCO, G. DE NOVA, *Il contratto*, I, Milano, 2016, p. 867.

[53] Solicitation was decriminalized with d.lgs. 30 December 1999, n. 507. Article 81, co. 1, letter a), modified article 5 of Merlin Law, by replacing the criminal offence with an administrative offence and a monetary sanction.

[54] "Foglio di via" is a personal prevention measure adopted by the local Chief of Police, contained in *Decreto legislativo* 159/2011. According to art. 1 and art. 2 the Chief of Police can adopt this measure if the person is a danger to public safety and prevent them from returning without authorization or for a period of three years in the related municipality. At article 1 the categories of people who might be the subjects of this measure are listed: a) those who are to be considered, on the basis of factual elements, to be habitually engaged in trafficking in criminal goods; b) those who, by reason of their conduct and standard of living, are to be regarded, on the basis of facts, as habitually living, even partly, from the proceeds of criminal activities; c) those who, by their conduct, are to be considered, on the basis of factual elements, including repeated violations of the obligatory route plan referred to in article 2, as well as prohibitions on visiting certain places provided for by current legislation, as perpetrators of crimes that offend or endanger the physical or moral integrity of minors, health, safety or public peace of mind. For further information on the application of this measure on prostitutes see F. PARISI, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutorio*, cit., pp. 150-158.

[55] These sanctions are the expression of the so-called "broken windows policy" with new powers for municipalities and mayors to adopt measures – a mixture of administrative and criminal law – to fight small incidents of crime socially perceived as dangerous. This kind of power was first given to mayors in d.l. 23 maggio 2008, n. 93 (*Decreto sicurezza*) then in d.l. 20 febbraio 2017, n. 14 (*Decreto Minniti*). See M. PELISSERO, *La sicurezza urbana. Nuovi modelli di prevenzione?*, in *Diritto Penale Procedurale*, 7, 2017, p. 845 ff.; C. RUGA RIVA, R. CORNELLI, A. SQUAZZONI, P. RONDINI, B. BISCOTTI, *La sicurezza urbana e i suoi custodi (il sindaco, il questore e il prefetto). Un contributo interdisciplinare sul c.d. decreto Minniti*, in *Diritto Penale Contemporaneo*, 2017, p. 28 ff.; R. CORNELLI, *Decreto sicurezza, un concetto pigliatutto poco mirato sui diritti*, in *Guida al diritto*, n. 13, 2017, p. 10 ff.; C. FORTE, *Il decreto Minniti: sicurezza integrata e "d.a.spo. urbano"*, in *www.penalecontemporaneo.it*, 2017. See also: T. PITCH, *Contro il decoro: l'uso politico della pubblica decenza*, Bari, 2013; L.M. DI CARLO, *Le ordinanze sindacali: profili critici di un utilizzo disinvolto dei poteri necessitati e urgenti*, in *Istituzioni del federalismo*, 3, 2016, pp. 775-804.

All these measures are particularly severe for anyone who is not an Italian citizen. At the same time, legal scholars draw attention to some critical points of the law, with a specific focus on the respect of the principle of legal certainty. The latter might be in contrast with the offences as defined by the Merlin Law, especially when it comes to the offence of exploitation and aiding and abetting prostitution, which are particularly vague. These critiques also point to the fact that, in an increasingly pluralistic and liberal State, little or no space is left for the right to self-determination of sex workers.

All these complaints were presented in the ruling for referral to the Constitutional Court by the *Corte d'Appello di Bari*[56], on which the Constitutional Court decided in June 2019 with Decision n. 141/2019.

1.4. Decision n. 141/2019 of the Constitutional Court

With Decision n. 141/2019[57] the Constitutional Court rejected the doubts of constitutional legitimacy on article 3(4) (Recruiting) and article 3(8) (Aiding and Abetting prostitution) in relation to articles 2, 3, 12, 25 co. 2, 27 and 41 of the Constitution. This question of unconstitutionality was originated by criminal proceeding before the Court of Ap-

[56] Ordinanza Corte d'Appello di Bari, sez. III, 6 February 2018.

[57] Constitutional Court, decision n. 141, 7 June 2019. For some doctrinal comments on this decision see R. BIN, *La libertà sessuale e prostituzione (in margine alla sent. 141/2019)*, in *Forumcostituzionale.it*; C.P. GUARINI, *La prostituzione «volontaria e consapevole»: né libertà sessuale né attività economica privata "protetta" dall'art. 41 Cost. A prima lettura di Corte costituzionale n. 141/2019*, in *Osservatorio costituzionale*, 4, 2019, pp. 175-190; A. DE LIA, *Le figure di reclutamento e favoreggiamento della prostituzione al banco di prova della Consulta. Un primo commento alla sentenza della Corte costituzionale n. 141/2019*, in *Forum di Quaderni Costituzionali*, 2019; P. SCARLATTI, *La sentenza n. 141 del 2019 della Corte costituzionale tra discrezionalità del legislatore e tutela dei diritti fondamentali delle persone vulnerabili*, in *dirittifondamentali.it*, 1, 2020; F. POLITI, *La prostituzione non è un diritto fondamentale ed è un'attività economica in contrasto con la dignità umana. La sent. n. 141 del 2019 e la "sostanza delle cose"*, in *Rivista AIC*, 2, 2020; F. BACCO, *La disciplina penale della prostituzione al doppio vaglio della consulta, tra giudizi di fatto, moralismo penale e ragionevolezza giudiziale*, in *Sistema Penale*, 7, 2020, pp. 5-24; L. VIOLINI, *La dignità umana al centro: oggettività e soggettività di un principio in una sentenza della Corte costituzionale (sent. 141 del 2019)*, in *dirittifondamentali.it*, 1, 2021.

peal of Bari (*Corte d'Appello di Bari*) (main proceeding), during which the judge decided to issue a ruling for referral to the Constitutional Court (*incidenter proceeding*). The *Corte d'Appello di Bari* raised the question of constitutional legitimacy[58] «in so far as the recruitment and aiding and abetting of prostitution voluntarily and consciously practiced constitute a criminal offence»[59] in relation to the abovementioned constitutional parameters.

The Constitutional Court recognizes the relevance and the clear unfoundedness of the question raised by the Court of Appeal, by accepting the argument of the Court on the point[60] and rejecting the exception by the State attorney (*Avvocatura dello Stato*)[61].

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[58] For commentary see A. CADOPPI, *L'incostituzionalità di alcune ipotesi della legge Merlin e i rimedi interpretativi ipotizzabili. Nota a ord. App. Bari sez. III pen. 6 febbraio 2018*, in *Diritto penale contemporaneo*, 3, 2018, p. 72; A. BONOMI, *Il reclutamento e il favoreggiamento della prostituzione al banco di prova dei principi costituzionali. Qualche osservazione alla luce di una recente ordinanza di rimessione alla Corte costituzionale*, in *Consulta online*, 1, 2018, p. 16.

[59] The translation is by the author. Here is the original quote in Italian: «Solleva questione di legittimità costituzionale dell'art. 3, comma primo, nr. 4) prima parte e nr. 8) della L. 20 febbraio 1958, n. 75, nella parte in cui configura come illecito penale il reclutamento ed il favoreggiamento della prostituzione volontariamente e consapevolmente esercitata siccome in contrasto con gli artt. 2, 3, 13, 25 comma 2, 27 e 41 della Costituzione».

[60] In particular see Points 1.1 and 1.2 of the decision.

[61] The President of the Council of Ministers, represented and defended by the Attorney General of the State, intervened, asking that the questions be declared inadmissible or unfounded. In the President's view, the national court raised the questions with the sole aim of obtaining an interpretative endorsement. In particular, the referring court did not make the necessary attempt to give a constitutionally oriented interpretation of the provision being criticized, verifying whether the same arguments used to raise the question could be mirrored to exclude certain specific cases from the scope of the precept. In any event, the substance of the questions is unfounded. The order of referral is, in fact, vitiated by an error of perspective, as regards the identification of the protected legal asset, which the referring judge refers to the entire Law no. 75 of 1958. Examination of the case law on legitimacy shows that, in reality, the rationale for protecting the provisions in question remains complex, not being limited to the sole protection of a person's freedom of choice in the sexual sphere, and that the various cases provided for by that law, and in particular by article 3 thereof, are underlying legal assets which are not exactly overlapping. The national court did not consider, in particular, that the

The decision will be analysed by following the order of the observations made by the *a quo* judge and the arguments by the Constitutional Court on each constitutional parameter involved.

1.4.1. Constitutional parameters: article 2 of the Constitution

As regards article 2, the *Corte d'Appello* states the need to consider the new phenomenon of the professional prostitution of escorts, something which was not conceivable when the Merlin Law was approved. On this matter, what plays a significant role is the principle of freedom of sexual self-determination, protected by Decision n. 561/1987 of the Constitutional Court. According to the *a quo* judge freedom of sexual self-determination implies the respect of the choice of using sexuality «in the contractual terms of the provision of sexual service for money or other benefits»[62]. The *a quo* judge acknowledges that Law 75/1958 gave little room for the free choice of practicing prostitution, but states that there is a need, given today's historical context, to give freedom a more positive and fuller connotation[63]. The *Corte d'Appello* continues

abovementioned article 3, in incriminating so-called activities related to prostitution, intended to protect the 'objective dignity' of the person being prostituted, finding in it their 'primary rationale'. The same sentence of the Court of Cassation, no. 49643 of 2015, referred to by the complainant, considered, on the other hand, manifestly unfounded the questions of constitutional legitimacy of art. 3, first paragraph, number 8), of Law no. 75 of 1958, with reference to articles 2, 13, 19, 21, 25 and 27 of the Constitution of the Republic of Italy, ruling out that the concept of "facilitation", in which the activity of aiding and abetting prostitution is contained, violates the principles of legality, determination and offensiveness, as well as that the incriminating disposition contrasts with the principle of secularity of the State.

[62] Point 1.2 of the decision. Here is the Italian passage: «Verrebbe, al riguardo, segnatamente in rilievo il «principio della libertà di autodeterminazione sessuale della persona umana»: libertà che, nel caso delle escort, si esprimerebbe nella scelta di disporre della propria sessualità nei termini contrattualistici dell'erogazione della prestazione sessuale contro pagamento di denaro o di altra […] utilità».

[63] In this sense prostitution should be recognized «as a self-assertive mode of the human person, who perceives their own self in terms of the delivery of their own corporeity and genitality (and of the pleasure connected to it) with or without the transfer of a different benefit». Here is the passage in the original language: «come modalità autoaffermativa della persona umana, che percepisce il proprio sé in termini di erogazione

by stating that, if this freedom is covered by article 2 of the Constitution, then any legislative interference hindering the exercise of this right should be removed. So, the punishment of activities of third parties who put into contact potential clients and escorts, or make it easier for them to conduct their business, would violate this right. Indeed, the activity of recruitment will result in support for the escort, by facilitating the «free encounter on the sex market between supply and demand»[64]. Similarly with aiding and abetting prostitution. The *a quo* judge also excludes the relevance of the argument of public morality, stating that this value is disappearing, in contrast to the freedom of self-determination in the sexual sphere.

The Constitutional Court starts by arguing that in Decision n. 561/1987, sexual freedom as «one of the essential modes of expression of the human person» protected by article 2 was affirmed in relation to its negative profile. Nonetheless, the Court recognizes the possibility of referring the statement to the positive aspect of the freedom in question: «which implies that each individual can make free use of sexuality as a means of expression of his/her personality, within the limits of respect for the rights and freedoms of others»[65]. However, it states that the act of voluntary prostitution cannot be considered an expression of the right to develop one's personality, covered by article 2 of the Constitution. According to the Constitutional Court: «the offer of sexual services is not at all an instrument of protection and development of the human person, but constitutes – much more simply – a particular form of economic activity»[66]. For the constitutional judges, prostitution must

della propria corporeità e genitalità (e del piacere ad essa connesso) verso o contro la dazione di diversa utilità».

[64] Point 1.2 of the decision, in Italian: «libero incontro sul mercato del sesso tra domanda ed offerta».

[65] Point 5.1 of the decision in the original language: «implica che ciascun individuo possa fare libero uso della sessualità come mezzo di esplicazione della propria personalità, s'intende, nel limite del rispetto dei diritti e delle libertà altrui».

[66] Point 5.2, in Italian: «L'offerta di prestazioni sessuali verso corrispettivo non rappresenta affatto uno strumento di tutela e di sviluppo della persona umana, ma costituisce – molto più semplicemente – una particolare forma di attività economica. La sessualità dell'individuo non è altro, in questo caso, che un mezzo per conseguire un

be defined mainly as a «provision of paid service», to be enlisted in the catalogue of economic activities. This view is considered, by the Constitutional Court, to be consistent with the frame provided by the European Court of Justice in *Jany and Others* (judgment of 20 November 2001 in Case C-268/99 *Jany and Others*)[67] and by the Court of Cassation (*Corte di Cassazione*) in its judgments[68]. Considering this, the parameters at article 2 are not appropriate in this case: it is unacceptable to think that «a fundamental right remains a fundamental right even if carried out for a fee», otherwise there would be a risk – in the words of the Court – of qualifying as an inviolable right of the person any entrepreneurial activity that requires the exercise of a constitutional freedom. The Court explicitly mentions that this consideration is not undermined by the element of voluntary or involuntary engagement in this profession: «Even if there are people who consider it personally gratifying to engage in prostitution, this does not change the substance of things»[69].

1.4.2. Constitutional parameters: article 41 of the Constitution

The *Corte d'Appello* continues by arguing that the provisions violate the freedom of economic initiative protected by article 41 of the Constitution. According to the Court, the activity of prostitution should be included in a range of protected economic activities, considering that it is a source of income subject to taxation[70]. This criminal provision constitutes a limit to this economic activity, and as such represents a viola-

profitto: una "prestazione di servizio" inserita nel quadro di uno scambio sinallagmatico».

[67] European Court of Justice, Jany and Others, Case C-268/99, 20 November 2001. On this decision see M. LUCIANI, *Il lavoro autonomo della prostituta*, in *Quaderni costituzionali*, 2, 2002, p. 398 ff.

[68] Cass. civ., sez. V, n. 22413, 4 November 2016; Cass. civ., sez. V, n. 15596; 27 July 2016; Cass. civ., sez. V, n. 10578, 13 May 2011; 1 October 2010, no. 20528. According to the *Corte di Cassazione* income from prostitution can be subject to taxation.

[69] Point 5.2 of the decision, in Italian: «Ammesso pure che vi siano persone che considerano personalmente gratificante esercitare la prostituzione, questo non cambia la sostanza delle cose».

[70] One of the latest decisions on this point is Cass. civ., sez. V, n. 15596, 27 July 2016, 6.

tion of the freedom of economic initiative (article 41). By punishing these activities, people exercising sex work are prevented from hiring personnel to help them with their business, suffering from a stigmatization in their chosen field of self-employment.

The Constitutional Court answers that the parameter is relevant, however it must be declared unfounded. Freedom of economic initiative finds its limitation in activities that contrast with social utility or that might damage safety, freedom and human dignity. In this case prostitution is involved within this limit: in fact, the goal of Law n. 75/1958 is to protect the fundamental rights of vulnerable subjects and human dignity. At this point the Court argues that it is

> irrefutable that, even in the present historical moment, when one is not in the presence of real forms of forced prostitution, the choice to "sell sex" finds at its root, in the vast majority of cases, factors which condition and limit the freedom of self-determination of the individual, reducing, at times drastically, the range of their existential options. This can derive not only from economic factors, but also situations of unease at the affective level or in family and social relations, which are capable of weakening the natural reluctance towards a "choice of life" such as that of offering sexual services for money[71].

The Court also notices that, even if we consider the very small percentage of people who choose freely to practice prostitution, it would be very hard to translate on the legislative level the line of distinction between a free decision and a coerced decision. On the other hand, this would be even harder to verify on the procedural level, through an ex-post assessment.

[71] Point 6.1 of the decision: «È, in effetti, inconfutabile che, anche nell'attuale momento storico, quando pure non si sia al cospetto di vere e proprie forme di prostituzione forzata, la scelta di "vendere sesso" trova alla sua radice, nella larghissima maggioranza dei casi, fattori che condizionano e limitano la libertà di autodeterminazione dell'individuo, riducendo, talora drasticamente, il ventaglio delle sue opzioni esistenziali. Può trattarsi non soltanto di fattori di ordine economico, ma anche di situazioni di disagio sul piano affettivo o delle relazioni familiari e sociali, capaci di indebolire la naturale riluttanza verso una "scelta di vita" quale quella di offrire prestazioni sessuali contro mercede».

In any case, according to the Court, some concerns remain for the few who carry out this work freely and consciously. This situation exposes them to

> dangers connected to their entry into a circuit from which it will then be difficult to leave voluntarily, given the ease with which they can become the object of undue pressure and blackmail, as well as the risks to physical integrity and health, which they inevitably encounter when they are isolated in contact with the customer (dangers of physical violence, coercion to undergo unwanted sexual acts, contagion resulting from unprotected sexual relations and so on)[72].

The Court affirms then that the notion of dignity needs to be defined by legislators according to the common social sentiment at a given historical moment. With this passage the Court affirms an objective notion of dignity in the Italian legal system. For this reason, every form of prostitution, even voluntary, is considered a degrading activity that reduces the intimate sphere of the body to a good to be sold.

By using an analogy with the law on drugs, consumers and drug dealers, and by citing also comparative case law[73], the Court argues in favour of the choice of intervening criminally against third parties by interfering with prostitution and not prostitutes. On the other hand, the Court notes that, while the law does not prohibit prostitution, that doesn't mean that this can be qualified as an expression of a constitu-

[72] Point 6.1 of the decision: «A ciò si affiancano, peraltro, anche preoccupazioni di tutela delle stesse persone che si prostituiscono – in ipotesi – per effetto di una scelta (almeno inizialmente) libera e consapevole. Ciò in considerazione dei pericoli cui esse si espongono nell'esercizio della loro attività: pericoli connessi al loro ingresso in un circuito dal quale sarà poi difficile uscire volontariamente, stante la facilità con la quale possono divenire oggetto di indebite pressioni e ricatti, nonché ai rischi per l'integrità fisica e la salute, cui esse inevitabilmente vanno incontro nel momento in cui si trovano isolate a contatto con il cliente (pericoli di violenza fisica, di coazioni a subire atti sessuali indesiderati, di contagio conseguente a rapporti sessuali non protetti e via dicendo)».

[73] In particular, the Court cites decision n. 641/2016, 21 November 2016 by the Constitutional Court of Portugal, a system inspired by abolitionist principles as well. In this decision it is observed that there is no irremediable contradiction in the dissociation of the judgment on the basic actions of prostitutes from that on the actions of third parties who facilitate – or exploit or instigate – the activity.

tional right. To support this statement the Court recalls that a contract having as its object the exchange of money for sexual services is void, because it is contrary to *boni mores* (art. 1343 of the Civil Code)[74]. The circumstance in which the competent Courts and Tribunals consider the income from prostitution taxable is in line with the general provision of the tax system. Indeed, income from facts, acts or activities which are illicit according to civil, administrative or criminal law are subject to taxation, if they are not seized or confiscated (art. 14, paragraph 4, Law 537/1999)[75]. For this reason, the Court finds no contradiction between the taxation of the activity of prostitution, and the fact that the law adopts indirect measures to inhibit the development of this activity, by affecting third parties cooperating with it. The Constitutional Court also provides an interpretation of the decision by the Court of Justice of 20 November 2011, case C-268/99, *Jany and others*, under which no support for the thesis of the *a quo* judge is provided[76].

1.4.3. Constitutional parameters: Principle of harm (article 13, 25 co. 1 and 27)

For the *a quo* judge, these provisions would also be in contrast with the principle stating that there can be no crime without the offence of a legal asset protected by law (art. 12, 25 co. 2, 27 Constitution). For the *Corte d'Appello di Bari* the paternalistic thesis stating that the protected good is public morality is outdated, especially if we consider sexual

[74] The only legally relevant effect is the *soluti retentio*, that is, the right of the person who works as a prostitute to withhold the sums received from the client (art. 2035 of the Italian Civil Code), without, however, being able to take legal action in the event of spontaneous non-payment. See the previous note on this matter.

[75] 4 December 1993, nº 537, containing "Corrective interventions of public finance".

[76] The Constitutional Court specifies that the ECJ has qualified prostitution as a self-employed economic activity, but only to rule out that the exercise of that activity can be considered an activity serious enough to justify restrictions on access to, or residence in, the territory of a Member State, of a national of another Member State, in the event that the first State (in this case, the Netherlands, whose legislation is inspired by the "regulatory" model) has not adopted repressive measures if the same activity is carried out by one of its nationals.

self-determination as a value protected under article 2 of the Constitution. To support this statement the *Corte d'Appello* mentions decisions stating that Law 75/1958 protects the freedom of determination of women in sexual acts, aiming at avoiding, with the threat of punishment, the practice of prostitution as the result of choices conditioned by forms of coercion or exploitation[77]. The *Corte d'Appello* also mentions the case law of the European Court of Human Rights, specifically *Tremblay v. France*[78], in which it was held that prostitution should be considered incompatible with the rights and dignity of the person only if there is coercion.

Following these arguments, neither of the censored provisions would cause offence to any legal asset, considering that the conducts they refer to facilitate the act of self-determination of a person who consciously chose to practice prostitution[79]. The *a quo* judge highlights that these auxiliary activities are strictly connected to exploitation, which is the only autonomous crime. This supports the idea that the activities of recruiting and aiding and abetting prostitution lack intrinsic offensiveness.

The Constitutional Court dismisses all these arguments. First of all, it observes that the identification of punishable activities is to be considered, for the constant case law of the Constitutional Court, a matter of legislative discretion[80]. These choices can be contested by the Constitutional Court only if they are manifestly unreasonable and arbi-

[77] In sequence, Court of Cassation, third criminal section, sentence June 8, 2004-2 September 2004, no. 35776; united criminal sections, sentence December 19, 2013-14 April 2014, no. 16207; third criminal section, sentence September 22, 2015-17 December 2015, no. 49643.

[78] Tremblay v. France, n. 37194/02, 16 May 2006.

[79] See what the Court states: «If the escort freely chooses to offer sex for a fee, the person who "helps her" in making this choice "produces an advantage and not a damage to the same protected legal asset"». In the original passage: «se la escort sceglie liberamente di offrire sesso a pagamento, chi "le dà una mano" nella realizzazione di tale scelta "produce un vantaggio e non un danno allo stesso bene giuridico tutelato"».

[80] Judgments no. 95 of 2019 and no. 394 of 2006.

trary[81]. The principle of offensiveness «operates on two distinct levels»[82]. The first one is for legislators, who should reserve criminal law to facts which are offensive to legal assets deemed worthy of protection. The second one is for the common judge, who needs to evaluate the concrete damaging attitude of a particular activity (so-called "concrete" offensiveness). The constitutional judges observe that the legal framework of Law n. 75/1958 changed in a significant way over the years: until 2004 the protected asset was public morality, then the dignity and freedom of determination of the person who practices prostitution[83], and, in the end, the dignity of the person during sexual activity, which cannot be negotiated[84]. The Court concludes by stating that the incriminations are in line with the principle of offensiveness. These are aimed at protecting the fundamental rights of vulnerable persons (whether or not they practice prostitution by choice). Nevertheless, the judges affirm that the incrimination of related activities, far from being a constitutionally imposed choice, is a legitimate solution chosen by the legislators in their discretionary powers. The Court also observed that if the activity does not concretely damage any relevant asset, it will be up to the competent judge to determine whether a crime has been committed.

1.4.4. Constitutional parameters: Principle of legality and the offence of recruiting

The last point considers exclusively the offence of aiding and abetting prostitution, which, according to the *Corte d'Appello*, violates the principles of legality by being an indeterminate and not sufficiently de-

[81] *Ex plurimis*, decision no. 95 of 2019, no. 273 and no. 47 of 2010; ordinances no. 249 and no. 71 of 2007; as well as, with particular regard to the sanctioning treatment, sentences no. 179 of 2017, no. 236 and no. 148 of 2016.

[82] Judgments n. 225 of 2008, n. 265 of 2005, no. 519 and n. 263 of 2000.

[83] Cass. pen., sez. III, n. 35776, 2 September 2004. It equally combines such individual interest with the protection of public morality and morality: Cass. pen., sez. III, n. 1716, 9 November 2004-21 January 2005.

[84] Cass. pen., sez. III, n. 14593, 30 March 2018; Cass. pen., sez. III, n. 5768, 7 February 2018.

fined offence. This offence is, indeed, described in a very generic way, and «the criminal sanction really does not seem to know limits to its scope of application»[85]. According to the *Corte d'Appello* this configuration would lead to the paradoxical consequence of having to select criminally relevant activities, not because of the conformity to an activity described by law, but in relation to its concrete capacity to offend the protected interest.

According to the Constitutional Court, this last exception is unfounded. First of all, the Court reiterates its previous ruling[86] where an identical question was similarly declared unfounded. According to the settled case law of the Court:

> the inclusion in the descriptive formula of the offence of summary expressions, of polysemantic words, or general clauses or "elastic" concepts, does not involve a *vulnus* of the constitutional parameter evoked, when the overall description of the offence allows the judge – having regard to the purposes pursued by the offence and to the wider legal context in which it is placed – to establish the meaning of that element by means of an interpretative operation that does not go beyond the ordinary task entrusted to him: that is, when that description allows the expression of a judgement of correspondence between the concrete case and the abstract case, supported by a controllable hermeneutical foundation; and, correlatively, allows the addressee of the rule to have a sufficiently clear and immediate perception of the relative perceptive value[87].

[85] Here is the original passage: «la sanzione penale pare davvero non conoscere limiti al suo spazio operativo».

[86] Decision 44/1964, confirmed and reiterated by Order 98/1964.

[87] The original passage in Italian: «l'inclusione nella formula descrittiva dell'illecito di espressioni sommarie, di vocaboli polisensi, ovvero di clausole generali o concetti "elastici", non comporta un vulnus del parametro costituzionale evocato, quando la descrizione complessiva del fatto incriminato consenta comunque al giudice – avuto riguardo alle finalità perseguite dall'incriminazione ed al più ampio contesto ordinamentale in cui essa si colloca – di stabilire il significato di tale elemento mediante un'operazione interpretativa non esorbitante dall'ordinario compito a lui affidato: quando cioè quella descrizione consenta di esprimere un giudizio di corrispondenza della fattispecie concreta alla fattispecie astratta, sorretto da un fondamento ermeneutico controllabile; e, correlativamente, permetta al destinatario della norma di avere una percezione suffi-

In the present case, the description of the incriminated facts is based on a concept, such as the one of aiding and abetting, already used in criminal law, which appears also in relation to the crime of juvenile prostitution (art. 600-bis, first para., Criminal Code). For these reasons it cannot be regarded as indeterminate. The offence requires the actions to be favouring the activity of prostitution, and not the person who practices it, to avoid an excessive expansion of the application of the criminal provision. The Court adds that

> The existence, then, of doubts or contrasts with regard to the concrete application of the principle in relation to certain cases does not, in itself, prove the lack of precision of the precept, since it is a case that falls within the physiology of judicial hermeneutics[88].

Subsequently, the considerations around article 3 are to be considered unfounded.

1.4.5. Some remarks and comments on the decision

The approach of the Constitutional Court was certainly very cautious in discussing a highly divisive and challenging topic. It is very likely that, in writing the decision, the evaluation on the consequences that an admissibility decision would have implied played a significant role[89]. In fact, this would have brought substantial consequences to the apparatus of the law, ultimately leading to a non-regulated liberaliza-

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cientemente chiara ed immediata del relativo valore precettivo». See judgment n. 25 of 2019; in the same sense, judgments no. 172 of 2014, no. 282 of 2010, no. 21 of 2009, no. 327 of 2008 and no. 5 of 2004.

[88] Point 8 of the decision: «L'esistenza, poi, di dubbi o contrasti riguardo alla concreta applicazione del principio in rapporto a determinate fattispecie non vale, di per sé, a dimostrare il difetto di precisione del precetto, trattandosi di evenienza che rientra nella fisiologia dell'ermeneutica giudiziale».

[89] S. BERNARDI, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione: irrilevante il fatto che l'esercizio del meretricio sia il frutto di una libera scelta?*, in *Diritto penale contemporaneo*, 2019.

tion of prostitution and related activities[90]. Despite this, there are some critical issues to be discussed, especially considering the liberal and secular nature of a State such as Italy[91]. These relevant points will follow the same structure of the judgment.

The main argument of the Constitutional Court on article 2 observed that practicing prostitution cannot be considered part of a fundamental right in the sphere of sexuality, because it is simply a particular form of economic activity. This argument does not seem to consider that work is a part of the rights covered in article 2, together with sexual rights. Given this, article 2 might cover the fundamental right of self-determination recognized to everyone who wants to make a job out of their sexual sphere. To continue, in the decision the Court, neglects the substantial role and impact that these provisions have on the possibility of practicing prostitution. In fact, the Court states that the relevant provisions do not inhibit anyone from engaging in this activity, while at the same time, ways in which prostitution is discouraged by law are explicitly acknowledged in the decision.

The Court concentrates then on article 41[92] with a very strong position: «the choice of selling sex in the vast majority of cases is rooted in factors which undermine and limit the self-determination of the individual», then «there are substantial worries even for persons who freely and consciously choose this job». These propositions, which are not

[90] As the court recognizes, indeed, if the arguments of the *a quo* judge were to be declared admissible then all the other criminal provisions around prostitution should have been declared against the Constitution. See point 5 of the Decision.

[91] S. BERNARDI, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit.

[92] Scholars have criticized this choice by stating that the Court argued too much on this point and decided not to face the main issues raised by the *Ordinanza* from the Corte d'Appello di Bari, concerning aspects of criminal law and in particular the harm principle and legal principle. See A. DE LIA, *Le figure di reclutamento e favoreggiamento della prostituzione al banco di prova della Consulta. Un primo commento alla sentenza della Corte costituzionale n. 141/2019*, cit. Conversely, other scholars have appreciated the discussion on article 41, stating that proper attention was given to an issue not often discussed in academia: C.P. GUARINI, *La prostituzione «volontaria e consapevole»: né libertà sessuale né attività economica privata "protetta" dall'art. 41 Cost. A prima lettura di Corte costituzionale n. 141/2019*, cit.

supported by any data, are characterized by a strong paternalistic approach with legitimate substantial and unreasonable limitations of personal choices[93]. On the contrary, a liberal State is believed to need stronger reasons to limit the right of self-determination of individuals. This is particularly true in criminal law, where the intervention of the State is justified in combating and preventing harm to other people and there is a duty of non-intervention in the case of self-harm[94]. For this reason, it was observed that on this point more profound arguments were expected from the Constitutional Court[95].

The Court affirms that these criminal law provisions protect vulnerable subjects. However, the notion of vulnerable subject is quite new for Italian criminal law[96]. The fact that the Court did not provide a definition of it, but simply linked this condition to a multiplicity of factors that can hinder self-determination, might reveal an underpinning moralistic assumption, according to which prostitution can never be consid-

[93] S. BERNARDI, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit. Further comments on the decision: C.P. GUARINI, *La prostituzione «volontaria e consapevole»: né libertà sessuale né attività economica privata protetta dall'art. 41 Cost. A prima lettura di Corte costituzionale n. 141/2019*, cit., pp. 175-190; P. PITTARO, *Osservatorio di giurisprudenza penale. Rassegna di giurisprudenza*, in *Famiglia e diritto*, 1, 2019, pp. 62-66; A. CADOPPI, *Moralismo penale e prostituzion*e, in *L'Indice penale*, 1, 2019, pp. 4-14; M. PICCHI, *La legge Merlin dinanzi alla Corte costituzionale. Alcune riflessioni sulla sentenza n. 141/2019 della Corte costituzionale*, in *Forum quaderni costituzionali*, 2019.

[94] J. FEINBERG, *The Moral Limits of the Criminal Law. Harm to Self*, vol. III, Oxford, 1986. Scholars have written widely on this point. *Ex multis* see A. CADOPPI (ed.), *Laicità, valori e diritto penale. The Moral Limits of the Criminal Law*, Milano, 2010; S. CANESTRARI, L. STORTONI (eds.), *Valori e secolarizzazione nel diritto penale*, Bologna, 2009; G. FIANDACA, G. FRANCOLINI (eds.), *Sulla legittimazione del diritto penale. Culture europeo-continentale e anglo-americana a confronto*, Torino, 2000.

[95] S. BERNARDI, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit.

[96] It was introduced in article 600 c.p. and 601 c.p., thanks to the influence of European law on human trafficking, Directive2004/81/EC. On this see S.H. KRIEG, *Trafficking in human beings: The EU approach between border control, law enforcement and human rights*, cit., pp. 775-790.

ered a work as any other[97]. Moreover, the Court openly embraces, without further articulating this point, an objective notion of dignity in relation to article 41 of the Constitution. This idea of dignity necessarily transcends individual choices and self-determination, and on the contrary is based on a predetermined evaluation by the legislator. In a recent decision on assisted suicide, Decision n. 207/2018[98], the Court

[97] S. BERNARDI, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit.

[98] This Order is widely commented by scholars, both because the topic is very sensitive, but also because it represents an exception in the constitutional landscape. In this decision, indeed, the Constitutional Court uses the power to manipulate in time the effects of its decisions, a prerogative which is not granted by the Constitution or by the legislation regulating it. The Court here substantially declared the conditions under which article 580 of the Criminal Code is to be considered against the Constitution, but gave time to the Parliament to implement this provision. The time expired in September and the Court, with decision 242/2019 on the 25 September 2019, declared the constitutional illegitimacy of article 580 of the Criminal Code under certain circumstances. For commentary on the Order see A. RUGGERI, *Venuto alla luce alla Consulta l'ircocervo costituzionale (a margine della ordinanza n. 207 del 2018 sul caso Cappato)*, in *Giurisprudenza Costituzionale*, III, 2018; M. BIGNAMI, *Il caso Cappato alla Corte costituzionale: un'ordinanza ad incostituzionalità differita*, in *Questione Giustizia*, 2018; U. ADAMO, *In tema di aiuto al suicidio la Corte intende favorire l'abbrivio di un dibattito parlamentare*, in *Diritti Comparati*, 2018; C. TRIPODINA, *Quale morte per gli "immersi in una notte senza fine"? Sulla legittimità costituzionale dell'aiuto al suicidio e sul "diritto a morire per mano di altri"*, in *Biolaw journal - Rivista di Biodiritto*, 3, 2018, pp. 139-151; S. PRISCO, *Il caso Cappato tra Corte costituzionale, Parlamento e dibattito pubblico. Un breve appunto per una discussione da avviare*, in *Biolaw journal - Rivista di Biodiritto*, 3, 2018, pp. 153-170; F.G. PIZZETTI, *L'ordinanza n. 207/2018 della Corte costituzionale, pronunciata nel corso del "Caso Cappato", e il diritto del paziente che rifiuta le cure salvavita a evitare un'agonia lenta e non dignitosa*, in *Biolaw journal - Rivista di Biodiritto*, 2, 2019, pp. 171-190; C. CUPELLI, *Il caso Cappato, l'incostituzionalità differita e la dignità nell'autodeterminazione alla morte*, in *Diritto penale contemporaneo*, 2018; U. ADAMO, *La Corte è 'attendista'... «facendo leva sui propri poteri di gestione del processo costituzionale» (ord. n. 207/2018)*, in *Forum di Quaderni Costituzionali*, 2018; S. CANESTRARI, *I tormenti del corpo e le ferite dell'anima: la richiesta di assistenza a morire e l'aiuto al suicidio*, in *Diritto penale contemporaneo*, 2019; F. DAL CANTO, *Il "caso Cappato" e l'ambigua concretezza del processo costituzionale incidentale*, in *Forum di Quaderni Costituzionali*, 2019; C. PANZERA, *L'ordinanza "una e trina"*, in *Forum di Quaderni Costituzionali*, 2019; G. RAZZANO, *Le discutibili asserzioni dell'ordinanza Cappato e alcuni enormi macigni*, in *Forum di*

used, however, a different notion of dignity. In the decision on assisted suicide the Court openly embraces a subjective notion of dignity, referring to a person's own understanding of dignity (§9) or a person's own vision of dignity in end-of-life (§10). Undeniably, the parameters involved are different: on the one side, indeed, we have article 2 and article 31 and on the other art. 41. This observation does not change the fact that, with these decisions, two antithetical definitions of dignity[99] co-exist in the constitutional system. The first is linked to self-determination, while the other is an expression of legislators' will. In the decision on assisted suicide the Constitutional Court affirms that the intention of legislators is «to protect the subject from his/her harmful decision» (committing suicide) and, given the impossibility of intervening directly on the subject, it «creates around him/her a "protective belt", inhibiting third parties from cooperating in any way with him/her»[100].

This mechanism resembles the one enacted by the Merlin Law in relation to persons practicing prostitution. In the case on assisted suicide, however, the Court recognized that exceptions must be made to the abovementioned provision, appreciating that there are cases when the self-determination of the subject wins over the need for protection of vulnerability. Again, of course, prostitution is a different phenomenon:

Quaderni Costituzionali, 2019; A. GRAGNANI, *Garanzia costituzionale della «libertà reale» e controllo accentrato di costituzionalità (in margine all'ordinanza n. 207/2018 della Corte costituzionale)*, in *dirittifondamentali.it*; E. FURNO, *Il "caso Cappato": le aporie del diritto a morire nell'ordinanza n. 207/2018 della Corte costituzionale*, in *Rivista AIC*, 2, 2019; M. RUOTOLO, *L'evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale. Per un inquadramento dell'ord. n. 207 del 2018 in un nuovo contesto giurisprudenziale*, in *Rivista AIC*, 2, 2019. On the concluding remarks some doctrinal contribution on decision 242/2019 will be mentioned.

[99] Legal scholars have pointed out the fact that the notion of dignity, especially with regard to ethically sensitive topics, is a sort of "empty vase" that takes on different connotations, depending on the context. On this observation, applied in the field of biolaw see C. CASONATO, *Introduzione al biodiritto*, cit., pp. 47-81; G. ARRUEGO, *El recurso al concepto de dignidad humana en la argumentación biojurídica*, in R. CHUECA (ed.), *Dignidad Humana y Derecho Fundamental*, Madrid, 2015, pp. 415-441.

[100] Point 4 of the decision. Here is the original passage: «Il legislatore penale intende dunque, nella sostanza, proteggere il soggetto da decisioni in suo danno: non ritenendo, tuttavia, di poter colpire direttamente l'interessato, gli crea intorno una "cintura protettiva", inibendo ai terzi di cooperare in qualsiasi modo con lui».

it involves the exchange of money and a part of it is contaminated by very serious criminal phenomena, such as exploitation and human trafficking. Undoubtedly the appreciation of free will is very hard and complex, but this does not invalidate the need to distinguish between human trafficking and sex work. Conversely, the Constitutional Court ruled out the possibility of recognizing any form of self-determination for this purpose. The abovementioned statements are partially attenuated in the final part of the decision, where the Court affirms that, in the end, this is not the one and only constitutionally compatible choice, leaving the responsibility to legislators.

Other critical remarks can be made on the Court's discussion of articles 13, 25 co. 2 and 27 of the Constitution. According to some scholars, the Court did not put much effort into arguing for the compatibility of the censored norm with the abstract principle of harm[101]. The solution of the Court was described as apodictic. The Court explicitly endorsed its previous ruling n. 44/1964. However, one of the determining factors of that decision has now changed. Indeed, at that time the Court affirmed that the concept of aiding and abetting did not create any jurisprudential contrast, being a notion with a precise and distinct meaning. In the following years this notion raised many contrasting decisions from Tribunals and Courts and the Constitutional Court's decision will not be resolutive in this sense (both regarding the issue of harm, as well as the boundaries between a legitimate activity and a criminally significant one)[102]. Conversely, the fact that the Court explicitly mentioned the discretion of the judges on the evaluation of relevant conducts, might result in fragmented decisions adopted with a case-by-case approach[103].

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[101] A. De Lia, *Le figure di reclutamento e favoreggiamento della prostituzione al banco di prova della Consulta. Un primo commento alla sentenza della Corte costituzionale n. 141/2019*, cit.

[102] A. De Lia, *Le figure di reclutamento e favoreggiamento della prostituzione al banco di prova della Consulta. Un primo commento alla sentenza della Corte costituzionale n. 141/2019*, cit.

[103] In agreement on this point are: A. De Lia, *Le figure di reclutamento e favoreggiamento della prostituzione al banco di prova della Consulta. Un primo commento alla sentenza della Corte costituzionale n. 141/2019*, cit.; S. Bernardi, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit.

To conclude, the final mention of this choice as not constitutionally necessary (and not the only one potentially acceptable) might reveal two relevant aspects. On the one hand, this might prove the existence of a different sensibility amongst the judges[104], and on the other, it may show a willingness to demonstrate a certain openness to a possible different evaluation and legislative approach in the future.

2. Sexual assistance in Italy: social actors and public debate

Sexual assistance in Italy appeared in the eye of public opinion around 2013, thanks to the efforts of Massimiliano Ulivieri, a disability rights activist, already well-known in the field of inclusive tourism[105]. Together with other activists, professionals, and doctors he created an association, *LoveGiver*, aimed at promoting sexual assistance in Italy[106]. The *LoveGiver* Committee drafted its own proposal on sexual assistance and recently started the first training course for sexual assistants.

Their advocacy work also inspired some law proposals that were developed during the previous legislature (see paragraph 4). Next to the work of this main association, in recent years, many other smaller initiatives have fed the public debate in towns and cities across Italy. At the same time, mainstream media have started to give more attention to sexual assistance. One of the most recent expressions of this growing interest is, for example, the show *Il corpo dell'amore*, broadcast on the Rai 3 channel, of which one episode is entirely dedicated to the story of an aspiring sexual assistant and her disabled client.

[104] A. Di Martino, *È sfruttamento economico e non autodeterminazione sessuale: la consulta salva la legge Merlin*, in *Diritticomparati.it*, 2019.

[105] He was the mind behind the project *Diversamenteagibile.it*, a website for sharing and collecting information about accessible tourism in Italy and Europe.

[106] The website of the project is where information, news and details on the association and their initiatives can be found. See *www.lovegiver.it*.

2.1. Target users and their experience

According to the latest ISTAT survey in Italy (2013), if we embrace a broad definition of disability, there are approximately 13 million people with disabilities over the age of 15, which means 25.5% of the entire population (of the same age)[107].

The sexual well-being of people with disabilities in Italy, and their potential interest in services such as sexual assistance, are still widely unexplored on both a social and scientific level[108]. A few studies in Italy have examined this phenomenon by interviewing potential users and sometimes even aspiring sexual assistants. In 2016, for example, a qualitive research project was carried out involving 12 people with disabilities and ten aspiring sexual assistants. The people with disabilities involved were mostly people with congenital physical disabilities[109]. What emerged from the interviews is an idea of sexuality as a normal

[107] The definition of disability used for the purpose of this data is very broad. It is comprehensive of severe functional limitations, light functional limitations, chronical conditions and permanent impairments. For further information on the methodology used see *https://www.istat.it/it/files//2015/07/Nota-metodologica-Inclusione-sociale.pdf*.

[108] There is one study only from 2016, but no data are provided: M. GARRO, A. MERENDA, A. SALERNO, *Quality of Life and Sexuality among People with Mental and Physical Disabilities in the Italian Context*, in *British Journal of Education, Society & Behavioural Science*, 15, 2, 2016, pp. 1-9. Another paper specifically examines the side of sexual assistants: E. LIMONCIN, D. GALLI, G. CIOCCA, G.L.E. CAROSA, D. MOLLAIOLI, A. LENZI, *The psychosexual profile of sexual assistants: an internet-based explorative study*, in *PLoS One*, 9, 6, 2014, p. e98413. In general, a lack of literature in the field of sexual assistance is reported in many studies such as R. GAMMINO, E. FACCIO, S. CIPOLLETTA, *Sexual Assistance in Italy: An Explorative Study on the Opinions of People with Disabilities and Would-Be Assistants*, in *Sexuality and Disability*, 34, 2, 2016, p. 158.

[109] G.R. GAMMINO, E. FACCIO, S. CIPOLLETTA, *Sexual Assistance in Italy: An Explorative Study on the Opinions of People with Disabilities and Would-Be Assistants*, cit., pp. 157-170. The authors report: «We used semi-structured interviews to obtain rich descriptive information about the phenomenon, and to allow participants to choose how and what to tell us. A curious and facilitative, rather than a challenging and interrogative stance, was adopted. The interview with the participants with disabilities began with a broad question about their knowledge of SA, and went on to explore their opinions of it, their sexual experience, their caregivers' attitudes toward the assisted person's sexuality, and the participants' possibility of gaining access to a sexual assistant».

and basic part of life[110], and sex as something mostly related to romantic relationships. The respondents all agreed that, due to stereotypes, it is much more difficult for people with disabilities to have sexual encounters. Reciprocity in attraction is seen as something impossible and some respondents supported this idea with negative experiences related to that. From the interviews the sphere of sexuality emerged as a taboo topic for parents[111], while very few talk more about sex with their sons/daughters and are more attentive to their needs. According to the answers given by the respondents in some cases, parents «do it [masturbation] directly» or take their daughters/sons to a prostitute.

On this point, some participants (five men and three women) reported knowing male friends with disabilities who have had sexual encounters with prostitutes and have been rejected because of their disability. Apparently: «Prostitution is still not particularly ''accessible'' for people with disabilities due to the difficulty of gaining access to the prostitute's workplace and the inability to host her at home, or for the lack of preparation to meet the needs of a person with disability»[112]. All the participants, however, knew what sexual assistance is, and saw it as something right or useful. It was commonly described as a «personal choice» or an opportunity that every person with disability should have[113]. Nonetheless most of the participants would rather have a ro-

[110] The terms used by most of the participants were: *life*, *beautiful*, and *transgression*. See G.R. GAMMINO, E. FACCIO, S. CIPOLLETTA, *Sexual Assistance in Italy: An Explorative Study on the Opinions of People with Disabilities and Would-Be Assistants*, cit., p. 163.

[111] See G.R. GAMMINO, E. FACCIO, S. CIPOLLETTA, *Sexual Assistance in Italy: An Explorative Study on the Opinions of People with Disabilities and Would-Be Assistants*, cit.

[112] G.R. GAMMINO, E. FACCIO, S. CIPOLLETTA, *Sexual Assistance in Italy: An Explorative Study on the Opinions of People with Disabilities and Would-Be Assistants*, cit.

[113] According to some participants this service should be at the National Health Service's expense, otherwise there would be a strong risk that «only those who have money may refer to a sexual assistant, whereas those who do not have enough money are always relegated to the end of the track!». Participants believe that the legalization of SA in Italy will be difficult and prefer that, in order of priority, money made available by the State for people with disabilities should be invested in other services. See

mantic relationship, so sexual assistance is not seen as the solution to the problem but a response to a "physiological need".

A second study, of a more quantitative nature, was carried out in Italy in 2017, consisting of three surveys directed to people with disabilities, their families and operators[114]. 223 people with disabilities participated in the survey (58% were men), most of them with an intellectual impairment[115]. According to 131 participants sexual life is a desire, while for 82 of them it is a need and for 56 people it is a right. 40% of the respondents were in favour of the legalization of sexual assistance in Italy and 56% of participants declared they would use sexual assistance (of which 68% were men, and 32% women).

The final part of the questionnaire considered some proposals to improve the sexual life of people with disabilities and many different suggestions emerged from the respondents[116]. Some proposals were provided by the questionnaire itself, such as the idea of creating a front office for counselling in the field of sexuality. This was considered useful by 82 respondents, of whom 75 declared they would use it immediately. In general, people with disabilities involved in the survey found the instrument "important" and "interesting", and declared they were thankful for being involved the project.

2.2. Sexual assistance in Italy according to the LoveGiver *Committee*

As mentioned above, the *LoveGiver* Committee is the main actor in Italy for the promotion of the figure of the sexual assistant. Over the

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G.R. GAMMINO, E. FACCIO, S. CIPOLLETTA, *Sexual Assistance in Italy: An Explorative Study on the Opinions of People with Disabilities and Would-Be Assistants*, cit., p. 164.

[114] The questionnaire, methodologies, results and their analysis can be found in D. DOLFINI, *Il diritto alla sessualità e la disabilità, tra bisogni e desideri. Il punto di vista delle persone con disabilità, dei loro familiari e degli operatori*, Trento, 2017.

[115] The author reports the difficulties and challenges in this part of the questionnaire. For more information see D. DOLFINI, *Il diritto alla sessualità e la disabilità, tra bisogni e desideri. Il punto di vista delle persone con disabilità, dei loro familiari e degli operatori*, cit., pp. 43-44.

[116] See the "box" in D. DOLFINI, *Il diritto alla sessualità e la disabilità, tra bisogni e desideri. Il punto di vista delle persone con disabilità, dei loro familiari e degli operatori*, cit., pp. 97-98.

years, the Committee has developed its own specific proposal, which distances itself from prostitution and sex work, in an attempt to find a framework compatible with Law 75/1958 on prostitution.

The *LoveGiver* Committee has been working since 2012 to promote the professional figure of the sexual assistant in Italy. According to the Committee, a sexual assistant is an operator for well-being who has to educate the user regarding affectivity, emotions, body experience and sexuality[117]. This assistant might be a man or a woman with a bisexual, heterosexual or homosexual sexual orientation, who is trained specifically, and assists and supports people with disabilities in recognizing, experiencing and living eroticism and sexuality[118].

The model promoted conceives sexual assistance as an experience with an educative purpose: it supports the person with disability in the exploration of sexuality and sensuality and in learning about pleasure and psycho-physical well-being. This aim is what, in the words of the Committee, mainly distinguishes sexual assistance from sex work: «the growth experience proposed by the sexual assistant is different from the mechanical one offered by prostitutes and escorts»[119]. Moreover, sexual assistants are described as figures with a vocation: «we can affirm that the selected people show a form of vocation»[120], related to the «noble intention of assisting» people with physical, cognitive and sensory impairment who are described as «less fortunate»[121]. In the opinion of the

[117] F. QUATTRINI, M. FULCHERI, *Affettività e sessualità nella disabilità. La formazione degli operatori*, in P. VALERIO, T. LICCARDO, A. RICCIARDI (eds.), *Affettività, relazioni e sessualità nella persona con disabilità tra barriere familiari e opportunità relazionali*, Napoli, 2016, pp. 108-109.

[118] F. QUATTRINI, M. FULCHERI, *Affettività e sessualità nella disabilità. La formazione degli operatori*, cit., pp. 108-109.

[119] F. QUATTRINI, M. ULIVIERI, *Cosa è (e cosa non è) l'assistenza sessuale*, in M. ULIVIERI (ed.), *Loveability. L'assistenza sessuale per persone con disabilità*, cit., p. 55.

[120] F. QUATTRINI, M. ULIVIERI, *Cosa è (e cosa non è) l'assistenza sessuale*, cit., p. 58.

[121] This kind of attitude is also confirmed in a study conducted with aspiring sexual assistants, from which it emerges that they see a sexual assistant as someone possessing "empathy", "sensitivity" and a "vocation to help" others. See R. GAMMINO, E. FACCIO,

Committee, the work of sexual assistants is not designed to give a functional answer to the needs of the person with disability, but rather, it is structured as an experience of growth. At the same time, this professional figure can promote better communication between caregivers and people with disabilities in a field such as sexuality, where self-expression is often denied and experienced with embarrassment and discomfort[122]. According to the Committee, in order for someone to become a sexual assistant, they have to take a training on sexuality and sexual well-being, with a specific scientific focus on disability and erotic-sexual response.

The encounters between sexual assistants and their users, which are to be intended as a form of «rehabilitative-educative training»[123], should vary from a minimum of five sessions to a maximum of ten.

The first sessions are dedicated to sharing information and knowledge on the theoretical aspects of affectivity, corporeity, and sexuality. These aspects will then be experienced on a practical level, through contact and massage techniques, through the experience of masturbation and by promoting the education of orgasmic pleasure. The work of sexual assistants can be divided into three different phases[124]:

1) Reception (*accoglienza*): the assistant will enter into contact with the user using empathy. Promoting a first level of interaction is fundamental to building trust for the relationship of care;
2) Attention (*ascolto*): the assistant will observe and will come into contact with the user, understanding their resources and limits, in order to make the last step with a personalized plan;
3) Contact (*contatto*): the assistant, having created and designed a specific intervention together with the user, will experience the practi-

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S. CIPOLLETTA, *Sexual Assistance in Italy: An Explorative Study on the Opinions of People with Disabilities and Would-Be Assistants*, cit., p. 165.

[122] F. QUATTRINI, M. ULIVIERI, *Cosa è (e cosa non è) l'assistenza sessuale*, cit., p. 61.

[123] F. QUATTRINI, *Assistenza sessuale: il progetto "Lovegiver" per la formazione degli operatori*, in M. ULIVIERI (ed.), *Loveability. L'assistenza sessuale per persone con disabilità*, cit., p. 66.

[124] F. QUATTRINI, *Assistenza sessuale: il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 77.

cal side of the process of sexual and bodily education. Each and every experience will be aimed at helping the person in understanding and recognizing their personal concept of erotic-sexual well-being. Given that in *LoveGiver*'s model sexual assistance needs to be easily distinguishable from prostitution, sexual assistants are banned from engaging in coital sexual activity with their users[125].

In 2018 the Committee officially launched the first course inspired by these guidelines[126]: the discussion of this course and its legal implication will be part of the following paragraphs.

2.3. The LoveGiver *Committee and the course for sexual assistants*

The Committee had already decided to explore the elements of a possible training course when discussing a manifesto, before 2014. During this work they decided to provide two different training sessions, one for professionals already working with disability who wanted to increase their knowledge and familiarity with the topic of sexuality and disability, and the other specifically for aspiring sexual assistants, who did not need to have previous training in working with people with disabilities.

The first course was launched in 2014 and was promoted under the scientific direction and support of two psychologists, Quattrini and Fulcheri[127]. The organization of the course was broken down into many different steps, namely: a call for participants, selection of the aspiring sexual assistants, the training course itself, an internship, and a follow-up. As of today, 16 people have been trained to carry out the profession of sexual assistant in Italy[128].

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[125] This includes penetration and oral sex. See F. QUATTRINI, M. ULIVIERI, *Cosa è (e cosa non è) l'assistenza sessuale*, cit., p. 59.

[126] The network is also responsible for setting up courses for sexual assistants, and now has a hotline that anyone can call to have information on sexuality and disability. See *www.lovegiver.it*.

[127] F. QUATTRINI, M. FULCHERI, *Affettività e sessualità nella disabilità. La formazione degli operatori*, cit., pp. 108-109.

[128] From this article and interview: *https://www.fanpage.it/attualita/anna-la-prima-assistente-sessuale-per-disabili-in-italia-insegno-lintimita-e-leros/*.

To begin with Quattrini and Fulcheri developed a protocol for the selection, widely inspired by the experience of Nordic countries, revisited for the Italian context and in line with the figure of the Italian sexual assistant[129]. The training course consists of 200 hours of training, lasting 12 months, with monthly encounters. Weekends are organized into three-day immersive experiences, with both theoretical and practical lessons, with the participation of sexual assistants from Nordic countries. An internship of 50-100 hours will be incorporated into the educational offering. This internship will take place in an organization or social enterprise which is part of the network created by the *LoveGiver* Committee. The internee will have the chance to enter into contact for the first time with this experience and, at the same time, will be monitored in this approach through specific supervision modules[130]. A follow-up phase will follow: during the training course the aspiring sexual assistant will be attended to by a psychotherapist, in order to elaborate and better analyse the implications and issues which might arise during the programme. In the post-training period, the follow-up of the experience and the monitoring of the well-being of the sexual assistants must be assessed by a psycho-sexologist or another sexual assistant for a period of one year. After this period this support is not mandatory, but highly recommended[131].

2.4. The training course for sexual assistants: some criminal law issues

The organization of *LoveGiver*'s training course follows a long period of political inertia. After the law proposals were drafted in 2014 and never discussed in Parliament (see further paragraph 4), the debate was stuck. It is probably for this reason that the Committee decided to

[129] F. QUATTRINI, M. FULCHERI, *Affettività e sessualità nella disabilità. La formazione degli operatori*, cit., pp. 108-109 and F. QUATTRINI, *Assistenza sessuale: il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 62.

[130] F. QUATTRINI, *Assistenza sessuale: il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 62.

[131] F. DONELLI, *Profili penali della disobbedienza sessuale: la pena come rimedio alla solitudine. Riflessioni sull'assistenza sessuale a margine dei rapporti fra diritto penale e neocostituzionalismo*, in *L'indice penale*, 2018, p. 70.

part ways with the legislative route and found new and alternative ways to give concrete life to the *LoveGiver* project. The launch of this training course is a way of taking into account the real needs of some people with disability and starting to discuss their isolation in the area of sexuality. This might be a concrete help also for some families and operators who would suggest that people with disabilities around them use this service[132]. According to some scholars, the launch of this course outside any legal framework represents a form of civil disobedience[133]. In any case, the organization of such a service in the current situation implies many risks.

First of all, the risk of abuse which inherently exists in such an intimate sphere for both sides (users and professionals) is exasperated by the absence of any legal provision. Secondly, the implementation of this service would probably be very different on a regional level. The possibility of using it will entirely depend on personal financial resources. Personal resources and networks also play an important role in the possibility of entering into contact with trained sexual assistants and the circumstance of being willing or unwilling to challenge the law.

All these situations generate a rift with article 3 of the Constitution.

Apart from these issues, the training course might have criminal significance under Law 75/1958 on prostitution. It has already been mentioned that the notion of prostitution according to Law 1958 is very broad. Any sexual activity, including through video chats, in exchange for money falls under the criminal law provisions. Physical contact is

[132] According to the previously mentioned study by Dolfini, 66% of operators are in favour of legalization of sexual assistance and 61% of families and friends are as well. 94% of operators and family members and friends would suggest using such service to a person with disability if it were legal. D. DOLFINI, *Il diritto alla sessualità e la disabilità, tra bisogni e desideri. Il punto di vista delle persone con disabilità, dei loro familiari e degli operatori*, cit., pp. 59-60.

[133] For a discussion on this point from a juridical point of view and, in particular, for the reason why it is still inappropriate to talk about civil disobedience, see F. DONELLI, *Profili penali della disobbedienza sessuale: la pena come rimedio alla solitudine. Riflessioni sull'assistenza sessuale a margine dei rapporti fra diritto penale e neocostituzionalismo*, cit., p. 413.

not a constitutive element of prostitution according to Law 75/1958[134]. For this reason, one of the most suitable ways for sexual assistance not to fall under the criminal law definition of prostitution is for it to be given without any form of monetary compensation[135]. This option, however, seems quite incompatible with the idea of the sexual assistant as a trained professional[136].

Given this, the possibility of including the actions of the *LoveGiver* Committee (the promotion, organization and launch of a training course for sexual assistants) among the activities of recruiting and aiding and abetting prostitution, as well as exploitation of prostitution, is not to be immediately excluded. This is particularly true, after Decision 141/2019 of the Constitutional Court. The organization of this course might be understood as the activity of an association aimed at recruiting prostitutes. The promotion of the course can be seen as the promotion of a prostitution business, and the act of creating contacts between persons with disabilities and aspiring sexual assistants as aiding and abetting prostitution. Some possible arguments against the liability of the association might be the following: I) there is no recruitment because people are recruited not to carry out the activity, but for theoretical and instructive purposes; II) there is no aim of attracting clients to a specific place or to specific persons practising prostitution; III) there is no aid-

[134] See Cass. pen., sez. III, 22 April 2004, n. 2546, in *Diritto e giustizia*, 2004, 25, p. 24, with commentary by A. NATALINI, *Webcam a luci rosse, per la Cassazione è atto di prostituzione. Nulla rileva che tra i partecipanti non vi sia congiunzione carnale*; and Cass. pen., sez. III, 21 March 2006, n. 15158, in *Cassazione Penale*, 2007, p. 1237 ff.; Cass. pen., sez. III, n. 17394, 27 April 2015, in *Cassazione penale*, 2015, pp. 3239-3244 with commentary by F. LOMBARDI, *Prostituzione "a distanza": tra analogia ed esigenze sistematico-evolutive*.

[135] The fact that these might not be distinguishable from a legal point of view does not mean they are ontologically impossible to distinguish. See F. DONELLI, *Profili penali della disobbedienza sessuale: la pena come rimedio alla solitudine. Riflessioni sull'assistenza sessuale a margine dei rapporti fra diritto penale e neocostituzionalismo*, cit., p. 392, pp. 398-399.

[136] Having trained professionals as sexual assistants diminishes the risk of abuse and devotism, according to studies. See, for example: E. LIMONCIN, D. GALLI, G. CIOCCA, G.L.E. CAROSA, D. MOLLAIOLI, A. LENZI, *The psychosexual profile of sexual assistants: an internet-based explorative study*, cit.

ing or abetting prostitution because the support to this activity is merely theoretical[137]. These theses trace a very thin line between what is relevant and what is not for criminal law. Moreover, if we consider any further activity of the association, such as hiring a secretary to manage the organization and putting in contact persons with disabilities and (already trained) sexual assistants, these arguments cannot be applied. Of course, what should be considered, as reiterated by the Constitutional Court in Decision 141/2019, is the possibility for the ordinary judge to assess the concrete damage to the relevant legal asset in question. In this case, the judge might evaluate the aim of the association, its goal and its methods as well as the training provided, and conclude that there is no concrete offence to any valuable asset, but, on the contrary, the willingness to support sexuality as a form of self-development as a right covered by article 2 of the Constitution.

3. The Law proposals on sexual assistance in Italy

Since 2014 there have been three attempts to create a piece of legislation regulating the new professional figure of sexual assistant. All three law proposals were drafted during the XVII legislature, while nothing similar has been proposed during the current legislature at this time.

The first attempt was made in the Senate and was promoted by Senator Lo Giudice, who worked together with the *LoveGiver* Committee in 2014. The other two proposals came from inside the Chamber of Deputies in 2015 and 2016 and were inspired by the previously mentioned draft.

None of this draft law was ever really discussed and scheduled in Parliament, showing very little interest on the part of institutional politics in the topic. Despite this, it is interesting to analyse in detail how these proposals were drafted, in order to understand and speculate on how sexual assistance might be handled in Italy on a legislative level.

[137] F. DONELLI, *Profili penali della disobbedienza sessuale: la pena come rimedio alla solitudine. Riflessioni sull'assistenza sessuale a margine dei rapporti fra diritto penale e neocostituzionalismo*, cit., p. 392.

3.1. Proposal n. 1442 9 April 2014 "Law on assisted sexuality for people with disabilities"

Disegno di legge n. 1442, presented in the Senate on 9 April 2014, was written mainly by Senator Lo Giudice, together with the *LoveGiver* Committee, and presented by other Senators from the Democratic Party (*Partito Democratico*)[138]. This proposal is called the "Law on assisted sexuality for people with disabilities"[139]. Interestingly, in the memorandum that opens the text, sexuality is seen as part of a broader project of personal development and sexual rights are considered human rights whose violation results in a denial of equality, non-discrimination, dignity and right to health.

The constitutional anchor is Decision n. 561/1987, where sexuality is considered part of the set of fundamental and undeniable rights protected by the Constitution. Unfortunately, however, many people with disabilities, for different reasons, cannot make informed and free choices around their sexual well-being or health. Moreover, the difficulty in living a sexual and intimate life results in a further loss of autonomy for people with psycho-social impairments. According to the memorandum, a huge role in this scenario is played by the dominant stereotypes around disabled people's sexuality. Even though the law cannot replace the need to overcome prejudices and cultural barriers, it can help in promoting, through the tool of sexual assistance, the sexual life of people with disabilities. For this reason, the law is aimed at creating a specific professional figure of a sexual assistant, a professional who needs to follow psychological, medical and sexology training.

The structure of the law proposal is very simple, and the text is quite short. It is composed of a single article divided into five paragraphs (*commas*). The professional figure of the sexual assistant, which is called an assistant for a healthy sexuality and psycho-physical well-being of the person

[138] The initiative was presented by senators: Lo Giudice, Cirinnà, D'Adda, Guerra, Ichino, Mancanoni, Maran, Mastrangeli, Mattesini, Pezzopane, Puppato, Ricchiuti, Sonego, Spilabotte, Valentini, Bencini and Romani.

[139] XVII Legislatura, Disegno di legge n. 1442, Disposizioni in materia di sessualità assistita per persone con disabilità, 9 April 2014.

with disability (paragraph 2), is not defined[140]. At paragraph 1, however, it is stated that the creation of this figure is aimed at protecting the right to sexuality and psycho-physical well-being of people with disabilities with reduced mobility and motility[141].

As stated in paragraph 1, this professional role will be disciplined by regional regulations, to be coordinated and promoted by guidelines from the Ministry of Health, through a decree to be approved within three months of the approval of the law. At paragraph 2 it is stated that the Regions and the Provinces of Bolzano and Trento must prepare a list of people who are trained to provide sexual assistance in their area. At paragraph 3 some compulsory requisites to be met to be part of this register are set. According to paragraph 3 sexual assistants must: a) be over 18 years old; b) be up-to-date with compulsory schooling; c) subscribe to the ethical code (§4); d) possess a certification of psycho-physical eligibility provided by the Local Health Authority; e) be accredited according to the procedure at §4[142].

At paragraph 4 it is indicated that the Regions and the Provinces of Trento and Bolzano must: a) determine the criteria and procedures for accreditation and define a training course to be part of the list at §2; b) arrange and update regularly the register at §2 and the regulation to be part of this list; c) approve measures to protect sensitive data of the sexual assistants, according to the law on data protection and freedom

[140] «Le regioni e le province autonome di Trento e di Bolzano predispongono un elenco di persone accreditate a svolgere nel territorio regionale la funzione di assistenti per la sana sessualità e il benessere psico-fisico delle suddette persone, di seguito denominati assistenti sessuali».

[141] «Al fine di tutelare il diritto alla sessualità e al benessere psico-fisico delle persone disabili a ridotta autosufficienza a livello di mobilità e motilità, e nel rispetto delle disposizioni sul riparto delle competenze in materia tra Stato e regioni, il Ministro della salute definisce con proprio decreto, da emanare entro tre mesi dalla data di entrata in vigore della presente legge, le linee guida per la promozione e il coordinamento degli interventi regionali individuati dalla presente legge».

[142] «Costituiscono elementi necessari per l'inserimento nell'elenco di cui al comma 2 le seguenti caratteristiche: *a)* il raggiungimento della maggiore età; *b)* l'avere adempiuto all'obbligo scolastico; *c)* la sottoscrizione del codice etico di cui al comma 4; *d)* il possesso dell'idoneità psico-fisica all'attività di assistente sessuale certificata dalla ASL competente; *e)* l'espletamento della procedura di accreditamento di cui al comma 4».

of choice about publication of professional contacts; d) adopt an ethical code for sexual assistants and for users, using content developed and implemented in Italy or other countries by organizations and institutions specifically trained in this area; e) define the type and the severity of the impairment that makes the intervention of the sexual assistant functional; f) define the tool to be used to monitor the psychophysical well-being and health condition of each sexual assistant[143].

Paragraph 5 regulates the aspects concerning labour law. It states that sexual assistance cannot be treated as employment, nor can it be conducted through procurement contracts. The work must be carried out in the full autonomy of the person who practices it. It can be regulated as self-employment in a cooperative company[144].

This proposal with its memorandum is the most extensive one: the other two, presented to the Chamber of Deputies, are largely inspired by it, with very few amendments.

[143] «Ai fini di cui al comma 1, le regioni e le province autonome di Trento e di Bolzano provvedono: *a)* a determinare i criteri e le procedure di accreditamento e a definire un percorso formativo ai fini dell'inserimento nell'elenco di cui al comma 2; *b)* alla predisposizione e all'aggiornamento periodico dell'elenco di cui al comma 2, nonché alla regolamentazione all'accesso a tale elenco; *c)* all'adozione di misure che garantiscano la protezione dei dati sensibili relativi agli assistenti sessuali, secondo quanto disposto dal codice in materia di protezione dei dati personali, di cui al decreto legislativo 30 giugno 2003, n. 196, e la libertà di ciascun interessato riguardo la pubblicazione del proprio recapito professionale, salva la necessaria pubblicità dell'elenco; *d)* alla recezione in un codice etico per gli assistenti sessuali e per gli utenti del contenuto dei codici etici elaborati e sperimentati, in Italia o in altri Paesi, da associazioni professionali o istituzioni competenti per questa materia; *e)* a definire il tipo e la gravità della disabilità dell'utente che rende funzionale l'intervento professionale dell'assistente per l'esercizio della sessualità; *f)* a definire le modalità per il monitoraggio dell'equilibrio psico-fisico e dello stato di salute di ciascun assistente sessuale».

[144] «L'attività di assistenza sessuale non può essere oggetto di un contratto di lavoro subordinato, né di un contratto di appalto, costituendo oggetto di una prestazione che deve rimanere caratterizzata da autonomia piena della persona che la esercita. Essa può costituire oggetto di lavoro autonomo cooperativo».

3.2. Law Proposals n. 2841 and n. 4143

The second proposal is *Proposta di legge n. 2841* presented on 23 January 2015, written by the Deputy Argentin, an activist for disability rights from the Democratic Party (*Partito Democratico*), and other Deputies[145], and is named "Law on assisted sexuality for people with disabilities"[146]. *Proposta di legge n. 2841* replicates precisely the text of the previous proposal.

The third proposal is *Proposta di legge n. 4143*, entitled "Creation of the professional figure of the educator for the sexual well-being of persons with disabilities"[147] and was presented on 11 November 2016 by the Deputy Savino from *Forza Italia*. The declared goal of this memorandum is to dismantle stereotypes about the sexuality of people with disabilities. Any intervention in education and assistance towards living a full sexual and relational life is framed as a step towards right to health and psycho-physical and sexual well-being. Here the sexual assistant is seen as a professional figure who can help people with disabilities to be *protagonists* of their life and aware of their sexual, emotional and relational potential. This educator can help the user through sexual education and raise their awareness of their self and increase their ability to take care of their own body. The memorandum explicitly mentions the topic of the relationship between sexual assistance and sex work. It states that prostitution differs widely from sexual assistance because the latter is offered by people who are trained experts, who have signed a register and are periodically supervised. Moreover, sexual assistance, unlike prostitution, is a specific therapy aimed at fulfilling the right to psycho-physical well-being.

[145] The Deputies were: Albini, Amoddio, Antezza, Becattini, Cani, Capone, Carella, Carloni, Castricone, D'Ottavio, Di Salvo, Fossati, Fragomeli, Gribaudo, Iacono, Maestri, Marantelli, Marchi, Piazzoni, Romanini, Paolo Rosi, Sbrollini, Terrosi, Valiante and Verini.

[146] *XVII Legislatura, Proposta di legge n. 4143, Disposizioni in materia di sessualità assistita per le persone disabili*, 23 January 2015.

[147] *XVII Legislatura, Proposta di legge n. 4143, Istituzione della figura dell'educatore al benessere sessuale per le persone disabili*, 11 November 2016.

The text of *Proposta di legge n. 4143* is composed of three articles. The biggest difference between this text and the one previously examined is that article 1 provides a definition of this new professional figure. In paragraph 1 the *educator of sexual well-being* is defined as a professional operator supporting people with disabilities in increasing their personal and bodily awareness by promoting sexual and affective education and by helping the person with disability to live a full, healthy and responsible relational life[148].

At paragraph 2 it is specified that the activity of this professional is carried out in full autonomy. At article 2, paragraph 1 the Ministry of Health is given the task of defining the guidelines for the promotion and coordination of the intervention needed according to this law, through a decree to be approved within six months. At paragraph 2 is it stated that the Regions and Provinces of Trento and Bolzano must create a register of people who are entitled to work as educators for the sexual well-being of people with disabilities.

At article 3, paragraph 1, three requisites to be part of the abovementioned list are established: a) be over 18 years old; b) possess a certification of psycho-physical eligibility provided by the Local Health Authority; c) be accredited according to §2[149]. In article 3, paragraph 2, it is established that the Regions and the Provinces of Trento and Bolzano must: a) define the type and severity of the impairment for the purpose of the operator's intervention; b) define the training course to be followed in order to be registered in the list and determine the criteria and the procedure for accreditation; c) establish the cadence of the updating of the register; d) regulate the ways in which the psychophysical eligibility of the operators should be periodically assessed[150].

[148] «L'educatore al benessere sessuale è un operatore professionale, che supporta le persone disabili a prendere maggiore coscienza di sé e del proprio corpo, promuovendo l'educazione sessuale e affettiva, nonché aiutando la persona disabile a condurre una piena, sana e responsabile vita relazionale. L'attività dell'educatore al benessere sessuale è caratterizzata dalla piena autonomia».

[149] «Costituiscono elementi necessari per l'iscrizione nell'elenco i seguenti requisiti: *a)* il compimento della maggiore età; *b)* il possesso dell'idoneità psico-fisica certificata dall'azienda sanitaria locale competente; *c)* l'accreditamento di cui al comma 2».

[150] «Ai fini di cui al comma 1, le regioni e le province autonome di Trento e di Bolzano provvedono a: *a)* definire il tipo e la gravità della disabilità della persona ai fini

3.3. The delegation to the Minister of Health and to the Regions, the register and the role of the Local Health Authorities

All these law proposals are very concise and brief. All the texts confer a predominant role to the Minister of Health as well as to the Regions and Provinces of Trento and Bolzano, to be carried out outside the national legislative power. Indeed, in accordance with the division of competences between State and Region stated in article 117 of the Constitution, a lot of crucial issues are to be determined by the Regions[151] coordinated by a Ministerial decree.

In such a delicate and unexplored legislative landscape, the idea of reducing to the minimum the intervention by formal Statute might represent a risk. In all these proposals the delegation to the Minister of Health is totally undefined: Regions and Provinces are asked to legislate broadly on very specific topics. The areas of intervention assigned to the Minister of Health, which should guarantee substantial uniformity, are not predefined. This implies the concrete possibility of a very inconsistent service, with substantial differences across Italy. Moreover, some Regions, where local organizations have been working for years on creating such services (such as Emilia Romagna), may have the support of these local entities to develop a proper legislation, while others are inexperienced and unsupported. In particular Regions are supposed to legislate broadly and on very specific topics: the training course, the ethical code to be adopted, the type of disability which determines whether or not the person is eligible for the service, and the monitoring of the psychophysical well-being of the sexual assistance. Considering this, together with the unknown and unbinding content of

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dell'intervento dell'educatore al benessere sessuale; *b)* definire un percorso formativo ai fini dell'iscrizione nell'elenco e a determinare i criteri e le procedure di accreditamento; *c)* stabilire i tempi per l'aggiornamento periodico dell'elenco; *d)* regolamentare le modalità per una supervisione periodica dell'idoneità psico-fisica degli educatori al benessere sessuale».

[151] Article 117 was modified after the reform of Title V of the Italian Constitution. This reform was and still is highly debated amongst legal scholars. For an introduction on the main points of the discussion see P. VERONESI, *I principi in materia di raccordo Stato-Regioni dopo la riforma del Titolo V*, in *Le Regioni*, 6, 2003, pp. 1007-1062.

the Guidelines from the Minister of Health, makes the concerns about substantial differences across the country and a violation of the principle of equality (art. 3 of the Constitution) real. At the same time, the fact that Regions and the Provinces of Trento and Bolzano will have to concretely regulate the procedure of accreditation and decide on the elements of the training course might violate the principle of formal legality[152].

Another point pertains to the need for the sexual assistant to receive a certification of eligibility from the Local Health Authority. This is one of the few requirements provided by law, however, again, it is not clear what kind of eligibility the law is referring to. To this end, a scientific protocol, similar to the one developed by the *LoveGiver* Committee for the selection of aspiring sexual assistants (see paragraph 5), might be suitable. However, the choice adopted by the protocol of asking a certificate of physical eligibility doesn't appear to be immediately reasonable and risks excluding disabled people who want to be trained as sexual assistants[153].

3.4. An ethical code: possible features and contents

The possibility of adopting an ethical code, as mentioned in the law proposals, is considered positively. What raises doubts and questions is that this code is to be adopted on a regional level, which may imply a high level of local differentiation. It is interesting however that, according to the law, Regions are encouraged to legislate on the matter by integrating the work and the experience of national and international organizations working on sexual assistance.

The *LoveGiver* Committee has not yet published its complete ethical guidelines, but from the available information their ethical code should be based on four main pillars: distinction between prostitution and sex-

[152] This is also according to F. DONELLI, *Profili penali della disobbedienza sessuale: la pena come rimedio alla solitudine. Riflessioni sull'assistenza sessuale a margine dei rapporti fra diritto penale e neocostituzionalismo*, cit., p. 412.

[153] See the interesting article by Shapiro on this experience of becoming a disabled sexual surrogate: L. SHAPIRO, *The disabled sexual surrogate*, in *Reproductive Health Matters*, 25, 50, 2017, pp. 134-137.

ual assistance; relation with the assisted person[154]; unaroused involvement of the professional[155]; respect between professionals[156]. As far as the difference between prostitution and sexual assistance is concerned, there is no similar mention in the law proposals, however this point cannot be ignored in the Italian legal system, especially given the last decision by the Constitutional Court on the matter[157].

Another aspect to consider is the remuneration of the professional figure, which seems to be uncontroversial in all the law proposals. Those however do not define the details, the minimum wage and the limits of this remuneration. If we consider sexual assistants as autonomous workers, then they should be capable of offering their service for the price they deem appropriate. However, if this service should be framed as an instrument for exercising fundamental rights, then there might be a need to ensure that prices in the free market are determined fairly, to protect both parties. On this point it is worth discussing

[154] According to the Committee, this aspect is related to the possibility for the person with disability to fall in love with their assistant. To avoid this, it has been suggested that the number of encounters between the sexual assistant and the user should be limited. Attention was also brought to the need for better training for sexual assistants, who need to be highly aware of what they are making the user experience in the emotional and sexual sphere.

[155] From this point of view, according to the Committee, the assistant must not be sexually involved in the contact with the user. The involvement must not imply any sexual arousal, which is why in the selection process there is a specific test to identify the possible *devotism* of the aspiring sexual assistant (see further on). The possibility that the sexual assistant relates to the assisted person as a sexual object must be avoided.

[156] The Committee shifts focus to the need to establish rules about fair behaviour between sexual assistants, who must respect each other as professionals to foster a working community based on mutual growth. F. QUATTRINI, *Assistenza sessuale: il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 70.

[157] This point is also confirmed by interviews with aspiring Italian sexual assistants. According to them, this professional figure must be: a person «without taboos about sexuality», «receptive to the problems of disability» and able to «understand the needs and desires of those who have never had sex before». However, the professional must be able to be «emotionally detached», a quality considered essential for both assistants and customers for many respondents. See R. GAMMINO, E. FACCIO, S. CIPOLLETTA, *Sexual Assistance in Italy: An Explorative Study on the Opinions of People with Disabilities and Would-Be Assistants*, cit., pp. 157-170.

whether or not this service should be financed by the State or by the Regions.

The ethical code should provide guidelines to safeguard both parties from potential abuse in a sphere such as the sexual one, where vulnerability is omnipresent. For this purpose, the experience gained in the field of medical consent through Law 219/2017[158] can be useful. Even in this field, in a symmetry with the patient-medical practitioner relationship, the autonomy of the user meets the professional competence of the service provider (as stated in co. 2 art. 1 Law 219/2017)[159], in mutual respect and listening. To make this encounter happen the relationship must be based on trust. For this reason, just as informed consent in the medical field must be given by paper[160] (paragraph 4), the intervention plan developed by the assistant after the communication and assessment phase could be written and signed by the assisted person. After all, this is what happens in countries such as Denmark (as discussed in Chapter III). More in general, many principles contained in the Deontology code for social workers[161] could be applied in this field as well.

3.5. Further observations on these proposals

The law proposals are to be considered an expression of interest from institutional politics in the topic and a good way to feed the public

[158] On Law n. 219/2017 see *Biolaw journal - Rivista di Biodiritto*, 1, 2018, pp. 1-104, with a specific Focus dedicated to Law on informed consent.

[159] I. CAVICCHI, *Le disavventure del consenso informato. Riflessioni a margine della legge sul consenso informato e sulle disposizioni anticipate di trattamento*, in *Biolaw journal - Rivista di Biodiritto*, 1, 2018, pp. 91-104, L. ORSI, *Un cambiamento radicale nella relazione di cura, quasi una rivoluzione (articolo 1, commi 2 e 3)*, in *Biolaw journal - Rivista di Biodiritto*, 1, 2018, pp. 25-27.

[160] Or it might be recorded on video, or by any other means of communication, according to the need of each person, always in the perspective of maximum accessibility and reasonable accommodation.

[161] For a general overview of social work in Italy see A. CAMPANINI, *Social work in Italy*, in *European Journal of Social Work*, 10, 1, 2007, pp. 107-116. For a specific inquiry on ethics and deontology of social workers: F.G. REAMER, *Social Work Values and Ethics*, New York, 2013.

debate. Nonetheless, there are many parts of these texts that can be better articulated or critical points that can be reformed in the perspective of new proposals in the current or future legislature.

Apart from some specific remarks which were already brought up in paragraphs 3.3 and 3.4, there are two main issues to be faced. The first one regards the theoretical matrix, while the other concerns the coordination between this kind of legislative measure and the law on prostitution.

To begin with, the proposals, specifically the first one, embrace – in both the opening memorandum and the articles – an idea of sexual assistance as therapy. Of course, if health is a comprehensive state of physical and emotional well-being, as affirmed by the WHO[162], sexuality can be part of this notion. Consequentially, it can be said that sexuality can be partially covered by health rights. However, putting a very strong emphasis on the therapeutic aim of sexual assistance might generate some criticism around the concept of disability underlying the law. The general concern is that these proposals could implement a medical view of disability, where sexuality is an issue to be treated medically. In the existing proposals, this idea is further reinforced by delegation given to the Ministry of Health to develop guidelines. Amongst these concerns, Regions are supposed to legislate on the type and severity of the impairment which makes the person eligible for the service. This is a very arbitrary criterion to set: legislators are asked to find a reasonable benchmark for distinguishing, aprioristically, who is worthy of receiving this kind of service and who is not, by law. This implies a serious risk of breach of the principle of equality, between people with disabilities in the same Region, between people with disabilities who live in different Regions and between people with different impairments. This physiological aspect of regionalism is usually counterbalanced by setting a minimum standard of protection that must be guaranteed to everyone, especially when it comes to social rights (for

[162] The World Health Organization in 1948 defined health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity in 1948. On this see D. CALLAHAN, *The "WHO" definition of health*, in *The Hastings Centre Studies*, 1, 3, 1973, pp. 77-87.

example in the field of healthcare)[163]. According to the law proposal, the criterion should be based on the type of impairment and its severity. Both features are assessed using medical criteria: the unavoidable risk is to medicalize disabled people's sexuality, putting the person in the role of object of state intervention again, and not subject. This approach is rejected by the Italian Constitution. Similarly, the fact that not every person is entitled to choose whether to use this service, as an expression of self-determination, might not be constitutionally compatible (in particular with articles 2 and 3). On the contrary, creating a category of disabled people who, because of their presumed difficulties in the sphere of sexuality, are eligible for this service is highly stigmatizing.

The second point concerns the coordination between these law proposals and the Merlin Law. The fact that the proposals do not address the issue directly might be critical[164], in particular from the point of view of the constitutionality of this law.

An intervention of coordination could be preferable: a modification or a new disposition inside the Merlin Law, for example, would have been functional[165].

[163] On regionalism in general see E. BALBONI, *L'attuazione del regionalismo differenziato: la differenziazione non implica di per sé diseguaglianza*, in *Quaderni Costituzionali*, 39, 2, 2019, pp. 444-446; G. FALCON, *Il regionalismo differenziato alla prova, diciassette anni dopo la riforma costituzionale*, in *Le Regioni*, 45, 4, 2017, pp. 625-634; C. PINELLI, *Sui "livelli essenziali delle prestazioni concernenti i diritti civili e sociali" (art. 117, co. 2, lett. m, Cost.)*, in *Diritto pubblico*, 3, 2002, pp. 881-908. On right to health: G. FRANCE, *Federalismo, regionalismo e standard sanitari nazionali*, Milano, 2011. We will further discuss how a minimum standard of protection was never established for personal assistance (LivEAS).

[164] Observed also by F. DONELLI, *Profili penali della disobbedienza sessuale: la pena come rimedio alla solitudine. Riflessioni sull'assistenza sessuale a margine dei rapporti fra diritto penale e neocostituzionalismo*, cit., p. 412.

[165] F. DONELLI, *Profili penali della disobbedienza sessuale: la pena come rimedio alla solitudine. Riflessioni sull'assistenza sessuale a margine dei rapporti fra diritto penale e neocostituzionalismo*, cit., p. 413.

4. An Italian sustainable way: sketching the affirmative specification model

In Chapter IV the existence of two main approaches to sexual assistance in Europe was observed and theorized. At this moment, Italy can be qualified as one of the countries belonging to the negative incorporation model. The proposals put forward both by associations and at a Parliamentary level examined in this chapter, however, suggest a sort of "third way" to sexual assistance, compared with the existing models of regulation in Europe. If this proposal were to pass, Italy would be the first country to adopt a specific legislation on sexual assistance. At the same time, Italy would be the first abolitionist country – when it comes to the regulation of prostitution – to create a legal space for a specific service in the field of sexuality, aimed at a particular category of people (people with disabilities). It is in this sense that Italy would represent a third option, distancing itself from the existing solutions in Europe.

If the development of a form of regulation is to be seen positively, some critical points could be raised and addressed. Some of these have already been mentioned in the previous paragraph, however a deeper analysis from a constitutional point of view will follow, to investigate the constitutional sustainability of this model. To conclude, a proposal for an alternative framework will be put forward, by using some of the suggestions that emerged from the comparative legal analysis.

4.1. The constitutional sustainability of a third model as outlined by the existing proposals

In the last paragraph of Chapter II, a possible constitutional basis for positive measures in the field of sexuality and disability was sketched. First, what emerged is that the Constitutional Court endorsed a social model of disability, according to which disability is considered a social issue to be addressed collectively, by society[166]. Secondly, the sphere of

[166] Here we refer to decision 167/1999 of the Constitutional Court. The judges affirmed that the legislator: «non si fosse limitato ad innalzare il livello di tutela in favore dei soggetti disabili, ma segnasse un radicale mutamento di prospettiva rispetto al modo

sexuality, as one of the essential ways of self-expression[167], must be encompassed in a broader constitutional project, aimed at granting the self-development of each individual, both with positive and negative rights[168].

From the analysis we managed to identify three constitutional directives for any possible intervention in the field of disability and sexuality: the first one is article 2 of the Constitution, covering the need to overcome social barriers in the field of sexuality, granting self-determination in the sexual sphere, full participation, and relational connection: in a word, securing and promoting sexual agency for disabled persons. The second one is article 32, closely linked to self-determination. Article 32 should be interpreted in light of the fact that «socialization (can be seen) as an essential element for health, and as such can have a therapeutic function just like medical treatments and rehabilitation»[169]. The use of this parameter, however, needs to be strictly linked to article 2 and article 3: emphasis must be given to the holistic and comprehensive notion of well-being of the person, rather than on the medical aspect, so as not to reaffirm the medical model of disability. The last parameter is article 3, in particular the notion of equality understood as an anti-subordination principle.

In the specific case of sexual assistance, these constitutional directives must be coordinated with the legal provisions around prostitution of the Merlin Law. In fact, legislation on sexual assistance in the Italian legal system would constitute an exception to the Merlin Law. Such a regulation would create a legal space where the organization of trade of sexual services for people with disabilities would not be criminally relevant. On the contrary, according to the proposals, this service would

stesso di affrontare i problemi delle persone affette da invalidità, considerati ora quali problemi non solo individuali, ma tali da dover essere assunti dall'intera collettività».

[167] Being defined by Constitutional Court as one of the essential ways in which the human person can express themself. See decision n. 215/1987.

[168] From which, however, the choice of selling sex must be excluded according to decision n. 141/2019 by the Italian Constitutional Court.

[169] Here is the original passage of decision n. 251/2008 by the Constitutional Court: «la socializzazione come un elemento essenziale per la salute degli interessati, sì da assumere una funzione sostanzialmente terapeutica assimilabile alle pratiche di cura e riabilitazione».

be promoted by the State and organized by the Regions. Such an exception to the general criminal law on prostitution would need to be reasonable and justified, especially from the constitutional point of view. The arguments used to support this exception are mainly two: the first one being that sexual assistance is inherently different from "general" prostitution, the second one that everything that surrounds the purchase of sexual services by people with disabilities should be excluded from the application of criminal law.

The first argument relies on the fact that sexual assistance, unlike common prostitution, has a therapeutic aim. In fact, it is provided by specially trained professionals for the sexual health of people with disabilities. This position is clearly endorsed, for example, by the *LoveGiver* Committee and the law proposal put forward. The second argument relies on the fact that, given social discrimination and stigma, people with disabilities do not easily cultivate a fulfilling sexual life: for this reason, they need the support of professionals in this field. According to this view, sexual assistance would be the only way for people with disabilities to explore sexuality. As sexuality is a relevant field for self-determination, then an exception to general provisions must be granted by law. Both these arguments risk perpetuating a view of disability which is now obsolete. Disability is considered a pejorative attribute and disabled people's sexuality is relegated either to a sphere of medicalization or something that can be satisfied only through the auxiliary work of a trained person. This view underpins a model of disability that is very distant from the one currently embraced by our constitutional system and, at an international level, by the CRPD.

This configuration of sexual assistance might patronize people with disabilities and pathologize their sexual sphere. It creates no space for self-determination and full participation, but a service based on medical assistance: the issues of full inclusion in social life, development of relational potential and erasure of barriers are not addressed[170]. This framework does not meet the interpretation of articles 2 and 32 of the Constitution in the disability field, where the emphasis is always on social factors, barriers, accessibility and self-determination. It is also

[170] C. COLAPIETRO, *Diritti dei disabili e Costituzione*, cit., p. 81.

hard to reconcile the compatibility of this exception with a proper interpretation of article 3 of the Constitution. If, at the core of the constitutional scheme for the person with disability, we find sociality, accessibility and active participation, then we can say that this exception does not find reasons in any of them.

In the end, it appears that a similar configuration of sexual assistance would perpetuate and strengthen the social stigma on people with disability, specifically in the field of sexuality.

4.2. What room left for a third way? The affirmative specification model

After examining the current proposals, an alternative framework will be sketched, drawing upon the comparative analysis carried out in Chapter IV. The possibility we would like to explore is to include sexual assistance in the already existing regulation for personal assistance (law 104/1992), rather than creating a whole new professional figure by law. In this case sexual assistance should be seen, as highlighted by Centeno[171], not as a therapeutic relationship or as an erotic/sensual experience, but as a tool – an instrument – for living sexuality within the philosophy of independent living[172]. Sexual assistance should be framed as a particular form of personal assistance. In this sense, a sexual assistant might be contacted to provide support to a couple's intimacy or to help the user with masturbation or to engage in sexual activity in general. Sexual assistants should not be involved in sexual intercourse with users, simply because that would be outside their competences. As Arnau and Centeno explain, sexual assistance should grant a person with disability access to their own body[173]. The experience of

[171] This view is also supported and being implemented currently by the Spanish association *asistenciasexual.org*.

[172] This philosophy is also promoted by international institutions on a macro-regional level. See Council of Europe, *The right of people with disabilities to live independently and be included in the community*, 14 October 2012. Available at *https://rm.coe.int/the-right-of-people-with-disabilities-to-live-independently-and-be-inc/16806da8a9*.

[173] A. CENTENO, *Asistencia sexual para personas con diversidad funcional*, cit.; S. ARNAU RIPOLLÉS, *La asistencia sexual a debate, Forum on Sexual Assistance*, cit., pp. 7-14.

Denmark and the *Guidelines on Sexuality Regardless of Disability* might be a good example to follow. Similarly to what happens in Denmark, a sexual assistant might help people with disabilities have sexual intercourse with partners and support them with masturbation, with a ban on having sex with the user. What would be different is that, in consideration of the Merlin Law, among the tasks of a sexual assistant there would not be the possibility of contacting a sex worker on behalf of their assisted person.

Early on, when Law 104/1992 was approved, some scholars soon complained about the lack of any mention of the area of sexuality and the sexual needs of people with disabilities[174]. The Law could now be modified to encompass the sphere of sexuality in its objectives (and this might be a good chance to update the terminology of the legislation in order for it to be more inclusive). This could be done, for example, with an amendment of article 1, by adding a new letter (namely the letter E) or including in the existing structure of the articles some references to sexuality, for example at letter "a". Even in article 5 a specific mention of sexuality could be included, in order to give more strength to the service of sexual assistance inside personal assistance. In a nutshell, sexual assistance could be covered by Law 104/1992, inside the service of personal help for «citizens with temporary or permanent serious limitation of personal autonomy» (article 3, paragraph 3)[175].

According to this Law, as emended by l. 104/1998, Regions are responsible for the organization of personal assistance. Regions must grant people with disabilities independent living, and the Law explicitly recognizes the possibility of self-managing personal assistance, in a direct form[176]. Sexual assistance could be subject to the legal system of

[174] On this point see V. VADALÀ, *La tutela delle disabilità*, cit., p. 195.

[175] Here is the text in Italian of article 3 paragraph 3: «Qualora la minorazione, singola o plurima, abbia ridotto l'autonomia personale, correlata all'età, in modo da rendere necessario un intervento assistenziale permanente, continuativo e globale nella sfera individuale o in quella di relazione, la situazione assume connotazione di gravità. Le situazioni riconosciute di gravità determinano priorità nei programmi e negli interventi dei servizi pubblici».

[176] Technically, this form of assistance is called by law "indirect". In spite of the confusing name, it works by giving the interested person the possibility of managing their assistance alone, on their own. With a sum of money provided by the Region,

personal assistance, with the possibility for the user of hiring a sexual assistant directly and covering the related expenses, if it is possible and desired, with the regional funding for personal assistance. Obviously, this measure counts on the ability of Regions to implement their policy for independent living, both from a financial and organizational point of view. Interventions to multiply available programmes and increase funding are desirable[177], since the introduction of this service does not mean an immediate and direct surplus in regional expenses for disability-related services. The budget can indeed remain unchanged and, consistent with the way personal assistance is currently structured, it would be the person with disability who decides in which area they want to invest their budget and plan their assistance.

In line with the current regulation for personal assistants, sexual assistants would not be obliged to undergo any specific training to practice this profession by law. However, training might be encouraged by funding the associations and NGOs of people with disabilities organizing these courses, but participation should not be mandatory. It will be up to the person with disability, in line with the philosophy of independent living, to choose the right person and, if possible, provide the specific training and instructions needed to perform the task.

The work of personal assistants in the field of sexuality could be supported also by other professional figures, such as the sexual advisor from the Danish model[178]. This figure is even more important in those cases where potential users, especially those with psycho-social and cognitive impairments, are not fully capable of guiding alone the work of a sexual assistant or of fully recognizing and expressing their needs and consent. Everyone – and this target in particular – could benefit from professional guidance and counselling on the path towards the

given upon specific request, they can hire a personal assistant. The work and the budget for this person must be reported to the Region.

[177] Tuscany can be considered the most virtuous Region in Italy for the implementation of the philosophy of Independent Living. See A. LAURÌA, B. BENESPERI, P. COSTA, F. VALLI, *Progetto ADA: un modello di intervento per l'autonomia domestica delle persone disabili*, Milano, 2017.

[178] D. KULICK, J. RYDSTRÖM, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, cit.

fulfilment of sexuality. This person, with a specific knowledge of sexuality and a stereotype-free, non-ableist and competent approach towards disability, would be able to detect, develop and address users' needs. At the same time, this professional would help ensure that the person in question fully understands the terms of the assistance required. The figure of the sexual advisor could be part of the already existing system created by "Consultori familiari"[179], as part of a public national service, managed by Regions, aimed at self-determination and informed choices in the area of sexuality and reproduction (specifically targeted at people with disabilities).

Nevertheless, training regarding sexuality and disability should be offered and promoted, at different levels, in order to promote a positive attitude towards the expression of sexuality of people with disabilities and encourage them to recognize and express their needs in this area. These initiatives should be aimed at medical professionals, social workers, families, and anyone working in institutions and services for people with disabilities. In general, as already mentioned, it is also important to offer programmes of inclusive sexual education in schools, addressing the topic of sexual accessibility for people with disabilities.

Law can be a propulsive agent of social change[180], affecting social attitudes and perception, but to do so, this issue must be addressed in the most comprehensive way. That is why sexual assistance without further interventions would be ineffective.

[179] As already mentioned in Chapter II, these health-related services were created by Law 405/1975 with the aim of protecting informed choice in reproductive issues. Many different professionals work inside these structures, such as social assistants, educators, gynaecologists, obstetricians, nurses, psychologist and pedagogists. See R.E. MARCOZ, *Sessualità e consultori familiari*, cit.; E. PROTETTÌ, M.T. PROTETTÌ, *I consultori familiari*, cit.; C. ZANTI TONDI, G. TEDESCO TATÒ, *Consultori familiari*, cit.; E. SGRECCIA, F. ANGELO, G. DALLA TORRE, *Consultori familiari: legge 405/1975*, cit.

[180] A. FACCHI, C. FRALLI, T. PITCH (eds.), L. GIANFORMAGGIO, *Eguaglianza, donne e diritto*, cit., p. 5.

CONCLUDING REMARKS

TOWARDS AFFIRMING A CULTURE OF DISABLED PEOPLE'S SEXUAL RIGHTS

SUMMARY: *1. Italian law and international law: from the medical model to the social model and the missing debate on sexuality. 2. Sexuality, law, disability: social barriers and the role of the law. 3. Issues of denied sexuality: sterilization and criminal law on sexual abuse and the need for an affirmative view of sexuality in the law for people with disabilities. 4. Two models for sexual assistance in Europe strictly connected to the regulation of sex work/prostitution. 5. Sexual assistance in Italy: the proposal of a constitutionally compatible third way. 6. Knots in our common thread (1): balancing protection and self-determination in the field of disability and sexuality law. 7. Knots in our common thread (2): the need for flexible and soft sources of law. 8. Knots in our common thread (3): the constitutional parameters in the field of disability and sexuality law. 9. On the need for a set of instruments and the role of law as an agent of social change.*

To provide input for our concluding remarks, we will look back and try to summarise the cardinal points established during this journey across the field of disability and sexuality from a fundamental rights perspective. For this reason, the first paragraphs summarize the main conclusions from each Chapter. We will continue by pinpointing some considerations that emerged as a common theme of the study, in particular: the use of different sources of law and models; the need to balance complex instances in the field of disability and sexuality; and the importance of constitutional parameters. The concluding remarks will be built upon the idea of a toolkit for fostering the sexual agency of people with disabilities and on the role of the law in supporting positive social change.

1. Italian law and international law: from the medical model to the social model and the missing debate on sexuality

In Chapter I the main theories, models and approaches towards disability were analysed. The intermediate model with some elements from feminist disability theory and crip theory enabled us to address the relationship between, disability, gender and sexuality.

One of the main goals of this chapter was to understand at what level social theories on disability have reached law and legislation in this field. For this purpose, both international and domestic Italian legal frameworks related to disability were analysed, through legislation and case law. On the domestic level a progressive shift towards the incorporation of the social model was noted. A virtuous example of this progress is the law on inclusive education, which, in spite of the ongoing economic crisis and the pandemic, still represents one of the best models in Europe. This system is based on the assumption that schools must be organized around the educational needs of their students to grant effective and quality education for everyone[1]. It is not by chance that one of the most significant decisions by the Italian Constitutional Court on disability is in the field of education: Decision n. 215/1987 is representative of the entire judicial philosophy of the Court on this topic. Here it is clearly stated that the law must address social barriers to overcome social marginalization of people with disabilities and ensure their full development as human beings[2]. Hereinafter, social inclusion has been the core of the constitutional jurisprudence on disability.

Internationally, this shift is happening inconsistently and slowly, at different levels. In this landscape, the United Nations have played a leading role with the 2006 Convention on the Rights of Persons with Disabilities. This treaty is currently the leading document for the protection of disability rights at an international level and is capable of influencing policy of both the European Union and the Council of Europe. The European Union signed the Convention in 2007, however in a

[1] S. PENASA, *La persona e la funzione promozionale della scuola: la realizzazione del disegno costituzionale e il necessario ruolo dei poteri pubblici. I casi dell'istruzione delle persone disabili e degli alunni stranieri*, cit., pp. 1-40.

[2] Point 5 of the decision.

decision the Court of Justice clarified that its provisions do not have direct effect in European Union law[3]. On the whole, the EU approach towards disability can be defined as erratic: indeed, if the Disability Strategy adopts a definition of disability inspired by the social model, the Court of Justice, in its fundamental task of interpreting European law, struggles to affirm and apply a definition fully disconnected from medical criteria[4].

As far as the Council of Europe is concerned, we can say that the work carried out has not been very incisive, however in some of its acts it adopts a notion of disability which is widely inspired by the CRPD. What emerged is that the law is being progressively contaminated by social elaboration and theories around disability. The law is slowly changing its architecture in order to embrace an understanding of disability capable of granting equality and access to every field of life for everybody. What can be noticed, however, is that a similar process has not been undertaken with the most recently developed theories, such as the feminist and crip disability theory. The observations by these scholars are still unacknowledged by law, in particular as far as the fields of sex, sexuality, and intimacy are concerned. These issues have not been addressed or have been addressed very little in law, legislations and policies: this is also shown by the scarcity of legal literature on the topic.

2. Sexuality, law, disability: social barriers and the role of the law

Starting from this observation, Chapter II investigated the unexplored intersection between law, disability, and sexuality.

The chapter opened by investigating the status of sexuality in law. This field indeed presents itself as a peculiar object of inquiry, still underexamined and marred by unresolved social conflicts and tension. From the reconstruction of the general relationship between law and sexuality emerged the complexity of this issue, while at the same time it was possible to detect some growing trends.

[3] Case C-363/12, Z. v. a Government Department.

[4] Case Daouidi v. Bootes Plus SL, C-395/15.

Law has been, for a long time, a way to control and regulate sexuality, especially through criminal law (e.g. the law criminalizing buggery or sodomy). During the 1960s and '70s, however, social movements strongly demanded that the law withdraw from the areas of sex, sexuality and the body, believing that this alone would grant individual self-determination. The final stage of this trajectory is represented by the awareness that to foster self-determination there is a need for recognition and promotion enacted through social rights and positive measures.

In fact, the analysis of international and domestic law has shown an increasing interest on the part of the law in the issues surrounding sexuality. At an international level, even if no treaty refers explicitly to sexuality, it is a common understanding that sexuality is a part of human rights. In the ECtHR's case law, for instance, sexuality is covered both in a negative (*freedom from* rights) and positive (*freedom to* rights) way by article 8 of the Convention (Private life), as a fundamental part of everyone's personality. These decisions cover areas such as the right to engage in consensual sex, the recognition of bodily integrity and gender identity. From this jurisprudential analysis we can deduce that, in the ECHR system, sexuality is a matter of dignity, self-determination and right to identity. However, the concrete outcome of the case in this system cannot ignore an assessment of social sensibility.

A similar trend can be detected looking at the Italian national level. From a legislative point of view, legal and social change started during the 1968 movements, with the approval of ground-breaking legislation such as the one on divorce (l. n. 898/1970), interruption of pregnancy (l. n. 194/1978) and the creation of family counselling centres (*consultori familiari*) (l. n. 405/1975). Another important step was made with the reform of sexual offences that linked sexuality to the right to personality – an approach that was later confirmed by Law n. 164/1982 (on the recognition of gender identity) and its evolutions. Looking at the case law, in those years the Court of Cassation started recognizing the right to compensation for damage in the sexual sphere and at the same time affirmed the prevalence of consent over public order, where the sexual sphere was involved.

At a first glance, however, these detected trends do not tackle disability issues, an area which appears to be segregated into a niche. The

sexuality of people with disabilities, indeed, is surrounded by many stereotypes and misconceptions that become social barriers. In recent years many disabled scholars have started addressing sexuality as a social issue, developing analytical categories through which to look at it. Law itself needs to be examined by using these categories, in order to dig into legal attitudes towards disabled people's sexuality. In line with the level of analysis developed earlier, both the international and national level were explored.

On the international level, the analysis took into consideration the CRPD, showing how sexuality is structured as a highly divisive topic. In the process of drafting, discussing and approving the Convention, indeed, many of the most incisive articles, in particular the affirmative ones in the field of sexuality, were modified and narrowed in their scope. The final result is less audacious than the previous document (Standard Rules). The CRPD adopted a "discursive silence" in the field of sexuality, which was reduced to an issue of sterilization and marriage.

The use of silence as a form of regulation can be found on the national level as well. However, before it there was a form of regulation which was *de facto* repressive against disabled people's sexuality. It was article 519(2)(3) of the Italian Criminal Code, for instance, that detailed a strict liability offence, incriminating for sexual violence anyone found having sexual intercourse with a person who is "mentally impaired" (*malata di mente*) or in "condition of physical or mental inferiority" (*condizioni di inferiorità fisica o psichica*). This provision, despite having as its object the protection of vulnerable people, constituted a deprival of sexual self-determination for people with disabilities, who were considered by law incapable of actuating any form of consensual sexual expression. The offence was cancelled and reformulated by the 1996 reform which gave life to a disability-neutral offence of sexual violence. However, no positive measures in this field have been enacted ever since. This happens because of the widespread idea that sexuality is something private and law should not interfere in it. In this field however the reference to the private (as a space outside the law), in opposition to the public (as the realm of the law) proves inadequate in representing complex phenomena. This dichotomy is frequently used

in the field of sexuality law and, according to historians, it was fundamental in early demands for law reform to challenge repressive State regulation. However, given the evolution in sexuality, customs and law, these strict categories seem fallacious nowadays, as the separation between them is more blurred due to the welfare State and social rights. Feminist scholars have widely researched this topic, showing how the private has been used to perpetuate situations of discrimination and power imbalances.

The privacy argument can indeed be a double-edged sword. An example of this can be found in US jurisprudence and policy regarding homosexual conduct and homosexuality. If privacy was what permitted an overruling of the infamous 1986 *Bowers v. Hardwick* decision, it was also the argument that gave legitimacy to state-enforced homophobic policy such as 'Don't ask, don't tell' in the US Army. Ultimately State intervention is needed to secure privacy and affirm self-determination in this area. With specific regard to the field of disability and sexuality, this argument is particularly fallible: in the area of disability people already experience very thin lines of separation between private and public. The common sense on what is private and what is public might not be valid for a person with disability who needs a high level of assistance with everyday activities – even the most intimate, such as bathing and going to the toilet. At the same time, intervening in the sphere of sexuality means securing the demand for privacy when needed, for example for people with intellectual disabilities living in group homes.

Given the need to articulate positive measures in the field of sexuality and disability, an attempt to elaborate a constitutional framework for these followed, starting from the analysis of the constitutional jurisprudence on sexuality. From this analysis it emerged that sexuality is framed, first of all, within the right to develop one's personality (art. 2 It. Const.), which means, for example, the right to be recognized in one's own gender identity. The Constitution also grants the right to sexual freedom, but as freedom from external unwanted interference and, positively, as the right to express and fulfil one's sexuality. Limits must be found in the notion of human dignity, which does not cover the possibility of making sexuality a source of legitimate income, as

emerged from Decision n. 141/2019. From this corpus a multifaceted notion of sexuality-related rights was highlighted. These are not new rights to be recognized, but a variety of constitutionally relevant conditions that call into action (and demand the application of) already well-established fundamental rights.

The possible constitutional outcome for measures in the field of sexuality and disability was outlined based on these findings. The leading principles in Italy are those expressed in articles 2, 3 and article 32. According to this set of principles, disabled people's sexuality needs to be an area of intervention in order to ensure the removal of social barriers and obstacles that inhibit the person from socialisation, fulfilment and self-development in this domain.

3. Issues of denied sexuality: sterilization and criminal law on sexual abuse and the need for an affirmative view of sexuality in the law for people with disabilities

Chapter III unwrapped and analysed specific legally relevant issues arising in the field of sexuality and disability. What emerged was mainly the need to overcome stereotypes that regard people with disabilities as vulnerable in the sexual sphere without giving up the need for protection. The topics examined were the creation of criminal offences to protect people with disabilities from sexual abuse and forced sterilization. Before digging into this topic, however, a premise was developed on the conditions of people with intellectual disabilities in the realm of sexuality. People with intellectual disabilities are depicted as incapable of acting as agents of their own life, even in the intimate and sexual sphere, with a significant social stigma. The widespread idea on the topic is that they are in need of protection, and even social workers and carers tend to treat the topic as taboo and not provide any support. It is true that people with intellectual disabilities, and in particular young people, are more vulnerable to sexual abuse than the rest of the population. However, it must be taken into account that the situation derives from many factors, such as the lack of information, opportunities of socialisation, and spaces for experimenting, rather than solely? From

the impairment itself. These observations are even more valid for people living in institutions and group homes, whose life is strictly controlled, and sexual socialization is often discouraged.

Still to this day, in some countries legislation legitimizes and exacerbates the deprival of sexual agency of people with intellectual disabilities, in an attempt to protect them, without addressing the causes of their vulnerability. The experience of some common law jurisdictions and the Irish debate for the reform of the Sexual Offence Act were discussed. Conversely, a disability-neutral offence is implemented in Italy where, on the basis of the already-mentioned article 609-bis, judges proceed with a case-by-case assessment of the ability to consent to the sexual act, an evaluation that is not influenced by the person's impairment. This approach, for example, is consistent with article 23 of the CRPD. A very positive example of the drafting of policy for the self-determination of people with intellectual disabilities living in group homes is provided by Denmark. Here, in 1989, the issue was addressed with guidelines (a soft, non-binding document) addressing the duties and obligations of social workers in relation to the sexuality of people with disabilities with whom they are involved.

Another instrument commonly used to regulate and deny sexual agency of people with disabilities is sterilization. The issue of sterilization has roots in the rise of the early eugenics movement in the US but also in other European countries. Still to this day, according to international institutions, people with disabilities, and in particular women with intellectual disabilities, are being sterilized against their will or without their consent in open violation of many international treaties and in particular of the CRPD. Thanks to a comparative analysis, it is possible to identify a common thread in the case law on sterilization of different systems: the argument of the best interest, expressed in different ways depending on the particular case and the historical moment.

In the US the leading case was *Buck v. Bell* (1927), where the sterilization of a young "feebleminded" woman was authorized for the best interest of society. The legal arguments evolved over the years and the best interest of society started to be replaced by the best interest of the subject, or the best interest of the children involved (on the assumption that parents with intellectual disabilities are incapable of such a duty).

Decisions with similar outcomes, but different arguments, are still being adopted nowadays in countries such as the UK, Spain and Argentina, in spite of the CRPD, which has specific provisions on the point (article 23, for example) and in spite of being against the jurisprudence of the ECtHR on the wider topic of sterilization (a specific question regarding the sterilization of people with disabilities has not reached court yet). In Italy, forced sterilization is considered a criminal offence, punishable by article 583(2)(3) of the Criminal Code. Moreover, it violates articles 2, 13 and 32 of the Constitution by hindering self-determination and not taking into account the fundamental principle of informed consent in the field of medical decisions and health. Informed consent indeed should be divorced from the issue of legal capacity and in general even for people whose capacity to take informed decisions is undermined, the process of shared decision-making (e.g. with legal guardians) must be started. A good example of the application of these constitutional principles at the jurisprudential level is represented by a decision by the *Tribunale di Catanzaro* that ruled against the request by the doctor and guardian of a pregnant woman with intellectual disability for the authorization of an interruption of pregnancy and sterilization.

This analysis clearly showed that it is necessary to balance the need for protection with the self-determination of people with disabilities in the sexual sphere. The first step is the elimination of unlawful medical practices such as sterilization and the repeal of the criminal offence denying the sexual agency of people with disabilities – but it is not enough. As the Danish experience suggests, for instance, to confront abuse there is a need to create an affirmative culture of sexuality for people with disabilities. In this view, tools such as sex education programmes, training for social workers and caregivers, as well as particular attention to medical practitioners working in the field of sexual health or specific hotspots for sexual counselling, are essential. Sexual assistance is one of these tools, and is, nowadays, one of the most discussed topics in this field.

4. Two models for sexual assistance in Europe strictly connected to the regulation of sex work/prostitution

Chapter IV was aimed at outlining sexual assistance as a practice, with a focus on the regulation and social landscape in Europe.

The definition of sexual assistance is controversial amongst scholars and professionals: it is possible to say that sexual assistance is a particular form of sexual facilitation, the act of receiving assistance in sexual activity. Variables regarding which practices should be involved, by whom this service should be given, what the nature of this activity is and the reason for its legitimacy, are very controversial and varied in the international landscape. One of the issues that emerged as deeply unresolved are the similarities and differences between sexual assistance and sex work.

This tension emerged in the comparative legal analysis as well. It is the regulation of prostitution/sex work that allows us to theorize the existence of two different models of sexual assistance in Europe. In fact, all countries in Europe are united by the lack of specific legislation on sexual assistance. The only partial exception to this is Denmark, with its guidelines on sexuality adopted in 1989 and modified in 2016 (which, however, is a non-binding document, only concerning people who live in institutions). It was observed that an analysis through models could be carried out by cross-referencing the data on sexual assistance with the regulation of sex work. There is a strong factual link, indeed, between the regulation of sex work and the presence/absence of procedure related to sexual assistance for people with disabilities. It was noted that sexual assistance is a well-established service in countries where prostitution and related activities are more widely decriminalized. Conversely, countries with abolitionist or neo-abolitionist legislation around prostitution are struggling both on a social and legal level to recognize sexual assistance.

This observation led to envisaging the existence of two different models in Europe. The first one, the so-called “negative incorporation model”, has produced a (more or less vibrant) public debate on sexual assistance which struggles to find its place inside a legal system that adopts an abolitionist or neo-abolitionist model of prostitution. In these

countries, associations are advocating and working outside any legal framework, trying to create a space for this service outside the criminal provisions around prostitution, but often having difficulty in falling outside the criminally sanctioned offences. In this model we can find countries such as Italy, Spain, France and Sweden. They can all be described through this model; however, each country has its own peculiarities. For example, in Spain, a country with a moderate abstentionist model on prostitution, the social debate is lively and various activities are organized by associations. France is a country that recently adopted a neo-abolitionist model by sanctioning clients of prostitution. Here the *Comité Consultatif National d'Éthique pour les Sciences de la Vie* issued a document on sexual assistance that, after a long analysis, concludes by stating that it is not possible to distinguish between sexual assistance and prostitution: they are both an exchange of money for sexual services. Sweden has such a profound assimilation of its legal principles on prostitution that highly criminalize clients of prostitutes, that the debate on sexual assistance has been substantially constrained in reaching a significant level, due to high social stigma around this issue. Here the Swedish National Board of Health and Welfare (*Socialstyrelsen*) and its social committee answered some questions around sexual facilitation with a written notice, giving no concrete answer but remarking that the purchase of sexual services in Sweden is illegal, and no personal assistants should be involved in illegal acts. Italy is the only country to this day where, even if unsuccessfully, a law proposal on sexual assistance has been drafted within the Parliament.

The second model was called the "positive incorporation model". Here sexual assistance falls into the broader notion of sex work from a legal point of view, but a plurality of practices is present in reality. Many theoretical frameworks and theories around sexual assistance coexist, but the practice is not criminally relevant and, on the contrary, can be regulated and protected by laws on sex work. In these countries, the self-determination and freedom of economic initiative of sex workers are protected, the residual criminal law provisions are aimed at contrasting human trafficking and sexual assistance is usually a service that has existed for more than 20 years. No specific regulation on sexual assistance is present in any of these countries, but Denmark is a partial

exception to this. Countries belonging to this model are Germany, the Netherlands, Switzerland and Denmark. Germany is the pioneer country in this field and was the first to design, offer and implement this service, immediately followed by the Netherlands. In Switzerland sexual assistance started around the 2000s. As we mentioned before, Denmark adopted a soft-law tool on sexual facilitation for people living in state-owned group homes, which however is not completely connected to sexual assistance. The latter falls under the umbrella of sex work.

5. Sexual assistance in Italy: the proposal of a constitutionally compatible third way

The last chapter explores the tool of sexual assistance in Italy. It opens by investigating the experience and proposal of the main social actors on this topic, the *LoveGiver* Committee. Before dealing with this topic however, a necessary excursus on the regulation of prostitution in Italy is provided.

Law n. 75/1958 (legge Merlin) defines prostitution as sexual intercourse of a commercial nature with an exchange of money and punishes the act of recruiting for prostitution (art. 3 n. 4), induction (art. 3 n. 5) as well as aiding and abetting and the exploitation of prostitution. This law that punishes related activities does not criminalize sex workers directly, however it discourages the act of practising prostitution and generates in fact a strong social stigma and isolation of this category of people. The system of the Merlin Law, with particular regard to the offence of recruiting and aiding and abetting prostitution, recently fell under the scrutiny of the Constitutional Court. The Constitutional Court declared it constitutional (compatible in particular with art. 2, 41, 13, 25(1) and 27) with Decision 141/2019. The Constitutional Court adopted a view according to which prostitution can never be a "life choice" and, even if it were, this field attracts vulnerable subjects that the State must protect in the name of an objective notion of human dignity.

It is in this framework that the proposal of the *LoveGiver* Committee needs to be understood. According to this NGO a sexual assistant is an operator for well-being with the task of educating on affectivity, emo-

tions, body experience and sexuality. The aspiring sexual assistant must respect specific requirements to have access to a special training course. These training courses are organized by the *LoveGiver* Committee itself. Sexual assistance is now developing in Italy outside any legal framework, opening up to possible situations of inequality, discrimination and abuse. The organization of the training course moreover, especially after Decision 141/2019 from the Constitutional Court, might have aspects relevant for criminal law.

Thanks to the advocacy work carried out by *LoveGiver*, three law proposals on sexual assistance were drafted during the previous legislature. All these proposals are very short and open, setting a weak framework and giving the concrete power to determine the key elements of sexual assistance to the Ministry of Health and Regions. A fundamental role, indeed, is given to local health authorities (ASL) which are responsible for the mandatory training of sexual assistants, which however is not defined in its contents. In the law proposals the need to subscribe to an ethical code of conduct is set out, however, again, there is no concrete structure for this document. The proposals do not provide any explicit coordination between the Merlin Law and the professional figure of the sexual assistant they wish to introduce. From the opening memorandum and the texts of the proposals it emerges how this new professional figure is circumscribed within a mostly medical view of disability, of a prominent therapeutic nature.

For all these reasons it was observed that the proposal hardly finds its space in the constitutional framework on disability, as developed by the Constitutional Court. Moreover, the coordination between these proposals and the law on prostitution appears controversial, especially after the latest decision by the Constitutional Court. The view that the proposal conveys indeed does not comply with the interpretation of articles 3, 2 and 32 of the Constitution in the field of disability, supporting a medical view of the phenomenon and creating an exception to the criminalization of certain activities that would hardly pass the non-discrimination scrutiny.

Given this, a possible third path, consistent with the current constitutional system and compatible with the existing legislative corpus, was proposed by taking into account some suggestions arising from the

comparative legal analysis. According to the idea of an "affirmative specification model", sexual assistance could be defined as a form of personal assistance in the sexual sphere, aimed at giving access to one's own body or facilitating sexual intercourse with other people. In this case sexual assistance would not be established together with a new professional figure, but it could be part of Law 104/1992 on personal assistance and be regulated by the same rules and principles. Adjustments should be made to encompass the field of sexuality in the objectives of the law, for example with an amendment of article 1 by adding a new letter. Otherwise, the service would follow the same rules and criteria of l. 104/1992 and the instrument would be part of the implementation of the philosophy of independent living and implemented through "direct" assistance with programmes managed and financed by the Regions. Another suggestion was the creation of the figure of sexual advisor. This person, with specific knowledge on sexuality and a conscious approach towards disability, could work inside *Consultori familiari* to address the specific needs and questions of people with disabilities and encourage their self-determination in the sphere of sexuality.

After laying out in summary the path followed by the analysis and based on its main findings, some relevant remarks that crosscut the study will be explored.

6. Knots in our common thread (1): balancing protection and self-determination in the field of disability and sexuality law

The first general conclusion regards the need for law to start addressing the field of disability and sexuality and to intervene where discrimination and obstacles hinder the self-development of people with disability. This awareness, inevitably, brings a second consideration: if it is true that people with disabilities are denied their sexuality, it must also be acknowledged that they are particularly vulnerable to abuses in this field. In the past, the law attempted to protect people with disabilities from sexual abuse through criminal legislation, an instrument that proved to be harmful and contributed to perpetuating the stigma around the expression of sexuality. In an attempt to find a proper balance be-

tween these apparently concurrent issues, the Danish experience might provide an interesting lens. The best way to secure protection in the field of sexuality for people with disabilities is by creating an affirmative culture of sexuality and providing tools for the development and fulfilment of it.

To ensure both the protection and promotion of the expression of sexuality, there is a need for specific measures to address the social barriers against people with disabilities in the sexual sphere, but not specific laws to protect them from abuses. More than the creation of specific norms for the protection of people with disabilities, which have proven to be inadequate and stigmatizing, we need to secure the possibility for people with disabilities to see their rights upheld according to already existing laws. What must be addressed is the guarantee of equal access to justice for people with disabilities[5].

In Italy, for example, this right might not be granted due to several social and architectural barriers related to the possibility of participating and being heard in trial, and much more. Law 104/1992, in particular at article 37, ensures that both the victim and the perpetrator with disabili-

[5] Access to justice is a fundamental right, protected by all the main international law charters and treaties and by national Constitutions. It is widely recognized by the international community that this right is often denied to people with disabilities, which is why it is the object of a specific provision of the CRPD, at article 13. However, «In spite of protection afforded under international human rights law, particularly the CRPD, persons with disabilities often continue to face consider obstacles in terms of access to justice. Barriers and impediments often involve combined forms of inaccessibility and other forms of discrimination. Overarching barriers, which can be compounded for those living in rural areas or in socio-economically disadvantaged situations, or for those facing multiple forms of discrimination, include (1) Legal barriers; (2) Attitudinal barriers; (3) Information and communication barriers; (4) Physical barriers; and (5) Economic barriers». See UN Division for Social Policy Development and Department of Economic and Social Affairs document, Toolkit on disability for Africa. Access to justice for persons with disabilities, 2017, p. 6, available at *https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf*. For an overview of the issue by disability law scholars see E. FLYNN, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons*, London, 2017; J. BEQIRAJI, L. MACNAMARA, V. WICKS, *Access to justice for persons with disabilities: from international principles to practice*, London, 2017; P. COOPER, L. HUNTING, *Access to justice for vulnerable people*, London, 2018.

ties are met in their rehabilitative and therapeutic needs during criminal law proceedings. Architectural accessibility is granted by d.P.R. 24 luglio 1996 n. 503 *Regolamento recante norme per l'eliminazione delle barriere architettoniche negli edifici, spazi e servizi pubblici*, which applies to public buildings and public spaces[6]. For example, the specific issue of accessibility of the courtroom was addressed by the *Corte di Cassazione* in the case of a disabled defendant[7]. The Court stated that the judge needed to consider different locations for the trial, even outside the court because: «The removal of obstacles must precede the needs of the disabled person. Today the problems of persons with disabilities cannot be regarded as individual problems, but must be taken on by the community as a whole»[8]. On the topic of accessibility, with a focus on communication, the Constitutional Court with decision n. 341/1999 granted the ability for deaf people in court as defendants to have a sign language translator[9]. Both these decisions express general

[6] A commentary on this law: L. PRESTINENZA PUGLISI, *Le barriere architettoniche: guida normativa aggiornata al d.P.R. 503/1996*, Roma, 1996. While, on the topic of architectural barriers in Italy and law, more in general, see M.M. SCRIBONI, *Le barriere architettoniche: normativa e giurisprudenza*, Torino, 2000; I. CHIANDETTI, L. PANTALEONI, R. CATTARUZZI (eds.), *Barriere architettoniche: normativa, giurisprudenza*, Udine, 2010.

[7] Corte di Cassazione, III sez. penale, 17 novembre 2001. The case concerned the legitimacy of the declaration of trial in absentia (dichiarazione di contumacia) of a disabled defendant, who however immediately informed the judge he was incapable of entering the courtroom due to architectural barriers.

[8] The translation is by the author. Here is the original sentence: «gli interventi di rimozione degli ostacoli devono essere preventivi rispetto al manifestarsi dell'esigenza della persona disabile e i problemi di questa non possono essere oggi considerati come problemi individuali, bensì vanno assunti dall'intera collettività». See Corte di Cassazione, III sez. penale, 17 novembre 2001.

[9] With this decision the unconstitutionality of article 199 c.p. was declared with a particular form of decision aimed at expanding the field of a specific law (pronuncia additiva). Here the court declared that the fact that article 199 did not provide a deaf-mute person the free assistance of a translator regardless of their illiteracy was against the Constitution. Here is the original passage: «nella parte in cui non prevede[va] che l'imputato sordo, muto o sordomuto, indipendentemente dal fatto che sappia o meno leggere e scrivere, ha diritto di farsi assistere gratuitamente da un interprete, scelto di preferenza fra le persone abituate a trattare con lui, al fine di potere comprendere l'accusa contro di lui formulata e di seguire il compimento degli atti cui partecipa». See

principles that must be followed to grant the application of article 24 and article 3(2) of the Constitution and can be extended to other barriers that hinder the possibility of accessing justice for people with disabilities.

The suggestion is that this balance should be reflected in efforts to design and implement instruments to grant people with disabilities access to sex education, sexual health, and the possibility of developing their personality in the sexual sphere, while at the same time reinforcing the protection system by fostering access to justice in the frame of disability-neutral norms.

7. Knots in our common thread (2): the need for flexible and soft sources of law

Throughout the whole work it has been observed that the field of sexuality, disability and law is disregarded by legal scholars and not discussed by Parliaments, denoting a general lack of interest of law in this area. In all the countries mentioned in the study, no State law pertaining to this issue was found, except the residual criminal norms inhibiting the sexual agency of people with disabilities. In general, the difficulty of even imagining a formal law addressing the broad, complex and multifaceted field of sexuality and disability must be admitted. This is also what emerged from the comparative analysis on sexual assistance: in spite of having very different approaches towards the sexuality of people with disabilities, both the models theorized betray the absence of any specific law provision on the topic. The only country that addressed the issue specifically (but partially) chose to do so with a set of guidelines.

The adoption of soft-law instruments, guidelines etc. can be seen in a positive way, if accompanied by a slight adjustment and amendment to relevant legislation, in order to legitimize and provide general principles for any guidelines and policy. This is the way paved for sexual as-

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Corte cost. n. 341/1999. For commentary: G. DI CHIARA, *Il «diritto all'interprete» dell'imputato sordomuto in caso di analfabetismo*, in *Diritto penale processuale*, 2000, p. 223 ff.

sistance in Chapter V: turning it into "sexual facilitation" with specific boundaries and rules, already framed by the law regulating personal assistance (in Italy: l. 104/1992). By adding the promotion of sexuality, sexual expression and sexual well-being to the objective of the law, any good procedure could be drafted, for example, through a Ministerial Circular. Similarly, if we consider, for example, the issue of sexual education, it would be appropriate to approve a general law on sex education programmes in school, still absent in Italy[10], with a specific provision stating that sex education needs to be inclusive and accessible, taking into account the specific needs of all students. Then policy, circulars or guidelines could be developed in order to collect best practices. The advantage of regulating this field with flexible and soft sources of law is the ability to collect best practices more than having a rigid apparatus of legislation, that inevitably would not be capable of addressing evolving and complex needs. Such tools, which are not to be approved by the Parliament, could be developed more quickly with participative

[10] Italy is one of the few countries in Europe that do not address the topic of sex education in schools. There is no specific law or soft law instrument regulating or prescribing sex education as mandatory in schools in Italy. This was flagged as problematic by the EU in the report because «Some experts argue that the lack of sexuality could lead to irresponsible and unconscious behaviours that can have dramatic impact on teenagers' lives. These are the reasons put forward by the proponents of sexuality education to enhance its delivery taking place at school and being included in a curriculum which should be prepared within the framework of guidelines issued by the Ministries of Education and Health of each member state. Sexuality education lessons should be comprehensive whilst dealing with various subjects. It should be adapted to young people and provided by specially trained adults who are prepared to answer all the audience's questions without giving their personal views». See European Parliament, Directorate General for Internal Policies, Policy Department: Citizens' Rights and Constitutional Affairs, Gender equality, Policies for Sexuality Education in the European Union - NOTE, 2013, p. 10. Available at *http://www.europarl.europa.eu/RegData/etudes/note/join/2013/462515/IPOL-FEMM_NT(2013)462515_EN.pdf.* For further insight on the sex education system in Europe see O. LOEBER, S. REUTER, D. APTER, S. VAN DER DOEF, G. LAZDANE, B. PINTER, *Aspects of sexuality education in Europe – definitions, differences and developments*, in *The European Journal of Contraception & Reproductive Health Care*, 15(3), 2010, pp. 169-176; R. PARKER, K. WELLINGS, J.V. LAZARUS, *Sexuality education in Europe: An overview of current policies*, in *Sex Education*, 9(3), 2009, pp. 227-242.

and transparent procedures and, above all, could be easily adjusted once the situation evolves. These flexible sources, however, would not be outside the democratic circuit, as their base would be in a framework law providing anchors and general principles guiding them.

It would be fundamental to involve NGOs, associations and people with disabilities themselves in this process of creation of guidelines, practices and flexible instruments, as the CRPD itself suggests. In this sense, the creation of an *ad hoc* independent authority (on the model of the UK Human Fertilisation and Embryology Authority)[11] could be useful: this kind of institution could be responsible for the collection and development of best practices, have consultative functions and issue non-binding guidelines. To promote its work and its democratic accountability this organism could be composed of different profiles, so that each person could bring a different contribution to the discussion (e.g. disability activists, medical professionals, scholars in the field of disability, social workers etc.).

8. Knots in our common thread (3): the constitutional parameters in the field of disability and sexuality law

In the operation of finding the right balance between protection and promotion, and developing specific instruments in this field, it is important not to forget the constitutional compass. Indeed, all these measures need to be rooted in the Constitution and should develop in sync with the path set out by the constitutional case law on disability and sexuality.

Sexuality is deeply intertwined with the fundamental rights recognized at article 2 of the Constitution, and is part of a larger constitutional project that promotes individual self-development in connection with society, that must be secured and promoted by the State. People with disabilities find space inside this provision, bringing with themselves their constitutional statute, which is complex and articulated. For the

[11] On the HFEA see S. PENASA, *La legge della scienza: nuovi paradigmi di disciplina dell'attività medico-scientifica. Uno studio comparato in materia di procreazione medicalmente assistita*, Napoli, 2015, pp. 228-231.

person with disability, the element of socialisation and personal development is already prominent, as the constitutional jurisprudence shows. When it comes to the field of sexuality, article 2 implies the need for the State to dismantle the concrete barriers that inhibit people with disabilities from living their sexuality fully. The removal of this barriers is to be enacted through measures aimed at granting and maximizing self-determination in the sexual sphere.

At the same time, the need to overcome these barriers is articulated in article 32 of the Constitution, given that «socialisation can be seen as an essential element for health»[12]. However, in addressing the well-being of the person, care must be taken not to implement a medical model of disability: the medical aspect of disability should give way to the social construction of disability.

Article 3 of the Constitution is the last parameter directly involved. It needs to be developed through the key of anti-subordination principle[13], that opens up spaces to embrace and promote individual differences[14] in the Italian legal system while granting equality. In accordance with this principle, the recommendation would be, again, to involve people with disabilities in the discussion and development of policies and norms about them. In this way the views, experiences and needs of the subjects directly involved could be incorporated in legislation, which would be deeply rooted in the reality of the people it wishes to protect.

[12] Corte cost. n. 251, 2008.

[13] See B. PEZZINI, *L'uguaglianza uomo-donna come principio anti-discriminatorio e come principio anti-subordinazione*, cit., pp. 1141-1176.

[14] See the elaboration of Letizia Gianformaggio and Tamar Pitch on the issue of equality and diversity discussed from a feminist perspective. Already articulated in Chapter II: A. FACCHI, C. FARALLI, T. PITCH (eds.), L. GIANFORMAGGIO, *Eguaglianza, donne e diritto*, cit.; T. PITCH, *I diritti fondamentali: differenze culturali, disuguaglianze sociali, differenza sessuale*, cit.

9. On the need for a set of instruments and the role of law as an agent of social change

In conclusion, to address the topic of sexuality and disability means embracing the irreducible complexity of disability itself, which has a strong social dimension but also an embodied matrix, and which comes in different forms: visible, invisible, permanent, temporary, acquired or not, etc.; and the complexity of sexuality, a field where social, personal and legal significances meet and often collapse. And, again, the social, individual and legal density we find when looking at a person in whom these two universes are reunited together, with their many possible intersections (in terms of gender, class, race, sexual orientation etc.).

We are looking at an intricate yet fascinating tangle, and that tangle is us, all of us. Jurists should not be scared by this complexity, but we need to be prepared and open to abandoning the perspective of definitive solutions and monolithic answers. These should be replaced by the idea of a continuous dialogue with civil society, the adoption of soft instruments and the development of best practices, in a democratic exercise.

Moreover, to a complex phenomenon, law might answer with a set of instruments[15]. In this sense, we can affirm that sexual assistance alone, even if designed in accordance with our constitutional framework and in coordination with the existing law, would not be an effective tool. On the contrary, if this is accompanied by many other, even smaller, tools and policy, then it could be a proper contribution to a systemic effort by the legal system to provide an affirming culture of sexuality for people with disabilities.

To better develop this point, an analogy with assisted suicide, *mutatis mutandis*, might be useful. Assisted suicide alone would not be an efficient tool to grant self-determination in the terminal phase of life. Assisted suicide, without tools aimed at granting the respect of the right

[15] In this sense see C. CASONATO, *21st Century Biolaw: A Proposal*, in *Biolaw Journal - Rivista di Biodiritto*, 1, 2017, pp. 86-89, where the author is arguing in favour of a plurality of procedures of rulemaking and decision making, to contaminate the legal dimension with scientific knowledge, philosophical knowledge and social sensibility. The author also adds that (bio)law should also be updated and attentive.

to refuse medical treatments and the principle of informed consent and its concrete derivation – recently formalized by the law – such as advance directives on treatments[16] (*Direttive anticipate di trattamento*) or the co-designed plan on medical treatment (*Pianificazione condivisa delle cure*)[17], would be an empty shell. It is no coincidence that such an audacious decision by the Constitutional Court as n. 242/2019[18] came

[16] For an introduction on this instrument in the Italian legislation and in a comparative perspective see C. PICIOCCHI, *Uno sguardo comparato alla disciplina giuridica delle disposizioni anticipate di trattamento*, in *Rivista Italiana di Medicina Legale*, 3, 2018, pp. 981-991; S. PENASA, *La disciplina delle dichiarazioni anticipate di trattamento nella legge 219/2017: spunti dal diritto comparato*, in *Diritto e salute. Rivista di sanità e responsabilità medica*, 4, 2018, pp. 224-234.

[17] For a first introduction of this instrument, provided by article 5 of Law 219/2017 see P. VERONESI, *La pianificazione condivisa delle cure*, in *Biolaw journal - Rivista di Biodiritto*, 1, 2018, pp. 66-69; C. CASONATO, *Taking sick rights seriously: la pianificazione delle cure come paradigma di tutela delle persone malate*, in *Rivista Italiana di Medicina Legale*, 3, 2018, pp. 949-963; ID., *La pianificazione condivisa delle cure*, in M. RODOLFI, C. CASONATO, S. PENASA (eds.), *Consenso informato e DAT: tutte le novità*, Milano, 2018, p. 41 ff.

[18] This decision is interesting from mainly for three reasons: for its peculiar judicial history, for the formal aspect concerning the powers of the Constitutional Court and for its substantial impact on the discipline of assisted suicide in Italy. This decision was vastly commented by scholars, for this reason only some selected literature references will be provided for each aspect. On the judicial history behind the decision see L. BUSATTA, *Il caso Cappato e la Corte costituzionale: un'incostituzionalità accertata ma non dichiarata?*, in *Rivista Italiana di Cure Palliative*, 20(4), 2018, pp. 227-233. On the second aspect: V.R. PESCATORE, *Caso Cappato-Antoniani: analisi di un nuovo modulo monitorio*, in *Osservatorio AIC*, 1, 2020; S. CATALANO, *La sentenza 242 del 2019: una pronuncia additiva molto particolare senza 'rime obbligate'*, in *Osservatorio AIC*, 2, 2020; R. DI MARIA, *Brevi considerazioni sul rapporto fra tutela sostanziale dei diritti (fondamentali) e rispetto delle forme processuali: la Corte costituzionale e gli "animali fantastici". The final cut*, in *Consulta online*, Studi, 1, 2020; F. MEOLA, *Discrezionalità legislativa e sindacato di costituzionalità ragionando sul tema alla luce del c.d. caso Cappato*, in *Diritto Pubblico Europeo. Rassegna online*, 1, 2020; M. D'AMICO, *Il "fine vita" davanti alla Corte costituzionale fra profili processuali, principi penali e dilemmi etici (Considerazioni a margine della sent. n. 242 del 2019)*, in *Osservatorio AIC*, 1, 2020. On the third aspect: L. BUSATTA, N. ZAMPERETTI, *Scelte di (fine) vita: cambia il diritto, può cambiare la medicina?*, in *Rivista Italiana di Medicina Legale*, 2, 2020, pp. 651-682; C. CASONATO, *La giurisprudenza costituzionale sull'aiuto al suicidio nel prisma del biodiritto, fra conferme e novità*, in C. PADULA (ed.), *Una nuova stagione*

after Law 219/2017[19]. A similar decision would not have been possible without Law 219/2017. Similarly, sexual assistance without the implementation of inclusive sex education, sexual counselling services, training for medical professionals and social workers, policy to grant access to quality sexual health services and tools to grant assisted decision making in the field of reproduction and sexuality, is condemned to be ineffective and rejected by society.

The profound social nature of the discrimination and oppression of people with disabilities in the field of sexuality and the need to re-shape the social perception of disability and in general to question the liberal paradigm of the individual and their standard of productivity, beauty and autonomy[20], have already been mentioned. The importance of intervening on the social perception on disability is also recognized by the CRPD, which states at article 8 the need for states to combat stereotypes, prejudices and harmful practices against people with disabilities, intervening with social campaigns, in media representation and through

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creativa della Corte costituzionale?, Napoli, 2020; C. CASONATO, *I limiti all'autodeterminazione individuale al termine dell'esistenza: profili critici*, in *Diritto pubblico comparato ed europeo*, 1, 2018, pp. 3-24; O. CARAMASCHI, *La Corte costituzionale apre al diritto all'assistenza nel morire in attesa dell'intervento del legislatore (a margine della sent. n. 242 del 2019)*, in *Osservatorio AIC*, 1, 2020; C. CUPELLI, *Il caso (Cappato) è chiuso, ma la questione (agevolazione al suicidio) resta aperta*, in *Sistema Penale*, 6 February 2020; L. BUSATTA, *Il caso Cappato e la decisione della Corte costituzionale: quando chiedere è lecito, in attesa di una legge*, in *Rivista Italiana di Cure Palliative*, 22(1), 2020, pp. 33-39.

[19] The literature on this topic is wide, for a first approach on the legislation, the jurisprudence and the doctrinal position see, ex multis: AA.VV., *Forum: la legge n. 219 del 2017. Norme in materia di consenso informato e di disposizioni anticipate di trattamento*, in *Biolaw journal - Rivista di Biodiritto*, 1, 2018, pp. 11-104; G. BALDINI, *Prime riflessioni a margine della legge n. 219/2017*, in *Biolaw journal - Rivista di Biodiritto*, 2, 2018, p. 97 ff.; M. FASAN, *Consenso informato e rapporto di cura: una nuova centralità per il paziente alla luce della legge 22 dicembre 2017, n. 219*, in *Giurisprudenza Penale* Web, 1-bis, 2019; L. BUSATTA, *A un anno dalla legge 219 del 2017: la sostenibilità costituzionale della relazione di cura*, in *Rivista AIC*, 2, 2019, pp. 95-115. Two selected monographic work on this topic are: S. CACACE, *Autodeterminazione in salute*, Torino, 2017; M. FOGLIA, *Consenso e cura*, Torino, 2018.

[20] B. CASALINI, *Disporre in autonomia del proprio corpo disabile*, in *Il Mulino*, 4, 2017, pp. 580-587.

education. If the biggest challenge in this field is related to cultural and social change, jurists should probably wonder what role law should play. The whole work was based on the idea that the false neutrality of law needs to be unmasked and addressed by recognizing how law itself is permeated by the social and cultural understanding of phenomena[21] and shaped by power structures. This view is inherently political, coming from the desire to alter a fundamental social relationship[22] characterized in terms of oppression (usually expressed through dichotomy such as female/male, normal/abnormal, black/white and so on). In order to overturn this framework, one of the methodologies proposed is the reconfiguration of the relationship between theory and procedure, which should be aimed at offering practical solutions to real-life questions and increasing the proper representation of human complexity[23].

It is within this broad landscape that the law can find its place in the field of sexuality and disability: by not forsaking its role in "orienting" society[24] and pursuing social justice. The law can find its role by appealing to its symbolic and transformative capabilities. This means recognizing that a broader social change towards equality can pass by law affirming positively the existence and the agency of people with disabilities as sexual beings in society: a law that, starting from the ques-

[21] See also O. GIOLO, *Il giusfemminismo e il confronto fra culture*, in T. CASADEI, *Donne, diritto, diritti. Prospettive del giusfemminismo*, Torino, 2015, pp. 41-59. The production on the mutual and complex relationship between law and society is vast even outside feminist legal theory. Amongst others see M. WEBER, *Economia e società. Diritto*, Bologna, 2016; S. RODOTÀ, *Vivere la democrazia*, Roma, 2018; P. GROSSI, *L'invenzione del diritto*, Roma, 2018.

[22] D. MORONDO TARAMUNDI, *Il dilemma della differenza nella teoria femminista del diritto*, Pesaro, 2004, pp. 5-6.

[23] J. RICHARDSON, *Feminist legal theory and Practice: Rethinking the Relationship*, in *Feminist Legal Studies*, 13, 2005, pp. 275-293.

[24] See V. POCAR, *Guida al diritto contemporaneo*, Bari, 2002; V. FERRARI, *Diritto e Società. Elementi di sociologia del diritto*, cit. More specifically on the discussion of the function of law see ID., *Funzioni del diritto: saggio critico-ricostruttivo*, Bari, 1987. On the relationship between law and society see T. GRECO, *Diritto e legame sociale*, Torino, 2012; D.J. GALLIGAN, *Law in Modern Society*, Oxford, 2007; G. CAMPESI, I. PUPOLIZIO, N. RIVA, *Diritto e teoria sociale. Introduzione al pensiero socio-giuridico contemporaneo*, Roma, 2009; F. CIARAMELLI, *Consenso sociale e legittimazione giuridica. Lezioni di filosofia del diritto*, Torino, 2013.

tions arising within the social fabric and from the materiality of life, can actively contribute to social change; a law anyone could look at and feel represented and recognized in flesh and blood.

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